

DIVISION III

CACR07-304

DECEMBER 5, 2007

MARK ANTHONY HOLSOMBACH
APPELLANT

APPEAL FROM THE VAN BUREN
COUNTY CIRCUIT COURT
[NO. CR-2004-27]

V.

HON. DAVID L. REYNOLDS,
JUDGE

STATE OF ARKANSAS

APPELLEE

REVERSED AND DISMISSED

Appellant Mark Anthony Holsombach was convicted on August 24, 2006, by a Van Buren County jury of possession of firearms by certain persons pursuant to Arkansas Annotated section 5-73-103(c)(1)(B) (Supp. 2003). He contends on appeal that the trial court erred in the following: by denying his motion to dismiss for violation of the speedy-trial rule; by overruling his motion for directed verdict; by allowing the State to amend the information; by allowing the introduction of evidence of appellant's possession of firearms; by not allowing him to present evidence to support a mistake-of-law defense. We reverse and dismiss for violation of the speedy-trial rule.

Appellant was involved in a romantic relationship with Anne Throneberry, the wife of Theodore Throneberry, the victim. On February 28, 2004, Mr. Throneberry returned home from work and was attacked and killed by appellant and William Frazier. The victim

was struck in the head with a large hammer, bound with duct tape, and held against his will. The victim was killed, his body was burned, and his remains were scattered on a farm road on his property. On March 7, 2004, the Van Buren County Sheriff's Office received information that the victim was missing. Police unsuccessfully attempted to contact the victim and his wife. An arrest warrant and a search warrant were issued, and on March 22, 2004, the Arkansas State Police encountered appellant and Frazier on appellant's property in Alread while executing the search warrant. Shots were fired, and Arkansas State Trooper Charlie Edmondson sustained a gunshot wound. Appellant, Anne Throneberry, and Frazier evaded capture for several days, but were eventually captured, charged, and tried for their crimes. Appellant was convicted in Van Buren County Circuit Court of the capital murder of Theodore Throneberry, the attempted capital murder of Officer Edmondson, and kidnapping. For these convictions, appellant was sentenced to life imprisonment without parole, twenty-five years' imprisonment with an enhancement of ten years for the use of a firearm, and thirty years, respectively.¹

During the search of appellant's property, several guns were found. By felony information filed March 19, 2004, appellant was charged with the Class B felony of violating Arkansas Code Annotated section 5-73-103, which makes it illegal for a convicted felon to possess firearms. The information was amended on August 18, 2006, when the State claimed that appellant's possession of a firearm subsequently involved the commission of another

¹*Holsombach v. State*, 368 Ark. 415, ___ S.W.3d ___ (2007).

crime, which is a Class B felony. Ark. Code Ann. § 5-73-103(c)(1)(B). Also on August 18, 2006, appellant filed a motion to dismiss for violation of the speedy-trial rule. This motion was denied, and appellant's objection to the State's amendment to the information was overruled. Appellant was tried on August 24, 2006, and the State presented evidence of firearms found on appellant's property. Appellant argued that this proof did not show that appellant's current possession of any firearm involved the commission of another crime. He moved for a directed verdict, arguing insufficient evidence, which was denied. On a related matter, he claimed that the State should not have been allowed to introduce the evidence of the firearms without also proving that the possession of those specific firearms involved the commission of another crime. This objection was overruled. Finally, appellant was not allowed to present an affirmative defense based upon a mistake of law. Appellant was found guilty and sentenced to forty years' imprisonment, said term to be served consecutive to the sentence he is currently serving. Appellant filed a timely notice of appeal, and this appeal follows.

In order to preserve his right against double jeopardy, this court would normally address appellant's argument that the trial court should have granted his motion for directed verdict. However, because we are compelled to reverse the trial court on appellant's speedy-trial argument, we do not reach any of the other issues raised by appellant in this appeal. *See Dunlin v. State*, 59 Ark. App. 207, 955 S.W. 2d (1997).

Under Rule 28.1(c) of the Arkansas Rules of Criminal Procedure, a defendant must be brought to trial within twelve months, unless there are periods of delay that are excluded

under Rule 28.3. If the defendant is not brought to trial within the requisite time, the defendant is entitled to have the charges dismissed with an absolute bar to prosecution. Ark. R. Crim. P. 30.1. Once a defendant establishes a prima facie case of a speedy-trial violation, *i.e.*, that his trial took place outside the speedy-trial period, the State bears the burden of showing that the delay was the result of the defendant's conduct or was otherwise justified. *Yarbrough v. State*, 370 Ark. 31, ___ S.W.3d ___ (2007). On appeal, we conduct a de novo review to determine whether specific periods of time are excludable under our speedy-trial rules. *Cherry v. State*, 347 Ark. 606, 66 S.W.3d 605 (2002). Here, the information was filed on March 19, 2004. Appellant filed a motion to dismiss for lack of a speedy trial on August 18, 2006. Appellant's trial began on August 24, 2006. The filing of a speedy-trial motion tolls the running of the time for a speedy trial. *E.g.*, *Yarbrough, supra*. The period from March 19, 2004, to August 18, 2006, consisted of 882 days, which constitutes a prima facie showing of a speedy-trial violation. Therefore, it is the State's burden to show that the delay was the result of appellant's conduct or otherwise justified. *Id.*

