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

REPLY BRIEF OF DEFENDANT-APPELLANT

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I. The State's Burden

The state argues that "[t]his court should conclude that the defense did not meets its burden because it had to do more than cursorily allege that the state failed to establish good cause." (State's brief: 1). Under *State v. Bowser*, "[t]he burden of establishing good cause lies with the party seeking the protective order." 2009 WI App 114, ¶ 10, 321 Wis. 2d 221, 772 N.W.2d 666. *Bowser* also indicates that, "[o]nce the state made a showing of good cause, [the defense] then had the burden to either rebut the state's reasons or demonstrate that his ability to mount an adequate defense would be hampered." *Id.* ¶ 14. Nothing in *Bowser* requires that the party opposing the protective order make or rebut a showing in order to obtain a hearing; the *Bowser* court was concerned only with weighing whether the state or the defense had met their respective burdens at the evidentiary hearing held by the trial court.

Moreover, the state's motion requesting the protective order didn't mention *Bowser* or even allege the existence of good cause. (37). The motion arguably should have been denied without a hearing as a result of these omissions, but in any event, the Plaintiff-Respondent's suggestion that the defense was obligated to make any sort of non-cursory showing is wholly inappropriate given that the state—the party actually required to meet an initial evidentiary burden—didn't so much as acknowledge the existence of a burden in its motion, much less make even a cursory or perfunctory showing. The argument that the defense was required to make a non-cursory showing in rebuttal to what was, at best, the state's unstated and unsupported implication that good cause existed is therefore nonsensical.

The state had the burden of establishing good cause; its motion failed to do so, and so a hearing should have been held to determine whether it could. At that hearing, the defense would have had the burden either of rebutting the state's showing of good cause or demonstrating that it would be hampered, but only if the state could establish good cause first. Either way, the only way to appropriately and accurately determine whether good cause existed was to have a hearing.

II. The State's Motion Was Insufficient to Meet its Burden

Despite the Plaintiff-Respondent's claims to the contrary, the state's protective-order motion simply cannot be understood to establish good cause on its own. As has been mentioned, the motion itself is devoid of any mention of *Bowser* or the applicable burden of proof. Moreover, it literally doesn't do anything other than identify the particular piece of discovery to which the order would apply, identify the charges against the defendant, give the initials of the alleged victim, claim the existence of "concerns" by the state about the sensitive content of the video being disseminated, and request various specific orders. (37). None of these pieces of information, either individually or collectively, establish good cause.

The fact that the requested order would apply to a forensic interview of a child in a child sexual-assault case is not itself sufficient to establish good cause justifying a protective order. The legislature could make protective orders automatic in such cases or for such pieces of evidence; it hasn't. It's certainly possible that protective orders would be appropriate in some cases of this type, but no source of law supports the conclusion that protective orders should be automatic in this or any other sort of case. In fact, *Bowser* specifically repudiates such an approach: "we stress that whether a particular proposed protective order is appropriate is determined on a case-by-case basis." *Bowser*, 2009 WI App 114, ¶ 23. The state's motion for protective order doesn't contain any indication that the forensic interview in this case contains particularly sensitive information or otherwise deserves special protection.

The charges against the defendant don't themselves support a finding of good cause for similar reasons.

The identity of the alleged victim is potentially relevant to the question of good cause, but the state's motion merely indicates that the initials of the alleged victim are J.T. Without some indication of who the victim is, what relationship she has to the defendant, and how the lack of a protective order could even potentially hurt her, her initials don't support a finding of good cause in any way.

Finally, the motion indicates the existence of "concerns" on the part of the state. The motion completely fails, however, to indicate what those concerns are, what the state's basis for those concerns is, or how the protective order would alleviate those concerns. Further, given the state's admission that it considers these types of protective orders "standard", (37:1; 44:25), it seems unlikely that any of the state's concerns are specific to Mr. Craig. That significantly weakens the argument that these concerns are themselves sufficient for a finding of good cause.

Taken collectively, these factors indicate that this is a child sexual-assault case, that a forensic interview was conducted, and that the state has "concerns." A finding of good cause on that basis means that good cause always exists in these kinds of cases provided that the state has "concerns." Such an approach would be in direct contravention of the explicit language in *Bowser* directing courts to make a case-by-case determination. *See Bowser*, 2009 WI App 114, ¶ 23.

Even considered together, then, the allegations contained in the state's motion for protective order simply fail to establish good cause.

