





Mike MORELAND v. VICKERS CHEVROLET
COMPANY

CA 91-57

826 S.W.2d 289

Court of Appeals of Arkansas
Division I
Opinion delivered January 15, 1992



[REDACTED]

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Armstrong & Binns, by: *Mike Moreland*, for appellant.

Rieves & Mayton, by: *Elton A. Rieves IV*, for appellee.

MELVIN MAYFIELD, Judge. Appellant Mike Moreland has appealed a decision of the Desha County Circuit Court which dismissed his appeal from the Dumas Municipal Court on the holding that the appeal was not timely filed and, consequently, the circuit court did not have jurisdiction.

On April 8, 1988, the appellee, Vickers Chevrolet Company, filed suit against Mike Moreland in the Desha County Small Claims Court. Moreland answered through an attorney and the case was transferred to the Dumas Municipal Court pursuant to Ark. Code Ann. § 16-17-612(a) (Supp. 1991), which provides, in pertinent part, as follows:

When any case is pending in the small claims division of any municipal court and the judge or referee of the court determines that an attorney is representing any party in the case, the case shall immediately be transferred to the regular municipal court docket.

Vickers Chevrolet Company, a corporation, had been represented in small claims court by its president, Herman Vickers, and he continued to represent the corporation in the regular division of the municipal court. Vickers is not an attorney. On June 9, 1988, judgment for \$2,854.56 was rendered in municipal court in favor of Vickers Chevrolet. On July 7, 1988, Moreland filed a notice of appeal and affidavit of appeal in the municipal court, but neither of these documents was filed in circuit court until July 13, 1988, which was more than 30 days after judgment was rendered in municipal court.

Vickers, still representing the corporation, filed a motion in circuit court to dismiss the appeal because it was not filed in circuit court within 30 days. Arkansas Inferior Court Rule 9(a) and (b) provides as follows:

(a) *Time for Taking Appeal.* All appeals in civil cases from inferior courts to circuit court must be filed in the office of the clerk of the particular circuit court having jurisdiction of the appeal within thirty (30) days from the date of the entry of the judgment.

(b) *How Taken.* An appeal from an inferior court to the circuit court shall be taken by filing a record of the proceedings had in the inferior court. It shall be the duty of the clerk to prepare and certify such record when requested by the appellant and the appellant shall have the responsibility of filing such record in the office of the circuit clerk.

This rule was involved in *West Apartments, Inc. v. Booth*, 297 Ark. 247, 760 S.W.2d 861 (1988), where the Arkansas Supreme Court affirmed a circuit court dismissal of an appeal from municipal court which was not filed in circuit court within 30 days after entry of the judgment in municipal court.

Moreland responded to the motion to dismiss his appeal by arguing that all proceedings taken in municipal court were a nullity. In his brief to this court, Moreland cites as his authority the case of *All City Glass & Mirror, Inc. v. McGraw Hill Information Systems, Company*, 295 Ark. 520, 750 S.W.2d 395 (1988), which held that corporations must be represented in court by licensed attorneys, and the case of *McKenzie v. Burris*, 255 Ark. 330, 500 S.W.2d 357 (1973), which contains a statement which indicates that proceedings in a suit maintained by one not entitled to practice law may be a nullity. 255 Ark. at 333.

Appellant argues on appeal that the circuit court erred by not allowing him to collaterally attack the judgment rendered by the municipal court. Appellant concedes that Ark. Code Ann. § 16-17-605 (1987) allows a corporation with no more than three stockholders to be represented by one of its officers in small claims court. Appellant argues, however, that once the action is transferred to the regular division of the municipal court, the corporation must be represented by an attorney and proceedings in a suit conducted by one not entitled to practice law are a nullity.

■ The complete statement relied upon by appellant in *McKenzie v. Burris, supra*, is as follows:

It is widely held in other jurisdictions that proceedings in a

[REDACTED]

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.

255 Ark. at 333. And in the *All City Glass & Mirror* case, *supra*, the appellate court affirmed the trial court's action in striking an answer filed by a corporation's president, acting as attorney for the corporation. However, in the instant case the record does not show, and it is not argued, that the appellant objected in municipal court to Vickers representing the corporation or that appellant sought to strike any pleadings filed by Vickers in that proceeding. Once the matter got to circuit court the appellant did raise the issue of Vickers representing the corporation and Vickers then obtained licensed legal counsel for the corporation. Therefore, we do not think the statement taken from the opinion in *McKenzie v. Burris* supports appellant's argument that the municipal court judgment was a nullity.

■ With regard to the reference, in Inferior Court Rule 9(b), to the duty of the clerk of the court to file the transcript in circuit court within thirty days, the appellee points to the language in Rule 9(b) which provides that "the appellant shall have the responsibility of filing such record in the office of the circuit court."

■ We think the trial court was correct in holding appellant's appeal from the municipal court was not timely filed.

Affirmed.

COOPER and DANIELSON, JJ., agree.

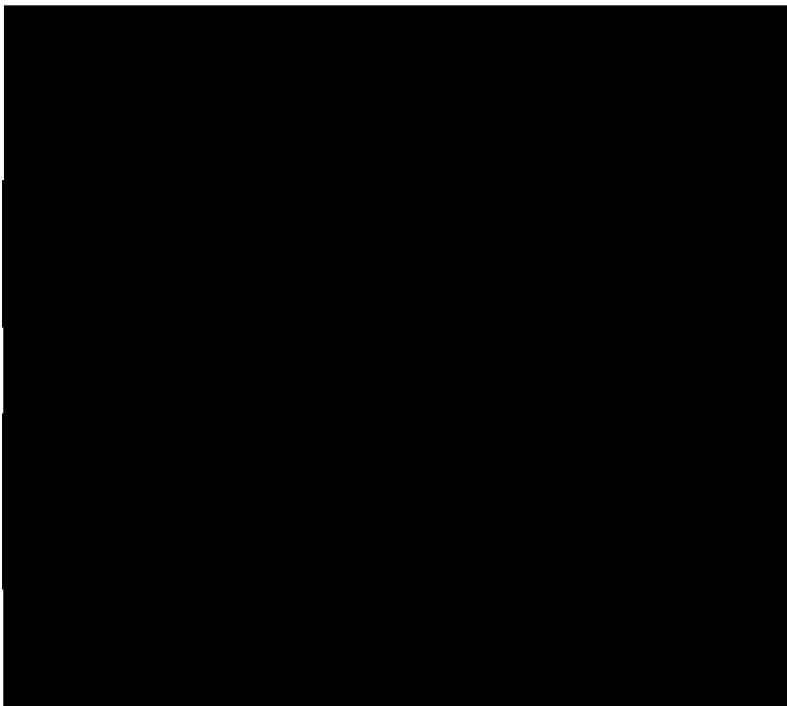
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M.W. BLACK v. Thomas H. MERRITT and Maryl L. Merritt, His Wife, and William G. McGhee and Ola Lee McGhee, His Wife, and Teddy Jones McGhee and Deborah McGhee, His Wife

CA 91-44

822 S.W.2d 853

Court of Appeals of Arkansas
Division I
Opinion delivered January 22, 1992



Daily, West, Core, Coffman & Canfield, by: *Robert W. Bishop* and *Thomas A. Daily*, for appellant.

Herby Branscum, Jr., for appellee.

GEORGE K. CRACRAFT, Chief Judge. M.W. Black appeals

from orders of the Perry County Chancery Court denying her motions to set aside default judgments cancelling oil, gas, and mineral leases executed to her by the named appellees. The two separate cases were consolidated for purposes of appeal. Appellant contends that the chancery court lacked jurisdiction to enter the judgments and that it was error not to set them aside. We agree.

The facts essential to a decision in this case are not in dispute. In December 1988, the appellees leased the oil and gas rights on their properties to appellant by written instruments which showed appellant's address to be in Fort Worth, Texas. In April 1989, appellees brought suit seeking to have those oil and gas leases cancelled, contending that they had been obtained by fraudulent misrepresentation and had been altered after they had been executed by the parties. Appellees first attempted service on appellant pursuant to Ark. R. Civ. P. 4(e) by mailing copies of the summonses and complaints by certified mail to the appellant addressed to her in Midland, Texas. The letters were returned marked "Unclaimed." Appellees then attempted to obtain service by publication of warning orders. Appellees' attorney filed his affidavit stating that he had made a diligent inquiry and that it was his information and belief that appellant was a nonresident of the state of Arkansas and her last known address was P.O. Box 124, Midland, Texas. Counsel also prepared, signed, and filed documents styled "Warning Order," which provided as follows:

The defendant, M.W. Black, is hereby warned to appear in this Court within thirty (30) days and answer the complaint of the plaintiffs, and upon failure to do so, said complaint will be taken as confessed.

FIRST PUBLISHED this 10th day of May, 1989.

/s/ Herby Branscum, Jr.
Attorney for Plaintiffs

An attorney ad litem was appointed and mailed copies of the complaints and "warning orders" to appellant at the same address in Midland, Texas. Those letters were also returned as "Unclaimed." The documents styled "Warning Order" were published in a local newspaper in Perry County once weekly for two consecutive weeks, and proof of publication was filed by the

editor of that paper. On July 5, 1989, the trial court entered orders cancelling the leases and granting all relief prayed for in appellees' complaints.

Appellant then filed motions to set the judgments aside on grounds that she had not been validly served with process. On May 16, 1990, the trial court denied the motions, finding that valid service had been obtained by publication of warning orders. Appellant brings this appeal contending that the trial court erred in denying her motions to set aside the judgments and in holding that the constructive service attempted on her was valid. We agree that the service was invalid and that the judgments entered on it was void.

■ Service of process on defendants whose identity or whereabouts is unknown, or whose rights may be affected by a judgment but who do not need to be subject to personal jurisdiction in strictly in rem proceedings, are governed by the provisions of Ark. R. Civ. P. 4(f)(1) and 4(j). Rule 4(f)(1) provides as follows:

[W]here it appears by the affidavit of a party or his attorney that, after diligent inquiry, the identity or whereabouts of a defendant remains unknown, service shall be by warning order *issued by the clerk* and published weekly for two consecutive weeks in a newspaper having general circulation in a county wherein the action is filed and by mailing a copy of the complaint and warning order to such defendant at his last known address, if any, by any form of mail with delivery restricted to the addressee or agent of the addressee.

(Emphasis added.) Rule 4(j) provides:

In any case in which a party seeks a judgment which affects or may affect the rights of persons who are not and who need not be subject personally to the jurisdiction of the court, *the clerk shall issue a warning order*. The warning order shall state the caption of the pleadings, a description of the property or other res to be affected by the judgment of the court, and it shall warn any interested person to appear within 30 days from the first date of publication of the warning order or be barred from answering or asserting

his interest. The warning order shall be published weekly for at least two weeks in a newspaper of general circulation in the county in which the court is held. No default judgment shall be taken pursuant to this procedure unless the party seeking the judgment or his attorney has filed with the court an affidavit stating that thirty days have elapsed since the first publication of the warning order. In any case in which an interested person is known to the party seeking judgment or his attorney, the affidavit shall also state that 30 days have elapsed since a letter enclosing a copy of the warning order and the pleadings was sent to the known interested person at his last known address by a form of mail restricting delivery to the addressee or the agent of the addressee.

(Emphasis added.)

■ ■ It is a well-settled rule that constructive service is a departure from the common law, and statutes providing for such service are mandatory and must be complied with exactly. This rule applies equally to the service requirements imposed by rules of the court. Proceedings conducted where the attempted service was invalid render judgments arising under them void. *Wilburn v. Keenan Companies, Inc.*, 298 Ark. 461, 768 S.W.2d 531 (1989); *Edmonson v. Farris*, 263 Ark. 505, 565 S.W.2d 617 (1978); *Davis v. Schimmell*, 252 Ark. 1201, 482 S.W.2d 785 (1972).

■ Here, the appellees' attempts to obtain service by publication did not comply with the provisions of either section of Rule 4. Both sections require that the warning order be issued by the clerk. Here, although the warning orders were published, they were not issued by the clerk of the court as required by the rule but by appellees' attorney. The supreme court has held that compliance with provisions such as this is an essential prerequisite to the publication of warning orders. Absent such compliance, no jurisdiction can be acquired over the defendants and all proceedings as to them are void. *Beidler v. Beidler*, 71 Ark. 318, 74 S.W. 13 (1903).

Appellant also argues that the attempts at service by publication were fatally defective in several other respects. Although we see merit in some of those arguments, the view we take of the matter does not require that we address them.

[REDACTED]

Nor do we find merit in appellees' argument that even though service might have been improper, appellant was required to show meritorious defenses in support of her motions under Ark. R. Civ. P. 60(d). It is well settled that in cases where a judgment is void for lack of jurisdiction, no proof of a meritorious defense is required under that rule. *Cole v. First National Bank*, 304 Ark. 26, 800 S.W.2d 412 (1990); *Wilburn v. Keenan Companies, Inc.*, *supra*.

Reversed and remanded for entry of an order not inconsistent with this opinion.

COOPER and DANIELSON, JJ., agree.

[REDACTED]

Christopher CHADWELL v. STATE of Arkansas

CA CR 91-124

822 S.W.2d 402

Court of Appeals of Arkansas
Division I

Opinion delivered January 22, 1992

[REDACTED]

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[REDACTED] [REDACTED]

William R. Simpson, Jr., Public Defender, and *Omar F. Greene II*, Deputy Public Defender, by: *Thomas B. Devine III*, Asst. Public Defender, for appellant.

Winston Bryant, Att'y Gen., by: *Catherine Templeton*, Asst. Att'y Gen., for appellee.

GEORGE K. CRACRAFT, Chief Judge. Christopher Chadwell was charged with breaking or entering and class C felony theft of property, and was convicted of both crimes at a non-jury trial. He appeals only from the theft conviction, contending that the trial court erred in not reducing it to a misdemeanor. We find no error and affirm.

The evidence reflects that on April 14, 1990, Gerard Joubert, the operator of Joubert's Tavern, observed a car stop on the parking lot of the tavern. Appellant got out of the car and went into the tavern for a moment. Appellant then returned to the parking lot, where Joubert saw him removing property from a vehicle which he knew belonged to Ed Morgan. When Joubert came out of the tavern, appellant fled to the car in which he had arrived and attempted to enter it through a window. Joubert apprehended him and held him until police arrived.

Ed Morgan testified that a jacket had been taken from his vehicle and that, at the time of the taking, his wallet had been in one of its pockets. He also testified that the wallet contained his driver's license and a credit card. The jacket was found partially hidden on the backseat of the vehicle appellant had attempted to enter. Morgan's wallet was found later that evening lying on the parking lot near the area where Morgan's car had been parked. In Morgan's opinion, the value of the jacket and wallet did not exceed \$140.00.

At the close of the evidence, appellant moved that the felony theft charge be reduced to a misdemeanor because there was no proof that he knowingly took the wallet and credit card, and the evidence established that the value of the coat and wallet would only sustain a conviction of misdemeanor theft. The trial court agreed that the value of the stolen articles did not equal the amount required to constitute a class C felony under Ark. Code Ann. § 5-36-103(b)(2)(A) (Supp. 1991), but held that the theft

of the credit card alone constituted a class C felony under § 5-36-103(b)(2)(D).

Arkansas Code Annotated § 5-36-103(a)(1) (Supp. 1991) provides that one commits theft of property if he knowingly takes or exercises unauthorized control over the property of another person with the purpose of depriving the owner thereof. Subsequent provisions of § 5-36-103 classify the degree of the crime of theft based largely on the value of the property stolen. Where the value of the property does not exceed \$200.00, the crime is ordinarily classified as a misdemeanor. However, subsection (b)(2)(D) provides that theft of property is a class C felony if the property is a credit card. Credit cards are singled out in the statute for special treatment regardless of value since such items almost invariably end up in illicit channels where they are used to commit additional offenses. *See* Commentary to Ark. Code Ann. § 5-36-103 (1987).

Appellant first contends that the evidence is insufficient to support his conviction for felony theft of property. He argues, as he did in the trial court, that since there was no proof that he knew that the jacket contained the wallet or that the wallet contained a credit card, he could not be held to have knowingly taken control of the credit card. We do not agree.

■ A person acts knowingly with respect to his conduct or the attendant circumstances when he is aware that his conduct is of that nature or that such circumstances exist. Ark. Code Ann. § 5-2-202(2) (1987). Criminal purpose or intent is a state of mind that is not ordinarily susceptible to proof by direct evidence. It may be inferred from facts and circumstances shown to have existed at the time. *Alford v. State*, 33 Ark. App. 179, 804 S.W.2d 370 (1991); *Cristee v. State*, 25 Ark. App. 303, 757 S.W.2d 565 (1988).

■ In this context, Ark. Code Ann. § 5-36-103(a)(1) requires only that one knowingly take unauthorized control over the property of another; it does not require that he know either the value or the true character of the property taken. Here, the court could easily find from the evidence that appellant knowingly took control of the jacket, whatever its pockets may have contained, with the intent of depriving the owner. Knowledge on his part of the contents of the pockets was not necessary for conviction. The

unauthorized taking of the jacket, which contained the wallet and the credit card, was one act, and the party committing it is liable for all of the property thus taken by him. *See People v. Earle*, 222 Cal. App. 2d 476, 35 Cal. Rptr. 265 (1963); *Stevens v. State*, 19 Neb. 647, 28 N.W. 304 (1886); *see also 3 Wharton's Criminal Law* § 360 (14th ed. 1980).

■ Appellant also contends that the proof did not strictly conform to the information. However, appellant never objected on these grounds in the trial court, and we do not address issues raised for the first time on appeal. *Walker v. State*, 303 Ark. 401, 797 S.W.2d 447 (1990); *Bell v. State*, 296 Ark. 58, 757 S.W.2d 937 (1988).

Affirmed.

COOPER and DANIELSON, JJ., agree.

Margaret Ann BEESON, Mother of Amanda Beeson, a
Minor v. ARKANSAS DEPARTMENT OF HUMAN
SERVICES

CA 91-102

823 S.W.2d 912

Court of Appeals of Arkansas
Division I

Opinion delivered January 22, 1992

Robert J. Gladwin, for appellant.

Ron McLaughlin, for appellee.

JAMES R. COOPER, Judge. The appellant in this chancery case is the mother of Amanda Beeson, a minor. On May 30, 1989, the Washington County Probate Court entered an order declaring Amanda to be dependent-neglected and placed custody of Amanda in the appellee. On June 27, 1990, the appellee petitioned the Washington County Chancery Court to terminate the appellant's parental rights and to grant the appellee the power to consent to Amanda's adoption. After a hearing, the chancellor entered an order on January 24, 1991, terminating the appellant's parental rights and appointing the appellee as custodian with the power to consent to Amanda's adoption without notice to or consent of the appellant. From that decision, comes this appeal.

For reversal, the appellant contends that the chancellor's decision to terminate the appellant's parental rights was not supported by the evidence. We find no error, and we affirm.

Arkansas Code Annotated § 9-27-341(b)(1) (Supp. 1991) provides:

(b) The court may consider a petition to terminate parental rights if it finds that the Department of Human Services has physical or legal custody of the juvenile and an appropriate placement plan for the juvenile. An order forever terminating parental rights shall be based upon a finding by clear and convincing evidence of one (1) or more of the following grounds:

(1) That a juvenile has been adjudicated by the court to be dependent-neglected and has continued out of the home for one (1) year and despite a meaningful effort by the Department of Human Services to rehabilitate the home and correct the conditions which caused removal, those conditions have not been remedied by the parent.

[REDACTED]

The appellant's argument challenges two of the statutory requirements. Her first contention, which is relevant to the meaningful nature of the Department's efforts to rehabilitate the home and correct the conditions causing Amanda's removal, is that the rehabilitative case plan developed by the Department was unreasonable and unworkable. The appellant's second contention is that the Department failed to prove that she had not remedied the conditions which caused Amanda's removal, or that she was unfit to care for Amanda.

■ Grounds for termination of parental rights must be proven by clear and convincing evidence. Ark. Code Ann. § 9-27-341(b) (Supp. 1991). When the burden of proving a disputed fact in chancery is by "clear and convincing" evidence, the question we must answer on appeal is whether the chancellor's finding that the disputed fact was proved by clear and convincing evidence is clearly erroneous. *Freeman v. Freeman*, 20 Ark. App. 12, 722 S.W.2d 877 (1987); Ark. R. Civ. P. 52(a). In resolving this question we must give due regard to the opportunity of the trial court to judge the credibility of the witnesses. *Freeman, supra*.

LaReine Williams-Beach, a family service worker employed by the Department of Human Services, testified that she was Amanda's case worker. She stated that Amanda came into the Department's custody on May 23, 1989, and was adjudicated dependent and neglected. Ms. Williams-Beach further stated that Amanda came into placement because of a report of failure to provide medical treatment for Amanda by her family. She stated that both the parents were unemployed at the time of the adjudication, and that Amanda's mother, the appellant, was diagnosed as paranoid schizophrenic and was not able to take care of Amanda because of her mental condition. Ms. Williams-Beach also testified that Amanda has a feeding disorder which requires her caregivers to obtain special training to learn to feed Amanda through gastrostomy, and that Amanda requires physical, occupational, speech, and habilitative therapies, some of which must be performed by specialists.

With regard to the Department's rehabilitative case plan, Ms. Williams-Beach testified that the appellant was required to maintain suitable housing and employment, to obtain a psychological evaluation and counselling, and to deal with Amanda's

specific medical needs. According to Ms. Williams-Beach's testimony, the appellant has not complied with the plan. With respect to the requirement that the appellant maintain suitable housing and employment, she testified that the appellant lives with her grandparents in an apartment that is in disarray. Ms. Williams-Beach testified that the appellant was told that she would either have to move from her residence or clean it because it was not suitable, but that the appellant had failed to do so. With respect to the requirement that the appellant obtain suitable employment, Ms. Williams-Beach stated that she did not believe that the appellant was unemployable even though the appellant is on permanent disability because of her mental status and receives social security benefits. Ms. Williams-Beach stated that the appellant was referred to a rehabilitative unit for job training but that the appellant told her counselor that she did not want to work because she might have Amanda returned to her. Although she conceded that the appellant was doing everything that could be reasonably required to control her mental health, Ms. Williams-Beach stated that the appellant was required to obtain a psychological evaluation under the case plan, but had failed to do so. Finally, with regard to the requirement that the appellant provide for Amanda's specific medical needs, Ms. Williams-Beach testified that the appellant had failed to obtain the training required for her to learn to feed Amanda, and stated that she did not believe that the appellant has the ability to recognize Amanda's needs when it comes to her feeding. This opinion was based, in part, on Ms. Williams-Beach's observation that the appellant did not voluntarily initiate contact with Amanda; for example, unless a suggestion is made to her, the appellant doesn't question whether Amanda is wet. Ms. Williams-Beach testified that although the appellant has a twelfth-grade education, she quickly forgets when things are explained to her. She also stated that the appellant has not inquired about the techniques involved in feeding Amanda. Ms. Williams-Beach stated that, in her opinion, Amanda could not be safely returned to the home now because the appellant is not prepared to take care of her and her special needs.

Peggy Bonno, who at the time of the hearing had been Amanda's foster mother for nineteen months, testified concerning Amanda's special needs. She stated that Amanda has

developmental delay and a psychological eating disorder. As a result of her feeding disorder, Amanda does not associate hunger with eating or satisfaction. Therefore, it is necessary to feed Amanda orally five times a day and to place her on a feeding pump that must be monitored for eleven hours a day. Ms. Bonno stated that, without the pump, Amanda does not take enough food to survive. Finally, Ms. Bonno testified that Amanda has a very complex schedule involving feeding and therapy which varies from day to day and is ever changing. She stated that ongoing training is required to meet Amanda's special needs, and that she had obtained this training in Little Rock.


Pat Duncan stated that she was employed at the Richardson Center, a special school for children with developmental delays. She further stated that Amanda is a student in the early intervention program conducted by the Richardson Center, where she receives therapy for her developmental delay disorder. Ms. Duncan stated that the Center normally dealt with the main caretaker, and that she had had no contact with Amanda's parents, only with her foster parents. Finally, she stated that the Richardson Center would welcome the parents if they chose to come along but, to her knowledge, the appellant has never contacted the Richardson Center to request involvement with Amanda.

The appellant testified that she understood that Amanda was in foster care because she has a feeding disorder. She stated that, although Dr. Langston informed her of Amanda's feeding disorder, he did not tell her what was going to have to be done to try and take care of Amanda. She stated that she was aware of the special training she needed to care for Amanda, but that she was thrown out of the hospital in Little Rock where the training was offered. She testified that she did not try to get this training anywhere else because she did not know where to get it. Likewise, she testified that she had not obtained the required psychological evaluation because she did not know where to get it. The appellant conceded that she had not asked her caseworker where a psychological evaluation could be obtained, and that there are many things she needed to learn about taking care of Amanda. She stated that she understood that Amanda requires a feeding schedule and special formula, but that she did not know what the special formula was because she had not been with Amanda.

■ After reviewing this testimony and the entire record, we conclude that the chancellor did not err in terminating the appellant's parental rights. Even should we assume, without deciding, that the requirement that the appellant obtain suitable employment was unreasonable in light of the appellant's mental condition, we cannot say that the Department did not make a meaningful effort to rehabilitate the home and correct the conditions which caused Amanda's removal.

We think it clear that overriding importance must be attached to Amanda's feeding disorder which, according to the evidence, requires her caregiver to adhere to a complex and demanding feeding routine several times each day. Moreover, the disorder is of such a nature as to require active involvement and vigilance on the part of the caregiver. The record indicates that, because Amanda does not associate hunger with food, she does not cry when she is hungry, and that there is the potential for her to quietly starve to death. The record also supports a finding that the appellant cannot or will not achieve the degree of interest, involvement, and initiative required to provide for Amanda's minimum needs.

■ Although we recognize that the appellant's economic status makes it difficult for her to commute to Little Rock to receive the training required to operate the feeding pump and assist in the various courses of therapy Amanda requires, the record shows that she has not made the minimal effort of inquiring whether this training could be obtained at a more convenient location. Likewise, although it may be conceded that relocating her residence would be difficult for the appellant, there was evidence that housecleaning was within the appellant's capabilities, but that she failed to comply with the requirement that she do so. A similar lack of initiative with regard to the Department's requirements is displayed by the appellant's explanation that she did not obtain a psychological evaluation because she did not know where to obtain one, especially in light of her testimony that, although she regularly saw a psychological caseworker, she did not ask the caseworker how to obtain the required evaluation. Similarly, there was evidence that the appellant failed to contact the Richardson Center to request involvement in Amanda's therapy. The chancellor stated that the appellant lacked the degree of interest required to properly care



for Amanda. Although the appellant contends that merely being uninterested is insufficient to support termination of parental rights, we think that, under the particular circumstances of this case, a lack of interest which results in a failure to learn the feeding techniques and therapies required to care for Amanda is tantamount to unfitness. Under these circumstances, we hold that the chancellor did not err in finding that the Department made a meaningful effort to rehabilitate the home, and that the conditions which caused removal had not been remedied by the appellant.

Affirmed.

CRACRAFT, C.J., and DANIELSON, J., agree.



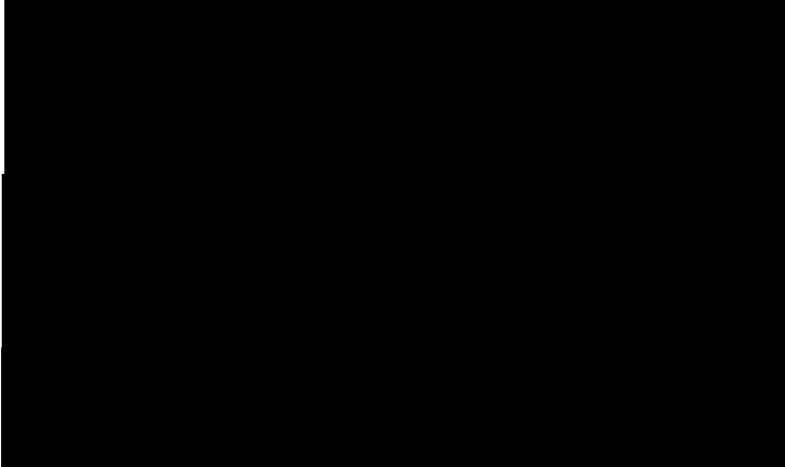
CONTEL OF ARKANSAS, INC. v. ARKANSAS
PUBLIC SERVICE COMMISSION

CA 91-108

822 S.W.2d 850

Court of Appeals of Arkansas
En Banc

Opinion delivered January 22, 1982



Chisenhall, Nestrud & Julian, P.A., by: *Lawrence Chisenhall*; and *Brydon, Swearngen & England, P.C.*, by: *W.R. England III*, for appellant.

Kenny W. Henderson, for appellee.

ELIZABETH W. DANIELSON, Judge. Appellant, Contel of Arkansas, Inc., a telephone utility serving approximately 75,000 Arkansas ratepayers, appeals from a decision of the Arkansas Public Service Commission, appellee, involving Contel's application for a general rate increase. Contel contends the Commission erred in calculating its cost of equity by including in its parent corporation's capital structure accrued common stock dividends payable as a zero-cost source of funds.¹ Alternatively, Contel argues that the Commission's use of a 105-day lag time during which Contel had the use of any zero-cost funds is erroneous. We affirm on the first point and reverse and remand on the second.

Contel of Arkansas contends that, by including about \$50 million in accrued common stock dividends at zero cost in Contel Corporation's capital structure, the Commission denied it any

¹ Contel of Arkansas, Inc., is a wholly-owned subsidiary of Contel Corporation; as such, its stock is not market-traded, and Contel Corporation's cost of capital is imputed to be Contel of Arkansas' cost of equity.

return on those funds by reducing Contel of Arkansas' return on equity. Appellant claims that the record demonstrates that dividends are paid out of retained earnings and, because retained earnings are the property of the shareholders, they have a cost associated with them.

The Commission, in response, argues exclusion of dividends payable as urged by Contel would allow a double return on the same money because of recognition of the lag in payment of common stock dividends. It says that stockholders are implicitly compensated through the allowed return on common stock and that investors expect a lag in receiving dividends, and this is recognized in the methodology used to calculate Contel Corporation's cost of equity.

■ Because of the limited scope of our review, we are compelled to affirm as to the first point. In *Southwestern Bell Telephone Co. v. Arkansas Public Service Commission*, 24 Ark. App. 142, 144, 751 S.W.2d 8 (1988), we said:

This court is generally not concerned with the method used by the Commission in calculating rates as long as the Commission's action is based on substantial evidence. It is the result reached, and not the method used, which primarily controls. If the Commission's decision is supported by substantial evidence and the total effect of the rate order is not unjust, unreasonable, unlawful or discriminatory, judicial inquiry terminates. *Southwestern Bell*, 19 Ark. App. at 327, 720 S.W.2d at 927; *Southwestern Bell Tel. Co. v. Arkansas Pub. Serv. Comm'n*, 18 Ark. App. 260, 715 S.W.2d 451 (1986); *Walnut Hill Tel.*, 17 Ark. App. at 265, 709 S.W.2d at 99.

This court also observed in *Southwestern Bell Telephone Co. v. Arkansas Public Service Commission*, 18 Ark. App. 260, 715 S.W.2d 451 (1986): "If the total effect of the rate order cannot be said to be unjust, unreasonable, unlawful or discriminatory, judicial inquiry is concluded, and infirmities in the method employed are rendered unimportant." In *General Telephone Co. v. Arkansas Public Service Commission*, 295 Ark. 595, 599-600, 751 S.W.2d 1, 3 (1988), the supreme court stated that, while it would reverse a decision where confiscatory ratemaking was evident, it was not concerned with the method the commission

used to determine the rate needed to supply the company adequately with working capital; since the commission's decision fell within the "zone of reasonableness," the court could not find it was confiscatory.

Therefore, given the above limitations on our scope of review, we cannot agree with appellant's first point on appeal. While the appellee's methodology may well be infirm, the record before us does not manifestly demonstrate that the 10.61% return on equity calculated for appellant differs so markedly from the 10.83% it claims is appropriate as to warrant judicial interference. The result reached by the appellee was based on testimony of expert witnesses who asserted that, because investor expectations with regard to dividends are addressed in the various calculations used in deriving the rates to be charged by appellant, inclusion of dividends payable at zero cost is appropriate. While the company vehemently contests this position, we cannot conclude on the record before us that the Commission erred in this regard.

However, we agree with appellant in its claim that the 105-day lag period adopted by the appellee is erroneous, and reverse on that point. As noted, the Commission calculated a lag period of 105 days during which Contel Corporation theoretically had the use of the funds represented by common stock dividends payable. It calculated this period on the assumption that money is collected by Contel Corporation on an even daily basis during a ninety-day calendar quarter; thus, Contel Corporation has the use of these funds on average for half the quarter, which is forty-five days. The Commission then added that period to the sixty-day lapse between the end of the quarter and the date of actual payment of the dividends and arrived at a 105-day period.

Contel argues that this period is overstated and not supported by the evidence because, accepting that common stock dividends payable are zero-cost funding sources, the liability representing these sources of funds does not come into existence until the dividend is declared. In this case, the dividend was declared only twenty-three days prior to the payment date, and Contel contends that this twenty-three days is the lag period supported by the evidence. Contel also points out that, until the dividend is declared and a funding source liability bearing zero

cost is thereby created, the funds represented thereby are retained earnings upon which a return should be earned.

The Commission's position is that, as with the first point on appeal, the 105-day lag period recognizes investor expectations and prevents appellant from earning two returns on the same funds. It says that, because a portion of every day's collections during a calendar quarter preceding payment of a dividend actually fund the dividend when paid, the company has the use of the funds for the period as calculated by the Commission.

■ Although we realize the limitations on our review, we must hold that the Commission's use of a 105-day lag period in this case is unreasonable, unjust, and not supported by substantial evidence. Although an expert witness testified in support of the rationale for a 105-day lag period, that same witness acknowledged the zero-cost liability representing dividends payable did not exist until the date the dividend was declared, which, as noted previously, was twenty-three days before payment.

■ Recognizing that utility ratemaking is an inexact art and of necessity involves judgment calls and educated surmise from time to time, *Arkansas Electric Energy Consumers v. Arkansas Public Service Commission and Arkansas Power and Light Company*, 35 Ark. App. 47, 813 S.W.2d 263 (1991), theory must at some juncture give recognition to reality. The theory as to the use of monies earning a return which eventually become zero-cost liabilities must recognize the reality that they cannot become zero cost under the ratemaking theory used in this case until such time as they in fact become liabilities, which is the date the dividend is declared. See *Anadarko Petroleum Corp. v. Panhandle Eastern Corp.*, 545 A.2d 1171, 1175 (Del. 1988); *St. Charles Bdg. & Loan Ass'n v. Webb*, 229 S.W.2d 577, 581 (Mo. 1950); *Benas v. Title Guar. Trust Co.*, 267 S.W. 28, 29 (Mo. Ct. App. 1924); *Gallagher v. Butler*, 378 S.W.2d 161, 167 (Tenn. 1964); *Atwood v. Huff*, 108 S.E. 562, 564 (Va. 1921). As demonstrated by the undisputed evidence in this case, the zero-cost liability (represented by common stock dividends payable) came into existence twenty-three days before the date it was paid, and a lag period of twenty-three days is, therefore, appropriate.

The decision of the appellee as to appellant's Point I for reversal is affirmed; the decision as to allowing a 105-day lag

period is reversed, and this case is remanded with directions that a lag period of twenty-three days be used in calculating common stock dividends payable.

Affirmed in part; reversed and remanded in part.

COOPER, J., concurs.

[REDACTED]

PUBLIC EMPLOYEE CLAIMS DIVISION, et al. v. Neva
TINER

CA 91-112

822 S.W.2d 400

Court of Appeals of Arkansas
Division I

Opinion delivered January 22, 1992

[REDACTED]

[REDACTED]






Richard S. Smith, for appellant.

Sam Boyce, for appellee.

ELIZABETH W. DANIELSON, Judge. In this workers' compensation case, appellants contend that the commission's findings that appellee sustained a compensable injury and that she is temporarily totally disabled are not supported by substantial evidence. We affirm.

At the time of the hearing in this matter, appellee was 63 years old and had been employed by the Newport Public School System for 33 years. It is undisputed that appellee has had a hiatal hernia and gastrointestinal problems for a number of years preceding the date of the injury. On January 6, 1988, appellee was called in to work to cook 90 pounds of hamburger meat. The school was closed due to weather conditions and no other employees were called in to assist appellee. Appellee was required to lift heavy pots to the top of the stove and stir the meat with a paddle during the cooking process. Appellee then had to clean out a waist-high chest-type freezer in order to put the meat into it. Appellee testified that during this cooking and cleaning process

she felt like something ripped in her chest and she began to experience pain so intense that she was crying and taking medicine while completing her task. After she completed her duties a worker from another school came by to take her home. As they were leaving, appellee saw her supervisor and reported her condition to him, telling him to be sure to file her injury with workers' compensation. Appellee contacted Dr. Green that evening, but was unable to see him until January 10, 1988, due to the road conditions. Dr. Green referred appellee to Dr. Allen, who performed surgery for repair of a large esophageal hiatal hernia.

