STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT III

Case No. 2017AP651-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

WILLIAM H. CRAIG,

Defendant-Appellant.

ON APPEAL FROM A NONFINAL PROTECTIVE ORDER, ENTERED IN THE MARATHON COUNTY CIRCUIT COURT, THE HONORABLE GREGORY HUBER, PRESIDING

BRIEF OF THE PLAINTIFF-RESPONDENT

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STATEMENT OF THE ISSUES

1. Is the circuit court required to hold an evidentiary hearing before issuing a protective order pursuant to Wis. Stat. § 971.23(6)?[1]

This Court should conclude that absent a factual dispute or allegation that would require fact-finding, the circuit court has discretion to issue a protective order without an evidentiary hearing.

2. In this case, did the State establish good cause for the protective order?

This Court should conclude that the State established good cause, and that the showing of good cause is directly related to the order sought.

3. If the State established good cause, did the defense meet its burden to either rebut good cause or demonstrate that the protective order hampered its the ability to mount an adequate defense?

This Court should conclude that the defense did not meet its burden because it had to do more than cursorily allege that that State failed to establish good cause.

4. In general, can the State request that defense counsel stipulate to an order that it will not copy or disseminate a child forensic interview in lieu of moving for a protective order pursuant to Wis. Stat. § 971.23(6)?

William Craig raised this argument in his petition for leave to appeal and in his brief. He did not, however, include the issue underlying that argument as a separate issue in either document. When a petition for leave to appeal is

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[1] The petition for leave to appeal presented one, compound issue. The State has separated out the elements of that issue for clarity.

granted, the issues on appeal are limited solely to those issues outlined in the petition. *State v. Aufderhaar*, 2004 WI App 208, ¶¶ 10–17, 277 Wis. 2d 173, 689 N.W.2d 674, *overruled on other grounds by State v. Aufderhaar*, 2005 WI 108, 283 Wis. 2d 336, 700 N.W.2d 4. This issue was not petitioned on, and thus, this Court should decline to address it.

If this Court reaches this issue, it should conclude that there is no reason, legal or practical, to limit the State's ability to request a stipulation before moving the court for a protective order.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State does not request oral argument. This case is before the court on a petition for leave to appeal. The court concluded that an interlocutory appeal was appropriate to address an issue important to the administration of justice. Thus, publication will likely be appropriate.

INTRODUCTION

If Wisconsin's commitment to victims' rights is to have any credence, then the State must take precautionary measures to not risk re-victimization and unnecessary invasions of privacy when it prosecutes offenders of sensitive crimes. In the case of child-victims, one way to do so is to take measures to prevent the dissemination of video-recorded interviews in which the child discloses the details of a sexual assault. To do so, the State can seek a protective order pursuant to Wis. Stat. § 971.23(6). The State did so in this case, and established good cause for a very limited order prohibiting the copying, dissemination, and use of the video for purposes other than preparing a defense.

SUPPLEMENTAL STATEMENT OF THE CASE

The State charged William H. Craig with multiple counts of sexual assault of a child under the age of 16. (R. 1.) The child-victim participated in a forensic interview at the Child Advocacy Center, which was audiovisually recorded. (R. 1:6–7.) A written account of that interview is contained in the criminal complaint. (R. 1:6–14.)

Craig was initially represented by Attorney Suzanne O'Neill. (R. 3.) Attorney O'Neill signed a stipulation that she would not copy the recording of the child-victim's interview and would use the copy provided to her in discovery only for the purposes of preparing a defense. (R. 10.) That stipulation was the basis for a protective order. (R. 10.)

Craig was not happy with his representation (R. 12), and a new attorney, John Bachman, was appointed to represent Craig (R. 13). Attorney Bachman later moved on behalf of Craig to allow him to withdraw as counsel. (R. 19.) Craig claimed that Bachman refused to go over his case and to provide him with "complete discovery." (R. 21.)

Attorney Sharon Gisselman was then appointed to represent Craig (R. 20), but was later permitted to withdraw as counsel due to a conflict of interest (R. 27).

