COURT OF APPEALS
DECISION
DATED AND FILED

November 18, 1997

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 96-2772-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

RAY A. HAMPTON,

DEFENDANT-APPELLANT,

KENDRICK L. NORMAN,

DEFENDANT.

APPEAL from a judgment of the circuit court for Milwaukee County: VICTOR MANIAN, Judge. *Affirmed.*

Before Fine, Schudson and Curley, JJ.

PER CURIAM. Ray A. Hampton appeals from a judgment of conviction, following a jury trial, for armed robbery, party to a crime. He argues

that the trial court erred in denying his motion for a continuance to produce a witness whom he contends was critical to his defense. Alternatively, he argues that this court should order a new trial in the interest of justice. We reject his arguments and affirm.

I. BACKGROUND

A. Trial testimony.

At approximately 2:30 a.m. on March 19, 1995, Hampton, along with co-defendant Kendrick Norman, Denise Anderson, and Allen McConnell, drove to the Amoco Food Shop (Food Shop) on West Silver Spring Drive in the City of Glendale. Hampton and Norman entered the store, while Anderson and McConnell remained in the car.

According to the testimony of Bonnie Otts, the Food Shop cashier, when Norman and Hampton entered the store, Norman asked her to direct him to the restroom, and Hampton requested her assistance in locating a five-pound bag of sugar. Otts testified that, at Hampton's request, she left her security booth to help him look for sugar. Otts testified that when she realized that the store did not have any five-pound bags of sugar, she returned to her booth. She stated that as she was entering her enclosed booth, Norman pushed her from behind, then grabbed her by her hair, picked her up, pressed a knife to her side, and demanded money from the cash register. Otts testified that she opened the cash register and handed him approximately $119. Norman seized the money and fled the shop.

Testimony also established that later that night, police officers brought two men to the Amoco Food Shop for a show-up, and that Otts identified Hampton as the person who had requested the sugar and Norman as the man who

had robbed her at knife point. She also gave the officers the videotape from the in-store camera, which had recorded the robbery.

Norman testified for the State at Hampton's trial. According to Norman, he and Hampton had planned to commit some robberies to obtain money to buy drugs. Norman claimed that it was Hampton who had handed him the knife which he had used to threaten the store clerk. Norman also testified that, pursuant to a plea agreement, he had pled guilty to armed robbery for his participation in the case.

Hampton testified, however, that he did not know that Norman was going to pull a knife or commit a robbery. He testified that when he realized what was happening, he left the store, got in the car, and informed McConnell and Anderson that Norman was committing a robbery. He testified that he then attempted to drive off and leave Norman behind, but could not flee because the car would not start. Hampton claimed that within moments of his exiting the store and attempting to start the car, Norman returned to the car and ordered him to drive, threatening to kill him if he did not. Hampton testified that when he tried to start the car as Norman had demanded, it started and they drove off, only to be apprehended a few miles away.

In support of Hampton's testimony, the defense introduced Anderson's statement to the police. The statement corroborated Hampton's claim that Norman had threatened him and ordered him to drive faster.

B. Procedural history.

Pursuant to Hampton's speedy trial demand, the case was originally scheduled to be tried on June 28, 1995. On June 27, 1995, however, defense counsel filed a motion for an adjournment on the ground that his investigator had been unable to locate either Anderson or McConnell. On June 28, defense counsel told the court that Anderson had been located but that he needed additional time to find McConnell. The trial court granted the defendant's request for an adjournment and set the trial for September 18, 1995.

On September 18, the prosecutor requested an adjournment because Otts had not received her subpoena. The trial court granted the State's request and rescheduled the trial for November 27, 1995. On November 27, however, defense counsel again indicated concern about Anderson and McConnell, explaining that he believed that McConnell was dodging service and that he had been unable to locate Anderson. Nevertheless, counsel assured the court that his process server would make another attempt to serve Anderson. The trial court then proceeded to select a jury. After jury selection, the court adjourned for the day because of a blizzard.

On November 28, the trial did not resume because of the snowstorm the previous day. However, brief proceedings were held that morning and defense counsel informed the court that his process server had failed in his attempt to serve Anderson on the evening of November 27. Counsel then requested a body attachment for Anderson; the trial court granted the request.

On November 29, defense counsel reiterated that Anderson had not been found, and moved the court for another adjournment. The trial court inquired whether there was "any indication that Anderson might be found" given that

counsel had been looking for her for several weeks. Defense counsel responded that he did not believe Anderson was attempting to avoid service and added that she had been cooperative when served for the original trial date. The trial court, however, was not convinced. Rejecting defense counsel's response, the court stated, "the problem is we don't know if she'll ever be found. She might have moved to Alaska …. [S]o you might be facing the same situation in March or April." The trial court then denied the motion for a continuance, stating, "I think it's time to try this case. I don't think the defense is gonna' be that much prejudiced by the fact that she is not here, although I understand the defense believes it to be the critical nature of the testimony, and we don't know if she'll ever be found …."

