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STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT II

Case No. 2019AP001573

STATE OF WISCONSIN,

Plaintiff-Respondent,

vs.

PATRICK A. KELLER,

Defendant-Appellant.

APPEAL FROM THE JUDGMENT OF CONVICTION
AND AN ORDER DENYING DEFENDANT'S POSTCONVICTION
MOTION ENTERED IN THE CIRCUIT COURT OF WAUKESHA COUNTY
THE HONORABLE LEE S. DREYFUS PRESIDING
WAUKESHA COUNTY CIRCUIT COURT CASE NO. 16-CF-449

BRIEF OF DEFENDANT-APPELLANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATEMENT OF THE ISSUES

I. DID THE TRIAL COURT ERR IN ADMITTING THE CHILD ABUSE REPORTS AS NON-TESTIMONIAL HEARSAY SUBJECT TO THE BUSINESS RECORDS EXCEPTIONS.

Trial Court answered: No.

II. DID THE STATE'S FAILURE TO DISCLOSE KELLERS ACCUSER VIOLATE HIS RIGHT TO CONFRONTATION.

Trial Court answered: No.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The Defendant-Appellant believes that the briefs will fully present and meet the issues on appeal and will fully develop the theories and legal authority governing the issues, and therefore oral argument would be of little value to the court as the law applicable to this case is already well settled.

STANDARD OF REVIEW

A circuit court's decision to admit or exclude evidence is a discretionary determination that will be upheld on appeal absent an abuse of discretion. State v. Whittemore, 166 Wis.2d 127, 136, 479 N.W.2d 566, 571 (Ct. App. 1991). While "a circuit court's decision to admit evidence is ordinarily a matter for the court's discretion, whether the admission of evidence violates a defendant's right of confrontation is a question of law subject to independent appellate review."

State v. Deadwiller, 2013 WI 75, P17, 350 Wis.2d 138, 151, 834 N.W.2d 362, 369 (quoting State v. Williams, 2002 WI 58, P7, 253 Wis.2d 99, 644 N.W.2d 919, 924.)

STATEMENT OF CASE/FACTS

Keller was charged with three counts of Causing Mental Harm to a Child, as party to a crime, contrary to sections 948.04(1), 939.50(3)(f), and 939.05, Stats. (R22:1-3) Prior to the commencement of trial, the State filed a motion seeking admission of child protective service records as non-testimonial business records. (R26:1)(A:15) Keller objected claiming that the evidence was testimonial hearsay evidence which violated Keller's right to confrontation. (R37:1-2)(A:22-23) On June 23, 2017, the trial court held a hearing on this motion. (R134:2) The court issued an oral ruling on August 3, 2017 granting the State's motion. (R135:3)(A:47) The child protective service records, but not the identity of the reporter were admitted at trial.

With regard to the child protective service records the state presented testimony from current and former employees of the Waukesha County Department of Health and Human Services.

At trial, Kathy Mullooly, a manager at Health and Human Services testified. (R142:33-34) She explained to the jury that one of the responsibilities of her department was to complete access reports. (R142:35) She informed the jury that access reports are reports that are generated when individuals call into the department regarding concerns for a child's well-being. (R142:35) Mullooly testified that access reports are completely confidential. (R142:36) She explained to the jury the process that her department goes through in gathering information and completing the access reports. (R142:41-42) She indicated that a report completed on December 7, 2012, related to this case, was completed in the manner she described. (R142:41)

Mullooly then testified to a January 9, 2013 report taken in this case. (R142:42) She indicated that the report appeared to be taken in the same manner as her department processes access reports. (R142:41-43) Mullooly stated that the department also processed reports in a similar fashion for the dates January 30, 2013, February 12, 2013 and August 1, 2013. (R142:43) She indicated the same occurred with regard to two additional reports taken on June 12, 2014, a report from September 4, 2014, September 16, 2014 and December 5,

2014. (R142:44-45) All these reports related to the allegations made against Keller in this case.

