COURT OF APPEALS
DECISION
DATED AND FILED

May 25, 2016

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

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A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and RULE 809.62.

**Appeal No. 2016AP81**

**Cir. Ct. No. 2015JV238**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS**
**DISTRICT II**

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**IN THE INTEREST OF L.C., A PERSON UNDER THE AGE OF 17:**

**STATE OF WISCONSIN,**

**PETITIONER-RESPONDENT,**

**V.**

**L.C.,**

**RESPONDENT-APPELLANT.**

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APPEAL from an order of the circuit court for Winnebago County: JOHN A. JORGENSEN, Judge. *Affirmed.*

¶1 REILLY, P.J.[1] L.C. appeals from a dispositional order adjudicating her delinquent for receiving stolen property in violation of WIS. STAT. § 943.34(1)(a). L.C. argues that the circuit court erred in not dismissing her delinquency petition as a sanction for the State's discovery violations. As all of the witnesses called by the State at trial as well as the substance of their testimony was identified in the delinquency petition, we conclude that the State's failure to provide a formal witness list was not prejudicial and we affirm.

## BACKGROUND

¶2 On June 4, 2015, the State filed a juvenile delinquency petition charging L.C. with receiving stolen property in violation of WIS. STAT. § 943.34(1)(a). Attached to the delinquency petition was an incident report drafted by Officer Patrick Pedersen relating that on April 10, 2015, Pedersen met with two students, O.M. and D.J., who reported that "someone had entered the [gym] locker room and taken their phones out of their backpacks." After taking the report from O.M. and D.J., Pedersen reviewed a surveillance video and he witnessed a female student, later identified as A.W., enter the locker room. A.W. left the locker room and returned later with an individual Pedersen "knew from prior contacts to be [L.C.]" School administration immediately met with L.C., who identified A.W. but denied involvement. Later that same day, Pedersen learned that O.M.'s and D.J.'s phones had been returned to them by an unidentified male student.

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(e) (2013-14). All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

¶3 The incident report also related that on April 13, 2015, Pedersen met with L.C. in his office where he informed her that he would be placing her under arrest for the theft of the cell phones. After Pedersen read L.C. her ***Miranda***[2] rights and activated the audio and video recording system, L.C. stated that she "left class and met up with [A.W.] and …. [t]hey went into the girls locker room in the field house and she stated that [A.W.] had taken these phones." L.C. admitted to having the phones in her possession and giving the phones to a male friend. With L.C.'s permission, Pedersen reviewed text messages on L.C.'s phone between L.C. and A.W., which supported L.C.'s statement. The messages discussed "taking the phones and wiping them so [L.C. and A.W.] each could have one." According to the incident report, Pedersen contacted L.C.'s mother and explained the situation to her.

¶4 At a plea hearing on June 26, 2015, L.C. denied the allegations in the petition and entered a discovery demand, requesting a list of witnesses whom the State intended to call at trial and L.C.'s recorded statement to Pedersen. The court scheduled a trial for July 10, 2015.

¶5 At trial, the State admitted that it had not complied with the discovery demand. L.C. moved to exclude the evidence per WIS. STAT. § 938.31(3)(b).[3] The circuit court denied L.C.'s request, stating, "[L]et's begin the trial, and we will see where this goes." The State called its first witness, L.C.'s

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[2] ***Miranda v. Arizona***, 384 U.S. 436 (1966).

[3] WIS. STAT. § 938.31(3)(b) states, "Except as provided under par. (c), a statement made by the juvenile during a custodial interrogation is not admissible in evidence against the juvenile in any court proceeding alleging the juvenile to be delinquent unless an audio or audio and visual recording of the interrogation was made as required under [WIS. STAT. §] 938.195(2) and is available."

mother. Defense counsel objected on the grounds that the State had not provided a witness list under WIS. STAT. § 971.23(1)(d). The State argued that L.C.'s mother is "in the [incident] report, and she's in the complaint so she's been disclosed." The court overruled the objection, explaining its belief that § 971.23 is only "applicable to criminal trials," and not juvenile proceedings.[4] The State proceeded to question L.C.'s mother, who testified that she did not remember if L.C. had told her anything about the incident.

¶6 After L.C.'s mother testified, the State moved for a "recess to complete this proceeding, provid[e] the confession or the statement to [defense counsel] … and present[] one further witness." Defense counsel objected and moved for a directed verdict for dismissal. The circuit court denied defense counsel's motion and granted the State's request, continuing the court trial to July 22, 2015. When asked whether the court was finding good cause, it replied that "[w]e are going to have the court trial within the 30 days … With this continuance that has been granted, we're still within those time periods so I don't believe the Court will have to make a good cause finding."[5]

¶7 On July 22, 2015, defense counsel filed a motion to exclude the evidence and dismiss the delinquency petition pursuant to WIS. STAT. §§ 971.23 and 938.293(2). The State had provided defense counsel with L.C.'s recorded

[4] The circuit court later acknowledged that it erred in its finding as the juvenile code discovery statute, WIS. STAT. § 938.293(2), expressly incorporates the criminal discovery statute, WIS. STAT. § 971.23, in all juvenile delinquency proceedings. Sec. 938.293(2).

[5] The circuit court erred in confusing the "good cause" requirement for extension beyond the thirty days for delinquency trials found in WIS. STAT. § 938.30(7) with "good cause" for not abiding by the discovery statute under WIS. STAT. § 971.23(7m). The circuit court's error, however, does not affect our analysis of this case.

statement to police, but it had not provided a witness list.[6] The circuit court denied defense counsel's motion, finding that L.C. had not suffered any prejudice.