Appellee tried to work some following the January 6 injury, but was unable to continue with her duties. Appellee's daughter testified that before the January 6 injury, appellee had been able to do her own housework, but could not do so following the injury. The appellee contends, and the commission found, that she suffered an aggravation of a pre-existing hiatal hernia in the course and scope of her employment, which necessitated the surgical repair of the hernia, and that as a result of the injury, she has been unable to return to work. Appellants contend that the hernia predated the January 6 incident and that there was no connection between appellee's work activity and the surgical repair of her hernia, but rather that appellee had a long history of gastrointestinal problems that ultimately resulted in the need for surgical repair of the hiatal hernia.

■ The findings of the Workers' Compensation Commission must be upheld on review if there is substantial evidence to support them. *Scarborough v. Cherokee Enterprises*, 306 Ark. 641, 816 S.W.2d 876 (1991). Before we can reverse a decision of the commission, we must be convinced that fair-minded persons with the same facts before them could not have reached the same conclusion reached by the commission. *Black v. Riverside Furniture Co.*, 6 Ark. App. 370, 642 S.W.2d 338 (1981).

■■ In workers' compensation law, the employer "takes the employee as he finds him" and employment circumstances that aggravate pre-existing conditions are compensable. *Nashville Livestock Comm'n v. Cox*, 302 Ark. 69, 787 S.W.2d 664 (1990). In *Loveless v. Garrison Furn. Co.*, 251 Ark. 776, 475 S.W.2d 158 (1972), the supreme court held that a hiatal hernia does not come within the purview of the statutory restrictions

applying to other types of hernias; claims involving hiatal hernias are governed by the general provisions of workers' compensation law. Appellants argue that the medical evidence does not provide substantial evidence that appellee's hiatal hernia was aggravated by her work activity to the degree that surgery would be required. However, Dr. Green stated in a letter admitted into evidence that he felt appellee's hiatal hernia condition could have been aggravated by the activity that she was required to perform in carrying out the duties of her employment. Appellants also rely on letters written by Dr. Silviso, in which he states basically that as a rule hiatal hernias do not result from physical activity such as stirring the hamburger meat. This argument is irrelevant because appellee acknowledges that the hernia existed prior to her injury. Appellants also rely on Dr. Silviso's statement that a hernia would probably be aggravated to an extent requiring surgery only if the person were involved in strenuous, stooping-over type activity for a prolonged period of time. However, Dr. Silviso also admits in his letter that he did not have all the necessary facts and could not make a judgment as to the degree appellee's work activities aggravated her pre-existing condition.

■ ■ At any rate, the commission has the duty of weighing medical evidence as it does any other evidence, and the resolution of conflicting evidence is a question of fact for the commission. *Mack v. Tyson Foods, Inc.*, 28 Ark. App. 229, 771 S.W.2d 794 (1989). Questions of credibility and the weight to be given the evidence are exclusively within the province of the commission. *Austin v. Highway 15 Water Users Ass'n*, 30 Ark. App. 60, 782 S.W.2d 585 (1990). We find there is substantial evidence to support the commission's finding that appellee sustained a compensable injury.

■ Appellants also question the commission's award of temporary total disability, claiming appellee's healing period has already ended. In the administrative law judge's opinion, which was adopted by the full commission, he pointed out that the surgeries resulting from the compensable injury resulted in an extended period of absence from work, and that appellee has been unable to continue with her duties. We cannot say the finding of the commission that appellee is entitled to temporary total disability is not supported by substantial evidence.

[REDACTED]

Affirmed.

CRACRAFT, C.J., and COOPER, J., agree.

[REDACTED]

David A. COOK v. STATE of Arkansas

CA CR 91-22

823 S.W.2d 916

Court of Appeals of Arkansas

En Banc

Opinion delivered January 22, 1992

[REDACTED]

S.W.2d 835 (1990). To be substantial, the evidence must be of sufficient force and character to compel a conclusion one way or the other with reasonable certainty; it must induce the mind to go beyond mere suspicion or conjecture. *Lair v. State*, 19 Ark. App. 172, 718 S.W.2d 467 (1986).

Viewed in the light most favorable to the appellee, the evidence shows that Officer Terry Canterbury of the El Dorado Police Department was dispatched to investigate a one-vehicle accident on July 15, 1989. When he arrived at the scene, Officer Canterbury observed that an automobile had struck a tree after crossing a set of railroad tracks. He first assessed the damage to the automobile and, while doing so, noticed an odor of alcohol in the vehicle. Officer Canterbury then walked over to a group of people which included the appellant, the appellant's girlfriend, and two other people who were helping them. Suspecting that alcohol might be involved in the accident, Officer Canterbury noticed that the appellant had an odor of alcohol on his breath, had a flushed appearance, and spoke rapidly in response to the officer's questions. Officer Canterbury stated that, once he detected the odor of alcohol on the appellant's breath, the appellant was not free to leave although he had not yet been formally arrested. Officer Canterbury also stated that he asked the appellant if he had been driving the car, and that the appellant admitted that he had been driving when the accident occurred. However, at trial the appellant moved in limine to suppress the statements given to Officer Canterbury on the grounds that he had not been given the warnings required by *Miranda v. Arizona*, 384 U.S. 436 (1966) and the trial court granted the motion. On cross-examination, Officer Canterbury stated that he never saw the appellant drive the automobile.

■■ Under Ark. Code Ann. § 5-65-103(a) (1987), it is unlawful for any person who is intoxicated to operate or be in actual physical control of a motor vehicle. Operation of a motor vehicle may be proven by (1) observation of the officer; (2) evidence of intent to drive after the moment of arrest; or (3) a confession by the defendant that he was driving. *Azbill v. State*, 285 Ark. 98, 685 S.W.2d 162 (1985). In the case at bar, Officer Canterbury testified that he never observed the appellant operating the vehicle; moreover, there was no evidence to show that the appellant intended to drive after the moment of arrest. Finally,

the appellant's admission that he had been driving was suppressed by the trial court and, therefore, was not in evidence. Under these circumstances, we hold that the evidence admitted at trial was insufficient to support a conviction for DWI because there was no evidence showing that the appellant operated or was in actual physical control of the vehicle.

In *Burks v. United States*, 437 U.S. 1 (1978), the United States Supreme Court held that the Double Jeopardy Clause precludes a second trial once the reviewing court has found the evidence legally insufficient to sustain a conviction, as distinguished from trial error. The state, however, argues that the trial court committed error in granting the appellant's motion to suppress the appellant's statement in which he told Officer Canterbury that he was the driver of the vehicle, and thus contends that the case should be remanded for retrial under our supreme court's decision in *Crutchfield v. State*, 306 Ark. 97, 104, 816 S.W.2d 884 (1991) (supplemental opinion granting rehearing).

In *Crutchfield, supra*, the supreme court had determined that the evidence presented at trial was insufficient to support the appellant's conviction, but the court also concluded that the trial court had erred in excluding expert testimony offered by the state. In its opinion on rehearing, although recognizing that retrial is prohibited on grounds of double jeopardy when a conviction is reversed for evidentiary insufficiency, the court ruled that when the state offers sufficient evidence and a portion of it is erroneously excluded the defendant may be retried without offending the right against being placed twice in jeopardy. Consequently, the case was remanded for a new trial on a holding that the evidence would have been sufficient had the state's expert testimony been properly admitted at trial.

In order to determine whether the decision in *Crutchfield, supra*, is applicable to this case, we must first decide whether the trial court erred in excluding appellant's statement. In his argument for suppression before the trial court, appellant contended that he was "in custody" at the time he made the incriminating statement, but had not been advised of his *Miranda* rights. We do not agree that the statement was a product of custodial interrogation so as to warrant its exclusion at trial.

█ The warnings required by *Miranda v. Arizona, supra*, come into play only when the defendant is subjected to custodial interrogation or its functional equivalent. *Bennett v. State*, 302 Ark. 179, 789 S.W.2d 436 (1990). *Miranda* warnings are not required if the questioning by police is simply investigatory. *Shelton v. State*, 287 Ark. 322, 699 S.W.2d 728 (1985). To determine whether or not one has been subjected to custodial interrogation so as to require the giving of *Miranda* warnings, in *Shelton v. State, supra*, the supreme court set forth the following test:

It is settled that the safeguards prescribed by *Miranda* become applicable as soon as a suspect's freedom of action is curtailed to a degree associated with formal arrest. A policeman's unarticulated plan has no bearing on the question whether a suspect was "in custody" at a particular time; the only relevant inquiry is how a reasonable man in the suspect's position would have understood his situation.

Shelton, 297 Ark. at 328-29, 699 S.W.2d at 731 (quoting *Berkemer v. McCarty*, 468 U.S. 420 (1984)).

█ The circumstances in the present case are not unlike those found in *Snyder v. City of Dewitt*, 15 Ark. App. 277, 692 S.W.2d 273 (1985). In *Snyder*, a police officer investigating the scene of an accident was told by the appellant that he had driven the vehicle into the ditch, and we found no error in the trial court's denial of the motion to suppress. Here, although officer Canterbury testified that appellant was not free to leave once he detected the odor of alcohol on appellant's person, there is no indication in the record that the officer communicated this restriction to appellant prior to his arrest. The record reveals that Officer Canterbury was the only policeman in attendance, and there were several spectators present during the investigation which took place on a public highway. As in *Snyder, supra*, we do not think the circumstances here were such that appellant would have been justified in the belief that he was in custody when he told Officer Canterbury that he had been driving the vehicle. Therefore, we hold that the trial court erred in suppressing appellant's inculpatory statement. We also hold that the inclusion of this evidence would render the evidence sufficient to support a conviction.

■ In *Crutchfield, supra*, the court said that the state is entitled to prove its case. Accordingly, we reverse and remand this case for retrial. Therefore, it becomes necessary to address the second issue raised by appellant on appeal.

■ Appellant contends that the results of the breathalyzer test, which showed he had .12% blood alcohol level, should have been suppressed because Officer Canterbury had no reasonable cause to require him to submit to the test. We do not agree. Arkansas Code Annotated § 6-65-203(a) (Supp. 1991) provides that the test "shall be administered at the direction of a law enforcement officer having reasonable cause to believe the person to have been operating or in actual physical control of a motor vehicle while intoxicated or while there was one-tenth of one percent (.10%) or more of alcohol in the person's blood." We believe that appellant's flushed appearance, slurred speech, and uneasiness on his feet, along with Officer Canterbury's detection of the odor of alcohol supplied ample cause for requiring the breath test. See *Elam v. State*, 286, Ark. 174, 690 S.W.2d 352 (1985). Therefore, we hold that the trial court did not err in allowing the introduction of the test results.

Reversed and Remanded.

COOPER and DANIELSON, JJ., dissent.

JAMES R. COOPER, Judge, dissenting. While I agree with the majority's decision to reverse the appellant's conviction due to the insufficiency of the evidence, I dissent from its remand to the trial court for a new trial because the appellant will thereby be twice placed in jeopardy. There are two bases for my conclusion. First, our conclusion that the evidence was insufficient should have ended the analysis because this finding is equivalent to acquittal by the trial court. Secondly, the majority opinion glosses over a procedural error, i.e., the State's failure to object to the appellant's untimely suppression motion, which resulted in its failure to preserve for appeal the issue of whether trial error was committed.

Double jeopardy considerations must be addressed when retrial of a criminal defendant arises, and the United States Supreme Court's decisions have foreclosed the disposition of this case arrived at by the majority. It was held in *Burks v. United*

States, 437 U.S. 1 (1978), that an appellate court's determination that the evidence is insufficient for conviction is tantamount to a verdict of acquittal. Consequently, a State cannot retry a defendant whose case is reversed by a State appellate court because of the insufficiency of the evidence. *Greene v. Massey*, 437 U.S. at 25 (1978). The same day the Supreme Court decided *Burks, supra*, it held in *Sanabria v. U.S.*, 437 U.S. 54 (1978), that even when an erroneous exclusion of evidence causes the insufficiency of evidence, retrial is barred.

In summary, when the defendant's case is reversed on appeal, retrial is barred by the rule against double jeopardy if the reversal is based upon insufficiency of the evidence, but retrial is not barred if it is based upon procedural error. S. Singer and M.J. Hartman, *Constitutional Criminal Procedure Handbook*, § 16.23 at 590 (1986). Because the case at bar was reversed due to insufficiency of the evidence, retrial is barred and the case should be dismissed regardless of whether the trial court's exclusion of the appellant's statement that he was driving was erroneous.

Arkansas has followed this reasoning. In *Harris v. State*, 284 Ark. 247, 681 S.W.2d 334 (1984), our Supreme Court held that, when the sufficiency of the evidence is at issue, it must be addressed before any question of trial error may be decided. The Court of Appeals specifically held in *Ryan v. State*, 30 Ark. App. 196, 786 S.W.2d 835 (1990), that an appellate court may not affirm a conviction by considering evidence which the jury did not hear when sufficiency is at issue. Thus, when evidence is excluded it may not be considered on appeal.

Nevertheless, the majority relies on *Crutchfield v. State*, 306 Ark. 97, 812 S.W.2d 459 (1991) (supp. op. Oct. 14, 1991), in which our Supreme Court ruled that when the State offers sufficient evidence and a portion of it is erroneously excluded, the defendant may be retried without offending the right against being placed twice in jeopardy. The supplemental opinion in *Crutchfield, supra*, reversed the Court's decision to dismiss, relying on dictum from an Illinois case, *Webster v. Duckworth*, 767 F.2d 1206 (7th Cir. 1985). *Webster* did conclude that the double jeopardy clause barred a second trial; however, the majority in *Crutchfield* relied on dictum in which the Illinois

Court distinguished a hypothetical scenario where the first jury should have acquitted on the evidence it heard, unlike *Burks*, where acquittal was based on all the prosecutorial evidence initially presented. In my opinion, the portion of the *Webster* opinion relied on has little or no precedential value.

In the case at bar, the majority's analysis finds the evidence insufficient in accordance with *Harris v. State, supra*, disregards the import of that conclusion, and continues to determine whether *Crutchfield* applies by "first [deciding] whether the trial court erred in excluding" the statement. "Trial error," in the double jeopardy analysis, clearly means error which prejudices the defendant, not the State. *Burks, supra*, at 15. Accordingly, because the evidence was insufficient, the case should be reversed and dismissed; but even if the analysis were continued, no "trial error" was committed as only the State may have been prejudiced.

A second basis for dismissal is that the State failed to preserve for appeal the issue of whether the statement by the appellant that he was driving should or should not have been suppressed. Rule 16.2 of the Arkansas Rules of Criminal Procedure provides that objections to the use of evidence, including confessions or admissions of a defendant, shall be made by a motion to suppress evidence filed no later than ten days before the date set for trial unless good cause is shown by the moving party. The appellant did not file a pretrial motion to suppress admission of the statement, but instead moved to suppress it on the day of the trial, offering no explanation for the untimeliness of the motion. The State did not object.

Had the appellant adhered to Rule 16.2, the State would have had the opportunity to bring an interlocutory appeal from an order suppressing the confession under Ark. R. Crim. P. 36.10. Proceedings in the trial court would have been stayed pending the determination of the State's appeal which is especially significant to the State because an interlocutory appeal cannot be taken by the State after jeopardy attaches, i.e., after the jury is sworn in a jury trial, or after the court begins taking evidence at a bench trial. *State v. Glenn*, 267 Ark. 501, 592 S.W.2d 116 (1980). As a result of the State's failure to object, it waived any right to an interlocutory appeal.

The manner in which the State's assertion of trial error came before the appellate court for review in *Crutchfield* is not apparent from the opinion, but it is clear that the Supreme Court did not hold that the appellate court in a criminal case was required to address, for the first time on appeal, an assertion of trial error made by the State in the absence of an interlocutory appeal. By addressing the asserted error, the majority has essentially allowed the State to cross-appeal without filing a notice of appeal in accordance with Ark. R. Crim. P. 36.10(b), and even if this procedure were correctly followed, the disposition of this case would not be changed. "In all such cases, regardless of the decision in this Court, the trial had below is a bar to any subsequent trial of the accused for the same offense, the only possible result of the appeal being a ruling by us on questions of law that might serve as a guide in future trials. *State v. Harvest*, 26 Ark. App. 241, 762 S.W.2d 806 (1989).

It is a fundamental rule in Arkansas that an assertion of error will not be considered on appeal in the absence of an appropriate objection in the trial court. This rule is applicable to the State, as well as to criminal defendants. *See State v. Houpt*, 302 Ark. 188, 788 S.W.2d 239 (1990). The issue of whether the statement's exclusion was erroneous was not properly preserved and therefore, the State may not be heard to complain when it raises issues for the first time on appeal.¹

DANIELSON, J., joins in this dissent.

¹ As recently as January 21, 1992, the Arkansas Supreme Court reaffirmed its holding in *Harris, supra*, by stating that "[w]e review the sufficiency of the evidence prior to the consideration of the other asserted trial errors because, if the evidence is insufficient, the other asserted errors do not matter." *Swanson v. State*, 308 Ark. 28, 823 S.W.2d 812 (1992).

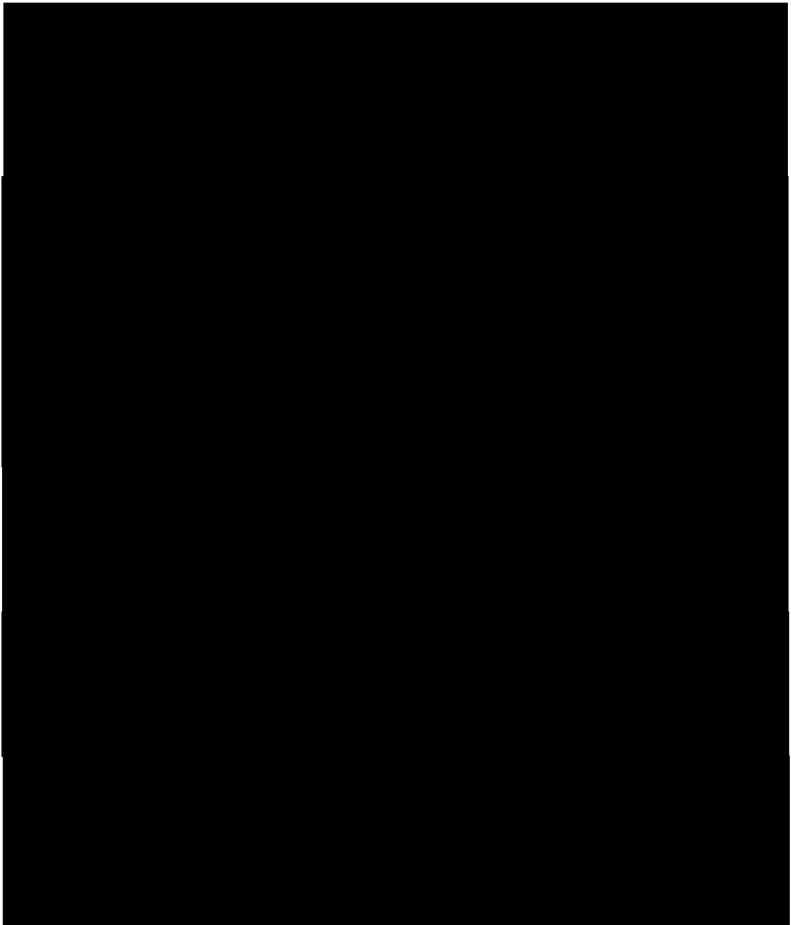


Carolyn S. WHITE v. Dorothy White TONEY,
Administratrix of the Estate of Carl Leham White, Jr.

CA 91-61

823 S.W.2d 921

Court of Appeals of Arkansas
Division II
Opinion delivered January 22, 1992



Robert D. Avery, for appellant.

Bridewell & Bridewell, by: *Laurie A. Bridewell*, for appellee.

JUDITH ROGERS, Judge. This is an appeal from an order of the probate court overruling appellant, Carolyn S. White's, objection to an inventory and accounting submitted by appellee, Dorothy White Toney, the administratrix of the estate of their father, Carl Lehman White, Jr. In overruling the objection, the probate judge ruled that funds represented by two certificates of deposit, which were in existence at the time of the decedent's death, were not distributable through the decedent's estate, but rather were the separate property of appellee and her daughter, Leah Toney. On appeal, appellant advances two arguments questioning the jurisdiction of the probate court, and a third issue in which she contends that the probate court's decision was in error. We find no merit in the issues raised, and affirm.

Carl Lehman White, Jr., a resident of Eudora, Arkansas, died intestate on November 11, 1987, and was survived by his three daughters, Dorothy White Toney, the appellee, Carolyn S. White, the appellant, and Judy White Richmond, who is not a party to this litigation. The dispute in this appeal is centered upon two certificates of deposit, totaling \$186,500, which were purchased from a Louisiana financial institution. One of the certificates was issued to "Carl White, Jr. or Dottie Toney (Payable to Survivor)," while the other was issued to "Carl White, Jr. or Leah Toney (Payable to Survivor)."

By order of November 25, 1987, appellee was appointed as the administratrix of the estate, and on February 16, 1988, she submitted an inventory and first accounting to the probate court for approval. Appellant objected to the inventory and accounting on the basis that the certificates of deposit were not included as assets of the estate. At the hearing on this matter, which was held after several continuances, it was disclosed that appellee and her daughter, Leah, had withdrawn the proceeds of the certificates from the Louisiana institution and had placed them in a bank in Georgia, where the two resided. The probate court was also informed that appellant had filed a lawsuit seeking the recovery of the funds against appellee in Louisiana. On December 30, 1988, the probate judge issued an order in which he declined to

determine the issue of whether the certificates of deposit were to be included in the inventory of the estate, stating that he was leaving the issue of ownership to be determined by the court in Louisiana. He thus ruled that the estate would remain open indefinitely, pending the outcome of that litigation. Appellee then filed a motion to set aside this order, or in the alternative, for a new trial. This motion was denied on February 9, 1989, by the probate court, which was then presided over by a newly elected judge.

Appellee then brought an appeal, but this court, sitting *en banc*, dismissed the appeal on a holding that the judge's decision declining to reach the merits of the issues presented did not constitute a final, appealable order in that it did not dismiss the parties from the court, discharge them from the action, or conclude their rights in the subject matter which was in controversy. *Toney v. White*, 31 Ark. App. 34, 787 S.W.2d 246 (1990). Thereafter, on April 30, 1990, appellee filed a motion before the probate court, asking it to reconsider the decisions of December 30, 1988, and February 9, 1989, and requesting its approval of the inventory and first accounting. By order of July 24, 1990, the probate court granted appellee's motion and approved the inventory, based on a determination that, by application of Arkansas law, the certificates of deposit were not property of the estate. It is from this order that this appeal arises.

As her first issue, appellant contends that the probate court had no authority and was without jurisdiction to vacate the earlier orders and thereby render a decision as to the ownership of the certificates of deposit. She bases this argument upon Ark. R. Civ. P. 60, which sets forth grounds for modifying and setting aside orders both within and beyond a ninety day period, and argues that none of the grounds mentioned in the rule were applicable to this case.

■ However, notwithstanding the provisions of Ark. R. Civ. P. 60, Arkansas Code Annotated § 28-1-115(a) (1987) provides in part that, for good cause, and at any time within the period allowed for appeal after the final termination of the estate of a decedent or ward, the probate court may vacate or modify an order or grant a rehearing. We have recognized that this statute allows a probate court to vacate or modify its orders at any time before the time for appeal has elapsed after the final termination

of the estate. *Carpenter v. Horace Mann Life Ins. Co.*, 21 Ark. App. 112, 730 S.W.2d 502 (1987). The supreme court in *Price v. Price*, 258 Ark. 363, 527 S.W.2d 322 (1975), observed that this statute was designed to afford a probate court greater flexibility with regard to the finality of its orders in the process of administration of an estate. Consequently, we find no error in the probate court's taking action on appellee's motion for reconsideration.

Secondly, appellant argues that the probate court lacked jurisdiction to determine the ownership of the certificates of deposit because the lawsuit in Louisiana was still pending. She contends that this matter must first be determined by the court in Louisiana, leaving the probate court here only to determine how the proceeds are to be distributed in accordance with Arkansas law on intestate succession. We disagree.

■ The probate court, in the exercise of its jurisdiction to administer the estates of decedents, is authorized to determine what property belongs to the estate. *Carlson v. Carlson*, 224 Ark. 284, 273 S.W.2d 542 (1954). The pendency of the Louisiana action on the same subject was no impediment to the exercise of the probate court's jurisdiction, since identical cases in different states can be pending in each court at the same time. *Carter v. Owens-Illinois, Inc.*, 261 Ark. 728, 551 S.W.2d 209 (1977). In such a situation, the parties are bound by the judgment of the forum which first disposes of the case by trial. *Id.* The record indicates that the litigation in Louisiana had not advanced beyond the pleading stages; therefore, we find no merit in appellant's argument that the probate court lacked jurisdiction on this basis.

Appellant's third argument is the primary issue in this appeal, and involves a conflicts of law question. In deciding that the certificates of deposit were not assets of the estate, the probate judge applied Arkansas law and ruled that appellee and her daughter owned the certificates of deposit by right of survivorship. Appellant asserts that the probate court erred in determining that Arkansas law governed the resolution of this issue.

The parties are in agreement that should Arkansas law apply, the probate court's decision awarding the certificates to appellee and her daughter was correct. See Ark. Code Ann. § 23-

32-1005(1)(A) (1987). The certificates of deposit, however, would remain the property of the decedent under the substantive law of Louisiana, as a deposit of funds in a joint account there does not effect a transfer of ownership, absent a showing of a "donation." *Succession of Miller*, 405 So. 2d 812 (La. 1981); *Dawson v. Capital Bank & Trust Co. of Baton Rouge*, 261 So. 2d 727 (La. Ct. App. 1972).

■ ■ It is generally understood that title to and rights in a joint bank account are governed by the law of the place where the deposit has been made and the account is kept. *See* 10 AmJur.2d *Banks* § 376 (1963); 9 C.J.S. *Banks and Banking* § 994 (1938); *see e.g. Herbin v. Farrish*, 266 S.E.2d 698 (N.C. Ct. App. 1980); *Tyler v. Suburban Trust Co.*, 247 Md. 461, 231 A.2d 678 (1967); *Hendricks v. Lundy*, 356 P.2d 566 (Okla. 1960); *Seng v. Corns*, 58 So. 2d 686 (Fla. 1952); *Sloan v. Jones*, 241 S.W.2d 506 (Tenn. 1951); *In re Kugel's Estate*, 78 N.Y.S.2d 851 (1948); *Kelly v. Kelly*, 134 N.J.Eq. 316, 35 A.2d 618 (1944); *Wynne v. Wynne*, 33 A.2d 173 (R.I. 1943); *Barstow v. Tetlow*, 97 A. 829 (Me. 1916). In so deciding, the Tennessee court in *Sloan v. Jones, supra*, reasoned that the creation of a bank account was in the nature of a contract, and thus applied the "familiar rule" that the construction and validity of a contract are governed by the law of the place where the contract is made. This "familiar rule" referred to by the court is also a settled component of the jurisprudence of this state. *See Lawler v. Lawler*, 107 Ark. 70, 153 S.W. 1113 (1913); *Hammons v. The Prudential Ins. Co. of America*, 19 Ark. App. 112, 717 S.W.2d 819 (1986).

Based on these authorities, we agree with appellant that reference must first be made to the law of Louisiana. In looking to Louisiana conflicts of law on this subject, however, we find that if this case were tried in Louisiana, a Louisiana court would apply the law of Arkansas, as the domicile of the deceased, in determining the ownership of the certificates of deposit. *Succession of Villere*, 411 So. 2d 484 (La. Ct. App. 1982). Given this circumstance, we are unable to conclude that the probate court erred in applying Arkansas law to determine this issue.

We are not unmindful of the supreme court's recent decision in *Morris v. Cullipher*, 306 Ark. 646, 816 S.W.2d 194 (1991). In *Morris*, the court applied Arkansas law, as the law of the domicile

of the deceased, as opposed to the law of the place where the contract was made, in determining the ownership of certificates of deposit purchased from a Texas bank. However, the court's application of the law of the domicile was based on the consideration that marital property was involved, which is not the situation in the case at bar. In any event, the same result would have been reached were we to have applied the decision in *Morris v. Cullipher*.

After careful consideration of the points raised on appeal, we affirm the probate judge's decision in all respects.

Affirmed.

CRACRAFT, C.J., and JENNINGS, J., agree.

Robert E. MARSH v. NATIONAL BANK OF
COMMERCE of El Dorado, Arkansas; Jerry M. Wilson;
Nadelle S. Wilson; Ralph Jackson Vines; Jo E. Vines; and
Gurvis F. Vines

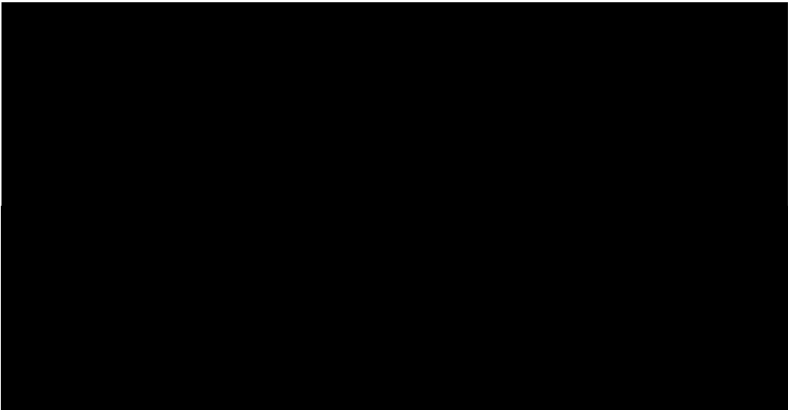
CA 91-239

822 S.W.2d 404

Court of Appeals of Arkansas
En Banc

Opinion delivered January 29, 1992
[Rehearing denied February 26, 1992.*]

*Rogers, J., would grant rehearing; Mayfield, J., not participating.



Wilson & Associates, by: *Jack T. Lassiter*, for appellant.

William I. Prewett, for appellees.

JOHN E. JENNINGS, Judge. On January 29, 1988, Jerry and Nadelle Wilson and Ralph and Jo Vines executed a promissory note to National Bank of Commerce of El Dorado for \$245,000.00. Gurvis Vines and Robert Marsh signed the note as guarantors. On March 8, 1989, Jerry Wilson, Ralph Vines, and Robert Marsh signed a second note to the bank for \$17,600.00 to cover accrued interest on the first note. After both notes went into default, the bank sued and obtained judgment against the parties in Union County Chancery Court on November 7, 1990. Robert Marsh appeals.

The primary issue is whether the chancellor erred in not holding that the bank's claim against Marsh was barred under section 124(1) of the Restatement of Security, dealing with the non-disclosure of material facts by a creditor to a surety, as expressly adopted by the Arkansas Supreme Court in *Camp v. First Fin. Fed. Sav. and Loan Ass'n*, 299 Ark. 455, 772 S.W.2d 602 (1989). More specifically, Marsh contends that the bank's failure to disclose the status of a note owed by his co-guarantor, Gurvis Vines, bars the claim. We hold that the question was one of fact and that the chancellor's decision was not clearly wrong. Ark. R. Civ. P. 52(a). Because we find no error, the trial court's judgment is affirmed.

Some history is necessary for an understanding of the issues presented. Jerry Wilson is the pastor of a Baptist church in El Dorado. He has also been in the business of buying real estate to renovate or rent. In 1983 he bought forty-one acres of land in Union County, for development purposes, financed by an \$85,000.00 loan from the appellee bank and secured by a purchase money mortgage on the land. When the note fell due in 1986 and he could not pay it, Wilson called Robert Marsh, who was then the president of Ensco, Inc., to see if either Marsh or Ensco might buy the property. Although Marsh was not interested in buying the land, he agreed to help.

In September 1986, Marsh guaranteed a new one-year note for \$120,000.00 made by Wilson and his wife, Nadelle, to the bank. When this note came due, Wilson again could pay neither principal nor interest. Marsh paid the \$13,000.00 in interest due and the bank extended the note another year.

Before the note fell due again, Gurvis Vines, a member of Pastor Wilson's congregation, became concerned about Wilson's financial burdens and proposed a solution. Vines had been in the insurance business in El Dorado for many years and was also an independent oil producer, operating under the name of Jay Mike Oil Company. Vines also had a long standing relationship with James Cook, the president of the bank since 1969.

Vines had an interest in several idle, but potentially oil-producing, tracts of land. He proposed to put up these interests as collateral for a larger note, from which he would receive additional funds to get the oil wells into operation. The idea was that

the entire note would then be satisfied from the proceeds of the sale of oil.

Vines, Wilson and Marsh met in January, 1988. The upshot was a new note to the bank for \$245,000.00. The makers were Wilson and his wife and Ralph "Jay" Vines and his wife, Jo. Ralph Vines, Gurvis Vines' son, is a sports memorabilia dealer in El Dorado. The note was guaranteed by Gurvis Vines and Robert Marsh and secured by a mortgage on the forty-one acres originally bought by Jerry Wilson, together with assignments of oil revenues on Vines' oil properties and chattel mortgages on related equipment. The proceeds of the note were used to satisfy in full Wilson's \$120,000.00 note and to reimburse Marsh for the \$13,000.00 in interest he had previously paid. The remaining note proceeds, some \$100,000.00, were deposited to the account of Jay Mike Oil Company.

Gurvis Vines' oil wells proved to be a disappointment and on March 8, 1989, Wilson, Marsh and Ralph Vines signed a note for \$17,600.00 to pay the interest on the \$245,000.00 note. By May of 1990 both notes were in default and the bank filed suit.

At trial both James Cook, the bank's president, and Marsh testified that they had enjoyed an excellent business relationship with each other. Cook testified that the bank had loaned Marsh some \$250,000.00 to build a home in Little Rock. Marsh testified that he had borrowed \$170,000.00 from the bank in 1987 to pay his income tax and had a \$750,000.00 certificate of deposit there.

Cook, who had worked for the bank since 1954, had known Gurvis Vines since the 1970's. He and Vines were partners in an oil investment business from the late 1970's until 1982. Cook testified that Vines still owed him, or some other partner, money as a result of that operation.

Robert Marsh is currently in the cattle business and is apprenticing as an economist. He holds a BS in mathematics, a BS in electrical engineering, a masters in business administration from the University of Pennsylvania, and a law degree from the University of Arkansas. In Arkansas he has been employed by Arkansas Power and Light as the director of treasury and accounting, by Stephens, Inc., and by Ensco, Inc., first as treasurer and secretary and then as president.

In arguing that the bank is barred from obtaining judgment against him, Marsh relies mainly on a \$420,000.00 note made by Gurvis Vines and his wife to the bank on January 16, 1986. The note was payable in monthly installments of \$12,000.00, including both principal and interest. The note had a balance of \$395,161.00 on January 29, 1988, the date Robert Marsh and Gurvis Vines guaranteed the \$245,000.00 note sued upon here. James Cook testified that he believed the interest payments were current on the Gurvis Vines note, but only \$25,000.00 had been paid on the principal.

Marsh testified that he would not have guaranteed the \$245,000.00 had he known of Gurvis Vines' payment history; that he was relying on Gurvis Vines to pay the \$245,000.00 note; that after the January meeting between him, Jerry Wilson, and Gurvis Vines, Vines told Marsh that he had never been this much in debt in his life; that he had no idea about the financial status of Ralph Vines; and that he felt that Cook "had gotten him into this mess." Cook testified that, although he did not divulge to Marsh the status of Gurvis Vines' note, he did tell Marsh that "Gurvis Vines could not borrow money on his own" and that Vines "had problems of his own."

In *Camp v. First Fin. Fed. Sav. and Loan Ass'n*, 299 Ark. 455, 772 S.W.2d 602 (1989), the supreme court adopted section 124(1) of the Restatement of Security:

- (1) Where before the surety has undertaken his obligation the creditor knows facts unknown to the surety that materially increase the risk beyond that which the creditor has reason to believe the surety intends to assume, and the creditor also has reason to believe that these facts are unknown to the surety and has reasonable opportunity to communicate them to the surety, failure of the creditor to notify the surety of such facts is a defense to the surety.

Although appellant characterizes the defense as one of estoppel, it is clear that the restatement section is merely an application of the rule of contract law that fraud creates a defense. Restatement of Security § 124 cmt. a (1941). Comment b to § 124 states:

- b. Although in applying the rule stated in this

Section to particular situations there is often considerable difficulty in ascertaining the precise degree of knowledge of surety and creditor and even in determining the materiality of the facts alleged to be concealed, the rule itself is simple. It does not place any burden on the creditor to investigate for the surety's benefit. It does not require the creditor to take any unusual steps to assure himself that the surety is acquainted with facts which he may assume are known to both of them. Among facts that are material are the financial condition of the principal, secret agreements between the parties, or the relations of third parties to the principal. If the surety requests information, the creditor must disclose it. Where he realizes that the surety is acting or is about to act in reliance upon a mistaken belief about the principal in respect of a matter material to the surety's risk, he should afford the surety the benefit of his information if he has an opportunity to do so.

