

IN THE FIFTEENTH JUDICIAL CIRCUIT IN
AND FOR PALM BEACH COUNTY,
FLORIDA

APPELLATE DIVISION (CRIMINAL)
CASE NO.: 05-12AC A02

DAVID WHELAN,
Appellant,
vs.

STATE OF FLORIDA,
Appellee.

Opinion Filed: DEC 20 2005

Appeal from the County Court in and for Palm Beach County,
Charles Burton, Judge.

For Appellant, Paul Petillo, Esq., Assistant Public Defender
Office of the Public Defender, 401 North Dixie Highway, West Palm Beach, FL 33401.

For Appellee, Michelle Zieba, Esq., Assistant State Attorney,
Office of the State Attorney, 401 North Dixie Highway, West Palm Beach, FL 33401.

PER CURIAM.

We find that the trial court abused its discretion in declining to permit an overnight opportunity to secure the appearance of a material defense witness. The witness had been served a subpoena for trial, the appellant had spoken to the witness the morning of trial, and the State's case concluded earlier than first anticipated. The appellant sought to present the witness on the following morning. The record reflects that the appellant demonstrated prior due diligence in securing the witness' appearance and that the witness was available and willing to testify the next morning. The witness was the sole defense witness, whose proffered testimony was favorable to the appellant on a material issue. Therefore, the denial of the overnight continuance created material prejudice to the appellant. Given the trial record, we REVERSE and REMAND for a new trial, Jenkins v. State, 872 So. 2d 388, 389-390 (Fla. 4th DCA 2004).

LABARGA, RAPP, AND McSORLEY, JJ., concur.