II. ANALYSIS

Hampton first claims that the trial court erred in denying his request for a continuance. He contends that his constitutional right to compulsory process was violated by the trial court's denial of his request for a continuance to produce Anderson. We disagree.

A motion for a continuance is addressed to the discretion of the trial court. *See* ***State v. Echols***, 175 Wis.2d 653, 680, 499 N.W.2d 631, 640 (1993). "The trial court's ruling … will not be set aside unless we find that the trial court erroneously exercised its discretion." ***Id.*** A denial of a continuance potentially implicates certain constitutional rights, *see* ***State v. Wollman***, 86 Wis.2d 459, 468, 273 N.W.2d 225, 230 (1979), and, on appeal, we must determine whether the trial court balanced the defendant's rights against the public interest in the prompt and efficient administration of justice. *See* ***id.***

In passing upon a motion for a continuance due to the absence of a witness, several factors should be considered by the trial court, including: (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; (3) whether there is a reasonable expectation that the witness can be located; and (4) whether the moving party has requested other continuances. *See* ***Bowie v. State***, 85 Wis.2d 549, 556-57, 271 N.W.2d 110, 113 (1978); *see also* ***Phifer v. State***, 64 Wis.2d 24, 31, 218 N.W.2d 354, 358 (1974). In addition, the trial court may consider the extent to which granting the continuance would inconvenience the court and the opposing party, including its witnesses. *See* ***United States v. Flynt***, 756 F.2d 1352, 1359 (9th Cir. 1985). The balancing of these factors must be done in light of all the circumstances that appear of record. *See* ***Wollman***, 86 Wis.2d at 468, 273 N.W.2d at 230. Here, the trial court's denial of Hampton's request for a continuance of trial to locate Anderson is well supported by the circumstances that appear of record.

First, the trial court reasonably concluded that Hampton failed to establish a "reasonable expectation" of finding Anderson. Although counsel averred that Anderson had been served with a subpoena on September 27, to appear for trial on November 27, he was forced to concede that Anderson had failed to appear on the trial date. And, on November 29, the date trial resumed after the blizzard, counsel told the court that his efforts to locate Anderson on November 27, 28, and 29, had proved futile. Further, defense counsel reported that Anderson had recently left her employment, that no information was available regarding her new employer, that her phone had been disconnected, and that efforts to contact her at her last known address had been unsuccessful. Under the

circumstances, the trial court reasonably concluded that Hampton had not shown a reasonable expectation of locating Anderson.

Second, the trial court properly took into account the adverse impact that a continuance would have had on the State and its principal witness, Otts. The trial court, understandably concerned about protecting the public interest in the prompt and efficient administration of justice, concluded:

> The State's [key] witness came down from Friendship [Wisconsin] in a blizzard, [and] has been here for two days. The jury was selected Monday, [and then] went home in a blizzard. Some of them came down yesterday, and then they were told to come back today.
>
> Mr. Norman is here to testify and to be cross-examined. There is no indication that [Denise Anderson] will be found ever, even if we put the case over to spring.

Finally, the trial court's decision to deny the continuance fully comported with Hampton's right to present a defense. Before denying the continuance, the court accepted the parties' stipulation that Anderson's statement to the police could be admitted. That statement corroborated Hampton's account and subsequent trial testimony in a number of respects, substantially providing Hampton with what he had hoped Anderson would have provided with in-person testimony. The trial court also noted that because a videotape was available concerning much of what had taken place in the Food Shop, Hampton and the State would be able to corroborate each of their respective accounts as to what had occurred. Therefore, under the totality of the circumstances, we conclude that the trial court properly exercised discretion in denying Hampton's request for a continuance.

Hampton next asks this court to order a new trial in the interest of justice, pursuant to § 752.35, STATS. He claims that the real controversy concerning his alleged participation in the robbery has not been tried because the jury did not have the opportunity to hear Denise Anderson's live testimony. We disagree.

Under § 752.35, STATS., we have the authority to reverse and remand for a new trial whenever it is probable that justice has miscarried. ***State v. Martinez***, 210 Wis.2d 397, 403-404, 563 N.W.2d 922, 925 (Ct. App. 1997). "The power of discretionary reversal … should be exercised only in exceptional cases." *See* ***id.*** at 404, 563 N.W.2d at 925. "In order to reverse for a miscarriage of justice under § 752.35, we must conclude that there is a substantial probability of a different result on retrial." ***Id.*** We are unable to so conclude on this record. In the instant case, the jury was allowed to decide who was telling the truth, and it elected not to believe Hampton or his claim that he would have left Norman and the scene of the crime if the car had started. We conclude that no miscarriage of justice occurred, and, accordingly, we deny Hampton's request for a new trial.

By the Court.—Judgment affirmed.

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