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CRIMINAL

McKinney v. State, 2019 Ark. App. 347 **[judicial disqualification]** There is no requirement that a hearing be held every time a party files a recusal motion and requests a hearing. A hearing is not required where the moving party's motion is devoid of any facts supporting his assertions of bias and prejudice and raises no issue of fact or law to be addressed in a hearing. A hearing is necessary, however, when one is requested and there is more than a conclusory allegation that a judge is biased or otherwise subject to recusal. (Talley, D.; CR-18-546; 8-28-19; Vaught, L.)

Kleier v. State, 2019 Ark. App. 340 **[habitual offender]** The sentencing court did not abuse its discretion when it took judicial notice of the laws of Missouri when determining whether appellant's prior felony convictions from that State could be included in the total number of convictions for purposes of the habitual-offender statute. (Johnson, L.; CR-18-927; 8-28-19; Gruber, R.)

Taylor v. State, 2019 Ark. App. 348 **[double jeopardy]** A defendant cannot object to a double-jeopardy violation based upon overlapping charges in the same prosecution until he has actually

been convicted of multiple offenses. Additionally, if he fails to object after being convicted, his double-jeopardy argument has been waived. (Guynn, A.; CR-19-76; 8-28-19; Hixson, K.)

Jones v. State, 2019 Ark. App. 345 **[jury instructions]** A party is entitled to a jury instruction when it is a correct statement of the law and when there is some basis in the evidence to support giving the instruction. Nonmodel jury instructions should be given only when the circuit court finds that the model instructions do not accurately state the law or do not contain a necessary instruction. However, just because a proffered jury instruction may be a correct statement of the law does not mean that a circuit court must give the proffered instruction to the jury. There is no error in the refusal to give an instruction when there is no evidence to support the giving of that instruction. In appellant's case, he requested a nonmodel jury instruction concerning his Second Amendment rights. The trial court did not abuse its discretion when it refused to give appellant's proffered instruction because the issue of whether appellant could legally possess a firearm was not an issue for the jury to decide. Thus, there was no basis in the evidence for giving the proffered instruction. (Thyer, C.; CR-18-610; 8-28-19; Switzer, M.)

Clay v. State, 2019 Ark. App. 356 **[hearsay; Ark. R. Evid. 803(8);(22)]** Certified copies of the docket sheets reflecting appellant's prior misdemeanor convictions were not admissible pursuant to Ark. R. Evid. 803(22). However, because the evidence falls squarely within the public-records exception to the rule excluding hearsay, the docket sheets were admissible pursuant to Ark. R. Evid. 803(8). (Johnson, L.; CR-18-834; 9-4-19; Gladwin, R.)

Wright v. State, 2019 Ark. 364 **[admission of evidence; Ark. R. Evid. 403]** At trial, appellant sought to have the victim read the results from a blood-alcohol test that was conducted on him after the altercation between appellant and the victim occurred. The trial court rejected the request and found that it would be too confusing for the jury to have the victim, who was not a medical professional, present the information. On appellate review, the Court of Appeals concluded that the circuit court did not err in declining to allow the victim to read the results. The Court noted that the danger inherent in reading the test results was that without further explanation as to the specifics of the results, the jury would confuse the numbers with the more common measurement of blood-alcohol content. The Court of Appeals also noted that if appellant's attorney wanted to present testimony about the meaning of blood-test results, an expert should have been called to testify. The appellate court explained that testimony of the results of the blood test, in addition to fostering confusion, also would have been more prejudicial than probative. The Court of Appeals further explained that drug and alcohol use by a victim in a case in which justification is at issue is often inadmissible as evidence whose probative value is substantially outweighed by the danger of unfair prejudice. Thus, the trial court did not abuse its discretion when it excluded the victim's testimony about the test results. (Honeycutt, P.; CR-19-105; 9-11-19; Gladwin, R.)

Boyd v. State, 2019 Ark. App. 363**[revocation]** Because the State failed to present sufficient evidence to establish that appellant committed a new offense, the trial court erred when it denied appellant's request to dismiss the State's petition to revoke appellant's probation, which was based upon an alleged DWI conviction from district court. The only evidence offered to support the petition was the testimony from appellant's probation officer, who had no knowledge of the facts giving rise to the district court conviction. (Guynn, A.; CR-19-80; 9-11-19; Abramson, R.)

