COURT OF APPEALS
DECISION
DATED AND FILED

April 03, 2007

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2005AP2175-CR **Cir. Ct. No. 2003CF2648**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT I

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

BRIAN HAROLD DUCHOW,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: MICHAEL B. BRENNAN, Judge. *Reversed and cause remanded.*

Before Wedemeyer, P.J., Curley and Kessler, JJ.

¶1 KESSLER, J. Brian Duchow appeals from the trial court's order refusing to suppress an electronic recording of Duchow's statements to, and the sounds of his actions toward, Jacob M., a minor, which were recorded

surreptitiously on a voice-activated recorder placed in Jacob's backpack by his parents. The statements occurred on a closed school bus when no persons other than Duchow and Jacob were present. The parents turned the recording over to the Milwaukee Police Department which ultimately charged Duchow with felony child abuse causing bodily harm. The trial court denied Duchow's motion to suppress the contents of the recording and evidence derived therefrom. Duchow pled guilty to the felony charge, maintaining his right to appeal the denial of the suppression motion under WIS. STAT. § 971.31(10) (2003-04).[1] We conclude that the statements were an oral communication under WIS. STAT. § 968.31(2)(c), and also that under WIS. STAT. § 968.27(12), that the parents in this case vicariously consented on behalf of their child to the electronic interception. However, because the resulting one-party consent recording was not obtained in cooperation with a law enforcement investigation, which would have brought the interception under color of law, we must reverse.

Background

¶2 Jacob M., born November 10, 1993, is a child with Down Syndrome, is diagnosed with Attention Deficit Hyperactivity Disorder, and is considered a child with special needs. Jacob rode to and from school on a small school bus which seats approximately six to eight children. Duchow, at all times material to this case, was the driver of that bus. Jacob was always the first child picked up for the bus ride to school. Before this incident, Duchow filed written complaints with the school complaining of Jacob spitting at him. Jacob's parents were concerned

[1] All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

about relatively recent negative changes in Jacob's behavior,[2] which did not occur until Jacob began riding with Duchow. Jacob's parents feared that he was being verbally and physically abused by Duchow. Jacob's parents did not contact law enforcement about their concerns, but instead, on April 29, 2003, put a voice-activated recording device in Jacob's backpack before he got on the school bus. Apparently after listening to the recording themselves, Jacob's parents contacted the police about the contents of the tape recording. Milwaukee Police Officer Steven Wells listened to the recording in the presence of Jacob and his parents.

¶3 After listening to the recording, Officer Wells interviewed Duchow. The police never conducted an electronic interception independently, or with the cooperation of Jacob's parents. Sometime after interviewing Duchow, Officer Wells referred the matter to the Milwaukee County District Attorney, who charged Duchow with intentionally causing bodily harm to a child and with disorderly conduct in violation of WIS. STAT. §§ 948.03(2)(b) and 947.01. The contents of the tape recording are described in detail in the complaint. The trial court denied Duchow's motion to suppress the recording. Thereafter, Duchow pled guilty to the felony charge, and the disorderly conduct charge was dismissed. This appeal followed.[3]

---

[2] The complaint recounts the following parental concerns, claiming that Jacob spat at the bus driver, kicked the family dog, punched his toys, cried at school when it was time to get on the bus to go home, and did not want to get on the bus to go to school.

[3] WISCONSIN STAT. § 971.31(10) states:

> An order denying a motion to suppress evidence or a motion challenging the admissibility of a statement of a defendant may be reviewed upon appeal from a judgment of conviction notwithstanding the fact that such judgment was entered upon a plea of guilty.

¶4 The issue before us is whether, under WIS. STAT. §§ 968.27-.37, the Wisconsin Electronic Surveillance Control Law (WESCL), the recording, and the information from the recording, is admissible as evidence against Duchow.

Standard of Review

¶5 We review questions of statutory interpretation *de novo*. ***State v. Stenklyft***, 2005 WI 71, ¶7, 281 Wis. 2d 484, 697 N.W.2d 769. Statutory interpretation begins with the statute's text; we give the text its common, ordinary, and accepted meaning, except that we give technical or specially defined words their technical or special definitions. ***State ex rel. Kalal v. Circuit Court for Dane County***, 2004 WI 58, ¶45, 271 Wis. 2d 633, 681 N.W.2d 110. We interpret statutory language "in the context in which it is used; not in isolation but as part of a whole; in relation to the language of surrounding or closely-related statutes; and reasonably, to avoid absurd or unreasonable results." ***Id.***, ¶46. In construing a statute, we give deference to the policy choices made by the legislature in enacting the law. ***Id.***, ¶44. We also consider the scope, context and structure of the statute itself. ***Id.***, ¶¶46, 48. "'If this process of analysis yields a plain, clear statutory meaning, then there is no ambiguity, and the statute is applied according to this ascertainment of its meaning.'" ***Id.***, ¶46 (citation and internal quotations omitted).

Wisconsin Electronic Surveillance Control Law

¶6 Before 1970, with three very narrow exceptions,[4] two Wisconsin statutes made electronic interceptions completely inadmissible in the courts of this state. The first, WIS. STAT. § 885.36 (1967), stated:

[4] WISCONSIN STAT. § 885.365(2) (1967) included limited exceptions to the blanket prohibition against intercepted telephone conversations for telephone companies engaged in (continued)

> **Wire tapping.** Evidence obtained directly or indirectly as a result of the interception of a communication, by telephone or telegraph, shall be totally inadmissible in the courts of this state.

The second, WIS. STAT. § 885.365 (1967), stated:

> **Recorded telephone conversation.** (1) Evidence obtained as the result of the use of voice recording equipment for recording of telephone conversations, by way of interception of a communication or in any other manner, shall be totally inadmissible in the courts of this state.

