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**STATE OF WISCONSIN**
**COURT OF APPEALS**
**DISTRICT II**

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**Case No. 2019AP001573**

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**STATE OF WISCONSIN,**

**Plaintiff-Respondent,**

**vs.**

**PATRICK A. KELLER,**

**Defendant-Appellant.**

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**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**

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# REPLY BRIEF OF DEFENDANT-APPELLANT

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**Bradley J. Lochowicz**
**(State Bar No. 1037739)**

**LOCHOWICZ & VENEMA LLP**
**Attorneys for Defendant-Appellant**

**11 1/2 N. Wisconsin Street**
**P.O. Box 20**
**Elkhorn, WI 53121**

## ARGUMENT

### I. THE CHILD ABUSE REPORTS WERE TESTIMONIAL HEARSAY AS THE CALLER CONTACTED A GOVERNMENT AGENCY FOR PURPOSES OF LODGING A COMPLAINT HE OR SHE WISHED TO BE INVESTIGATED FURTHER.

The State cites to Ohio v. Clark in support of its position that the United States Supreme Court reviewed statements made to non-law enforcement agencies. Ohio v.Clark, 576 U.S.1 (2015) involves statements made by a child victim of abuse to teachers at his school who suspected abuse. This situation is much different than the statements made against Keller in this case. The statements against Keller were made to a government agency. Further, the statements were made to a government agency charged with investigating child abuse complaints by the state legislature. The complainant making a statement to CPS (Child Protective Services) is substantially similar to an individual who contacts the police department to make a complaint. One function of CPS is to gather information and investigate further to determine services but also to assist in CHIPS and JIPS cases.

CPS reports are similar to police reports in that individuals may contact CPS to report an emergency that is taking place involving the abuse of child. Parties may also

contact CPS to report abuse of children they have seen in the past or have been made aware of through other means. The reports made in this care were clearly non-emergency type situations in that the report was not seeking emergency intervention. Said reports, in non-emergency situations, 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.

The State argues that the calls made in this case were not made with the purpose of making a record against Keller but rather out of concern of the child's safety. Just like someone who contacts law enforcement, in a non-emergency situation, an individual who makes a complaint against a defendant for past actions makes the complaint knowing that those statements will be further investigated, and potential court action taken. None of the callers in this case sought immediate assistance or intervention on behalf of CPS or law enforcement. Therefore, the statements were testimonial in nature.

**II. THE ADMISSION OF STATEMENTS OF KELLER'S ACCUSORS VIOLATED HIS RIGHT TO CONFRONTATION AND THE ADMISSION OF SAID STATEMENTS WAS NOT HARMLESS ERROR.**

By statute the confidentiality of the child abuse or neglect reports remain confidential absent certain exceptions set forth within the statutes. Section 48.981(7), Stats. 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. 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.

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. 81 Atty. Gen. 66. 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.

It is clear that should the District Attorney determine that the disclosure of reports is necessary for prosecution that the identity of the reporter must also be disclosed. The opinion makes clear that the District Attorney should protect the identity of the individual making the complaint only if it does not undermine the prosecution. Basically, the information can remain confidential if the reports, or statements of the reports, are not being used in the prosecution.

In Keller's case, 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 State implies in its brief that the reporters in this case were anonymous. There is no evidence to suggest that the complainants in this case were anonymous. 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 guarantees 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.

Essentially, the only way the State could protect the identity of the complainant in Keller's situation was to not use the CPS reports at trial. Once the State decided to introduce evidence received from the reports it was required to release the identity of the accuser.

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. Section 48.98 (7)(2)8, stats. 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, 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 at trial 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 by the jury. As a result of this violation, Keller's conviction should be reversed and this matter set for a new trial.

**III. THE STATE HAS NOT DEMONSTRATED THAT THE ADMISSION OF STATEMENTS WAS HARMLESS ERROR**

The State is correct that it has the burden to demonstrate harmless error. For an error to be harmless, the party benefitting from the error must demonstrate that it is "clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error." State v. Martin, 2012 WI 96, P45, 343 Wis.2d 278, 816 N.W.2d 270 (quoting Neder v. United States, 527 U.S. 1, 18 (1999)).

The State is also correct that when considering whether the erroneous admission of evidence is harmless, the following seven factors, among others, assist the Court's analysis: (1) the frequency of the error; (2) the importance of the erroneously admitted evidence; (3) the presence or absence of evidence corroborating or contradicting the erroneously admitted evidence; (4) whether the erroneously admitted evidence duplicates untainted evidence; (5) the nature of the defense; (6) the nature of the State's case; and (7) the overall strength of the State's case. Martin, 343 Wis.2d 278, p46.

The State argues that the error in admitting the CPS records was harmless because of the corroborating evidence presented by the State.

The State argues that Lutheran Social Services (LSS) employees Maria Dean and Amanda Smith provided untainted direct evidence that corroborated the CPS records. The State argues that much of the testimony provided by Dean and Smith was duplicative information. If this was truly the case, then the records and statements of the confidential reporters were not required. Rather, the testimony of Dean and Smith was insufficient, in and of itself, for the State to meet its burden. The State is correct that the testimony corroborated the reports made to CPS. However, it was the hearsay testimony provided in the reports that allowed the State to prove the charges against Keller.

Additionally, the daycare workers' testimony, that of April Bolan and Karen Steinke, did not fill in gaps that the hearsay testimony from the complainant provided. The testimony provided from Bolan and Steinke highlighted difficulties that any child, who faced the same limitations that AM faced, would suffer from.

The State then argues that the testimony of the experts, Dr. Angela Rabbitt and Dr. Rolan Manos, provided sufficient evidence, absent the statements made by the confidential complainant in the CPS records to support a finding of guilt.

However, much of what these experts relied upon in reaching their conclusions was based upon the statements made by the alleged complainants to CPS intake workers.

One only has to review the State's closing statement to realize that they relied on these confidential reporters statements to support the argument that this was a "systematic dehumanization" (R146:10-37,68-80) However without the reference to the undisclosed reporters statements made to CPS, the State would have been unable to demonstrate the same.

## 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.

**LOCHOWICZ & VENEMA LLP**

By: *//s/ Bradley J. Lochowicz*
Bradley J. Lochowicz
State Bar No. 1037739

11 1/2 North Wisconsin Street
P.O. Box 20
Elkhorn, WI 53121-0470
Telephone: (262) 379-2095

**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 11 pages.

Dated this 16th day of July, 2020.

By: *//s/ Bradley J. Lochowicz*
Bradley J. Lochowicz
SBN: 1037739

**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 16th day of July, 2020.

**LOCHOWICZ & VENEMA LLP**

By: *//s/ Bradley J. Lochowicz*
Bradley J. Lochowicz
State Bar No. 1037739

**LOCHOWICZ & VENEMA LLP**
11 1/2 North Wisconsin Street
P.O. Box 20
Elkhorn, WI 53121-0470
Telephone: (262) 379-2095

**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 16th day of July, 2020.

**LOCHOWICZ & VENEMA LLP**

By: *//s/ Bradley J. Lochowicz*
Bradley J. Lochowicz
State Bar No. 1037739