

STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT III

RECEIVED

09-05-2017

**CLERK OF COURT OF APPEALS
OF WISCONSIN**

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

Appeal no. 17-AP-651-CR

WILLIAM H. CRAIG,

Defendant-Appellant

ON APPEAL OF A NONFINAL ORDER OF THE
CIRCUIT COURT FOR MARATHON COUNTY, THE
HONORABLE GREGORY HUBER PRESIDING

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

ANDREW I. MARTINEZ

Attorney at Law

State Bar #1067089

Martinez & Ruby, LLP

144 4th Ave, Suite 2

Baraboo, WI 53913

(608) 355-2000

Attorney for Defendant-Appellant

TABLE OF CONTENTS

	<u>PAGE</u>
Table of Authorities	2
Statement of the Issues	3
Statement on Oral Argument	3
Statement on Publication	3
Statement of Facts and Procedural History	4
<u>ARGUMENT</u>	4
I. Applicable Law	4
II. By Issuing the State’s Proposed Prospective Orders Over Defense Counsel’s Objection and Without Holding an Evidentiary Hearing, the Circuit Court’s Decision did not Rest on the Relevant Facts and Was Therefore an Erroneous Exercise of Discretion	5
III. The “Standard” Nature of These Proposed Orders Is Troubling and Does Not Justify the Court’s Decision to Issue Them Without an Evidentiary Hearing	7
Conclusion	8
Certification	8
Certificate of Compliance with Rule 809.19(12)	9
Appendix	

TABLE OF AUTHORITIES

<u>Cases Cited</u>	<u>PAGE</u>
<i>State v. Bowser</i> , 2009 WI App 114, 321 Wis. 2d 221, 772 N.W.2d 666	5, 6

<u>Statutes Cited</u>	
971.23(1)	4
971.23(1)(e)	4, 7
971.23(6)	4
908.08(6)	4

STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT III

STATE OF WISCONSIN,

Plaintiff-Respondent,

v. Appeal no. 17-AP-651-CR

WILLIAM H. CRAIG,

Defendant-Appellant

ON APPEAL OF A NONFINAL ORDER OF THE
CIRCUIT COURT FOR MARATHON COUNTY, THE
HONORABLE GREGORY HUBER PRESIDING

BRIEF OF DEFENDANT-APPELLANT

STATEMENT OF THE ISSUES

ISSUE 1: Can a circuit court, on a motion by the state, issue a protective order under section 971.23(6) over the objection of defense counsel without a hearing and without a showing of good cause by the state?

The circuit court found that it could.

STATEMENT ON ORAL ARGUMENT

Appellant anticipates that the issues raised in this appeal can be fully addressed by the briefs. Accordingly, appellant is not requesting oral argument.

STATEMENT ON PUBLICATION

The decision in this case could clarify an issue of importance to the administration of justice. Therefore,

appellant requests that this case be considered for publication.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

On February 28, 2017, the defense filed a motion objecting to the state's request that it sign a Stipulation and Order Regarding Use of Videotaped Statements, arguing that there was no legal basis for the state's request, that the correct procedure by which the state should go about obtaining a protective order was by moving the court for one, that good cause did not exist for the issuance of the orders, and that the specific protective orders contained in the proposed stipulation were ethically problematic. (31:1-2). The state responded by filing a Motion for Protective Order requesting essentially the same orders as contained in the proposed stipulation. (38). The court signed the proposed protective orders despite defense counsel's pending motion objecting to those motions and challenging the existence of good cause for the orders and without holding an evidentiary hearing. Again, this order was signed without a hearing and over the objection of defense counsel. It is from these orders that the defendant appeals.

On April 12, 2017, the defendant filed a petition for leave to appeal a non-final order. (44). This court subsequently issued an order granting the petition to appeal. (47).

ARGUMENT

I. Applicable Law

Section 971.23(1) of the Wisconsin Statutes lists what the state must disclose to the defense in a criminal case. A forensic interview of an alleged victim like the one involved in this case is covered by section 971.23(1)(e), which requires that the state turn over "[a]ny relevant . . . recorded statements of a witness . . . including any audiovisual recording of an oral statement of a child under § 908.08." Section 908.08(6), in turn, specifically establishes that "[r]ecorded oral statements of children under this section in the possession . . . of the state are discoverable under . . . § 971.23(1)(e)." Section 971.23(6) allows courts to issue

protective orders “[u]pon motion of a party.” These orders may deny, restrict, or defer discovery, and courts may make other orders as appropriate. *See id.* A protective order under section 971.23(6) cannot be issued until the party requesting the order establishes good cause for the order. *See State v. Bowser*, 2009 WI App 114, ¶ 10, 321 Wis. 2d 221, 772 N.W.2d 666 (“Good cause must be established before a protective order may be issued The burden of establishing good cause lies with the party seeking a protective order under the statute.” (citations omitted)). A circuit court’s decision to issue a protective order is reviewed under the erroneous exercise of discretion standard. *Id.* ¶ 9 (citations omitted). “A proper exercise of discretion requires that the court rest its decision on the relevant facts, apply the proper standard of law, and arrive at a reasonable conclusion using a demonstrated rational process.” *Id.* (citations omitted).

II. By Issuing the State’s Proposed Prospective Orders Over Defense Counsel’s Objection and Without Holding an Evidentiary Hearing, the Circuit Court’s Decision did not Rest on the Relevant Facts and Was Therefore an Erroneous Exercise of Discretion

The most important appellate-court decision on protective orders under section 971.23(6) is *State v. Bowser*. That case involved a dispute over whether the defense was entitled to a copy of a hard drive allegedly containing child pornography. *See id.* ¶ 1. The state objected to the defense’s demand that it receive a copy of the hard drive. *See id.* ¶ 2. The court held an evidentiary hearing, and ultimately decided to issue a protective order limiting the defense to reviewing the hard drive at the Department of Criminal Investigation. *See id.* ¶ 3. The circuit court’s main concern was preventing the dissemination of child pornography. *See id.* ¶ 4.

