COURT OF APPEALS
DECISION
DATED AND RELEASED

November 26, 1996

NOTICE

No. 95-3501-CR

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT I

State of Wisconsin,

Plaintiff-Respondent,

v.

Jimmie Baldwin,

Defendant-Appellant.

APPEAL from a judgment of the circuit court for Milwaukee County: DAVID A. HANSHER, Judge. *Affirmed.*

Before Fine, Schudson and Curley, JJ.

PER CURIAM. Jimmie Baldwin[1] appeals from a judgment of conviction, following a jury trial, for one count of first-degree reckless homicide while armed (party to a crime) and four counts of first-degree recklessly

[1] Inconsistent spellings of the defendant's first name appear throughout the record. We are unable to determine which is correct.

endangering safety while armed (party to a crime). Baldwin argues that the trial court erred by refusing to exclude two of the State's witnesses from testifying and in denying his alternative request for a continuance. We affirm.

On July 22, 1994, Robert Baker was fatally shot while running down a sidewalk away from his pursuers. Claude Robinson testified that he saw Baker running down the sidewalk, then heard numerous gunshots and saw Baker fall. Following the shooting, Robinson told Ian Nelson, one of the persons present in the apartment where Robinson had last seen Baker prior to the shooting, that it was "Red E and them" who did the shooting. Other witnesses testified at trial that "Red E" was in charge of a gang with which Baldwin was allegedly involved.

Robinson first told the police that the shooter of the Glock pistol with the red laser-beam sight responsible for killing Baker was a person named "Darnell." Robinson later identified "Kevin Cook" as the shooter with the "beam gun." Finally, three months after the shooting, Robinson identified Baldwin as the shooter.

Marlo Bratton, one of the two State witnesses Baldwin argues should not have been allowed to testify (and who also was convicted in separate cases of crimes relating to this shooting), testified that he drove the shooters to the scene and that Baldwin had the Glock. Allen Newsom, the other State witness to which Baldwin objected, testified he was at a meeting where Baldwin agreed to participate in the shooting. Newsom also testified that Red E told him to "put it all on Jimmy [Baldwin]" because Baldwin was a minor.

Baldwin's theory of defense throughout the trial was alibi. Baldwin testified that on the night of the shooting he stayed at his girlfriend's house and had not been involved with the shooting. Contrary to their statements to the police the day after the shooting that Baldwin had been at their house the night of the shooting, Baldwin's girlfriend and her mother testified at trial that Baldwin had not been there.

Baldwin also testified that the day after the shooting, a gang "chief" called a meeting during which Baldwin was ordered to take the blame

for the shooting. The "chief" assured him that he would not "get much time" because he was a minor. Baldwin testified that, out of fear, he agreed.

The case was set for a jury trial on January 9, 1995. Prior to trial, on November 17, 1994, Baldwin served the State with a notice of alibi. *See* § 971.23(8), STATS.[2] On December 9, 1994, Baldwin served the State with an offer to exchange witness lists. *See* § 971.23(3), STATS.[3] On January 3, 1995, the State served Baldwin with its formal "proposed witness list." The State's list did not include Bratton's name or Newsom's name. The cover letter to the State's list, however, in relevant part, read:

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[2] Section 971.23(8), STATS., provides:

> NOTICE OF ALIBI. (a) If the defendant intends to rely upon an alibi as a defense, the defendant shall give notice to the district attorney at the arraignment or at least 15 days before trial stating particularly the place where the defendant claims to have been when the crime is alleged to have been committed together with the names and addresses of witnesses to the alibi, if known....
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> ....
>
> (d) Within 10 days after receipt of the notice of alibi, or such other time as the court orders, the district attorney shall furnish the defendant notice in writing of the names and addresses, if known, of any witnesses whom the state proposed to offer in rebuttal to discredit the defendant's alibi. In default of such notice, no rebuttal evidence on the alibi issue shall be received unless the court, for cause, orders otherwise.

[3] Section 971.23(3)(a), STATS., in relevant part, provides:

> A defendant may, not less than 15 days nor more than 30 days before trial, serve upon the district attorney an offer in writing to furnish the state a list of all witnesses the defendant intends to call at the trial, whereupon within 5 days after the receipt of such offer, the district attorney shall furnish the defendant a list of all witnesses and their addresses whom the district attorney intends to call at the trial. Within 5 days after the district attorney furnishes such list, the defendant shall furnish the district attorney a list of all witnesses and their addresses whom the defendant intends to call at trial.