Herron v. State, 2019 Ark. App. 367 **[Ark. Code Ann. § 5-5-101(a)]** When the rightful owner of property seized pursuant to Ark. Code Ann. § 5-5-101 files a motion to have the property returned, the State must prove by a preponderance of the evidence that the seized property is contraband. In appellant's case, the State offered no evidence in support of its contention that appellant's shotgun had been used in the commission of a felony. Appellant had been convicted of a misdemeanor in district court. Thereafter, he appealed to circuit court and was charged with two felonies and two misdemeanor offenses. Ultimately, the felony offenses were reduced to misdemeanor charges. The State called no witnesses to testify to the felonious nature of appellant's actions with the shotgun, nor did it offer into evidence any records of the district court proceedings, the amended information reflecting the felony charges, or the circuit court's order reflecting its granting of the State's motion to reduce the felony charges to misdemeanors. Thus, the circuit court clearly erred in finding that appellant's shotgun was contraband. (Karren, B.; CR-19-34; 9-11-19; Whiteaker, P.)

Montgomery v. State, 2019 Ark. App. 376 **[admission of evidence; Rule 901 Ark. R. Evid.]** At trial, appellant sought to have screenshots of texts messages between an undercover police officer and himself excluded. He argued that they were not authenticated, constituted hearsay, and were more prejudicial than probative. The trial court admitted the evidence. On review, the Court of Appeals looked at the following facts and determined that the evidence was properly admitted. First, appellant pleaded guilty to using a communication device in the commission of a drug offense. Thus, he had already admitted to using a phone to commit the crimes. Second, the officer testified that he had communicated with appellant by phone and by text. The screenshots of the text messages were taken from the cell phone the officer used in these communications. He testified that the screenshots were texts of a continuing conversation he had with appellant. He also said that the messages were from the same number of the phone on which he spoke with appellant. Finally, he described the transactions discussed in the texts for which appellant later pleaded guilty. The text messages concerned the precise events that the officer testified occurred between appellant and him. Additionally, the State was entitled to introduce evidence of the circumstances of the crime during appellant's sentencing hearing, which it did through the text messages. Accordingly, the trial court did not abuse its discretion when it admitted the evidence. (Pope, S.; CR-18-500; 9-18-19; Gruber, R.)

Holmes v. State, **[sufficiency of the evidence; possession of firearms]** The State did not sufficiently prove that appellant possessed a firearm. There were no witnesses that saw appellant with a gun. A firearm was never recovered and presented as being one that appellant had possessed. There was no video or photographic evidence that appellant had possessed a gun. No identifiable damage related to a discharged firearm from the crime scene was presented. Both witnesses testified that they heard a gunshot, but that purported sound was not linked to a gun appellant possessed. Appellant's threat to "shoot up" individuals did not sufficiently establish that he actually possessed or controlled a gun at the time of the crime. Because the State did not present sufficient evidence on which a fact-finder could have convicted appellant of being a felon in possession of a firearm, the trial court erred when it denied appellant's motion to dismiss the charge. (Wright, H.; CR-18-836; 9-18-19; Harrison, B.)

Dunn v. State, **[right to counsel; waiver]** A defendant may proceed pro se in a criminal case when: (1) the request to waive the right to counsel is unequivocal and timely asserted; (2) there has been a knowing and intelligent waiver of the right to counsel; and (3) the defendant has not engaged in conduct that would prevent the fair and orderly exposition of the issues. Appellant contends that his waiver was not unequivocal because he continuously stressed his intentions to hire private counsel. The record is replete with colloquies between the court and appellant as it pertained to his wanting to proceed pro se or keep appointed counsel. Appellant was appointed at least three different attorneys, and each time he stated that he did not want the appointed counsel to represent him and would prefer to represent himself. He insisted that he was not indigent and could afford to pay for his own attorney, but he could not find one who would accept his case. Although he was given several continuances to find an attorney willing to accept his case, he was unable to do so. When asked if he would allow a public defender to represent him, he responded no, he would proceed pro se. Based on the foregoing facts, the Court of Appeals concluded that appellant's waiver was unequivocal. **[competency]** In *Indiana v. Edwards*, the United States Supreme Court held that a defendant may be mentally competent to stand trial but mentally incompetent to act as his own counsel. The Court approved the actions of the State of Indiana in forcing Edwards to use an attorney despite his repeated requests for self-representation. The *Edwards* Court held that the United States Constitution "permits states to insist upon representation by counsel for those who suffer from severe mental illness to the point where they are not competent to conduct trial proceedings by themselves." The ruling in *Edwards* made the test for an effective waiver of counsel a four-prong conjunctive test instead of a three-prong conjunctive test by adding a pro se litigant's mental competency to conduct the trial proceedings. (Vardaman, G.; CR-18-524; 9-18-19; Brown, W.)

