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October 3, 2018

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You are hereby notified that the Court has entered the following opinion and order:

2017AP2477-CR State of Wisconsin v. Justin P. Posey (L.C. #2016CF109)

Before Neubauer, C.J., Reilly, P.J., and Gundrum, J.

Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

Justin P. Posey appeals a judgment of conviction and an order denying his postconviction motion in which he sought a new trial on the ground that the circuit court erred in denying an adjournment to permit the testimony of a defense witness. Based upon our review of the briefs

and record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2015-16).[1] Because Posey has not shown that the testimony of the witness would have added anything beyond what had already been shown by other evidence, the denial to adjourn the trial was not an erroneous exercise of the circuit court's discretion. We affirm.

On September 27, 2015, a man robbed a gas station worker at gunpoint in Menasha. It was about 2:15 a.m. The robber wore a mask and a blue-hooded sweatshirt with a yellow print. Based on a tip, police obtained a warrant and searched Posey's house. They found a sweatshirt that was similar to the robber's sweatshirt. The police arrested Posey.

During police questioning, Posey initially said that he was at work at the time of the robbery. He later claimed he was at home. He said that he had an injured leg at the time, possibly implying the injury prevented him from robbing the station. But as police told him of the incriminating evidence they had obtained, he ultimately confessed. In this regard, when told surveillance camera footage showed his car in a parking lot next to the station around the time of the robbery, Posey admitted to being in the parking lot and at the station that night. Posey also admitted to moving his car from one parking lot stall to another, which was consistent with the video. Posey said he robbed the station because he needed money to pay for loans, insurance, and gas. He gave details of the robbery that were corroborated by the worker: he entered the gas

[1] All references to the Wisconsin Statutes are to the 2015-16 version.

station while wearing a mask, saw an employee mopping the floor, asked her for rubbing alcohol, and then robbed her with a gun.[2]

The State charged Posey with one count of armed robbery. In a one-day trial, witnesses testified to the facts summarized above, which included showing portions of videos of the surveillance footage and the police questioning Posey.

Posey planned to call three witnesses: his wife, brother, and doctor. After the State rested, the court asked when the doctor would arrive, and Posey's counsel indicated 3:30 p.m. The court stated, "No. The doctor's going to be here at 12:30. Get on the phone and have the doctor here earlier [because] I'm not waiting …. [T]he jury would be done deliberating by 3:30, so get your doctor here" by 1:00 p.m. at the latest.

Because Posey was having difficulty securing his doctor's attendance, the State stipulated to the admission into evidence of Posey's medical records. The State also agreed that Posey's wife could testify about the medical records. Whether the records would be read aloud or not, the State agreed to make no hearsay or foundation objections.

Posey's wife testified she woke up on September 27, at 2:00 a.m., and that Posey was in bed next to her. She testified that Posey hurt his leg on the weekend of September 18. She thought that the surveillance video of the robbery did not show the robber walking with a limp. She identified two photos and an x-ray showing Posey's leg injury. She also read from a medical record of Posey's doctor's visit, which stated the doctor had diagnosed Posey with a "[c]losed

[2] He told police it was a BB gun.

fracture of right tibia." The document stated that there was a lump and swelling below Posey's right knee and that Posey had "[s]lipped on some rocks while fishing last Saturday." The court received the exhibits into evidence. It published the two photos and the x-ray to the jury.

Posey's brother testified he saw Posey at a family gathering on September 27. He testified Posey "had a hard time standing," and his leg "was bruised pretty bad" and "swollen up."

Posey decided to testify. He testified he was at home at the time of the robbery, he had hurt his leg while fishing on September 18, and he had difficulty walking for weeks thereafter. He denied robbing the station, repudiating his confession to police.

After being informed the doctor had not yet arrived, the court stated they would wait until 3:30 p.m. and scolded Posey's counsel for not having the witness at the courthouse by 8:30 a.m. Counsel indicated the subpoena required an arrival of 8:30 a.m., but the doctor had refused.

At 3:33 p.m., the court asked defense counsel for the next witness. Counsel said he had talked with the doctor's attorney five minutes prior, who said the doctor was "in Oshkosh and he'll be up here in moments." The court said, "Yet another person lying to me. This doctor really wants to sit the night in jail." The court asked Posey's counsel if he had a copy of the subpoena, and counsel said he did not. The State asked to proceed without the doctor because "[t]he jury's been waiting now for 35 minutes or so" and noted the State's stipulation to admit the medical-related evidence. The court decided to wait until 3:40 p.m. before proceeding without the doctor. Posey's counsel responded, "That's perfectly fair."

At 3:40 p.m., the court proceeded to jury instructions. At 3:48 p.m., the doctor entered the courtroom. After instructing and then excusing the jury, the court asked the doctor why he arrived so late. The doctor confirmed the subpoena had been for 8:30 a.m, but he stated that his office was told it would be acceptable for him to arrive by 4:00 p.m. The doctor did not testify.

