COURT OF APPEALS
DECISION
DATED AND FILED

May 7, 2013

Diane M. Fremgen
Clerk of Court of Appeals

Appeal Nos. 2012AP1463-CR
2012AP1464-CR

Cir. Ct. Nos. 2011CF1566
2011CF3695

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ROYCE L. HAWTHORNE,

DEFENDANT-APPELLANT.

APPEAL from judgment of the circuit court for Milwaukee County: MEL FLANAGAN, Judge. *Affirmed.*

Before Curley, P.J., Fine and Brennan, JJ.

¶1 PER CURIAM. Royce L. Hawthorne appeals from a judgment of conviction for four felonies that stem from the shooting of his brother, including: one count of first-degree recklessly endangering safety by use of a dangerous

weapon, domestic abuse; one count of being a felon in possession of a firearm; and two counts of felony intimidation of a witness, domestic abuse, as a repeater. *See* WIS. STAT. §§ 941.30(1), 968.075(1)(a), 939.63(1)(b), 941.29(2), 940.43(7), and 939.62(1)(b) (2011-12).[1] Hawthorne argues that the trial court erred when it applied the forfeiture by wrongdoing doctrine to allow two absent witnesses' statements to police officers to be introduced at trial. Specifically, Hawthorne argues that the witnesses were not legally "unavailable" for confrontation because the State failed to demonstrate good faith and due diligence to compel the witnesses' appearance at trial. We affirm.

BACKGROUND

¶2 Hawthorne was charged with shooting his brother, Corneil Hawthorne, at the home they share with their mother, Grace Hawthorne. The criminal complaint alleged that Corneil Hawthorne told a police officer that Hawthorne shot him in the leg during an argument. The criminal complaint further alleged that Grace Hawthorne witnessed the brothers' argument and saw Hawthorne with a "short barrel shotgun."

¶3 While Grace Hawthorne appeared at the April 18, 2011 preliminary hearing and testified, Corneil Hawthorne did not. Subsequently, an investigator for the district attorney's office learned about three phone calls that were placed from the jail to a third Hawthorne brother and two women, including Hawthorne's

[1] The first two crimes were charged in No. 2011CF1566 (Milwaukee Cnty. Cir. Ct.) and the second two crimes were charged in No. 2011CF3695 (Milwaukee Cnty. Cir. Ct.). The cases were consolidated for trial and appeal.

All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

girlfriend, on April 7 and April 11, 2011. During those calls, the man calling from the jail identified himself as "Royce" and asked the listeners to convince his mother and brother not to show up for court. The investigator played "snippets" of the calls for Grace Hawthorne, who identified Hawthorne as the speaker. The State charged Hawthorne with two counts of witness intimidation based on the telephone calls.

¶4 Shortly after the second complaint was filed, the State filed a motion to invoke the doctrine of forfeiture by wrongdoing in the event Grace Hawthorne did not appear for trial.[2] Subsequently, both Grace Hawthorne and Corneil Hawthorne were personally served with subpoenas to appear for trial at 8:30 a.m., but neither appeared. The State told the trial court on the morning of trial that it was sending investigators out to try to locate them. Neither witness was located. That afternoon, the trial court considered the State's motion and granted it, for reasons explained below.

¶5 The jury found Hawthorne guilty of all counts. He was sentenced to two concurrent terms of three years of initial confinement and three years of extended supervision for the shooting and firearm possession, consecutive to two concurrent terms of two years of initial confinement and two years of extended supervision for the two counts of witness intimidation. This appeal follows.

[2] While the written motion referred only to the possibility that Grace Hawthorne would fail to appear for trial, a footnote stated that the State would seek to introduce statements made to law enforcement officers by both Grace Hawthorne and Corneil Hawthorne. At the motion hearing, the State indicated that it was seeking to introduce both witnesses' statements based on their non-appearance.

DISCUSSION

¶6 At issue in this case is the trial court's ruling on the State's motion to apply the forfeiture by wrongdoing doctrine, which "is an exception to the Sixth Amendment's Confrontation Clause" that allows the admission of hearsay statements by a witness who does not testify at trial once the court determines that the defendant has forfeited his or her right to confront the witness due to improper conduct. *See* ***State v. Baldwin***, 2010 WI App 162, ¶¶34-35, 330 Wis. 2d 500, 794 N.W.2d 769.

¶7 For the doctrine to apply, the State must prove by a preponderance of the evidence "that the defendant prevented the witness from testifying" and "that the defendant *intended* to prevent the witness from testifying." *See* ***id.***, ¶¶37-39 (applying ***Giles v. California***, 554 U.S. 353 (2008)). In addition, the witness must be "[u]navailab[le] for confrontation," which requires that he or she did not appear at trial and that the State made a "'good faith effort' to produce that declarant at trial." *See* ***State v. King***, 2005 WI App 224, ¶6, 287 Wis. 2d 756, 706 N.W.2d 181 (citation omitted); *see also* ***Baldwin***, 330 Wis. 2d 500, ¶48 ("WISCONSIN STAT. § 908.04(1)(e) requires the proponent of a witness to secure the witness's appearance by process or other reasonable means. The proponent must make a good-faith effort and exercise due diligence to secure the witness's presence.") (citations and internal quotation marks omitted).