Dixon v. State, 2019 Ark. 245 **[jury instructions; second-degree murder]** Appellant requested that the trial court instruct the jury on second-degree murder. He asserted that the instruction was proper because there was some evidence that the victim was agitated prior to the shooting and that he and appellant had an argument that escalated into physical violence. However, the evidence did

not support appellant's assertions. There were no eyewitnesses to an argument or altercation between appellant and the victim. In fact, the evidence suggested that appellant and the victim were talking and laughing before appellant shot the victim. Additionally, there was no evidence to indicate that the victim ever brandished his firearm. In fact, the eyewitness testimony consistently described a scene where appellant shot the victim in the head at close range and in the absence of any provocation. The circuit court did not abuse its discretion by refusing to give appellant's proffered second-degree murder instruction because there was no rational basis for doing so. **[jury instructions; manslaughter]** Appellant identified his interaction with his girlfriend and his behavior in her presence on the day of the murder and asserted that based upon his statements and actions he established that he was under the influence of extreme emotional disturbance for which there was reasonable excuse at the time of the murder and thus the court should have given the manslaughter instruction to the jury. The statements and actions that appellant identified occurred after the murder and did not provide any evidence as to appellant's mental state when he shot the victim. Therefore, the trial court's decision to not give the extreme-emotional-disturbance manslaughter instruction was not an abuse of discretion. **[jury instruction; second-degree battery]** The evidence introduced at trial demonstrated that appellant shot the victim once in the neck and a second time in the back as the victim fled. The circuit court's determination that these actions demonstrated an intent to inflict serious physical injury as opposed to merely physical injury and that the jury should receive only an instruction on battery in the first degree was not an abuse of discretion. (Singleton, S.; CR-18-816; 9-19-19; Hudson, C.)

Avery v. State, 2019 Ark. App. 405 **[Ark. R. Evid. 901]** At his trial, appellant challenged the admission of an audio recording based upon the State's inability to comply with the authentication requirements of Ark. R. Evid. 901. The circuit court permitted a law enforcement officer, who had previously interviewed appellant, to identify the voices on the recording. On appeal, the Court of Appeals identified several facts as establishing compliance with Rule 901. Specifically, the Court held that there was no abuse of discretion in admitting the audio recording because it was properly identified and authenticated through the officer's testimony. The circuit court could rely on both the testimony of the officer, who recognized appellant's voice, as well as the circumstantial evidence that linked the recording to appellant such as his name was mentioned in the recording and his attorney was referred to by name in the recording. (Hearnsberger, M.; CR-18-936; 9-25-19; Gladwin, R.)

Dixon v. State, 2019 Ark. App. 412 **[revocation]** The State's failure to introduce a copy of the terms and conditions of probation at a revocation hearing is a procedural issue that must be raised before the circuit court. (Halsey, B.; CR-19-104; 9-25-19; Switzer, M.)

Jenkins v. State, 2019 Ark. App. 419 **[mistrial]** A new trial or other relief will not automatically be granted because counsel has referred to matters in opening statements that are not later admitted into evidence. When considering a request for a mistrial based upon such inadmissible statements,

the court should consider whether they were made in bad faith and whether there was a request by the opposing party for an admonition. (Proctor, R.; CR-18-793; 9-25-19; Hixson, K.)

CIVIL

City of Magnolia v. Milligan, 2019 Ark. App. 374 **[county sales and use tax]** The City of Magnolia contends that the per capita remittance procedure in Ark. Code Ann. section 26-74-214(b)(2) applies in this case to require the county to provide a share of the tax proceeds to the city. The statutes do not support the City's argument that the County Treasurer is required to remit the solid-waste tax to the county and municipalities on a per capita basis. Magnolia is not entitled to a per capita share under the controlling statutes. (Reif, M.; CV-18-516; 9-11-19; Brown, W.)