Attorney Andrew Martinez was then appointed. (R. 28.) On December 7, 2016, Attorney Martinez emailed the State and noted that he had a copy of the child-victim's forensic interview, but asked for any *other* recorded statements. (R. 31:3.) The State responded in part by asking Attorney Martinez to sign the same stipulation signed by Attorney O'Neill that the recorded interview of the child-victim would not be copied or disseminated and used solely for preparing the defense. (*Compare* R. 10:1–2 *with* 31:8–9.)

Two months later, Attorney Martinez objected to the stipulation, and moved the court to order that the State turn

over any *other* recorded statements. (R. 31:2.) A little more than two weeks after Attorney Martinez filed his motion to compel, the State moved the circuit court for a protective order specific to the child-victim's interview that Attorney Martinez already had in his possession. (R. 37:1.) The State's motion was brought pursuant to Wis. Stat. § 971.23(6) and alleged that it had "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 above-captioned case." (R. 37:1.) The State's concern was based, in part, on defense counsel's objection to the proposed stipulation. (R. 37:1.)

The State's motion further alleged that the defendant was charged with four counts of sexual assault of a child under the age of sixteen. (R. 37:1.) The victim of the alleged assaults was J.T. (R. 37:1.) The proposed order was specific to the "electronically recorded forensic interview of a child witness, J.T." (R. 37:1.)

The court signed the State's proposed order seven days later—on March 22, 2017—but the order was not filed until March 28, 2017. (R. 39.) Attorney Martinez objected to the protective by letter to the court on March 28, 2017. (R. 40.) Attorney Martinez's letter alleged that it was "conceivable" that the State could establish good cause for a protective order if an evidentiary hearing was held, but that the State did not establish good cause in its motion. (R. 40.) Presumably in response to Attorney Martinez's letter, the court signed a new, identical protective order that same day, which was filed on April 4, 2017. (R. 41.)

Attorney Martinez filed a petition for leave for appeal, which this Court granted.

STANDARD OF REVIEW

"A circuit court's decision whether to grant a motion for a protective order under Wis. Stat. § 971.23(6) is reviewed under the erroneous exercise of discretion standard." *State v. Bowser*, 2009 WI App 114, ¶ 9, 321 Wis. 2d 221, 772 N.W.2d 666.

ARGUMENT

I. A circuit court can exercise its discretion to issue a protective order without holding an evidentiary hearing.

"Wis. Stat. § 971.23(1) confers on defendants a broad right to pretrial discovery." *Bowser*, 321 Wis. 2d 221, ¶ 21. "However, the right to pretrial discovery is tempered by the circuit court's discretion under Wis. Stat. § 971.23(6) to deny, restrict, defer, 'or make other appropriate orders' concerning discovery upon a showing of good cause." *Id.* (quoting Wis. Stat. § 971.23(6)). This case presents a question whether the court must hold an evidentiary hearing before exercising its discretion pursuant to Wis. Stat. § 971.23(6). The answer to the question is no for two reasons.

First, there is nothing in the statute itself that would indicate that the court is required to hold a hearing before issuing a protective order. Section 971.23(6) specifically reads that the court has authority to act at "any time" "[u]pon motion of a party." Wis. Stat. § 971.23(6). If a hearing was mandatory as a matter of right, absent a showing of need, that would be reflected in the statute itself. *See*, *e.g.,* Wis. Stat. §§ 968.06, 968.20(1g), 968.38(4), 968.45(1), 969.035(5), 970.03(2), 971.14(4)(b), 971.17(2)(g), 971.31(3).

Second, while the State acknowledges that "the traditional rule [is] that hearings are to be liberally granted

if a motion is made prior to judgment or sentence," *State v. Velez*, 224 Wis. 2d 1, 12, 589 N.W.2d 9 (1999), a court is not required to hold an evidentiary hearing absent the need for one. "An evidentiary hearing is necessary only if the party requesting the hearing raises a significant, disputed factual issue." *Id* (quoting *United States v. Sophie*, 900 F.2d 1064, 1070 (7th Cir. 1990)). Thus, this Court should conclude that absent a factual dispute or allegation that would require fact-finding, the circuit court has discretion to issue a protective order without an evidentiary hearing.