III. General Victim's Rights Principles Do not Justify Granting a Protective Order in This Case Without a Hearing

The Plaintiff-Respondent cites to numerous pieces of victim's-rights legislation in an attempt to support its position. The Plaintiff-Respondent's reliance on these authorities is misplaced.

While it's true that the Wisconsin Constitution provides that Wisconsin "shall treat crime victims . . . with fairness, dignity, and respect for their privacy," Wis. Const. art. I, § 9m, the Plaintiff-Respondent omitted crucial language from that provision. Specifically, the relevant paragraph of the Constitution lists specific privileges and protections to which victims are entitled; protective orders are not on the list. *See id.* Further, "[n]othing in this section, or in any statute enacted pursuant to this section, shall limit any right of the accused which may be provided by law." *Id.*

While it's true that victim's rights should be "honored and protected . . . in a manner no less vigorous than the protections afforded criminal defendants," Wis. Stats. §

950.01, nothing in that section or anywhere in chapter 950 entitles a victim who has voluntarily provided a forensic interview to a protective order. While it's true that victims have the right to be protected from harm, Wis. Stats. § 950.04(2w)(c), the state failed to establish or even allege that the victim in this case would be harmed in any way if the case proceeded without the protective order. While it's true that victims should be treated with respect for their privacy, Wis. Stats. § 950.04(1v)(ag), the state failed to establish or even allege that providing the forensic interview to the defense without the protective order would result in an invasion of the victim's privacy that hadn't already resulted from the criminal complaint's summary of the interview or that wouldn't result from the victim's testimony in open court at the trial. Additionally, section 950.04(1v)(ag) specifically indicates that it does not "impair the right or duty of a public official . . . to conduct his or her official duties reasonably and in good faith." Complying with the discovery statute is clearly a duty of a prosecutor.

Finally, while it's true that children are entitled to "additional consideration and different treatment than that usually afforded to adults," Wis. Stats. § 950.055(1), no source of law sets a lower burden for protective orders in criminal cases involving allegations of child sexual assault. Moreover, the explicit legislative intent of section 950.055 is to provide the "additional rights and protections" to which children are entitled in criminal cases. Section 950.055 makes no mention of protective orders.

The legislature could have made protective orders automatic or standard in cases such as these. The fact that they didn't means they aren't. These general victim's rights principles are obviously extremely important, none of them trump the specific language of section 971.23(6) or *Bowser*, and none of them can be read to relax or lower the state's burden when it seeks a protective order.

IV. An Evidentiary Hearing Was Necessary in this Case

The Plaintiff-Respondent argues that a court can issue a protective order without a hearing because the statute doesn't require a hearing. (State's brief: 5). The Plaintiff-Respondent's description of the statutory language is accurate

but misleading. The fact is that section 971.23(6) doesn't mention the need for a showing of good cause, either, but it's undisputed that such a showing is necessary. A correct understanding of the law depends not only on the language of the statute, but on an understanding of the case law interpreting that statute. Here, a correct understanding of section 971.23(6) must include an understanding of *Bowser*, which requires a showing of good cause. Under the facts of this particular case, and given the scant information in the state's motion for protective order, a hearing was necessary under *Bowser*.

According to the Plaintiff-Respondent, "[a]n evidentiary hearing is necessary only if the party requesting the hearing raises a significant, disputed factual issue." (State's brief: 6) (citations omitted). There were several significant, disputed factual issues in this case relevant to the propriety of a protective order.

a. The Existence of Good Cause

The defense consistently argued that the state had not established good cause for a protective order. (31:2; 40). That factual question was therefore disputed, and was obviously extremely significant. By the state's own reasoning, then, a hearing should have been held.

b. Whether the Dissemination of this Particular Forensic Interview Without a Protective Order Constituted an "Invasion of Privacy" Given the Context of the Creation of the Interview and the Contents of the Criminal Complaint

The Plaintiff-Respondent claims that the protective order was necessary to prevent unnecessary invasions of the victim's privacy. (State's brief: 2, 7, 8, 9). It's not clear, however, either that the release of the forensic interview to the defense without the protective order would have constituted an invasion of privacy or that the protective order would address that invasion in any way.

The context for the forensic interview is important. The interview is between the alleged victim in this case and a trained interview who was, nonetheless, a stranger to the

alleged victim. The interview was observed as it was being conducted by numerous people. The interview was recorded for the express purpose of being used in litigation, the culmination of which would be a trial during which the video could be played for a room full of strangers in a courtroom that would necessarily be open to any member of the public. The criminal complaint in this case contains a lengthy summary of the forensic interview in question. The complaint is twenty-two pages long; eight of those pages contain detailed references to the contents of the forensic interview. (1:7-14).

