ARKANSAS COURT OF APPEALS
NOT DESIGNATED FOR PUBLICATION
WENDELL L. GRIFFEN, JUDGE

DIVISION III

CACR07-945

September 17, 2008

GARY LONNIE WILLIAMS
APPELLANT

AN APPEAL FROM FAULKNER COUNTY CIRCUIT COURT
[CR2006-29]

V.

HON. CHARLES CLAWSON, JR., JUDGE

STATE OF ARKANSAS
APPELLEE

AFFIRMED

On March 9, 2007, a Faulkner County jury found Gary Lonnie Williams guilty of first-degree murder[1] and sentenced him to a forty-year term in the Arkansas Department of Correction. Appellant brings this appeal, alleging that the trial court erred (1) in denying his motion to dismiss for lack of a speedy trial, (2) in excluding evidence that the victim stole a pistol from a pawn shop and brought it to the crime scene, and (3) in denying him an instruction on corroboration of accomplice testimony. We affirm, holding (1) that the trial court properly denied appellant's motion to dismiss; (2) that evidence that the victim stole a pistol was irrelevant and cumulative; and (3) that the trial court properly denied the corroboration instruction, as the witness in question was not an accomplice.

Speedy Trial

[1]Appellant was also charged with and convicted of possession of drug paraphernalia and misdemeanor possession of a controlled substance. The main focus in this appeal is on the homicide. We recognize, however, that had we reversed on the appellant's speedy-trial argument, his drug convictions would have been reversed as well.

We first address appellant's speedy-trial argument. Any defendant charged in circuit court shall be entitled to have the charge dismissed with an absolute bar to prosecution if not brought to trial within twelve months of the date he was arrested or the date the charges were filed, whichever is earlier, excluding any periods of necessary delay as authorized by Rule 28.3. *See* Ark. R. Crim. P. 28.1, 28.2; *Killian v. State*, 96 Ark. App. 92, 238 S.W.3d 629 (2006). To preserve a speedy-trial objection for appeal, the defendant must make a contemporaneous objection at the hearing where the time is excluded. *Killian*, *supra*. The burden is on the State to bring a case to trial within the required time. *Jones v. State*, 347 Ark. 455, 65 S.W.3d 402 (2002).

Appellant was arrested on January 11, 2006, and brought to trial on March 6, 2007, 419 days later. The 419 days between arrest and trial is a prima facie speedy-trial violation; therefore, the burden was on the State to prove that appellant was brought to trial within a reasonable time, after considering proper exclusions. *See Yarbrough v. State*, 370 Ark. 31, 257 S.W.3d 50 (2007). The record shows the following:

January 11, 2006:	Appellant was arrested and brought to court for his first appearance. A pretrial hearing was scheduled for May 19, 2006, and trial was scheduled for June 6, 2006.
February 17, 2006:	Appellant appeared for a status hearing without counsel; the court instructed him to appear with counsel on March 13, 2006, and entered an order charging the delay against appellant.
March 13, 2006:	Appellant appeared without counsel. The hearing was continued to March 31, 2006, with the delay charged against appellant.
March 31, 2006:	Appellant appeared with counsel. The court addressed matters unrelated to this appeal.
May 19, 2006:	The court announced that it was not prepared to hear all of the

	pending defense motions. The State requested a continuance until the following court term. The hearing was rescheduled for August 11, 2006, with the delay until July 14, 2006, charged against appellant. Trial was rescheduled for August 28, 2006.
August 11, 2006:	Pretrial motions were rescheduled for September 11, 2006, with the delay charged against appellant.
September 11, 2006:	Pretrial motions were rescheduled for December 1, 2006, with the delay through September 21, 2006, charged against appellant.
December 1, 2006:	Pretrial motions were continued on appellant's motion to January 8, 2006. The trial was rescheduled for the week of January 16, 2007. That same day, the court granted the motion to sever the case of appellant's co-defendant.
January 8, 2007:	Pretrial hearing in a separate case continued to January 12, 2006, upon motion of appellant.
January 16, 2007:	The State requested a continuance for time to serve process to two key witnesses who had moved to Colorado. The court granted the continuance and charged the delay to appellant, over appellant's objection.[2]
March 6, 2007:	The jury trial began.

As noted above, the State requested a continuance on January 16, 2007, for additional time to serve subpoenas to Shiloh and J.B. Middleton, both of whom were key witnesses in its case. The prosecutor reported that both had moved to Colorado and that her office had

[2]Appellant filed his first motion to dismiss for lack of speedy trial the morning of the January 16, 2006 hearing. The court denied the motion during that hearing.

difficulty finding them. She had obtained an address for the witnesses the previous Saturday. Appellant's counsel questioned whether the State exercised due diligence in finding the witnesses and requested a hearing.