Appellant contends that the period from July 25, 2005, to August 18, 2006, the date upon which his motion to dismiss was filed, should not be excluded for speedy-trial purposes because the trial court stated in its order that the trial was delayed during that time due to docket congestion.² He contends that pursuant to *Berry v. Henry*, 364 Ark. 26, 216 S.W.3d 93 (2005), a mere recital of "docket congestion" is not enough. We agree.

²The parties agree that the time period from June 12, 2006, until August 18, 2006, is not excludable, and is not, therefore, addressed by this court.

In *Berry*, the Arkansas Supreme Court considered specific time periods for their excludability under the speedy-trial rule. Time period “#3” therein was a ninety-four day period of delay that the trial court noted was due to “docket congestion.” The *Berry* court stated:

Because “docket congestion” is not a just cause for violating the speedy-trial rule, and because the trial court failed to offer any further explanation to satisfy Rule 28.3, the period of delay set out in Time Period # 3 does not constitute an excludable period under that rule. Therefore, this ninety-four day time period is not excludable from the time that Berry may include in his speedy-trial calculation.

Id., 364 Ark. at 31-32, 216 S.W.3d at 97.

Arkansas Rule of Criminal Procedure 28.3 provides in pertinent part that the following periods shall be excluded in computing the time for trial:

- (a) The period of delay resulting from other proceedings concerning the defendant, including but not limited to an examination and hearing on the competency of the defendant and the period during which he is incompetent to stand trial, hearings on pretrial motions, interlocutory appeals, and trials of other charges against the defendant. No pretrial motion shall be held under advisement for more than thirty (30) days, and the period of time in excess of thirty (30) days during which any such motion is held under advisement shall not be considered an excluded period.
- (b) The period of delay resulting from a continuance attributable to congestion of the trial docket if in a written order or docket entry at the time the continuance is granted:
 - (1) the court explains with particularity the reasons the trial docket does not permit trial on the date originally scheduled;
 - (2) the court determines that the delay will not prejudice the defendant; and
 - (3) the court schedules the trial on the next available date permitted by the trial docket.

In conducting our de novo review, we conclude that the continuance granted by the trial court due to “docket congestion” does not comply with Rule 28.3 or *Berry, supra*. The October 17, 2005 order of the trial court states in pertinent part as follows:

4. That Mark Holsombach, William Frazier and Anne Throneberry are hereby severed as co-defendants.
5. That the offenses against Mark Holsombach, in cases CR2004-30 and CR2004-121, shall be joined for trial and are set for trial beginning November 1, 2005.
6. That the offense against Mark Holsombach in case CR 2004-27 shall be scheduled at a later date, as the congestion of the Court docket permits, and speedy trial time is tolled from August 31, 2005 until the date scheduled for trial by the Court.

At the August 24, 2006 pre-trial hearing on this motion, the trial court stated, “I will specifically say that because of the previous trial in this case, the preparation for the Frazier case and others backed up our docket to such an extent that we are still trying to catch up and that’s the reason that it was scheduled for now.” The order before us attributes the continuance to docket congestion without saying more. We might speculate that appellant’s other cases and those of his codefendants are reasons for the congested docket. However, even with the trial court’s explanation on the record, and considering as we can under Rule 28.3 the trials of other charges of the defendant, this court is constrained to follow *Berry*. Here, the trial court failed to comply with Rule 28.3(b)(1) by not explaining with particularity the reasons the trial court’s docket did not permit trial on the date scheduled in its written order or docket entry.

The State argues that appellant must make a contemporaneous objection at the hearing where the time is excluded in order to preserve a speedy-trial objection for appeal. *E.g.*, *DeAsis v. State*, 360 Ark. 286, 200 S.W.3d 911 (2005). The State argues that appellant’s attorney failed to sign the order to indicate that he objected to it. It was not until August 24, 2006, that a record was made of an objection to the continuance that was granted in the

October 17, 2005 ruling. The State contends that because appellant did not timely object to the continuance, the trial court did not err by denying his motion to dismiss. However, we decline to hold that an attorney's failure to approve of the form of a precedent constitutes a failure to indicate his objection to it. Accordingly, we reverse.

Reversed and dismissed.

HART and GRIFFEN, JJ., agree.