Every surety by the nature of his obligation undertakes risks which are the inevitable concomitants of the transactions involved. Circumstances of the transactions vary the risks which will be regarded as normal and contemplated by the surety. While no surety takes the risk of material concealment, what will be deemed material concealment in respect of one surety may not be regarded so in respect of another. A creditor may have a lesser burden of bringing facts to the notice of a compensated surety who is known to make careful investigations before taking any obligation than to a casual surety who relies more completely upon the appearances of a transaction. The rule stated in this Section applies an objective test of the materiality of the facts not disclosed rather than the intent of the creditor in failing to make the disclosure.

In the case at bar the testimony was in conflict as to whether Cook told Marsh anything about Gurvis Vines' financial condition. Furthermore, the materiality of facts not disclosed is ordinarily itself a question of fact. *First Nat'l Bank and Trust Co. of Racine v. Notte*, 97 Wis. 2d 207, 293 N.W.2d 530 (1980). See also *Southern Equip. & Tractor Co. v. K&K Mines, Inc.*, 272 Ark. 278, 613 S.W.2d 596 (1981). It is also a prerequisite for the application of the section 124 defense that the creditor "has

reason to believe that [the] facts are unknown to the surety. . . .” Restatement of Security § 124(1) (1941).

■ The chancellor stated that Marsh’s “contention that he would not have signed the guarantee had he known of a 1986 Gurvis Vines note to NBC is contrary to the evidence and is also refuted by the fact that he made no request for Gurvis Vines to guarantee the note for \$17,595.00 In March of 1989.” The latter is a legitimate inference the chancellor was entitled to draw. It was also proper for the chancellor to give consideration to Marsh’s education and background in financial matters. Restatement of Security § 124 cmt. b. There are other distinctions between *Camp* and the case at bar. In *Camp*, the trial court was unaware of the rule and “applied the wrong standard of duty.” *Camp*, 299 Ark. at 457. Here, the chancellor knew the applicable law. *Camp* involved the issuance of secret side loans to the maker after the original note was guaranteed; the allegation here is one of non-disclosure of a pre-existing liability of a co-guarantor. Our conclusion is that the question in the case at bar was one of fact and we cannot say that the chancellor’s determination that Robert Marsh had not established the defense of fraud is clearly against a preponderance of the evidence. Ark. R. Civ. P. 52(a).

■ Appellant next contends that the chancellor erred in not finding a fiduciary relationship between him and the bank. The general rule is that the relationship between a bank and its customer is merely that of debtor and creditor. *See Lasley v. Bank of Northeast Ark.*, 4 Ark. App. 42, 627 S.W.2d 261 (1982). “There is no set formula by which the existence of a confidential relationship may be determined, for each case is factually different and involves different individuals.” *Donaldson v. Johnson*, 235 Ark. 348, 359 S.W.2d 810 (1962). The question is one of fact and the party claiming the existence of the confidential relationship has the burden of proving it. *See Donaldson*, 235 Ark. at 351. These last two general rules have been applied in the context of the bank-customer relationship. *See, e.g., Dennison State Bank v. Madeira*, 230 Kan. 684, 640 P.2d 1235 (1982). In the case at bar, Mr. Marsh testified that he guaranteed Wilson’s original note “as a favor to the bank.” It was for the trial court to determine the weight to be accorded this testimony. In viewing the record as a whole, we cannot say that the chancellor’s failure to find the existence of a fiduciary relationship between the bank

and Marsh was clearly against a preponderance of the evidence.

The cases appellant relies on to support this argument are not persuasive. *Walters v. First Nat'l Bank of Newark*, 69 Ohio St. 2d 677, 433 N.E.2d 608 (1982), stands merely for the proposition that a bank has a duty to counsel a loan applicant as to how to secure mortgage insurance. In *Richfield Bank & Trust Co. v. Sjogren*, 309 Minn. 362, 244 N.W.2d 648 (1976), there was apparently no contention that a fiduciary relationship existed.

■ Appellant also argues that the notes are unenforceable against him due to a "failure of consideration." It is true, as appellant contends, that a contract of guaranty, like any other contract, must be based upon consideration. *First Nat'l Bank v. Nakdimen*, 111 Ark. 223, 163 S.W. 785 (1914). It is not true, however, that any benefit must have passed to him personally. See *Rockafellow v. Peay*, 40 Ark. 69 (1882); see also Restatement (Second) of Contracts § 88 (1979). A contract of guaranty may be supported by sufficient consideration so long as there is a benefit to a principal debtor or guarantor, or a detriment to the guarantee. *Shamburger v. Union Bank of Benton*, 8 Ark. App. 259, 650 S.W.2d 596 (1983). A promise to forebear bringing suit or an agreement to extend the time for payment of a debt is sufficient consideration. *Wilson Bros. Lumber Co. v. Furqueron*, 204 Ark. 1064, 166 S.W.2d 1026 (1942). Here both notes were clearly supported by consideration.

Although Marsh's name appears as a maker on the March 8, 1988, note for \$17,600.00, he contends that the trial court erred in finding him to be a maker of the note because the bank admitted he was a guarantor in response to requests for admission. The short answer to this contention is that the bank's admission is not binding upon the other parties to the note, who have the only real interest in the distinction.

■ Finally, appellant argues that the chancellor erred in refusing to marshal assets. The marshaling of assets is an equitable principle through which the assets and securities of a debtor are resorted to or apportioned in such a manner as to secure protection to the rights of each of two or more creditors, or of a creditor and some person other than a creditor having an interest in such assets and securities. *Bank of Bentonville v. Swift*

& Co., 233 Ark. 808, 348 S.W.2d 881 (1961). Appellant cites no authority that would require the application of the doctrine at the instance of a co-debtor in circumstances similar to those presented here. While we agree generally with appellant's contention that the doctrine, like other equitable doctrines, should be applied in a flexible manner, we cannot say the court erred in refusing to apply it under the facts of this case.

We affirm the judgment of the trial court in its entirety.

MAYFIELD, J., not participating.

ROGERS, J., dissents.

JUDITH ROGERS, Judge, dissenting. I believe the chancellor's decision should be reversed because of NBC's non-disclosure of Gurvis Vines' financial condition to appellant. Although appellant was clearly obligated on the 1986 note for \$120,000.00, I believe that NBC's actions with regard to appellant's guaranty of the 1988 note provides a defense to appellant.

In affirming the chancellor's decision, the majority refuses to apply the protection of § 124(1) of the Restatement of *Security* (1941), adopted by the Arkansas Supreme Court in *Camp v. First Financial Federal Savings and Loan Association*, 299 Ark. 455, 772 S.W.2d 602 (1989), to appellant. Section 124(1) provides a defense to the surety if the creditor knows facts, unknown to the surety, that materially increase the risk beyond that which the creditor has reason to believe the surety intends to assume and does not communicate these facts to the surety. Although I agree with the majority that whether this non-disclosure is material is a question of fact, I strongly believe that the chancellor's finding that NBC did not conceal material facts about Mr. Vines from appellant is clearly erroneous.

The majority opinion states § 124 is merely an application of the rule of contract law that fraud creates a defense. I strongly disagree with the majority's implication that one seeking to use this section as a defense must establish fraud. In *Camp v. First Fin. Fed. Sav. and Loan Ass'n*, 299 Ark. at 457, 772 S.W.2d at 604, the Arkansas Supreme Court held that it is not necessary for the surety to prove bad faith or fraudulent misrepresentation; only the elements set forth in § 124 need be proved. I am convinced that appellant proved these elements.

When appellant signed the guaranty of the 1988 note, he was ignorant of Gurvis Vines' poor financial situation and of Mr. Vines' lengthy, close relationship with NBC and its president, Mr. Cook. Although Mr. Cook testified that he informed appellant that Mr. Vines was a "problem borrower" and could not borrow this amount of money on his own, this information did not adequately inform appellant of the pertinent facts affecting the risk he was undertaking. The majority opinion does not attach enough significance to Mr. Cook's long relationship with Mr. Vines and his extensive personal knowledge of Mr. Vines' poor financial situation. He knew that Mr. Vines was not able to pay off his \$420,000 note to NBC. Indeed, Mr. Cook had intimate knowledge of Mr. Vines' prior history of being unable to pay off his debts. He knew that, when Mr. Vines signed the \$420,000 note, his older notes to NBC were not performing as planned. Mr. Cook also had information about Mr. Vines' bad financial situation that he had obtained during their partnership in an oil investment; in fact, he knew that Mr. Vines still owed money on that venture. Mr. Cook had reason to believe that appellant was ignorant of these facts, yet he withheld this information from appellant. It is clear that the information withheld from appellant materially increased appellant's risk far beyond that which Mr. Cook had reason to believe he intended to assume.

Additionally, the majority's description of the oil wells' performance as a "disappointment" is not completely appropriate. When the 1988 note was signed, the oil wells were not producing at all, and the evidence reveals little justification for Mr. Vines' optimism that he could make them produce adequate income to retire the debt.

Appellant's argument that, had he known these facts, he would not have signed the 1988 guaranty, is thoroughly believable and persuasive. I also cannot agree with this court's approval of the chancellor's refusal to extend the protection of § 124 of the Restatement of *Security* to appellant because he is a well-educated, sophisticated businessman. That section makes no such distinction among sureties. Although appellant clearly understood the liability of a guarantor, he did not know the full extent of the risk he was undertaking. In sum, Mr. Cook knew facts about Mr. Vines, which he had reason to believe appellant did not know, that materially increased appellant's risk beyond that which

[REDACTED]

appellant intended to assume in executing the guaranty. Because I believe appellant established his defense under § 124, I would reverse.

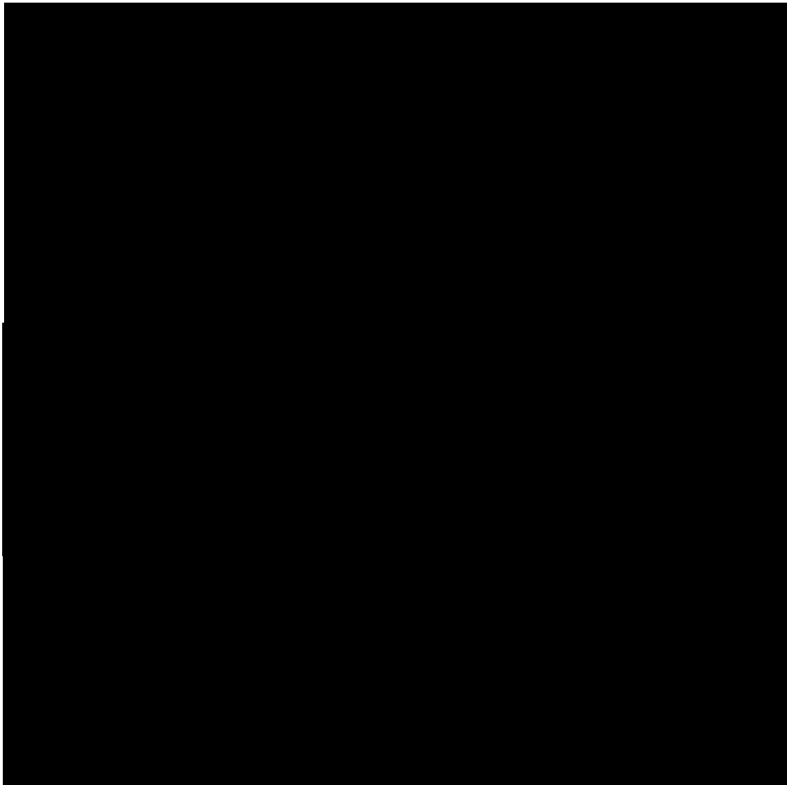
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Jim TRICOU and Utility Management Controls, Inc. v.
ACI MANAGEMENT, INC.

CA 90-547

823 S.W.2d 924

Court of Appeals of Arkansas
Division I
Opinion delivered January 29, 1992



fused to answer several questions but promised to furnish certain information to appellee. On July 13, 1989, the appellee filed a motion to compel the appellants to furnish the promised information. The trial court granted the motion by an order filed of record on October 10, 1989.

The license to practice of the attorney representing the appellants was subsequently revoked and the trial court entered an order substituting new counsel on February 24, 1990. By this time the new counsel was aware that the court had granted the motion to compel and had advised the appellants of the court's order in this regard. On April 3, 1990, the appellee filed a motion alleging that the information which the court's order of October 10, 1989, had directed appellants to furnish had not been furnished. The motion further alleged that the case was set for trial on April 25, 1990, and that the information to be furnished "might be useless if furnished at this late date." The motion concluded with the request that the court "impose sanctions on the defendant by awarding plaintiff the relief sought in the complaint in the form of summary judgment.

This motion was heard on May 30, 1990. On that same day the appellants filed a "Response to Discovery Requests" which supplied information in the form of statements made and documents and correspondence attached. At the hearing on the motion for sanctions, counsel for appellee pointed out that the information ordered furnished by the court's order of October 10, 1989, was not furnished until May 30, 1990, over seven months later, and that he thought default judgment against appellants would be a proper sanction under Arkansas Rules of Civil Procedure, Rule 37.

Counsel for appellants explained to the court that another attorney had represented the appellants at the time Mr. Tricou's deposition was taken and that there was some confusion in getting the requested information to the present attorney. Counsel said he "finally got to the point" where he called his client and told him to "get the stuff to me" if "you want me to stay on this case." He said he "did not receive the stuff until yesterday." Counsel also pointed out that default judgment was a harsh remedy.

After some discussion, the court stated:

Allright. The Court is going to, I am going to strike the counterclaim and I am going to grant a default judgment. You're going to have to put on proof of damages. I'm not going to mess with this any longer.

The court then set August 27, 1990, as the date for a hearing on damages. A written order to that effect was entered in July of 1990. At the August hearing, the court granted appellee a judgment against the appellants for compensatory damages in the sum of \$47,689.50 and punitive damages in the sum of \$95,995.65.

Appellants first argue that the trial court abused its discretion in awarding a default judgment as a sanction for failing to comply with its order to furnish discovery information within a timely period. One point made in their argument is that the Arkansas cases, in which the sanctions of dismissal or default judgment have been employed, are cases where the court order has specifically warned that failure to comply would subject the party to the sanctions provided for such failure. Appellants cite the following cases in support of that argument: *Cagel v. Fennel*, 297 Ark. 353, 761 S.W.2d 926 (1988); *Mann v. Ray Lee Supply*, 259 Ark. 565, 535 S.W.2d 65 (1976); *Graham v. Sledge*, 28 Ark. App. 22, 771 S.W.2d 296 (1989). It is not contended that such a warning must be given; only that the cases have involved situations where the warning was given; and that it would be proper in this case to reverse the severe sanction imposed since no warning was given, there was a change of counsel, and there was ultimate compliance with the court's order.

■ *Cagel v. Fennel, supra*, points out that our rules do not require a finding of willful or deliberate disregard of the court's order before sanctions may be applied. However, the court's order granting default judgement in the instant case made the specific finding that the appellants "have willfully failed to comply" with the order which directed them to furnish the information promised in Tricou's deposition. Because the order to furnish that information, which was entered on October 10, 1989, provided that the appellants had thirty days in which to comply and because they failed to do so until more than seven months later, and then only after present counsel warned appellants to furnish the information if they wanted him to stay on the case, we cannot

say the sanctions imposed by the court, although certainly harsh, were an abuse of the court's discretion.

Appellants also argue that the award of punitive damages was not proper, was not supported by the evidence, and was excessive.

After hearing the evidence as to damages on August 27, 1990, the trial court simply announced the amount of compensatory and punitive damages which it granted without making any finding of malice or willful, wanton, or reckless conduct, nor did the judgment entered by the court make any such findings. This issue has been fully discussed in the recent opinion of the Arkansas Supreme Court in the case of *Stein v. Lukas*, 308 Ark. 74, 823 S.W.2d 832 (1992). In that opinion, the court stated:

We have held that punitive or exemplary damages are proper where there is an intentional violation of another's right to his property. *See Walt Bennett Ford, Inc. v. Keck*, 298 Ark. 424, 768 S.W.2d 28 (1989). We have further held that punitive damages are available in cases of misrepresentation or deceit. *See Thomas Auto Co. v. Craft*, 297 Ark. 492, 763 S.W.2d 651 (1989).

In addition, we have said that an award of punitive damages is justified only where the evidence indicates that the defendant acted wantonly in causing the injury or with such a conscious indifference to the consequences that malice may be inferred. *See Missouri Pacific Railroad v. Mackey*, 297 Ark. 137, 760 S.W.2d 59 (1988); *National By-Products, Inc. v. Searcy House Moving Company, Inc.*, 292 Ark. 491, 731 S.W.2d 194 (1987). In both cases we quoted the following language from *St. Louis, I.M. & S. Ry. Co. v. Dysart*, 89 Ark. 261, 116 S.W. 224 (1909) with approval:

In other words, in order to superadd this element of damages by way of punishment, it must appear that the negligent party knew, or had reason to believe, that his act of negligence was about to inflict injury, and that he continued in his course with a conscious indifference to the consequences, from which malice

may be inferred.

Mackey, 297 Ark. at 145; 760 S.W.2d at 63; *National By-Products, Inc.*, 292 Ark. at 494; 731 S.W.2d at 196.

We have also defined circumstances from which malice can be inferred: "In other words, in order to warrant a submission of the question of punitive damages, there must be an element of willfulness or such reckless conduct on the part of the defendant as is equivalent thereto." *Dalrymple v. Fields*, 276 Ark. 185, 188, 633 S.W.2d 362, 364 (1982); quoting *Hodges v. Smith*, 175 Ark. 101, 293 S.W.2d 1023 (1927).

In 1987, we cited Arkansas Model Jury Instruction 2217 as an embodiment of the law on punitive damages. See *Dongary Holstein Leasing, Inc. v. Covington*, 293 Ark. 112, 732 S.W.2d 465 (1987). We quoted AMI 2217 in part as requiring a finding that the defendant "knew or ought to have known, in the light of the surrounding circumstances, that his conduct would naturally or probably result in injury and that he continued such conduct in the reckless disregard of the consequences from which malice can be inferred." *Id.* Hence, malice can be inferred either from a conscious indifference to the consequences of one's actions or from a reckless disregard to those same consequences.

Our analysis begins by determining the degree of evidence required for the jury to consider a punitive damage award. We have said that if there is evidence tending to show deliberate misrepresentation or deceit, that meets that plaintiff's burden. See *Ray Dodge, Inc. v. Moore*, 251 Ark. 1036, 479 S.W.2d 518 (1972). We have further said that the degree of proof required is *substantial evidence* of actual or inferred malice. See *City Nat'l Bank v. Goodwin*, 301 Ark. 182, 783 S.W.2d 335 (1990); *Satterfield v. Rebsamen Ford, Inc.*, 253 Ark. 181, 485 S.W.2d 192 (1972). We believe that the better rule is to look for any substantial evidence to support a punitive damages instruction, and we hold that to be the standard.

Stein v. Lukas, 308 Ark. at 77-79, 823 S.W.2d 832.

Using the analysis employed by the court in the above case,

we consider the evidence in the instant case to see if the court's award of punitive damages is supported by substantial evidence. The only evidence on this issue was introduced at the hearing before the court on August 27, 1990. The deposition of Jim Tricou is in the record and was referred to in the hearing on appellee's request for sanctions which was held on May 30, 1990. At that hearing, a default judgment for appellee was granted, under the authority of Ark. R. Civ. P. 37(b)(2)(C), as a sanction for failing to comply with the trial court's order filed October 10, 1989, and the court set a hearing for proof of damages to be presented on August 27, 1990. However, the deposition of Jim Tricou was not introduced into evidence at the hearing on damages, and he did not testify at that hearing. The only evidence on the punitive damages issue came from the testimony of Charles C. Snapp who testified that on behalf of appellee ACI Management, Inc., he entered into the agreement with the appellants to purchase the voltage surge suppressors. His testimony on the punitive damage issue was as follows:

Q Mr. Snapp, you've made a request for, let me make sure about this, but my recollection is that a request was made for punitive damages in this case under the theory that this was an intentional misrepresentation to you.

A Yes, sir.

Q What can you tell the Court about whether or not the misrepresentation was intentional and purposeful in order to get you to buy these units, Mr. Snapp?

A Well, when we had our original meeting, he had a similar brand of suppressor that he showed us, and when we were discussing the merits and so on and so forth and the price, he said, "This one that we're putting into production will exceed the expectations and [sic] what this one will do completely," and that unit was UL listed, clearly marked. Then, when he, when we get the units and we've been putting them out for several months, the way we actually found out about it was from a potential customer who called the Underwriters Laboratory and they said, "No, that unit's not UL listed, that, that number even belongs to another company not even associated with them," and so on and so forth. And after we quit doing

business with them and after we filed the case against them, they still continued to sell units to other people displaying the same UL number.

Q But the units were not in fact UL listed —

A No.

Q — and you have documents from united —

A Yes, sir.

Q — from Underwriters Laboratory to prove that.

A Yes, sir.

BY MR. JARBOE: I think that's all, Judge.

Looking now at the law on recovery of punitive damages, we note that the court in *Stein v. Lukas, supra*, concluded its discussion on the "degree of evidence required for the jury to consider a punitive damage award" by citing three cases. The first case, *Ray Dodge, Inc. v. Moore*, 251 Ark. 1036, 479 S.W.2d 518 (1972), is cited in support of the statement that it will meet the plaintiff's burden "if there is evidence tending to show deliberate misrepresentation or deceit." The other two cases, *City Nat'l Bank v. Goodwin*, 301 Ark. 182, 783 S.W.2d 335 (1990) and *Satterfield v. Rebsamen Ford, Inc.*, 253 Ark. 181, 485 S.W.2d 192 (1972), are cited in support of the statement that there must be "substantial evidence of actual or inferred malice." The opinion in *Stein v. Lukas* had earlier stated that "malice can be inferred either from a conscious indifference to the consequences of one's actions or from a reckless disregard of those same consequences." *Stein v. Lukas*, at 77.

■ When we apply the evidence in the instant case, we do not think it will support an award of punitive damages. There was no evidence introduced at the hearing on August 27, 1990, that Mr. Tricou represented that the voltage surge suppressors he sold the appellee were UL listed. The most the evidence would support on this point is that Mr. Tricou showed Mr. Snapp a "similar brand of suppressor," which was UL listed, and said the one Tricou's company was putting into production "will exceed" the performance of the "similar brand" that was being shown. This evidence will not support a finding that Tricou represented the

suppressor he was selling the appellee was UL listed. Mr. Snapp did indicate that his company was supplied units with a UL number on them, and a potential customer found out that the number did not belong to the appellants. There was, however, no evidence of how or why that number appeared on those units. We do not think this evidence is sufficient to show that appellants placed a UL number on its units with the intent to deceive or mislead the appellee, or in reckless disregard of the consequences. Furthermore, the evidence does not show that the suppressors sold to the appellee did not exceed the performance of the "similar brand" that Tricou showed to Snapp. At this point, however, the problem becomes clear.

The appellee in proving its damages did not attempt to prove that the appellants were liable for either compensatory or punitive damages. It was not necessary that it do so as far as *compensatory* damages were concerned. The sanction of the trial court established liability for those damages. The order imposing that sanction stated "the court does hereby award plaintiff a money judgment," and sets a date on which "proof of damages shall be presented." In its brief in this appeal the appellee does not even argue that it presented proof of liability for *punitive* damages. It argues only that the trial court, by granting the sanction of default judgment, granted liability for punitive damages as well as liability for compensatory damages. We do not know whether or not the court's order imposing sanctions against the appellants, intended to impose liability for punitive damages, but if such liability was imposed by that order, we think it was error.

■ So, while we do not find the court erred in the imposition of the sanction of liability for compensatory damages, we hold that it would be an abuse of the trial court's discretion to extend its sanction to liability for punitive damages. In *Thomas Auto Co. v. Craft*, 297 Ark. 492, 763 S.W.2d 651 (1989), the court said that the purpose of punitive damages is "deterrence and punishment of wrongdoing." 297 Ark. at 498. It is clear that the sanction imposed in this case for failing to comply with the order to furnish information was for punishment. Awarding liability for compensatory damages seems punishment enough for failing to furnish the information. To also award liability for punitive damages would smack of double punishment. Thus we find that if the trial

████████████████████

court intended to award liability for punitive damages for the appellants' failure to furnish the information as ordered, there was an abuse of the court's discretion in that respect. And, if that was not the trial court's intent, we find that the evidence presented at the hearing to establish damages is not sufficient to constitute substantial evidence to support liability for the punitive damages awarded by the court.

████ The ordinary rule in reversing law cases is to remand for new trial rather than dismiss, unless it is clear that there can be no recovery. *Little Rock Newspaper, Inc. v. Dodrill*, 281 Ark. 25, 32, 660 S.W.2d 933 (1983); *Colonial Life & Accident Ins. Co. v. Whitley*, 10 Ark. App. 304, 311, 664 S.W.2d 488 (1984). Because we know from the deposition of appellant Jim Tricou (which is in the record for the ruling on appellee's motion to compel appellants to furnish information but not put in evidence at the hearing on damages) that there is additional evidence available on the punitive damage issue, we cannot say that the record affirmatively shows there can be no recovery for punitive damage. However, we cannot affirm the compensatory damage award and remand the case for trial as to the punitive damage issue only. See *Hinkle v. Perry*, 296 Ark. 114, 117, 752 S.W.2d 267 (1988); *McVay v. Cowger*, 276 Ark. 385, 635 S.W.2d 249 (1982); *Clark v. Arkansas Democrat Co.*, 242 Ark. 497, 413 S.W.2d 629 (1967) (supplemental opinion). Therefore, we reverse and remand.

Reversed and remanded.

COOPER and DANIELSON, JJ., agree.

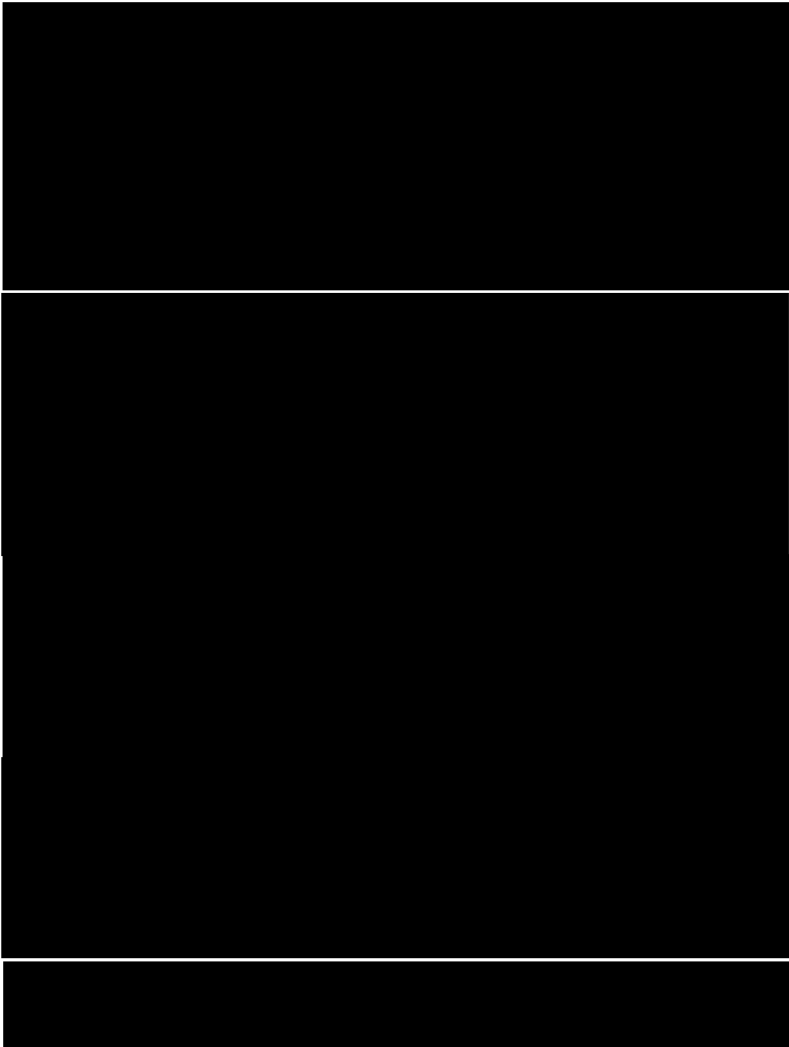
Cletus A. McDONALD v. STATE of Arkansas

CA CR 91-247

824 S.W.2d 396

Court of Appeals of Arkansas
Division II

Opinion delivered January 29, 1992



[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

G. Christopher Walthall, for appellant.

Winston Bryant, Att'y Gen., by: Jeff Vining, Asst. Att'y Gen., for appellee.

JUDITH ROGERS, Judge. The appellant, Cletus A. McDonald, was charged by information with the offense of first degree murder in connection with the death of Robert Dewayne Williams. He appeals from a judgment of conviction, entered in accordance with the jury's verdict finding him guilty of second degree murder, and sentencing him to twenty years in prison. For reversal, appellant contends that there was insufficient evidence introduced to corroborate an accomplice's testimony; that the trial court erred in denying his motion for a new trial, based on the presence of the alternate juror with the jury during its deliberations; and that he was denied a fair trial in that the prosecutor elicited testimony referring to uncharged misconduct. We affirm.

Appellant first argues that the testimony of an accomplice, Smead Grubbs, was not adequately corroborated, thus rendering the evidence insufficient to support his conviction. In a separate trial, Mr. Grubbs had been convicted of second degree murder for the death of Mr. Williams.

We initially note that there is nothing in the record to indicate that appellant moved for a directed verdict on the ground that the accomplice's testimony was not sufficiently corroborated so as to preserve this issue for appeal. See *Pilcher v. State*, 303 Ark. 335, 796 S.W.2d 845 (1990). Moreover, the jury was not instructed as to the necessity of corroboration and it does not appear that appellant requested such an instruction, which results in a waiver of this argument. See *Garrison v. State*, 13 Ark. App. 245, 682 S.W.2d 772 (1985). While we need not do so, we will address the merits of appellant's issue. See *Maynard v. State*, 21 Ark. App. 20, 727 S.W.2d 858 (1987).

■ By statute, a conviction cannot be had in any case of felony upon the testimony of an accomplice unless it is corrob-

rated by other evidence tending to connect the defendant with the commission of the offense. Ark. Code Ann. § 16-89-111(e)(1) (1987). The test for determining the sufficiency of the 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. *Andrews v. State*, 305 Ark. 262, 807 S.W.2d 917 (1991). Where circumstantial evidence is used to support accomplice testimony, all facts of evidence can be considered to constitute a chain sufficient to present a question for resolution by the jury as to the adequacy of the corroboration, and the appellate court will not look to see whether every other reasonable hypothesis but that of guilt has been excluded. *Johnson v. State*, 303 Ark. 12, 792 S.W.2d 863 (1990).

The record reflects that the partially decomposed body of Robert Williams was found on September 26, 1989, near a creek and off rural Highway 9 in Hot Spring County. Dr. Fahmy Malak, the State Medical Examiner, testified that Mr. Williams died as a result of receiving multiple stab wounds to the body. State witnesses Carol Grubbs, the estranged wife of Smead Grubbs, and Mark Buie related that Mr. Williams, a resident of Oklahoma, had arrived in Malvern early on the morning of September 18th, and that they had last seen him at appellant's home when he left there with appellant and Smead Grubbs in appellant's vehicle. These witnesses further testified that appellant and Grubbs returned some hours later to appellant's home without Mr. Williams, and that they were told by Grubbs that Williams had become angry and had run away from them on Highway 9. Mr. Buie also recalled that when they returned the pant legs of both appellant and Grubbs appeared to be wet. Mrs. Grubbs stated that appellant changed clothes and started the washing machine upon their arrival.

Smead Grubbs testified that he began living with Mr. Williams in Tulsa, Oklahoma, in August of 1989, after Mrs. Grubbs had left him and returned to Arkansas. He said that he had introduced appellant and Williams to each other by telephone, and that he and Williams had traveled to Arkansas for the purpose of transacting a drug deal with appellant. Grubbs testified that on the evening of September 18th, he, appellant and Williams left appellant's home and were going to Leola to

conduct the drug deal. He said that he fell asleep in the backseat of appellant's car during the ride, but that he woke up to the sound of screaming and a rustling commotion. He related that appellant was standing outside and that appellant leaned inside the car and asked him for his knife. He said that appellant stabbed Williams repeatedly in the back, while Williams was lying motionless and partially outside of the car. Grubbs further testified that they dragged Williams' body through the creek to a place where they covered him with limbs and pine needles.

Deputy Shawn Garner of the Hot Spring County Sheriff's Office, investigated the homicide and testified that he went to the location described by those who had discovered the body and found a blood stain on the edge of the road. From that point, he said it appeared that something had been dragged along the edge of the road and down to the creek, and that he followed this trail which led him to the body of Mr. Williams. He stated that he found a checkbook and bank statement, bearing the names of E.K. or Cletus McDonald, in the vicinity of the crime scene; these items were introduced into evidence. He said that appellant's vehicle was impounded after appellant's arrest, that the interior was wet and that the flooring was both wet and soapy. He submitted for analysis a hinge cover for the seatbelt attachment which bore a small red stain. Jane Parsons, a serologist at the crime lab, identified this stain as human blood, but said that the sample was too small to determine the blood type.

■ We think that the evidence placing appellant in the company of the deceased on the night he disappeared; the evidence that his pant legs were wet when he returned to his house without Williams; the evidence that he changed and washed his clothes; the evidence that blood was found in his vehicle; the evidence that his vehicle appeared to have been cleaned; and the evidence that his bank statement and checkbook were found in close proximity to the location of the body, as a whole, provides ample corroboration of Smead Grubbs' testimony.

When the trial judge submitted the case to the jury, he excused the alternate juror. Nevertheless, due to some misunderstanding on the part of the alternate, she entered the jury room fifteen minutes after the jury had retired, and remained there for some fifteen minutes until the jury took its first break. After this

recess, the alternate juror did not return to the jury room, and the jury deliberated several hours before reaching a verdict. As his second issue, appellant contends that the trial court erred in denying his motion for a new trial, arguing that the "mere presence" of the alternate juror compromised the sanctity of the jury's deliberations and his right to a fair and impartial trial.

At the hearing on appellant's motion, the impaneled jurors, with the exception of one who could not be located, were called upon to give testimony, which was properly focused on whether improper influence was brought to bear on any of the jurors due to the presence of the alternate. See Ark. R. Evid. 606(b). The jurors vaguely recalled the alternate being in the jury room at the outset of their deliberations, but did not remember her asking any questions or expressing any views concerning any aspect of the case.

Arkansas Code Annotated § 16-30-102(b) (1987) provides in part that "[a]n alternate juror who does not replace a regular juror shall be discharged after the jury retires to consider its verdict." Applying the language of this statute [formerly Ark. Stat. Ann. § 39-233 (Repl. 1962)], the supreme court in *Cantrell v. State*, 265 Ark. 263, 577 S.W.2d 605 (1979), reversed and remanded the appellant's conviction on the ground that, an hour and a half into the jury's deliberations, the trial court had allowed the substitution of an alternate juror for a seated juror, who for religious reasons was unable to render a guilty verdict or impose punishment. The court reasoned that, since the alternate had been discharged when the jury retired to deliberate, the alternate was severed from the case and no longer maintained the status of a potential juror, and thus could not sit as a member of the jury. Therefore, the replacement of the disqualified juror with the alternate after the jury had begun to deliberate was deemed reversible error.

Although the decision in *Cantrell v. State, supra*, provides no answer to the issue involved in this appeal, it is evident from the court's interpretation of the above-mentioned statute that an alternate juror is not permitted to accompany the jury in its deliberations. The question then becomes whether the alternate juror's brief intrusion into the jury room warrants the relief requested by appellant. The standard in making this decision is

whether the trial court abused its discretion in overruling the motion for a new trial. See *Mitchell v. State*, 299 Ark. 566, 776 S.W.2d 332 (1989).

In *Hutcherson v. State*, 262 Ark. 535, 558 S.W.2d 156 (1977), it was reported to the trial court that one of the members of the jury was seen talking to the father of the murder victim during a recess. After questioning the father, the trial court was satisfied that nothing had been said which would prejudice a juror. The argument before the court on appeal was that such a meeting in and of itself constituted prejudicial error. In upholding the trial court's denial of a mistrial, the court found no prejudice indicated in the record simply as a result of such an encounter.

The case of *Campbell v. State*, 264 Ark. 575, 572 S.W.2d 845 (1978), is more factually similar to the one at bar. There, an intoxicated woman, who had been with the appellant when he was arrested, wandered into the jury room. Citing *Hutcherson v. State*, *supra*, the court said that the burden was on appellant to show actual improper influence from the woman's entry into the jury room. No abuse of discretion was found in the trial court's refusal to grant a new trial in that the woman was immediately removed from the jury room and she was apparently only looking for a cup of coffee.

■ Here, in denying appellant's motion for a new trial, the trial court found that no extraneous prejudicial information was improperly brought to the jury's attention, nor was any outside influence brought to bear upon any juror as a result of the alternate juror's presence. Although the alternate's entry into the jury room was unauthorized, appellant has not shown that improper influence was occasioned by her "mere presence," or that he suffered any resulting prejudice. Under these circumstances, we cannot say that the trial court abused its discretion in denying the motion for a new trial.

