

State of Wisconsin,

Plaintiff,

v.

Case No. 2008CM261

Damien Bell,

Defendant.

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**Motion to Exclude State's Witnesses**

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NOW COMES the above-named defendant, by his attorney, Jeffrey W. Jensen, and pursuant to sec. 971.23(7m)(a), Stats., hereby moves the court to exclude all witnesses on behalf of the State for the reason that, pursuant to sec. 971.23(1)(d), Stats., the defendant served upon the district attorney a demand to exchange witness lists and the State has failed to timely serve a witness list upon the defendant.

This motion is further based upon the attached Memorandum of Law.

Dated at Milwaukee, Wisconsin, this \_\_\_\_\_ day of \_\_\_\_\_, 2008:

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Attorneys for the Defendant

By: \_\_\_\_\_  
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State of Wisconsin,

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**Memorandum in Support of Motion to Exclude State's Witnesses**

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On February 25, 2008, (attached hereto as Exhibit A) the defendant served upon the State a demand for a witness list. To date, the State has failed to serve a witness list upon defense counsel. The defendant now moves to exclude all witnesses on behalf of the State.

§971.23(1), Wis. Stats. (1997), provides,

(1) What a district attorney must disclose to a defendant. Upon demand, the district attorney ***shall, within a reasonable time before trial***, disclose to the defendant or his or her attorney and permit the defendant or his or her attorney to inspect and copy or photograph all of the following materials and information, if it is within the possession, custody or control of the state:

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(d) A list of all witnesses and their addresses whom the district attorney intends to call at the trial. This paragraph does not apply to rebuttal witnesses or those called for impeachment only.

As a sanction for non-compliance with the requirement to provide a witness list,

sec. 971.23(7m), Stats. (1997), provides:

(a) The court shall exclude any witness not listed or evidence not presented for inspection or copying required by this section, unless good cause is shown for failure to comply. The court may in appropriate cases grant the opposing party a recess or a continuance.

(b) In addition to or in lieu of any sanction specified in par. (a), a court may, subject to sub. (3), advise the jury of any failure or refusal to disclose material or information required to be disclosed under sub. (1) or (2m), or of any untimely disclosure of material or information required to be disclosed under sub. (1) or (2m).

It is meaningful to point out that §971.23(7m) speaks in mandatory terms, "the court **shall** exclude any witness not listed . . . unless good cause for failure to comply is shown." The procedure under the statute is clear: (1) If an offer is served the State must comply; (2) If the State fails to comply and fails to show good cause for failing to comply the court **shall** exclude the witnesses; (3) If the State shows good cause and the court permits the witness to testify the defendant (opposing party) should be granted a continuance if appropriate.

As we read this section, it requires two separate determinations by the trial court. First, the court must determine whether the noncomplying party (here, the state) has shown good cause for the failure to comply. If good cause is not shown, the statute is mandatory--the evidence shall be excluded. See *In re E.B.*, 111 Wis.2d 175, 185, 330 N.W.2d 584, 590 (1983). *State v. Wild*, 146 Wis. 2d 18, 429 N.W.2d 105, 108 (Wis.App. 1988)

Whether or not "good cause" exists is a matter of law. In, *State v. Martinez*, 166 Wis.2d 250, 479 N.W.2d 224, 228 (Wis.App. 1991), the court of appeals made clear,

Section 971.23(7), Stats., requires the trial court to exclude evidence which is not produced pursuant to a discovery demand unless "good cause is shown for failure to comply." This burden clearly rests with the state. Whether a party

has satisfied its burden is a question of law which we review without giving deference to the trial court's conclusion. **Becker v. State Farm Mut. Auto. Ins. Co.**, 141 Wis.2d 804, 811, 416 N.W.2d 906, 909 (Ct.App.1987).

In the words of the Supreme Court,

This requirement of intention to call the witnesses listed is one of the chief aims of the discovery procedure--to inform the opposing party of evidence to be produced at trial so he can most effectively test its validity. **Irby v. State**, 60 Wis.2d 311210 N.W.2d 755, 760 (Wis. 1973)

Where the State has failed to provide a witness list or where it has failed to name certain witnesses, it is not "good cause" for failure to comply for the State to argue simply that the defendant has had the discovery materials and the names of the witnesses appear in the police reports . This is inadequate to establish "good cause" for several reasons.

Regarding this very argument, the court of appeal observed, in, **State v. Fink**, 195 Wis.2d 330, 536 N.W.2d 401, 404 (Wis.App. 1995)

[t]he State argues that whether there was actual surprise is questionable at best. It notes that Terri's allegations were, at least in a general way, contained in the police reports which had been provided to the defense more than a month before trial. Thus, use of this evidence could reasonably have been foreseen. We disagree. **What may have been in the police reports regarding "other acts" and what the State intended to produce at trial are two completely different things.** Fink's attorney attempted to find out almost two months in advance of trial whether the State expected to use "other acts" evidence at trial. (emphasis provided)

Secondly, such an argument amounts to an assertion that §971.23(3), Stats., is mere surplusage, a meaningless subsection of the criminal discovery statute. That is, if all the State need do is mention the name of a witness in a letter or to turn over the

volumes of police reports (which is required by another section of the statute), subsection (3) has no meaning because the State would never be required to actually turn over a "list" of witnesses. If this were acceptable, in almost every case it would be to the State's advantage to turn over the police reports and to ignore the witness list requirement. By failing to provide the witness list, the defendant's trial preparation is made far more difficult, if not impossible.

For these reasons, no good cause has been shown by the State for failing to timely file a witness list. Thus, under the statute and the case law the exclusion of witnesses is mandatory.

Dated at Milwaukee, Wisconsin, this \_\_\_\_\_ day of \_\_\_\_\_, 2008:

Law Offices of Jeffrey W. Jensen  
Attorneys for the Defendant

By: \_\_\_\_\_

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