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DISTRICT II

October 23, 2024

To:

Hon. Sandy A. Williams
Circuit Court Judge
Electronic Notice

Connie Mueller
Clerk of Circuit Court
Ozaukee County Justice Center
Electronic Notice

Bradley William Novreske
Electronic Notice

Sara Lynn Shaeffer
Electronic Notice

You are hereby notified that the Court has entered the following opinion and order:

2023AP1221-CR State of Wisconsin v. Gregory A. Beyer (L.C. #2020CF240)

Before Gundrum, P.J., Neubauer and Grogan, JJ.

Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

Gregory A. Beyer appeals a judgment of conviction, entered following his no-contest plea, to first-degree sexual assault of a child under the age of thirteen. On appeal, Beyer argues the circuit court erred by not requiring the State to disclose statements the victim made in relation to the victim's work as a confidential informant in unrelated drug cases. Based upon our review of the briefs and record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2021-22).[1] We affirm.

[1] All references to the Wisconsin Statutes are to the 2021-22 version unless otherwise noted.

In July 2020, the State charged Beyer with repeated sexual assault of the same child. The complaint alleged that approximately twenty years earlier Beyer had repeatedly sexually assaulted Andrew,[2] who was then nine or ten years old. Beyer touched and rubbed Andrew's penis, placed Andrew's penis in Beyer's mouth, placed his fingers in Andrew's anus, and attempted to place his penis in Andrew's anus, which caused injury to Andrew. In July 2020, Andrew met with Beyer and confronted him about the assaults. The meeting was audio and video recorded. Beyer admitted to the assaults and apologized to Andrew.

Prior to trial, the State disclosed that Andrew was a confidential informant ("CI") for the State on drug cases. Specifically, Beyer learned that in 2019, the State investigated Andrew for distributing marijuana and other drugs and later arrested him for drug-related offenses. After Andrew's arrest, Andrew became a CI. Andrew's work as a CI resulted "in the prosecution of at least 12 individuals for at least 56 felony charges." Ultimately, because of Andrew's substantial assistance, the State decided not to prosecute Andrew in relation to the drug offenses undermining Andrew's arrest. The State provided Beyer with information relating to their investigation and arrest of Andrew along with its agreement to not prosecute Andrew for these offenses due to his CI work.

A discovery dispute arose between Beyer and the State regarding Andrew's CI work, and Beyer ultimately sought exclusion of Andrew's and law enforcement's testimony at trial. Specifically, Beyer wanted the State to produce all oral and written statements Andrew had made in relation to the twelve drug cases where he had worked as a CI. Beyer argued that the

[2] A pseudonym is used to identify the victim. *See* WIS. STAT. § 809.86(4).

discovery was covered by the terms of WIS. STAT. § 971.23 as written or recorded statements of a witness, and he noted that the State had listed Andrew on its witness list. Beyer also argued he needed the information to effectively cross-examine Andrew. Beyer asserted Andrew had been deceptive when he recorded Beyer confessing to the sexual assaults because Andrew told Beyer that he had not discussed the assaults with anyone else when Andrew had already told law enforcement. Beyer stated Andrew's deception during his confession raised questions about the length to which Andrew was willing to go in order to mitigate his own criminal exposure and the statements Andrew made as a CI in other cases would be impeachment material for his case.

The State refused to provide written or recorded statements Andrew made during the course of his work as a CI in unrelated drug cases. It argued that Andrew's CI work in these drug cases was privileged information, which was not even subject to disclosure in those drug cases. *See* WIS. STAT. § 905.10. Following briefing and motion hearings, the circuit court determined the State did not have "an obligation to disclose all written statements made by [Andrew] while he was operating as a CI for the State or body camera footage on which he makes any statements during his activities as a CI and police reports including statements from the CI as a result of that activity." It denied Beyer's request.

Beyer then pled no contest to an amended charge of first-degree sexual assault of a child. The circuit court sentenced him to eight years of initial confinement and four years of extended supervision. He appeals.

On appeal, Beyer argues the circuit court erred by not requiring the State to disclose statements Andrew made as a CI. The State responds that by pleading no contest Beyer waived his right to challenge the resolution of this discovery dispute on appeal. *See* ***State v. Beyer***,

2021 WI 59, ¶14, 397 Wis. 2d 616, 960 N.W.2d 408 ("When a defendant enters a guilty, no contest, or ***Alford*** plea, the defendant ordinarily 'waives all nonjurisdictional defects, including constitutional claims.'" (citation omitted)). In reply, Beyer agrees that, as relevant, the guilty-plea-waiver rule only excludes motions to suppress evidence and motions challenging the admissibility of the defendant's statements. However, Beyer argues that his motion was a suppression motion because he sought to exclude testimony based on violations of his constitutional rights and government misconduct. *See* ***State v. Eichman***, 155 Wis. 2d 552, 562-63, 456 N.W.2d 143 (1990) (a suppression motion "bars admission of evidence at trial as a result of government misconduct, such as a constitutional violation"; an exclusion motion "involves only a violation of the rules of evidence.").

