COURT OF APPEALS
DECISION
DATED AND FILED

October 20, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 99-0984-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

LORI J. SCHROEDER

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Winnebago County: ROBERT A. HAWLEY, Judge. *Affirmed.*

¶1 BROWN, P.J. Following a jury trial, Lori J. Schroeder was adjudged guilty by the trial court for operating a vehicle while intoxicated. She argues that the trial court erroneously exercised its discretion when it denied her motion for a continuance because her expert witness was not available. We hold that the trial court did not misuse its discretion and affirm.

¶2 Schroeder's sole argument on appeal is that the trial court should have granted her request for a continuance because her expert witness was unavailable. She contends that the trial court either ignored or failed to fully consider the three-part test announced in ***Elam v. State***, 50 Wis.2d 383, 184 N.W.2d 176 (1971). The test is: (1) whether the testimony of the absent witness is material, (2) whether the moving party has been guilty of any neglect in endeavoring to procure the attendance of the witness, and (3) whether there is a reasonable expectation that the witness can be located. *See* ***id.*** at 390, 184 N.W.2d at 180.

¶3 Regarding the first factor, nowhere in her brief does Schroeder mention what the witness's expertise is or how the expert's presence was so special to her defense. Nor does perusal of the record help. This court is at a loss to consider whether the witness is material absent a supporting record. In her argument to the trial court for a continuance, all Schroeder could muster was that, without the witness, "I do not have a defense to the prohibited alcohol concentration charge."

¶4 Regarding the second factor, Schroeder's assertion that the trial court ignored this factor is absolutely contrary to the record. In truth, the trial court discussed Schroeder's neglect at length. The trial court found that Schroeder was "playing fast and loose with the court's calendar." The court noted that the first date for trial was November 2, 1998, and counsel did not indicate that there was going to be any problem. Later, counsel requested an adjournment, and it was granted until November 9, 1998, "as a courtesy to your office." But then on November 5, four days before trial, counsel pleaded for another continuance, citing a busy trial calendar. The trial court not only granted the request but worked to accommodate Schroeder's counsel's calendar. The date of December

14 was agreed upon by all and counsel even said "great" when the date was reached.

¶5 On December 8, just six days before the trial date, counsel represented to the court by letter that an adjournment was necessary because the expert witness was attending a trial in Minnesota and the trial there was going to present a conflict. The court denied the motion by letter dated December 9. On the day of the jury trial, counsel renewed the motion. Following is the colloquy after the motion was presented:

> THE COURT: Even though the case has been adjourned three times for jury trial you didn't want to be assuring yourself of giving your client adequate representation by covering all your bases by subpoenaing that expert witness for testimony?
>
> [COUNSEL]: It has never even dawned on me to do that.
>
> THE COURT: It has never dawned on you to secure a witness who is absolutely essential to your client's case by a subpoena when you have gotten even a third adjournment in front of the court. You just expected to get a fourth adjournment, or a fifth and sixth.... I told you we were bringing in a jury especially for your case; special accommodation to accommodate you and your office to have this case and to make the state come in to do this non-criminal jury trial date to accommodate you. We had a conversation on the record that was very, very specific as to that. I was telling you this is it; this is locked in gold; you are telling me it never dawned on you to subpoena the one expert witness that was necessary for your case so you would know that expert is under subpoena so she would have to come to this court and tender her opinion as to the certification or whatever her expertise is. It never dawned on you, counsel.
>
> ….
>
> I guess it boggles the mind; if you had her under subpoena she would have stayed home and would have been required to come here, would have told those other people she couldn't make it ….

¶6 This court's view of the record is that the trial court made extensive remarks addressing the second factor. The jury was there for that case alone. The trial was on a special date picked after consulting Schroeder's counsel's calendar. The State had its witnesses. But the defense did not bother to subpoena its expert witness because it was not counsel's "practice." The trial court appeared to consider that neglect. This court agrees.

¶7 Schroeder asserts that "subpoenaing expert witnesses is of limited value" because it only mandates that a person appear. It does not compel a witness to testify in a manner friendly to the litigant issuing the subpoena. Schroeder states that "a defendant need not risk alienating an expert witness by issuing him or her [a] subpoena, when the person has already been retained to appear in court at the proper time." In other words, Schroeder is arguing that the trial court erred in reasoning that she should have ensured the witness's presence by issuing a subpoena.

¶8 Our answer is that the subpoena is the statutorily recognized method for ensuring a witness's attendance. While this court certainly understands why counsel may feel uncomfortable about subpoenaing her own witness, Schroeder's discomfort is hers to bear; she runs the risk if the witness does not or cannot show. This is especially so where, as here, the court had already accommodated earlier adjournment requests and went out of its way to select a date that would not be in conflict with Schroeder's counsel's schedule. Schroeder cannot plead that the circumstances resulting in her witness's absence were out of her hands. She had the legal machinery available to ensure that all the witnesses she needed would be in attendance. She cannot shift that responsibility to the trial court.

¶9 The third ***Elam*** factor has no relevance to this case. That factor asks whether the witness can be located. Here, Schroeder's counsel knew where the witness was.

By the Court.—Judgment affirmed.

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