

**COURT OF APPEALS
DECISION
DATED AND FILED**

April 4, 2000

Cornelia G. Clark
Acting Clerk, Court of Appeals
of Wisconsin

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

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.

No. 99-1984-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JAMES A. BEVER,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Dunn County: DONNA J. MUZA and WILLIAM C. STEWART, JR., Judges.
Affirmed.

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 PER CURIAM. James Bever appeals his convictions for first-degree sexual assault of a child and sexual exploitation of a child, both as a party to the crime, after a jury trial. A babysitter found and viewed a videotape in Bever's home, and the tape depicted Bever engaging in sex acts with a minor. The

babysitter took the tape to the neighbors, who viewed it and contacted the police. The police then viewed the tape at the neighbors' home without first getting a search warrant, and later viewed it again at the station. Bever argues on appeal that the police viewing violated the Fourth Amendment's bar against unreasonable searches and seizures. He claims that neither the babysitter nor the neighbors had his permission to view the tape and that this nullified the police's right to view it. Bever also argues that the trial court improperly allowed him to act as his own counsel without conducting an adequate colloquy on whether he knowingly and voluntarily waived counsel. We reject these arguments and affirm Bever's convictions.

¶2 The search and seizure satisfied the Fourth Amendment. First, the Fourth Amendment puts no bar on private persons acting without a warrant. *See United States v. Jacobsen*, 466 U.S. 109, 113 (1984); *see also State v. Rogers*, 148 Wis. 2d 243, 246, 435 N.W.2d 275 (Ct. App. 1988). As a result, the babysitter's and neighbors' conduct is of no consequence to the search's Fourth Amendment legality. Second, police may view what the private party put in their hands, regardless of the private party's actions, as long as the police did not unreasonably exceed the scope of the private party's viewing. *See Jacobsen*, 466 U.S. at 115-18. Here, the police viewed a tape already viewed and made available to them by the babysitter and neighbors. The police's viewing was consistent with the babysitter's and neighbors' antecedent actions and was thereby lawful under the Fourth Amendment. *See also United States v. Simpson*, 904 F.2d 607, 609-10 (11th Cir. 1990) (police could legally view elicited tapes found in package and already viewed by Federal Express security agents without obtaining search warrant).

¶3 Bever knowingly and voluntarily waived his right to counsel, regardless of the colloquy's adequacy. A defendant cannot complain if the prosecution shows a knowing and voluntary waiver. *See State v. Klessig*, 211 Wis. 2d 194, 206-07, 564 N.W.2d 716 (1997). Here, Bever proceeded with standby counsel, who gave Bever advice during the trial. In postconviction proceedings, Bever's standby counsel testified that Bever understood the basic risks and rewards of going to trial pro se. Bever knew that he was not schooled in the law and that he had only a layman's understanding. On the other hand, he expected to reap advantages from self-representation, thereby having a platform to expound his views through questioning and argument, without having to testify and subject himself to cross-examination. While Bever denied these claims and disputed whether he knew the pitfalls of representing himself, the trial court was entitled to believe the contrary testimony of Bever's standby counsel. The trial court is the judge of the credibility of witnesses and the weight of their testimony. *See State v. Poellinger*, 153 Wis. 2d 493, 504, 451 N.W.2d 752 (1990). Thus, we will not disturb the trial court's findings and ultimate conclusions.

By the Court.—Judgment and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.