Attorney Martinez implies that because there was an evidentiary hearing in *Bowser*, an evidentiary hearing is required if the request for a protective order is opposed. (Craig's Br. 5.) There is no support for such a proposition in *Bowser* and the circumstances of *Bowser* are far different from the case here. In *Bowser*, the State sought a protective order allowing the State to limit the defense team's access to evidence of child pornography. *Bowser*, 321 Wis. 2d 221, ¶ 6. The hearing was necessary, in part, to allow the defense team to try to prove its allegation that the order was hampering its ability to adequately prepare a defense; Bowser's expert testified to how the protective order impacted his ability to analyze the evidence. *See id.* ¶ 18.

There was not such an allegation here, and the protective order in this case did not limit access. Attorney Martinez had a copy of the evidence. The protective order here only prohibited copying, disseminating, or using the evidence for a purpose other than preparing a defense. There was no need for a hearing because there was no factual dispute or allegation that would require fact-finding. Thus the court did not erroneously exercise its discretion simply by granting the order without a hearing.

II. The State established good cause for the protective order.

Wisconsin has a long history of honoring and protecting victim rights. "This state shall treat crime victims, as defined by law, with fairness, dignity and respect for their privacy." Wis. Const. art., I, § 9m. "[T]he rights extended . . . to victims . . . are honored and protected by law enforcement agencies, prosecutors and judges in a manner no less vigorous than the protections afforded criminal defendants." Wis. Stat. § 950.01. Victims have the right to be protected from harm resulting from their cooperation and the right to be treated with "respect for his or her privacy." Wis. Stat. §§ 950.04(1v)(ag), (2w)(c). And "it is necessary to provide child victims . . . with additional consideration and different treatment than that usually afforded to adults." Wis. Stat. § 950.055(1).

When a protective order is sought to protect the victim of a crime, it is reasonable for a court to seek to minimize, within its discretion under Wis. Stat. §§ 971.23(1) and (6), the risk of re-victimization through an invasion of privacy. *See*, *e.g.*, *Bowser*, 321 Wis. 2d 221, ¶ 16 (citing *United States v. Sherman*, 268 F.3d 539, 547 (7th Cir. 2001); *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 249 (2002)) (finding support for a protective order on evidence of child pornography because it directly victimized the children portrayed by violating their right to privacy, and publication of a permanent record of child abuse caused new injuries to the reputation and emotional well-being of the child).

Protective orders are appropriate even when there is no reason to believe that members of the defense team will distribute the discovery at issue. *Bowser,* 321 Wis. 2d 221, ¶ 17. This is so because it is reasonable for the circuit court to conclude "that the risk of improper use and dissemination increases when more persons possess copies . . . whether

they are government employees or members of a defense team." *Id.*

"Good cause must be established before a protective order may be issued pursuant to Wis. Stat. § 971.23(6)." *Bowser*, 321 Wis. 2d 221, ¶ 10. "The burden for establishing good cause lies with the party seeking a protective order under the statute." *Id.* "[W]hether a particular proposed protective order is appropriate is determined on a case-by-case basis." *Id*. ¶ 23.

Here, the State established good cause for the limited nature of this protective order. It is only logical that the good cause showing is directly related to the protections of the order. Defense counsel had a full, unaltered copy of the child-victim's interview. There was no limitation on discovery or access. The protective order prohibited the defense team only from copying the video, or using it for a purpose other than for preparing the defense.

The State's motion for the order alleged "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 above-captioned case." (R. 37:1.) This a valid concern even absent a reason to believe that members of the defense team will distribute the discovery at issue. *Bowser,* 321 Wis. 2d 221, ¶ 17.

The State's motion further alleged that the defendant was charged with four counts of sexual assault of a child under the age of sixteen. (R. 37:1.) The victim of the alleged assaults was J.T. (R. 37:1.) And the order was specific to the "electronically recorded forensic interview of a child witness, J.T." (R. 37:1.) Where the protective order was sought to protect the victim, it is reasonable for a court to seek to minimize the risk of re-victimization through an invasion of privacy. *See*, *e.g.*, *Bowser*, 321 Wis. 2d 221, ¶ 16.