Five Forks Hunting Club v. Nixon Family Partnership, 2019 Ark. App. 371 **[prescriptive easement]** A prescriptive easement can include a ditch or a waterway. Temporary absences of a claimant from the land adversely possessed or periods of vacancy of such land that evince no intention of abandonment do not interrupt the continuity of the adverse possession, provided the absence or vacancy does not extend over an unreasonable period Both the creation and extent of an easement by prescription are determined by the adverse use of the property over a long period of time. The circuit court found that neither the route of the easement nor the manner of its use should be altered from that established by Nixon's use during the prescriptive period. This is because, unlike an express written grant of an easement, it is the use made of the property of another, not the language of the grant, that defines the location of the easement. The circuit court found that Nixon's manner of boating had not changed during the running of the prescriptive period. Here, the imposition of the boating restrictions at this time when none existed during the running of the prescriptive period would change and limit Nixon's use of its easement. (Henry, D.; CV-18-301; 9-11-19; Hixson, K.)

Sanders v. Union Pacific Railroad, 2019 Ark. App. 386 **[FELA/assumption of risk instruction]** The circuit court did not abuse its discretion in refusing to give the assumption of the risk instruction. There is no indication that the circuit court acted improvidently, thoughtlessly, or without due consideration. **[Contributory negligence]** Contributory negligence is defined as a careless act or omission on a plaintiff's part tending to add new dangers to conditions that the employer created or permitted to exist. Although disputed, there was evidence that Sanders acted carelessly. Based on the facts in evidence, the circuit court did not abuse its discretion by giving the contributory-negligence instructions. **[exclusion of remedial measure] The mechanical alert** was a subsequent remedial measure. The alert establishes that the bracket will not be used again, and it qualifies as a subsequent remedial measure despite the fact that it was used only once in an experimental test. (Pierce, M.; CV-18-340; 9-18-19; Switzer, M.)

Sex Offender Assessment Committee v. Cochran, 2019 Ark. Pp. 396 **[sex offender assessment]** The circuit court did not err by denying the Committee's request for dismissal and allowing Cochran to amend his petition for judicial review to designate the Committee rather than Department of Corrections' Assessment Unit (SOCNA) as the respondent. Based on the administrative record, the Committee correctly assessed Cochran as a Level 3offender. The record is replete with Cochran's admissions to other instances involving young victims that support his Level 3 assessment. (Karren, B.; CV-18-807; 9-18-19; Murphy, M.)

Bullock Kentucky Fried Chicken v. City of Bryant, 2019 Ark. 249 **[foreclosure of tax lien]** District 84's complaint plainly describes the land it seeks to foreclose, as well as the tracts excluded from the action. The complaint also identifies TND as the owner of the land and the total amount of taxes owed. The complaint was not statutorily defective. Appellants argue that District 84's lien for nonpayment of improvement taxes can only attach to individual tracts upon which taxes were actually delinquent and unpaid. Specifically, Appellants argue the land north of Hilltop Road is not "real property" under the definition of the governing statute, and therefore an in rem judgment cannot be attached to those tracts. Given that the legislative intent indicates that the lien attaches to all unreleased property within an improvement district, it is fair to assume the requirement of in rem proceedings merely intends to limit the scope of a foreclosure action under this statute to real property within a district. (Arnold, G.; CV-17-761; 9-19-19; Womack, S.)

Hardesty v. North Arkansas Medical Services, Inc., 2019 Ark. App. 410 **[hospital-tax exemption]** Tax Assessor appeals circuit court's granting exemption status to hospital for its seven parcels of land based on the public-charity exemption provided by article 16, section 5(b) of the Arkansas Constitution, which provides that "buildings and grounds and materials used exclusively for public charity" are exempt from taxation. The thrust of the argument on appeal is that the hospital's usage of these parcels is for "the pursuit of compensation" and not exclusively for public charity. The parcels in this case are used by the hospital in furtherance of the hospital's charitable mission. (Rogers, R.; CV-18-949; 9-25-19; Klappenbach, M.)

