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SUPREME COURT OF ARKANSAS

No. CR-16-1132

	Opinion Delivered: March 1, 2018
DARREN LEON DUNCAN APPELLANT	APPEAL FROM THE ARKANSAS COUNTY CIRCUIT COURT [NO. 01CR-14-60]
V.	
STATE OF ARKANSAS APPELLEE	HONORABLE DAVID G. HENRY, JUDGE
	AFFIRMED.

SHAWN A. WOMACK, Associate Justice

Darren Duncan was convicted of capital murder in connection with the death of Courtney London. The State waived the death penalty, and therefore Duncan received a life sentence without the possibility of parole as required by law. Duncan makes a single argument on appeal. He contends that the trial court erred in allowing Latrenda Gibson to testify and, in the alternative, in denying his motion for a continuance. Duncan argues that the trial court's rulings on this issue were in error due to the relatively late disclosure of the State's intent to have Gibson testify. We affirm.

The State only learned from the victim's family that Gibson was a witness to the crime after 4:00 p.m. on the day before the trial was set to begin. The State immediately (1) requested a statement from Gibson and (2) notified defense counsel of this development. Defense counsel received this notice by 5:00 p.m. The State received Gibson's statement at approximately 7:00 p.m. and faxed a copy of it to defense counsel

immediately. The parties informed the trial court of these developments the next morning. The State explained the relevance of Gibson's testimony, pointed to the State's immediate disclosures as evidence that there was no attempt to "sandbag" the witness, and argued that there would be no prejudice to Duncan if defense counsel received an opportunity to speak with Gibson before she testified. The State also committed to turning over Gibson's criminal-history report once it was generated. Defense counsel countered that Gibson should not be allowed to testify due to the lateness of the developments and, in the alternative, that the trial court should grant a continuance to allow the defense more time to prepare. The trial court denied the request for a continuance, citing scheduling concerns. The court deferred ruling on the substantive question of whether it was appropriate for Gibson to testify until the next day because the testimony would not take place until then in any case. The court agreed that defense counsel should have full access to Gibson and receive a copy of her criminal-history report. Returning to the issue on the second day, the court was satisfied that defense counsel had an opportunity to interview Gibson and had received a copy of the report. The trial court allowed Gibson to testify.

Gibson testified that she saw London and others quarreling while she was sitting in her parked car across the street with her sister and daughter. She testified that Duncan then sped onto the scene in his girlfriend's car and emerged with a gun, "wanting to know who wants to fight and who play [*sic*] with guns or whatever." Gibson claimed Duncan then got back into the car and drove off, driving close by London in the process. Gibson testified that she feared for her safety at this point and began driving away. She claimed

there was a flash, followed by Duncan's car speeding past her own. By the time she turned her car around, London had been shot and was on the ground. She further testified that she did not see London with a gun or anyone take a gun from him. Gibson spoke with a police officer the night of the crime, but she did not plan to testify until the prosecutor contacted her immediately before the trial. She cited her poor health and the fact that she had expected her daughter to give a statement identical to her own as the reasons for her failure to speak with the authorities between the night of the crime and the day before the trial. On cross-examination, defense counsel was able to explore several issues that were uncovered in the interview with Gibson. Gibson acknowledged that she would likely test positive for marijuana at the time of her testimony, that she had been in a romantic relationship with London's father for fifteen years, that she considered London to be like a son to her, and that she had pleaded guilty to felony abuse of an adult while employed at a nursing home.

We review the trial court's evidentiary decisions for an abuse of discretion. *White v. State*, 367 Ark. 595, 601, 242 S.W.3d 240, 246 (2006). The same standard applies to the decision to deny a continuance. *Hickman v. State*, 372 Ark. 438, 442, 277 S.W.3d 217, 222 (2008).

Arkansas Rule of Criminal Procedure Rule 17.1 requires the prosecuting attorney to disclose the names and addresses of the "persons whom the prosecuting attorney intends to call as witnesses" at trial. Rule 19.2 makes clear that the obligation of disclosure is ongoing, continuing up to and through trial. *See* Ark. R. Crim. P. 19.2. If the trial court determines that these rules were violated, Rule 19.7 provides a number of

potential remedies, such as permitting additional discovery, exclusion of the offending evidence, granting a continuance, or entering an alternative appropriate order. *See* Ark. R. Crim. P. 19.7. We have held that permitting "a recess to interview the witness" is sufficient to cure defects in the disclosure process in some circumstances. *Nooner v. State*, 322 Ark. 87, 100, 907 S.W.2d 677, 684 (1995).