Due to the limited nature of the protective order at issue, those allegations were sufficient to establish good cause. Moreover, while it was not explicit in the State's motion, a cursory review of the record would reveal that a description of the interview was included with the criminal complaint and the child-victim described the sexual assaults in detail during that interview. (R. 1:6–14.) Those details were known to the court, and thus, there was no need to repeat those details in a motion or at an evidentiary hearing. Again, the protective order functions to protect the victim of a crime from unnecessary invasions of privacy. It would be counterintuitive to require an evidentiary hearing, or detailed description of the assaults in yet another court document when the entire purpose of the protective order was to limit the proliferation of those details.

The circuit court did not erroneously exercise its discretion when it granted this very limited protective order. The State established that the discoverable evidence at issue was the recorded interview of the child-victim of repeated acts of sexual assault and that the interview contained sensitive content. That was sufficient to establish good cause for the court to order that the recording not be copied or used for any other purpose than preparing a defense.

III. Attorney Martinez's letter in opposition to the protective order neither rebutted good cause nor demonstrated that the protective order would hamper the ability to mount an adequate defense.

Once good cause is shown, the opposition has the burden to either rebut good cause or, in case of the defense, demonstrate that the protective order will hamper the ability to mount an adequate defense. *Bowser*, 321 Wis. 2d 221, ¶ 14. The ability to mount a defense is not hampered simply because the defense team is inconvenienced,

especially when there is no impediment to discovery. *Id.* ¶¶ 18–19.

Here, Attorney Martinez had full access to the copy of the child's recorded interview. His letter in opposition to the protective order did not allege that his ability to mount an adequate defense was hampered by the order. (R. 40.) Attorney Martinez also did not allege that there was any factual dispute or that the State improperly described the content of the interview as sensitive. (R. 40.) He only disagreed that the State established a basis for its concern that the content of the interview would be disseminated or used for purposes other than trial preparation. (R. 40.)

As explained above, protective orders are appropriate even when there is no reason to believe that members of the defense team will distribute the discoverable evidence at issue. *Bowser,* 321 Wis. 2d 221, ¶ 17. This is so because it is reasonable for the circuit court to conclude "that the risk of improper use and dissemination increases when more persons possess copies . . . whether they are government employees or members of a defense team." *Id.* Thus, Attorney Martinez's letter did not rebut the good cause established, and provided no meritorious reason for the court to reconsider or vacate the protective order at issue.

IV. The State can and should request that defense counsel stipulate to an order that it will not copy or disseminate a child forensic interview.

The State is unclear what is "troubling," in Attorney Martinez words, about the practice of requesting that defense counsel sign a stipulation that the defense team will not copy or disseminate a forensic interview of a child sexual assault victim. (Craig's Br. 7–8.) There is absolutely no support for his allegations that "[t]he result of this policy is that defendants are being routinely deprived of full and unfettered access to the discovery in their cases" and that

the practice "illegally infring[es] on defendant's rights." (Craig's Br. 7.)

Attorney Martinez had full and unfettered access to the recorded interview. The State asked only that he stipulate to not copying or disseminating the recorded interview. His sensationalized allegations should be flatly rejected by this court.

The practice of asking for a stipulation to a protective order does not infringe upon any right and functions to conserve scare judicial resources by preventing unnecessarily litigation. The State should be commended, not condemned, for first trying to reach an agreement with opposing counsel before bringing the issue to the court. This is especially true in this case where a protective order was already in place (R. 10), and the State was, in effect, only seeking agreement from successor counsel.

CONCLUSION

For the forgoing reasons, this Court should affirm the order granting the State's motion for a protective order.

Dated this 2nd day of November, 2017.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 2668 words.

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TIFFANY M. WINTER
Assistant Attorney General

CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § 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 Wis. Stat. § 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.

Dated this 2nd day of November, 2017.

_____
TIFFANY M. WINTER
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