The state's next witness was Bobbi Borchardt, another supervisor at Health and Human Services. (R142:58) She testified that she was the access worker who took the reports dated December 7, 2012, January 9, 2013, January 30, 2013, February 12, 2013, August 1, 2013, June 12, 2014, and September 4, 2014. (R142:57) She testified to the information she received from the individual(s) who reported concerns regarding the treatment and care of A.M. (R142:59-65) Borchardt admitted that she was not the worker who took information from a reporter related to the December 7, 2012 report. (R142:71) Trial counsel asked Borchardt the identity of the reporter for the December 7, 2012 report and Borchardt would not disclose the identity because she indicated the identity was confidential under state law. (R142:72) She further testified that she did not remember the identity of any of the reporters. (R142:72)

Kris Borkowski, a social worker with Waukesha County Human Services, then testified for the state. (R142:76) She indicated that her current duties are to take reports of child abuse or neglect from individuals. (R142:77) She testified

that she took two of the reports from reporters in this case. (R142:78) Borkowski testified that those reports were taken in the ordinary course of business for the Human Services Department. (R142:71-72) She then informed the jury as to the information she received from the callers related to the reports. (R142:72-89)

The state then called Sarah Vargas, an access supervisor with Waukesha County Health and Human Services. (R143:9) Vargas testified specifically to the reports identified as exhibits 3, 4, 6 and 7. (R143:15) She informed the jury that those reports were completed according to the procedures adopted by Human Services. (R143:15-16) Vargas testified that she was the individual who took the January 30, 2013 report. (R143:17) She testified to the information she received from the caller that formed the basis of the report. (R143:18-23)

Vargas provided further testimony related to the February 12, 2013 report. (R143:23) Vargas testified that she did not author the report or take the call from any individual that formed the basis the report. (R143:23-24) She then told the jury what was documented in this report. (R143:24-27) Vargas acknowledged that she was not the supervisor on this report. (R143:27)

The state then shifted to the June 12, 2014 report. (R143:27) Vargas stated that she was the supervisor for the report, but not the access worker who took the June 12 report. (R143:27) She then testified as to the information that was documented in the report. (R143:29-32)

The state's next witness was Kathryn Flansburg, an employee with Human Services who completes access reports as part of her responsibilities. (R143:55) She testified as to how those reports are completed. (R143:55-56) Flansburg indicated that she was the access worker who completed the reports identified as exhibits 5 and 10. (R143:56) She testified to the contents of those reports. (R143:57-74) The access reports were admitted into evidence at trial.

On January 26, 2018, Keller was found guilty by jury of all charges. Keller filed a post-conviction motion raising, in part, the issues he now raises on appeal. The trial court denied his motion. This appeal follows.

ARGUMENT

I. THE CHILD ABUSE REPORTS WERE TESTIMONIAL HEARSAY NOT SUBJECT TO THE BUSINESS RECORD EXCEPTION AND THE COURT ALLOWING ADMISSION OF THE SAME WAS IMPROPER.

The State argued that the reports taken by the social workers with regard to the alleged child abuse or neglect

fall within the business-record exception to the hearsay rule. This exception is set forth in section 889.25, Stats.

In order for an entry in the business record to be admissible, all declarants involved in making the specific entry record must be part of the organization which prepared it. If one of the declarants is not part of the organization, an additional level of hearsay is present which must fall into an exception. See State v. Gilles, 173 Wis.2d 101, 496 N.W.2d 133 (Ct. App. 1992). In this scenario of a corporation, if an employee of the corporation sets forth in a document made in the course of regularly conducted activity what he saw and did at a meeting, the "business records" exception would allow for the introduction of that information. However, if that same employee sets forth what a person, who is not a member of the corporation, said at that same meeting, the statement of that person is not admissible unless some other hearsay exception applies. The "business records" exception does not allow admission of a second level of hearsay without an additional exception to the hearsay rule. The reports cannot establish more than their maker could if he was testifying in court on their subject. See Mitchell v. State, 84 Wis.2d 325, 330, 267 N.W.2d 349, 352 (1978). All

the State's witnesses who testified to the statements made by the reporter(s) in this case did not imply or establish that the reporter(s) were making reports from within the Human Services Department. The Statements made by any reporter to CPS workers fall outside of the business record exception and are inadmissible.

Further, CPS reports are similar to police reports in that said reports are investigative tools created in anticipated of litigation. When the reports are created by Human Services, they are created with the knowledge that they may provide the basis and be relied upon for the filing of CHIPS, JIPS, TPR or criminal proceedings. As a result, documents created in anticipation of litigation cannot fall under the business records exception. See State v. Williams, 253 Wis.2d 99, 644 N.W.2d 919 (2002).

