

**COURT OF APPEALS
DECISION
DATED AND FILED**

August 16, 2001

Cornelia G. Clark
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.

No. 00-2336-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

KURT W. MEYER,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Sauk County:
JAMES EVENSON, Judge. *Affirmed.*

Before Roggensack, Deininger and Lundsten, JJ.

¶1 PER CURIAM. Kurt Meyer appeals a judgment convicting him of being party to the crimes of robbery with use of force, burglary, substantial battery with intent to do substantial harm, and disorderly conduct. Meyer claims the trial court improperly denied his request for a continuance to find a witness, and that the absence of the witness kept the real controversy from being tried. For the

reasons discussed below, we conclude that the trial court's decision was an appropriate exercise of discretion and decline to order a new trial in the interest of justice.

BACKGROUND

¶2 The charges in this case were based on an incident in which two men broke down the door to an apartment, entered it, demanded money from the resident, took cash from his wallet, and choked him until he lost consciousness. The victim was unable to positively identify his assailants, but he noted that one had spoken in Spanish to the other.

¶3 That same evening, Meyer had entered the same apartment building with two Hispanic brothers, Albert and Alexander Salinas, looking for Meyer's girlfriend. When they discovered the girlfriend was not home, Albert and Meyer went to a neighboring apartment and Albert choked the neighbor, demanding to know the girlfriend's whereabouts. Later, the neighbor could hear the sounds of a commotion from the apartment directly over his. Alexander came to his door and warned him not to talk to the cops, then ran out of the building. Shortly thereafter, the neighbor heard someone running down the steps and saw two people with cloth wrapped around their heads or necks running towards what he recognized as Meyer's car.

¶4 The day before trial, Meyer asked for a continuance because he had been unable to locate a woman who had told police that she heard voices coming from the victim's apartment, and that neither of the voices sounded like Meyer's. The trial court denied the continuance on the grounds that it believed Meyer had been given ample opportunity to locate the witness prior to trial.

STANDARD OF REVIEW

¶5 The decision whether to grant a continuance lies within the trial court's discretion. *State v. Oswald*, 2000 WI App 3, ¶31, 232 Wis. 2d 103, 606 N.W.2d 238. A court properly exercises discretion when it considers the facts of record under the proper legal standard and reasons its way to a rational conclusion. *Burkes v. Hales*, 165 Wis. 2d 585, 590-91, 478 N.W.2d 37 (Ct. App. 1991).

¶6 We will independently review the record to determine whether the real controversy has not been fully tried, either because the jury was erroneously not given the opportunity to hear significant testimony or because it heard evidence that should not have been admitted and that evidence clouded a crucial issue. *State v. Johnson*, 149 Wis. 2d 418, 429, 439 N.W.2d 122 (1989).

ANALYSIS

¶7 A motion for a continuance requires the trial court to balance the defendant's right to adequate representation against the public's right to the efficient administration of justice, taking into account the length of delay requested, any prior continuances, the inconvenience to the parties, witnesses and court, whether the delay seems to be sought for legitimate reasons or for a dilatory purpose, and other relevant factors. *State v. Wollman*, 86 Wis. 2d 459, 470, 273 N.W.2d 225 (1979).

¶8 Here, Meyer requested a continuance of indeterminate length, with no indication of when he believed the witness could be located. The trial court noted that the trial had already been rescheduled twice, and that other cases had been taken off the calendar to accommodate it. The record shows that both delays were attributable to Meyer's uncertainty about whether to accept a plea.

Furthermore, the prosecution effort involved coordination among three counties, such that rescheduling would involve considerable inconvenience. Under these circumstances, we are satisfied that the trial court could reasonably have denied a continuance based on efficiency concerns.

¶9 Moreover, contrary to Meyer's assertion, we are not persuaded that the denial of a continuance kept the real controversy from being tried. First of all, no one testified to having heard Meyer speak during the burglary. The victim testified that one of the intruders, who had an accent, did all of the talking, and the downstairs neighbor testified that he could hear the victim's voice and an accented voice. Therefore, the missing witness's testimony that she did not hear a voice that sounded like Meyer's would not have conflicted with any of the evidence presented at trial. The real controversy—namely, which two of the three people whom the downstairs neighbor saw that night had been involved in the upstairs robbery and battery—was fully tried. Meyer's own testimony was that he had been outside speaking with another resident when the crimes were being committed. Albert testified that he (Albert) was in the girlfriend's apartment when the crimes were being committed. These stories conflicted with the testimony of the downstairs neighbor that he heard the sounds of a struggle upstairs at the same time that Alexander was standing at his door.

By the Court.—Judgment affirmed.

This opinion will not be published. WIS. STAT. RULE 809.23(1)(b)5 (1999-2000).