Appellant filed a motion to dismiss for lack of speedy trial on February 27, 2007, wherein he alleged that the State failed to exercise due diligence in locating material witnesses for trial. At a hearing on the issue, the court heard testimony from Janet Young, Shiloh's mother and J.B.'s mother-in-law. Young testified that the Middletons moved to Delores, Colorado in mid-September 2006 and that she was aware of their location as of mid-October 2006. During that time, she went to Colorado to be with her sister; she returned to Conway on November 5. Other than the periods where she was in the hospital, she testified that she had been at home since that date. On cross-examination, Young stated that the Middletons were staying with her sister when they first moved to Colorado. The Middletons eventually moved to a cabin near her sister's residence. Five weeks later, they moved into a second cabin. At some later point, they returned to living with Young's sister. Young testified that she gave someone the Middletons' address as soon as she had it.

The State also brought the court file to the court's attention. Subpoenas were issued to the Middletons on December 29, 2006, for a trial set for January 16, 2007. The subpoenas were filed with the court on January 18, 2007. At the conclusion of the hearing, the court denied appellant's motion to dismiss.

Appellant reasserts his speedy-trial rights before this court. To show that appellant was not denied his right to a speedy trial, at least fifty-four days must be excluded from the speedy-trial calculation. Appellant concedes the ten-day period beginning September 11, 2006, when the court took defense motions under advisement, but he contends that all others days between his arrest and trial were countable.

On May 19, 2006, the court granted the State's motion for continuance of a pretrial

hearing, but it charged the delay from that date until July 14, 2006, to appellant. Similarly, on August 11, 2006, the court continued the hearing until September 11, 2006, attributing the delay to motions, and excluded the delay from the speedy-trial period. Appellant contends that the record is void of any reason the court had to continue these hearings and that the entire period of delay for the continuance should be charged to the State. Appellant may have a point. The court charged this time to appellant due to the pending pretrial motions, but the mere filing of a pretrial motion does not toll the speedy-trial clock. *See Miller v. State*, 100 Ark. App. 391, ___ S.W.3d ___ (2007). Some delay attributable to the defendant must result from the motion before time is excluded from the calculation. *Id.* (citing *Ferguson v. State*, 343 Ark. 159, 33 S.W.3d 115 (2000)). There is no explanation as to how the pretrial motions delayed the trial.

Nonetheless, we must exclude both of these periods from the calculation, as appellant failed to present a timely objection to their exclusion. To preserve a speedy-trial objection for appeal, the defendant must make a contemporaneous objection at the hearing where the time is excluded. *Killian*, *supra*. The reason for requiring a contemporaneous objection is to inform the trial court of the reason for disagreement with its proposed action prior to making its decision or at the time the ruling occurs. *Id.* Appellant agreed to have the court consider the motions on July 14, 2006. The remaining pretrial procedures were scheduled for August 11, 2006. The court charged the delay until July 14, 2006, to appellant without objection. When August 11 came, the court continued the hearing until September 11, 2006, and charged the delay to appellant without objection. Accordingly, both the fifty-six-day period beginning July 14 and the thirty-one day period beginning August 11 are excluded from the speedy-trial calculation.

At the pretrial hearing on September 11, 2006, the court addressed pretrial motions and the speedy-trial issue. The State requested that the delay caused by pending pretrial

motions be excluded from the calculation. The court excluded the ten days it would take to consider the pending motions and charged the remaining delay to the State. Appellant did not object to the exclusion and would not have grounds to do so. *See* Ark. R. Crim. P. 28.3(a) (excluding the time a court takes to consider a pretrial motion, up to thirty days, from the speedy-trial calculation).

Finally, on November 28, 2006, appellant moved for continuance. A continuance through January 8, 2007, was granted on December 1, 2006. This thirty-eight day period was excluded from the calculation, and appellant did not object to the exclusion of the thirty-eight days. *See also* Ark. R. Crim. P. 28.3(c) (excluding periods of delay resulting from a continuance granted at the request of defense counsel).

If the above days are excluded from the speedy-trial calculation, the record shows that appellant was brought to trial 284 days after his arrest, well within the time required under Rule 28.1.[3] Accordingly, the trial court did not err in denying appellant's motion to dismiss for lack of speedy trial.