¶8 The trial proceeded, and the State called three witnesses, all of whom were identified in the incident report attached to the delinquency petition and who testified in accordance with the incident report. O.M. testified that on April 10, 2015, her cell phone went missing from her backpack in the locker room. She testified that she reported the theft to Pedersen, the school liaison officer, and her phone was returned to her later that day. D.J., also identified in the incident report, testified that her cell phone was missing from her backpack on April 10, 2015. Her cell phone was returned to her that afternoon by O.M. Pedersen testified in accordance with the incident report he drafted. L.C. told Pedersen that A.W. was "actually the one that stole the phones." According to Pedersen, L.C. admitted to having the stolen cell phones in her possession.

¶9 After the State rested, L.C. did not present any evidence. The court concluded that L.C. had violated WIS. STAT. § 943.34(1)(a) and placed L.C. on formal supervision for twelve months. L.C. appeals.

## DISCUSSION

¶10 L.C. argues that the circuit court erred by failing to exclude the State's evidence after the State violated L.C.'s discovery rights under WIS. STAT. §§ 938.293 and 971.23. The interpretation and application of the discovery statute to a set of facts presents a question of law that we review independently of the circuit court, while benefiting from its analysis. ***State v. Harris***, 2008 WI 15, ¶15,

[6] A witness list was never provided to L.C.'s defense counsel.

307 Wis. 2d 555, 745 N.W.2d 397. If we conclude that the State violated its statutory discovery obligation, we "must then determine whether the State has shown good cause for the violation and, if not, whether the defendant was prejudiced by the evidence or testimony." ***Id.*** The circuit court's decision as to remedies is discretionary and is reviewed under the erroneous exercise of discretion standard. ***Id.***, ¶96.

¶11 Two discovery violations are at issue: the State's failure to provide the recorded statement L.C. made to police and a witness list. As to L.C.'s recorded statement to police, we find no violation as on the first day of trial the State moved for a recess to, among other things, "provid[e] the confession or the statement to [defense counsel]." Under WIS. STAT. § 971.23(7m), the court may grant the opposing party a recess or continuance, and although the State requested the recess, § 971.23(7m)(a)-(b) makes clear that excluding evidence based on a discovery violation is not the only option available to the courts. Under the circumstances, the circuit court's grant of a recess was not an erroneous exercise of discretion.[7] The incident report attached to the delinquency petition related the substance of L.C.'s confession and L.C. had the recorded version at the time the trial continued. L.C. has alleged no prejudice for not having the recorded version of her confession on the first day of trial.

¶12 The second violation is the State's failure to furnish L.C. with a witness list. On appeal, the State acknowledges that it "negligently violated [WIS. STAT. § 971.23(1)(d)], and [it] did not show good cause." As the State failed to

[7] The imposition of a sanction for a discovery violation is a matter for trial court discretion. *See* ***State v. Wild***, 146 Wis. 2d 18, 28, 429 N.W.2d 105 (Ct. App. 1988).

demonstrate good cause for its violation, the court could, in its discretion, have prohibited the State from calling any witness under § 971.23(7m)(a). Exclusion is not the only option for a discovery violation as § 971.23(7m)(b) provides that a court may, "in lieu of any sanction specified in par. (a)," take notice of the failure to properly disclose. Section 971.23(7m) does not mandate prohibition of unnamed witnesses—the exercise of discretion does.

¶13 L.C. compares this case to ***State v. Prieto***, 2016 WI App 15, 366 Wis. 2d 794, 876 N.W.2d 154. ***Prieto*** involved a charge of recklessly causing great bodily harm to a child. ***Id.***, ¶2. Over the course of two years, the state ignored several discovery demands as well as two orders of the circuit court requiring the state to submit a witness list. ***Id.*** The circuit court granted Prieto's motion to exclude undisclosed witnesses, save for one expert witness who the defense had been informally made aware of. ***Id.***, ¶3. Three days after the court's ruling, the state filed a witness list naming twelve other witnesses and requesting the court to reconsider its exclusion order. ***Id.***, ¶7. The court refused to reconsider, and we affirmed, finding that the court's sanction was not an erroneous exercise of discretion. ***Id.***, ¶¶9, 11, 16.

¶14 In ***Prieto***, the state ignored multiple, specific circuit court orders over the course of two years. Here, the State failed to respond to defense counsel's discovery request for several weeks, not two years, and the State did not ignore specific court orders to provide the missing witness list. Further, ***Prieto*** was a "shaken baby" case where expert testimony was a crucial aspect of the case. In ***Prieto***, the circuit court allowed the state to call one expert that the defense was aware of despite the lack of a witness list. In this case, all of the factual witnesses called by the State, as well as the substance of their testimony, were included in the incident report provided to L.C. before trial.

¶15 L.C.'s only claim of prejudice is that if the State had complied with the discovery demand, it would have helped "defense counsel reasonably advise L.C. about the strengths and weaknesses of her case and provide her guidance on whether she should negotiate a plea instead of exercising her right to a trial[.]" We fail to see any prejudice as neither the identity of the witnesses nor their testimony were a surprise to L.C.'s defense counsel. *See* ***State v. Hunter***, No. 2014AP2521, unpublished slip op. ¶40 (WI App Sept. 15, 2015) (finding harmless error where defendant was aware that the state intended to introduce certain evidence). This was a straight forward factual case and L.C. was not surprised by the testimony of any witness or evidence presented.

## CONCLUSION

¶16 While the State failed to demonstrate good cause for failing to provide a witness list, L.C. suffered neither prejudice nor surprise and any error was harmless. We caution that our holding is limited to the facts presented, and we do not condone the actions of the State.

*By the Court.*—Order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)4.