COURT OF APPEALS
DECISION
DATED AND FILED

June 25, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 98-0577-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

KARLEEN K. RAASCH,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Portage County: JOHN V. FINN, Judge. *Affirmed.*

ROGGENSACK, J.[1] Karleen Raasch appeals her conviction of violating § 346.63(1), STATS., by operating a motor vehicle while intoxicated. Prior to trial, Raasch requested a list of the State's witnesses, pursuant to § 971.23(1)(d), STATS., and the State did not respond until the day of trial.

[1] This appeal is decided by one judge pursuant to § 752.31(2)(c), STATS.

Because defense counsel did not bring the State's alleged failure to comply with § 971.23(1)(d) to the court's attention prior to the jury being sworn, the circuit court concluded Raasch had waived her right to seek the sanction of striking the State's witnesses. Raasch contends she did not waive her right to sanctions. The State maintains that its oral pretrial recitation was sufficient to satisfy the statute's requirements. We conclude that the State failed to comply with the statutory demand for a witness list. However, because the defense was not surprised and prejudiced by the State's violation, we conclude that the circuit court did not err when it refused to exclude the State's witness. Therefore, we affirm Raasch's conviction.

BACKGROUND

Karleen Raasch was charged with a violation of § 346.63(1), STATS., as a second offense. Prior to trial, defense counsel filed a discovery demand dated March 21, 1997, which included a request for the names of prospective State witnesses and other written materials in the State's possession. The State responded by sending defense counsel discovery which included an arrest report prepared by Trooper Rick Nowack, an alcoholic influence report, and an intoxilyzer test record. No potential witnesses were identified. On August 5, 1997, defense counsel filed a supplemental demand for discovery regarding certification and assay reports, which the State provided.

At the commencement of the trial on August 6, 1997, prior to the jury being sworn, the trial judge asked the State the names of the witnesses it intended to call. The assistant district attorney responded that the State intended to call Trooper Nowack and Shelly Binder. Nowack was the state trooper who stopped Raasch and performed the intoxilyzer examination on February 1, 1997.

Defense counsel was present, but made no objection or motion to exclude the witnesses. During *voir dire*, the trial judge asked the assistant district attorney to tell the jury the names of the State's intended witnesses. Again, Nowack and Binder were named. Defense counsel made no objection, and she did not bring the State's alleged noncompliance with her discovery request to the court's attention. After the jury was sworn but prior to the start of the trial, defense counsel moved to exclude Nowack from testifying because the State had not supplied the defense with his name as a witness.

The circuit court did not decide whether the State had complied with its obligations under the discovery statute because it concluded that Raasch waived her right to invoke a discovery sanction when defense counsel did not object to the witnesses or move to exclude their testimony immediately after becoming aware of whom the State intended to call. The case proceeded to trial where Nowack testified, but Binder did not. A Portage County jury found Raasch guilty of a second offense of operating a motor vehicle while intoxicated, in violation of § 346.63(1), STATS. This appeal followed.

DISCUSSION

Standard of Review.

This case presents a question of statutory interpretation, which we review *de novo*. ***Patients Comp. Fund v. Lutheran Hosp.***, 216 Wis.2d 49, 52-53, 573 N.W.2d 572, 574 (Ct. App. 1997) (citing ***Wisconsin Patients Comp. Fund v. Continental Cas. Co.***, 122 Wis.2d 144, 150, 361 N.W.2d 666, 669 (1985)).

List of Witnesses.

Upon request, § 971.23(1), STATS., requires the district attorney to supply the defendant with a list of witnesses the district attorney intends to call at trial:

> Upon demand, the district attorney shall, within a reasonable time before trial, disclose to the defendant or his or her attorney and permit the defendant or his or her attorney to inspect and copy or photograph all of the following materials and information, if it is within the possession, custody or control of the state:
>
> ….
>
> (d) A list of all witnesses and their addresses whom the district attorney intends to call at the trial. This paragraph does not apply to rebuttal witnesses or those called for impeachment only.

Wisconsin courts have interpreted § 971.23(1)(d), STATS., to require the district attorney to supply the defendant with a witness list that is sufficiently specific in regard to whom the State actually intends to call. *See* ***Irby v. State***, 60 Wis.2d 311, 319, 210 N.W.2d 755, 760 (1973). For example, a witness list is not specific enough if it omits intended witnesses. ***Kutchera v. State***, 69 Wis.2d 534, 542, 230 N.W.2d 750, 754-55 (1975). The opposite is also true. The list is not specific enough if it includes a large number of witnesses, many of whom the district attorney has no serious intention of calling to testify. ***Irby***, 60 Wis.2d at 320, 210 N.W.2d at 760. In both ***Irby*** and ***Kutchera***, the defense got a list of witnesses, but the list was not specific enough to meet the requirements of § 971.23(1)(d), *i.e.,* "a list of all witnesses … whom the district attorney *intends to call* at the trial."

In the case before us, the State did not supply defense counsel with a written witness list. The arrest report and other pieces of discovery that included

Nowack's name did not list him as a potential witness; they merely provided information about the circumstances of the arrest, including his name as the arresting officer. Thus, under § 971.23(1)(d), STATS., as interpreted by the supreme court, the State failed to supply defense counsel with a written list of witnesses.

We do not address whether the State's oral recitation of witnesses to the trial judge and to the jury constituted compliance with § 971.23(1)(d), STATS., because we conclude that even if an oral recitation could fulfill the State's statutory obligation (which we do not decide), it was not timely made.[2] Therefore, we conclude the State did not comply with the requirements of § 971.23(1)(d).

Sanctions.

