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# ARKANSAS COURT OF APPEALS

DIVISION III

No. CACR 10-358

ANTWAN HARDAWAY

APPELLANT

V.

STATE OF ARKANSAS

APPELLEE

Opinion Delivered FEBRUARY 9, 2011

APPEAL FROM THE JACKSON  
COUNTY CIRCUIT COURT  
[NO. CR-2008-118]

HONORABLE HAROLD S. ERWIN,  
JUDGE

AFFIRMED

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**JOHN B. ROBBINS, Judge**

Appellant Antwan Hardaway was convicted in a jury trial of being a felon in possession of a firearm, as well as the misdemeanor offenses of fleeing on foot and refusing to submit to arrest. Mr. Hardaway was sentenced to six years in prison and fined \$600. Mr. Hardaway now appeals from his conviction for being a felon in possession of a firearm. For his sole argument for reversal, Mr. Hardaway argues that the trial court erred in refusing to allow his defense witness, Billy Mitchell, to testify at trial. We affirm.

Officer Larry Delany testified for the State at the jury trial held on December 9, 2009. Officer Delany testified that on the night of July 1, 2008, he responded to a report that there had been shots fired in an area of Newport. Officer Delany drove his patrol car to the area

and saw three men sitting at a table. He put his spotlight on the men and saw Mr. Hardaway stand up, grab a rifle, and flee on foot.

Officer Delany chased Mr. Hardaway on foot and Mr. Hardaway was carrying the rifle. Officer Delany lost sight of Mr. Hardaway, and later found him in front of a parked car. Mr. Hardaway got up from in front of the car, jumped a fence, and proceeded down a gravel road. Officer Delany caught up with him and held him at gunpoint, but Mr. Hardaway refused the officer's orders to show his hands or get on the ground. As a result, Officer Delany physically took Mr. Hardaway to the ground and arrested him. Officer Delany subsequently checked Mr. Hardaway's criminal history and learned that he was a convicted felon. A certified copy of Mr. Hardaway's prior felony conviction for domestic battery was introduced as evidence.

Officer Michael Calendar was also called to the area, and he assisted in chasing and apprehending Mr. Hardaway. Officer Calendar testified that he found Mr. Hardaway hiding behind a white car. According to Officer Calendar, they approached Mr. Hardaway and he jumped a fence and was apprehended down an alley. After appellant was arrested, Officer Calendar went to where Mr. Hardaway had been hiding behind the white car and searched for a weapon. Officer Calendar found a loaded SKS rifle under the car.

After the State rested, the following colloquy occurred pertaining to appellant's unsuccessful request to call Billy Mitchell as a defense witness:

DEFENSE COUNSEL: Judge, the only other thing I would do and I don't guess I have been on the record. You already, in chambers, told me that my witness—what's his name?

APPELLANT: Billy Mitchell

DEFENSE COUNSEL: Billy Mitchell, who late yesterday called me and indicated that he is the gentleman that was running and had the weapon. I called [the prosecutor]. Talked to him about it. I understood that he would object to it. The name was just provided to me yesterday. He came forward and lives in Benton, Arkansas. He tells me he is here ready to testify today. The only witness that we would call would be him. I think the court already, in chambers, ruled that based on the timeliness of it that you would not allow his testimony.

TRIAL COURT: That's correct.

DEFENSE COUNSEL: And just the proffer on his testimony would be that on the evening in question that the officers testified about, that he and three other individuals, including Antwan Hardaway, were present when the officers came. Several other individuals took off running. That he picked up the weapon, ran and officers came, approached this white car that he and Mr. Hardaway were around. Mr. Hardaway bolted away. He scooted to the other side of the car. When the officers drove off—or ran off, he slid the weapon under the car and ran the opposite direction. That is what his testimony would be. And I think, judge, that the fact of the matter is that this is a witness that I did not have available to me, nor had I talked to or knew about until yesterday. And that it is a witness that is a key to Mr. Hardaway's defense. It's one that if he testified I think would greatly impact the jury's deliberations. And that the proper remedy, as I indicated before trial started in chambers, may be that give the State an opportunity to visit with him and determine whether or not they wanted to go forward. But that much like any other newly discovered evidence, if it had been on the State's behalf, or even the defense's behalf, that the proper remedy would be to exercise the court's discretion and allow a continuance. But on something that was that critical and that was not based on a lack of diligence on my part as attorney for the defendant, that he ought to have been allowed to testify or the State seek a continuance.

TRIAL COURT: I'm not saying it was a lack by you.

DEFENSE COUNSEL: I understand.

TRIAL COURT: Let's make that clear.

PROSECUTOR: Your honor, the issue from the proffer that I understand is Mr. Hardaway has known about this incident since July 1, 2008, and the State filed a motion for discovery and Mr. Hardaway knew about this witness and it was not disclosed to the State. So he brings him in at the last minute and sandbags the State.