¶8 To satisfy those legal standards in this case, the State presented the testimony of the investigator who listened to the jail calls and who spoke with Grace Hawthorne about the calls. The State played the calls for the trial court. The State also presented the testimony of a detective who had interviewed Hawthorne on two occasions and who said he recognized Hawthorne's voice on

the tapes. Finally, the State confirmed for the trial court that it had personally served both Grace Hawthorne and Corneil Hawthorne with subpoenas to appear at 8:30 a.m., and the trial court noted that they had not appeared as of 3:00 p.m.

¶9 Trial counsel said he was objecting to the State's forfeiture argument on "two grounds," including "authentication" and "cause." With respect to authentication, trial counsel asserted that "there's no evidence to show that it was [Hawthorne] on those phone calls" and contested the manner in which the detective was asked to authenticate Hawthorne's voice. With respect to cause, trial counsel argued that there was insufficient evidence that the calls led to the witnesses' non-appearance at trial, noting that Grace Hawthorne appeared at the preliminary hearing after the calls were made and that Corneil Hawthorne told police on the day of the shooting that he did not want his brother prosecuted.

¶10 The trial court concluded that the State had met its burden and granted the State's motion. In doing so, the trial court discussed the statements that it found Hawthorne had made during the three telephone calls. It also noted that the witnesses were personally served with subpoenas and had not appeared.

¶11 On appeal, Hawthorne does not contend that the trial court erred when it found that he made the calls and that the calls caused the witnesses' absence. Instead, he argues that the record fails to support the trial court's "unavailability finding." Specifically, he argues that the State did not make a good faith effort to locate the witnesses and did not exercise due diligence. Hawthorne complains about the fact that when the trial court offered to issue bench warrants for the witnesses after making its ruling on the State's motion, the State declined. Hawthorne argues:

> [The State's] decision not to ask for the bench warrants and not send out the police that evening to, at the very least, go to the last known residences of the absent witnesses and attempt to serve the warrants was not a "good faith effort" nor was it an exercise of "due diligence[.]"

¶12 In response, the State argues that Hawthorne forfeited his right to contest the trial court's unavailability finding when he did not contest that issue at the trial court. The State also argues that it did, in fact, demonstrate that the witnesses were legally unavailable. We find both arguments persuasive.

A. Forfeiture.

¶13 The State argues first that Hawthorne "forfeited the right to appellate review of the adequacy of the showing that the witnesses were unavailable because he did not raise that challenge in the trial court." (Some capitalization omitted.) The State explains:

> [Trial] counsel objected to the State's motion to admit the witnesses' out-of-court statements under the forfeiture by wrongdoing doctrine solely on the grounds that the State had not sufficiently proved that the voice on the recordings was that of Hawthorne and that the State had failed to adequately prove the calls were a substantial factor in causing the witnesses not to appear for trial. Hawthorne never argued in the trial court that the State had not sufficiently demonstrated that the witnesses were unavailable.

(Record citations omitted.)

¶14 The State also emphasizes that the trial court offered to issue bench warrants only *after* it had already decided the State's motion. In response to the offer, the State told the trial court that if it wanted to issue bench warrants in addition to the personal service the State had already completed in order to "make [its ruling on] the motion even stronger," that would be fine "as long as the next

court date that we're set for jury trial, that we can proceed [with] forfeiture by wrongdoing if they're not here." The trial court indicated that it could wait until the next morning to begin the trial, but that it would "present a real problem for us if [the trial] doesn't go forward." The State said it was ready to proceed and declined to have bench warrants issued.[3] Throughout this exchange, trial counsel never asked that the bench warrants be issued, asked the trial court to reconsider its earlier ruling, or argued that the State's decision not to seek bench warrants demonstrated a lack of good faith and due diligence.

¶15 The State argues that "Hawthorne is not entitled to relief on his claim that the record does not adequately demonstrate that the witnesses were unavailable for confrontation purposes because he never raised that claim in the trial court." The State cites ***State v. Ndina***, 2009 WI 21, ¶¶29-31, 315 Wis. 2d 653, 761 N.W.2d 612, which held that a party may forfeit his or her right to appellate review by failing to timely object or raise a claim at trial. The State continues:

> It is not sufficient that Hawthorne objected to the admission of the hearsay evidence on the ground that the State had not proven the necessary elements of the doctrine of forfeiture by wrongdoing because that objection did not alert the trial court and prosecutor that unavailability of the witnesses was in dispute….
>
> … [T]he [State] was not made aware that the witnesses' unavailability was a pertinent factor because Hawthorne never objected on that ground. If Hawthorne had objected to the adequacy of the showing of unavailability, the prosecutor could have responded accordingly and this issue need never have arisen. The

[3] Ultimately, the potential jurors were not brought to the courtroom until the next morning, due to the trial court's handling of other issues in the case, including Hawthorne's statement that he wanted to represent himself.