DOMESTIC RELATIONS

Holloway v. Holloway, 2019 Ark. App. 375 **[no reversible error even if child support order did not directly reference chart; circuit court properly divided marital property and provided credits; visitation increase was not against children's best interest]** Neither the income nor the child support amount were disputed at the lower level, but Appellant claimed that the child support order failed to meet the guidelines of Administrative Order No. 10 because it did not directly reference the family support chart. Because the income was not in dispute and the circuit court did not deviate from the family support chart, the appellate court found no reversible error. The appellate court also found no abuse of discretion in the equal division of the marital home nor the

credits awarded to Appellee. The circuit court properly followed the statutory presumption favoring equal division of martial property even though Appellee used nonmarital funds toward the purchase of the land and construction of the home. The circuit court then gave Appellee a credit on the principal reduction of the mortgage for the time period that she alone made the payments and a credit for proceeds that Appellant used to pay his personal debts. There was no clear error in this property division. Lastly, the appellate court found no error in the circuit court's decision to award Appellant one extra day of visitation every other week. Appellee failed to offer any concrete examples of how the children's best interest had been negatively affected by visitation, and she acknowledged that he was a fit and proper parent. (Jackson, S.; CV-18-577; 9-11-19; Brown, W.)

Case v. Van Pelt, 2019 Ark. App. 382 [**material change in circumstances when joint custodians fail to cooperate**] The ability to cooperate in joint custody is crucial, and the failure of the parents to do so constitutes a material change in circumstances. Because circumstances had worsened in this matter, the appellate court found no error in the modification of the joint custody arrangement. The circuit court property weighed the evidence -- including failure of Appellant to participate in the required co-parenting class, the parties' failure to engage in their required phone call, and the parties' failure to cooperate on health care decisions -- in determining that joint custody could not continue. (Parker, J.; CV-18-788; 9-18-19; Gladwin, R.)

Mayland v. Mayland, 2019 Ark. App. 390 [**no corroboration of grounds of divorce, even if defendant admitted allegations]** The appellate court found that the circuit court erred in granting Appellee's counterclaim for divorce because Appellee failed to present corroborating evidence of grounds. Under Arkansas law, Appellee had to prove entitlement to dissolution on the ground of general indignities and had to corroborate her grounds or offer a waiver of corroboration from Appellant. Apart from her own testimony concerning the personal indignities, Appellee failed to present any other witnesses or evidence. Appellee contends that Appellant's own testimony was consistent with the grounds that she cited and thus was sufficient corroboration. However, a petition for divorce may not be granted on the testimony of the complainant alone. Even if the defendant admits the allegations, the testimony or admission must be corroborated by other evidence to establish the truth of the assertion. (Watson, T.; CV-19-18; 9-18-19; Whiteaker, P.)

Ellington v. Ellington, 2019 Ark. App. 395 [**allegations were isolated incidents of petty complaints or otherwise complaints of problems resolved by the time of the hearing so they did not constitute a material change sufficient to warrant a modification of custody**] The appellate court found that there was no material change in circumstances sufficient to support a change of custody. Although Appellant may have demonstrated some poor decision making in the past, the appellate court found that it had been remedied well before the hearing so there was no material change in regard to those allegations. Furthermore, certain factors are examined in the aggregate may support a finding that a change in custody is warranted where each factor, if examined in isolation, would not. However, the appellate court found that all allegations were, at

most, isolated incidents of petty complaints or otherwise complaints of problems resolved by the time of the hearing, and that none of the factors in this case, either alone or in combination, constituted a material change sufficient to warrant a modification of custody. (Fox, T.; CV-18-484; 9-18-19; Murphy, M.)

Cunningham v. Cunningham, 2019 Ark. App. 416 [**joint custody awarded despite conflict between parents; finding of grounds separate from best interest findings**] The appellate court found that the circuit court carefully considered all evidence presented and that there was no error in the award of joint custody. Appellant argued that the circuit court should not award joint custody because he also found the grounds of general indignities supported the divorce action. However, different considerations are required to make general-indignities and joint-custody findings, and the evidence supported the grounds between the parents while also supported the fact that joint custody was in the best interest of the children. The circuit court acknowledged conflict between the parties but found that both parents love the child and want what is best for her. Despite Appellant being the primary custodian before the separation, the circuit court found that joint custody was in the child's best interest because it would maximize her time with both parents and reduce the number of custody exchanges, which was the source of a significant amount of the conflict between the parties. Joint custody is not appropriate when there is significant hostility and inability to communicate, but the appellate court found that those facts were not present and relied on cases when joint-custody was appropriate despite evidence that the parties were not getting along or not communicating well. (Foster, H.; CV-18-1037; 9-25-19; Vaught, L.)