As his last issue, appellant contends that it was error for the prosecution to have elicited testimony with regard to appellant's drug dealing and usage. Our review of the record indicates that the testimony adduced on this subject was limited to the drug transaction said to have been arranged between appellant and Mr. Williams. The prosecutor referred to this evidence during *voir dire*, at which time appellant moved for a mistrial, which was

denied by the trial court. The prosecutor again made references to this during his opening statement, without objection, and thereafter elicited testimony about the drug deal from Smead Grubbs, again without objection.

■ ■ Arkansas Rule of Evidence 404(b) permits the introduction of testimony of other criminal activity when the testimony is independently relevant to the main issue — relevant in the sense of tending to prove some material point in the case rather than merely tending to prove that the defendant is a criminal. *Baldrige v. State*, 32 Ark. App. 160, 798 S.W.2d 127 (1990). Under this rule, evidence of other crimes can be admitted as proof of motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident. We believe the prosecution was entitled to introduce evidence showing a possible motive for the killing of the victim, whom, as the testimony revealed, appellant had just met the day of the murder. Furthermore, any subsequent testimony to that of Mr. Grubbs was merely cumulative and repetitious of his testimony which was admitted without objection, and cannot be claimed to be prejudicial. *Gonzalez v. State*, 306 Ark. 1, 811 S.W.2d 760 (1991). Moreover, the appellant waived any objection he may have had to any testimony on this subject when he introduced the transcript of Smead Grubbs' testimony taken at Grubbs' trial, which contained references to the planned drug transaction. *Aaron v. State*, 300 Ark. 13, 775 S.W.2d 894 (1989). In short, we find no error on this point.

Affirmed.

JENNINGS and MAYFIELD, JJ., agree.

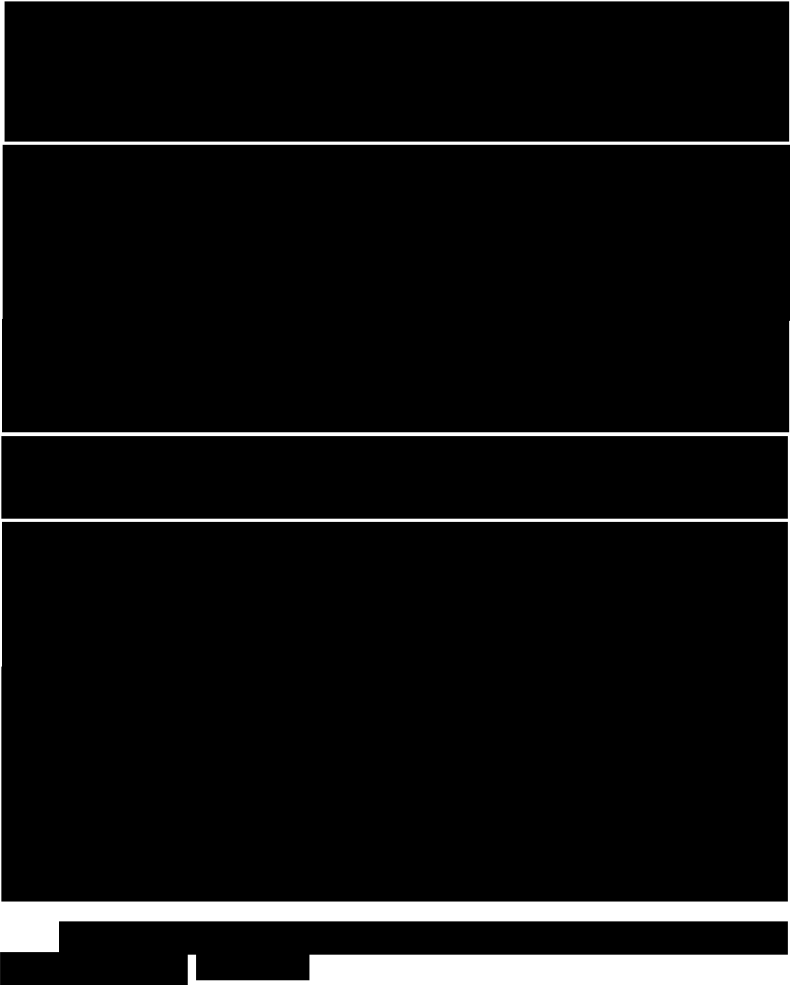


Zakerea Carl SCALES v. STATE of Arkansas

CA CR 90-311

824 S.W.2d 400

Court of Appeals of Arkansas
Division I
Opinion delivered February 5, 1992



William R. Simpson, Jr., Public Defender, by: Thomas B.

Devine, Deputy Public Defender, for appellant.

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

GEORGE K. CRACRAFT, Judge. Zakerea Carl Scales appeals from his conviction of aggravated robbery and theft of property for which he received consecutive sentences totalling fifteen years in the Arkansas Department of Correction. He contends on appeal that the trial court erred in denying his motion to suppress evidence of his confession. We do not agree.

Rowena Crabtree testified that she was robbed at gunpoint by four men. The contents of her purse and other personal property exceeding \$330.00 in value was taken. The robbers took her keys from the purse and left the scene driving her car. The next day she observed her car parked on a mall parking lot and alerted the police. Appellant and his three accomplices were taken into custody. The victim positively identified appellant as the person who held the gun on her at the time of the robbery. Appellant, in a pretrial statement, fully admitted his participation in the robbery.

Prior to trial, appellant filed a motion to suppress the confession on grounds that it had been taken in violation of his *Miranda* rights. At the hearing on the motion, Officer Vince Mayer testified that he and Officer James Linkous were present at the interrogation of appellant after his arrest. Officer Mayer stated that appellant freely and voluntarily agreed to answer all questions without an attorney being present. He testified that he showed appellant a standard *Miranda* rights form and asked him if he could read. Appellant stated that he could, and Mayer had him confirm this by reading out loud the first right contained thereon. He stated that appellant did so correctly and without any difficulty. He then asked appellant to read the other listed rights and to initial each one if he understood it. After reading and initialing each of the rights, Mayer asked appellant whether he understood them. Appellant responded that he did. Mayer then asked appellant to read the written waiver of rights attached to the form, which appellant did. Mayer explained what the waiver meant and asked appellant if he had any questions. Appellant responded that he did not, and he signed the waiver.

Officer Linkous testified that he was also present. He stated, however, that Officer Mayer orally advised appellant of his rights before appellant initialled them and signed the waiver. Linkous testified that appellant stated that he understood each right as it was read to him. Both officers testified that there was no indication that appellant was under the influence of alcohol or drugs and that he executed the waiver freely and voluntarily.

Appellant admitted that he could read, but testified that no one gave him any of the warnings required by *Miranda*, either orally or in writing. He stated that he initialed the rights and signed the waiver only because one of the officers hit him on the head with a camera and told him to do so. He denied any knowledge of any of the rights afforded him under *Miranda* other than the right to be represented by an attorney.

The trial court denied appellant's motion to suppress. The court noted the conflict between the officers as to whether the rights were given verbally or in writing, but held that issue was not dispositive. The court found that appellant could read, was informed of his *Miranda* rights, understood those rights, and voluntarily waived them. The judge specifically stated that he did not believe appellant's accusation that the officers had struck him and coerced him to sign the form without telling him what it was.

■ ■ As the record shows that the interrogation of appellant took place while he was in custody, his statement is presumed to have been involuntary. The burden was on the State to prove that appellant knowingly and intelligently waived his privilege against self-incrimination and his right to an attorney, and that he voluntarily made the statement. *Scherrer v. State*, 294 Ark. 227, 742 S.W.2d 877 (1988). On appeal, we make an independent review of the totality of the circumstances but will not reverse the trial court's ruling unless it is found to be clearly erroneous. *Porchia v. State*, 306 Ark. 443, 815 S.W.2d 926 (1991); *Douglas v. State*, 286 Ark. 296, 692 S.W.2d 217 (1985). Among the factors to be considered are the age, education, and intelligence of the accused, the advice or lack of advice as to his constitutional rights, the length of detention, the repeated or prolonged nature of the questioning, and the use of any physical or mental punishment. *Douglas v. State, supra*.

Here, appellant testified that he was seventeen years of age

when arrested and that he had completed the eighth grade. He admitted that he could read, and Officer Mayer testified that he confirmed that fact by having appellant read out loud from the rights form. Although the officers differed as to whether appellant's constitutional rights were explained to him verbally or in writing, both testified that they were explained in one form or the other, that appellant stated that he understood each of them before he signed the waiver, and that appellant responded to all questions coherently. There was no evidence that appellant had been in custody for a prolonged period of time before the interview or that the interrogation was prolonged in nature. Although appellant testified that he was subjected to a blow on the head with a camera to compel his waiver, the trial judge stated his disbelief that such an event occurred.

■ ■ Appellant's youth, while a factor, is not alone a sufficient reason to exclude his confession. *Douglas v. State, supra; Hunes v. State*, 274 Ark. 268, 623 S.W.2d 835 (1981). For the most part, the other points of contention in this case concern matters of credibility, which are left to the trial court. See *Porchia v. State, supra; Segerstrom v. State*, 301 Ark. 314, 783 S.W.2d 847 (1990).

■ Finally, we agree with the trial court that it is not essential that the warnings required by *Miranda* be given in oral rather than written form. The important thing to determine in each case is whether the accused was informed of and understood his rights before electing to waive them. See *United States v. Sledge*, 546 F.2d 1120 (4th Cir.), cert. denied 430 U.S. 910 (1977); *United States v. Coleman*, 524 F.2d 593 (10th Cir. 1975); *United States v. Alexander*, 441 F.2d 403 (3rd Cir. 1971); *Bell v. United States*, 382 F.2d 985 (9th Cir. 1967). In view of the heavy burden upon the State to prove that a person in custody knowingly and intelligently waived his privilege, however, we agree with the court in *Sledge* that the preferred practice would include both an oral recitation of the required warnings coupled with the delivery of a written explanation thereof to the accused and the request that he execute a legally sufficient waiver prior to the commencement of custodial interrogation.

■ From our review of the totality of the circumstances of this case, we cannot conclude that the trial court's findings are



clearly against the preponderance of the evidence or that the court erred in denying appellant's motion to suppress.

Affirmed.

COOPER and DANIELSON, JJ., agree.



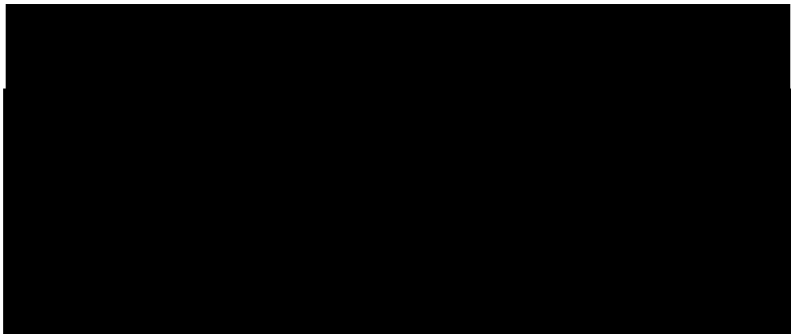
Maurice WESTRIDGE v. Harold BYRD, et al.

CA 91-294

823 S.W.2d 930

Court of Appeals of Arkansas
Division I

Opinion delivered February 5, 1992
[Rehearing denied March 11, 1992.]



Appellant, pro se.

Mashburn & Taylor, by: *Terry D. Harper*, for appellees.

GEORGE K. CRACRAFT, Judge. Maurice Westridge appeals from an order of the Washington County Circuit Court dismissing his complaint. We affirm.

Appellant brought this pro se action against Paul Vaughn d/b/a Vaughn Electronics, Radio Shack, and David Byrd for injuries he allegedly suffered in a Radio Shack store in Fayette-

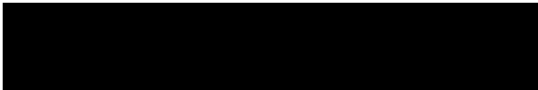
ville, Arkansas, as the result of concurring negligence of an employee of the Radio Shack and one David Byrd. Appellant complained for damages of \$25,000.00 as a result of gross negligence of the defendants.

A short time later, appellant filed an amended complaint in which appellee, Harold Byrd, "Heir to David Byrd now deceased," was made a party defendant. Appellant alleged in the amended complaint that David Byrd died on December 4, 1990, and Harold Byrd was his son and "in control" of his father's estate. The complaint made no allegation that Harold Byrd was himself guilty of any negligent act. It sought relief against him solely because he was the heir of a deceased tortfeasor.

Appellee moved to dismiss on the ground that appellant had failed to state facts upon which relief could be granted. Ark. R. Civ. P. 12(b)(6). In a letter opinion, the trial judge stated that he was unaware of any statute or case allowing a plaintiff in a tort action to sue a deceased person's heir rather than his personal representative. The court ruled that, as appellant made no allegation other than that Harold Byrd was the heir of David Byrd, it failed to state a cause of action against him. An order of dismissal without prejudice was entered. Appellant then filed a motion to set aside the order of dismissal which was denied by the trial court for the same reasons.

■ ■ We agree with the trial court that this complaint did not state a cause of action against appellee. At common law, all actions for tort died with the tortfeasor. That rule is still in effect in this state, except where changed by statute. *White v. Maddux*, 227 Ark. 163, 296 S.W.2d 679 (1956); *Miller v. Nuckolls*, 76 Ark. 485, 89 S.W. 88 (1905); *Davis v. Nichols*, 54 Ark. 358, 15 S.W. 880 (1891). Arkansas Code Annotated § 16-62-101 (1987) has removed that bar as to tortious injury to the person. It provides that such actions survive the death of the tortfeasor and may be brought against his estate or personal representative. However, it does not authorize such actions to be maintained against the heirs of a deceased person. As this complaint alleged no act of negligence on the part of appellee, and sought only to hold him liable for the negligence of his ancestor, we find no error in its dismissal.

Appellant also argues that the court committed several



procedural errors. As none of these matters affected the existence of a cause of action against appellee, we do not address them.

Affirmed.

COOPER and DANIELSON, JJ., agree.



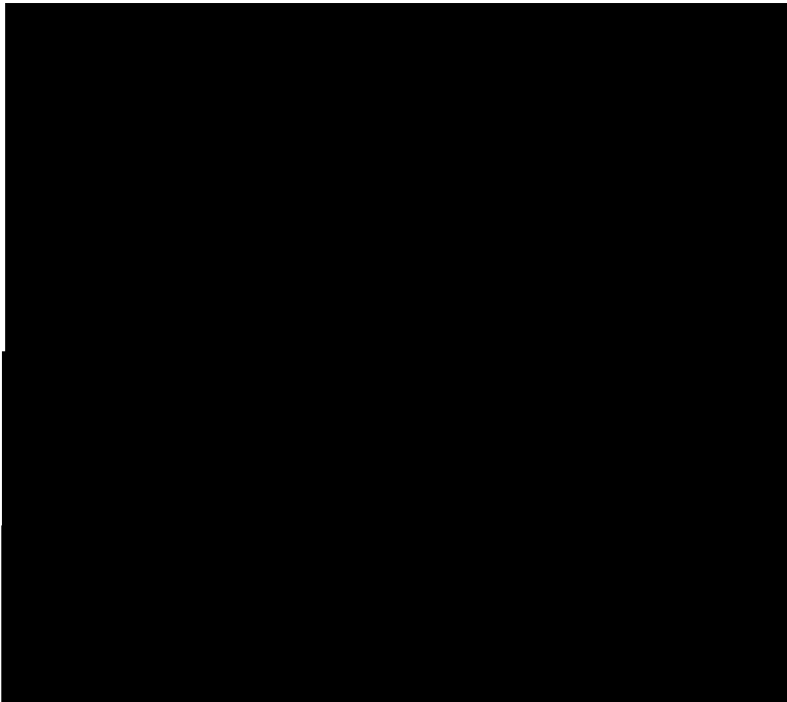
SANYO MANUFACTURING CORPORATION v.
DIRECTOR OF LABOR, and Joyce Brown, et al.

E 91-5 and E 91-6

822 S.W.2d 410

Court of Appeals of Arkansas
Division I

Opinion delivered February 5, 1992



[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

Daggett, Van Dover & Donovan, by: *Robert J. Donovan*, for appellant.

Ronald A. Calkins, for appellee Director of Labor.

Youngdahl, Trotter, McGowan & Harmon, by: *Jimmie C. Bush*, for AFL-CIO.

MELVIN MAYFIELD, Judge. In two separate cases, which have been consolidated for this appeal, several hundred employees of appellant Sanyo Manufacturing Corporation were awarded unemployment compensation benefits. The crucial issue in both cases is whether these employees were entitled to receive unemployment benefits for the period June 1 through 8, 1984, in addition to the vacation pay they received for this period. In December 1983, appellant posted a notice indicating that the plant would be closed for vacation in 1984 during the last week of May and the first week of June. The union informed appellant that their collective bargaining agreement did not authorize a vacation shutdown during the month of May. This led to arbitration, litigation in state court, and ultimately litigation in federal court. On May 16, 1984, the federal court enjoined appellant from holding a vacation shutdown on May 25, 29, 30, and 31, 1984, because such schedule was contrary to the union contract which called for vacation shutdown to be scheduled during the months of June, July, and August.

On May 16, 1984, appellant sent a letter to hourly employees stating that as a result of the federal court decision it had little choice but to change the vacation schedule. The previously proposed vacation shutdown period of May 25, 29, 30, and 31 was then designated a shutdown for inventory. May 28, 1984, was to be observed as the Memorial Day holiday, and the plant was to be shut down for vacation on June 1, 4, 5, 6, 7, and 8, 1984. On May

24, employees were given a check for the week just worked and a check for vacation pay.

The employees filed claims for unemployment compensation for the entire period (May 25 - July 8). The Employment Security Division allowed the benefits in E 91-5, but denied benefits in E 91-6 on the basis that the claimants had not timely filed their claims. The Appeal Tribunal affirmed the agency finding in E 91-5, but reversed the agency finding in E 91-6 and held that the claimants had good cause for failing to timely file their claims.

On appeal to the Board of Review, both decisions of the Appeal Tribunal were affirmed. In regard to E 91-5, the Board concluded:

Based on the evidence, the Board of Review finds that the claimants were unemployed and not on vacation. The employer's position is, in effect, that the claimants were not unemployed from June 1 through 8, 1984, because the employer had designated that period as a vacation shut-down period. The interpretation would appear correct if the phrase ". . . and he is not on layoff" did not conclude the statutory definition of vacation. That phrase, however, cannot be considered superfluous. Whenever a vacation period is preceded by a layoff period, a claimant is considered unemployed during the entire period when he is not working, according to Section 2(m)(1) of the law.

On appeal to this court, appellant argues the Board's holding that Section 2(m)(1)(C) of the Unemployment Security Act (Ark. Stat. Ann. § 81-1103(m)(1)(C) (Supp. 1985)) mandates the payment of unemployment compensation benefits for the entire period of May 25 through June 8 is erroneous.

Ark. Stat. Ann. § 81-1103(m)(1)(C) (Supp. 1985), *the law in effect at the time*, provided:

(C) he is not on vacation. A vacation shall be defined as a period of temporary suspension of regular work such period having been scheduled by, or with the consent of, the employer solely for reasons of vacation during which time the employee is either receiving vacation pay, has been paid or will be paid vacation pay for the period at a later date, or would be entitled to vacation pay for the

period if he had sufficient seniority or hours of work and he is not on layoff.

Receipt of vacation pay during a period when an employee is on layoff shall not in itself render such employee ineligible for unemployment benefits.

■ Appellant argues the phrase “and he is not on layoff” applies only to those employees who “would be entitled to vacation pay for the period if he had sufficient seniority or hours of work.” It argues that this section, in effect, “creates two classes of employees.” One category is those employees who, at the time of the vacation period, had received, were receiving, or would receive vacation pay for the period; and the second category is those employees who at the time of the vacation period would have received vacation pay for the period but lacked sufficient seniority or hours worked to qualify and are not on layoff.

■ Appellant argues that in the present case each employee has been paid full vacation pay, so none of the claimants here fall into the category of employees who did not have “sufficient seniority or hours of work” to receive vacation pay. Appellant says it is illogical to believe the legislature intended that an employee receiving vacation pay would also be entitled to receive unemployment compensation. Appellant says the last sentence under paragraph (C) recognizes that an employee can possibly be unemployed during vacation, and that the fact he is paid vacation pay is not “in itself” conclusive as to his ineligibility for unemployment benefits. For example, appellant says, if during a layoff period an employee’s prescribed vacation period arrives he would be entitled to receive that which he has already earned (vacation pay) without rendering him ineligible for unemployment compensation for the layoff period then in progress. However, appellant contends the Board of Review erred in holding that the claimants here were entitled to unemployment benefits, during a period of paid vacation, simply because the vacation period was “preceded by a layoff period.”

In support of its statutory interpretation, appellant cites *Conagra Frozen Foods v. Director of Labor*, 34 Ark. App. 108, 806 S.W.2d 27 (1991). That case is not directly in point as it was decided under this section as later amended in 1987, but our holding in that case is not inconsistent with the holding we make

in the present case.

We think the interpretation suggested by the appellant is reasonable and logical, and we hold that none of the claimants in the two cases before us are entitled to the unemployment compensation benefits claimed by them. Therefore, we reverse the Board's decision in both cases and remand for the Board to enter orders denying the claims made.

While we place no particular emphasis on the matter, it is interesting to note that Act 48 of 1991 has deleted the section involved in this case, Ark. Stat. Ann. § 81-1103(m)(1)(C) (Supp. 1985), *see* Ark. Code Ann. § 11-10-214 (Supp. 1991).

Reversed and remanded.

COOPER and DANIELSON, JJ., agree.

Wally CHESHIRE v. FOAM MOLDING CO.

CA 91-148

822 S.W.2d 412

Court of Appeals of Arkansas
Division II

Opinion delivered February 5, 1992

Laura J. McKinnon, for appellant.

Michael E. Ryburn, for appellee.

JUDITH ROGERS, Judge. In this workers' compensation case, the Commission affirmed and adopted the administrative law judge's decision that appellant's claim for additional benefits was barred by the statute of limitations. The only issue in this appeal is whether that determination is correct. We hold that it is, and affirm.

As a result of a pre-hearing conference, the parties agreed to submit the statute of limitations issue to the administrative law judge for decision on the basis of stipulated facts and briefs. It was stipulated that on February 18, 1988, appellant had sustained a work-related injury to his head and face. Appellee had accepted compensability and benefits were paid accordingly. On February 17, 1989, appellant was examined by an ophthalmologist. The ophthalmologist's bill was paid by appellee's insurance carrier on March 31, 1989. The appellant filed a claim by mail for additional benefits of March 21, 1990, in which he sought an award of compensation for disfigurement pursuant to Ark. Code Ann. § 11-9-524 (1987). This claim was acknowledged as received by the Commission on March 26, 1990.

The time limitation for filing claims for additional benefits is found at Ark. Code Ann. § 11-9-702(4)(b) (1987), which provides:

In cases where compensation for disability has been paid on account of injury, a claim for additional compensation shall be barred unless filed with the commission within one (1) year from the date of the last payment of compensation, or two (2) years from the date of injury, whichever is greater.

It is undisputed that appellant's claim filed in March of 1990 was beyond the two year limitations period. It was the appellant's contention before the administrative law judge, as it is on appeal, that the statute of limitations was suspended for a year from the date that payment was made of the ophthalmologist's services,

March 31, 1989. The administrative law judge determined, however, in reliance on the supreme court's decision in *Heflin v. Pepsi Cola Bottling Co.*, 244 Ark. 195, 424 S.W.2d 365 (1968), that the one-year limitations period began to run on February 17, 1989, the date that the ophthalmologist's services were rendered, thus barring appellant's claim for additional benefits.

■ Appellant acknowledges that the administrative law judge's decision, as affirmed and adopted by the Commission, is consistent with the holding in *Heflin v. Pepsi Cola Bottling Co.*, *supra*. In that case, the court held that the furnishing of medical services constitutes payment of compensation within the meaning of Ark. Code Ann. § 11-9-702(4)(b) (1987) [formerly Ark. Stat. Ann. § 81-1318(b) (Repl. 1960)], based upon reasoning that the claimant is "compensated" by the furnishing of medical services and not by the payment of the charges therefor. Nevertheless, appellant argues that, based on elementary principles of statutory construction, we should construe the statute according to its literal and plain meaning and hold that the date on which medical services are actually paid constitutes the "payment of compensation" for the purposes of tolling the statute of limitations. In essence, appellant contends that the decision in *Heflin* is wrong, and that we should depart from its holding.

■ This case is clearly controlled by *Heflin v. Pepsi Cola Bottling Co.*, *supra*, and we are not at liberty to overturn a decision of the supreme court. *Myles v. Paragould School District*, 28 Ark. App. 81, 770 S.W.2d 675 (1983). In this case, the one-year limitations period started to run on February 17, 1989, when appellant was examined by the ophthalmologist; therefore, appellant's claim for additional benefits filed in March of 1990 was untimely. We affirm.

Affirmed.

JENNINGS and MAYFIELD, JJ., agree.

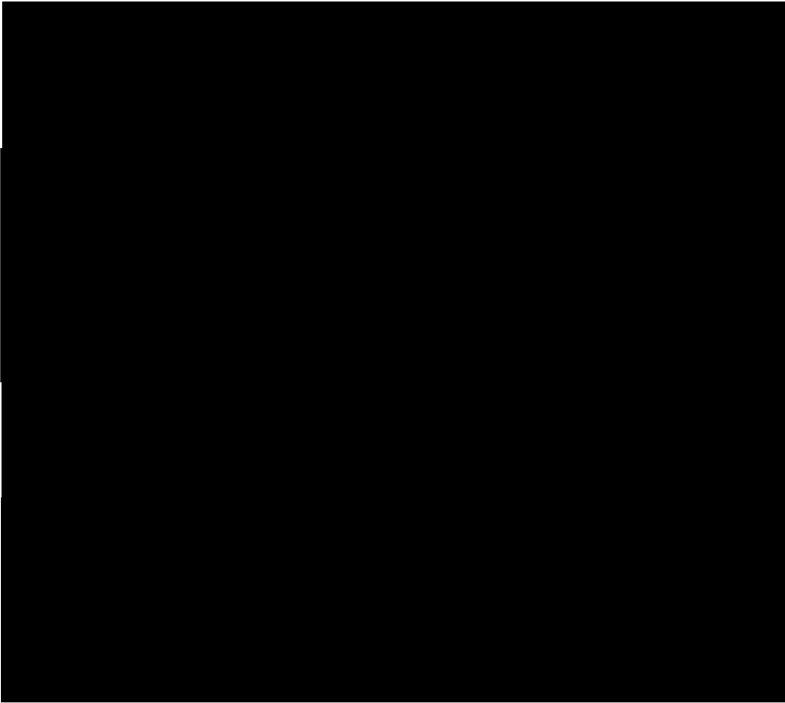
Larry FREEMAN v. STATE of Arkansas

CA CR 91-137

824 S.W.2d 403

Court of Appeals of Arkansas
Division II

Opinion delivered February 12, 1992



Daniel D. Becker and *Terri Harris*, for appellant.

Winston Bryant, Att'y Gen., by: *Elizabeth A. Vines*, Asst. Att'y Gen., for appellee.

JUDITH ROGERS, Judge. Pursuant to Ark. R. Crim. P. 24.3, the appellant, Larry Freeman, entered a conditional plea of guilty to the charge of possession of a controlled substance (marijuana) with intent to manufacture or deliver, reserving the right to

appeal the denial of his motion to suppress. For reversal of the trial court's decision, appellant contends that the court erred in overruling his motion to suppress evidence seized in an illegal search. We find no error and affirm.

At the hearing on appellant's motion, it was disclosed that on June 21, 1990, the Garland County Sheriff's Office received an anonymous phone call reporting that there was a light-colored, older-model, Ford van containing marijuana in the back of it that was parked in the parking lot of the J&B Drive-in in Mountain Pine, Arkansas. Based on this information, Robert Gibbs, a narcotics investigator with the Arkansas State Police, and Larry Sanders, an investigator with the Garland County Sheriff's Department, went to that location, but when they arrived, the drive-in was closed. Through the testimony of these officers, it was further established that they proceeded to drive around the surrounding residential area looking for the van. When they came to the intersection of Main and Sixth Streets, Officer Gibbs observed a van appearing to match the description that had been given sitting in a driveway in front of a mobile home at 301 Sixth Street. The officers pulled into the driveway behind the van, which was occupied by an unidentified man and appellant, who got out of the van from the driver's side. It was said that the mobile home was appellant's residence.

Gibbs testified that he and Officer Sanders exited their vehicle, that it was dark, and that he shined his flashlight on appellant and then toward the rear of the van. He said that, in shining the flashlight through the rear windows of the van from a distance of about five feet away, he observed what he recognized to be marijuana. Gibbs further related that appellant was attempting to close the side door of the van when he told appellant that he had already seen the marijuana, at which time Gibbs said appellant took on a "real resigned appearance" and swung the door open. Inside the rear of the van, there was a bucket containing thirty-two growing marijuana plants. It is this evidence that appellant sought to suppress.

Citing *Alabama v. White*, 496 U.S. ___, 110 S.Ct. 2412, 110 L.Ed.2d 301 (1990) and our decision in *Lambert v. State*, 34 Ark. App. 227, 808 S.W.2d 788 (1991), appellant argues that the unverified, anonymous tip and the vague description given of the

van do not support a finding of reasonable suspicion sufficient to warrant the stopping of his vehicle, and thus it was error for the trial court to have denied his motion to suppress. On the other hand, the state contends that the seizure in this case was justified under the plain view doctrine.

■ Under the plain view doctrine, seized evidence is admissible when the initial intrusion was lawful; the discovery of the contraband was inadvertent; and when the incriminating nature of the evidence was immediately apparent. *Munguia v. State*, 22 Ark. App. 187, 737 S.W.2d 658 (1987). Appellant argues that the plain view doctrine is inapplicable only on the ground that the officers were not legitimately on the premises, as having no right to enter upon his driveway. We disagree. We also cannot agree that the officers "stopped" appellant's vehicle under the facts of this case. See *Williams v. State*, 26 Ark. App. 62, 760 S.W.2d 71 (1988).

The touchstone of Fourth Amendment analysis is whether a person has a constitutionally protected, reasonable expectation of privacy. *Oliver v. United States*, 466 U.S. 170 (1984). See also, e.g. *Arndt v. State*, 26 Ark. App. 243, 763 S.W.2d 98 (1989); *Ingle v. State*, 8 Ark. App. 218, 655 S.W.2d 2 (1983); *Gross v. State*, 8 Ark. App. 241, 650 S.W.2d 603 (1983). The Amendment does not protect the merely subjective expectation of privacy, but only those expectations that society is prepared to recognize as reasonable. *Oliver v. United States*, 466 U.S. at 177. Citing *United States v. Magana*, 512 F.2d 1169 (9th Cir.) cert. denied 423 U.S. 826 (1975), we noted in *Gaylord v. State*, 1 Ark. App. 106, 613 S.W.2d 409 (1981), that the expectation of privacy in driveways and walkways, which are commonly used by visitors to approach dwellings, is not generally considered reasonable. *Accord United States v. Ventling*, 678 F.2d 63 (8th Cir. 1982). Still, the question of whether a driveway is protected from entry by police officers depends on the circumstances, with reference to such factors as accessibility and visibility from a public highway. *United States v. Smith*, 783 F.2d 648 (6th Cir. 1986). The test in each case is that of reasonableness. *United States v. Magana, supra*.

■ In the case at bar, the driveway was situated in a residential neighborhood, and the testimony revealed that there

were no fences or other obstructions limiting access to the area, which was clearly visible from the street. We are also impressed that the sliding door to the van was open upon the officers' arrival. Under these circumstances, we are of the opinion that appellant possessed no legitimate expectation of privacy in the driveway, and that the officers' presence there was not violative of the Fourth Amendment.

■ Only unreasonable searches are prohibited by the Fourth Amendment. *Webster v. State*, 300 Ark. 169, 777 S.W.2d 849 (1989). The observation of evidence in plain view is not a search and therefore the resulting seizure is not the product of an unreasonable search. *Johnson v. State*, 291 Ark. 260, 724 S.W.2d 160 (1987). We add that the officer's use of a flashlight to enhance his vision does not alter our decision. *See Texas v. Brown*, 460 U.S. 730 (1983).

■ In reviewing the trial court's action in granting or denying motions to suppress evidence obtained by warrantless searches, we make an independent determination based on the totality of the circumstances, but we will not set aside the trial court's finding unless it is clearly against the preponderance of the evidence. *Haygood v. State*, 34 Ark. App. 161, 807 S.W.2d 470 (1991). We cannot say that the trial court's decision is clearly erroneous.

Affirmed.

JENNINGS and MAYFIELD, JJ., agree.

CAGLE FABRICATING AND STEEL, INC. v. Roger D.
PATTERSON

CA 90-481

827 S.W.2d 660

Court of Appeals of Arkansas
Division II
Opinion delivered February 12, 1992

Wayne Harris, for appellant.

Eldon F. Coffman, for appellee.

PER CURIAM. Appellee's motion for attorney's fee is granted.

MELVIN MAYFIELD, Judge, dissenting. The majority of this court has today granted the appellee's motion for attorney's fee in the above styled case. I dissent.

This case was appealed from the Arkansas Workers' Compensation Commission. By a three to three vote this court affirmed the Commission's award of compensation to the appellee. *See Cagle Fabricating and Steel, Inc. v. Patterson*, 36 Ark. App. 49, 819 S.W.2d 14 (1991).

Appellee's motion was based upon Ark. Code Ann. § 11-9-715(b)(1) (1978), which provides:

(b)(1) In addition to the fees provided in subdivision (a)(1) of this section, if the claimant prevails on appeal, the attorney for the claimant shall be entitled to an additional fee at the full commission and appellate court levels, the additional fee to be paid equally by the employer or carrier and by the injured employee or dependents of a deceased employee, as provided above and set by the commission or appellate court.

The problem with allowing appellee's motion at this time is the fact that this case is now in the Arkansas Supreme Court on review under Arkansas Supreme Court Rule 29(6). Our decision was handed down on November 6, 1991; the Supreme Court granted review on December 9, 1991.

Under the plain terms of the above statute "if the claimant prevails on appeal" his attorney is entitled to an additional fee "at

[REDACTED]

the full commission and appellate court levels.” What if the Supreme Court reverses our decision and finds for the employer? In that event, did the claimant prevail at the “appellate court” level. I think it would be best to simply leave this issue to the Supreme Court. Thus, I would certify the motion to that court for it to act upon after it has reviewed our decision.

Therefore, I dissent from the decision of this court which allows the appellee’s motion for attorney’s fee.

CRACRAFT, C.J., joins.

[REDACTED]

Jon DODSON v. Worthy DODSON

CA 91-191

825 S.W.2d 608

Court of Appeals of Arkansas
Division II

Opinion delivered February 19, 1992

[REDACTED]

Friday, Eldredge & Clark, by: *Barry E. Coplin* and *T. Wesley Holmes*, for appellant.

Hurley, Whitnell, Shepherd & Welch, by: *Stephen E. Whitwell*, for appellee.

GEORGE K. CRACRAFT, Chief Judge. Jon Dodson appeals from that portion of an order of the chancery court directing him to obtain a life insurance policy to replace a lapsed one that he has agreed to keep in force. We find no error and affirm.

On August 30, 1986, the parties to this appeal entered into a written property settlement agreement in contemplation of divorce. They were divorced on September 4, 1986, by a decree that recited the property settlement verbatim and ordered the parties to proceed consistent with it.

Paragraph 8 of the agreement provided as follows:

That the husband shall pay to the wife the amount of \$2500.00 per month on the first day of each and every month for a period of three (3) years and \$1000.00 per month for the following five (5) years on the first day of each and every month as alimony. It is agreed between the parties that the \$2500.00 per month payment is irrevocable and cannot under any circumstances be canceled. The husband shall not be obligated or otherwise legally bound

[REDACTED]

to continue payments of \$1000.00 per month if the wife remarries. In that event, all remaining payments shall cease.

Paragraph 9 provided that the husband pay appellee's attorneys's fees and expenses. Paragraph 10 provided that a failure by the parties to insist upon strict performance of the terms of the agreement would not constitute a waiver of the right to insist upon performance in the future. Paragraph 11 provided as follows: "The husband shall maintain in full force and effect his present life insurance program and shall immediately name the wife Worthy Dodson as irrevocable beneficiary thereon."