The jury returned a guilty verdict. Posey filed a postconviction motion asserting the court had erred by not adjourning the trial for an additional ten minutes so the doctor could testify. The court denied the motion, and Posey appeals.

A circuit court's grant or denial of a motion for a continuance to allow the attendance of a witness will not be disturbed on appeal absent an erroneous exercise of discretion. ***Elam v. State***, 50 Wis. 2d 383, 389-90, 184 N.W.2d 176 (1971). No such error occurs if the circuit court considers the relevant facts, uses a proper standard of law, and reaches a reasonable conclusion. ***State v. Vollbrecht***, 2012 WI App 90, ¶30, 344 Wis. 2d 69, 820 N.W.2d 443.

Upon a request for an adjournment, some of the primary factors to be considered are "whether the testimony of the absent witness is material, whether the moving party has been guilty of any neglect in endeavoring to procure the attendance of the witness, and whether there is a reasonable expectation that the witness can be located." ***Bowie v. State***, 85 Wis. 2d 549, 556-57, 271 N.W.2d 110 (1978). A failure to show one of these is grounds for denying an adjournment. ***State v. Williams***, 2000 WI App 123, ¶15, 237 Wis. 2d 591, 614 N.W.2d 11.

Although the State asserts Posey has not demonstrated any of the foregoing factors, we need only address materiality. Posey has not shown that the doctor's testimony was sufficiently material to conclude the court erroneously exercised its discretion by denying the adjournment.[3]

Posey asserts the doctor's testimony was material because he "could [have] answer[ed] questions about Posey's physical abilities" at the time of the robbery that were not addressed by the records, he could have clarified an ambiguity regarding the date of the injury, and his live testimony would have carried more weight with a jury than paper records.[4]

Posey's assertions are insufficient to show materiality. They do not establish how the doctor's testimony would have added anything beyond the testimony of Posey's wife and brother and the doctor's medical records. We are hard pressed to conclude that the materiality of evidence to support an adjournment is satisfied by testimony that is merely cumulative, as cumulative evidence is unlikely to affect the outcome of the proceeding. *See* ***Elam***, 50 Wis. 2d at 390 (testimony of an absent witness is material particularly if the evidence cannot be provided otherwise and the "testimony would not be merely cumulative"); *see also* ***Allen v. Allen***, 78 Wis. 2d 263, 275, 254 N.W.2d 244 (1977) (concluding that the court properly denied a continuance to secure testimony that would have been cumulative); ***State v. Ray***, 166 Wis. 2d 855, 870, 481 N.W.2d 288 (Ct. App. 1992) (when determining the materiality of exculpatory

[3] Because the court did not commit error, we need not address whether the denial constituted harmless error.

[4] The State argues Posey forfeited his argument because his counsel agreed to proceeding with the trial if the doctor did not arrive by 3:40 p.m. The forfeiture rule is the fundamental principle that issues raised on appeal must be preserved at the circuit court. ***State v. Huebner***, 2000 WI 59, ¶¶10-11, 235 Wis. 2d 486, 611 N.W.2d 727. But the rule is one of judicial administration, and we choose not to apply it here. *See* ***id.***

evidence, the test is whether "there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different").

Significantly, our ability to fully examine the alleged materiality of the doctor's testimony is hampered by Posey's failure to have made an offer of proof to show exactly what the doctor would have added, e.g., what specific questions the doctor would have answered about Posey's physical abilities at the time or how the doctor would have clarified any ambiguity about the date of injury.[5] *See* ***State v. Anastas***, 107 Wis. 2d 270, 274-76, 320 N.W.2d 15 (Ct. App. 1982) (concluding no error in denying a continuance supported by assertions of counsel but not a detailed offer of proof showing the testimony would not be cumulative). The circuit court appropriately made this point at the postconviction motion hearing, indicating there was "nothing before this court to say what the doctor's going to say." In response to the court, Posey's counsel could only reply, "Well, we have the medical records essentially," but those records had already been admitted into evidence, portions of which were discussed by Posey's wife and published to the jury.

Because Posey failed to prove materiality, the denial to adjourn the trial was not an erroneous exercise of the circuit court's discretion.

[5] The ambiguity about the date of injury is of questionable significance in any event. Posey visited the doctor on September 29. The medical report states Posey had "[s]lipped on some rocks while fishing last Saturday." The parties at trial disputed whether "last Saturday" referred to the immediately preceding Saturday or the one before. But either way Posey injured his leg *before* the robbery, which occurred on September 27. Further, without an offer of proof, it is speculative to say the doctor would have been able to testify about the date of injury more than a year later at trial.

Posey's assertion that live testimony from a doctor carries more weight than paper records does nothing to show that his testimony would have been anything other than cumulative.

Upon the foregoing reasons,

IT IS ORDERED that the judgment and order of the circuit court are summarily affirmed pursuant to WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that this summary disposition order will not be published.

Sheila T. Reiff
Clerk of Court of Appeals