It is uncontested in this case that the prosecuting attorney made defense counsel aware of Gibson's likely participation in the trial within minutes of contacting her, faxed a copy of Gibson's statement to defense counsel immediately upon receiving it, and similarly provided Gibson's criminal-history report as soon as it was generated. This diligence satisfies the written command of Rule 19.2 to "promptly notify opposing counsel" about new witnesses and information. Ark. R. Crim. P. 19.2. When last-minute evidence or witnesses arise, however, the trial court must inquire "whether last minute preparation was abused" or "used as a ploy or subterfuge to gain advantage over the opposing party." *Nooner*, 322 Ark. at 101, 907 S.W.2d at 684. The trial court asked questions clearly meant to detect whether any bad faith of this sort on the part of the prosecution existed. Both in the initial conference on the morning of the first day of trial and in the conference on the second day, the trial court confirmed that the State only recently learned of Gibson through no fault of its own, that the State divulged all required information promptly, and that defense counsel had an opportunity to speak with Gibson. There was no facial violation of the rules governing disclosure, and the trial court conducted an inquiry into any potential ulterior motives for the timing of the State's disclosure of Gibson's name. Under these circumstances, we cannot say that the trial

court abused its discretion by allowing Gibson to testify or by denying Duncan's request for a continuance.

Duncan cites several cases to challenge this conclusion, but they are inapposite. He cites *Henry v. State*, 29 Ark. App. 5, 775 S.W.2d 911 (1989), as an example of a reversal over an improper late disclosure. In *Henry*, however, the disclosure defect was that the State failed to turn over crime laboratory results that were in the State's possession long before they were disclosed. *Id*. As discussed above, it is not disputed in this case that the State promptly disclosed Gibson's identity as a witness as soon as it learned of her. Next, Duncan cites *McEwing v. State*, 366 Ark. 456, 237 S.W.3d 43 (2006), because the trial court there excluded a defense witness identified the day before trial, and we upheld that decision. Duncan contrasts this exclusion of a *defense* witness with the admission of a *prosecution* witness here and asserts that "[w]hat is good for the goose should be good for the gander." Even ignoring the different facts of these cases, this argument misunderstands the standard of review. Simply pointing to an instance in which we affirmed a trial court's reaching a different conclusion in different circumstances says nothing about whether the trial court in this case abused its discretion. Beyond this foundational flaw in the argument, *McEwing* is readily distinguished from the present case in that, unlike Duncan, the State in *McEwing* would not have had an opportunity to interview the last-minute witness before she testified. *See id.* at 461, 237 S.W.3d at 47. Similarly, Duncan's reliance on *N.D. v. State*, 2011 Ark. 282, 383 S.W.3d 396, fails because that case also turned on the last-minute witnesses being unavailable for an adequate interview by the adverse party prior to the proceedings. Defense counsel in

this case spoke with Gibson before she testified and was able to conduct an effective cross-examination.

As required by Ark. Sup. Ct. R. 4-3(i) (2017), the record has been examined for reversible error. None has been found.

Affirmed.

HART, J., concurs.

JOSEPHINE LINKER HART, Justice, concurring. I agree that our precedent requires us to affirm this case, but I write separately to point out the rule of law that this case has solidified if not, in-part, created. I also wish to emphasize that this court's disposition of this case most definitely does not sanction springing prosecution witnesses on the defense on the eve of trial.

As the majority notes, Rule 17.1 of the Arkansas Rules of Criminal Procedure required the State to disclose Ms. Gibson's name and address. Certainly the State did disclose that information in this case, albeit on the eve of trial. However, Rule 17.2(a) requires that "[t]he prosecuting attorney shall perform his obligations under Rule 17.1 as soon as practicable." While I am mindful that the circuit court apparently accepted the State's assurance that its dilatory disclosure was not an effort to "sandbag" the defense, the late disclosure of a pivotal prosecution witness should have compelled the circuit court to grant a continuance. I am troubled that the circuit court elevated docket management over Mr. Duncan's constitutional right to a fair trial. An entire defense strategy can be undermined by such a belatedly disclosed witness. Perhaps the Arkansas

Supreme Court Standing Committee on Criminal Practice needs to explore the question whether a continuance should be mandated.