The pre-1970 statutes established that no communication interceptions were permitted, except the limited class specifically authorized in § 885.365(2) (1967). There were no methods to obtain court authorization for interceptions, and no permission for one-party consent recordings, whether obtained "under color of law" or otherwise.

¶7 In 1970, the blanket prohibition was significantly modified and specific interceptions and limited disclosures of those interceptions and derivative evidence were permitted. The WESCL was adopted as WIS. STAT. §§ 968.27 through 968.33 (1969). *See* 1969 Wis. Act 427. Act 427 took effect in 1970. It contained a comprehensive statutory system for permitting court-authorized electronic surveillance, allowing such surveillance to be shared among law enforcement, allowing such surveillance to be used in court, making "not unlawful" certain interceptions that were not court-authorized, but providing no permission to use the unauthorized interceptions in court. In addition, violation of the WESCL, both as to interception not authorized by a court and as to disclosures

---

equipment repair and maintenance or employee supervision, and for fire and police to investigate false alarms. An interception announced on a public telephone before a call began was also admissible.

not specifically allowed by statute, became a felony. The original WESCL contained the following provisions material to this case:

> **Definitions.**
>
> ….
>
> (2) "Oral communication" means any oral communication uttered by a person exhibiting an expectation that such communication is not subject to interception under circumstances justifying the expectation.
>
> ….[5]

WISCONSIN STAT. § 968.27 (1969).

> **Authorization for disclosure and use of intercepted wire or oral communications.** (1) *Any investigative or law enforcement officer* who, by any means authorized by ss. 968.28 to 968.34 or 18 USC 119, has obtained knowledge of the contents of any wire or oral communication, or evidence derived therefrom, may disclose such contents to another investigative or law enforcement officer only to the extent … disclosure is appropriate to the proper performance of the official duties of the officer making or receiving the disclosure.
>
> (2) *Any investigative or law enforcement officer* who, by any means authorized by ss. 968.28 to 968.34 or 18 USC 119, has obtained knowledge of the contents of any wire or oral communication or evidence derived therefrom may use such contents only to the extent such use is appropriate to the proper performance of his official duties.
>
> (3) *Any person* who has received, by any means authorized by ss. 968.28 to 968.34 or 18 USC 119 or by a like statute of any other state, *any information concerning a wire or oral communication or evidence derived* therefrom intercepted in accordance with ss. 968.28 to 968.34, *may*

[5] WISCONSIN STAT. § 968.28 (1969) entitled: Application for court order to intercept communications. This statute sets forth who may apply for an order to intercept wire, electronic or oral communications, what courts can authorize these interceptions, and under what circumstances and for what offenses courts can authorize these interceptions.

> *disclose* the contents of that communication or such derivative evidence *only while giving testimony* under oath or affirmation in any proceeding in any court or before any magistrate or grand jury in this state, or in any court of the United States or of any state, or in any federal or state grand jury proceeding.
>
> ….[6]

WISCONSIN STAT. § 968.29 (1969).

> **Interception and disclosure of wire or oral communications prohibited.** (1) Except as otherwise specifically provided in ss. 968.28 to 968.30, whoever commits any of the acts enumerated in this section may be fined not more than $10,000 or imprisoned not more than 5 years or both:
>
> (a) Intentionally intercepts, attempts to intercept or procures any other person to intercept or attempt to intercept, any wire or oral communication;
>
> (b) Intentionally uses, attempts to use or procures any other person to use or attempt to use any electronic … device to intercept any oral communication;
>
> (c) Discloses … to any other person the contents of any … oral communication, knowing … that the information was obtained through the interception of … oral communication in violation of this section…;
>
> (d) Uses … the contents of any … oral communication, knowing … that the information was

[6] WISCONSIN STAT. § 968.29(4) (1969) provides that privileged communications remain privileged even if intercepted.

WISCONSIN STAT. § 968.29(5) (1969) provides that when law enforcement learns, through authorized interceptions, information relating to offenses not identified in WIS. STAT. § 968.28, this information can be disclosed to and within law enforcement under § 968.29(1) and (2), and this information can also be disclosed under subsec. (3) when approved by the judge who issued the original order, but only if permission is requested within forty-eight hours of getting the unauthorized information.

Detailed procedures for obtaining court authorization for interceptions are provided in WIS. STAT. § 968.30 (1969) and other sections of the WESCL statute. They are not reproduced here because they do not bear on this case.

obtained through the interception of … oral communication in violation of this section…; or

(e) Intentionally discloses the contents of any oral … communication obtained by authority of ss. 968.28, 968.29 and 968.30, except as therein provided.

….[7]

(2) It is *not unlawful* under ss. 968.28 to 968.34:

(a) For an … employe … of any telephone public utility … to intercept, disclose or use that communication in the normal course of his employment….

(b) *For a person acting under color of law to* intercept a wire or oral communication, *where such person is a party to the communication* or one of the parties to the communication has given prior consent to such interception.

(c) *For a person not acting under color of law to* intercept a wire or oral communication *where such person is a party to the communication* or where one of the parties to the communication has given prior consent to such interception unless such communication is intercepted for the purpose of committing any criminal or tortious act in violation of the constitution or laws of the United States or of any state or for the purpose of committing any other injurious act.

(d) Any person whose wire or oral communication is intercepted, disclosed or used in violation of this chapter [ss. 968.28 to 968.33] shall 1) have a civil cause of action against any person who intercepts, discloses or uses … such communication, and 2) be entitled to recover … [defined actual damages, punitive damages and reasonable attorney fees and reasonable litigation costs].

….[8]

[7] WISCONSIN STAT. § 968.31(f) (1969) prohibits intentional alteration of intercepted information.

[8] The remainder of WIS. STAT. § 968.31(2) (1969) notes that it is "not unlawful" under WIS. STAT. §§ 968.28 to 968.33 (1969) to intercept commercial radio or governmental public service transmissions, including police and fire communications, marine and aeronautical communications; engage in conduct prohibited by § 633, or excepted from application of § 705(a) (continued)

WISCONSIN STAT. § 968.31 (1969). (Emphasis added.)