In contrast to the circumstances in *Bowser*, the circuit court in this case did not have the benefit of evidence produced at an evidentiary hearing before issuing the contested protective orders. At the time that the court issued those orders in this case, it had the benefit only of the basic pleadings, including the criminal complaint and the Motion

for Protective Order. The Motion for Protective Order contains almost no specific information beyond stating the existence of a forensic interview of the alleged child victim, the number and severity of charges against the defendant, and the existence of the state's "concerns about the sensitive content of the recorded forensic interview being disseminated beyond the Defendant and his attorney and for reasons other than trial preparation" in the case. (37:1).

Specifically, the Motion contains no information at all about what the state's basis for its concerns related to the forensic interview are; why it would be concerned that either defense counsel, an experienced attorney in good standing and with no history of improperly handling sensitive discovery materials, or the defendant, a man who is currently incarcerated and therefore has no ability to review, copy, or disseminate the forensic interview on his own, would disseminate the interview; or what purposes defense counsel or the defendant could use the video for other than trial preparation. In other words, while it's conceivable that there is some possible fact pattern in which defense counsel or the defendant use the forensic interview for improper or nefarious purposes, the state has presented exactly zero evidence that any of those conceivable scenarios is actually likely, possible, or plausible in this specific case.

While the state has identified the prevention of the dissemination of the forensic interview as a possible harm to be prevented, the video here differs from the evidence in *Bowser* significantly. Because *Bowser* was a child-pornography case, the hard drive alleged to contain child pornography was itself contraband. Unlike *Bowser*, neither the discovery here nor its possession is illegal, and the state has not provided any evidence at all that dissemination of the forensic interview—even if it were to occur—would be harmful to anyone.

Finally, the state has provided exactly no evidence the protective orders it requested would actually prevent any harm it might reasonably fear.

Because the Motion for Protective Order does not so much as allege a valid basis for the state's concerns and because the court issued these orders without an evidentiary hearing, the court lacked the relevant facts necessary to properly exercise its discretion almost by definition. Obviously, the court could not apply the proper legal standard

to facts it didn't have, and therefore could not arrive at a reasonable conclusion. Further, because the circuit court's rulings on this issue have not extended beyond signing the state's proposed orders, there is no basis to conclude that the court used a demonstrably rational process.

The court's decision to issue these orders therefore fails under the erroneous use of discretion standard.

III. The "Standard" Nature of These Proposed Orders Is Troubling and Does Not Justify the Court's Decision to Issue Them Without an Evidentiary Hearing

In multiple communications, the state has referred to the proposed protective orders as "standard": "The stipulation regarding the forensic interview is a standard stipulation in Marathon County that the judges approve of." (44:25). "The state sent a copy of the standard Stipulation and Order Regarding Use of Videotaped Statements to defense counsel." (37:1). These orders are not standard, however, even if they're common in Marathon County. Forensic interviews of children are clearly and unquestionably discoverable under both sections 971.23(1)(e) and 908.08(6). Neither of those sections suggests that all such interviews must be subject to any protective orders, and neither section authorizes anything approximating the protective orders sought and granted in this case. The legislature could have written the statutes such that all forensic interviews of children would be automatically subject to some protective order; the legislature chose not to do so. Instead, it created section 971.23(6), which contains a separate and exclusive procedure for either party to seek a protective order in the appropriate circumstances.

Marathon County has apparently decided not only to ignore the intent of the legislature, but to directly contravene it. By making protective orders "standard" in these situations, Marathon County has turned the statutory provisions upside down, apparently issuing protective orders in all cases involving child forensic interviews and issuing those orders where good cause may not exist and certainly hasn't been demonstrated. The result of this policy is that defendants are being routinely deprived of full and unfettered access to the discovery in their cases without a showing that such deprivation is justified by any legitimate concerns about

improper use or dissemination of the recordings. In short, Marathon County is routinely, unjustly, and illegally infringing on defendants' rights. This cannot be allowed to continue, and if the local circuit courts are unwilling to follow the law, then the appellate courts must become involved, either as a function of their appellate jurisdiction or in their supervisory capacity.

CONCLUSION

For the reasons discussed in this brief, the defendant-appellant respectfully requests that the court reverse the trial court's non-final order granting the state's request for protective order and remand to the circuit court for further proceedings.

Respectfully submitted this 5th day of September, 2017.

Andrew I. Martinez
Attorney at Law
State Bar #1067089

Martinez & Ruby, LLP
144 4th Ave, Suite 2
Baraboo, WI 53913
(608) 355-2000

Attorney for Defendant-Appellant

CERTIFICATION

I hereby certify that this brief conforms to the rules contained in s. 809.19(8)(b) and (c) for a brief and produced with a proportional serif font. The length of this brief is 1,610 words.

Signed September 5, 2017

Andrew I. Martinez
Attorney at Law
State Bar #1067089

Martinez & Ruby, LLP
144 4th Ave, Suite 2
Baraboo, WI 53913
(608) 355-2000

Attorney for Defendant-Appellant

**CERTIFICATE OF COMPLIANCE
WITH RULE 809.19(12)**

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of s. 809.19(12). I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Signed September 5, 2017

Andrew I. Martinez
Attorney at Law
State Bar #1067089

Martinez & Ruby, LLP
144 4th Ave, Suite 2
Baraboo, WI 53913
(608) 355-2000

Attorney for Defendant-Appellant