

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

WALTER JACKSON, JR.,

Defendant-Appellee.

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UNPUBLISHED

October 9, 2001

No. 230421

Wayne Circuit Court

LC No. 99-012623

Before: Cavanagh, P.J. and Markey and Cooper, JJ.

MEMORANDUM.

The prosecutor appeals as of right from an order of dismissal entered following the denial of his motion for a continuance. We affirm. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

A motion to adjourn must be based on good cause. MCR 2.503(B)(1). An adjournment may be granted because of the unavailability of a witness or evidence, but “only if the court finds that the evidence is material and that diligent efforts have been made to produce the witness or evidence.” MCR 2.503(C)(1), (2). Such a motion must be brought “as soon as possible after ascertaining the facts.” MCR 2.503(C)(1). The court’s ruling on a motion for a continuance is discretionary and is reviewed on appeal for an abuse of discretion. *Soumis v Soumis*, 218 Mich App 27, 32; 553 NW2d 619 (1996); *People v Pullins*, 145 Mich App 414, 417; 378 NW2d 502 (1985). “The burden of proof is on the party asserting an abuse of discretion.” *In re Jackson*, 199 Mich App 22, 28; 501 NW2d 182 (1993).

The prosecutor’s motion was timely, as he had no indication that the missing witness would not appear for trial until he failed to show up on the trial date. However, the prosecutor did not show that a diligent effort was made to produce the witness. As a result, the court was prepared to deny the prosecutor’s motion to introduce the witness’ preliminary examination testimony. MRE 804(a)(5), (b)(1). The court stated that it was willing to consider giving the prosecution more time to find Dawson and then reconsider the motion under MRE 804(b)(1).

However, the court apparently did not envision that effort taking two weeks and the prosecutor did not request a shorter adjournment in the alternative. Therefore, under the facts of this case, we cannot find that the court abused its discretion.

Affirmed.

/s/ Mark J. Cavanagh

/s/ Jane E. Markey

/s/ Jessica R. Cooper