¶8 As we see, in the 1969 version of the Wisconsin Statutes, WIS. STAT. § 968.27 defined terms. WISCONSIN STAT. § 968.29 (1969) described when and how court-authorized interceptions could be disclosed and used, while WIS. STAT. § 968.31 (1969) described penalties for violations of the WESCL and carved out specific exceptions for conduct that would otherwise be in violation of the statute. The original WESCL specifically permitted disclosure only of information from "authorized" interceptions and then only under three circumstances. Section 968.29(1) permitted disclosure *among* law enforcement officers who were performing their official duties. Section 968.29(2) permitted disclosure *by* law enforcement officers in the performance of their official duties. Section 968.29(3) permitted disclosure by "[a]ny person … only while giving testimony under oath … in any proceeding in any court or before any magistrate or grand jury." All of these permitted disclosures were limited to "authorized" disclosures. There was no provision in § 968.29 or elsewhere in the WESCL permitting private electronic interceptions to which a party to the conversation consented, but which were not "authorized" by a court, even if the recordings were obtained by cooperating police informants. Likewise, no other statutory provisions made such prohibited

---

by § 705(b) of the Communications Act of 1934; for users of same frequency to intercept transmissions, including the providers of the system; to use a trap and trace device or pen register; or for a communications provider to record the beginning and ending of transmissions to protect provider from fraudulent, unlawful or abusive use of its service.

WISCONSIN STAT. § 968.31(2m) (1969) provides for a civil cause of action by the victim of an unauthorized interception, and allows for recovery of actual and punitive damages and reasonable attorney fees.

WISCONSIN STAT. § 968.31(3) (1969) provides that good faith reliance on a court order or on WIS. STAT. § 968.30(7) (1969) provides a complete defense to any civil or criminal action brought under WIS. STAT. §§ 968.28-.33 (1969).

interceptions admissible in court. So intent was the legislature on limiting electronic surveillance—either "under color of law" or privately—that § 968.31(1) imposed serious criminal penalties both for unauthorized electronic interceptions and for disclosure of oral communications not specifically permitted by the WESCL.

¶9 Cases involving one-party consent interceptions quickly made their way into the courts. In 1971, our supreme court decided ***State ex rel. Arnold v. County Court of Rock County***, 51 Wis. 2d 434, 187 N.W.2d 354 (1971), a case which involved the surreptitious recording of conversations with a public official who was later accused of soliciting a bribe. ***Id.*** at 436-37. The recordings were consented to by a private citizen, but the interception devices were installed and orchestrated by the police. ***Id.*** There was no mention in the decision of prior court authorization under WIS. STAT. § 968.28 (1969) to conduct the surveillance and install the interception devices.[9] ***Arnold***, 51 Wis. 2d at 439, 443. The court discusses, among other things, the distinctions between § 968.28, which limits authorization for electronic interception, WIS. STAT. § 968.29 (1969), which permits disclosure of *authorized* interceptions (only in testimony before a court, if the information comes from a person not acting under color of law), and WIS. STAT. § 968.31(2)(b) (1969), which exempts from criminal penalties a person not acting under color of law who consents to the interception. ***Arnold***, 51 Wis. 2d at 440-44. The court explained that a "not unlawful" interception is not the same under the statute as an "authorized" interception and simply because the interception was "not unlawful" does not necessarily make the interception a

[9] The interceptions were "not unlawful" under WIS. STAT. § 968.31(2)(b) and (c) (1969), but the opinion makes no reference to the interceptions being "authorized" under WIS. STAT. § 968.28 (1969).

matter of permitted disclosure: "While making such interception not unlawful, sec. 968.31 (2) (b), does not "authorize" it as a procedure which is done by sec. 968.30 requiring an application for electronic surveillance to the circuit court. Interception is one thing; disclosure as evidence in court is another." ***Arnold***, 51 Wis. 2d at 442. Perhaps because the opinion describes no purely private-party interception, there is no discussion by the ***Arnold*** court of any legal or policy differences that may exist between a purely private interception and one orchestrated by law enforcement with the consent and cooperation of the private party. Both would have been "not unlawful" under § 968.29(2), but neither would either have been "authorized" because the interception was not ordered by a court under WIS. STAT. § 968.30 (1969). Consequently, the interception was not in the class for which disclosure was permitted by § 968.29. To properly enforce the § 968.29 limitations, the ***Arnold*** court concluded that a writ of prohibition against admission of the intercepted conversations was required. ***Id.***, 51 Wis. 2d at 444.

¶10 In ***State v. Waste Management of Wisconsin, Inc.***, 81 Wis. 2d 555, 261 N.W.2d 147 (1978), a private party self-recorded conversations he had with another person. ***Id.*** at 569. The party then gave the recordings to law enforcement. ***Id.*** Law enforcement provided the party with an interception device which he wore and again surreptitiously recorded conversations with the other person. ***Id.*** The court concluded that WIS. STAT. § 968.29(3) (as it existed in 1978)[10] did not prohibit a private party from disclosing his personal electronic interception, in which he participated, to law enforcement. ***Waste Mgmt.***, 81 Wis. 2d at 573. The court reaffirmed its decision in ***Arnold*** that one-party consent

[10] WISCONSIN STAT. § 968.29(3) was not modified from its creation in 1971 until 1987 Wis. Act 399.

interceptions are not unlawful in Wisconsin, but are not specifically "authorized" by WIS. STAT. §§ 968.28 to 968.33 (1977). ***Waste Mgmt.***, 81 Wis. 2d at 572-73. Focusing apparently on the police-assisted interceptions, the court explained that ***Arnold*** teaches that such interceptions (one-party consent under color of law) are not admissible as evidence.[11] ***Waste Mgmt.***, 81 Wis. 2d at 573. The one-party consent interceptions were not submitted as evidence either before the grand jury or at the trial, ***id.*** at 569, but rather were turned over by the interceptor in order to obtain immunity from prosecution, ***id.*** at 571. Because the recordings of the electronic interception were not admitted into evidence, the court held that there was no violation of the WESCL. ***Id.*** at 572.