Appellee, Worthy Dodson, subsequently filed a motion for an order directing appellant to show cause why appellant had not complied with those portions of the decree providing for payment of alimony, medical payments, and bills assumed by appellant, and the transfer of an automobile title. Although the failure to comply with the provision regarding the life insurance policy was not contained in the motion, it became an issue during the hearing. There, it was disclosed that, although appellant had designated appellee as beneficiary of the life insurance policy in the amount of \$1,000,000.00, he had allowed the policy to lapse. Appellee testified that, although she was not familiar with the policy terms of insurance, "We had maintained that policy, oh, approximately maybe twenty years." During his direct examination, appellant admitted that he was aware that both the agreement and decree required him to maintain the insurance. He explained the lapse as follows:

I did have a life insurance policy that was paid for by my company as a key-man life policy. It was for \$1,000,000.00. At the time of the divorce I was required to pay \$2500.00 alimony. I had no assets, with the exception of *my* business and I was in the position of having to borrow against the policy for many months in order to pay *my* bills. As a result, I borrowed against the policy an amount that I could not afford to repay and could not maintain the policy. [Emphasis added.]

At the conclusion of the hearing, the court entered an order directing appellant to procure an equivalent policy with appellee

as irrevocable beneficiary and to provide proof of its procurement within thirty days. On appeal, appellant advances several points of error in the trial court's ruling on that issue. We find no merit in any of them.

■ Appellant first contends that the chancellor erred in holding that the separation agreement was an independent contract not subject to modification. He contends that it had become merged as part of the decree and was therefore subject to modification on change of circumstances. *See Seaton v. Seaton*, 221 Ark. 778, 225 S.W.2d 954 (1953). Although our cases do make a distinction between "independent contracts" and those less formal agreements that become "merged" as part of a decree, we do not address appellant's argument because any error in the court's ruling was invited. The record reflects that at the conclusion of the hearing the following occurred:

THE COURT: Assuming that he is insurable, I would agree with you that that's a very substantial life insurance policy, and I would hope, perhaps you all could negotiate and, perhaps as some other arrangement or agreement you could reach. But this is the decree that the parties worked out. It is not something that the court put on the parties and has, as far as I can see, the power to modify.

[APPELLANT'S COUNSEL]: Judge, *I think you are right. I don't think the court has the power to modify*, but I think the court has the power to refuse to enforce something that's against public policy and totally unreasonable and serves no purpose. [Emphasis added.]

It is a well-settled rule that an appellant may not complain on appeal that an action of the chancellor is erroneous if he has induced, consented to, or acquiesced in that action. *Briscoe v. Shopper's News, Inc.*, 10 Ark. App. 395, 664 S.W.2d 886 (1984); *J. I. Case Company v. Seabaugh*, 10 Ark. App. 186, 662 S.W.2d 193 (1983).

Appellant next contends that even if the parties' agreement is contractual, the chancellor's construction does not reflect the true intent of the parties. He contends that the parties intended the insurance policy to act as security to guarantee payment of alimony and compliance with other provisions of the settlement.

We do not agree.

■ In reaching our conclusion, we apply principles of contract law. See *Sutton v. Sutton*, 28 Ark. App. 165, 771 S.W.2d 791 (1989). When the terms of a contract are ambiguous and capable of having more than one meaning, extrinsic evidence is permitted to establish intent of the parties, and the meaning of the contract then becomes a question of fact. However, when a contract is free of ambiguity, its construction is a matter of law for the court to determine. *Floyd v. Otter Creek Homeowners Association*, 23 Ark. App. 31, 742 S.W.2d 120 (1988); *Geurin Contractors, Inc. v. Bituminous Casualty Corporation*, 5 Ark. App. 229, 636 S.W.2d 638 (1982). It is also established that different clauses of a contract must be read together and construed so that all of its parts harmonize if that is possible. See *Floyd v. Otter Creek Home Owners Association, supra*.

Appellant argues that the use of the words "insurance program" indicates a "key-man policy" which had been maintained by his company to be available for the payment of his creditors. Neither the policy nor any of its provisions were brought forward in the record. The only indication that the insurance policy in question was a "key-man policy" was appellant's own characterization of it as such. There is no evidence that appellant's insurance program contained any insurance policy other than the one in issue. Appellant admitted that he had agreed to, and did, make appellee the irrevocable beneficiary of that policy. Appellant further testified that the policy had lapsed because he had borrowed over \$60,000.00 against it to pay personal debts and could not afford the repayment. The chancellor held that the insurance policy in issue was a "bargained for item" and therefore should be replaced.

■■ Although we review chancery cases *de novo* on the record, we do not reverse unless the chancellor's findings are clearly against the preponderance of the evidence or clearly erroneous. *Thomas v. Thomas*, 246 Ark. 1126, 443 S.W.2d 534 (1969); *Andres v. Andres*, 1 Ark. App. 75, 613 S.W.2d 404 (1981). From our review of the record, we cannot conclude that the chancellor's finding with regard to the insurance policy is clearly erroneous.

█ Nor can we agree with appellant's argument that the maintenance of this life insurance policy with appellee as beneficiary violated public policy. Our courts have held that "wagering" policies, taken out by one with no insurable interest on the life of another, are against public policy and void. However, one may take out a policy on his own life and name anyone he pleases as beneficiary unless there is proof that there was a wagering contract between those parties at the time the policy was taken out. *Langford v. National Life & Accident Insurance Co.*, 116 Ark. 527, 173 S.W. 414 (1915). Provisions that award the ex-wife the benefit of some interest in a policy of insurance on an ex-husband's life are generally sustained. See 24 Am. Jur. 2d *Divorce and Separation* § 912 (1983). Here, the policy had been in force during the marriage for over twenty years. It had been taken out by the appellant on his own life, and he could agree to maintain it and name appellee as the beneficiary without violating any public policy.

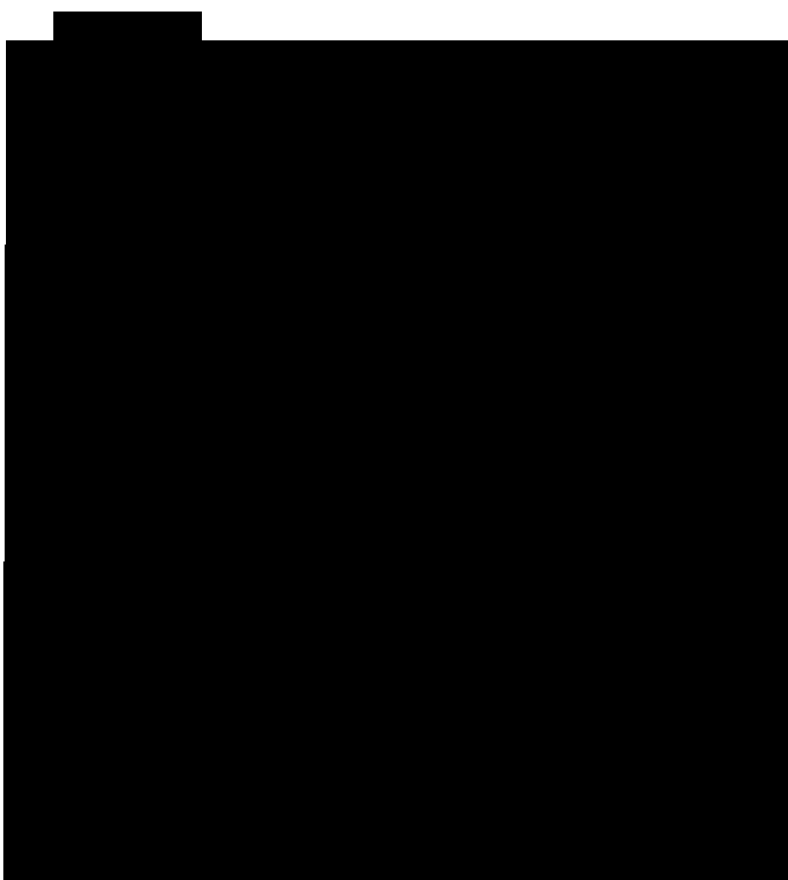
Affirmed.

COOPER and MAYFIELD, JJ., agree.

█
WEYERHAEUSER COMPANY v. Galen McGINNIS
CA 91-182 824 S.W.2d 406

Supreme Court of Arkansas
Opinion delivered February 19, 1992

█



Wright, Lindsey & Jennings, by: *Wendell L. Griffen* and *Tammera Rankin Harrelson*, for appellant.

Kaplan, Brewer & Maxey, P.A., by: *Silas H. Brewer, Jr.*, for appellee.

JOHN E. JENNINGS, Judge. This is a workers' compensation case. Galen McGinnis sustained an admittedly compensable injury on December 15, 1987, while employed with Weyerhaeuser Company. While lifting a log, he broke two lumbar vertebrae. It is undisputed that as a result of the injury McGinnis has a five

percent permanent anatomical impairment to the body as a whole. McGinnis is fifty years old and went through the eleventh grade in school. At the time of the injury he had worked for Weyerhaeuser in the raw materials department for eighteen years and was earning \$8.49 an hour. By June of 1989 he had been placed in a "roundtable" job in the mill work department and was earning \$7.21 per hour.

Under its collective bargaining agreement, Weyerhaeuser posts job openings on bulletin boards at its plant. Employees may bid on these jobs and are selected on the basis of seniority for a thirty day trial period. If at the end of the trial period the employee has not demonstrated the ability to do the job, he may return to his old position. After McGinnis's injury, five such job openings were posted on plant bulletin boards. McGinnis bid on one such job and was not selected due to lack of seniority. He denied knowledge of the others. One of the jobs, traffic controller, would have paid more than McGinnis was earning at the time of his injury. He testified that he was unaware of this job opening.

On this evidence, the Commission held that McGinnis was entitled to 7.5 percent wage-loss disability in addition to this five percent permanent anatomical impairment. Weyerhaeuser contends that this finding is not supported by substantial evidence, relying on Ark. Code Ann. § 11-9-522 which provides, in pertinent part:

(b) In considering claims for permanent partial disability benefits in excess of the employee's percentage of permanent physical impairment, the commission may take into account, in addition to the percentage of permanent physical impairment, such factors as the employee's age, education, work experience, and other matters reasonably expected to affect his future earning capacity. However, so long as an employee, subsequent to his injury, has returned to work, has obtained other employment, or has a bona fide and reasonably obtainable offer to be employed at wages equal to or greater than his average weekly wage at the time of the accident, he shall not be entitled to permanent partial disability benefits in excess of the percentage of permanent physical impairment established by a preponderance of the medical testimony and evidence.

(c)(1) The employer or his workers' compensation insurance carrier shall have the burden of proving the employee's employment, or the employee's receipt of a bona fide offer to be employed, at wages equal to or greater than his average weekly wage at the time of the accident.

■ Appellant's argument is that the statute bars an award of wage-loss disability because McGinnis "had a reasonably obtainable offer to be employed at wages greater than his average weekly wage at the time of the accident." We hold that the Commission's determination that the statute does not bar an award of wage-loss disability under the facts presented is supported by substantial evidence.

■■ To the extent that the statute is unclear, it must be construed liberally in accordance with the remedial purposes of the act. Ark. Code Ann. § 11-9-704(c)(3). The statute clearly requires a bona fide *and* reasonably obtainable offer. Ark. Code Ann. § 11-9-522(b). The employer has the burden of providing "a bona fide offer to be employed." Ark. Code Ann. § 11-9-522(c)(1). We agree with the Commission that this means there must be an actual offer of employment. In holding as it did, the Commission noted the testimony of Don Trantham, appellant's loss control manager, that nothing prevented Weyerhaeuser from offering McGinnis a higher paying job and that no such offer was ever made. The posting by appellant of job opportunities on its bulletin board were not "bona fide offers" but were rather invitations to bid for specific jobs to be awarded on a trial basis. Clearly, a bid by an employee would not constitute an acceptance of an offer of employment. We find no error in the Commission's holding that the statute does not bar an award of wage-loss disability.

■ Weyerhaeuser also contends that, even if an award of wage-loss disability is not barred, there is no substantial evidence to support it. In making the award the Commission stated that it had considered the claimant's age, education, work experience, attitude and motivation, permanent anatomical impairment, and permanent physical limitations. It was appropriate for the Commission to consider these matters. Ark. Code Ann. § 11-9-522(b); *Glass v. Edens*, 233 Ark. 786, 346 S.W.2d 685 (1961). The fact that McGinnis did not bid on posted job opportunities is a factor

[REDACTED]

the Commission could, and evidently did, take into consideration. Similarly, the claimant's post-injury earnings are relevant to the determination of wage-loss disability. *See Bragg v. Evans-St. Clair, Inc.*, 15 Ark. App. 53, 688 S.W.2d 956 (1985). When the issue is whether the Commission's decision is supported by substantial evidence, we reverse only if reasonable minds could not have reached the conclusion arrived at by the Commission. *Hope Brick Works v. Welch*, 33 Ark. App. 103, 802 S.W.2d 476 (1991). Here, we conclude that the Commission's award of wage-loss disability is supported by substantial evidence.

Affirmed.

DANIELSON and ROGERS, JJ., agree.

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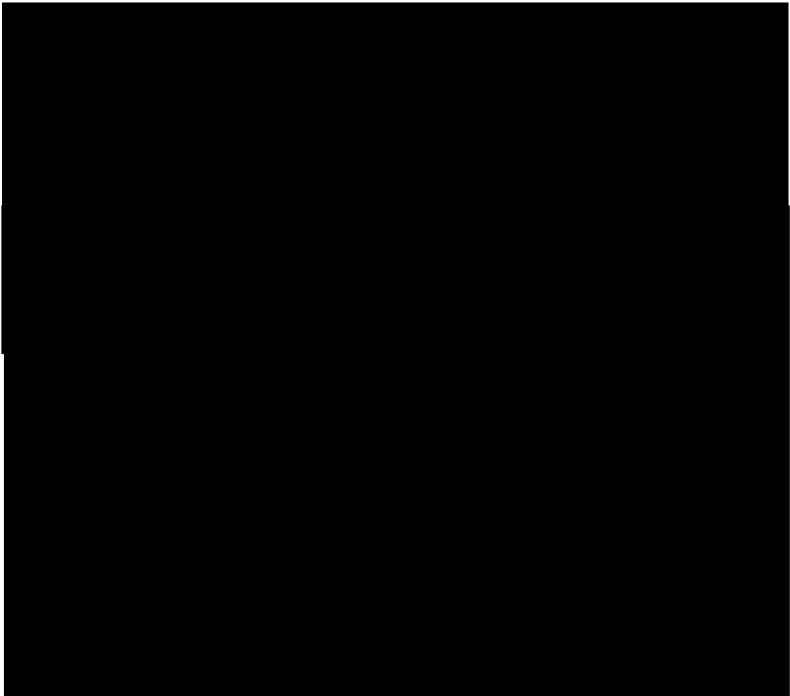
Derrick KENDRICK v. STATE of Arkansas

CA CR 91-143

823 S.W.2d 931

Supreme Court of Arkansas
Opinion delivered February 19, 1992

[REDACTED]



William R. Simpson, Jr., Public Defender, by: *Jerry J. Sallings*, Chief Deputy Public Defender, for appellant.

Winston Bryant, Att'y Gen., by: *Teena L. White*, Asst. Att'y

Gen., for appellee.

ELIZABETH W. DANIELSON, Judge. Appellant was convicted of attempt to commit burglary, aggravated assault, and fleeing. He raises two points on appeal. We affirm.

On September 21, 1990, two Little Rock police officers responded to a call that a burglary was in progress at a residence located at 2426 Louisiana Street. The officers split up and walked around to the back of the house where they found appellant kneeling by a back door. Officer Davis testified that he saw appellant with something in his hand trying to pry open the door. After seeing Officer Davis, appellant got up and walked in the direction of where Officer Smith was positioned. Officer Smith yelled at the appellant to stop and drop the knife he was carrying. Officer Smith testified that appellant ran but was unable to escape as he was positioned between both officers. Appellant denied having been told to drop the knife and testified that he did not have a knife at this time.

Officer Davis testified that when appellant apparently realized he was not able to escape, he "took a step toward me and then wheeled around toward Officer Smith with the knife pointed out in what we conceived as a threatening manner," so as to "cut or stab somebody." Officer Smith testified that appellant had the knife pointed toward the officer and that, "it appeared as though he was fixing to lunge forward with it." Officer Smith hit appellant with his baton, knocking him to the ground. He was apprehended and the knife was confiscated.

Appellant contends that there was insufficient evidence to sustain his conviction for attempted burglary. In a challenge to the sufficiency of the evidence, the appellate court reviews the evidence in the light most favorable to the appellee and sustains the conviction if there is any substantial evidence to support it. *Hutcherson v. State*, 34 Ark. App. 113, 806 S.W.2d 29 (1991). Substantial evidence is evidence that is of sufficient force and character that it will, with reasonable certainty, compel a conclusion one way or the other without resort to speculation or conjecture. *Ward v. State*, 35 Ark. App. 148, 816 S.W.2d 173 (1991). The fact that evidence is circumstantial does not render it insubstantial. *Sweat v. State*, 25 Ark. App. 60, 752 S.W.2d 49 (1988). When circumstantial evidence alone is relied upon, it

must indicate the accused's guilt and exclude every other reasonable hypothesis. *Ward*, 35 Ark. App. 148. It is only when the circumstantial evidence leaves the jury solely to speculation and conjecture that it is insufficient as a matter of law. *Id.*

Arkansas Code Annotated § 5-3-201(a)(2) (1987) states that a person attempts to commit an offense if he purposely engages in conduct that constitutes a substantial step in a course of conduct intended to culminate in the commission of an offense whether or not the attendant circumstances are as he believes them to be.

Arkansas Code Annotated § 5-39-201 (1987) states that a person commits burglary if he enters or remains unlawfully in an occupiable structure of another person with the purpose of committing therein any offense punishable by imprisonment.

■ ■ There does not appear to be any rational reason to explain why appellant was kneeling by the back door of the victim's home at night prying at the door with a knife and when approached, attempting to flee except that he was attempting to commit burglary. The fundamental theory, in absence of evidence of other intent or explanation for breaking or entering an occupiable structure at night, is that the usual object or purpose of burglarizing an occupiable structure at night is theft. *Cristee v. State*, 25 Ark. App. 303, 757 S.W.2d 565 (1988). The actions of an accused fleeing from the scene of a crime is a circumstance that may be considered with other evidence determining guilt. *Id.*

■ The existence of criminal intent or purpose is a question of fact to be determined by the trier of fact when criminal intent may be reasonably inferred from the evidence. *Id.* The trier of fact resolves any conflicts in testimony and determines the credibility of the witnesses, and its conclusion on credibility is binding on the appellate court. *Sweat*, 25 Ark. App. 60 We find there is substantial evidence to confirm appellant's attempted burglary conviction.

Appellant next contends that there was insufficient evidence to sustain his conviction of aggravated assault. The testimony from the officers was that they identified themselves as police officers, and told appellant to drop the knife but he refused. They stated that appellant turned toward Office Smith, pointed the

knife toward him, and “appeared as though he was fixing to lunge forward with it.”

Appellant states that there was a four-foot-high chain link fence between him and Officer Smith, that he held the knife in his hand just above his waist, and that he was about four to five feet away from Officer Smith. Thus, appellant concludes that there was no proof of substantial risk of death or serious physical injury to the officer. However, appellant testified, in response to questions from the prosecuting attorney that he was close enough to the officer to strike him with the knife. It should be noted that at trial, appellant denied having possession of a knife when confronted by Officer Smith, but admitted being in possession of a knife at the time in question in his appellate brief. Surely if the officer was close enough to strike appellant on the head and abdomen with his baton, appellant was close enough to the officer to stab him or cause him serious physical harm.

Arkansas Code Annotated § 5-13-204(a) (1987) states that a person commits aggravated assault if, under circumstances manifesting extreme indifference to the value of human life, he purposely engages in conduct that creates a substantial danger of death or serious physical injury to another person.

█ A person’s state of mind at the time of a crime is seldom apparent. *Tarentino v. State*, 302 Ark. 55, 786 S.W.2d 584 (1990). One’s intent or purpose, being a state of mind, can seldom be positively known to others, so it ordinarily cannot be shown by the facts and circumstances in evidence. *Id. Chaviers v. State*, 267 Ark. 6, 588 S.W.2d 434 (1979). Since intent cannot be proven by direct evidence, the factfinder is allowed to draw upon his own common knowledge and experience to infer intent from the circumstances. *Robinson v. State*, 293 Ark. 243, 737 S.W.2d 153 (1987). Because of the difficulty in ascertaining a person’s intent, a presumption exists that a person intends, a presumption exists that a person intends the natural and probable consequences of his acts. *Tarentino*, 302 Ark. 55. From the testimony describing appellant’s actions, there is substantial evidence to conclude that he acted under circumstances manifesting an extreme indifference to the value of human life and purposely engaged in conduct that created a substantial danger of death or serious physical injury.



Affirmed.

JENNINGS and ROGERS, JJ., agree.



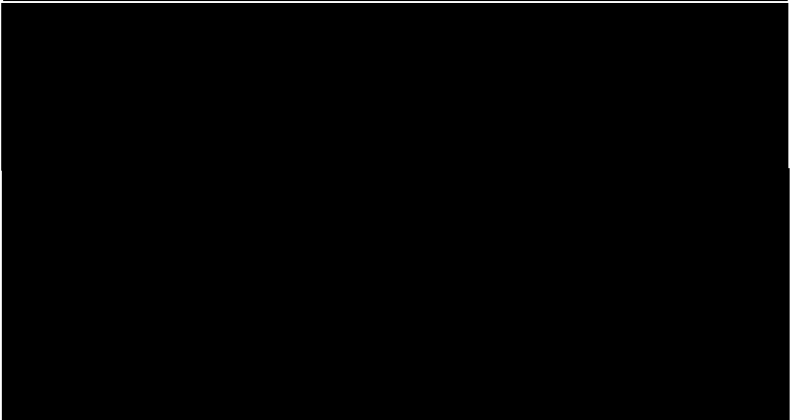
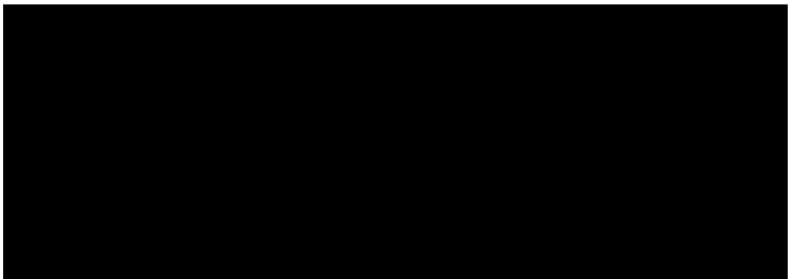
Henry L. HAPNEY v. Renate E. HAPNEY

CA 91-204

824 S.W.2d 408

Court of Appeals of Arkansas
Division I

Opinion delivered February 26, 1992
[Rehearing denied April 1, 1992.]



Thurman Ragar, Jr., for appellant.

Davis & Cox, by: *Hal W. Davis*, for appellee.

JAMES R. COOPER, Judge. The parties in the chancery case had been married for twenty-four years at the time of their divorce in November 1984. Under their divorce decree, the appellant's military retirement was found to be marital property and subject to division by the court. The appellee was awarded \$300.00 per month as her equitable share of the military retirement. Subsequently, the appellant's Veterans Administration disability benefits were increased, causing a concomitant reduction in his military retirement pension, which is now only \$400.00 per month. The appellant had arranged for the \$300.00 per month payment to be made to the appellee directly by the Department of Military Retirement. After the appellant elected to take an increase in disability benefits, which caused his retirement benefits to be reduced to \$400.00 per month, the direct payments to the appellee by the Department of Military Retirement were reduced to \$200.00 per month pursuant to 10 U.S.C.A. § 1408(e)(1) (Supp. 1991). Consequently, the appellee filed a petition for contempt in the chancery court which had entered the decree of divorce. The chancellor found the appellant in contempt, entered a judgment for arrearages, and awarded attorneys' fees. From that decision, comes this appeal.

For reversal, the appellant contends that the chancellor erred in finding that the \$300.00 per month payment was alimony; in taking jurisdiction to hear the appellee's contempt petition; and in failing to follow federal law which prohibits the court from taking action against the appellant. We find no error, and we affirm.

■ The appellant first contends that the chancellor erred in finding the \$300.00 per month payment to be alimony. We find no merit in this contention because the record reflects that the chancellor made no such finding. Instead, the chancellor noted in his letter opinion that the parties entered into an agreement concerning the division of marital property which was incorporated into the divorce decree. The chancellor further found that the agreement required the appellant to pay the appellee \$300.00 per month by the fifth day of each month, and that this amount was less than one-half of the military retirement that the appellee

was entitled to. Finally, the chancellor found that the appellee's agreement to accept less than the full amount of the military retirement to which she was entitled was made in consideration of the parties' overall property settlement, including issues relating to alimony and division of marital property. It is clear from our reading of the order appealed from that the chancellor never found the \$300.00 per month payment at issue to be alimony, and we find no error on this point.

■ Next, the appellant contends that the chancellor lacked subject matter jurisdiction to hear the appellee's contempt petition. In essence, the appellant argues that there were no provisions in the 1984 divorce decree which would give the chancery court continuing jurisdiction, and that the appellee's remedy was to bring an action in circuit court based on the contract. We do not agree. The divorce decree did not reduce the amount owed by the appellant to the appellee to a sum certain, but instead required continuing payments in the amount of \$300.00 per month. This continuing order was in the nature of a mandatory injunction, and the chancery court therefore retained jurisdiction with respect to this matter. *See Reves v. Reves*, 21 Ark. App. 177, 730 S.W.2d 904 (1987). The order to pay \$300.00 per month to the appellee was an order to compel conduct, and our Supreme Court has recently held that a chancellor can enforce such an order, even if it is an order to pay money, by the contempt power so long as it is assured that the contempt power is not used unless the contemnor has the ability to pay. *Gould v. Gould*, 308 Ark. 213, 823 S.W.2d 890 (1992). The appellant in the case at bar does not contend that he is unable to pay, and we find no error on this point.

■ Finally, the appellant contends that the chancellor violated federal law by awarding the appellee military retirement pay waived by the appellant in order to receive Veteran's disability benefits. We find no merit to this contention. Although the United States Supreme Court has held that the Uniformed Services Former Spouse's Protection Act does not permit state courts to treat certain military retirement pay, waived by the retiree in order to receive (or increase) Veteran's disability benefits, as property divisible upon divorce, *Mansell v. Mansell*, 490 U.S. 581 (1989), the appellant's argument lacks merit because the record in the case at bar does not demonstrate that

[REDACTED]

the \$300.00 per month award constituted a division of his Veteran's disability benefits. The divorce decree did not purport to award the appellee a portion of the appellant's disability benefits, but instead was limited to the appellant's military retirement benefits. Moreover, as noted earlier, in the order appealed from the chancellor found that the appellee's agreement to accept \$300.00 per month, in lieu of the larger amount to which she was entitled, was made in consideration of concessions made in the parties' overall property settlement, including other matters relating to the division of marital property and alimony. Because the parties' original agreement, as submitted to the chancellor and incorporated into his decree, has not been included in the abstract before us, we are unable to determine the percentage of the \$300.00 award which was based on military retirement benefits, as opposed to other consideration, or to say that the chancellor erred in so construing the agreement of the parties. Under these circumstances, we regard the chancellor's action as a clarification of the award which was originally intended, rather than a modification, and the appellant has presented no evidence demonstrating that the chancellor's interpretation is clearly erroneous. *See Ford v. Ford*, 30 Ark. App. 147, 783 S.W.2d 879 (1990). Based on this record, we cannot say that the chancellor's interpretation of the decree is clearly wrong, and we affirm.

Affirmed.

CRACRAFT, C.J., and DANIELSON, J., agree.

[REDACTED]

John Dale ENOCH v. STATE of Arkansas

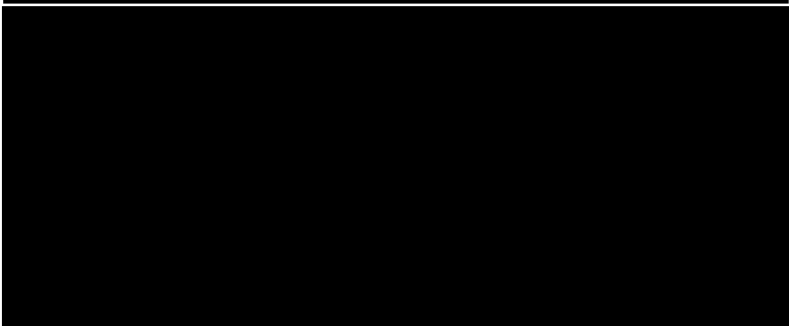
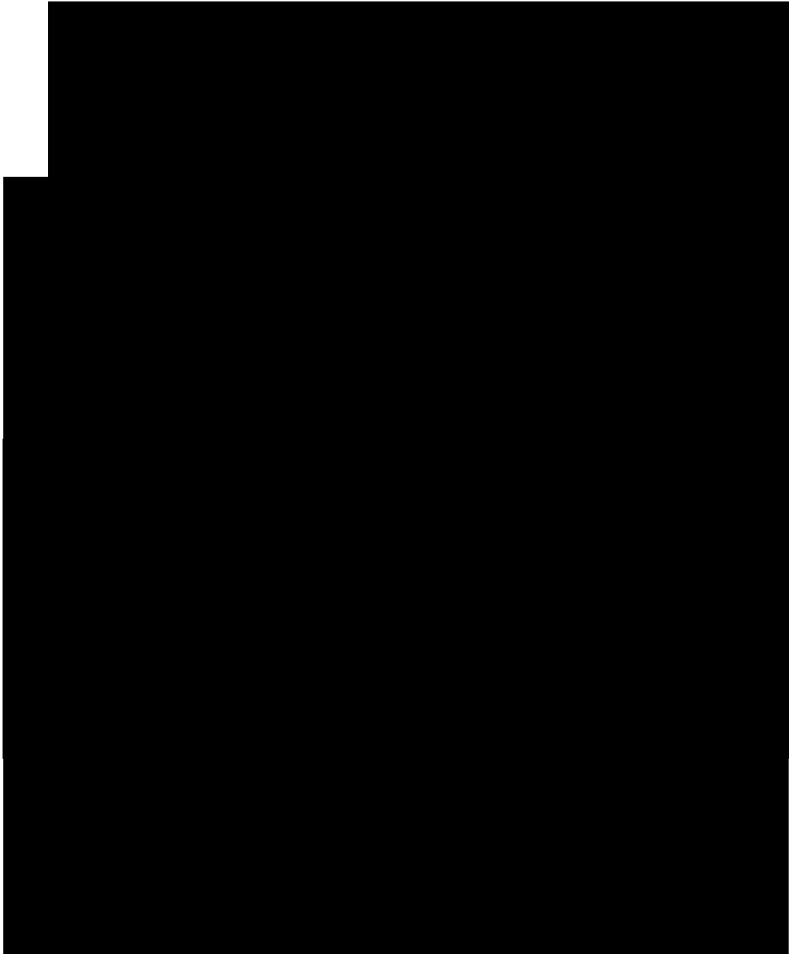
CA CR 91-81

826 S.W.2d 291

Court of Appeals of Arkansas
Division II

Opinion delivered February 26, 1992

[REDACTED]



John William Murphy, for appellant.

Winston Bryant, Att'y Gen., by: *Clint Miller*, Senior Asst. Att'y Gen., for appellee.

MELVIN MAYFIELD, Judge. Appellant, John Dale Enoch, was convicted of first degree assault, a Class A misdemeanor, and sentenced to 365 days in the Washington County Jail. He argues on appeal that (1) the trial court erred in failing to dismiss the assault charge; (2) the assault charge placed him in double jeopardy which is barred by Article 2, Section 8, of the Arkansas Constitution; and (3) his motion for a directed verdict should have been granted.

West Fork Police Officer Maynard Kennedy testified at the circuit court trial that on May 5, 1990, he received a call from the Washington County Sheriff's Office regarding a possible drunk driver in a brown van, license number LGG-123, headed south on Highway 71. Kennedy said he saw the vehicle following closely behind a large truck, shining a spotlight at the truck, and

tailgating it. He said he followed the van and stopped it, and the driver got out and produced his driver's license, which identified him as John Dale Enoch. According to Kennedy he asked appellant if he had been drinking, and appellant admitted that he had consumed six or seven beers. Kennedy said he gave appellant a field sobriety test, which appellant failed, and Kennedy then placed appellant under arrest for driving while intoxicated.

Officer Kennedy testified further that when he attempted to place appellant in the patrol car appellant bolted, attempted to kick Kennedy twice, said "Kill me or I'll kill you," and ran. Kennedy said he told his companion, Tim Caudle, to call for backup. In the meantime, appellant stopped at a pile of rocks, picked up one, and threw it at Kennedy who put his arm up to stop the rock from hitting his head; however, the rock hit his wrist, broke his watch, bounced off his shoulder, and fell to the ground. Kennedy estimated the rock was thrown approximately 25-30 feet.

Officer Kennedy said he charged appellant with driving while intoxicated, violating the implied consent law (Ark. Code Ann. § 5-65-202 (Supp. 1991)), and resisting arrest. Appellant entered a plea of guilty in West Fork Municipal Court to each of these charges, and was subsequently charged in Washington County Circuit Court with the felonies of terroristic threatening, fleeing, and aggravated assault, all arising out of the same incident. Prior to trial, counsel for appellant moved to dismiss these charges on the grounds of double jeopardy. The trial court granted the motion as to the terroristic threatening and fleeing charges, but refused to dismiss the aggravated assault charge. A jury convicted appellant of the lesser included offense of first degree assault and this appeal followed.

■ ■ Appellant's third argument is that his motion for a directed verdict as to the assault charge should have been granted. A motion for a directed verdict is a challenge to the sufficiency of the evidence. *McIntosh v. State*, 296 Ark. 167, 753 S.W.2d 273 (1988). In *Harris v. State*, 284 Ark. 247, 681 S.W.2d 334 (1984), the Arkansas Supreme Court held that when there is a challenge to the sufficiency of the evidence, we must review that point prior to considering any alleged trial errors and, in doing so, we must consider all the evidence, including any which may have

been inadmissible, in the light most favorable to the appellee. In resolving the question of the sufficiency of the evidence in a criminal case, this court views the evidence in the light most favorable to the appellee and affirms the judgment if there is any substantial evidence to support the finding of the trier of fact. *Ryan v. State*, 30 Ark. App. 196, 786 S.W.2d 835 (1990). Substantial evidence is that which is of sufficient force and character that it will, with reasonable certainty, compel a conclusion one way or the other, without resorting to speculation or conjecture. *Williams v. State*, 298 Ark. 484, 768 S.W.2d 539 (1989); *Ryan v. State*, *supra*.

■ The appellant contends his conduct did not constitute aggravated assault because it did not create a substantial danger of death or serious physical injury to another person. He argues that the evidence shows that he only attempted to kick the officer and threw a rock at him. Appellant was convicted of the lesser included offense of first degree assault, so we need not discuss the aggravated assault charge. First degree assault is committed when a person "recklessly engages in conduct which creates a substantial risk of death or serious physical injury to another person," and it is a Class A misdemeanor. Ark. Code Ann. § 5-13-205 (1987). Recklessly is defined in Ark. Code Ann. § 5-2-202(3) (1987) as follows:

A person acts recklessly with respect to attendant circumstances or a result of his conduct when he consciously disregards a substantial and unjustifiable risk that the circumstances exist or the result will occur. The risk must be of a nature and degree that deviation from the standard of care that a reasonable person would observe in the actor's situation.

And Ark. Code Ann. § 5-1-102(19) (1987) defines serious physical injury as "physical injury that creates a substantial risk of death or that causes protracted disfigurement, protracted impairment of health, or loss or protracted impairment of the function of any bodily member or organ."

Serious physical injury has been found where the victim was struck three times with a fist causing face fractures and impairment of vision for about two weeks, *Lum v. State*, 281 Ark. 495, 665 S.W.2d 265 (1984), and where the victim suffered a broken

leg, fractured toe, and bruised heel and pelvis, *Harmon v. State*, 260 Ark. 665, 543 S.W.2d 43 (1976).

■ Officer Kennedy testified that, as the result of being struck by the rock, he suffered a bruised shoulder and a damaged nerve in his arm. He wore a brace for a week, his thumb had no feeling for a while, and at the time of the trial he still did not have full strength in his thumb or full gripping power with that hand. He testified that he missed work for a week because of his injuries and that his arm still tingled at times. We think this constitutes serious physical injury and that there is substantial evidence from which the jury could conclude that appellant engaged in reckless conduct which created a substantial risk of serious physical injury to another person.

Appellant's first argument is that because he had entered a plea of guilty in municipal court to resisting arrest, the judge of the circuit court erred in refusing to dismiss the assault charge as it violated the provisions of Ark. Code Ann. § 5-1-110 (1987). That section provides in pertinent part as follows:

(a) When the same conduct of a defendant may establish the commission of more than one offense, the defendant may be prosecuted for each such offense. He may not, however, be convicted of more than one offense if:

(1) One offense is included in the other, as defined in subsection (b) of this section;

(b) A defendant may be convicted of one offense included in another offense with which he is charged. An offense is so included if:

(1) It is established by proof of the same or less than all the elements required to establish the commission of the offense charged;

■ An offense is included within another offense if it is established by proof of the same or less than all the elements required to establish the commission of the other offense. See *Strawhacker v. State*, 304 Ark. 726, 731, 804 S.W.2d 720 (1991). An offense is not a lesser included offense of another when each required proof of a fact which is not required by the other, the elements of the statutory definitions being different. See

Rhodes v. State, 293 Ark. 211, 736 S.W.2d 284 (1987); *Thomas v. State*, 280 Ark. 593, 660 S.W.2d 169 (1983). A comparison of the elements of proof required to establish resisting arrest and aggravated or first degree assault reveal the dissimilarities between the crimes.