II. FAILURE OF THE STATE TO DISCLOSE KELLER'S ACCUSOR VIOLATED HIS RIGHT TO CONFRONTATION.

Wisconsin statute section 48.981, Stats., governs the confidentiality of child or neglect reports in the state of Wisconsin. Under that statute, reports are to remain confidential but may be disclosed to certain parties. Pursuant to section 48.981(7) provides in part:

(7) CONFIDENTIALITY.

> (a) All reports made under this section, notices provided under sub.(3)(bm) and records maintained by an agency and other persons, officials and institutions shall be confidential. Reports and records may be disclosed only to the following persons:
>
> 1. The subject of a report, except that the person or agency maintaining the record or report may not disclose any information that would identify the reporter…
>
> …3m. A child's parent, guardian, or legal custodian or the expectant mother of an unborn child, except that the person or agency maintaining the record or report may not disclose any information that would identify the reporter…
>
> …8. A law enforcement officer or law enforcement agency or a district attorney for purposes of investigation or prosecution.

Section 48.981(7), Stats.

Wisconsin courts have not decided the issue regarding whether a defendant's right to confrontation is violated when the District Attorney submits into evidence at trial child abuse reports but fails to disclose the identity of the accuser or complainant involving said reports. In Pennsylvania v. Ritchie, the United States Supreme Court ruled that a defendant is not entitled to access confidential child abuse reports. Pennsylvania v. Ritchie, 480 U.S. 39 (1987). However, the Ritchie court determined that due process requires that a court undertake an *in camera*

inspection of the file to determine whether it contains material exculpatory evidence. Ritchie, 480 U.S. 39. The issue facing Keller, however, is much different than the facts in issue the United States Supreme Court was asked to decide in Ritchie. Ritchie only answers the question as to whether a defendant is entitled to confidential child abuse reports, it does not answer whether a defendant is entitled to the identity of his or her accuser or complainant where the State discloses and uses the confidential child abuse records. Thus, while the confrontation clause does not require a defendant's access to confidential child abuse reports, it is Keller's contention that if the State intends to submit said reports at the time of trial and elicit testimony from said reports, the confrontation clause requires the State to disclose the identity of the accuser or complainant. To the extent that Keller's attorney failed to preserve this argument he was ineffective.

By statute the, the confidentiality of the child abuse or neglect reports remain confidential absent certain exceptions set forth within the statutes. Section 48.981(7), Stats. It is clear that the statutes allow disclosure of the child abuse or neglect reports to the District Attorney's

Office for purposes of prosecution. Section 48.981(7)(a) 8, Stats. Unlike limited restrictions placed on other disclosures, including disclosures to the subject of a report, or parent of a child, there are no limitations on the disclosure of information to the District Attorney's Office. See section 48.981(7)(a) 8, Stats. Further, there is nothing limiting the ability of the District Attorney's Office to disclose the contents or all information related to said reports by statute. Id. This is consistent with the Wisconsin Attorney General's opinion in response to an inquiry from a District Attorney in August of 1993 where said District Attorney requested an opinion as to whether a District Attorney may reveal the contents of a report made under section 48.981, Stats., in the course of the criminal prosecution. 81 Atty. Gen. 66. There, the Attorney General opined that the provisions of section 48.918(7), Stats., do not require that the report or the identity of the reporter remain confidential during a criminal prosecution where the contents of said reports have already been disclosed to the District Attorney's Office. Id. Therefore, the District Attorney's Office is not required to conceal information that would identify the reporter or otherwise keep the information

in the report confidential under said circumstances. Id. The Attorney General goes on further to indicate that in some cases the law may require disclosure of the reporter's identity where the child is to be a witness in the court proceeding and the child has given a statement to the reporter about the incident which causes the reporter to act. Id. It was further set forth by the Attorney General that a District Attorney could protect the identity of a reporter whenever it can be done without impairing the District Attorney's ability to present its case at trial. Id.