¶11 In 1989, the legislature made a significant change to the WESCL by renumbering the former WIS. STAT. § 968.29(3) (1987-88) to WIS. STAT. § 968.29(3)(a) (1989-90), and adding § 968.29(3)(b) (1989-90).[12] Section § 968.29(3)(b) states:

> In addition to the disclosure provisions of par. (a), any person who has received, in the manner described under s. 68.31(2)(b), any information concerning a wire, electronic or oral communication or evidence derived therefrom, may disclose the contents of that communication or that derivative evidence while giving testimony under oath … in any proceeding described in par. (a) in which a person is accused of any act constituting a felony, and only if the party who consented to the interception is available to

[11] Because there was no provision permitting purely private-party interceptions under the then-existing statutes, we conclude that the court based its decision on the interceptions that were permitted, though not authorized—that is, the police-assisted interceptions which would certainly be "under color of law." To read the decision in ***State ex rel. Arnold v. County Court of Rock County***, 51 Wis. 2d 434, 187 N.W.2d 354 (1971), otherwise would suggest the court permitted conduct which the legislature had not authorized. We decline to leap to such a precipitous conclusion.

[12] 89 Wis. Act 121 at § 113 created WIS. STAT. § 968.29(3)(b), which became effective on January 31, 1990.

> testify at the proceeding or if another witness is available to authenticate the recording.

89 Wis. Act 121, § 113. WISCONSIN STAT. § 968.31(2)(b) (1989-90)[13] described one-party consent interceptions obtained under color of law as "not unlawful." This change to § 968.29 now allowed court testimony based upon a one-party consent interception where the consenting person was acting "under color of law." However, use was strictly limited to a proceeding involving WIS. STAT. ch. 161 offenses (drug offenses) and then only if the consenting party was available at trial or the recording could be authenticated by another available witness. 89 Wis. Act 121, § 13. Essentially, this change reflects a determination by the legislature that detection and prosecution of drug offenses was so important that societal privacy expectations could be somewhat diminished. Limited surreptitious electronic surveillance involving a witness cooperating with law enforcement would now be permitted without a prior court surveillance authorization.

¶12 In 1995, the legislature removed the limitation to drug offenses by removing the reference to WIS. STAT. ch. 161. *See* 95 Wis. Act 30, § 1. Private-party consent interceptions, and derivative evidence, could now be used in testimony in any felony proceeding if the interception was obtained by someone acting "under color of law." *See* WIS. STAT. § 968.31(2)(b) (1995-96).[14] No changes to WIS. STAT. § 968.29 authorized disclosure of interceptions and

[13] WISCONSIN STAT. § 968.31(2) (1989-90) states: "It is not unlawful under ss. 968.28 to 968.37: … (b) For a person *acting under color of law* to intercept a wire, electronic or oral communication, where the person is a party to the communication or one of the parties to the communication has given prior consent to the interception" (emphasis added).

[14] WISCONSIN STAT. § 968.31(2)(b) (1995-96) states: "It is not unlawful under ss. 968.28 to 968.37: … For a person acting under color of law to intercept a wire, electronic or oral communication, where the person is a party to the communication or one of the parties to the communication has given prior consent to the interception."

derivative evidence by a person *not* acting under color of law, that is, a person described in § 968.31(2)(c).[15]

¶13 The Wisconsin Statutes do not specifically define the phrase "under color of law"; however, the United States Civil Rights Act of 1964, codified in part in 42 U.S.C. § 1983, has provided the generally understood meaning of this common legal term. Wisconsin has accepted that generally understood meaning. "A private person nevertheless acts under color of law for purposes of [a federal civil rights action] if that person is 'a willful participant in joint activity with the State or its agents.'" ***Prahl v. Brosamle***, 98 Wis. 2d 130, 137, 295 N.W.2d 768 (Ct. App. 1980), *abrogated on other grounds by* ***Wilson v. Lane***, 526 U.S. 603 (1999) (citations omitted). "For all practical purposes … 'color of law' and state action are the same … as distinct from purely private conduct." ***Cameron v. City of Milwaukee***, 102 Wis. 2d 448, 454, 307 N.W.2d 164 (1981) (citations and one set of quotation marks omitted). In the context of the WESCL, it is apparent that the legislature intended that a person acting "under color of law" be distinguished from a "law enforcement officer." The context of the WESCL statutes indicates

---

[15] WISCONSIN STAT. § 968.31(2) (1989-90) states in relevant part:

> It is not unlawful under ss. 968.28 to 968.37:
>
> ….
>
> (c) For a person *not* acting under color of law to intercept a wire, electronic or oral communication where the person is a party to the communication or where one of the parties to the communication has given prior consent to the interception unless the communication is intercepted for the purpose of committing any criminal or tortious act in violation of the constitution or laws of the United States or of any state or for the purpose of committing any other injurious act.

(Emphasis added.) Section 968.31(2)(c) has not been modified since 1987 Wis. Act 399.

that the legislature intended that "any person" who was acting "under color of law" refers to a private citizen who is actively cooperating with a law enforcement investigation, because there are separate sections of the statute setting limits on law enforcement interception and disclosure that differ from other "persons," and the limits for the other "persons" differ depending on whether or not they are "acting under color of law."