We need not resolve whether Beyer's discovery issue survives his no-contest plea because we determine the circuit court did not err by refusing to have the State turn over statements Andrew made as a CI in unrelated drug cases. "We analyze alleged discovery violations in three steps, each of which poses a question of law reviewed without deference." ***State v. Rice***, 2008 WI App 10, ¶14, 307 Wis. 2d 335, 743 N.W.2d 517.

> First, we decide whether the State failed to disclose information it was required to disclose …. Next, we decide whether the State had good cause for any failure to disclose …. Absent good cause, the undisclosed evidence must be excluded. However, if good cause exists, the circuit court may admit the evidence and grant other relief, such as a continuance…. Finally, if evidence should have been excluded under the first two steps, we decide whether admission of the evidence was harmless.

Id.

Here, we agree with the State that it was not required to disclose all the written and oral statements Andrew made as a CI in unrelated drug cases. First, WIS. STAT. § 971.23(1)(e)

requires the State to produce all "relevant" statements of witnesses. During the motion hearing, the circuit court explained the State's position as:

> They have an obligation to disclose things; for example, if he gave false information to police during those other investigations they have an obligation to disclose that. They know that. But they don't have an obligation to disclose police reports from other incidents merely because he is a confidential informant in that and will be a witness on a sexual assault for the State. That's their position.

Beyer argued the information was relevant, and therefore subject to disclosure because Andrew was dishonest with Beyer when Beyer admitted to sexually assaulting Andrew and Andrew also purportedly made dishonest statements working as a CI. Beyer's argument, however, was entirely based on speculation. As the circuit court explained, "you don't point to anything to show that. And there's got to be some preliminary showing for the Court to consider–this is highly unusual to consider, getting all reports from other incidents that have nothing to do with this." We agree. Any statements Andrew made as a CI on unrelated drug cases are not relevant to whether Beyer sexually assaulted Andrew. Any challenge to Andrew's honesty and credibility or bias could have been explored through detailed cross-examination.

Further, we also agree that the information was privileged under WIS. STAT. §§ 905.09 and 905.10. Under § 905.09, the State has a privilege to refuse to disclose "investigatory files, reports and returns for law enforcement purposes except to the extent available by law to a person other than the" State. Here, the police reports that Beyer requested containing Andrew's statements as a CI are not available to any other person. Section 905.10(1) also supports the circuit court's decision, as it provides the State a privilege to avoiding disclosing the identity of its confidential informants. The State advised the circuit court that it had only disclosed Andrew's identity in one of the twelve unrelated drug cases. Beyer made no showing that this

privileged information should nevertheless be disclosed in a child sexual assault case. As the circuit court pointed out to Beyer,

> [Y]ou haven't pointed out anything except an assumption that because the victim, when speaking to [Beyer], indicated that he hadn't talked to anyone else about it when he had disclosed it to detectives, that that somehow shows a pattern or that it would be shown in those reports that he's deceitful.

In any event, even if statements Andrew made in the course of his work as a CI in unrelated drug cases should have been produced in discovery, we conclude that any error was harmless. The test for harmless error is whether there is a reasonable possibility that the error contributed to the outcome. *See* ***State v. Dyess***, 124 Wis. 2d 525, 542-43, 370 N.W.2d 222 (1985).

Here, we emphasize, as the circuit court did, that nothing prohibited Beyer from confronting or impeaching Andrew at trial on his allegations against Beyer's crime. Beyer had the reports from Andrew's own criminal case along with the State's agreement not to prosecute Andrew based on his work as a CI. Issues related to credibility, bias, and motive could have been addressed and impeached through cross-examination without disclosure of the material from the unrelated drug cases Andrew worked on.

More importantly, the State's proffered evidence against Beyer was overwhelming. There is no reasonable possibility that Beyer would have gone to trial had he had access to the oral and written statements Andrew made as a CI in unrelated drug cases. In this child sexual assault case, Andrew alleged Beyer assaulted him multiple times as a child by touching and rubbing Andrew's penis, placing Andrew's penis in Beyer's mouth, placing his fingers in Andrew's anus, and attempting to place his penis in Andrew's anus. The State also had a

recording of Beyer confessing that he had sexually assaulted Andrew more than once and apologizing to Andrew for his conduct. *See* ***Arizona v. Fulminante***, 499 U.S. 279, 296 (1991) ("'[T]he defendant's own confession is probably the most probative and damaging evidence that can be admitted against him.'" (citation omitted)). The circuit court had also granted the State's motion to admit other acts of Beyer's previous sexual assaults of other children. The other-acts evidence included two incidents that resulted in Beyer's convictions for first-degree sexual assault of a child. At least three of Beyer's previous victims of his other-acts offenses indicated they were willing to testify. In short, the State's failure to disclose Andrew's statements as a CI in unrelated drug cases did not cause any prejudicial effect to Beyer. It was harmless.

Upon the foregoing reasons,

IT IS ORDERED that the judgment of the circuit court is summarily affirmed. *See* WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that this summary disposition order will not be published.

Samuel A. Christensen
Clerk of Court of Appeals