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**IN THE  
COURT OF APPEALS OF INDIANA**

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MICHAEL BALES,

Appellant-Defendant,

vs.

STATE OF INDIANA,

Appellee-Plaintiff.

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No. 49A02-0704-CR-348

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APPEAL FROM THE MARION SUPERIOR COURT  
The Honorable Reuben Hill, Judge  
Cause No. 49F18-0604-FD-75527

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**October 30, 2007**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**KIRSCH, Judge**

Michael Bales appeals his conviction for theft,<sup>1</sup> a Class D felony, contending that the trial court abused its discretion and committed fundamental error when it denied his motion for continuance on the day of trial to allow him time to subpoena a witness. We affirm.

On March 17, 2006, Quincy Franklin saw an awning that he owned and that he had stored on his property significantly damaged and located in the back of Bales' truck. When Franklin confronted Bales about the awning, Bales offered to pay Franklin for the awning by giving him fence posts. Franklin declined Bales' offer and called police.

The State charged Bales with theft of the awning, and on January 8, 2007, the trial court set the case for trial on March 19, 2007. On the day of trial, counsel for Bales moved to continue the trial to allow him to subpoena a police officer to testify as a witness. Counsel did not previously subpoena the officer because he had assumed that the officer would testify for the State during its case in chief and would be available for cross-examination. The court denied Bales' motion, and at the conclusion of the trial found Bales guilty of theft.

Ind. Code § 35-36-7-1 sets forth the procedure that a defendant in a criminal proceeding must follow when moving to postpone a trial due to the absence of a witness. It requires that the defendant file an affidavit stating the name and address of the witness, the probability of securing the testimony of the witness within a reasonable time and show that the absence of the witness must not have been procured by the act of the defendant. The defendant must also set out the facts to which the witness would testify and state that the defendant is unable to prove such facts in any other way. Finally, the statute requires that the motion and affidavit for continuance must be filed not later than five days before trial or

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<sup>1</sup> Ind. Code § 35-43-4-2

show why a belated motion was not due to the fault of the defendant. It is undisputed that Bales did not file such an affidavit nor did he provide the information called for by the statute to the trial court. His claim of error in the denial of his motion is, therefore, waived.

In an attempt to avoid waiver, Bales claims on appeal that the denial constitutes fundamental error because it denied him his constitutional right of compulsory process guaranteed by Art. I, §13 of the Indiana Constitution. Fundamental error is error so prejudicial to the rights of a defendant that it amounted to a denial of fundamental due process. *Lacey v. State*, 670 N.E.2d 1299, 1302 (Ind. Ct. App. 1996). While denial of a constitutional right may demonstrate fundamental error, such conclusion does not automatically follow. *Foster v. State*, 484 N.E.2d 965, 967 (Ind. 1985). “The mere fact that error occurred and that it was prejudicial will not suffice. . . . Rather[,] the error must be one such that the defendant could not possibly have had a fair trial or such that this court is left with the conviction that the verdict or sentence is clearly wrong or of such dubious validity that justice cannot permit it to stand.” *Stewart v. State*, 567 N.E.2d 171, 174 (Ind. Ct. App. 1991), *trans. denied*.

Here, Bales has failed to show error, fundamental or otherwise. He failed to follow the statutory procedure in seeking a continuance, and he failed to provide the information to the trial court from which it could make an informed decision about the importance of the witness. On appeal, he has failed to rectify such failures. He does set out what the testimony of the police officer would have been, why such officer’s testimony was not available through other means, or how such testimony was critical to his case. It was Bales’ failure to exercise due diligence that led to the unavailability of the officer as a witness. Bales has

failed to show that he was entitled to a continuance or that he was prejudiced as a result of its denial. The trial court did not err in denying Bales' motion. *See Arhelger v. State*, 714 N.E.2d 659 (Ind. Ct. App. 1999) (no error in denying continuance where defendant failed to exercise due diligence to subpoena witness and failed to show prejudice).

Affirmed.

ROBB, J., and BARNES, J., concur.