¶14 In 2005, our supreme court revisited one-party consent interceptions in ***State v. Maloney***, 2005 WI 74, 281 Wis. 2d 595, 698 N.W.2d 583, applying the now significantly modified WESCL. ***Id.***, ¶31. Maloney was suspected in the murder of his estranged wife. ***Id.***, ¶6. Unbeknownst to him, his girlfriend contacted the police and offered to record conversations with him[16] because she believed the conversations would prove his innocence. ***Id.***, ¶7. The police accepted the offer, and arranged for video recording equipment in a Las Vegas hotel room. ***Id.*** The girlfriend's expectations turned out to be unfulfilled; the conversations contained substantial inculpatory admissions and information from Maloney. ***Id.***, ¶8. He was charged with several felonies as a result of the video recordings. ***Id.***, ¶9. These were played for the jury. ***Id.***, ¶10. Maloney was convicted. ***Id.*** On appeal he challenged his trial attorney's failure to try to suppress the video recordings. ***Id.***

¶15 When the court reviewed the probability of success of a motion to suppress the intercepted recordings in ***Maloney***, the statutes contained specific permission for use in felony proceedings of private-party consent recordings

[16] There is no suggestion in ***State v. Maloney***, 2005 WI 74, 281 Wis. 2d 595, 698 N.W.2d 583, that the girlfriend ever recorded any conversations in which police assistance was not involved.

obtained "under color of law." As previously discussed, in 1989-90,[17] the WESCL included WIS. STAT. § 968.29(3)(b), which had not been part of the statute when ***Arnold*** was decided. Although WIS. STAT. § 968.31(2)(c) provided that interceptions by persons "*not* acting under color of law" were "not unlawful" under described circumstances, no similar modification of § 968.29 specifically permitted disclosure of interceptions obtained by such a person.

¶16 When suppression of the recordings in ***Arnold*** was decided, the only statutory provision dealing with the admissibility of recordings obtained by someone other than a law enforcement officer allowed the person to testify about the contents of the interception in court, but only if the interception was authorized by specific statutory provisions. Specifically, WIS. STAT. § 968.29(3) (1969) stated:

> *Any person* who has received, by any means authorized by ss. 968.28 to 968.34 or 18 USC 119 or by a like statute of any other state, *any information concerning a wire or oral communication or evidence derived* therefrom intercepted in accordance with ss. 968.28 to 968.34, *may disclose* the contents of that communication or such derivative evidence *only while giving testimony* under oath or affirmation *in any proceeding in any court* or before any magistrate or grand jury in this state, or in any court of the United States or of any state, or in any federal or state grand jury proceeding.

(Emphasis added.)

¶17 The focus of the court's analysis in ***Maloney*** was on whether the recordings were illegally obtained, and thus subject to suppression.[18] The witness

[17] WISCONSIN STAT. § 968.29(3)(a) is identical to the prior § 968.29(3). The earlier version was changed to (a), and new language added in (b). *See* 89 Wis. Act 121, § 113.

[18] *See* ***Mapp v. Ohio***, 367 U.S. 643, 656 (1961) (the exclusion of evidence illegally and improperly obtained is a long-standing rule); ***State v. Hochman***, 2 Wis. 2d 410, 419, 86 N.W.2d (continued)

was at all times cooperating with law enforcement. She was at all times a person acting "under color of law" when the recordings were made. Maloney was charged with several felonies. Disclosure occurred during the felony trial. All the statutory requirements of WIS. STAT. § 968.29(3)(b), in effect at the time, permitted limited disclosure of interceptions obtained under color of law in private party consent recordings, and did not require that the recordings had been "authorized" by a court. *See* WIS. STAT. § 968.29(3)(b) (1997-98).[19]

¶18 The ***Maloney*** court makes no reference to ***Arnold***. This is hardly surprising as statutory changes that intervened between ***Arnold*** in 1971, and ***Maloney*** in 2005, compelled a different outcome on the question of admissibility of private-party consent interceptions obtained under color of law. As we have explained, the statutes in effect in 2005 clearly permitted use in felony proceedings of one-party consent recordings obtained under color of law, although provisions in effect in 1971 did not. Consequently, there was no need for the court to analyze whether the recordings would also have been admissible had they been purely private-party interceptions. Since those facts were not before the court, we do not understand the court to have decided that question.[20] *See* ***Dairyland***

---

446 (1957) (general rule that evidence obtained in violation of a constitutional right must be suppressed).

[19] The most recent modification to WIS. STAT. § 968.29 was made in 1995 Wis. Act 30 while WIS. STAT. § 968.31(2)(b) has remained unchanged since the enactment of 1987 Wis. Act 399.

[20] The court rejected an alternative argument Maloney raised for the first time on appeal, namely that the girlfriend did *not* make the recordings under color of law. ***Maloney***, 281 Wis. 2d 595, ¶¶34, 35. The court states that it does not matter whether the interceptions were under color of law because the recordings would be admissible under either circumstance. ***Id.*** This comment by the court features prominently in the State's argument for admission of the tapes in this case. We believe that the State's emphasis is unfortunate as there could be no serious question in ***Maloney*** as to the involvement of law enforcement in all electronic interceptions. The supreme court found there was no factual basis to claim that the girlfriend acted other than under color of (continued)

Greyhound Park, Inc. v. Doyle, 2006 WI 107, ¶335, 295 Wis. 2d 1, 719 N.W.2d 408 (Abrahamson, C.J., concurring) ("As various members of this court have said, we should not 'reach out and decide issues' that were not presented to the court by the parties") (citing ***Town of Beloit v. County of Rock***, 2003 WI 8, ¶72, 259 Wis. 2d 37, 657 N.W.2d 344 (Abrahamson, C.J., dissenting)); ***State v. Peters***, 2003 WI 88, ¶35, 263 Wis. 2d 475, 665 N.W.2d 171 (Abrahamson, C.J., concurring) ("As I have written before, there is a growing tendency for this court to reach out and decide issues that are not squarely presented.").