TRIAL COURT: Okay, Let's go.

In this appeal, Mr. Hardaway argues that the trial court erred in excluding Billy Mitchell as a defense witness. Matters pertaining to the admissibility of evidence are left to the sound discretion of the trial court, and we will not reverse such a ruling absent an abuse of that discretion. *McEwing v. State*, 366 Ark. 456, 237 S.W.3d 43 (2006). Mr. Hardaway submits that the proposed testimony of Billy Mitchell was essential to his defense, that it was not discovered until the day before trial, and that the trial court abused its discretion in disallowing the testimony.

The applicable rules are Rules 18.3 and 19.7 of the Arkansas Rules of Criminal Procedure. Rule 18.3 provides:

Subject to constitutional limitations, the prosecuting attorney shall, upon request, be informed as soon as practicable before trial of the nature of any defense which defense counsel intends to use at trial and the names and addresses of persons whom defense counsel intends to call as witnesses in support thereof.

Rule 19.7 provides:

(a) If at any time during the course of the proceedings it is brought to the attention of the court that a party has failed to comply with an applicable discovery rule or with an order issued pursuant hereto, the court may order such party to permit the discovery or inspection of materials not previously disclosed, grant a continuance, prohibit the party from introducing in evidence the material not disclosed, or enter such other order as it deems proper under the circumstances.

(b) Wilful violation by counsel or a defendant of an applicable discovery rule or an order issued pursuant thereto may subject counsel or a defendant to appropriate sanctions by the court.

In the present case, Mr. Hardaway asserts that he informed the prosecutor about his defense witness as soon as practicable because his counsel was not made aware of the witness until the day before trial, at which point he notified the prosecutor. Mr. Hardaway notes that

even the trial court in its comments indicated that there was no lack of diligence on the part of his counsel in identifying the witness. Given these circumstances, Mr. Hardaway asserts that the trial court should have considered other options rather than excluding the witness. In particular, Mr. Hardaway contends that the trial court should have granted a continuance to allow the State preparation time to cross-examine the witness. He cites *Reed v. State*, 312 Ark. 82, 847 S.W.2d 34 (1993), for the proposition that a continuance may be sufficient to cure a failure to comply with discovery obligations. Mr. Hardaway argues that extreme prejudice resulted from the exclusion of a critical defense witness, and that consequently this case should be reversed and remanded.

In *Mitchell v. State*, 306 Ark. 464, 816 S.W.2d 566 (1991), the supreme court noted that discovery in criminal cases, within constitutional limits, must be a two-way street. This interpretation promotes fairness by allowing both sides the opportunity for full preparation, preventing surprise at trial, and avoiding unnecessary delays during the trial. *Id.* In *McEwing v. State*, 366 Ark. 456, 237 S.W.3d 43 (2006), the supreme court relied on *Mitchell, supra*, and held that there was no abuse of discretion by the trial court in excluding a defense witness where Mr. McEwing failed to disclose the witness until the day of trial. Later, in *Neal v. State*, 375 Ark. 389, 291 S.W.3d 160 (2009), the supreme court upheld the exclusion of a defense witness, Shavonda Perry, who was not identified until the day of trial even though the appellant did not learn of her testimony until that morning. The supreme court wrote:

While *McEwing* is distinguishable on the basis that there was a blatant violation of Rule 18.3 involved there, the underlying principle that it would be unfair to the State

under Rule 18.3 to allow a witness who comes forward the morning of trial to testify is the same in both cases. Even though in the present case it is clear that Appellant was unaware of Ms. Perry and her potential testimony, we still cannot say that the trial court abused its discretion in excluding her as a witness.

*Id.* at 393–94, 291 S.W.3d at 163–64.

Applying these principles to the case at bar, we cannot say that the trial court abused its discretion in excluding the testimony of Mr. Mitchell. Eight months before trial, the State filed its discovery motion requesting the names and addresses of all defense witnesses, and also at that time the State submitted its witness list in response to Mr. Hardaway’s discovery request. In turn, Mr. Hardaway filed a motion to limit the State’s witnesses to those identified in its discovery response, and the State complied with that request at trial. Between the time that Mr. Hardaway was charged on July 2, 2008, and the December 9, 2009, trial date, the trial was continued five times at appellant’s request. And as the State pointed out at trial and now asserts on appeal, Mr. Hardaway should have known the necessity of Mr. Mitchell’s testimony from the date he was arrested on July 1, 2008. The witness was not provided to the State until the day before trial at the earliest, and under the circumstances presented we hold that it was within the trial court’s discretion to preclude the witness from testifying.

Affirmed.

WYNNE and GLOVER, JJ., agree.