

**COURT OF APPEALS
DECISION
DATED AND FILED**

November 15, 2011

A. John Voelker
Acting Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2010AP2854-CR

Cir. Ct. No. 2006CF969

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

BENJAMIN GORDON WALKER,

DEFENDANT-APPELLANT.

APPEAL from judgments and an order of the circuit court for Outagamie County: NANCY J. KRUEGER, Judge. *Affirmed.*

Before Hoover, P.J., Peterson, J., and Thomas Cane, Reserve Judge.

¶1 PER CURIAM. Benjamin Walker, pro se, appeals a judgment of conviction for stalking and burglary with intent to commit stalking and an order denying his postconviction motion. Walker argues the State violated discovery

rules by failing to provide the addresses of its witnesses. Walker also challenges two judgments of forfeiture of bond.¹ We reject Walker's arguments and affirm.

BACKGROUND

¶2 Lindsay Rogers and her boyfriend, Jonathon Bunnow, lived in Rogers' mother's home. On November 11, 2006, Walker was discovered hiding under Rogers' mother's bed. Police responded and arrested Walker. As a result of this incident, the State charged Walker with stalking Lindsay and burglary with intent to commit the crime of stalking. Additionally, it charged Walker with burglary with intent to steal Lindsay's cat during an admitted prior nonconsensual entry into her home in October 2006. The October burglary charge was dismissed during trial due to insufficient evidence that Walker intended to permanently deprive Rogers of possession of her cat. Apparently, his plan was to steal the cat, and then after Rogers posted signs in the neighborhood reporting the missing cat, he would pretend to find it, return it to Rogers, and be a hero to her.

¶3 Pursuant to Walker's discovery demand, the State provided a list of witnesses it intended to call at trial, but it excluded the witnesses' addresses. The witness list consisted of Rogers; her mother, Carol Bolton; Bunnow, Rogers' husband by the time of trial; and two police officers. On the first day of trial, Walker, pro se, moved to exclude all of the State's witnesses because the State had not disclosed their addresses or requested a protective order. Walker also proffered case law in support of an argument that he had a due process right to witnesses' addresses because that information would permit him to investigate the

¹ Walker also argued that the court lacked subject matter jurisdiction for various reasons. However, he withdrew that argument in his reply brief.

witnesses' credibility, regardless of whether he interviewed the witnesses themselves.

¶4 The State argued it had good cause for excluding the witnesses' current addresses because of the nature of the charges. It further asserted that all of its witnesses were concerned that Walker would know where they live and would continue his behavior. Finally, the State observed that all of the named witnesses were produced at the courthouse during the preliminary hearing.

¶5 The trial court found good cause for the State to not disclose the witnesses' current addresses to Walker and therefore denied Walker's motion. The court based its decision on the nature of Walker's charges; the particular circumstances of the case; the presence of a no contact order in Walker's bond prohibiting him from contacting Lindsay; and the ease with which Walker could have contacted the police officers through the police department.

¶6 Walker renewed his discovery violation argument in a postconviction motion, which the court denied in a written order reiterating its earlier holding. Walker now appeals.

DISCUSSION

¶7 Walker argues he is entitled to a new trial because the State violated the discovery statute by failing to disclose any of its witnesses' addresses. Accordingly, we first address whether the State violated the discovery statute. *See State v. DeLao*, 2002 WI 49, ¶14, 252 Wis. 2d 289, 643 N.W.2d 480. If so, we then determine whether the State has shown good cause for the violation. *Id.*, ¶15. If not, we must then determine whether Walker was prejudiced by admission of

the State’s witnesses’ testimony. *See id.* Each of these inquiries presents a question of law subject to independent appellate review. *Id.*, ¶¶14-15.

¶8 The State concedes it violated WIS. STAT. § 971.23(1)(d),² which required it to disclose, a reasonable time before trial, a “list of all witnesses and their addresses whom the district attorney intends to call at the trial.” Additionally, Walker emphasizes that the State failed to request a protective order under § 971.23(6), which provides: “Upon motion of a party, the court may at any time order that discovery, inspection or the listing of witnesses required under this section be denied, restricted or deferred, or make other appropriate orders.”

¶9 Having found a discovery violation, we next analyze whether the State had good cause under WIS. STAT. § 971.23(7m)(a), which provides, in part: “The court shall exclude any witness not listed ... [as] required by this section, unless good cause is shown for failure to comply.” The burden of proving good cause rests on the State. *DeLao*, 252 Wis. 2d 289, ¶51. If there is not good cause for the noncompliance, exclusion is mandatory; if there is, sanctions are discretionary. *Id.*, ¶51 (citing *State v. Wild*, 146 Wis. 2d 18, 27-28, 429 N.W.2d 105 (Ct. App. 1988)). Walker argues the State acted in bad faith by failing to either disclose the witnesses’ addresses or seek a protective order denying or restricting disclosure.

¶10 We agree with the State and the trial court that, given the charges, there was good cause to withhold the addresses of Rogers and her family. This is especially so because of the intrusiveness of Walker’s stalking—repeatedly

² All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

entering the family's shared home. In fact, the district attorney told the court the witnesses had expressed concern that Walker would continue his past behavior if their addresses were known. Additionally, Walker's bond conditions already prohibited him from contacting Rogers or coming within 100 yards of her home, and Bolton's address had not changed since the time of Walker's invasions into it. The withholding of the addresses was also made more reasonable because Walker was not represented by an attorney, who could legally interview Rogers and the other victims of the home invasions. As to the police officers, one of the two named officers was never called at trial. Thus, there was no need to exclude that officer's testimony. Regardless, as public officials, Walker could have simply contacted the officers at the police department. Finally, Walker's conduct—absconding for well over two years while released on bond—demonstrated he was unwilling to abide by court orders, rendering a WIS. STAT. § 971.23(6) protective order for a limited disclosure of addresses less suitable.

¶11 Because we conclude the State had good cause to violate the discovery statute, we need not address prejudice.³ We observe, however, that both the trial court and the State have misapplied the prejudice standard. The inquiry is not whether Walker was prejudiced by the discovery violations themselves, i.e., by failing to disclose the witnesses' addresses. Rather, as noted in the State's own brief, the question is whether Walker was prejudiced by the admission of

³ “[I]f the State can show good cause for its failure to disclose, the circuit court may exclude the evidence or may grant other relief such as a recess or continuance.” *State v. DeLao*, 2002 WI 49, ¶51, 252 Wis. 2d 289, 643 N.W.2d 480. Walker did not, however, request any other relief. Nor did Walker object that the court ended its inquiry with its good cause finding, without considering whether it should nonetheless exclude the witnesses' testimony in its discretion.

testimony from witnesses who should have been excluded from trial because of the discovery violations. *See DeLao*, 252 Wis. 2d 289, ¶¶15, 51.

¶12 Finally, Walker seeks to challenge two forfeiture judgments that were entered against him for violating his bond. We previously rejected his attempt to appeal the forfeitures because he failed to timely appeal those separate judgments within ninety days of entry. *See State ex rel. Walker v. Circuit Court for Outagamie Cnty.*, 2010AP2494-W, unpublished slip op. (Wis. Ct. App. Oct. 14, 2010). Not only is our prior order preclusive as law of the case, *see Univest Corp. v. General Split Corp.*, 148 Wis. 2d 29, 38, 435 N.W.2d 234 (1989), but Walker's current attempt at appeal is certainly no less untimely than the first. The forfeiture judgments are dated May 20, 2008 and March 17, 2010. Walker did not file his notice of appeal in this appeal until November 19, 2010, well beyond the ninety-day deadlines.

By the Court.—Judgments and order affirmed.

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