Because we have concluded the State violated § 971.23(1)(d), STATS., we must determine if the circuit court was required to exclude Nowack's testimony. Section 971.23(7m)(a) provides sanctions for noncompliance:

> 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.

The purpose of requiring a district attorney to supply defense counsel with a requested list of trial witnesses is not to allow the defense an opportunity to exclude witnesses as a tactical move if the State fails to respond. Rather, the purpose is to inform the defense of witnesses to be called at trial so

[2] Defense counsel made the § 971.23(1)(d), STATS., request on March 21, 1997. The assistant district attorney disclosed the State's trial witnesses on August 6, 1997, the morning of trial. As a matter of law, that is not providing discovery in a reasonable time before trial.

counsel can effectively prepare a defense. Therefore, in order to exclude a witness, defense counsel must raise the statutory violation in a timely fashion, and show surprise and prejudice by the State's failure to disclose. ***Irby***, 60 Wis.2d at 322, 210 N.W.2d at 761. These requirements further the aims of the discovery procedure: disclosure for efficient trial preparation. *See* ***id.*** at 319-20, 210 N.W.2d at 760.

1. Objection must be timely.

"An objection must be made to the introduction of evidence as soon as the adversary party is aware of the objectionable nature of the testimony. Failure to object results in a waiver of any contest to the evidence." ***Caccitolo v. State***, 69 Wis.2d 102, 113, 230 N.W.2d 139, 145 (1975) (citing ***Bennett v. State***, 54 Wis.2d 727, 735, 196 N.W.2d 704, 708 (1972)). In ***Caccitolo***, defense counsel did not object at trial to the admission of hearsay testimony. The court found that by failing to object at trial when the defense became aware of the hearsay, the defense waived the admissibility of the testimony. ***Id.*** at 113, 230 N.W.2d at 145. A timely objection permits the circuit court to remedy the claimed error prior to its having an impact on the rights of the parties at trial.

When Raasch's attorney first became aware of the potential witnesses for the State, she failed to object or move to exclude the witnesses. Defense counsel also failed to object when, prior to the jury being sworn, the State told the circuit court the names of the witnesses it intended to call. Finally, defense counsel did not object when, during *voir dire*, the State told the jury the names of its potential witnesses. Defense counsel admits that in response to discovery requests, she received police reports that included Nowack's name and that she expected Nowack to testify at trial.

After becoming aware of the State's potential witnesses and before the jury was sworn, defense counsel had the opportunity to inform the court of the State's failure to provide its witness list. If she had done so, the court could have provided an adjournment or recess sufficient to facilitate trial preparation. Or, if it concluded that Raasch had been prejudiced by the State's failure to provide the witness list, it could have refused to permit their testimony. Defense counsel must notify the court of a violation of § 971.23(1), STATS., in a timely fashion so that the court has the opportunity to provide an appropriate remedy.

2. Surprise and prejudice.

The State's failure to provide defense counsel with a requested witness list does not necessarily require the court to exclude the State's witnesses unless there is a showing of surprise and prejudice. ***Irby***, 60 Wis.2d at 321, 210 N.W.2d at 761. For example, in ***Irby***, the prosecutor provided the defense with a very long witness list. The list included LaMar Walker, who had been incarcerated with the defendant. Shortly before trial, the prosecutor informed defense counsel that he intended to call Walker to testify about a statement that the defendant made to Walker while in jail. Defense counsel moved for a two weeks' continuance or suppression of the statement, but the court denied the request. However, the court allowed defense counsel sufficient time to interview Walker prior to trial. ***Irby***, 60 Wis.2d at 318-19, 210 N.W.2d 759-60. On appeal, the Wisconsin Supreme Court concluded that the prosecutor failed to provide defense counsel with a sufficiently specific witness list. ***Id.*** at 319, 210 N.W.2d at 760. However, the court also concluded that the defense was not surprised and prejudiced by Walker's testimony because defense counsel was afforded an opportunity to talk to Walker and did not ask for a continuance thereafter. ***Id.*** at 321, 210 N.W.2d at 761.

Similarly, the defendant in ***State v. Koopmans***, 202 Wis.2d 385, 550 N.W.2d 715 (Ct. App. 1996), argued that the court erred when it allowed a police officer to testify to the defendant's inculpatory statement and then denied the defendant's motion for a mistrial. The defendant maintained that the State violated § 971.23(1)(b), STATS., which required the district attorney to provide the defense with a requested written summary of all oral statements made by the defendant which the district attorney planned to use at trial and the names of the witnesses to these statements. The court reasoned that because the statement was divulged during the discovery process, the defendant was given fair notice that the State intended to use it. ***Id.*** at 395-96, 550 N.W.2d at 720.

As in ***Irby*** and ***Koopmans***, Raasch's counsel was aware that Nowack would testify at trial because Nowack was the arresting officer and his name was listed on most of the discovery sent to the defense. Defense counsel admitted that she expected Nowack to testify at trial. Because Raasch was provided with the arrest report, the intoxilyzer report and the alcoholic influence report, her defense knew the substance of his testimony. Additionally, defense counsel did not ask for a recess or an adjournment to interview him. Therefore, we conclude Raasch was not surprised and prejudiced when Nowack testified as a State witness, and the circuit court's decision to permit Nowack's testimony must be affirmed.

CONCLUSION

Although the State failed to comply with § 971.23(1), STATS., we conclude that the circuit court did not err when it refused to exclude Nowack's testimony because defense counsel did not make a timely objection to the State's violation of the statute, and because Raasch's defense was not surprised and prejudiced.

By the Court.—Judgment affirmed.

This opinion will not be published in the official reports. *See* RULE 809.23(1)(b)4., STATS.