The Attorney General also indicated in its opinion that the confidentiality provisions governing section 48.981(7), Stats., apply to the entire report, not just to the identity of the reporter or of the mandatory reporter. Id. Thus, the entire report is to be treated as confidential by a District Attorney unless the information is to be used during a criminal prosecution. Id. Thus, the Attorney General noted that when the District Attorney was fulfilling its duties, all the information contained report can be revealed to the court pursuant to the plain language of section 48.981(7)(a)10, Stats. Id. Thus, the Attorney General recognized that it was likely that the information was going

to be disclosed to the court during the criminal proceedings would be provided to all parties in the action. Id.

The Attorney General was clear that the statute does not prohibit or restrict the District Attorney's use of the information that it receives from any agency. Id. It was noted in the Attorney General's opinion that the District Attorney could not bring criminal charges unless the statutes exempted this type of activity and the confidentiality requirements during criminal prosecutions because they are of public record. Id.

The opinion further indicates that a District Attorney, where he or she determines that the information received from the reporter is unnecessary to the effective presentation of a case and not exculpatory, that the office should further the policy of the statutes by protecting a reporter's identity. Id. The Attorney General did note that a prosecutor should protect the identity of the reporter, where able, as long as said protection does not undermine the District Attorney's ability to carry out its duties. Id.

Here, various social workers were able to testify to the contents of not only the reports admitted at trial, but the specific allegations and information provided by the

reporter/accuser. The information and allegations that could be relied upon for Keller's conviction in this matter were generated by the protected complainant/accuser. To allow witnesses to testify to statements and information made by an accuser in an unrestricted manner violated Keller's right to confrontation. This is especially true where the reliability or truthfulness of the reporter cannot be ascertained. "The confrontation clause of the United States and Wisconsin Constitution's guarantee criminal defendants the right to confront witnesses against them." State v. Jensen, 2007 WI 26, p13, 299 Wis.2d 267, 727 N.W.2d 518. The confrontation clause "bars admission of an out-of-court-testimonial statement unless the declarant is unavailable and the defendant has had a prior opportunity to examine with respect to the statement." Jensen, 2007 WI 26, p15, 299 Wis.2d at 278-279, 727 N.W.2d at 524. "[A] statement is testimonial if a reasonable person in the position of a declarant would objectively foresee that his statement might be used in the investigation or prosecution of a crime." Jensen, 2007 WI 26, p25, 299 Wis.2d at 285, 727 N.W.2d at 527. "[W]hether the admission of evidence violates a defendant's right to confrontation is a question of law." Id. In determinating

whether Keller's right to confrontation was violated, this court must first determine whether the reporter's statements are admissible under the rules of evidence. State v. Tomlinson, 2002 WI 91, P41, 254 Wis.2d 502, 526, 648 NW.2d 367, 379. Next, the court must determine whether the admission of the statement by the complainant/accuser violated Keller's right to confrontation.

The State argued that the accuser's statements were non-testimonial and therefore admissible. Keller's attorney objected to the accuser's statements as hearsay. The trial court concluded that the statements were non-testimonial and allowed numerous witnesses to testify to the statements made by the accuser/complainant without limitation.

It is true that not all hearsay implicates the confrontation clause, only that which is testimonial. Crawford v. Washington, 541 U.S. at 51. Typically, "testimony" is typically "[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact." Id. Testimonial statements can be characterized by three various formulations:

> 1. "[E]x parte in-court testimony or its functional equivalent-that is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-

> examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially." Crawford, at 51.
>
> 2. "[E]xtra judicial statements…contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions." Crawford. 541 U.S. at 51-52.
>
> 3. "[S]tatments that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial." Crawford, 541 U.S. at 52.

Under any of these situations, the court was able to indicate that "[w]hatever else the term [testimonial] covers, that applies that a minimum to prior testimony a preliminary hearing, before a grand jury, or a former trial; and to police interrogations." Crawford, 541 U.S. at 68. These, the court wrote, represent "the modern practices with closest kinship to the abuses at which the confrontation clause was directed." Id.

An accuser who makes a formal statement to government officers bares testimony in a sense that a person who makes a causal remake to an acquaintance does not. Crawford, 541 U.S. at 51. The Supreme Court in Davis v. Washington, 547 U.S. 813 (2006) addressed the definition of testimonial in the context of a statement given to a law enforcement officer. The court adopted a "primary purpose" test for analyzing

whether a statement is testimonial. Davis, 547 U.S. at 822. "Statements are non-testimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency." Id. Statements may be "testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution." Id.