However, based on the arguments made and the record before us, I agree that this case must be affirmed. Our review of a circuit court's denial of a continuance motion, like every allegation of trial error, hinges on whether the error is "prejudicial." *E.g.*, *Hickman v. State*, 372 Ark. 438, 443, 277 S.W.3d 217, 222 (2008). This requirement of prejudice leads to the unusual rule of law implicated by this case.

For reversal, Mr. Duncan relies on *McEwing v. State*, 366 Ark. 456, 237 S.W.3d 43 (2006). In *McEwing*, the defense informed the State of a new witness the day before trial, and the State objected to allowing the witness to testify. *Id*. The defense offered to permit the State to interview the witness prior to that witness testifying. *Id*. The circuit court found that accommodation reasonable, but conditioned allowing the witness to testify on the State confirming that it had adequate time to prepare to cross-examine the witness. *Id*. The witness was ultimately excluded because the State informed the court that, given the demands of its trial preparation, it had not been able to interview the witness. *Id*. The following colloquy in *McEwing* is illustrative:

> [THE COURT]: Okay. Well, what I'll do is this. I'll let the State talk to both the witnesses, Janelle—what is her last name?
>
> [DEFENSE COUNSEL]: Young.
>
> [THE COURT]: Young and Annette McGee. I'm not going to—if the State won't allow you all—if you all can't prepare a response to the—to their testimony, I'm going to exclude Janelle Young. If McGee, Annette McGee is in the file, then I'll allow her to testify, but I'll exclude Janelle Young if the State doesn't—if they can't, because they may want to do her record or find

> out on that. It's just unfair. You can't do that. I won't allow it unless the State has had a chance to talk to the witness and if it feels that it can adequately do a cross examination then I'll allow it. But otherwise I'm not going to allow that witness to testify. All right.
>
> . . . .
>
> [THE COURT]: Did you guys have a chance to talk to the other witness?
>
> [DEPUTY PROSECUTING ATTORNEY]: Your Honor, we've had so many problems getting our own witnesses here.
>
> [THE COURT]: Okay. All right. I'll allow the one witness, the mother.
>
> [DEFENSE COUNSEL:] Okay. For the record, I would like to state that I think, you know, they could've called and checked or had their office in the five hours, four hours that we've been here and call ACIC at least and check and see if she had any record or anything like that.
>
> [THE COURT:] All right.

366 Ark. at 459–460, 237 S.W.3d at 45–46.

In my view, *McEwing* is directly on point, and Mr. Duncan has misinterpreted the holding, to his detriment. The broad holding in *McEwing* is that a belatedly disclosed witness should be excluded if it prejudices the other side, but determination of that prejudice is based on the adverse party's representation to the circuit court that it was unable to adequately prepare for the belatedly disclosed witness. It is disquieting to note this rule of law, because it has the potential to bring about outcomes that do not necessarily comport with justice. Furthermore, it is precedent for requiring a circuit court

to cede its authority to order a continuance to an adverse party that has strong incentive to impair the opposing party's case.

In *McEwing*, the deputy prosecutor asserted that he did not have time to interview the witness and that he could not adequately prepare for the witness, so the circuit court disqualified the witness. In the case before us, Mr. Duncan's defense counsel took the time to interview Ms. Gibson and expressed confidence that he could adequately cross-examine her. My vote to affirm this case rests on the fact that the record demonstrates that Mr. Duncan's confidence in his ability to impeach Ms. Gibson on cross-examination was well-founded.

On cross-examination, Mr. Duncan's defense counsel elicited testimony from Ms. Gibson that she would probably test positive for marijuana on the day she testified and that she had smoked it on and off for about 15 years. Further, she admitted that she had dated the victim's father for about 15 years prior to the victim's death, that she regarded the victim like a son, that it had hurt her to see the victim shot, and that she wanted "justice" for him. Ms. Gibson also had to admit that she had been arrested before because a man "put his hands on" her and she "cut him with a knife," but she was not charged with a crime. She also revealed that she had pleaded guilty to felony abuse of an adult in Lonoke County in 2008 when she worked in a nursing home, that she was placed on probation for three years, and that she had the crime expunged. Accordingly, there is no proof of prejudice in the record before us.

I concur.

Short Law Firm, by: *Lee D. Short*, for appellant.

Leslie Rutledge, Att'y Gen., by: *Karen Virginia Wallace*, Ass't Att'y Gen., for appellee.