> very purpose of the forfeiture rule is to require specific, contemporaneous objections so that opposing counsel and the trial court are on notice, steps to prevent error can be taken, and needless consumption of judicial time with unnecessary appeals can be averted.

¶16 In his reply brief, Hawthorne argues that he did not forfeit the right to challenge the trial court's unavailability finding because he opposed the State's motion to invoke the doctrine of forfeiture by wrongdoing. He contends that trial counsel's statement that Hawthorne objected to granting the motion "preserved the defendant's right to seek review of the trial court's decision to grant the motion, a ruling which included the trial court's findings as to unavailability."

¶17 We reject Hawthorne's reasoning and agree with the State. At no time before or after the motion hearing did trial counsel put the trial court or the State on notice that it was challenging the State's efforts to locate the witnesses. Instead, trial counsel explicitly cited two bases for its "objection" to the motion, stating: "One is authentication, and the second is cause."

¶18 Further, when the trial court for the first time offered to issue a bench warrant and the State declined, trial counsel did not ask the trial court to reconsider its previous ruling on the motion to invoke the doctrine of forfeiture by wrongdoing. This deprived the trial court of a "fair opportunity to address" the concern that Hawthorne raises for the first time on appeal: that the State's decision to decline the issuance of bench warrants constituted a lack of good faith and due diligence. *See* ***Ndina***, 315 Wis. 2d 653, ¶30 (explaining that the forfeiture rule gives parties and the trial court "a fair opportunity to address" objections and "prevents attorneys from 'sandbagging' opposing counsel by failing to object to an error for strategic reason and later claiming that the error is grounds for reversal"). The right to challenge the trial court's unavailability finding is not one of those

rights that cannot be forfeited. *See* ***id.***, ¶31 ("'[A] criminal defendant has certain fundamental constitutional rights that may only be waived personally and expressly,' including 'the right to the assistance of counsel, the right to refrain from self-incrimination, and the right to have a trial by jury,'" and those "'rights cannot be forfeited by mere failure to object.'") (citation omitted). We conclude that Hawthorne forfeited his right to challenge the trial court's unavailability finding when he failed to raise concerns at the motion hearing about the State's efforts to locate the witnesses.

B. The trial court's unavailability finding.

¶19 Reviewing *de novo* the trial court's finding that the witnesses were unavailable, we agree with the State that the trial court's order should be affirmed. *See* ***King***, 287 Wis. 2d 756, ¶11 ("Whether a hearsay declarant is unavailable 'for confrontation purposes, is a constitutional fact'" that appellate courts review *de novo*.) (citation omitted).

¶20 As noted, a witness is unavailable for confrontation if he or she fails to appear at trial and the State made a "'good-faith effort' to produce that declarant at trial." *See* ***id.***, ¶6 (citation omitted). Hawthorne does not contend that the witnesses appeared. Rather, he argues that in order to "meet the same level of 'good faith' and 'due diligence' that is found in ***Baldwin***"—a case where the State served the witness and a body attachment was also issued—"the [State] only needed to have accepted the offer made by the trial court for the bench warrants and sent out a police officer or two sometime later that evening to attempt to find the witnesses." We are not convinced that the State's failure to take those actions constituted a lack of good faith and due diligence.

¶21 While ***Baldwin*** affirmed the trial court's finding that the State demonstrated good faith and due diligence where it served the witness and also obtained a body attachment for her, ***Baldwin*** did not hold that the failure to do both of those things would have rendered the State's efforts insufficient. *See* ***id.***, 330 Wis. 2d 500, ¶¶46-51. The State in this case personally served the witnesses with subpoenas and also sent its investigators out to look for the witnesses on the morning of the scheduled trial. Hawthorne has not convinced us that these actions were insufficient to demonstrate good cause and due diligence.

¶22 In addition, Hawthorne ignores the circumstances under which the State chose to decline the trial court's offer to issue bench warrants. The offer was made at the end of the day when the trial court indicated it was ready to call the potential jurors to the courtroom. The State indicated that it did not object to issuing bench warrants and rescheduling the trial, but when the trial court said that it did not want to delay the trial beyond the next morning, the State said it was ready to proceed. The State's decision to proceed with the trial where it previously served the witnesses with subpoenas and had investigators looking for them did not signal a lack of good faith or due diligence in the State's attempt to procure the witnesses' appearance.

By the Court.—Judgment affirmed.

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