Facts

Because appellant is not challenging the sufficiency of the evidence, only a brief recitation of the facts is necessary. Appellant and Marvin Perkins[4] were charged in the January 9, 2006 death of Heath Rodgers. That evening, Perkins and appellant were at Perkins's apartment with a number of guests. Appellant agreed to take one of the guests home. When appellant did not return the vehicle he was driving to its parking spot, Perkins went outside to investigate. He saw appellant having a conversation with someone. Perkins returned to

[3]This is not to suggest that any of the other 284 days could not be excluded from the calculation. We simply do not address them because we can affirm without doing so.

[4]Perkins pled guilty to a number of charges, including second-degree murder, and testified against appellant.

his home, thinking that appellant would soon return. Perkins waited a few minutes and walked outside again. This time, he saw appellant walking toward him, with Rodgers following closely behind. Appellant told Perkins that Rodgers had a gun, which was stolen from a pawn shop. Perkins had a gun on his person as well. When appellant and Rodgers went inside the residence, Rodgers said that he wanted to talk about a car. Perkins, who had issues with Rodgers in the past, asked Rodgers to leave. Rodgers did not comply. When Perkins attempted to slam the door in Rodgers's face, Rodgers kicked the door open, and the argument became more heated. Rodgers and Perkins soon began fighting and hitting each other with their guns. Appellant eventually joined the fight. While they were fighting, Rodgers dropped his weapon. Appellant and Perkins later gained the advantage over Rodgers and began beating Rodgers with the guns.

Perkins stopped hitting Rodgers when his wife, Aretha, came into the room. Perkins told Aretha to take their daughter out of the house. Aretha called the Middletons to come get her. After Aretha left with the couple's daughter, Perkins and appellant continued to beat Rodgers. At no point did they call the police or attempt to get him medical assistance.

During trial, appellant sought to call Bud Grimes, a pawn shop owner, to testify. Appellant's counsel proffered:

> That Mr. Grimes would testify that on or about the 9th of January at about 3:30 in the afternoon or so, some blacks – individuals came into his store. One of them was an individual who had on a white coat, that we would show Mr. Grimes the coat that's been introduced by the State that they contend was worn by Heath Rodgers that same day, ask him if that's similar in nature to it, ask him to describe the black gentlemen that was wearing, which would be in the physical description be similar to Mr. Rodgers, that he had a .40 caliber Browning out that was in a box, that there was no shells with it, that there was two clips, that he could not say who took the gun but after these individuals left, the gun was missing, that the gun did not have any ammunition, and that – which would be relevant to show a clear intent by Mr. Rodgers after he got the gun when he has 50 – almost 50 rounds of hollow point ammunition which the police have indicated or – is a highly effective round for killing people with.

Appellant argued that Grimes's testimony was relevant to show that he was not in possession

of the gun when Rodgers walked into Perkins's residence. The State argued that the testimony was irrelevant and cumulative, as there was already testimony that Rodgers brought the gun into the apartment and that the gun was stolen from Grimes's pawn shop. The court agreed with the State and excluded the evidence.

Appellant also requested an instruction regarding corroboration of J.B. Middleton's testimony. Evidence presented at trial showed that Aretha called J.B. and his wife during the fight. When J.B. arrived, he saw Aretha acting "hysterical[ly]," Perkins bleeding from the head in the middle of the living room, and appellant sitting on Rodgers and rapping a song. J.B. witnessed appellant hit Rodgers in the head with the butt of the pistol. He later found Aretha and her daughter and got them out of the residence. He also removed one of the guns from the scene at the insistence of either appellant or Perkins. J.B. took the gun to his home but hid it at a nearby residence when his mother-in-law told him not to bring the gun into the house.

Appellant proffered two instructions regarding J.B., one stating that J.B. was an accomplice and another stating that the defense contended that he was an accomplice. Appellant argued that one of the two instructions should have been presented to the jury, as there was evidence that J.B. helped by disarming Rodgers. The State objected, contending that there was no evidence that J.B. was an accomplice to the homicide. The court agreed with the State and refused to give the instruction.

The case was submitted to the jury, and the jury found appellant guilty of first-degree murder. It later sentenced him to a forty-year term in the Arkansas Department of Correction.

Grimes's Testimony

Appellant argues that the trial court erred in excluding Grimes's testimony. He contends that the jury was left with the impression that it could have been appellant who

stole the gun and brought it to the apartment, thereby placing his justification defense into question. He further asserts that the jury would have been more likely to accept the justification defense if it had independent evidence that Rodgers brought the gun to the scene.

The admissibility of evidence is reviewed under the abuse-of-discretion standard. *See*, *e.g.*, *McKeever v. State*, 367 Ark. 374, 240 S.W.3d 583 (2006). Relevant evidence is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Ark. R. Evid. 401. All relevant evidence is admissible unless it is excluded by statute or another rule; all irrelevant evidence is inadmissible. Ark. R. Evid. 402. Further, the trial court has the discretion to exclude relevant evidence if its probative value is substantially outweighed by the danger of unfair prejudice or if the evidence is merely cumulative. Ark. R. Evid. 403.

