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CRIMINAL

Sims v. State, 2025 Ark. App. 23 [**double jeopardy; mistrial; hearsay**] Hearsay is a statement, other than one made by the declarant while testifying at trial, offered in evidence to prove the truth of the matter asserted. But an out-of-court statement is not hearsay if it has relevancy apart from the truth of the matter that it asserts or implies. Additionally, an out-of-court statement is not hearsay under Rule 801(c) of the Arkansas Rules of Evidence where the statement is offered to show the basis for the witness's actions. Here, the victim's friend testified about how she introduced the victim to the appellant. By agreement of the parties, the witness testified via Zoom, and defense counsel noted that there was a "lag" between question and response because of the Zoom setup. The defense counsel asked the witness, "[W]hy did you connect him?" The witness replied, "[The victim] said that she was looking for a friend." Then defense counsel asked, "[S]pecifically, do you know what . . . she was looking for?" The State immediately objected on hearsay grounds, and before the circuit court could rule on the objection or instruct the witness to wait, she replied, "Someone to have sex with." The victim's state of mind had already been established when the witness testified that she was looking for a friend. Accordingly, the circuit court did not err in ruling that the statement in question was inadmissible hearsay. [**overruling necessity**] The circuit court denied appellant's motion to dismiss based on double jeopardy. On appeal, appellant argued that there was no overruling necessity for the circuit court to grant a

mistrial and that an admonition would have cured any potential prejudice caused by the testimony in question. When a jury is sworn to try a case, jeopardy attaches, and when the jury is discharged before the case is complete without the defendant's express or implied consent, then the constitutional right against double jeopardy may be invoked unless the termination was justified by overruling necessity. If a defendant consents to a mistrial, then the demonstration of "overruling necessity" is not required so that a defendant may be retried for the same offense. "Overruling necessity" means a circumstance that is forceful and compelling and is in the nature of a cause or emergency over which neither court nor attorney has control or which could not have been averted by diligence and care. Although each case must turn on its own facts, examples of an "overruling necessity" upheld on appeal include when the jury was exposed to matters outside the courtroom that could affect its judgment, a juror or material witness was ill, or defense counsel was intoxicated. Here, the witness testified via Zoom, and the court noted in its order denying appellant's motion to dismiss that it was concerned about allowing a witness to testify in this manner but allowed it because the State had agreed "as long as the witness only testified about how the parties met." The circuit court found the situation concerning enough to decide to never allow a Zoom witness again. Additionally, the circuit court explained that its observation of at least one juror's guffaw after the witness stated that the victim was "looking for someone to have sex with" weighed heavily in its decision to grant the mistrial. The circuit court gave appellant every opportunity to argue how the testimony at issue was not hearsay and whether it fell under a hearsay exception. The circuit court also allowed both the State and appellant to further develop their respective arguments. Finally, the court expressed concern about the potential significance the jurors could assign to the testimony in question due to the sheer amount of time both counsel and the court spent attempting to remedy the entry of the inadmissible and prejudicial testimony. Based on the facts of the case, the appellate court found that the circuit court did not act improvidently, thoughtlessly, or without due consideration. While the appellate court acknowledged appellant's argument that the prejudice could have been cured by an admonishment, the circuit court is in the best position to gauge the prejudicial effect of the error. Thus, the circuit court did not err in granting a mistrial. (Galloway, D.; 01SCR-19-264; 1-22-25; Gladwin, R.)

DOMESTIC RELATIONS

Lewis v. Lewis, 2025 Ark. App. 8 [**child-support; imputing income**] The circuit court entered an order granting appellee's motion to modify child support after finding that a material change in circumstances had occurred in that appellee's monthly income had decreased. On appeal, appellant argued that the circuit court erred by imputing income to her above minimum wage. [**imputing income**] Arkansas Supreme Court Administrative Order No. 10(III)(8) provides that if imputation of income is ordered, the court must take into consideration the specific circumstances of both parents, to the extent known, including such factors as the parents' assets, residence, employment and earnings history, job skills, educational attainment, literacy, age, health, criminal record and other employment barriers, and record of seeking work, as well as the local job market, the availability of employers willing to hire the parent, prevailing earnings level in the local community, and other relevant background factors in the case. Here, the testimony showed that