¶19 There are two questions before us in this case. First, whether the recordings made by Jacob's parents, when they did not personally participate in the conversations that were recorded, are permitted under the WESCL. Second, if the recording is permitted, is the recording and derivative evidence admissible against Duchow. Both are questions of first impression in Wisconsin.

Were the parents' recordings permitted by WESCL?

¶20 In order to be covered by WESCL, the recorded statements must be "oral communications" as defined by statute.[21] The statute covers "any oral communication uttered by a person exhibiting an expectation that the communication is not subject to interception under circumstances justifying the expectation." WIS. STAT. § 968.27(12). This has been held to mean that both a subjective expectation, and an objectively reasonable expectation, that the communication is not subject to interception is required. ***State v. Smith***, 149

---

law, ***id.***, ¶35, hence the comment about what effect the law would have on facts not before the court, and not raised before the trial court, should not be considered the principal holding of the case.

[21] *See* WIS. STAT. § 968.27(12).

Wis. 2d 89, 94-95, 438 N.W.2d 571 (1989).[22] The parties have stipulated that Duchow had a subjective expectation that his statements on the school bus would not be intercepted. They disagree as to whether such expectation was objectively reasonable.[23] The trial court initially concluded that the intercepted statements *were* an oral communication under § 968.27(12) and suppressed the interceptions. On the State's motion to reconsider, which included a more detailed legal analysis than previously provided, the trial court reversed its earlier ruling. On reconsideration, the trial court held that the statements *were not* an oral communication under § 968.27(12) because there was not an objectively reasonable expectation that the communications were private.

¶21 Key to a determination of whether Duchow had an objectively reasonable expectation of privacy, or of being free from interception, is an examination of the circumstances surrounding Duchow's communications. Three federal circuit courts have analyzed this prong of the federal wiretapping statute, to which Wisconsin's statute is substantially similar.[24] The Sixth Circuit, in ***Boddie v. American Broadcasting Cos. Inc.***, 731 F.2d 333 (6th Cir. 1984),

[22] Although the court in ***State v. Smith***, 149 Wis. 2d 89, 104-05, 438 N.W.2d 571 (1989), uses the term "reasonable expectation of privacy," it is apparent from the context of the disputed communication in ***Smith*** that the term was the equivalent of a reasonable expectation of not being intercepted because the communication was on a cordless phone and could not have been overheard in any way other than interception. ***Id.*** at 104-05.

[23] At oral argument, there was discussion as to whether the test was a reasonable expectation of "privacy" or a reasonable expectation of not being "intercepted." The statute refers to interception; it does not use the word "privacy." However, we see no need in this case to distinguish between the two terms.

[24] *See* ***State v. Riley***, 2005 WI App 203, ¶10, 287 Wis. 2d 244, 704 N.W.2d 635 (citing ***State ex rel. Arnold v. County Court of Rock County***, 51 Wis. 2d 434, 443, 187 N.W.2d 354 (1971)) ("The WESCL is patterned after Title III of the federal Omnibus Control and Safe Streets Act of 1968," 18 U.S.C. § 2510, *et seq*.).

examined the expectation of privacy under 18 U.S.C. § 2510(2). ***Boddie*** involved the surreptitious recording of Boddie's conversation with ABC reporters. ***Id.***, at 731 F.2d 335, 339. The court concluded that whether Boddie had a reasonable expectation of privacy in her conversation with the reporters was a question of fact and noted that "there 'may be some circumstances where a person does not have an expectation of total privacy, but still would be protected by the statute because he was not aware of the specific nature of another's invasion of his privacy.'" ***Id.***, at 339 n.5 (citation omitted).

¶22 In ***Walker v. Darby***, 911 F.2d 1573 (11th Cir. 1990), a postal employee sued his supervisors for electronically intercepting his hallway conversations with third parties. In interpreting 18 U.S.C. § 2510(2), the Eleventh Circuit noted that while a plaintiff "might have expected conversations uttered in a normal tone of voice to be overhead by those standing nearby, it is highly unlikely that he would have expected his conversations to be electronically intercepted and monitored in an office in another part of the building." ***Walker***, 911 F.2d at 1579.

¶23 Finally, the Fifth Circuit, in ***Kee v. City of Rowlett***, 247 F.3d 206 (5th Cir. 2001), surveyed decisions across the country and synthesized a list of six circumstances which courts have considered in determining whether an individual had an objectively reasonable expectation that his or her communications were not being intercepted, *i.e.*, of privacy as to their communications. ***Id.***, 247 F.3d at 213-15. These include:

> (1) the volume of the communication or conversation; (2) the proximity or potential of other individuals to overhear the conversation; (3) the potential for communications to be reported; (4) the affirmative actions taken by the speakers to shield their privacy; (5) the need for technological enhancements to hear the communications; and (6) the place or location of the oral communications as it relates to the subjective expectations of the individuals who are communicating.

Id. (citations and footnotes omitted).

¶24 One of the factors which the trial court cited in its decision to grant the State's motion for reconsideration and conclude that Duchow had no objectively reasonable expectation of non-interception was the fact that Duchow's communications took place on a school bus, a semi-public location. The trial court cited to ***United States v. Longoria***, 177 F.3d 1179 (10th Cir. 1999), and ***Kemp v. Block***, 607 F. Supp. 1262 (D. Nev. 1985). In ***Longoria***, the defendant challenged audiotapes and videotapes of his conversations which were made by a police informant in Longoria's tire shop, a location "not accessible to the general public." ***Id.***, 177 F.3d at 1181, 1183. Longoria claimed that he had an objectively reasonable expectation of privacy because even though other individuals were present during the communications, Longoria was speaking in a foreign language. ***Id.*** at 1183. In ***Kemp***, the intercepted communications occurred in a semi-public instrument room through which other mechanics came in and out as necessary to conduct their work. ***Id.***, 607 F. Supp. at 1263-64. The courts in both instances found that the individuals had no objectively reasonable expectation of not having their communications intercepted because while the conversations took place in areas that were not accessible to the general public, there were others present and the speakers knew the others were present. ***Longoria***, 177 F.3d at 1183; ***Kemp***, 608 F. Supp. at 1264.

