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SUPREME COURT

STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT II

Case No. 2019AP001573

STATE OF WISCONSIN,

Plaintiff-Respondent,

vs.

PATRICK A. KELLER,

Defendant-Appellant.

PETITION FOR REVIEW

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INTRODUCTION

Patrick A. Keller petitions the Supreme Court of Wisconsin pursuant to sections 808.10 and 809.62, Wisconsin Statutes, to review the decision of the Wisconsin Court of Appeals, District II, in State of Wisconsin v. Patrick A. Keller, Appeal 2019 AP 001573, filed on March 3, 2021.

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.

Circuit Court answered: No.

Court of Appeals answered: No,

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

Circuit Court answered: No.

Court of Appeals answered: No.

STATEMENT ON CRITERIA FOR REVIEW

The Supreme Court should grant review in this case because the question of whether individuals/reporters statements to CPS workers are testimonial is a question which will have an impact in criminal cases, such as Keller's case, throughout the state. There is no definitive determination as to whether reports made to child protective services is the equivalent of statements being made to police officers for

purposes of criminal investigation, where those statements form a basis for criminal charges being issued against a defendant.

This petition for review focuses on Keller's right to confrontation being violated where witnesses were able to testify to complaints made against Keller at the time of trial without the complaining witnesses having to come to court to testify, subject to cross-examination, in support of the state's charges.

Keller contends that statements, particularly complaints made to child protective services workers should be treated the same as those statements made to police officers for purposes of conducting a criminal investigation.

This court can better clarify and develop the law related to the treatment of statements made by individuals to child protective service investigators, when made for purposes of making complaints against individuals and where the intent is to make child protective services aware of an individual's potential wrongdoing. This case is properly suited for further determination by this court.

STATEMENT OF CASE

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.

The court of appeals reached its decision "by considering whether the 'primary purpose' of the statement was to 'gather evidence for [the defendant's] prosecution' or 'substitute for testimony in a criminal prosecution.'" State v. Nelson, 2021 WI App 2, ¶29 (citation omitted). The court properly noted the factors relevant to and analysis as to whether statements are testimonial in nature include: "(1) the formality/informality of the situation producing the out-

of-court statement; (2) whether the statement is given to law enforcement or a non-law enforcement individual; (3) the age of the declarant and (4) the context in which the statement was given." Mattox, 373 Wis. 2d 122, ¶32 (footnote omitted). The court of appeals concluded that the statements were nontestimonial and thus, the Confrontation Clause was not implicated.

This petition for review followed.

ARGUMENT

I. THE COURT SHOULD ACCEPT THE PETITION BECAUSE A DECISION BY THIS COURT WILL HELP DEVELOP, CLARIFY OR HARMONIZE THE LAW AND THE QUESTION IS NOT ONLY NOVEL BUT IS A QUESTION OF LAW LIKELY TO RECUR UNLESS RESOLVED BY THE SUPREME COURT.

Keller asserts that 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 for, and be relied upon, in the filing of CHIPS, JIPS, TPR or criminal proceedings.

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.

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.

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.

The court of appeals referenced the relevant factors in analyzing whether a statement is testimonial: "(1) the formality/informality of the situation producing the out-of-court statement; (2) whether the statement is given to law enforcement or a non-law enforcement individual; (3) the age of the declarant and (4) the context in which the statement was given." ***Mattox***, 373 Wis. 2d 122, ¶32 (footnote omitted).

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.

The reporters here 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, this court can resolve whether factual information provided by a complainant/accuser to human services for purposes of completing a child abuse or neglect report are testimonial statements.

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. Thus, if Keller is right that said statements are testimonial then his right to confrontation was violated.

CONCLUSION

For the aforestated reasons, Keller respectfully requests that the Court accept his petition for review for purposes of determining whether statements made to child protective services for purposes of making a complaint, where it is reasonably known that said complaint will be investigated, are non-testimonial or testimonial as subject to the Confrontation Clause.

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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 16 pages.

Dated this 25th day of March, 2021.

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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 25th day of March, 2021.

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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.

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