The trial court did not abuse its discretion in excluding Grimes's testimony. Appellant contended that without the testimony, the jury was left with the impression that appellant stole the gun and brought it to the scene. However, the evidence showed that Rodgers brought the gun to the scene, and neither the State nor appellant presented evidence to the contrary. There was no evidence presented from which the jury could have reasonably inferred that appellant brought the gun to the scene. Grimes's testimony that the gun was stolen would have been merely cumulative of the other evidence presented, and evidence implicating Rodgers in that theft was irrelevant to show the circumstances that led to his death. Accordingly, we affirm on this point.

Middleton as an Accomplice

Finally, appellant argues that the trial court erred in denying his request for an instruction regarding corroboration of accomplice testimony. He correctly states the law that

an accomplice's testimony must be corroborated by other evidence tending to connect the defendant to the crime. *See* Ark. Code Ann. § 16-89-111(e)(1)(A) (Repl. 2005). He then asserts that J.B. was an accomplice and that he was entitled to an instruction stating that he could not be convicted based upon uncorroborated testimony of J.B.

A party is entitled to an instruction if there is sufficient evidence to raise a question of fact or if there is any supporting evidence for the instruction. *E.g.*, *Hickman v. State*, 372 Ark. 438, ___ S.W.3d ___ (2008). There is no error in refusing to give a jury instruction where there is no basis in the evidence to support the giving of the instruction. *Id.* A witness's status as an accomplice is a mixed question of law and fact. *Id.* When the status of a witness presents issues of fact, the defense is entitled to have the question submitted to the jury. *Id.* In determining whether the circuit court erred in refusing an instruction in a criminal trial, the test is whether the omission infects the entire trial such that the resulting conviction violates due process. *Id.*

Appellant relies heavily on *Jackson v. State*, 193 Ark. 776, 102 S.W.2d 546 (1937). There, the appellant appealed from a murder conviction based on the trial court's failure to instruct the jury on accomplice corroboration. The court refused the instruction based on the State's argument that the witness in question was not an accomplice. The supreme court reversed the conviction, holding that the jury had before it evidence upon which it could find that a female witness was an accomplice. Specifically, there was testimony that a woman's tracks were found at the scene of the homicide, and the witness admitted that she had knowledge of the homicide. The court wrote, "Whether she was an accessory, either before or after the fact, or both, for a time, at least, she concealed the crime and protected the criminal. If she were an accessory, either before or after the fact, she was in law an accomplice." *Id.* at 781, 102 S.W.2d at 548.

However, *Jackson* was decided at a time when a person who was an accessory to the

crime after the fact was considered an accomplice. Today, accessories before and after the fact are treated differently; the former is considered an accomplice, while the latter is guilty of a separate crime—hindering apprehension and prosecution. *See Fight v. State*, 314 Ark. 438, 863 S.W.2d 800 (1993). When causing a particular result (such as causing the death of another) is an element of an offense, a person is an accomplice in the commission of that offense if, acting with respect to that result with the kind of culpability sufficient for the commission of the offense, he aids, agrees to aid, or attempts to aid the other person in planning or engaging in the conduct causing the result. *See* Ark. Code Ann. § 5-2-403(b)(2) (Repl. 2006).

The record shows that J.B. removed Rodgers's gun from the scene during the scuffle. There is no other evidence showing that J.B. was involved in any other way. By removing the gun, he was at best an accessory after the fact, which is not considered an accomplice under today's law. Accordingly, the State did not have to present evidence to corroborate his testimony, and appellant was not entitled to an instruction on the issue.

Even if appellant were entitled to such an instruction, he was not prejudiced by the trial court's failure to issue it. In *Hickman*, *supra*, the supreme court affirmed the conviction, despite the trial court erring in not giving an accomplice-corroboration instruction, when the record contained evidence corroborating the accomplice's testimony. Corroborating testimony must be sufficient, standing alone, to establish the commission of the crime and to connect the defendant with it. *MacKool v. State*, 365 Ark. 416, 231 S.W.3d 676 (2006). The record consists of extensive testimony on the state of the crime scene, testimony from Aretha about the fight, and testimony about appellant's statements to the police. This evidence sufficiently corroborated J.B.'s testimony. Had appellant been entitled to the instruction, any error in not giving it would have been harmless.

Affirmed.

HART and HUNT, JJ., agree.