It's possible that dissemination of this type of evidence to the defense without a protective order could constitute an invasion of privacy in this type of case, but the state is not entitled to a presumption to that effect. If the state believes that a protective order is necessary to protect the alleged victim's privacy despite having created this piece of evidence for the express purpose of displaying it in a necessarily public trial and then summarizing it in a necessarily public document, it would be free to make that argument at an evidentiary hearing on its motion for protective order. But that would be a significant issue, and it would absolutely be disputed. It would also be significant and disputed whether the protective orders sought could in fact address the concern of an invasion of privacy. By the state's own reasoning, then, a hearing should have been held.

c. Whether, If the Dissemination of the Forensic Interview Was an Invasion of Privacy, Such an Invasion Was Necessary

The Plaintiff-Respondent repeatedly characterizes any potential invasion of privacy as "unnecessary." (State's brief: 2, 9). Necessity is a factual determination that would have been both significant and disputed. By the state's own reasoning, then, a hearing should have been held.

d. Whether the Dissemination of the Forensic Interview Without a Protective Order Would have Constituted Re-Victimization

The Plaintiff-Respondent repeatedly expresses concern at not re-victimizing the alleged victim. (State's brief: 2, 7,

8). While that's a valid concern, the state is not entitled to a presumption that turning the forensic interview over to the defense without a protective order would have resulted in re-victimization. This is especially the case given that the state didn't raise any issue related to re-victimization in its motion. Moreover, given the context of the creation of the forensic interview, the purpose for which it was created, and the content of the criminal complaint, whether the dissemination of the interview to defense counsel would have constituted re-victimization would have been a significant, disputed factual issue. By the state's own reasoning, then, a hearing should have been held.

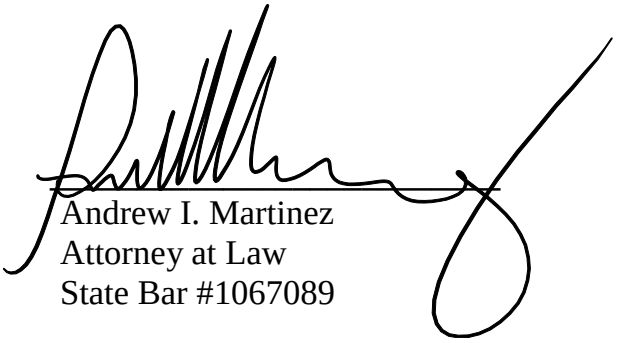
e. How to Correctly Weigh the Differences Between the Evidence in this Case and the Evidence in *Bowser*

Unlike in *Bowser*, the evidence subject to the protective order here was created by the state and was not itself contraband. The mere possession of that evidence is not illegal. The evidence contains video of the alleged victim discussing alleged sexual activity, not engaged in sexual activity. In other words, the implications for the alleged victim's privacy are substantially mitigated in this case as compared to *Bowser*. While the Plaintiff-Respondent is correct in pointing out that the protective order here was less restrictive than that in *Bowser*, the trial court wasn't in a position to properly exercise its discretion because it didn't have all or even many of the pertinent facts.

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 orders.

Respectfully submitted this 30th day of November, 2017.



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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 2,383 words.

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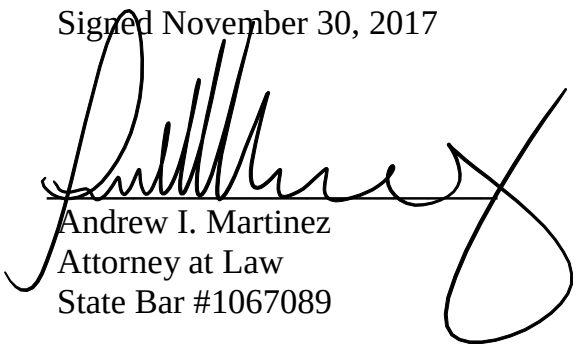

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I hereby certify that:

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:

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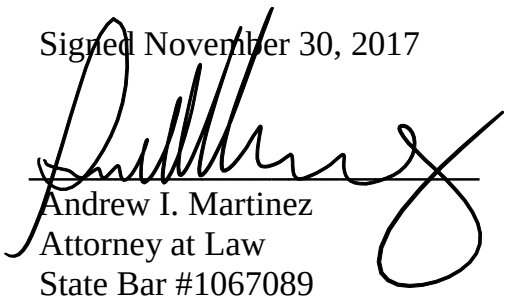

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