¶25 In the present case, Duchow made the intercepted statements when he and Jacob were the only people on the school bus. The bus is small, designed to transport six to eight children. The school bus doors were closed. There is no evidence that anyone who Duchow might reasonably have expected would be intercepting his statements was in the general vicinity. Consequently, we agree with the trial court's original conclusion that Duchow had an objectively

reasonable expectation that his communications with Jacob would not be intercepted. We conclude that Duchow's statements were oral communications under WIS. STAT. § 968.27(12).

¶26 There is no evidence that any court authorized recording Duchow's communication, nor that it was obtained "under color of law" because there was no law enforcement involvement in the interception. Thus, the interception is not one of those covered by the disclosure provisions of WIS. STAT. § 968.29(1), (2) or (3).

¶27 As a child, among other legal disabilities, Jacob is legally unable to consent to medical treatment, *see* WIS. STAT. § 48.023(1); enter into a contract, *see, e.g.*, ***Halbman v. Lemke***, 99 Wis. 2d 241; join the military, *see* WIS. STAT. § 48.023(1); or convey real property, *see* WIS. STAT. § 706.03(4). The record does not indicate that Jacob knew the voice-activated recorder was in his backpack. Jacob could not consent to the interception. Consequently, the recording becomes a private-party consent recording and "not unlawful" under WIS. STAT. § 968.31(2)(c) only if his parents can vicariously consent to the recording on Jacob's behalf.

¶28 Whether vicarious consent is permitted by WIS. STAT. § 968.31(2)(c) is a question of first impression in Wisconsin. Our courts have found implied consent under this statute when telephone conversations from a jail were recorded after inmates were advised generally that their calls may be monitored. *See* ***State v. Riley***, 2005 WI App 203, ¶16, 287 Wis. 2d 244, 704 N.W.2d 635.

> In sum, we conclude that Riley consented to the monitoring and recording of his outgoing telephone calls from … jail. He received meaningful notice that his phone calls were subject to surveillance, but nonetheless chose to proceed with his calls. Therefore, his communications were lawfully intercepted under the WESCL and the

> evidence derived from the interceptions is admissible as long as the authentication procedures set forth in WIS. STAT. § 968.29(3)(b) are met.

Id.

¶29 Vicarious consent has been discussed in other jurisdictions, both under the federal electronic surveillance law and under individual state laws.[25] Because the WESCL is patterned after the federal wiretapping law, the decisions of courts under that law are informative. We examine for guidance both decisions involving the federal wiretap statute and decisions of states with statutes similar to ours.

¶30 In ***Pollock v. Pollock***, 154 F.3d 601 (6th Cir. 1998), a father and his new wife taped conversations between the minor daughter and the mother. ***Id.*** at 603. The mother, upon hearing about the taping, began taping conversations between the daughter and the father and between the daughter and the father's wife. ***Id.*** The court, in determining whether the parents could consent on behalf of the children held:

> [T]hat as long as the guardian has a good faith, objectively reasonable basis for believing that it is necessary and in the best interest of the child to consent on behalf of his or her minor child to the taping of telephone conversations, the guardian may vicariously consent on behalf of the child to the recording.

[25] A thorough analysis of vicarious consent and the federal wiretapping statute was made in a 2005 law review article by an Idaho assistant prosecutor, Daniel R. Dinger, entitled, *Should Parents Be Allowed to Record a Child's Telephone Conversations When They Believe The Child is in Danger?: An Examination of the Federal Wiretap Statute and The Doctrine of Vicarious Consent in The Context of a Criminal Prosecution*, 28 SEATTLE U. L. REV. 955 (2005).

Id. at 610. The court, examining cases from the Seventh, Tenth and Second Circuits[26] involving the extension telephone exemption and parental taping of children's conversations, noted, in reaching its conclusion to adopt vicarious consent, "[w]e cannot attribute to Congress the intent to subject parents to criminal and civil penalties for recording their minor child's phone conversations out of concern for that child's well-being." ***Id.***, 154 at 610 (quoting ***Scheib v. Grant***, 22 F.3d 149, 154 (7th Cir. 1994)).

¶31 Federal trial courts have come to conclusions similar to those in ***Pollock***. In ***Thompson v. Dulaney***, 838 F. Supp. 1535 (D. Utah 1993), a case relied upon by the ***Pollock*** court in creating its standard for vicarious consent, a mother tape-recorded conversations between the father and the minor children. ***Id.***, 838 F. Supp. at 1537. Later, in a different proceeding, the father sought to suppress the recording. ***Id.*** at 1537-38. The court first noted that "[i]t is clear from the case law that Congress intended the consent exception to be interpreted broadly," with courts drawing the distinction "between whether a party had the legal capacity to consent and whether they actually consented." ***Id.*** at 1543. Because the children "lack[ed] *both* the capacity to consent and the ability to give actual consent," vicarious consent was appropriate, where the guardian had a good faith, objectively reasonable basis for believing that the eavesdropping was necessary and in the best interest of the child. ***Id.*** at 1543-44; *see also* ***Campbell v. Price***, 2 F. Supp. 2d 1186, 1191 (E.D. Ark. 1998) (Because Congress intended the consent exception in the federal wiretap statute be interpreted broadly, a parent may tape the telephone conversations between a child and other parent without

[26] *See* ***Scheib v. Grant***, 22 F.3d 149 (7th Cir. 1994); ***Newcomb v. Ingle***, 944 F.2d 1534 (10th Cir. 1991); ***Janecka v. Franklin***, 843 F.2d 110 (2d Cir. 1988); ***Anonymous v. Anonymous***, 558 F.2d 677 (2d Cir. 1977).

liability under Title III, if the interception is "founded upon a *good faith* belief that, to advance the child's best interests, it was necessary to consent on behalf of [the] minor child.").

