

Cite as 2011 Ark. 21

SUPREME COURT OF ARKANSAS

No. CR10-759

MARION EDWARD RIDDELL,
APPELLANT,

VS.

STATE OF ARKANSAS,
APPELLEE,

Opinion Delivered January 27, 2011

APPEAL FROM THE GARLAND
COUNTY CIRCUIT COURT,
NO. CR-08-61-4,
HON. MARCIA RENAUD
HEARNSBERGER, JUDGE,

AFFIRMED.

PAUL E. DANIELSON, Associate Justice

Appellant Marion Edward Riddell appeals from his conviction for rape. His sole point on appeal is that the circuit court erred in ruling against a continuance of the trial or, in the alternative, a delay, for two witnesses who failed to appear in court.¹ We find no error and affirm the circuit court.

As Riddell does not challenge the sufficiency of the evidence supporting his conviction, only a brief recitation of facts is necessary. Riddell was charged with one count of rape on February 5, 2008. A pretrial hearing was scheduled for March 16, 2010; however,

¹Riddell originally noted in his points on appeal that he was challenging the circuit court's denial of his motion for directed verdict. However, that issue was not pursued, and there is no argument on that issue included in Riddell's brief.

that hearing was rescheduled for April 6, 2010, when Riddell was hospitalized due to a viral infection. Riddell's trial was scheduled to begin on April 14, 2010.

At the April 6 pretrial hearing, the court was to address, among other things, a motion in limine filed by the State pursuant to the rape-shield statute to preclude Riddell from eliciting certain testimony. The court was to hear witness testimony to determine the issue; however, Riddell's two main witnesses, Jose and Thelma Anaya, previous caretakers of the victim, were not present. Riddell's counsel explained that these witnesses were going to be called to testify about accusations the victim had made against Jose Anaya in the past. The court agreed to continue the pretrial hearing until April 13 to give Riddell's counsel the opportunity to get his witnesses to court.

On April 13, Riddell's counsel informed the court that Jose Anaya had been served with a subpoena, but had informed the process server that he would not be appearing in court. Riddell requested that the court issue a show-cause order for Jose Anaya and have the sheriff's department physically bring him to court. The court readily agreed to issue such an order as long as Jose Anaya had been properly served; however, the court refused to continue the trial, noting that the case had been pending for a lengthy amount of time. The court informed Riddell that if and when the witnesses appeared, the rape-shield hearing could proceed. The State's motion in limine was granted, subject to further order of the court. The court later found that Jose Anaya was not timely served and that it could not issue a show-cause order.

The morning of trial, neither Jose Anaya or Thelma Anaya appeared in court, and Riddell moved for a continuance in order to secure their attendance. The court denied the request. On the second day of trial, Riddell again requested the court to issue a show-cause order for Jose Anaya and also requested that the court delay trial until April 19 in order for him to get Jose Anaya to court. Riddell's counsel argued that the subpoena had been issued on April 12 for April 13, 14, and 15. The court stated that Jose Anaya had been served on April 12, and the subpoena required him to be in court on April 13, which was not timely service.² For that reason, the court denied Riddell's requests. The court further found that, based on the arguments made on the record by Riddell's counsel and by the State, even if the testimony was presented, it would be excluded pursuant to the rape-shield statute.

The case proceeded to trial, and the jury found Riddell guilty of rape and sentenced him to life imprisonment. Riddell then filed this timely appeal. Riddell argues that the circuit court erred in denying his motion for continuance because two material witnesses for the defense refused to appear in court and their whereabouts were known. The State argues that the circuit court did not abuse its discretion in denying Riddell's motion and that Riddell failed to meet his burden of proving that the denial was an abuse of discretion and resulted in prejudice amounting to a denial of justice.

²To be effective, a subpoena must be served at least two days prior to the trial or hearing. See Ark. R. Civ. P. 45(d) (2010). See *Swanson v. State*, 308 Ark. 28, 823 S.W.2d 812 (1992) (applying Rule 45(d) in a criminal context where the subpoena was untimely and was not issued with leave of the court).

Motions for a continuance are governed by Arkansas Rule of Criminal Procedure 27.3, which provides:

The court shall grant a continuance only upon a showing of good cause and only for so long as is necessary, taking into account not only the request or consent of the prosecuting attorney or defense counsel, but also the public interest in prompt disposition of the case.

It is well settled that a motion for continuance is left to the sound discretion of the circuit court, and its judgment will not be reversed on appeal in the absence of a clear abuse of that discretion. *See Stenhouse v. State*, 362 Ark. 480, 209 S.W.3d 352 (2005). The burden of establishing an abuse of the circuit court's discretion falls squarely on the shoulders of the appellant. *See id.* An appellant must not only demonstrate that the circuit court abused its discretion by denying the motion for a continuance, but also must show prejudice that amounts to a denial of justice. *See Cherry v. State*, 347 Ark. 606, 66 S.W.3d 605 (2002).

When deciding whether a continuance should be granted on account of the absence of a witness, the following factors are to be considered by the circuit court: (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 appellant believes them to be true. *See Clark v. State*, 358 Ark. 469, 192 S.W.3d 248 (2004); *Green v. State*, 354 Ark. 210, 118 S.W.3d 563 (2003).

In his motion for continuance made at trial, Riddell argued that the whereabouts of the two missing witnesses were known, that the subpoenas for the missing witnesses had been

issued in a timely fashion although only Jose Anaya was located for service, and that the subpoena for Jose Anaya was timely as of the second day of trial even though it had not been served in time to require him to appear the first day. The circuit court found that the subpoena was not valid and that even if the testimony of Jose Anaya was presented, it would be excluded pursuant to the rape-shield statute.

While Riddell's counsel had argued at the pretrial hearing what he believed the witnesses' testimony would have revealed, an affidavit was never filed regarding the motion for continuance. Therefore, Riddell failed to comply with Ark. Code Ann. § 16-63-402(a) (Repl. 2005), which provides:

(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 due diligence has been used to obtain it. If the motion is for an absent witness, the affidavit must show what facts the affiant believes the witness will prove and not merely show the effect of the facts in evidence, that the affiant himself believes them to be true and that the witness is not absent by the consent, connivance, or procurement of the party asking the postponement.

We have consistently interpreted this statute as requiring the presence of an affidavit in order to justify a continuance due to a missing witness. *See Clark v. State, supra; King v. State*, 314 Ark. 205, 862 S.W.2d 229 (1993); *Cloird v. State*, 314 Ark. 296, 862 S.W.2d 211 (1993). The denial of a continuance when a motion is not in substantial compliance with the statute is not an abuse of discretion, and the burden is on the appellant to establish prejudice and abuse of discretion in denying the continuance. *See Cloird, supra*.

Cite as 2011 Ark. 21

By failing to file an affidavit, Riddell failed to show his diligence in attempting to have the two missing witnesses appear in court. In addition, without the affidavit regarding the expected testimony of the missing witnesses and without demonstrating how such testimony would survive exclusion pursuant to the rape-shield statute, Riddle hardly proved that he was prejudiced by the denial of the continuance. Therefore, we hold that the circuit court did not abuse its discretion in denying Riddell's motion for continuance.

4-3(i) Review

As required under Ark. Sup. Ct. R. 4-3(i), in addition to the arguments raised by Riddell, the record has been examined for all objections, motions, and requests made by either party that were decided adversely to appellant, and no reversible error has been found.

Affirmed.