appellant had a college degree and a history of employment with teaching experience. The trial court found that appellant “presents well,” and appellant testified that she is capable of working full-time. Appellant had testified at the time of the divorce that she expected to become employed, yet at the child support modification hearing, appellant said that she had no intention of seeking a full-time job. Virtually all of appellant's living expenses were paid by her mother and boyfriend. The circuit court found that appellant’s imputed potential earnings were the equivalent of appellee’s reduced earnings, such that neither must pay child support. Considering the specific circumstances of this case, the appellate court could not say that the circuit court abused its discretion in imputing more than minimum-wage income to appellant. **[forty-hour work week]** There is a rebuttable presumption that the payor and the payee can work full-time or earn full-time income, and the court may base its child-support calculation on a determination of potential income that would otherwise ordinarily be available to the parties. Here, appellant conceded that she was capable of working forty hours a week. She testified that she chose not to work full-time because she preferred to pursue an out-of-state relationship. The appellate court found that the circuit court did not abuse its discretion in finding that appellant failed to rebut the presumption that she was capable of full-time work. (Herzfeld, R.; 63DR-18-952; 1-5-25; Virden, B.)

Waldrip v. Waldrip, 2025 Ark. App. 29 **[division of marital property]** The parties resolved all issues under a property-settlement agreement but asked the circuit court to determine and divide their interest in Razorback Foundation priority points and tickets and suites to sporting events at the University of Arkansas. The circuit court entered a divorce decree finding that the priority points, tickets, and suites were marital property and ordering that the priority points be divided in half, the suites be shared with each party paying for half the cost of the suites and receiving half the seats within the suites, and the tickets be sold at a private auction between the parties. On appeal, appellant argued that the circuit court erred in finding that the priority points, tickets, and suites are marital property subject to division. On cross-appeal, appellee argued that the circuit court erred in ordering the parties to share the suites and to purchase the tickets at a private auction. **[marital property]** Marital property is all property acquired by either spouse subsequent to the marriage. Here, the evidence established that the parties contributed more than \$650,000 throughout their forty-two-year marriage to accumulate the priority points, the Foundation will split and transfer the points to an immediate family member by agreement of the owners, due to the death of the owners, or under a court order in a divorce case, the points were held in an account with the Foundation in the names of the parties (or their business) and were subject to an accounting, the points were “owned” by the person whose name is on the account, and the parties keep the points even if they do not purchase tickets or suites. The appellate court found that this was sufficient evidence of an ownership interest in the Foundation priority points such that the circuit court did not err in finding that they were marital property subject to division. Additionally, there was testimony that the Foundation allowed donors to maintain their existing suites and tickets as long as they made the required annual donation. There was also evidence that the parties could sell their tickets on a game-by-game basis. Therefore, the appellate court held that the circuit court did not err in finding that the tickets and suites were marital property subject to division. **[division of suites]** By requiring that all property be divided and distributed at the time the divorce decree

is entered, Ark. Code Ann. § 9-12-315(a) seeks to disentangle the parties' financial affairs and free each party from the other's interference. Here, the circuit court found that the parties' suites should be "split in half," with each party having half the seats and bearing half the cost. The appellate court found that the circuit court erred in ordering the parties to share the suites. They were divisible, and in failing to divide them, the parties remained financially and personally entangled. **[division of tickets]** At the time a divorce decree is entered, all marital property shall be distributed one-half to each party unless the court finds such a division to be inequitable. Here, the circuit court found that with respect to the individual tickets, they were much more difficult to split because there were many tickets and who is to say which were best, better or equivalent. Ordering the parties to bid against one another for their marital property could result in an unequal distribution because the parties' business acumen is not equal. The appellate court found that the circuit court erred in ordering the parties to share the suites and to purchase the tickets at a private auction. Thus, the circuit court must make a division of the suites and tickets that is fair and equitable under the circumstances—mathematical precision is not required. (Beaumont, C.; 72DR-21-1759; 1-22-25; Wood, W.)

Henderson v. Simpson, 2025 Ark. App. 40 **[child custody; default judgment; best interest]** The circuit court denied appellant's motion to set aside a final order entered by default on appellee's petition to establish paternity and custody. On appeal, appellant argued that the circuit court erred denying her motion without evidence and without determining the child's best interest—which is an "other reason justifying relief" from default judgment under Arkansas Rule of Civil Procedure 55(c)(4). The primary consideration in domestic relations cases is the welfare and best interest of the children, and all other considerations are secondary. Here, the default judgment found appellee was the natural father of appellant's child and awarded appellee sole custody and authority to deny appellant any visitation or contact with the child. After a hearing where the circuit court heard no testimony and received no evidence on best interest, the circuit court entered a final order, stating that the appellee "ha[d] overcome the burden of proof regarding the presumption of joint custody for the minor child by clear and convincing evidence" and awarded him "full legal and physical custody" of the child. Appellant moved to set aside the default judgment and for a new trial. Appellant did not dispute that she was properly served with the petition. She explained that she had not answered it because she spoke to appellee shortly before the deadline, and he told her they could come to an agreement to keep things out of court. Neither the initial custody award nor the order denying the motion to set it aside could reflect any proper judicial determination of the child's best interest. The boilerplate, bare-boned allegations in appellee's paternity petition were the minimum on which a paternity judgment could rest, but they could not rebut the presumption of joint custody under Ark. Code Ann. § 9-13-101 even if appellant's default admitted them. The custody award conflicted with the General Assembly's legislative determination that, unless clear and convincing evidence showed otherwise, the child's best interest was for her parents to have joint custody. Therefore, the circuit court erred in entering its order and denying the appellant's motion to set aside the default judgment. (Williams, L.; 26DR-23-340; 1-29-25; Harrison, B.)

