

the trial court imposed an unduly severe sanction in prohibiting Martin from calling witnesses other than himself. While this harsh remedy may be appropriate in cases where a defendant commits a flagrant discovery violation to gain a tactical advantage,¹ that was not the case here. Counsel missed the court-ordered discovery deadline by two days, and fifteen days remained before trial. By statute, discovery must be completed within ten days before trial.² The trial court could have fashioned alternative remedies, including requiring counsel to provide full discovery by the afternoon of April 1 or April 2, or granting a continuance, to allow the State to prepare for Martin's witnesses. To flatly prohibit Martin from calling witnesses other than himself, when discovery could have been ordered complete before the statutory time limit, was too severe. The outcome of this case depended on which of two conflicting stories jurors believed. We cannot conclude jurors were unaffected by the absence of witnesses to bolster Martin's claims.

Decision

The Judgments and Sentences of the District Court are **REVERSED** and this case is **REMANDED** for a new trial.

¹ *Short v. State*, 1999 OK CR 15, 980 P.2d 1081, 1093, *cert. denied*, ___ U.S. ___, 120 S.Ct. 811, 145 L.Ed.2d 683 (no error to prevent from testifying defense witness not endorsed on list presented 11 days before trial); *Wisdom v. State*, 1996 OK CR 22, 918 P.2d 384, 396, *cert. denied*, ___ U.S. ___, 120 S.Ct. 549, 145 L.Ed.2d 410 (1999); *Morgan v. District Court of Woodward County*, 831 P.2d 1001, 1005 (Okl.Cr.1992) (in capital case, error to exclude defense witnesses when defendant is not personally responsible for discovery violation).

² 22 O.S.Supp.1998, § 2002(D).

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OPINION BY: CHAPEL, JUDGE

STRUBHAR, P.J.:	Concur
LUMPKIN, V.P.J.:	Dissent
JOHNSON, J.:	Concur
LILE, J.:	Dissent

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LUMPKIN, VICE-PRESIDING JUDGE: DISSENTS

I dissent to the reversal of this case and to the finding that the trial court's sanction for Appellant's discovery violation was too harsh. Title 22 O.S.1991, § 2002(D) provides that all issues relating to discovery will be completed at least ten (10) days prior to trial. However, the trial court retains the authority to set reasonable time limits for discovery and other pre-trial matters. Here, the discovery order was issued March 9, 1999, with a deadline of March 30, 1999. Appellant knew of the witnesses and had at least 21 days in which to apprise counsel of any additional witnesses who could testify on his behalf. Appellant failed to do so, waiting until after the discovery deadline to provide counsel with the additional names. Even at that time Appellant did not have statements of the proposed witnesses, know what their addresses were or even the complete name of one of them. The defendant bears some burden of supplying counsel with necessary information within his knowledge. *Roberts v. State*, 910 P.2d 1071, 1081 (Okla.Cr.1996). As the failure to comply with the discovery order appears to be attributable to Appellant and not solely counsel, the trial court's sanction preventing those witnesses from testifying was not too severe.

I am authorized to state J. Lile joins in this dissent.