

ARKANSAS COURT OF APPEALS

DIVISION III
No. CR-13-568

RUSSELL WAYNE HUDSON
APPELLANT

V.

STATE OF ARKANSAS
APPELLEE

Opinion Delivered April 30, 2014

APPEAL FROM THE FAULKNER
COUNTY CIRCUIT COURT
[NO. CR-10-1060]

HONORABLE CHARLES E.
CLAWSON, JR., JUDGE

REVERSED AND DISMISSED

ROBERT J. GLADWIN, Chief Judge

Appellant Russell Hudson appeals his conviction by a Faulkner County jury on a charge of rape, for which he was sentenced to twenty years' imprisonment in the Arkansas Department of Correction. Appellant argues that the circuit court erred in granting the State's request for a continuance of the jury trial and in not dismissing the charge because his right to a speedy trial was violated.¹ Because we find merit in appellant's first argument, we reverse and dismiss.

On September 29, 2010, the State filed a felony information against appellant, alleging that on or about between January 1, 2000, and January 1, 2002, appellant committed the Class Y felony of rape as defined in Arkansas Code Annotated section 5-14-103 (Repl. 2013). A jury trial was scheduled for March 13, 2012. Although the State had not

¹Because we reverse and dismiss based on appellant's first issue, we need not address the alleged violation of his right to a speedy trial.

subpoenaed any witnesses for the trial, prosecutors filed a motion to continue, claiming that the victim, its key witness, was unavailable. The circuit court continued the case over appellant's objections, and the case was re-set for trial on August 21, 2012.

On August 10, 2012, appellant filed a motion to dismiss the rape charge based on the violation of his right to a speedy trial. On August 14, 2012, the State filed a response to appellant's motion to dismiss, and on August 17, 2012, the State filed a supplemental response. On August 17, 2012, the circuit court held a hearing on the speedy-trial motion and denied the motion from the bench the same day. The circuit court's order was filed on August 17, 2012,² and the trial commenced on December 4, 2012. Appellant was found guilty of rape and sentenced as previously set forth pursuant to a sentencing order filed on December 5, 2012. A timely notice of appeal was filed on January 2, 2013.

It is within the trial court's discretion to grant or deny a motion for continuance, and the appellate courts of Arkansas will not reverse the circuit court's decision absent a clear abuse of discretion. *See Haskins v. State*, 2013 Ark. App. 613. An appellant must also demonstrate that, as a result of the ruling on the motion for a continuance, he suffered prejudice that amounts to a denial of justice. *Smith v. State*, 2012 Ark. App. 613.

²Subsequently, appellant filed a petition for a writ of certiorari seeking interlocutory review pursuant to Arkansas Rule of Criminal Procedure 28.1(d) (2012), raising the speedy-trial issue. The State filed a response, arguing the merits. Rule 28.1(d) allows a defendant to file such a petition "in appropriate cases," but the rule does not clarify exactly what that means. [Here, the supreme court did not review the merits and denied the petition without prejudice in its formal order entered on October 12, 2012.]

On October 13, 2011, this matter was set for a jury trial on March 13, 2012. On March 13, 2012, the State filed a motion for a continuance stating, “The [S]tate needs additional time to prepare for trial and a witness was unexpectedly unavailable.” The circuit court held a hearing at appellant’s request, at which time the prosecuting attorney explained that the State had maintained contact with the alleged victim, but “we were beginning to arrange flight arrangements . . . we didn’t hear from her. When we finally did hear from her, she was in Puerto Rico.” The State also stated that, as it relates to the complaining/missing witness, “when the trial date was set, the victim was notified in writing.”

The circuit court expressed concern about not having the witness present for trial and stated, “I guess the thing that bothers me the most about this is that I understand the victim is now out of state. She lives out of this general jurisdiction. And I would suspect when this case was set for trial back some months ago, she knew when spring break was going to be and it would have been awfully easy for her or some member of her family to have advised your office that, ‘Wait a minute. That’s spring break and we have plans or we may have plans,’ and we could have adjusted the time.” Despite those concerns, the circuit court granted the motion over the objections of appellant.

Rule 27.3 of the Arkansas Rules of Criminal Procedure (2012) provides that a circuit court shall grant a continuance only upon a showing of good cause and shall take into account the request or consent of the prosecuting attorney or defense counsel, as well as the public interest in the prompt disposition of the case. In deciding whether to grant or deny a motion for a continuance to secure the presence of a witness, the circuit court considers

(1) the diligence of the movant; (2) the probable effect of the testimony at trial; (3) the likelihood of procuring the attendance of the witness in the event of a postponement; and (4) the filing of an affidavit, stating not only what facts the witness would prove but also that the affiant believes them to be true. *H.C. v. State*, 2013 Ark. App. 284.

Appellant claims that these factors, as applied to this case, demonstrate an abuse of discretion. First, the diligence of the State in requesting a continuance is absent—the State waited until the day of the scheduled jury trial to file a motion to continue the matter. The record lacks the subpoena that was issued for the March 13, 2012 jury trial to the complaining witness—the absent witness whom the State used as a basis for the continuance. Instead, the record reflects that the State made an effort to subpoena the witness only after the circuit court continued the March 13, 2012 jury trial. We also note that not one other witness was subpoenaed by the State for the March 13, 2012 trial date.