■ Resisting arrest is committed when a person “knowingly resists a person known by him to be a law enforcement officer effecting an arrest,” and “resists” means “using or threatening to use physical force or any other means that creates a substantial risk of physical injury to any person.” Ark. Code Ann. § 5-54-103(a)(1)(2) (Supp. 1991). Thus, to prove appellant resisted arrest it was only necessary to show that when Officer Kennedy attempted to arrest appellant, appellant knew that Kennedy was a police officer and that appellant resisted the arrest by any means that created a substantial risk of physical injury to the officer. To prove either aggravated or first degree assault the prosecution had to show that appellant engaged in conduct which created “a substantial risk of death or serious physical injury” to another person, but it was not required to show that the other person was a police officer. *See* Ark. Code Ann. § 5-13-204 and 205 (1987). On the other hand, in order to show that appellant resisted arrest it was not necessary to show conduct that created a substantial risk of *death of serious* physical injury as a substantial risk of physical injury only would be sufficient.

■ The appellant argues that the line between the “serious physical injury,” required to prove first degree assault, and the “physical injury,” in the definition of “resists,” is “not clear.” We disagree. Physical injury means the impairment of physical condition or the infliction of substantial pain, Ark. Code Ann. § 5-1-102(14) (1987), but serious physical injury means the substantial risk of death or protracted impairment or disfigurement. “Protracted” is defined in the *American Heritage Dictionary* 997 (2d ed. 1982) as “to draw out or lengthen in time, prolonged.” Appellant contends that Officer Kennedy sustained only physical injury from the rock which hit him and not “serious” physical injury. Kennedy testified that at the time of appellant’s trial he continued to suffer from reduced strength in his thumb, reduced grip and tingling in his arm. We think there is ample evidence to show that the throwing of the rock created the danger of “serious physical injury.” So it was the bolting and attempting to kick the

officer that constituted the crime of resisting arrest and it was the act of throwing the rock which hit the officer and caused him injury that constituted the first degree assault.

Appellant also argues that the trial court erred in failing to dismiss the assault charge because it placed him in double jeopardy in violation of Article 2 Section 8 of the Arkansas Constitution which provides that "No person . . . shall be twice put in jeopardy of life or liberty." In support of this argument appellant cites *Champion v. State*, 110 Ark. 44, 160 S.W. 878 (1913), which held that a conviction of an offense in mayor's court bars a conviction for the same offense in circuit court. There the court said, "It is contrary to principles of natural justice and humanity, and against the policy of the law to multiply or carve different crimes out of only one criminal act." 110 Ark. at 46. Appellant argues that in the present case the same actions for which he was convicted of resisting arrest were used to carve out a different crime, aggravated or first degree assault, to prosecute him again.

In *Grady v. Corbin*, 495 U.S. ___, 110 S.Ct. 2084, 109 L.Ed.2d 548, (1990), the United States Supreme Court stated:

To determine whether a subsequent prosecution is barred by the Double Jeopardy Clause, a court must first apply the traditional *Blockburger* [*Blockburger v. United States*, 284 U.S. 299 (1932)] test. If application of that test reveals that the offenses have identical statutory elements or that one is a lesser included offense of the other, then the inquiry must cease, and the subsequent prosecution is barred.

110 S.Ct. at 2090; 109 L.Ed. 2d at 561. Quoting from *Green v. United States*, 355 U.S. 184, 187, 78 S.Ct. 221, 2 L.Ed.2d 199 (1957), the Court explained.

"The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity"

110 S.Ct. at 2091; 109 L.Ed.2d at 562. The Court concluded:

[T]he Double Jeopardy Clause bars any subsequent prosecution in which the government, to establish an essential element of an offense charged in that prosecution, will prove conduct that constitutes an offense for which the defendant has already been prosecuted. This is not an "actual evidence" or "same evidence" test. The critical inquiry is what conduct the State will prove, not the evidence the State will use to prove that conduct.

110 S.Ct. at 2093; 109 L.Ed.2d at 564.

Recently, in *State v. Thornton*, 306 Ark. 402, 815 S.W.2d 386 (1991), our supreme court discussed the *Grady v. Corbin* case and stated:

The Court formulated a two (2) part inquiry to determine whether double jeopardy bars a prosecution. First, the *Blockburger* test should be applied. If it reveals that the offenses have identical statutory elements or that one offense is a lesser included offense of the other, then the inquiry must cease, and the subsequent prosecution is barred. *Id.* at 2090. [110 S.Ct. at 2090.] If the subsequent prosecution is not barred under the first inquiry, it should be subjected to the second inquiry, the "proof of the same conduct" analysis. The holding of the case concisely sets out this second inquiry as follows: "We hold that the Double Jeopardy Clause bars a subsequent prosecution if, to establish an essential element of an offense charged in that prosecution, the government will prove conduct that constitutes an offense for which the defendant has already been prosecuted." *Id.*

306 Ark. at 405.

In the instant case, to prove the assault charge the State was required to prove that appellant had recklessly engaged in conduct that created a substantial risk of death or serious physical injury to another person. None of those essential elements are elements of resisting arrest. To prove resisting arrest the State had to prove that appellant knew a law officer was attempting to arrest him and that he resisted the arrest by using physical force or any other means that created a substantial risk of physical injury to the officer. None of those essential require-



ments are elements of aggravated or first degree assault. Consequently, appellant was not placed in double jeopardy.

Affirmed.

JENNINGS and ROGERS, JJ., agree.



Johnny WHITAKER v. STATE of Arkansas

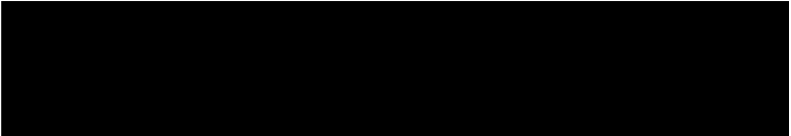
CA CR 90-305

825 S.W.2d 827

Court of Appeals of Arkansas
Division II

Opinion delivered February 26, 1992

[Supplemental Opinion on Denial of Rehearing June 3, 1992.]



[REDACTED]

Green & Cook, P.A., by: *Don Lloyd Cook, II*, for appellant.

Winston Bryant, Att'y Gen., by: *Clint Miller*, Senior Asst. Att'y Gen., for appellee.

MELVIN MAYFIELD, Judge. Appellant was convicted in Mountain Home Municipal Court of resisting arrest and interference with a law enforcement officer. On appeal to Circuit Court, the appeal was joined with the felony charge of terroristic threatening which arose out of the same episode. Appellant was tried by a jury and convicted of all charges. He was sentenced to serve one year in the Arkansas Department of Correction on the felony conviction and to pay a fine of \$1,000.00 on each of the misdemeanor convictions.

On June 16, 1989, Officer Jack Burkhart of the Cotter Police Department investigated complaints of a loud party at appellant's residence. Upon his arrival the officer heard profanity coming from the party and some voices said they had a .22 and were going to blow the officer away. The officer also heard them yelling "you're afraid to come up here," and "come on, we're waiting on you," and other comments along that line. The officer eventually contacted other law enforcement officers in the area, and it was decided that the best course of action was for Officer Burkhart to go to appellant's door and ask them to quiet down and cease disturbing the peace.

The officer then approached the back door of the residence, with a "walkie talkie," and observed the appellant, Darren Moore, and Alan Collins run inside the back wooden screen door and close it. The officer warned the men they were going to have to stop cussing him, or he would arrest them for disorderly conduct due to verbal abuse. The men continued and Alan Collins gave the officer a "good verbal tongue lashing", used very vulgar language, and told the officer to get off the property. At that point the officer told Collins he was under arrest for disorderly conduct; Collins turned around and took off for the kitchen; the officer opened the back screen door to go after him; and radioed for assistance.

As the officer walked in the back door Darren Moore rushed him and a scuffle ensued after which Moore was also arrested for

disorderly conduct. The officer was then aware that Officer Magness was in the house to assist and that the appellant was swinging a flashlight at Officer Magness's head. Magness then pulled a gun, appellant stopped swinging for a second, and the other officers got appellant under control. Appellant was injured about the head and while Burkhart and Magness were taking appellant to the hospital, appellant continued to "cuss and threaten" the officers. After appellant received medical attention, Officer Burkhart took him to the jail where misdemeanor charges were filed and appellant "bonded out immediately." Appellant was subsequently charged with terroristic threatening by the prosecuting attorney.

Appellant's first argument on appeal is that the trial court erred in refusing to grant his motion for continuance made on March 22, 1990, the morning of trial. In the motion, appellant alleged he had made a request for discovery on December 28, 1989; filed a motion to compel discovery in March; partial discovery information was transmitted on March 20, 1990; but it was incomplete and in no particular order; and that appellant did not receive all the information until March 21, 1990.

On March 22, 1990, immediately before jury selection, the trial court held an in-chambers hearing on appellant's motion. At the hearing, appellant's attorney stated that due to the condition of the information transmitted to him, he was unable to interview the witnesses from the trial in municipal court; that the prosecutor had listed a possibility of fourteen witnesses, several of whom appellant was unaware of until the date of the hearing; that the prosecutor failed to answer his question as to whether any of the prospective witnesses had any criminal convictions; and that the prosecutor would not answer any questions as to the certification of the officers involved. Appellant said the prosecution had since December 28 to get the information to him; but did not get it to him until March 19 through 21, and the defense was thus put at a disadvantage.

Appellant renewed his motion for continuance immediately prior to trial. Appellant argued he had not yet received all the discovery information, specifically information involving whether the arresting officers had been properly certified pursuant to the existing law enforcement standards. On appeal,

appellant argues the prosecuting attorney ignored repeated requests to comply with discovery and that appellant's ability to structure a meaningful defense was greatly impaired by the inability to obtain witness lists, records of the officers' certification, criminal convictions of witnesses, and other vital matters. Appellant argues the prejudice against him was so great that the failure to grant a continuance or other sanctions against the prosecution rose to the level of an abuse of discretion.

A motion for continuance is addressed to the sound discretion of the trial judge, and his decision will not be reversed absent a clear abuse of discretion amounting to a denial of justice. *Butler v. State*, 303 Ark. 380, 797 S.W.2d 435 (1990).

Ark. R. Crim. P. 17.1(a)(i) provides that the prosecuting attorney disclose to defense counsel on timely request the names and addresses of persons whom the prosecuting attorney intends to call as witnesses. The record shows that appellant had the name of every police officer who was present at the incident as of Monday, March 19. Moreover, after the in-chambers hearing on March 22, 1990, the trial court reset the case for March 27, 1990, stating:

If we're talking about witnesses, if there's some witness here, I'll be glad to address whether that witness will be allowed to testify.

...

Well, we're going to pick the jury today and we're going to try this case next Tuesday. You've got all your information now and that gives you an additional five days. To me this case has been tried once in municipal court and I just can't imagine that there's any nuances or things here at least that addresses the merits of the charges that's going to come as a surprise to anybody.

Thus, although appellant's motion was denied, the trial court gave appellant five days from the denial of this motion until the start of trial. And, as to appellant's complaint that he was not made aware of any criminal convictions of any witnesses, the record reveals that on March 22, appellant was already aware that one of the witnesses had been convicted of a prior felony, and there is nothing in the record to show there were any witnesses

who had been convicted of a felony.

Regarding appellant's argument that he was not provided with information regarding whether the officers were properly certified, even if they were not that information would be of no help to appellant. Act 44 of 1989 (3rd Ex. Session) amended Ark. Code Ann. § 12-9-108 (Supp. 1991) to provide that actions taken by law enforcement officers who do not meet all the standards and qualifications shall not be held invalid merely because of the failure to meet the standards and qualifications.

Under the circumstances we cannot say the trial court abused its discretion in refusing to grant appellant's requests for a continuance.

Appellant then argues the trial court erred in denying his motion to dismiss the misdemeanor charges against him because he was charged by an illegal document and was not properly before the court. Appellant argues the charging document, an Arkansas Uniform Traffic Ticket and Complaint, was entitled "Complaint-Affidavit" and was set out in clear affidavit language, but the spaces provided for the signature of the subscribing witness was left blank indicating the document was neither sworn to nor subscribed before anyone. Appellant contends the documents do not conform to the requirements for affidavits (Ark. Code Ann. §§ 16-45-102 and 103) and are therefore not sufficient to charge appellant with the misdemeanors of which he was accused.

But, appellant has cited us no authority requiring a citation to be in affidavit form. Ark. R. Crim. P. 5 sets forth the law regarding citations. A "citation" means a written order, issued by a law enforcement officer who is authorized to make an arrest, requiring a person accused of violating the law to appear in a designated court or governmental office at a specified date and time. Ark. R. Crim. P. 5.1(a). Every citation shall: (i) be in writing; (ii) be signed by the officer issuing it with the title of his office; (iii) state the date of issuance and the municipality or county where issued; (iv) specify the name of the accused and the offense alleged; (v) designate a time, place, and court for the appearance of the accused; and (vi) provide a space for the signature of the accused acknowledging his promise to appear. Ark. R. Crim. P. 5.3(a).

■ The record reflects the charging documents complied with the requirements for issuing a citation and we cannot agree appellant was not legally charged.

■ Appellant next argues appellant's conviction should be reversed because the police officers making the arrests were not properly certified and could not have made a lawful arrest; and the only charging documents were signed by these uncertified officers. Appellant argues that Act 44 of 1989 (3rd Ex. Session) which amended Ark. Code Ann. § 12-9-108(a) and attempted to cure defects in officer certification is ex post facto legislation. However, this argument was decided against appellant by our supreme court in *Ridenhour v. State*, 305 Ark. 90, 805 S.W.2d 639 (1991), where the court held retroactive application of Act 44 did not violate the Ex Post Facto Clause of the United States or the Arkansas Constitutions. We are bound by that decision.

Finally, appellant argues the trial court erred in refusing to dismiss the charges based upon the officer's warrantless entry into appellant's residence to make a misdemeanor arrest. Appellant argues the Fourth Amendment prohibits police officers from entering a suspect's home in order to make a routine felony arrest without an arrest warrant, unless exigent circumstances are present. *Payton v. New York*, 445 U.S. 573 (1980).

■ However, there is nothing in *Payton* to suggest that a person should go free just because an officer enters his home without an invitation and arrests him without a warrant. In *State v. Block*, 270 Ark. 671, 606 S.W.2d 362 (1980) the court stated:

In the *Payton* case the court merely held that evidence is not admissible when it was obtained by an officer's illegal entry into a person's home without an arrest warrant. There was no limit that the charges should be dismissed. Quite the contrary, the court specifically stated in Footnote 34: "The issue is not whether a defendant must stand trial, because he must do so even if the arrest is illegal."

270 Ark. at 672. See also *State v. Holcomb*, 271 Ark. 619, 609 S.W.2d 78 (1980) (an illegal arrest of a defendant does not, per se, preclude his prosecution).

For the reasons stated above, the appellant's convictions are affirmed.

JENNINGS and ROGERS, JJ., agree.

[REDACTED]
SUPPLEMENTAL OPINION ON DENIAL OF REHEARING
JUNE 3, 1992

[REDACTED] [REDACTED]
Don Lloyd Cook, for appellant.


Winston Bryant, Att'y Gen., by: *Clint Miller*, Senior Asst. Att'y Gen., for appellee.

MELVIN MAYFIELD, Judge. On February 26, 1992, we affirmed the appellant's misdemeanor convictions in this case. A petition for rehearing has been filed in which the case of *Welch v. Wisconsin*, 466 U.S. 740 (1984), is cited. Although that case was not cited in appellant's original brief, the argument made in the petition for rehearing is the same argument made in the original brief. The argument was: "The trial court erred in refusing to dismiss the misdemeanor charges based upon a police officer's warrantless entry into appellant's residence." The original brief stated that "while it might be argued that the proper motion would have been to suppress the evidence, that would have been, in essence, the same motion as the one Appellant made at trial."

We did not agree and cited *State v. Block*, 270 Ark. 671, 606 S.W.2d 362 (1980), which relied upon *Payton v. New York*, 445 U.S. 573 (1980), for its holding that while evidence obtained by an officer's illegal entry into a person's home without an arrest warrant is not admissible, the defendant must stand trial even if the arrest is illegal.

The case of *Welch v. Wisconsin*, cited in appellant's petition for rehearing, does not hold contrary to *Payton*. In *Welch* the United States Supreme Court reversed a decision by the Wisconsin Supreme Court which held that an arrest in petitioner's home without a warrant for a "civil, nonjailable traffic offense" was not illegal as there were exigent circumstances for the arrest. However, the issue in *Welch* involved a Wisconsin statute which provided that a driver's refusal to take a blood-alcohol test was justified if his arrest was unlawful.

The case before us involves an issue of whether misdemeanor criminal charges should be dismissed because the arrest was alleged to be illegal. No motion to suppress evidence based upon the alleged illegal arrest was filed in this case. The motion here



was simply to dismiss the charges. Thus, under the authority of *Payton v. New York* and *State v. Block*, cited in our original opinion, we held that the trial court did not err in refusing to dismiss the charges against the appellant. We think that decision was correct.

The petition for rehearing is denied.

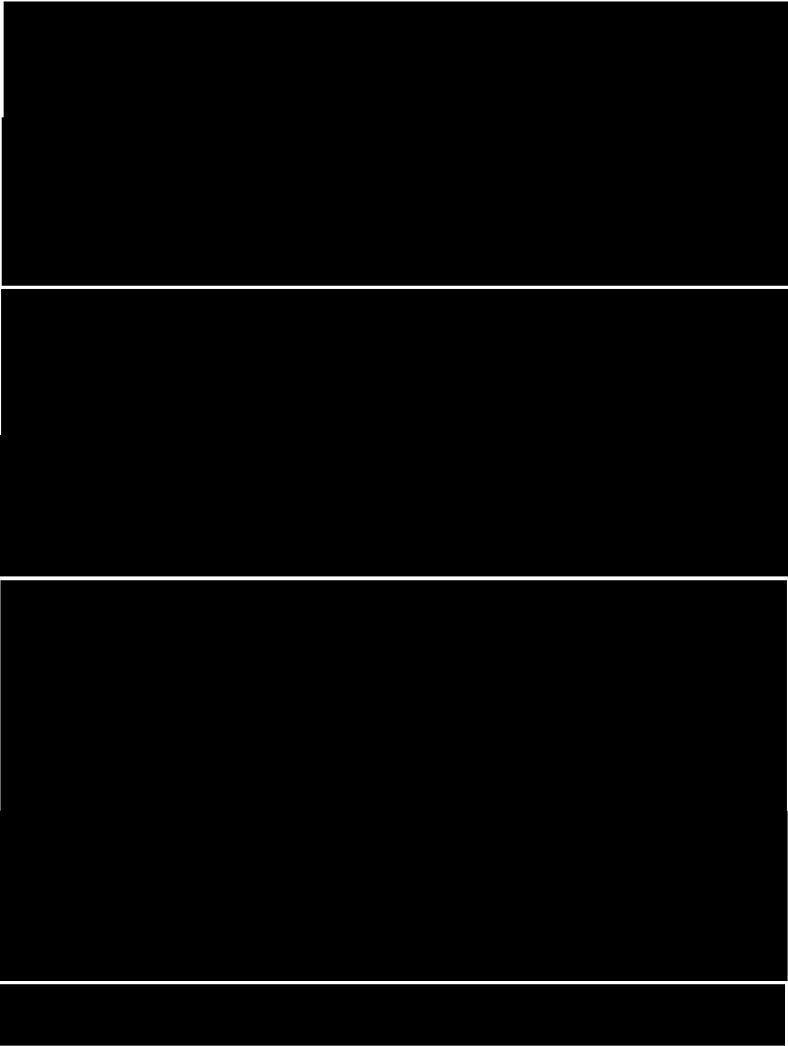


Deryl BARGERY v. STATE of Arkansas

CA CR 91-103

825 S.W.2d 831

Court of Appeals of Arkansas
Division II
Opinion delivered March 4, 1992



Wayne Emmons, for appellant.

Winston Bryant, Att'y Gen., by: *Gil Dudley*, Ass't. Att'y Gen., for appellee.

GEORGE K. CRACRAFT, Chief Judge. Deryl Bargery appeals from his conviction of the crime of manslaughter. He contends that the finding of guilt is not supported by the evidence, and that the trial court erred in allowing certain statements of the deceased to be introduced as a dying declaration, and in excluding testimony of appellant as to his personal knowledge of the violent propensities of the victim. We find no error and affirm.

■ ■ ■ When a criminal appeal challenges the sufficiency of the evidence, we consider that issue before considering any alleged trial errors. *See Harris v. State*, 284 Ark. 247, 681 S.W.2d 334 (1984). We view the evidence in the light most favorable to the State and will affirm if the findings are supported by substantial evidence. *Jones v. State*, 20 Ark. App. 1, 722 S.W.2d 871 (1987). In making this review, we do not weigh that evidence favorable to the State against any conflicting evidence favorable to the accused. *Westbrook v. State*, 286 Ark. 192, 691 S.W.2d 123 (1985).

Here, the deceased, Bruce Davis, and his identical twin, Barry Davis, Mark Sutter, and some friends, parked their vehicles in the parking lot of a filling station. Appellant, accompanied by Milton Baser, was also parked on the lot. Some difficulties arose between these two groups and Baser and Sutter began fighting.

Carolyn Maddox testified that after Baser and Sutter began fighting, appellant "jumped in" the fight. Barry Davis knocked appellant down, took a pair of "brass knucks" off his hands, and threw them to his brother, who was not taking any part in the fight. Maddox stated that she saw appellant run to his vehicle, come back with a shiny object in his hand, and make contact with Bruce Davis. Bruce then walked over to her, holding his side, and collapsed. According to her testimony, Bruce had not been involved in the fight when he was stabbed.

Barry Davis testified to similar facts leading up to the affray. He stated that after Sutter and Baser began fighting, it appeared that appellant was about to jump in to help Baser. Barry, therefore, hit appellant in the face. Barry was walking over to the area where Baser and Sutter were fighting, when he heard Carolyn Maddox shout that his brother had been stabbed and that she needed help. They then took the victim to the hospital. Two other witnesses testified that they heard appellant admit that he "thought that he had stabbed someone." The medical examiner testified that Bruce Davis died as the result of a stab wound, which had damaged his heart and lung.

Ronald Davis, father of the deceased, testified that he went to the hospital shortly after he had been notified of the event and talked with his son. He stated that Bruce said that he had been stabbed, he was scared, and "why, I don't know why he stabbed me." The court permitted that testimony, over appellant's objection, as a dying declaration. Several other witnesses testified that they had heard appellant admit that he had stabbed someone. Appellant admitted that he had stabbed the deceased but stated that he had done so out of fear that he was about to be seriously injured.

Appellant was charged with the crime of murder in the first degree. The jury returned a verdict finding appellant guilty of the lesser included offense of manslaughter. Arkansas Code Anno-

admissible under this rule, and on review we will reverse that determination only if there is an abuse of discretion. *Thompson v. State*, 306 Ark. 193, 813 S.W.2d 249 (1991). The fact that the declarant was possessed of a sense of imminent and inevitable death need not be shown by the deceased's express words, but may be supplied by inferences drawn from his condition, imminent danger, and other circumstances that indicate a sense of impending death. *Boone v. State*, 282 Ark. 274, 668 S.W.2d 17 (1984); *Barker v. State*, 21 Ark. App. 56, 728 S.W.2d 204 (1987). See also 4 J. Weinstein, *Weinstein's Evidence*, ¶ 804(b)(2)[1] (1991); 5 J. Wigmore, *Evidence in Trials at Common Law* § 1442 (3d ed. 1940). It is the declarant's belief in the nearness of death when he makes the statement, not the swiftness with which the death actually ensues, which is most important. See E. Cleary, *McCormick on Evidence*, § 282 (3d ed. 1984).

The evidence here shows that the deceased collapsed almost immediately after he was stabbed. According to the medical examiner, the wound damaged his heart and his lung. His father arrived at the Crittenden Memorial Hospital within ten minutes of being notified of the incident. He was asked what he observed when he saw his son at that time and responded:

A. Well, *they had him laying there, and they had put a tube in his side draining the blood off because he was choking on his blood.* I asked him what happened, and he said, "I was stabbed and I don't know why." Then later on *he said, "Daddy, I'm so scared."*

Q. Did he say anything else?

A. No. I said, "Son, you're going to be all right. I'm going to get you to Memphis." He said, "Why? I don't know why he stabbed me." *He kept repeating that he was scared,* and that's about all I got to talk to him.
[Emphasis added.]

■ The deceased was transferred to the Trauma Clinic in Memphis that evening, and he died soon thereafter. His statements that he had been stabbed and did not know why clearly referred to the cause and circumstances of his death. Considering the obvious severity of the wound as described by the medical examiner and the deceased's father, coupled with the victim's

repeated statement that he was scared, we cannot conclude that the trial court abused its discretion in admitting this testimony.

The trial court refused to allow appellant to testify about a prior altercation between one of the Davis brothers and George Crumb. Appellant proffered testimony that he was told, by Crumb, of a fight between Crumb and one of the Davis twins in which Crumb had been injured. Appellant also proffered the testimony of George Crumb. Crumb testified that on an afternoon some three months prior to the homicide, he was at the Holiday Plaza parking lot when some difficulty arose between him and "one of the Davis twins." They did not exchange any blows because someone reported that the police were coming. Before they left, one of the Davis twins issued Crumb an invitation to go to the Girls' Club and settle it. Crumb and the twins went to the Girls' Club where there was a fight. Crumb fought with and was slightly injured by one of the Davis twins, although neither Crumb nor appellant was sure which one.

■ ■ The State argues that this evidence was inadmissible because it did not identify which of the Davis twins had been involved and that it was a fight by invitation, which Crumb regrets having accepted. Appellant argues that the proffered evidence was relevant to his defense of justification. He correctly points out that the defense of justification is conditioned on a reasonable belief on the part of the actor that unlawful physical force is about to be inflicted on him. He relies on the well-established rule that evidence of specific acts of violence that were directed at a defendant or were within his knowledge is admissible under Ark. R. Evid. 405(b) as being probative of what the defendant reasonably believed at the time and thus relevant to his plea of justification. *Halfacre v. State*, 277 Ark. 168, 639 S.W.2d 734 (1983); *Britt v. State*, 7 Ark. App. 156, 645 S.W.2d 699 (1983). We find no error in the trial court's ruling.

Appellant testified in his own behalf that he had been struck in the face but did not know who hit him. He stated, "They just started fighting and then I got hit. I did not see it coming." He stated that when he was hit a second time he reached into his pocket, pulled out his knife, and opened it, and he then stuck the knife in the person standing over him. At that time, appellant was totally unaware of who had hit him. He was asked if he intended

to kill the deceased, and answered:

No, sir, I didn't. All I did was try to get *somebody* off of me. *I didn't even know it was Bruce Davis I stabbed or if it was Mark Sutter or who until I got to the police station. I didn't know who had hit me or who I stabbed or what.* [Emphasis added.]

Appellant's knowledge of the alleged prior instance of violence was not appellant's stated reason for his fear for his own safety at the time he struck the fatal blow. In order for prior specific acts of violence to be relevant to the issue of what the actor reasonably believed, he must not only be aware of those prior violent acts, but also be aware that his present assailant is the person who committed them. Absent any knowledge of the identity of his assailant, the proffered evidence was not relevant to the issue of his reasonable belief.

Affirmed.

COOPER and MAYFIELD, JJ., agree.

Gary SHAVER v. STATE of Arkansas
CA CR 90-346 826 S.W.2d 300
Court of Appeals of Arkansas
En Banc
Opinion delivered March 11, 1992

Q Not any one of these years?

A Never.

This cross-examination followed:

Q Was '86 the first year you began growing marijuana?

A (No audible response.)

Q I asked you a question.

A That's a trick answer.

Q Is that the first year you began growing marijuana?

A I have never grown marijuana.

Q As a matter of fact, in the year 1986 someone stole your marijuana; is that correct?

A No.

Q You went around accusing everyone of it, didn't you?

A No, sir. I didn't.

Q You know you, you were ready to repeat the sheriff's alleged profanity to the jury yesterday. You don't ever use profanity; do you?

A Once in a while.

Q Ever now and then?

A Yeah.

Q When you get riled up?

A Yeah.

Q Sometimes you even get violent; isn't that correct?

A No. Not really.

Q Ever now and then, don't you?

A I have been before, yeah.

Q As a matter of fact, you have gotten riled up and you used profanity and even got violent looking for marijuana at times; isn't that correct?

A No.

MR. DAVIS: Objection, Your Honor.

THE COURT: What grounds?

MR. DAVIS: This wasn't covered on direct and it's not a proper cross-examination point, Your Honor.

The court overruled the objection and the State then asked Mr. Shaver if he had not had a confrontation with a Mr. Whitely in September, 1986, in which he accused Whitely of stealing his marijuana and struck him. The State also asked if he had not accused one John Holt in September of 1986 of taking his marijuana. Shaver denied that either incident occurred. Subsequently, on rebuttal, the State called both Whitely and Holt who testified, without objection, that the incidents did occur.

The arguments on appeal are that the State's cross-examination was outside the scope of cross, that the cross-examination violated Rule 608(b), and that the calling of the rebuttal witnesses violated Rule 608(b).

The objection made adequately raises the first issue argued on appeal: whether the question was outside the scope of cross-examination. However, an objection must be timely made. Ark. R. Evid. 103(a)(1); *Gustafson v. State*, 267 Ark. 830, 593 S.W.2d 187 (1979). Testimony that is merely cumulative cannot constitute reversible error. *See Snell v. State*, 290 Ark. 503, 721 S.W.2d 628 (1986), cert. denied, 484 U.S. 872 (1987).

■■ Assuming for the sake of argument that the objection was timely enough, we find no error in the court's ruling that the question was within the scope of cross-examination. The cross-examiner is given wide latitude, particularly in matters relating to the witness's credibility. *Gustafson v. State*, 267 Ark. 830, 593 S.W.2d 187 (1979). The trial judge has considerable discretion in determining the scope of cross-examination. *Bennett v. State*, 308 Ark. 393, 825 S.W.2d 550 (1992); *Wilson v. State*, 289 Ark. 141, 712 S.W.2d 654 (1986). Here, the question was logically related to matters raised on direct by the defendant himself, i.e., his assertion that he had never grown marijuana on his farm. We find no error in the court's ruling.

Appellant also argues that the State's cross-examination

violated Ark. R. Evid. 608(b). That rule provides, in pertinent part:

Specific instances of the conduct of a witness, for the purpose of attacking or supporting his credibility, other than conviction of crime as provided in Rule 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning his character for truthfulness or untruthfulness, or (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified.

The threshold question is whether the objection made raises the 608(b) issue. In our view it does not — the objection relates only to the issue of the proper scope of cross-examination.

■ ■ Even had the objection been sufficient to raise the 608(b) issue, no error was committed. Here, the cross-examination related to alleged statements made by the defendant which would contradict his direct testimony. This is impeachment by contradiction. See *Garst v. Cullum*, 291 Ark. 512, 726 S.W.2d 271 (1987); *McDaniel v. State*, 291 Ark. 596, 726 S.W.2d 679 (1987); *McFadden v. State*, 290 Ark. 177, 717 S.W.2d 812 (1986); *Hill v. State*, 33 Ark. App. 135, 803 S.W.2d 935 (1991); *Spicer v. State*, 2 Ark. App. 325, 621 S.W.2d 235 (1981). See also Edward J. Imwinkelried, *Uncharged Misconduct Evidence* § 6:16 (1984); Frederick C. Moss, *The Sweeping-Claims Exception in the Federal Rules of Evidence*, 1982 Duke L. J. 61. The procedure is so well established that, as the court in *Garst* noted, there is no express provision for it in the Uniform Rules of Evidence, although it is implicitly authorized by Ark. R. Evid. 613. Rule 608(b) has no application to the issue of impeachment by contradiction. *McFadden v. State*, 290 Ark. 177, 717 S.W.2d 812 (1986); *Hill v. State*, 33 Ark. App. 135, 803 S.W.2d 935 (1991); W. Dent Gitchell, *Charting a Course Through Character Evidence*, 41 Ark. L. Rev. 585 (1988); Imwinkelried, *supra*. We think that the better view is that Rule 403, which permits the court to exclude relevant evidence if its probative value is substantially out-weighted by the danger of unfair prejudice, is applicable. See, e.g., *United States v. Benedetto*, 571 F.2d 1246

[REDACTED]

(2nd Cir. 1978); *United States v. Green*, 648 F.2d 587 (9th Cir. 1981); Moss, *supra* at 95; Gitchell, *supra* at 635. However, the Rule 403 issue must be specifically brought to the attention of the trial court. *Walker v. State*, 301 Ark. 218, 783 S.W.2d 44 (1990).

■ Appellant also contends that it was error to permit Whitely and Holt to testify on rebuttal. The argument, again, is that this violated Ark. R. Evid. 608(b). Because no objection whatever was made to the testimony of the rebuttal witnesses, the issue is not preserved for appeal. Ark. R. Evid. 103(a)(1).

For the reasons stated, the judgment of the circuit court is affirmed.

Affirmed.

MAYFIELD, J., dissents.

ROGERS, J., not participating.

MELVIN MAYFIELD, Judge, dissenting ■ I cannot agree with the majority decision in this case. My disagreement is not so much with rules of law referred to by the majority as it is with the application of that law to the facts.

The majority quotes the objection made to a question asked by the state on cross-examination of the appellant but fails to quote the reason given by the state to support its right to pursue the line of questions upon which the state was about to embark.

On direct examination, the appellant had testified that on two occasions he had found marijuana growing on his land; that he reported this to law enforcement officers; and that he did not plant or grow this marijuana — or any other marijuana on his land. On cross-examination, the appellant was asked:

As a matter of fact, you have gotten riled up and you used profanity and even got violent looking for marijuana at times; isn't that correct.

Counsel for appellant objected to this question and in response to the court's inquiry of the grounds upon which the objection was based, counsel stated:

This wasn't covered on direct and it's not a proper cross-examination point, Your Honor.

[REDACTED]

The court then asked the prosecuting attorney to “show me the relevance.” The prosecutor then replied:

Yes, Your Honor, I intend to tie this line of testimony — questioning — directly to Bobby Whitely and other individuals. I will establish that this individual has confronted folks in the year 1986 accusing them of stealing his marijuana and in fact got violent with them, including Mr. Whitely.

To this statement the trial judge replied:

I will overrule your objection and I will admonish the jury once again that the statements from counsel are not evidence and you should take into account the evidence that’s brought to you from the witness stand and the exhibits.

The prosecutor then went directly to questions in which he asked the appellant if he had a confrontation with Mr. Whitely in September of 1986; if he did not strike Mr. Whitely at that time; and if he did not accuse him of having stolen appellant’s marijuana. The same kind of questions were asked with regard to James Allen and John Eddie Holt.

Appellant denied that these events occurred; however, after the appellant rested his case, the state then called Whitely and Holt to the stand on rebuttal, and each of them testified that the appellant had accused them of stealing his marijuana and went into great detail concerning alleged threats and acts of violence committed against them by the appellant. James Allen described how the appellant simply walked up and hit him without any exchange of words. Allen said he was a friend of Whitely. Apparently, this was the only reason for appellant’s alleged attack on Allen.

It should be noted that the alleged threats and attacks took place *before* the marijuana, which the appellant was charged with growing, was discovered. The appellant argues that the “obvious purpose” of the state was to portray the appellant “as a mean, violent man who grew marijuana in the past — and, therefore, he must have been the grower and caretaker of the marijuana found on his property at the time of his arrest.” While the appellant denies that these alleged prior bad acts occurred, it

is also argued that even if they did, they had no place in the trial of this case; that appellant "was not charged with battery, or terroristic threatening," and this case should be reversed and appellant tried on the violation for which he was charged.

I agree that appellant did not have a fair trial. The problem started when the trial court overruled the appellant's objection that the question asked was not covered on direct examination and was not proper cross-examination. Ark. R. Evid. 611(b) provides that "cross-examination should be limited to the subject matter of the direct examination and matters affecting the credibility of the witness." Appellant did not object to the questions asked on cross-examination as to whether someone had stolen appellant's marijuana in 1986, or whether appellant had gone around "accusing everyone of it." The question to which appellant objected asked:

As a matter of fact, you have gotten riled up and used profanity and even got violent looking for marijuana at times; isn't that correct.

This was not the subject matter of anything testified to on direct examination. Appellant did testify that he had never grown marijuana, and he did not object to cross-examination on that point. But the question about being riled up, using profanity, and committing acts of violence while looking for his marijuana was outside the scope of his direct testimony.

