

ARKANSAS COURT OF APPEALS  
NOT DESIGNATED FOR PUBLICATION  
JOHN B. ROBBINS, JUDGE

DIVISION III

CACR 06-507

JANUARY 17, 2007

DENNIS CALVIN WARREN  
APPELLANT

APPEAL FROM THE WHITE  
COUNTY CIRCUIT COURT  
[NO. CR-05-365]

V.

HONORABLE ROBERT EDWARDS,  
JUDGE

STATE OF ARKANSAS  
APPELLEE

AFFIRMED

Appellant Dennis Warren appeals the judgment of conviction entered against him after a jury trial in White County Circuit Court for delivery of a controlled substance, cocaine. Appellant asserts two points for reversal: (1) the trial court abused its discretion when it failed to grant appellant a continuance; and (2) there is insufficient evidence to support the conviction. We affirm.

We first consider the sufficiency of the evidence. Although this is actually appellant's second point on appeal, we address it first, as an appellant's right to be free from double jeopardy requires a review of the sufficiency of the evidence prior to a review of any asserted trial errors. *See Flowers v. State*, 362 Ark. 193, \_\_ S.W.3d \_\_ (May 5, 2005); *Carter v. State*, 360 Ark. 266, 200 S.W.3d 906 (2005). Appellant argues that the trial court erred in denying

his motion for a directed verdict, which is the means by which to challenge the sufficiency of the evidence. *Hampton v. State*, 357 Ark. 473, 183 S.W.3d 148 (2004); *Martin v. State*, 354 Ark. 289, 119 S.W.3d 504 (2003). The test for determining the sufficiency of the evidence is whether the verdict is supported by substantial evidence, direct or circumstantial. *Martin, supra*. Substantial evidence is evidence that is of sufficient certainty and precision to compel a conclusion one way or the other and pass beyond mere suspicion or conjecture. *Id.* On appeal, we view the evidence in the light most favorable to the State, considering only that evidence that supports the verdict. *Id.*

The evidence, viewed in the light most favorable to the State, revealed that a former narcotics investigator for the Searcy Police Department, Stan Young, had investigated appellant upon information received by a confidential informant. Young proceeded to appellant's home on the night of April 28, 2005. Young was wearing a microphone to audiotape a drug transaction. Once inside appellant's house, Young asked appellant if he could purchase crack cocaine, and appellant offered seven individually packaged rocks to him for a price of \$100. Appellant was observed removing a pill bottle from his jacket and taking out seven rocks, exchanging them for money. A crime laboratory chemist verified that the rocks were made from a base of cocaine. The audiotape of the transaction was entered into evidence.

Young was cross examined about his work history, including his having left several jobs for having been dishonest. Furthermore, the confidential informant was Young's

cousin, and the informant rode with Young to appellant's house, although Young said that the informant did not participate in the buy. The informant did not testify at the trial.

Appellant's counsel moved for directed verdict as follows:

Your Honor, at this time, the defendant would move to dismiss the charges against him based on the insufficiency of the evidence. The State has put on only one witness that said this transaction occurred. And I believe that through cross examination and the testimony of other witnesses, the defense has shown that this man is not credible and should not be believed. And I don't believe that they have met their prima facie burden of showing the elements of this offense.

This motion was denied. At the close of the evidence, this motion was renewed and denied. This motion challenged whether the primary State's witness was *credible* in testifying that appellant had sold cocaine. He reasserts that argument on appeal – that the testifying officer who recounted the undercover transaction was untruthful, that the voices on the audiotape are actually Young and his cousin, and that Young “framed” appellant. We hold that sufficient evidence was presented to support appellant's conviction.<sup>1</sup>

The credibility of witnesses is an issue for the jury and not the court. *Burley v. State*, 348 Ark. 422, 73 S.W.3d 600 (2002). The trier of fact is free to believe all or part of any witness's testimony and may resolve questions of conflicting testimony and inconsistent evidence. *Id.* To the extent that there may have been flaws in Young's testimony or his credibility, that was an issue for the jury to resolve. Viewing the evidence in the light most

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<sup>1</sup>The State asserted in its brief that the merits should not be reached because no element of the offense was challenged in the motion for directed verdict. Appellant adequately challenged the State's overall proof by attacking the veracity of Young.

favorable to the State, we hold that sufficient evidence was presented to support appellant's conviction for delivery of a controlled substance.

Appellant's other point on appeal concerns the trial court's denial of his motion for continuance on the day of trial. Appellant's counsel stated to the trial court that appellant was unable to contact the informant, Cornelius Earl, at the telephone number that had been produced because the phone line was disconnected. The trial court responded that "I don't know if there's anything else for the Court to do on that matter." Appellant's counsel responded that the State did not have Earl under subpoena, and neither did the defense. Appellant's counsel wanted to ensure that she had been made aware of the correct informant, which was confirmed by the prosecutor. Appellant's counsel then stated that appellant "would like very much to have him here." The judge said that he did not know "if there's anything else for the Court to do on that matter."

Other pretrial matters were taken up, and then appellant's counsel formally moved for a continuance to have appellant's ex-wife, Sharon Thorpe, present for trial as "an essential witness." Appellant's counsel said she had tried, without success, to subpoena Thorpe. She then stated that Thorpe's expected testimony would be that appellant was targeted by the police because of Thorpe's friendships with police officers. The trial judge denied the request for a continuance, given that the case had been pending for months and this information was known for months.

On appeal, appellant argues that a continuance was wrongfully denied him with regard to both witnesses. The State points out that appellant asked for a continuance only as to Thorpe. We must agree with the State that the only motion for a continuance related to Thorpe. Therefore, we address his argument on appeal only as to that witness because it is the sole issue preserved for appeal.

A 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. Ark. R. Crim. P. 27.3. Granting or denial of a motion for continuance is within the sound discretion of the trial court, and will not be reversed absent an abuse of discretion amounting to a denial of justice. *Davis v. State*, 345 Ark. 161, 44 S.W.3d 726 (2001). When deciding whether a continuance should be granted, 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. *Green v. State*, 354 Ark. 210, 118 S.W.3d 563 (2003). Lack of diligence alone is sufficient cause to deny a continuance. *Id.* Arkansas Code Annotated section 16-63-402(a) (1987), 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.

Our supreme court has consistently interpreted this statute as requiring the presence of an affidavit in order to justify a continuance due to a missing witness. *Cloird v. State*, 314 Ark. 296, 862 S.W.2d 211 (1993); *King v. State*, 314 Ark. 205, 862 S.W.2d 229 (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. *Cloird, supra*.

We hold that the trial court did not abuse its discretion. Defense counsel failed to act with due diligence, and defense counsel acknowledged that they were not in a position to ask for assistance from the trial court in light of failure to subpoena Thorpe. Asking for a continuance on the day of trial was too late. This is especially true where there were earlier continuances granted, one at defense request, extending the time to have the defense prepare for trial.

We affirm appellant's conviction.

PITTMAN, C.J., and GLADWIN, J., agree.