> Enclosed please find a witness list for Mr. Baldwin's case .... I believe this list to be complete, but reserve the right to amend the list should there appear to be other essential witnesses.
>
> With regard [to] specific witnesses, you should be aware of the following agreements made between the State and the witnesses who I anticipate will testify in Mr. Baldwin's trial. The witnesses are:
>
> 1) Marlo Bratton, who pled guilty [to] First Degree Reckless Homicide and is currently awaiting sentencing. Mr. Bratton will likely testify in the case against Mr. Baldwin ....
>
> ....
>
> 3) Allen Newsom, who is charged with Aiding a Felon, and is currently awaiting sentencing .... Mr. Newsom has agreed to be an available witness in the cases against Johnny Foster, Marlo Bratton, Kevin Cook, and Gregory Sharp.

The State did not file a list of alibi rebuttal witnesses at this time.

Baldwin's trial was rescheduled to begin on Monday, June 5, 1995. On Thursday, June 1, 1995, the State filed an alibi rebuttal witness list and a new witness list, both of which listed Bratton and Newsom.[4]

At the hearing on Baldwin's motions in limine prior to trial, Baldwin sought to exclude Newsom and Bratton from testifying. Baldwin also moved in the alternative for a continuance in order to prepare to cross-examine these witnesses. The State argued that it had not violated § 971.23, STATS., because the original trial date had been adjourned and Baldwin had not renewed his request to exchange witness lists prior to the June 5, 1995 trial date.

[4] The State's new witness list does not appear in the record.

Baldwin responded by pointing out that under § 971.23(7), STATS., the State was under a continuing duty to update a defendant as to any "additional material or the names of additional witnesses." *See* § 971.23(7), STATS.[5] The State also argued that even though it had not listed Bratton and Newsom on its formal witness list, their names were mentioned in its cover letter to Baldwin's defense counsel.

The trial court held that the State's January 3, 1995 cover letter constituted "good cause" for noncompliance with § 971.23, STATS. The trial court also denied Baldwin's request for a continuance, citing "no prejudice" and "no surprise" to the defense.

If the State fails to comply with the requirements of subsections three and eight of § 971.23, STATS., then any witness not timely listed shall be excluded unless the State can show good cause for its noncompliance.[6] *See* ***State v. Wild***, 146 Wis.2d 18, 27, 429 N.W.2d 105, 108 (Ct. App. 1988). Whether the State has shown good cause is a discretionary determination for the trial court. *See* ***Swonger v. State***, 54 Wis.2d 468, 473, 195 N.W.2d 598, 601 (1972).

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[5] Section 971.23(7), STATS., provides:

> CONTINUING DUTY TO DISCLOSE; FAILURE TO COMPLY. If, subsequent to compliance with a requirement of this section, and prior to or during trial, a party discovers additional material or the names of additional witnesses requested which are subject to discovery, inspection or production hereunder, the party shall promptly notify the other party of the existence of the additional material or names. The court shall exclude any witness not listed or evidence not presented for inspection or copying required by this section, unless good cause is shown for failure to comply. The court may in appropriate cases grant the opposing party a recess or a continuance.

[6] Because we conclude that the trial court did not erroneously exercise its discretion in concluding that good cause existed, and because we also conclude that the trial court did not erroneously exercise its discretion by denying Baldwin's request for a continuance, we do not address whether the State did, in fact, violate § 971.23. *See* ***Gross v. Hoffman***, 227 Wis. 296, 300, 277 N.W. 663, 665 (1938) (only dispositive issue need be addressed).

Additionally, the decision whether to grant or deny a request for a continuance is also within the trial court's discretion. ***State v. Fink***, 195 Wis.2d 330, 338, 536 N.W.2d 401, 404 (Ct. App. 1995). Because "'the denial of a continuance may raise questions relative to a defendant's sixth amendment right to counsel and fourteenth amendment right to due process of law,'" we must "balance the defendant's right to adequate representation by counsel against the public interest in the prompt and efficient administration of justice." ***Id.*** (citation omitted). Therefore, when a party is denied a continuance after claiming surprise, we examine the following three factors in considering whether the trial court erroneously exercised discretion: (1) whether there was actual surprise that could not have been foreseen; (2) where the surprise was caused by unexpected testimony, whether the party seeking the continuance made a showing that contradictory or impeaching evidence "could probably be obtained within a reasonable time"; and (3) whether the denial of the continuance was prejudicial to the party who sought it. ***Id.*** at 339-340, 536 N.W.2d at 404.

We agree with the trial court's conclusion that the letter by the State did constitute good cause because it put Baldwin on notice that Newsom and Bratton were possible trial witnesses. The letter stated, "With regard [to] specific witnesses, you should be aware of the following agreements made between the State and *the witnesses who I anticipate will testify in Mr. Baldwin's trial*," and then listed Newsom and Bratton. (Emphasis added.) Further, Baldwin has failed to show that he was actually prejudiced by the denial of a continuance. Given the notification of these two witnesses and the obvious proposition that, as Baldwin's alleged accomplices they could rebut his alibi defense, no continuance was required.

By the Court. – Judgment affirmed.

This opinion will not be published. *See* RULE 809.23(1)(b)5, STATS.