As to the probable effect of the testimony at trial, the absent witness was the complaining witness, and the case likely could not have been prosecuted without her. As to the likelihood of procuring the attendance of the witness in the event of a postponement, the prosecutor offered the following: “Judge, I would prefer both. I’d like some time to remove the victim from the immediate pressure of the current moment before the conversation, but at the same time if she’s unwilling to go forward or [the State is] unable to procure her attendance” No assurance was provided by the prosecutor that the witness would appear at trial if it were continued; in fact, it seems as though the State was not even certain that the complaining witness wanted to continue with the prosecution.

Finally, and most important, the fourth factor deals with the requirement of filing an affidavit, stating not only which facts the witness would prove, but also that the affiant believes them to be true. On behalf of appellant, trial counsel stated the following as it relates to the affidavit requirement:

Judge, we are set for a jury trial today. We were asking to go forward on the jury trial. This trial was set some months ago and Mr. Thomas has still not articulated a reason why this person is not here. When did she find out about the trial? What contact has their office had with her? What due diligence did they seek in trying to get her here? When were the flight arrangements made, if at all, to get her here? Those kind of things are the things that should have been put in the affidavit under 16-63-402. He still has not addressed that issue.

Arkansas Code Annotated section 16-63-402 (Supp. 2013), which governs continuances for the absence of evidence or a witness, states:

(a) A motion to postpone a trial on account of the absence of evidence shall, if required by the opposite party, be made only upon affidavit showing the materiality of the evidence expected to be obtained and that the affiant believes the witness will prove and not merely show the effect of the facts in evidence, that the affiant believes them to be true, and that the witness is not absent by the consent, connivance, or procurement of the party asking the postponement.

(b) If thereupon the adverse party will admit that on trial the absent witness, if present, would testify to the statement contained in the application for a continuance, then the trial shall not be postponed for that evidence.

Here, the party moving for the continuance, the State, failed to meet the affidavit requirement. Appellant, in no uncertain terms required the affidavit as set forth by subsection (a) of the statute; however, no affidavit from the State was submitted.

We acknowledge that this requirement typically arises when a defendant moves for a continuance; the State raises the issue of the missing affidavit; the circuit court denies the motion for continuance on that basis, and it is before us on appeal. However, our review

of the rule and related caselaw provides no support for an argument that the rule applies only to defendants. Accordingly, we find merit to appellant's argument that the March 13, 2012 continuance should not have been granted and that there was a clear abuse of discretion in granting the continuance.

At trial, the State responded to appellant's argument that there was no written motion for continuance filed; the State did not include an affidavit showing what the affiant believed the witness's testimony would prove; and the State failed to exercise due diligence—arguing that the victim's testimony would be as expected from her statement in the police report—that she was raped by appellant. The State noted that it had been in “consistent” communication with the victim, who lived out of state, and, when the time came to make flight arrangements for the trial, it discovered that the victim was in Puerto Rico. The State believed that the victim had felt pressured about testifying and that, if she did not want to proceed, the State would dismiss the charge, but it needed time to make that determination. The circuit court ruled that, as the victim of the offense, the witness's testimony was necessary and material.

The State claims that a circuit court does not abuse its discretion by denying a continuance when the motion is not in substantial compliance with the statute, Ark. Code Ann. § 16-63-402(a). See *Hill v. State*, 321 Ark. 354, 902 S.W.2d 229 (1995). The State reiterates that although a lack of diligence “is sufficient to deny a request for continuance, it does not *require* the denial of the request.” *Dotson v. State*, 2011 Ark. App. 731, at 4

(emphasis added). The State attempts to lump the affidavit requirement into the same category, but we disagree.

The State focuses on the fact that appellant fails to point to any requirement for an affidavit that must be satisfied when the witness that is sought to be procured is the victim of the offense. The State claims that the requirement is “nonsensical” under the circumstances. Only the prosecutor can file a criminal information. Ark. Const. amend. 21 § 1. The State claims that prosecutorial discretion to pursue criminal charges by filing a criminal information based on allegations made by a rape victim, when viewed in light of the intent behind requiring an affidavit, indicates that the State found the victim’s allegations sufficient to proceed with a criminal prosecution. The State notes that, with regard to informing the defense of the nature of a witness’s testimony, an affidavit is helpful particularly to avoid surprise or prejudice to the defense; however, based on the very nature of the facts presented, the witness’s, i.e., the victim’s, testimony, is self-evident here.

The State reminds this court that an appellant must demonstrate that, as a result of the ruling on the motion for continuance, he suffered prejudice amounting to a denial of justice. *Dotson, supra*. The State argues that appellant cannot establish prejudice from the State’s failure to provide an affidavit here, as he was aware of the criminal allegation against him, had spoken with the victim for purposes of preparing for trial, and was aware of the nature of her testimony. However, this line of reasoning begs the question of whether both parties must meet the same requirements of providing an affidavit under the statute. Our review of both the statute and the relevant case law indicates that the rule cuts both ways. Accordingly, we

find merit to appellant's argument that the March 13, 2012 continuance should not have been granted and that there was a clear abuse of discretion in granting the continuance. Because the continuance was erroneously granted, the State had time to secure the only witness who could provide evidence sufficient to convict appellant, and, that had the continuance not been granted, the charge likely would have otherwise been dropped.

Reversed and dismissed.

GLOVER and HIXSON, JJ., agree.

Hancock Law Firm, by: *Charles D. Hancock*, for appellant.

Dustin McDaniel, Att'y Gen., by: *LeaAnn J. Adams*, Ass't Att'y Gen., for appellee.