Subsequently, in Michigan v. Bryant, the court "reiterated [its] view in Davis that when the primary purpose of an interrogation is to respond to an ongoing emergency, its purpose is not to create a record for trial and thus is not within the scope of the confrontation clause." Ohio v. Clark, 135 S. Ct. at 2180 (quoting Bryant, 562 U.S. at 358). However, the court clarified that the existence of an ongoing emergency is not the touchtone of the testimonial inquiry, but the existence of an emergency is just one factor when determining the primary purpose of an interrogation." Bryant, 562 U.S. at 374.

The State argues that the statements made by the accuser/reporter were done to assist the government with an ongoing emergency. There is insufficient evidence presented to demonstrate whether or not the witness was assisting with an ongoing emergency. While the allegations of abuse or neglect could be viewed as an ongoing emergency, it is difficult to support said finding where actions were not taken on an immediate basis. This is not a situation where police officers responded and statements were made for purposes of protection or to locate a suspect. The statements made by the accuser in this case were not made in an informal setting but were strategically made for purposes of baring testimony against Keller. It is clear that the reporter made these statements to human services for purposes of establishing facts for use in an action which would restrain Keller's interactions with his child, whether civil, criminal or otherwise. The context in which a statement is made is significant in determining whether a statement is testimonial. Clark, 135 S. Ct. at 2182. And, "part of that context is the questioner's identity." Id. "Statements made to someone who is not principally charged with uncovering and prosecuting criminal behavior are significantly less to be

testimonial than statements giving to law enforcement officers." Id. While child protective services may not be principally charged with uncovering and prosecuting criminal behavior, they are the significant contact in establishing whether child are in need of protection and services and whether additional information should be provided to police officers and prosecutors for purposes of prosecution. Therefore, the statement is testimonial. In fact, the statutes provide that any complaint made to the county agency or department may be required to be referred to the sheriff or police department under certain circumstances. While this particular statutory requirement may not have been known to the reporter/accuser at the time that the statements were made to human services, it is likely that the reporter/accuser made said statements to child protective services understanding that this was the primary contact for said complaint.

The reporter provided information related to past criminal actions alleged against Keller. Statutorily child protective services has broad investigatory authority and responsibility over allegations of abuse committed against a child by their parent, and is statutorily required to

investigate reports of abuse. While it is unknown whether the reporter was aware of the statutory investigatory obligations of child protective services is unknown but the statements made are testimonial where an investigative motive exists.

As a result, given the totality of the circumstances of the complaint and factual information provided by the complainant/accuser, to human services for purposes of completing a child abuse or neglect report, these statements are clearly testimonial. As a result of the statements being testimonial, any presentation of said statements at the time of trial without having said complainant present violated Keller's right to confrontation. The state could have strategically decided to not disclose or provide testimony regarding these reports. However, once the state disclosed the information it cannot hide behind the argument that certain information remains confidential. This is especially true where the state elicited hearsay testimony from witnesses as to the allegations made by these reporters.

The testimony provided by the Human Services employees was clearly used by the state as a way of presenting the statements of the reporters to prove the assertions made by

the reporters as true. Without an opportunity to cross examine the witnesses or ascertain their identity, Keller was put in a position where the complaints made by the various reporters were taken as fact be the jury. As a result of this violation, Keller's conviction should be reversed and this matter set for a new trial.

CONCLUSION

For the aforestated reasons, Keller respectfully requests that the Court grant his motion for a new trial. In the alternative, this matter should be remanded to the trial court for an evidentiary hearing on Keller's ineffective assistance of counsel claims.

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CERTIFICATION

I certify that this brief conforms to the rules contained in s. 809.19(8)(b) and (c) for a brief produced using the following font:

> Monospaced font: 10 characters per inch; double spaced; 1.5 inch margin on left side and 1 inch margins on the other 3 sides. The length of this brief is 21 pages.

Dated this 9th day of January, 2020.

//s/ Bradley J. Lochowicz
Bradley J. Lochowicz
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CERTIFICATION 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.

Dated this 9th day of January, 2020.

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CERTIFICATION

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with s. 809.19(2)(a) and that contains, at a minimum:

(1) a table of contents;

(2) the findings or opinion of the circuit court; and

(3) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Dated this 9th day of January, 2020.

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