JUVENILE

Williams v. Ark. Dep't of Human Servs., 2025 Ark. App. 21 [**ADJ; prior contact**] Appellant argued that the circuit court improperly considered the prior “successfully resolved” DHS case to determine whether the children were currently dependent-neglected, as the prior case and the present case both centered on her home being “not fit for human habitation.” This argument was unpersuasive as Ark. Code Ann. § 9-27-327(a)(2) required Appellee to present evidence about prior contact between it and the family before the circuit court could make a finding that Appellee had provided reasonable efforts to prevent the children’s removal. Simply, Appellant allowed the family home to return to a squalid condition unsafe for her children; no error found. (Warren, D.; CV-24-531; 1-22-2025; Klappenbach, N.)

Dawn v. Ark. Dep't of Human Servs., 2025 Ark. App. 27 [**intervention; lack of diligence**] Appellant filed a motion to intervene and petition for adoption of her great-grandchildren four (4) months after the parental rights of her granddaughter had been terminated; she also argued that the circuit court erred in limiting her intervention and in its denial of her motion for continuance to request an update to her ICPC home study, which had expired some weeks before. Appellate court found that appellant demonstrated a lack of diligence in failing to request a hearing on her motion or her adoption petition, especially considering that she was aware the ICPC home study had expired weeks prior to her filing a motion. Additionally, Appellant had no standing to challenge the circuit court’s termination decision and consideration for her relative placement: she lost her status as a great-grandmother when her granddaughter’s parental rights were terminated. Appellant also appealed the granting of only limited intervention; as she failed to raise this issue at the trial level, the appellate court declined to consider her arguments. No error found. (Warren, D.; CV-24-540; 1-22-25; Potter Barrett, S.)

Briggs v. Ark. Dep't of Human Servs., 2025 Ark. App. 28 [**TPR-best interest; potential harm**] Sufficient evidence supported the court’s best-interest finding in this case. The Appellee provided appropriate services, but the evidence was uncontroverted that throughout the entirety of the case, Appellant lacked stable income or housing, and consistently failed to remain drug-free despite multiple attempts at inpatient rehabilitation. At the hearing, Appellant claimed that her situation was “pretty stable” during the three to six months she lived with her mother; however, it was undisputed that her mother had been incarcerated for selling methamphetamine, so the adequacy of that stability was questionable. Moreover, while it appeared that Appellant had, once again, completed or nearly completed an inpatient-treatment program at the time of the termination hearing, she had yet to demonstrate an ability to maintain sobriety, employment, or housing outside the treatment-program setting and had yet to progress to unsupervised visitation with her child. A child’s need for permanency and stability may override a parent’s request for more time to see if the parent can change his or her behavior. Accordingly, the circuit court did not clearly err in terminating Briggs’s parental rights. (Hendricks, A.; CV-24-608; 1-22-25; Thyer, C.)

Pineda-Garcia v. Ark. Dep't of Human Servs., 2025 Ark. App. 33 [ADJ/DN; **physical abuse**] Appellant contended that the evidence was insufficient to support the circuit court's finding that her child was dependent-neglected; he was adjudicated dependent-neglected based on physical abuse. The Arkansas Juvenile Code defines abuse to include any nonaccidental physical injury committed by a parent or guardian and to include the intentional or knowing interference with a child's breathing with or without physical injury. The incontrovertible evidence was that the child disclosed that Appellant choked him, and he was unable to breathe at that time. He continued to reenact the incident even while in foster care. There was a small scratch in the area where he stated he was injured, and he also indicated pain in that area when touched although no bruising was present. Although the witnesses agreed that he could have misperceived what Appellant had done to him, criminal charges were brought against her, a no-contact order was put in place, and there was a true finding of abuse. Based on this evidence, the appellate court could not say that the circuit court erred by finding the child was dependent-neglected due to physical abuse. Additionally, Appellant's arguments were simply a request for the court to reweigh the evidence, which it will not do. (Warren, D.; CV-24-569; 1-22-25; Brown, W.)