In addition, the question objected to was not a "proper cross-examination point." Ark. R. Evid. 608(b) provides that "specific instances of the conduct of a witness, for the purpose of attacking or supporting his credibility, other than conviction of crime as provided in Rule 609, may not be proved by extrinsic evidence." But in regard to cross-examination, Rule 608(b) provides as to "specific instances of the conduct of a witness" that:

They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning his character for truthfulness or untruthfulness, or (2) concerning the character for truthfulness or untruthfulness of another witness as to whose character the witness being cross-examined has testified.

As to Rule 608(b), the Arkansas Court of Appeals said in *Urquhart v. State*, 30 Ark. App. 63, 782 S.W.2d 591 (1990):

In interpreting this rule, the supreme court has adopted a three-fold test for admissibility: (1) the question must be asked in good faith; (2) the probative value must outweigh its prejudicial effect; and (3) the prior conduct must relate to the witness's truthfulness. *Mackey v. State*, 279 Ark. 307, 651 S.W.2d 82 (1983). The latter prong of the test has been taken to mean a lack of veracity rather than dishonesty in general. *McKinnon v. State*, 287 Ark. 1, 695 S.W.2d 826 (1985); *Rhodes v. State*, 276 Ark. 203, 634 S.W.2d 107 (1982).

30 Ark. App. at 66. Carrying a pistol into a courtroom is not probative of whether the witness is truthful or not. *Richmond v. State*, 302 Ark. 498, 505, 791 S.W.2d 691 (1990). Embezzlement is not probative of untruthfulness and therefore cannot be inquired about on cross-examination under Rule 608(b). *Stiz v. State*, 23 Ark. App. 126, 743 S.W.2d 18 (1988). And I do not think that whether appellant was riled up, used profanity, or committed acts of violence is probative of whether he is truthful or not. Thus, under Rule 608(b), it was error to overrule the objection to the question asked on cross-examination of appellant.

Although the question asked on cross-examination violated the cross-examination provisions contained in both Rule 611(b) and Rule 608(b), the majority opinion in this case holds the question was proper under what is called "impeachment by contradiction." One case cited for that proposition is *Spicer v. State*, 2 Ark. App. 325, 621 S.W.2d 235 (1981). There, the appellant testified on direct that he had never been previously involved in a drug transaction, and we held it was not error to ask on cross as to whether he had been guilty of such a crime on a certain date. We cited *Montague v. State*, 219 Ark. 385, 390, 242 S.W.2d 697 (1951), for authority and quoted the following language from that opinion:

Counsel for the State had a right to question appellant on cross-examination as to prior arrests, in the circumstances, in an effort to show that he had not truthfully answered the above questions propounded by his own counsel on direct

examination.

We said in *Spicer* that although *Montaque* was decided prior to the Uniform Rules of Evidence, the same result was reached in federal courts which have the same evidence rule as our Rule 608(b). However, we also pointed out that a limitation on the right to cross-examine about a matter brought out by direct is found in evidence Rule 403 which allows the court to exclude evidence if its probative value is, among other factors, substantially outweighed by the danger of unfair prejudice or the misleading of the jury. 2 Ark. App. at 331-32. Moreover, we said the court "may also require a good faith showing on the part of counsel" as suggested in *Gustafson v. State*, 267 Ark. 278, 590 S.W.2d 853 (1979), and *Harper v. State*, 1 Ark. App. 190, 614 S.W.2d 237 (1981).

The majority opinion cites *McFadden v. State*, 290 Ark. 177, 717 S.W.2d 812 (1986), as authority. I have no problem with that case or other cases like it. It relies on Arkansas cases which hold that a party, by giving direct evidence of good character, opens the door to rebuttal evidence showing bad character. It cites authority which refers to this as "fighting fire with fire," and cites a United States Supreme Court case, *Walder v. United States*, 347 U.S. 62 (1954), as an example of the application of that rule.

However, *McFadden* as did *Spicer v. State, supra*, notes a limitation on the use of evidence of other crimes to "fight fire with fire." The case of *Price v. State*, 268 Ark. 535, 597 S.W.2d 598 (1990), is cited for this limitation. That case held that "it is mandatory" for the trial judge to also review the objections to such evidence under the evidentiary standards prescribed by Rule 403. That rule provides that 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 consideration of undue delay, waste of time, or needless presentation of cumulative evidence.

So, in the instant case, my view is that the trial court should have sustained the objection made by appellant to the cross-examination question set out in this and the majority opinion. Evidence that the appellant had claimed to own the marijuana previously growing on his land would clearly be admissible, under

the theory advanced in the majority opinion and also under Ark. R. Evid. 404(b) (as proof of intent, plan, or knowledge). But the ruling made by the court allowed evidence of bad acts and violations of the law to also come in. Once the questions were allowed on cross-examination "the fat was in the fire" and the matter was out of control. Appellant did not have to object to the rebuttal evidence after the ruling made on the objection to the question on cross-examination. *See* E. Cleary, *McCormick on Evidence*, § 52 at 132 (3rd ed. 1984) (most courts hold that one is entitled to assume the judge will continue to make the same ruling and the objection need not be repeated). Indeed, it is probable that it would have hurt appellant's cause in the minds of the jury to have objected again.

Had the court sustained the objection to the cross-examination question, the evidence of bad acts and unlawful conduct could not have been revealed to the jury until the evidence was offered on rebuttal. At that time appellant would have been required to object to each question he thought improper and the court could have controlled the matter.

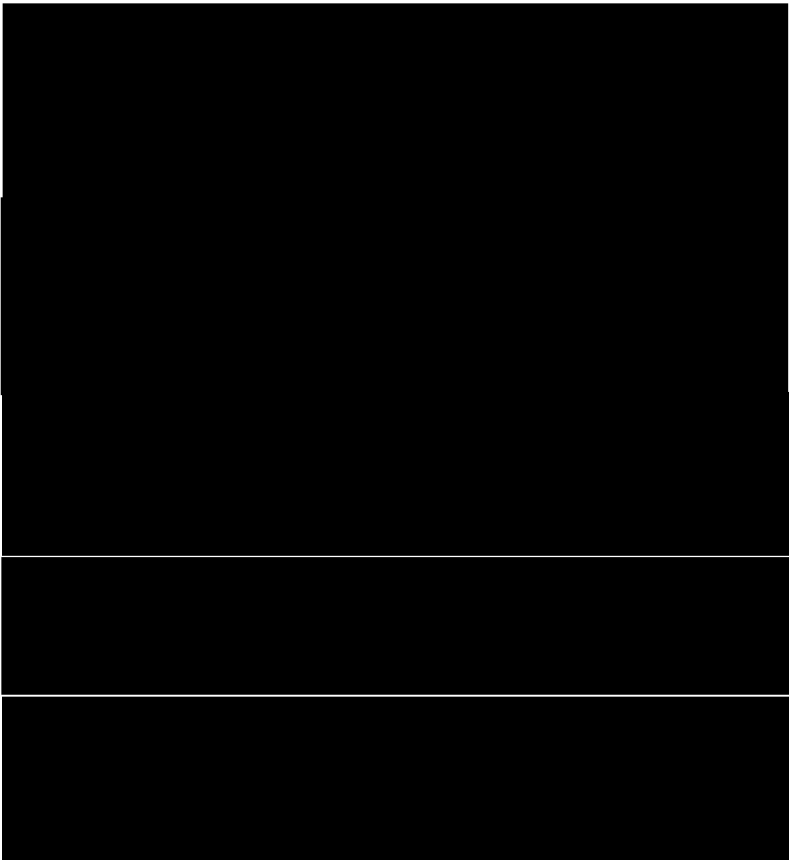
I would reverse and remand so that appellant can be tried on the violations charged and not on the uncharged bad conduct with which most of the evidence in this case was concerned.

Bronston GREGORY v. STATE of Arkansas

CA CR 91-18

825 S.W.2d 269

Court of Appeals of Arkansas
Division I
Opinion delivered March 11, 1992



William R. Simpson, Jr., Public Defender, *Llewellyn J. Marczuk*, Deputy Public Defender, by: *Didi Sallings*, Deputy Public Defender, for appellant.

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

ELIZABETH W. DANIELSON, Judge. Appellant was convicted in a bench trial of delivery of a controlled substance, crack cocaine, and fleeing. He contends that there is no substantial evidence to support the delivery conviction because the state failed to prove that he sold a useable amount of cocaine. We affirm.

A narcotics detective with the Little Rock Police Department testified that on May 22, 1990, she gave appellant forty dollars for two white rock substances appellant presented as cocaine. The detective further testified that on June 5, 1990, she made two separate purchases from appellant, both times purchasing a white rock substance she was told to be cocaine.

Nick Dawson, a drug chemist with the Arkansas State Crime Laboratory, testified that the evidence obtained from the detective's May 22 purchase tested positive for cocaine. He stated that the two rocks were a measurable amount, weighing 159 miligrams, and that based on his training and experience as a chemist, he believed the cocaine was a useable amount. Gene Bangs, another chemist with the state crime lab, testified that he examined evidence obtained from the detective's June 5, 1990, purchases and found that each rock-like substance tested positive for cocaine base, each was a measurable amount, the first weighing 83 milligrams and the second 68 milligrams, and that based on his training and experience, he believed each was a useable amount. In response to a question during cross-examination, Bangs stated that since he is not a pharmacologist, he could not testify as to the effect that amount of cocaine would have on the human body.

When the sufficiency of the evidence is challenged on appeal, we review the evidence in the light most favorable to the appellee, and affirm if there is any substantial evidence to support the verdict. *Brown v. State*, 35 Ark. App. 156, 814 S.W.2d 918 (1991). Substantial evidence is evidence that is of sufficient force and character that it will, with reasonable and material certainty and precision, compel a conclusion one way or the other, forcing or inducing the mind to pass beyond a suspicion or conjecture. *Taylor v. State*, 304 Ark. 174, 801 S.W.2d 267 (1990).

Appellant contends that *Harbison v. State*, 302 Ark. 315, 790 S.W.2d 146 (1990), requires that the state prove in all drug cases that the amount of the controlled substance seized is a useable amount. Appellant further contends that since the chemists are not pharmacologists they were not qualified to give an opinion as to whether or not there was a useable amount, and thus it was error for the trial court to allow their testimony on this issue.

Contrary to appellant's position, *Harbison* does not require that the state prove that a useable amount of a controlled substance was delivered in order to sustain a conviction for delivery. Useable amount is a factor to be considered where the accused is charged with possession of a controlled substance. See *Harbison*, 302 Ark. 315; *Conley v. State*, 308 Ark. 70, 821 S.W.2d 783 (1992). Since the case at bar deals with delivery of a controlled substance, it was not necessary for the state to prove that appellant sold the detective a useable amount. See *Hattison v. State*, 36 Ark. App. 128, 819 S.W.2d 298 (1991). Further, Ark. Code Ann. § 5-64-401(a)(1)(i) (Supp. 1991) provides that one who delivers a controlled substance which by aggregate weight, including adulterants or dilutents, is less than 28 grams is guilty of a felony and sets forth the applicable penalty. This statute strongly suggests that delivery of *any* amount of a controlled substance is criminal. This court has affirmed convictions where a lesser amount of cocaine than that at issue was seized. See *Terrell v. State*, 35 Ark. App. 185, 818 S.W.2d 579 (1991); *Buckley v. State*, 36 Ark. App. 7, 816 S.W.2d 894 (1991).

As to the chemists' testimony, whether a witness may give expert testimony rests largely with the sound discretion of the trial court and that decision will not be reversed absent an abuse of discretion. *Terrell*, 35 Ark. App. 185. If some reasonable basis exists from which it can be said the witness has knowledge of the subject beyond that of persons of ordinary knowledge, his testimony is admissible. *Id.* In *Terrell*, this court approved the testimony of a narcotics officer and a state crime laboratory chemist that 10 milligrams of crack cocaine was a useable amount. In the case before us, considering the two chemists' experience in the examination of controlled substances, it was not an abuse of discretion for the trial court to allow the chemists to testify as to whether there was a useable amount of crack cocaine.



Affirmed.

JENNINGS and ROGERS, JJ., agree.



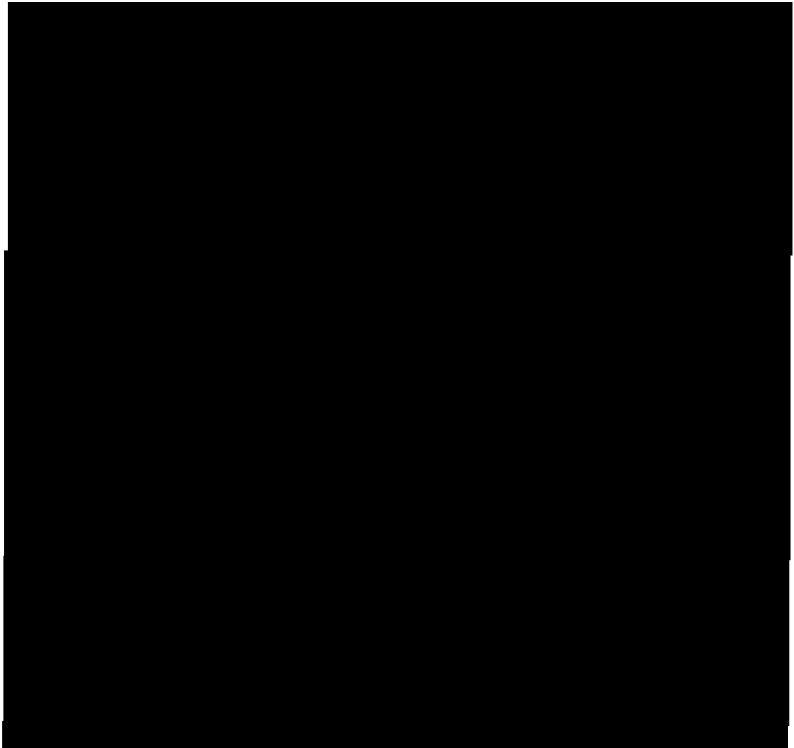
Bruce SLOAN v. VOLUNTARY AMBULANCE SERVICE,
Benton County, and Fred S. James & Co.

CA 91-123

826 S.W.2d 296

Court of Appeals of Arkansas
Division II

Opinion delivered March 11, 1992
[Rehearing denied April 8, 1992.]



[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

Jay N. Tolley, for appellant.

Stephen A. Geigle, for appellee Voluntary Ambulance Service.

Bassett Law Firm, by: *Curtis L. Nebben*, for appellee Benton County.

MELVIN MAYFIELD, Judge. This is an appeal from a decision of the Workers' Compensation Commission which held that appellant was not entitled to benefits under the Arkansas Workers' Compensation Act. We affirm.

In 1985 the Benton County Quorum Court established the Northeast Benton County Emergency Medical Service District (hereinafter EMSD) to provide emergency medical services to the residents of Benton County. Voluntary Ambulance Service (hereinafter VAS) was hired to provide the required medical services. Appellant, Bruce Sloan, worked as a volunteer emergency medical technician for VAS. It is undisputed that he had no regular hours and received no pay; his regular, full-time job was with the USDA inspecting meat.

On May 15, 1987, VAS held a fund-raiser at which its employees played the volunteer fire department employees in a volleyball match. During one of the games appellant received an injury to his ankle and was unable to return to work with the USDA until the following January. He filed this claim for workers' compensation benefits seeking medical expenses, temporary total disability, permanent partial disability and attorneys' fees. The claim was controverted in its entirety.

Although the administrative law judge held that appellant was an employee of VAS, he also held that VAS was a not-for-

profit corporation and was therefore exempt from liability under the workers' compensation law by the exception set out in Ark. Code Ann. § 11-9-102(3)(A)(iii) (1987), "Institutions maintained and operated wholly as public charities." He also held that both VAS and Benton County were exempt from the Workers' Compensation Act under Ark. Code Ann. §§ 21-13-101 — 21-13-111 (1987), "State and local government volunteers." He did not address appellant's claim that in the case of an uninsured subcontractor, the primary contractor, which appellant contended was Benton County, was liable. The full Commission affirmed and adopted the decision of the law judge.

On appeal appellant first argues that the Commission erred in finding that VAS was exempt from the mandates of the Arkansas Workers' Compensation Act under Ark. Code Ann. § 11-9-102(3)(A)(iii). That statute provides in pertinent part:

(3) "Employment" means:

(A) Every employment carried on in the state in which three (3) or more employees are regularly employed by the same employer in the course of business, except:

.....

(iii) Institutions maintained and operated wholly as public charities.

In affirming the decision of the law judge, the Commission relied upon the criteria set out in *Marion Hospital Ass'n v. Lanphier*, 15 Ark. App. 14, 688 S.W.2d 322 (1985), where we said:

In its decision holding that appellant was not within the exception to employment contained in Ark. Stat. Ann. § 81-1302(c)(1) [now Ark. Code Ann. § 11-9-102 (1987)], the Commission listed the following factors it believed should be followed in determining whether or not a particular hospital is an institution "maintained and operated wholly as" a public charity:

(1) Do the articles of incorporation provide that the purpose of the hospital is charitable in nature? "

- (2) Is the corporation maintained for the private gain, profit or advantage of its organizers, officers or owners either directly or indirectly?
- (3) Does the hospital have capital stock or does it have provisions for distributing dividends or making a profit?
- (4) Does the hospital derive its funds from public and private charity as well as those who are able to pay?
- (5) Do all 'profits' go toward maintaining the hospital and extending and enlarging its charity?
- (6) Is the hospital open to all who are not pecuniarily able?
- (7) Are those patients who are unable to pay received into the hospital without charge, without discrimination on account of race, creed or color and are they given the same care as those who are able to pay?
- (8) Is the hospital exempt from the payment of both state and federal taxes?

15 Ark. App. at 16.

Appellant concedes that the articles of incorporation of VAS state that it is a not-for-profit corporation, but contends that "the fact that an entity says it is 'charitable in nature' should be given little if no weight by a reviewing court." Appellant then argues that VAS fails to meet factor number four because it does not derive all its funds from public and private charity. On that point there was evidence that, pursuant to the ordinance which created the Northeast Benton County Emergency Medical Service District, VAS was partially funded by a \$15.00 assessment on the personal property of each household in the district, and a 10% penalty was assessed if any household failed to pay the EMSD fee when due. Appellant admits that VAS derives some of its funds from voluntary contributions and fund raising events. However, he contends that because of the \$15.00 fee charged each household in the county, which is *not* voluntary, VAS does not derive all

of its funds from public or private charity. Appellant also argues that VAS fails to meet factor number seven because those people who are unable to pay the \$15.00 assessment are penalized 10% and thus are clearly "not 'given the same care as those who are able to pay.'"

In reply, VAS points out that in the *Marion Hospital* case the court's primary reliance was upon such factors as the hospital's exemption from state and federal taxes and its operation so that none of the profits were distributed to the incorporators or officers but were funneled back into maintaining the hospital and enlarging its charity. VAS also points to the Commission's decision which stated:

VAS is a nonprofit corporation under the laws of Arkansas and is organized exclusively for charitable, religious, educational and scientific purposes. The articles of incorporation provide that in the event of dissolution, all property of VAS is to be distributed exclusively for charitable purposes to worthy nonprofit organizations. VAS derives its funds from donations, fund raising events, a \$15.00 assessment from each household within the emergency medical services district, and payments for services actually rendered. VAS is exempt from liability for state and federal taxes. All income or profit is used exclusively for the payment of costs, maintenance, and the enlargement of its charity. VAS provides its services to anyone within or without the emergency medical services district, regardless of race, creed, color or ability to pay. Based on these facts, we find that VAS is immune from liability for claimant's injury under Ark. Code Ann. § 11-9-102(3)(A)(iii).

■ ■ We do not think the fees paid to VAS by EMSD prevents, as a matter of law, VAS from being an institution maintained and operated "wholly" as a public charity under the *Marion Hospital* decision; and it is our conclusion that there is substantial evidence to support the facts found by the Commission and its decision that VAS was exempt from liability under the workers' compensation law because of the exception provided by Ark. Code Ann. § 11-9-102(3)(A)(iii) (1987).

Appellant's second argument is that he is entitled to compen-

sation from Benton County pursuant to the subcontractor-prime contractor statute, and his third argument is that the Commission erred in not considering this argument.

Ark. Code Ann. § 11-9-402(a) (1987) provides:

Where a subcontractor fails to secure compensation required by the chapter, the prime contractor shall be liable for compensation to the employees of the subcontractor.

Appellant claims Benton County is the prime contractor in this case because it created the Northeast Benton County Emergency Service District and assessed each household within the district \$15.00 a year and VAS is the subcontractor because it was hired by Benton County to provide the medical services. Appellant argues that if we find that appellee VAS falls within the confines of the public charity exemption, then Benton County and the Fred S. James & Company, Inc., its insurance carrier, should be liable as the prime contractor. He argues that to hold otherwise would be contrary to public policy. In support of this argument, appellant relies on *Hobbs-Western Co. v. Craig*, 209 Ark. 630, 192 S.W.2d 116 (1946), where the Arkansas Supreme Court held:

In *Schneider on Workmen's Compensation*, Permanent edition, Text Volume II, page 176, in commenting on the subcontractor provisions in the Workmen's Compensation Laws of the various states, this is stated:

“The apparent legislative purpose of constituting the principal contractor a statutory employer is to prevent evasion of the act; to protect the employees of subcontractors who are not financially responsible; to induce all employers to carry insurance; or to make the principal contractor a guarantor of the personal injury obligations of the subcontractor. . . .”

209 Ark. at 636. Appellant argues that because the law judge found that the employee-employer relationship existed between the appellant and appellee VAS and it cannot “be seriously disputed that appellant’s injury arose out of and in the course of that employment relationship,” it is then only necessary to show

that appellee Benton County was the prime contractor and appellee VAS was the subcontractor.

■ In the first place, we do not agree with appellant's assertion that it cannot "be seriously disputed that appellant's injury arose out of and in the course of that employment relationship." The appellant admitted he was an unpaid volunteer and had no regular hours during which he was on call to the VAS. He testified that before his injury he had been on only three calls, had been on none since, and that his presence at and participation in the volleyball game was purely voluntary. In his opinion, which was affirmed and adopted by the Commission, the administrative law judge stated:

[T]he claimant failed to prove by the greater weight of credible evidence that he was in the course of his employment at the time that he was injured and that his injuries arose out of his employment. Being present at and participating in a fund raising event is not the same as being required to be present and to participate in a fund raising event.

Since appellant did not appeal this finding of the Commission it could be regarded as dispositive of the case. However, on the merits of the prime contractor-subcontractor issue, we look to *Bailey v. Simmons*, 6 Ark. App. 193, 639 S.W.2d 526 (1982), where the court said:

The Supreme Court in *Hollingsworth & Rockwood Ins. v. Evans*, 255 Ark. 387, 500 S.W.2d 382 (1973) recognized the distinction between a subcontractor and an independent contractor:

There is, of course, a considerable difference between a subcontractor and an independent contractor. In *Black's Law Dictionary* a subcontractor is defined as:

"One who takes portion of a contract from principal contractor or another subcontractor. *** One who has entered into a contract, express or implied, for the performance of an act with the person who has already contracted for its performance."

In *Gaydos v. Packanack Wood Dev., Co.*, 166 A.2d 182, at page 184, the New Jersey Court defined a subcontractor in a workmen's compensation case as follows:

"A subcontractor is one who enters into a contract with a person for the performance of work which such person has already contracted to perform. In other words, subcontracting is merely 'farming out' to others all or part of work contracted to be performed by the original contractor."

6 Ark. App. at 196. The holding of *Bailey v. Simmons* affirmed a finding of the Commission that the appellees in that case were not contractually bound to any third person in connection with the work being done by appellants.

In the instant case, Benton County maintains that VAS was not a subcontractor because Benton County had no contractual obligation to provide ambulance service to its residents. It points to the ordinance as evidence that it was under no contractual obligation to furnish ambulance services to the residents of the district. The ordinance which established the emergency medical services district provides in part:

WHEREAS, Ark. Stat. § 82-3411 states that the Quorum Court of any county, upon petition of ten percent (10%) of the electors of the county or any designated area of the county, may, by ordinance establish a system to provide emergency medical services to the residents of Benton County.

.....

NOW THEREFORE, be it enacted by the Quorum Court of the County of Benton, State of Arkansas.

ARTICLE I. ESTABLISHMENT. There is hereby established pursuant to Ark. Stat. § 82-3410 — § 82-3420 an emergency medical service district known as Northeast Benton County Emergency Medical Service District.

.....

ARTICLE IX. REFERENDUM AND EFFECTIVE DATE. This Ordinance shall not be in effect until approved by a majority of the qualified voters in the EMSD at an election as set forth in Ark. Stat. § 17-4003, and Ark. Stat. § 17-4011.

■ ■ We think it is undisputed factually that the citizens of the northeast portion of Benton County *assessed* a tax against themselves in order to secure dependable emergency ambulance service, and the county only served as a conduit to collect the tax and turn it over to VAS on an as-needed basis. Therefore, we cannot agree with appellant's argument that the subcontractor-prime contractor statute is factually involved in this case. Thus, it was not necessary for the Commission to discuss that part of appellant's argument which was based on this statute.

Finally, appellant argues that the full Commission erred in finding that appellees are exempt from the requirements of the workers' compensation law pertaining to "State and Local Government Volunteers." However, we need not discuss this point because we have held that appellant is not entitled to compensation for other reasons which we have discussed.

Affirmed.

JENNINGS and ROGERS, JJ., agree.

Kevin SKIVER v. STATE of Arkansas

CA CR 91-148

826 S.W.2d 309

Court of Appeals of Arkansas
Division II

Opinion delivered March 18, 1992
[Rehearing denied April 8, 1992.]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

Christopher O'Hara Carter, for appellant.

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

GEORGE K. CRACRAFT, Chief Judge. Kevin Skiver appeals from his conviction at a jury trial of the crime of rape, for which he was sentenced as a habitual offender to a term of twenty years in

[REDACTED]

the Arkansas Department of Correction. He contends that the evidence is insufficient to support the conviction, that the trial judge erred in not recusing, and that the trial court erred in allowing the complaining witness to testify as to the effect the rape had upon her. We affirm.

On appellate review, this court views the evidence in the light most favorable to the State and will affirm the conviction if it is supported by substantial evidence. Evidence is substantial if it is of sufficient force and character to compel reasonable minds to reach a conclusion and pass beyond suspicion or conjecture. *Williams v. State*, 304 Ark. 509, 804 S.W.2d 346 (1991). In deciding this issue, we do not weigh that evidence favorable to the State against any conflicting evidence favorable to the accused. *Westbrook v. State*, 286 Ark. 192, 692 S.W.2d 123 (1985).

A person commits rape if he engages in sexual intercourse or deviate sexual activity with another person by forcible compulsion. Ark. Code Ann. § 5-14-103(a)(1) (1987). "Forcible compulsion" means physical force or a threat, express or implied, of death or physical injury to or kidnapping of any person. Ark. Code Ann. § 5-14-101(2) (1987). "Physical force" means any bodily impact, restraint, or confinement. *West v. State*, 290 Ark. 329, 719 S.W.2d 684 (1986).

The victim testified that appellant asked her to take him home from a friend's house. She testified that he gave her false information as to the route to take to his destination and caused her to drive down a dead-end road. He pulled the keys from the ignition and asked her to engage in sexual intercourse with him. When she refused, he grabbed her by the arms and attempted to pull her pants off. She stated that appellant was pulling large amounts of hair from her head, and that she was hitting and scratching him in an effort to free herself. She stated, "He did not use a weapon on me, only physical force, he pulled hair, and had my arm and squeezed my arm. Then I tried to fight him again and then I gave up and took a breath or two and then I fought again. I fought the whole time."

[REDACTED] Appellant does not contend that he did not engage in sexual intercourse with the victim, but argues that there was no proof of forcible compulsion. Our courts have noted that forcible compulsion includes physical force, which is defined as bodily

impact, restraint, or confinement. *West v. State, supra*. The victim testified that appellant restrained her and she had fought him throughout the entire period. The credibility of witnesses is for the jury to determine, and it is well established that a rape victim's testimony need not be corroborated and may constitute substantial evidence of the crime. *Jackson v. State*, 290 Ark. 375, 520 S.W.2d 282 (1986); *Lackey v. State*, 283 Ark. 150, 671 S.W.2d 757 (1984). From our review of the record, we cannot conclude that the jury's finding that appellant engaged in sexual intercourse with the victim by forcible compulsion is not supported by substantial evidence.

After the victim reported the rape, she was taken to the local hospital where attendants prepared a "rape kit." The rape kit consists of physical evidence taken from the victim's body and her clothing, as well as a written "Sexual Assault Medical Form" which includes medical history, examination information, and a statement from the victim describing the assault. The rape kit is prepared by a specific procedure, according to accompanying instructions. When completed, it is sealed and labeled.

Appellant argues that introduction of the rape kit was error because it amounted to an investigative report prepared by or for the government and offered by the government, and therefore did not fall under the public record exception to the hearsay rule. *See Ark. R. Evid. 803(1)(iv)*. We do not address this argument because it was not preserved for our review. At the time the evidence was admitted, there was some discussion between the court and counsel as to whether the rape kit had been admitted in a previous trial which had resulted in a hung jury and mistrial. After it was determined that it had been admitted at the first trial, defense counsel stated, "I made the same specific objection about the report. The rest of the items in the kit, *I have no problem with.*" (Emphasis added.) There was no objection at trial to the admission of the physical evidence contained in the kit, and the propriety of its admission will not be considered for the first time on appeal. The "Sexual Assault Medical Form" (the "report" referred to) was not admitted into evidence, and it need not be discussed.

Shortly after the victim reported the rape, appellant was taken into custody. At that time, he gave a voluntary, taped

statement to the officers. In his statement, he admitted that he had engaged in intercourse with the victim but insisted that it had been with her consent and at her invitation. Appellant made reference to the fact that he had had sexual relations with the victim on a number of occasions, at least one of which had been in her own home. He also stated that other men had been the recipients of her sexual favors and that at one time she "booted" her husband out and moved another man in the marital home with her. He also stated his refusal to take a polygraph test.

In a side-bar conference outside the hearing of the jury, it was mentioned that the tape of appellant's pretrial statement may have been played in the presence of the jury in the prior trial of the case. The court stated:

One of the things I will note here, you all may have had an agreement, and apparently there was an agreement in the previous case, but as far as the Court's concerned, my understanding of the rules of evidence is that a taped statement made by the defendant, upon objection, will not be admissible evidence. I don't know. It's a hearsay statement, patently hearsay, and I don't know that it falls into any exception of the hearsay rule.

Later in the trial, when the officer was called as a witness, he testified that appellant admitted to him that he had had sexual intercourse with the victim but stated that it had been by her consent. The court sustained the State's objection to appellant's request to play the entire tape for the jury. At that time, appellant admitted that the officer's testimony was not inconsistent with appellant's statement on the tape, but insisted that since part of that conversation had been introduced, he had a right to introduce the entire tape under Ark. R. Evid. 106. The trial court ruled that because of rules prohibiting introduction of evidence of a rape victim's sexual history and a defendant's refusal to take a polygraph test, those portions would be inadmissible. The court stated:

You have the interview and what the Court will allow you to do is is there a specific part of the interview, that you may ask him if the defendant said this, or the defendant said, that, based on the transcript. But the Court's not going to allow in the rankest of hearsay of matters there [sic] are no

way in the world are admissible under any other circumstances. Now, Mr. Webb, do you wish to make it clear through this witness?

On appeal, appellant does not argue that the recorded statement should have been admitted. Appellant contends that the trial judge, by indicating early in the trial, before any objection by the State, that he would not allow the taped statement to be played to the jury, lost his objectivity in the case and, therefore, had a duty to recuse himself as trial judge.

We find no merit in this contention. First, this issue was not raised in any way at trial. Under our well-settled rule, this court does not consider issues raised for the first time on appeal. *Kitchen v. State*, 271 Ark. 1, 607 S.W.2d 345 (1980). Secondly, while we may agree with appellant that it is improper for a trial judge to needlessly inject himself into the trial, the judge is not merely the chairman of a trial, who must remain mute until a party calls upon him for a ruling; instead he has some responsibility for the proper conduct of the trial and achievement of justice. *See id.*

■ ■ Although it is a safer practice for a court to defer action on admission of evidence until a proper objection is made by the party interested in having it excluded, the court is not bound to hear and determine the case on improper evidence. In the exercise of its discretion to control and regulate the conduct of the trial, the court may, on its own motion, exclude or strike evidence which is wholly incompetent or inadmissible for any purpose, even though no objection is made to such evidence. 88 C.J.S. *Trials*, § 156 (1955); *see also American Workmen v. Ledden*, 196 Ark. 902, 120 S.W.2d 346 (1938). It is the responsibility of the trial judge to maintain an appropriate balance in the performance of his role of impartiality, and a clear transgression of the proper bounds must be demonstrated before an appellate court is justified in reversing a judgment because the trial judge injected himself into the trial. *American Workmen v. Ledden, supra; Kitchen v. State, supra.* We find no such transgression here.

Rule 106 of the Arkansas Rules of Evidence is directed toward preventing a misleading impression that may be created by taking a statement out of context. The right to put in the remainder of a statement as part of the opponent's case is subject

to the general principles of relevancy. See 1 J. Weinstein, *Weinstein's Evidence* § 106[02] (1991). The rule is not designed to make something admissible that should be excluded. *Id.* Here, appellant did not offer the tape of his statement to dispel any misleading impressions created by the officer's testimony. He offered it solely for the purposes of amplifying his case.

During the examination of the victim, she was asked whether the attack had continued to have an effect on her. Over appellant's relevancy objection, the court permitted her to testify that she had had nightmares, that she was fearful of repetition of the violent act, and she was afraid to go out after dark.

■ Appellant contends that this testimony was not relevant to any issue. Relevant evidence means any 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. The admission of evidence as relevant under this rule is a matter within the discretion of the trial court and will not be reversed absent abuse. *Jones v. State*, 277 Ark. 339, 641 S.W.2d 717 (1982). Appellant testified that they had consensual sex. The victim testified that it was the result of long-continued and violent compulsion. Evidence of her fear and repulsion was at least relevant to that issue. See *Segerstrom v. State*, 301 Ark. 314, 783 S.W.2d 847 (1990); *Fountain v. State*, 273 Ark. 457, 620 S.W.2d 936 (1981). We cannot conclude that the trial court abused its discretion in this instance.

Appellant further argues that even if the evidence was relevant and admissible, the trial court erred in not holding that its probative value was substantially outweighed by its prejudicial effect. We do not address this argument as no such objection was made in the trial court. *Segerstrom v. State*, *supra*.

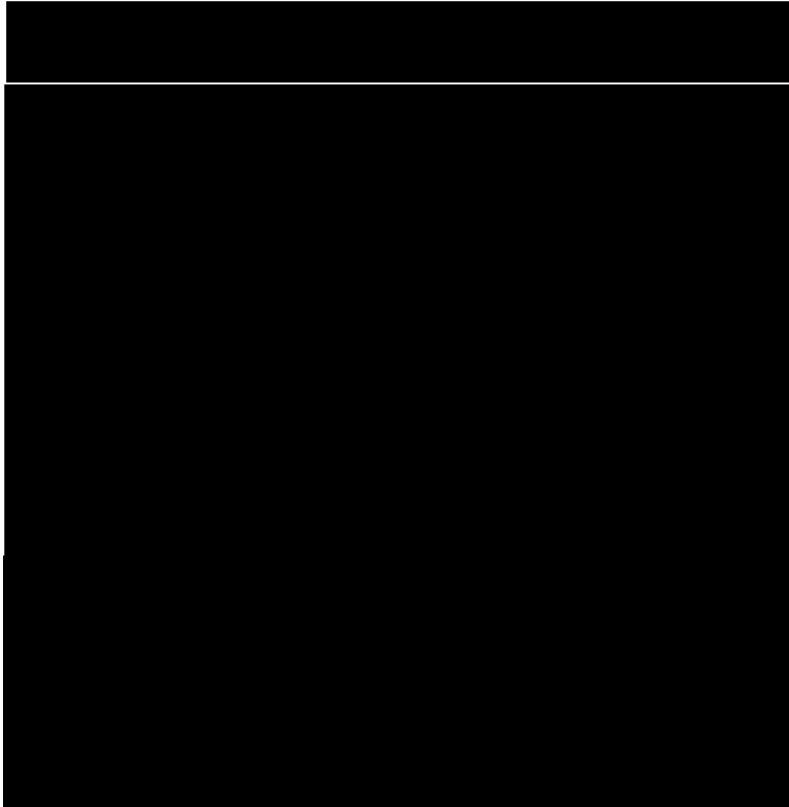
Affirmed.

COOPER and MAYFIELD, JJ., agree.

Robert STANDRIDGE v. STATE of Arkansas
CA CR 91-140 826 S.W.2d 303

Court of Appeals of Arkansas
En Banc

Opinion delivered March 18, 1992
[Rehearing denied April 29, 1992.*]



Parker, Settle & McMarty, by: *John W. Settle*, for appellant.
Winston Bryant, Att'y Gen., by: *Teena L. White*, Asst. Att'y

*Cooper and Mayfield, JJ., would grant rehearing.

Gen., for appellee.

ELIZABETH W. DANIELSON, Judge. The appellant, Robert Standridge, was convicted by a jury of manufacturing marijuana, sentenced to eight years in the Arkansas Department of Correction, and fined \$20,000. He contends that the trial court erred in allowing certain evidence to be admitted at trial and that there was insufficient evidence to support his conviction. We affirm.

On August 23, 1989, the Logan County Sheriff's Department conducted an aerial search as part of their drug eradication program and located a marijuana patch consisting of 93 marijuana plants eight to ten feet in height. The marijuana patch was located in a remote area of extremely heavy undergrowth along the Arkansas River, a quarter to a half mile west of the six mile recreation area northeast of Paris in the National Forest.

To reach the marijuana, the officers had to follow a path beneath the brush, sometimes crawling on their hands and knees. When the officers reached the area that had been cleared out for the marijuana, they saw a small tent located in the underbrush about six feet from the marijuana. Inside the tent they found a sleeping bag, an open package of three plastic drinking cups, two metal cups, and a paperback book. An ice chest was also found filled with fresh ice, beer, soft drinks, and lunch meat. An officer testified that whoever had been in the camp site had been there shortly before the officers arrived.

A fingerprint expert with the state crime lab compared a thumb print on one of the cups with the fingerprints of four individuals, one of whom was Standridge. The expert identified Standridge's thumb print on the cup and concluded that the thumbprint could not have belonged to anyone else.

Standridge first contends that the trial court erred by not granting his motion for directed verdict due to insufficient evidence. A motion for a directed verdict is a challenge to the sufficiency of the evidence and, on appellate review, we determine whether the verdict is supported by substantial evidence. *Prince v. State*, 304 Ark. 692, 805 S.W.2d 46 (1991). Whether direct or circumstantial, substantial evidence must be of sufficient force that it compels a conclusion with reasonable and material certainty. *Id.* It must force or induce the mind to pass beyond

mere suspicion or conjecture. *Smith v. State*, 34 Ark. App. 150, 806 S.W.2d 391 (1991). In deciding whether there is substantial evidence to support the verdict, the evidence is reviewed in the light most favorable to the appellee. *Prince*, 304 Ark. 692.

■ ■ The Arkansas Supreme Court has held that fingerprints can constitute evidence that is sufficient to sustain a conviction. *Howard v. State*, 286 Ark. 479, 695 S.W.2d 375 (1985); *Ebsen v. State*, 249 Ark. 477, 459 S.W.2d 548 (1970). In the case at bar, Standridge's fingerprint was found on a cup inside the tent located just a few feet away from a well-tended marijuana patch. The trial court found that since the marijuana was discovered in a very remote area that was extremely difficult to reach, it was reasonable to conclude that anyone who had been there was there for the specific purpose of growing marijuana. In ruling that there was enough evidence to link Standridge to the offense, the trial court stated that anyone appearing at the tent would have to know there was a patch of marijuana growing just a few feet from it, and it is unlikely a visit to the crime scene would be accidental, fortuitous, or coincidental. We find there is sufficient evidence to affirm the jury verdict.

Standridge next contends that it was error for the court to deny his motion to suppress. He alleges that the search of the tent and seizure of the cup from within violated his Fourth Amendment rights because the search was conducted without a warrant and none of the exceptions to the search warrant requirements are applicable in this case. Standridge did not make any claim of ownership or possession of the tent. Therefore, he failed to establish why he should have an expectation of privacy in the search of the tent. He had no standing to challenge the search as unconstitutional. *Fernandez v. State*, 303 Ark. 230, 795 S.W.2d 52 (1990).

■ The tent was located on federal land in a very remote, isolated area that was not designated for public camping or recreational use. A trespasser on federal land who is subject to immediate ejection has no standing to invoke the exclusionary rule of the Fourth Amendment for the suppression of incriminating evidence. See *U.S. v. Ruckman*, 806 F.2d 1471 (10th Cir. 1986). A trespasser who is wrongfully on the premises has no expectation of privacy that would justify a claim of a violation of

Fourth Amendment rights. *Id.* Given the facts of this case, Standridge did not have a reasonable expectation of privacy in the tent or the items seized, and accordingly cannot claim Fourth Amendment protection. See *Izzard v. State*, 10 Ark. App. 265, 663 S.W.2d 192 (1984).

Our standard of review on appeal of a trial court ruling on a motion to suppress is that this court will make an independent determination based on the totality of the circumstances as to whether evidence obtained by means of a warrantless search should be suppressed, and the trial court's finding will not be set aside unless it is clearly erroneous. *State v. Villines*, 304 Ark. 128, 801 S.W.2d 29 (1990). Additionally, the trial judge has discretion in deciding evidentiary issues and his decision will not be reversed on appeal unless he has abused his discretion. *Booth v. State*, 26 Ark. App. 115, 761 S.W.2d 607 (1989). From the facts stated and the cases listed above, we find no error in the trial court's denial of Standridge's motion to suppress.

Affirmed.

COOPER, JENNINGS, and MAYFIELD, JJ., dissent.

JAMES R. COOPER, Judge, dissenting. I dissent because I strongly disagree that the evidence is sufficient to support the appellant's conviction. The sole shred of evidence which could arguably connect the appellant to the marijuana field is one thumbprint on a plastic cup. The trial judge reasoned that, because the marijuana was in a remote area¹, it was unlikely that a person would be there accidentally, and that the tent was so close to the marijuana field that anyone at the tent site would have to know about the marijuana field. On this basis, the trial judge reasoned that there was sufficient evidence to link the appellant to the offense, and the majority has adopted this reasoning in affirming the appellant's conviction. I disagree because, in my view, this analysis assumes that the appellant's presence at the tent site has been established, an assumption that is unwarranted by the evidence.

¹ The marijuana patch was located one-quarter mile from a recreation area on the Arkansas River. I would not agree that this was a "remote" area although it may have been difficult to walk to it.

The appellant's fingerprint is circumstantial evidence of his presence at the tent site. Although circumstantial evidence may be sufficient to establish guilt, where circumstantial evidence alone is relied upon, the circumstances relied upon by the State must be so connected and cogent as to show guilt to a moral certainty, and must exclude every other reasonable hypothesis than the guilt of the accused. *Green v. State*, 269 Ark. 953, 601 S.W.2d 279 (Ark. App. 1980). In the case at bar, the State's fingerprint expert testified that, although several items from the tent site were tested and other fingerprints were obtained, he did not find the appellant's fingerprints on any item of evidence except the clear plastic cup. He also stated that he had no idea where or when the appellant touched the cup; he could have touched it at any point in time, anywhere in the world. Given that an entire package of clear plastic cups was seized at the tent site, and that there is considerable confusion in the record concerning precisely where the plastic cup bearing the appellant's fingerprint was found within the tent site, it seems completely plausible that the appellant's fingerprint could have been placed on the cup when the package of cups was being used elsewhere. There are several reasonable hypotheses that account for the appellant's fingerprint on the cup other than the appellant's presence at the tent site, none of which are excluded by the other evidence in this case. Further, not one witness testified that there was any other evidence showing that the appellant had been at the tent.

In *Holloway v. State*, 11 Ark. App. 69, 666 S.W.2d 410 (1984), the appellant was convicted of burglary committed by entering a residence. There was evidence that a kitchen window had been broken, that there was glass "everywhere" inside the kitchen, and that a television set was missing. Mr. Holloway's fingerprint was found on a piece of broken glass located outside the house and directly under the kitchen window. We reversed the appellant's conviction, reasoning that the evidence was insufficient to show that Mr. Holloway ever entered the house or touched the television set, and that such a finding could be arrived at on those facts only by resorting to supposition and conjecture. *Holloway*, 11 Ark. App. 70-72. Likewise, there is nothing in the case at bar to show that the appellant ever manufactured marijuana except for a single fingerprint, as was the case in *Holloway*, *supra*. Moreover, the piece of glass in *Holloway*,

supra, was much more directly related to the crime charged than is the plastic cup on which the appellant's fingerprint was found in the case at bar. I submit that the State has failed to produce substantial evidence to show that the appellant was ever at the tent site.

If the evidence placing the appellant at the tent site is weak, the evidence connecting him with the manufacture of marijuana is nonexistent. In *Pollard v. State*, 264 Ark. 753, 574 S.W.2d 656 (1978), the appellant was convicted of manufacturing marijuana on an island in the Mississippi River. An accomplice testified that Pollard was guilty of growing marijuana on the island. Besides the accomplice's testimony, there was evidence that four fields of marijuana were found on the island, that Pollard had been on the island frequently, that Pollard's three-wheeler was on the island, that three-wheeler tracks were seen at the edge of a field of marijuana, that Pollard had purchased blood meal in Memphis, and the accomplice testified that Pollard used the blood meal on the marijuana plants to ward off animals. Although there was more evidence showing Pollard's connection with marijuana in general, the Arkansas Supreme Court held that his conviction was not supported by substantial evidence and reversed. The Pollard Court's reasoning is particularly applicable to the case at bar:

Certainly, there is plenty of evidence that something may have been going on of a suspicious nature. However, when we apply the law to the facts in this case, we just ask the question, where is the evidence, aside from the accomplice's testimony, that Pollard planted or cultivated this marijuana on the island? It is simply not there. Therefore, we have no alternative but to reverse the judgment of the trial court.

Pollard v. State, 264 Ark. at 756.

I think it should be noted that there was a relative abundance of evidence, including eyewitness testimony, to place the appellant in *Pollard* on the Mississippi River island where the marijuana was being cultivated. In the case at bar, the only evidence placing the appellant at the tent site is a single fingerprint on the cup, which the State's expert testified could have been made anywhere. However, the point which should not

be overlooked in comparing *Pollard* to the case at bar is that, in *Pollard*, an accomplice testified that Mr. Pollard cultivated the marijuana; the issue was not whether the other evidence noted above was sufficient to sustain a conviction, but was instead whether that evidence was sufficient merely to connect Mr. Pollard with the offense so as to corroborate the accomplice's testimony. Given that our Supreme Court, in *Pollard, supra*, held that the relative abundance of circumstantial evidence in that case was insufficient even to corroborate the accomplice's testimony, how could the single fingerprint in the case at bar be sufficient to sustain a conviction for manufacturing marijuana?

Nor should it be thought that the *Pollard* case was an aberration. A similar result obtained in *Harris v. State*, 284 Ark. 247, 681 S.W.2d 334 (1984). The appellants in *Harris* were charged with manufacturing a controlled substance after police seized a van containing methamphetamine, as well as chemicals and equipment used in the manufacture of that drug. Evidence showed that an expired vehicle registration in the appellant's name was found in the van, which had been found in a self-storage rental unit. In addition, one or two fingerprints of Mr. Harris were found on two different articles in the van. The Supreme Court, quoting *Pollard, supra*, held that the evidence was insufficient to show that the appellants in *Harris* had been involved in the manufacturing process. The convictions were reversed and dismissed. *Harris v. State, supra*.

The total lack of proof that the appellant was involved in the manufacturing process is even more glaring in the case at bar. The State appears to argue that the fingerprint shows the appellant was at the tent, and that his location at the tent is sufficient to show that he was involved in manufacturing the marijuana. This, however, is not a sufficient basis for a conviction, because, it is not enough to show that the appellant merely knew about the marijuana. None of the items seized from the tent site were functionally connected with the manufacture of marijuana. Due process requires the prosecution to prove beyond a reasonable doubt every essential element of the crime charged. *Ward v. Lockhart*, 841 F.2d 844 (8th Cir. 1988). In the case at bar, there is not one scintilla of evidence connecting the appellant to the manufacturing of the marijuana. I would reverse and dismiss this

case and therefore I dissent.²

JENNINGS and MAYFIELD, JJ., join in this dissent.

Jessie JACKSON v. STATE of Arkansas

CR CR 91-154

826 S.W.2d 307

Court of Appeals of Arkansas
Division II

Opinion delivered March 18, 1992

William R. Simpson, Jr., Public Defender, by: *Thomas B. Devine III*, Deputy Public Defender, for appellant.

Winston Bryant, Att'y Gen., by: *Elizabeth A. Vines*, Asst. Att'y Gen., for appellee.

JUDITH ROGERS, Judge. The appellant, Jessie Jackson, was charged with aggravated robbery and theft of property. The trial judge, sitting as the finder of fact, found appellant guilty and sentenced him to a term of twenty years in the Department of Correction on each count, to run concurrently. For reversal, appellant argues that ownership of the property was not proven as alleged in the information, and therefore that the evidence was insufficient to support his conviction for theft of property. We disagree and affirm.

² Because of the way I would dispose of the case I have not discussed the suppression issue, but I do not disagree with the majority's disposition on that issue.

In reviewing the sufficiency of the evidence, we view the evidence in the light most favorable to the appellee, and affirm if there is substantial evidence to support the conviction. *Booker v. State*, 32 Ark. App. 94, 796 S.W.2d 854 (1990). Substantial evidence is evidence of sufficient force and character that it will compel a conclusion one way or the other without resort to speculation or conjecture. *Williams v. State*, 304 Ark. 509, 804 S.W.2d 346 (1991).

A person commits theft of property if he knowingly takes or exercises unauthorized control over the property of another person with the purpose of depriving the owner thereof. Ark. Code Ann. § 5-36-103 (Supp. 1991).

At trial, Michael Baggett testified that on April 19, 1990, he was in his van attempting to pull out of a parking lot onto the street when he saw appellant carrying a stereo box. Baggett and appellant engaged in conversation concerning the stereo, and Baggett indicated that he was not interested in going to appellant's apartment to look at a stereo which was for sale. Appellant opened the box he was carrying, pulled out a gun, and demanded Baggett's wallet. Baggett said that he showed appellant that he had some money, and that he gave him the \$310 which was visible because he did not want appellant to take the entire wallet, which contained an additional \$1,100. He testified that all of the money belonged to his employer, but that he was responsible for it.

Appellant cites *Fletcher v. State*, 97 Ark. 1, 132 S.W. 918 (1910), and argues that the evidence is insufficient to support his conviction for theft of property because it was not proven that Baggett was the owner of the property taken. In *Fletcher*, it was held that, in an indictment for larceny, an allegation of ownership must be proven as alleged. The information charging appellant with theft of property alleged that the property belonged to Baggett.

"Property of another person" is defined as "any property in which any person . . . has a possessory or proprietary interest." Ark. Code Ann. § 5-36-101(7) (Supp. 1991). It is wholly immaterial who owns the stolen property if, at the time it is taken, it is in the possession and under the control of another person who is alleged to be the owner; possession and control in such a case constitutes special ownership. *Hoover v. State*, 262 Ark. 856, 562

[REDACTED]

S.W.2d 55 (1978); *Harrell v. State*, 169 Ark. 1038, 278 S.W. 45 (1925). It has been held that a special ownership which entitles one to exclusive possession of and control over the property is sufficient to support an allegation of ownership. *Hoover v. State, supra*; *State v. Esmond*, 135 Ark. 168, 204 S.W. 210 (1918).

■ We think there is substantial evidence to support a finding that Michael Baggett had a possessory interest in the money taken by appellant, *See Phillips v. State*, 297 Ark. 368, 761 S.W.2d 933 (1988), and that his possession and control over the property constituted special ownership. Therefore, we must affirm.

Affirmed.

CRACRAFT, C.J., and JENNINGS, J., agree.

[REDACTED]

Charles KELLOGG v. STATE of Arkansas

CA CR 90-291

827 S.W.2d 166

Court of Appeals of Arkansas
Division II
Opinion delivered March 18, 1992

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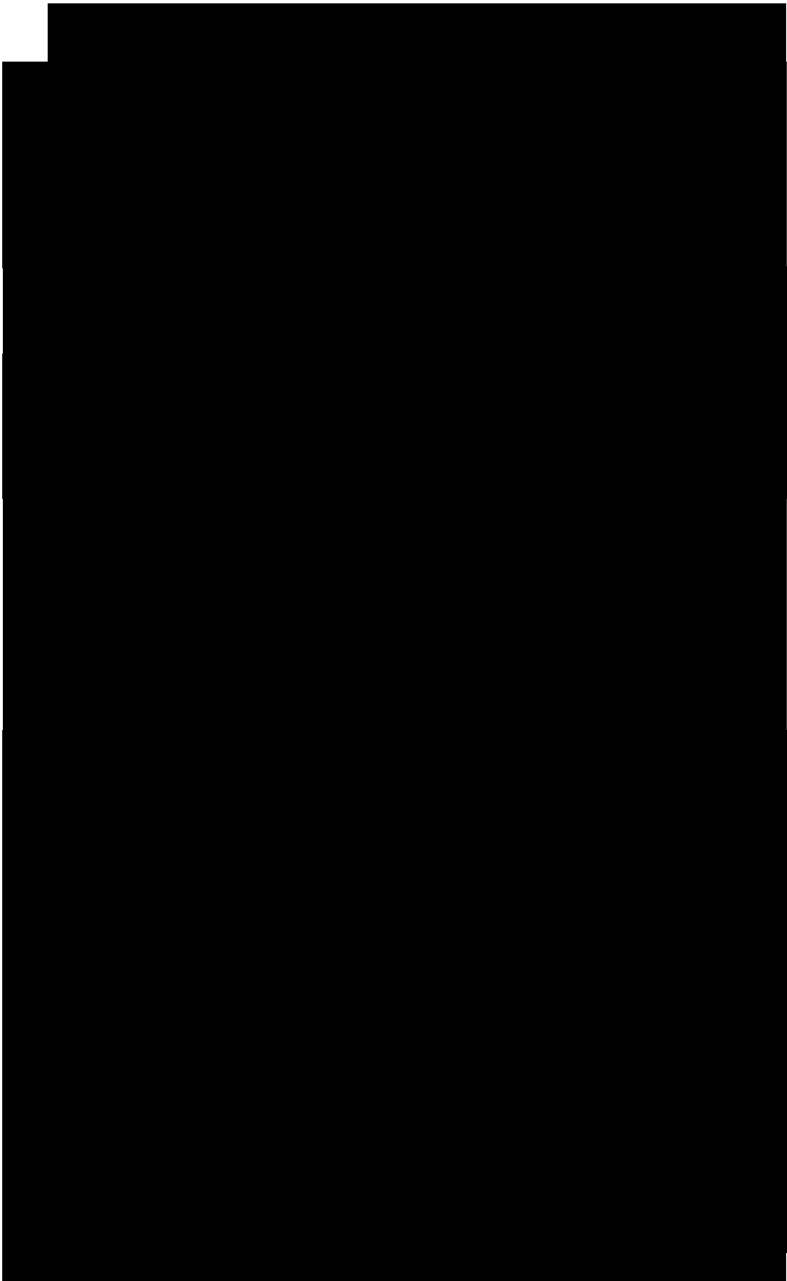
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The Strother Firm, P.A., by: *Judith C. Strother*, for appellant.

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

JUDITH ROGERS, Judge. The appellant, Charles Kellogg, was convicted in a jury trial of two counts of delivery of a controlled substance, marijuana, and one count of delivery of a controlled substance, cocaine. He was sentenced to terms of five years for each of the convictions involving the delivery of marijuana, and was sentenced to twenty years in prison for the delivery of cocaine; all sentences were ordered to be served consecutively. Appellant advances six issues for the reversal of his convictions. We find no reversible error, and accordingly we affirm.

As his third issue, appellant contends that the trial court erred in not dismissing the charge of delivery of cocaine because the prosecution failed to prove that a "useable amount" of cocaine was delivered. We must discuss this issue first, as when there is a challenge to the sufficiency of the evidence, the appellate court is required under the decision in *Harris v. State*, 284 Ark. 247, 681 S.W.2d 334 (1984), to review that point prior to considering other allegations of trial error. When the sufficiency of the evidence is at issue on appeal, we review the evidence in the light most favorable to the appellee, and affirm if there is any substantial evidence to support the verdict. *Brown v. State*, 35 Ark. App. 156, 814 S.W.2d 918 (1991). Substantial evidence is evidence that is of sufficient force and character that it will, with reasonable certainty, compel a conclusion one way or the other without resorting to speculation and conjecture. *Alford v. State*, 33 Ark. App. 179, 804 S.W.2d 370 (1991).

At trial, Troy Combs identified himself as a paid informant who had been working in cooperation with the Arkansas State Police and the Baxter County Sheriff's Department. He testified that appellant came to his apartment on January 9, 1990, and offered to arrange a sale of marijuana. Combs said that during this conversation appellant informed him that there was also a gram of cocaine for sale. Mr. Combs pretended that he might have a friend who would be interested in buying the cocaine as well as the marijuana, and Combs privately alerted the Baxter County Sheriff's Department from a telephone upstairs. After this phone call, Combs told appellant that he had to leave to go get the money from his friend. Combs then went to the sheriff's office where he was given money and was equipped with a body microphone. While there, Combs telephoned appellant at

Combs' apartment and they discussed that a half-ounce of marijuana would cost \$90 and that the gram of cocaine would cost \$120. Combs returned to his apartment and gave appellant \$210. Appellant left and returned about an hour later with the marijuana and cocaine.

Combs further testified that during this exchange appellant told him that more marijuana would be available in several days, and that it would cost only \$35 for a quarter of an ounce. Combs related that appellant came to his apartment on January 12, 1990, and that a deal was arranged whereby he would purchase an ounce of marijuana from appellant for \$140. As with the first transaction, the sheriff's department furnished the buy money and Combs was again fitted with a microphone. Appellant came to Combs' apartment and received the money, and appellant left and returned sometime later with the marijuana.

In support of his argument that the evidence is insufficient to sustain the conviction for the delivery of cocaine, appellant relies on the testimony of Nick Dawson, a chemist with the state crime lab. He testified that the purported gram of cocaine submitted to him for analysis actually weighed .583 grams, and that it tested positive for cocaine and lidocaine. He described lidocaine as a non-controlled substance, and said that it is commonly used by persons selling cocaine as a cutting agent to lessen the purity of cocaine so as to increase the seller's profit. On cross-examination, Dawson stated that he did not analyze the sample to determine the respective percentages of cocaine and lidocaine. He said, however, that it would require at least ten milligrams of cocaine to test positive in each of the three screening tests he performed, and a lesser amount for the mass spectrometry and thin layer chromatography tests he also conducted. On the basis of this testimony, appellant contends that the prosecution failed to prove that a useable amount was delivered. He cites *Harbison v. State*, 302 Ark. 315, 790 S.W.2d 146 (1990), as authority for his position.

■ In *Harbison v. State, supra*, our supreme court held that possession of a controlled substance must be of a measurable or useable amount to constitute a violation of Ark. Code Ann. § 5-64-401. The court reasoned that legislation criminalizing the possession of controlled substances was aimed at preventing use

and trafficking of prohibited substances, and then concluded that the possession of a trace or less than useable amount does not contribute to either of those purposes. Unlike *Harbison*, however, this is a case involving the delivery of a controlled substance, which is defined as "the actual, constructive, or attempted transfer from one (1) person to another of a controlled substance or counterfeit substance in exchange for money or anything of value, whether or not there is an agency relationship." Ark. Code Ann. § 5-64-101(f) (1987). We have held that the useable amount standard announced in *Harbison* has no application to cases of delivery. *Gregory v. State*, 37 Ark. App. 135, 825 S.W.2d 269 (1992).

In *Harbison*, the court was influenced by decisions from other jurisdictions. One of those decisions was *State v. Moreno*, 92 Ariz. 116, 374 P.2d 872 (1962), where the Arizona court held that a useable amount of a controlled substance must be found in order to constitute the offense of possession. In a subsequent case, however, the Arizona Supreme Court rejected the argument that the state must prove that a useable amount was sold in a conviction for the sale of a narcotic drug. The court said:

Appellant's position is without merit. The charge of possession of a narcotic drug, as in other crimes, requires a union of act and intent. As a matter of law the intent necessary to establish the crime of possession is not present when the amount is so minute as to be incapable of being applied to any use, even though it might be identified as narcotics by chemical analysis. But where the crime charged is the sale of a narcotic drug, the required intent is established by the transfer of any amount when accompanying circumstances indicate an intent to sell.

State v. Ballesteros, 100 Ariz. 262, 413 P.2d 739 (1966) (citation omitted). See also *State v. Cortez*, 101 Ariz. 214, 418 P.2d 370 (1966). Accord *Reyes v. State*, 480 S.W.2d 373 (Tex. Crim. App. 1972); *People v. Case*, 270 Cal. App. 2d, 76 Cal. Rptr. 111 (1969).

In *Harbison*, the court was concerned with the offense of possession and the lack of criminal culpability when the evidence reveals only infinitesimal amounts of a controlled substance. On the other hand, trafficking in illegal substances is one of the

condemned evils recognized by the supreme court in its decision. There was evidence here that appellant sold a quantity of cocaine in exchange for \$120. This constitutes substantial evidence to sustain appellant's conviction for the delivery of a controlled substance. Consistent with the holding and rationale of *Harbison*, it was not incumbent upon the state in these circumstances to produce evidence of a useable amount.

Appellant also argues that the trial court erred in failing to exercise discretion in ordering his sentences to be served consecutively. He bases this argument on a handwritten notation found on the judgment and commitment order which states, "sentence [sic] to run consecutively because these are separate jury verdicts indicating jury's desire for separate sentences, and [the] court deems it appropriate." Citing *Acklin v. State*, 270 Ark. 879, 606 S.W.2d 594 (1980), and our decision in *Wing v. State*, 14 Ark. App. 190, 686 S.W.2d 452 (1985), appellant argues that this notation indicates that the trial court did not exercise discretion in imposing consecutive sentences. We disagree.

■ ■ The decision as to whether multiple sentences are to be served concurrently or consecutively is left to the sound discretion of the trial judge and the exercise of that discretion will not be altered on appeal unless it is clearly shown to have been abused. *Patton v. State*, 281 Ark. 36, 660 S.W.2d 939 (1983). In *Acklin v. State*, *supra*, the supreme court found the exercise of that discretion to be lacking when the trial judge imposed consecutive sentences either because of his view that the defendant had asked for a jury trial without a defense, or because it was the trial judge's standard practice to order consecutive sentences. In *Wing v. State*, *supra*, we reversed and remanded for resentencing when the trial judge's comments indicated that he had imposed consecutive sentences based on his perception of the jury's intention and his declaration that he rarely deviated from the jury's wishes. In remanding that case, we noted the supreme court's statement in *Acklin* that the choice between concurrent and consecutive sentences lies with the trial judge, not the jury, and we said that the trial judge should make it clear that it is his or her discretion being exercised when entering sentences. We believe the trial judge made this clear in this case, as he specifically stated that he "deemed it appropriate" for appellant's sentences to be served consecutively. This is manifestly indicative

of an exercise of discretion, and does not reflect the application of an inflexible rule or rigid adherence to the perceived intention of the jury. We find no abuse of discretion in the trial court's decision.

Appellant next argues that it was error for the trial court to have allowed the admission of state exhibits four and six, which are tape recordings of the drug transactions. He also argues that the trial court erred in allowing the jury to review a transcription of exhibit six while listening to the tape. It is the appellant's contention that the tape recordings were not properly admissible because they were inaudible and unintelligible.

■ ■ We note at the outset that we are unable to address appellant's argument with regard to exhibit six because the tape has not been included in the record on appeal. It is the appellant's duty to bring up a record sufficient to demonstrate error. *Cox v. State*, 299 Ark. 312, 772 S.W.2d 336 (1989). The record also reveals that the transcript of exhibit six was not actually introduced into evidence and that appellant interposed no objection to the jury being provided with copies of the transcript while listening to the tape. We do not address issues which are raised for the first time on appeal. *Ellis v. State*, 36 Ark. App. 219, 821 S.W.2d 56 (1991).

■ ■ Exhibit four has been made a part of the record, and it is a tape recording of that portion of the January 9, 1990, transaction involving the exchange of contraband upon appellant's return to Mr. Combs' apartment. Appellant argues that the recording is of such poor quality as to be inadmissible. The general rule is that a recording such as the one at issue is admissible unless the inaudible portions are so substantial as to render the recording as a whole untrustworthy. *Hamm v. State*, 301 Ark. 154, 782 S.W.2d 577 (1990). The admissibility of tape recordings containing inaudible portions is a matter within the sound discretion of the trial court, and we will not reverse unless there has been an abuse of that discretion. *Walker v. State*, 13 Ark. App. 124, 680 S.W.2d 915 (1984). The tape at issue does admittedly contain portions that are inaudible or unintelligible due to background noise from children who were present and a television set that was playing at a high volume. However, the recording as a whole is not so incomprehensible as to make it

untrustworthy, and we find no abuse of discretion in the admission of the exhibit.

During appellant's cross-examination of Mr. Combs, appellant elicited responses from the witness that he had never sold drugs and that he had not used drugs since December of 1989. As his fourth issue, appellant contends that the trial court erred in excluding the testimony of three defense witnesses whom appellant desired to call for the purpose of contradicting these assertions made by Mr. Combs. The trial court disallowed this testimony as extrinsic evidence of conduct based on Rule 608(b) of the Arkansas Rules of Evidence. We uphold the trial court's exclusion of this evidence, although for a different reason.

It has been held that the Rules of Evidence, and in particular Rule 608(b), has no application to the issue of "impeachment by contradiction;" therefore, we must look to the common law to determine the propriety of the trial court's action. *See Garst v. Cullum*, 291 Ark. 512, 726 S.W.2d 271 (1987). We have recognized that when a witness testifies on direct examination that he has not committed collateral acts of misconduct, that testimony may be contradicted by extrinsic evidence. *Hill v. State*, 33 Ark. App. 135, 803 S.W.2d 935 (1991). *See also McFadden v. State*, 290 Ark. 177, 717 S.W.2d 812 (1986). However, it is well settled that, when a witness is cross-examined on a matter collateral to the issue being tried, his answer cannot be contradicted by the party putting the question. *Teas v. State*, 23 Ark. App. 154, 744 S.W.2d 739 (1988). Since the testimony appellant sought to refute was revealed on cross-examination, the trial court did not err in excluding extrinsic evidence of impeachment on this collateral matter. We affirm the court if it is correct even though the court states the wrong reason for its ruling. *Hicks v. State*, 28 Ark. App. 268, 773 S.W.2d 113 (1989).

As his fifth point, appellant contends that the trial court erred both in refusing to instruct the jury on the defense of entrapment and in allowing Mr. Combs to testify that he had used drugs with appellant in the past. Appellant argues that he was entitled to an instruction on entrapment based on evidence that Mr. Combs was unemployed and was being paid for his cooperation with the authorities. Appellant objected to the testimony of Mr. Combs regarding past drug usage on the sole ground that

“previous alleged misconduct on the part of a Defendant is not admissible.” On appeal, appellant contends that this testimony was inadmissible because it was designed to give the jury the impression that he was a bad person.

Entrapment occurs when a law enforcement officer or any person acting in cooperation with him induces the commission of an offense by using persuasion or other means likely to cause normally law-abiding persons to commit the offense. *White v. State*, 298 Ark. 163, 765 S.W.2d 949 (1989); Ark. Code Ann. § 5-2-209(b) (1987). However, conduct of the officer or informant merely affording the accused the opportunity to do that which he is ready, willing and able to do is not entrapment. *Webber v. State*, 15 Ark. App. 261, 692 S.W.2d 255 (1985). Entrapment is an affirmative defense which must be proved by a preponderance of the evidence. *Harper v. State*, 7 Ark. App. 28, 643 S.W.2d 585 (1982). Instructions in the law should be given to the jury if there is evidence to support the giving of that instruction. *Hill v. State*, 13 Ark. App. 307, 683 S.W.2d 628 (1985). When there is no evidence to support the giving of an instruction, it is not error to refuse it. *Sumner v. State*, 35 Ark. App. 203, 816 S.W.2d 623 (1991). Here, while there is evidence that the informant was paid for his efforts, there was no additional evidence tending to show that Combs induced appellant into committing the offense by use of “persuasion or other means likely to cause [a] normally law-abiding” person to commit the offense. *See id.* Therefore, we find no error in the trial court’s refusal to instruct the jury on entrapment.

With respect to the testimony of Mr. Combs, Rule 404(b) of the Arkansas Rules of Evidence provides that evidence of other crimes, wrongs or acts is not admissible to prove the character of the person to show that he acted in conformity therewith. The rule further provides, however, that such evidence may be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity and absence of mistake or accident. Such actions may be admissible if they are relevant to prove some material point rather than merely to prove the defendant is a criminal. *See Harper v. State*, 7 Ark. App. 28, 643 S.W.2d 585 (1982). Furthermore, such evidence is usually admissible in rebuttal to the defense of entrapment. *Jackson v. State*, 12 Ark. App. 378, 677 S.W.2d 866 (1984).

█ In response to appellant's objection, the prosecutor stated that the purpose of this testimony was to rebut appellant's asserted defense of entrapment. The prosecutor also offered to forego this line of questioning if appellant had decided not to pursue this defense. Appellant made no further argument or objection, and the trial court allowed Mr. Combs, the state's first witness, to testify on direct examination that he and appellant had used marijuana together and that there was nothing unusual about appellant asking him if he wanted to purchase marijuana on these two occasions. Testimony of the kind complained of here, as reflective of the accused's predisposition toward committing the crime, is generally admissible to rebut the defense of entrapment, and is thus relevant on a material point in issue. Therefore, we find no abuse of discretion in the trial court's ruling based on the objection made at trial as well as the argument advanced on appeal.

█ In addressing this issue, however, we point out that we are not unmindful of the decision in *Spears v. State*, 264 Ark. 83, 568 S.W.2d 492 (1978), which suggests that this testimony was not properly admitted at this stage of the proceedings. In *Spears*, while recognizing that this type of evidence is admissible in rebuttal to the defense of entrapment, the court reversed the conviction in that case because the testimony was offered as part of the state's case in chief and there was no evidence of entrapment presented in the state's case. Here, however, there was no objection that Combs' testimony was not admissible at this point in the proceedings, and thus this precise issue was not preserved, nor is it even argued, on appeal. It is well established that the only specific objection available on appeal is the specific objection made in the trial court. All other specific objections are waived. *Whaley v. State*, 11 Ark. App. 248, 669 S.W.2d 502 (1984). Moreover, parties on appeal are bound by the scope and nature of those objections and arguments presented to the trial court for its consideration. *Taylor v. State*, 299 Ark. 123, 771 S.W.2d 742 (1989).

█ As his final issue, appellant argues that the trial court erred in denying his motion for a new trial in which he asserted ineffective assistance of counsel. On this issue it is the appellant's burden to prove ineffective assistance of counsel, and it is a heavy burden because counsel is presumed effective. *Mays*

v. *State*, 303 Ark. 505, 798 S.W.2d 75 (1990). To prove ineffective assistance of counsel, the appellant must first show that counsel's performance was deficient in that counsel made errors so serious that he was not functioning as the "counsel" guaranteed by the Sixth Amendment. Second, the deficient performance must have resulted in prejudice so pronounced as to have deprived the appellant of a fair trial whose outcome cannot be relied upon as just. See *Wainwright v. State*, 307 Ark. 569, 823 S.W.2d 449 (1992).

■ ■ As his first allegation, appellant contends that counsel was ineffective by not calling him to testify. Appellant states that his testimony would have allowed him the opportunity to present his version of the facts relative to the defense of entrapment. The accused has the right to choose whether to testify in his own behalf. *Robinson v. State*, 295 Ark. 693, 750 S.W.2d 60 (1988). Counsel may only advise the accused in making the decision. *Watson v. State*, 282 Ark. 246, 667 S.W.2d 953 (1984). At the hearing, trial counsel testified that he did not deem it advisable for appellant to testify because he recognized that the evidence of entrapment was weak and that appellant would have had to openly admit the charges in order to establish this defense. The decision to advise a defendant not to take the stand, even if it proves improvident, is a tactical decision within the realm of professional judgment, and matters of trial tactics and strategy are not grounds for post-conviction relief. *Wainwright v. State, supra*. We cannot say appellant was denied a fair trial on this claim.

■ Appellant next argues that counsel was ineffective for having cross-examined Mr. Combs on the subject of appellant's past drug usage. This issue was not included in appellant's written motion, nor was it argued at the hearing as a basis for a new trial. We need not consider a claim of ineffective assistance of counsel on a ground which is being raised for the first time on appeal. See *Mays v. State, supra*. Therefore, we do not discuss this issue.

■ Lastly, appellant contends that counsel's caseload was extremely busy before his trial and that counsel was not adequately prepared to assist in his defense. He argues that counsel did not visit with him frequently enough to discuss the case and that he did not interview or locate potential witnesses. Appellant

fails to state, however, what witnesses or relevant facts the attorney could have found had he adequately investigated and prepared the case. Therefore, the allegations are conclusory and will not provide a basis for post-conviction relief. *Brooks v. State*, 303 Ark. 188, 792 S.W.2d 617 (1990); *Gilbert v. State*, 282 Ark. 504, 669 S.W.2d 454 (1984).

The primary objective of review of allegations of ineffective assistance of counsel is not to grade counsel's performance, but to determine whether actual prejudice occurred. *Cranford v. State*, 303 Ark. 393, 797 S.W.2d 442 (1990). Of the issues raised in support of his claim, appellant has demonstrated no actual prejudice resulting from the representation he received at trial.

Affirmed.

JENNINGS and MAYFIELD, JJ., agree.