¶32 State courts, though not unanimously, have also adopted vicarious consent as an exemption to both Title III and their own state wiretapping statutes. This has frequently occurred in the context of domestic relations cases. *See* ***Silas v. Silas***, 680 So. 2d 368, 371 (Ala. Civ. App. 1996) (parent must have a "good faith basis that is objectively reasonable for believing that the minor child is being abused, threatened, or intimidated by the other parent," based on the common law duty of the parents to protect their children); ***Cacciarelli v. Boniface***, 737 A.2d 1170, 1176 (N.J. Super. Ch. 1999) (court adopted the doctrine of vicarious consent, but admonished father that he should have gone to court and obtained authorization for subsequent tapings after hearing content of first tape).

¶33 Vicarious consent has also been approved in circumstances where the parents intercept conversations between their children and a third party. *See*, ***State v. Morrison***, 56 P.3d 63, 64 (Ariz. App. 2002) (mother concerned about her minor daughter's sexual relations with thirty-five-year-old man, justified mother's vicarious consent to recording conversations without either the daughter's or defendant's knowledge); ***Commonwealth v. Barboza***, 763 N.E.2d 547, 549, 552-53 (Mass. App. 2002) (based on concern that his minor son was having a sexual relationship with a fifty-seven-year-old man, the father could vicariously consent to record telephone conversations between the two without either's knowledge. The court saw "no reason why the rule should protect the defendant here from the consequences of the unlawful interception by a private citizen, a father, acting in the privacy of his own home, without any government involvement, to protect his child from sexual exploitation by the defendant."); ***State v. Diaz***, 706 A.2d 264,

270 (N.J. Super. Ct. App. Div. 1998) (audio portions of a videotape of the nanny abusing a child were admissible under a theory of vicarious consent on behalf of the infant); ***Alameda v. State***, 181 S.W.3d 772, 778 (Tex. App. 2005) (Texas Court of Appeals held "that as long as a parent has a good faith, objectively reasonable basis for believing that the taping of telephone conversations is in the best interest of the parent's minor child, the parent may vicariously consent to the recording on behalf of the child.").

¶34 Some courts have rejected the doctrine of vicarious consent. *See*, ***Bishop v. Georgia***, 526 S.E.2d 917, 921-22 (Ga. App. 1999) (Georgia statute required suppression of a recording made by the parents of a teenage girl after police had refused to assist them in recording the girl's conversations with an older man which contained sexual references and talk of killing the girl's parents.); ***Williams v. Williams***, 581 N.W.2d 777, 780[27] (Mich. App. 1998) (court refused to permit father to consent to recording telephone conversations between mother and their son holding that "this Court has no authority to create judicially the vicarious consent exception" based on the language of the statute); ***West Virginia Dep't of Health & Human Res. ex rel. Wright v. David L.***, 453 S.E.2d 646, 648 (W. Va. 1994) (paternal grandmother may not vicariously consent to recording conversations in grandchild's mother's home).

[27] In light of ***Pollock v. Pollock***, 154 F.3d 601 (6th Cir. 1998), ***Williams v. Williams***, 581 N.W.2d 777 (Mich. App. 1998), was reversed in ***Williams v. Williams***, 603 N.W.2d 114 (Mich. App. 1999), as to its finding that summary judgment was appropriate on the federal wiretapping claim. However, the court in the second ***Williams*** case specifically noted that "[w]e remain convinced by the statutory analysis in our prior opinion that if the Legislature had intended the result argued by [appellants], then it could have included such an exception in [the Michigan statute]." ***Id.*** at 116.

¶35 Under the Fourteenth Amendment Due Process Clause, it is "the fundamental right of parents to make decisions concerning the care, custody, and control of their children." ***Troxel v. Granville***, 530 U.S. 57, 66 (2000); ***In re Guardianship of Nicholas C.L.***, 2006 WI App 119, ¶16, 293 Wis. 2d 819, 719 N.W.2d 508. We conclude that vicarious consent falls both within the Fourteenth Amendment's Due Process Clause's recognition that parents have a responsibility to provide for the care and well-being of their children and the public policy underlying Wisconsin's Children's Code (WIS. STAT. ch. 48), especially WIS. STAT. § 48.01,[28] which states that "the best interests of the child" are always "of paramount consideration." The ***Pollock*** test requiring that a parent have a subjective good faith belief that intercepting the conversation is "necessary to protect the child from harm," ***id.***, 154 F.3d at 610, and that the belief is objectively reasonable, also provides an easily understood criteria by which to determine that the interception was not for the purpose of committing "an injurious act," when vicarious consent of a parent is offered as the consent required by WIS. STAT. § 968.31(2)(c). ***Pollock*** provides a test that we conclude balances the obligations of parents to act in their child's best interest with the privacy rights of the person whose conversation is being intercepted, and does so with deference to the legislative conclusion, described in § 968.31(2)(c), that one-party consent recordings by a person not acting under color of law are "not unlawful." The record reflects legitimate parental concerns for the safety and well-being of their minor child, based upon observations by the parents of negative changes in Jacob's behavior. Jacob's parents had an objectively reasonable basis to be

[28] *See* WIS. STAT. § 48.01(1): "This chapter may be cited as 'The Children's Code.' In construing this chapter, the best interests of the child or unborn child shall always be of paramount consideration…."

concerned for the safety of their child which justified their consent on Jacob's behalf to the interception of conversations between Jacob and Duchow. We conclude, therefore, that the recording here is a private-party consent interception which is not unlawful under § 968.31(2)(c).[29]

[29] We note that this case involves only the use in a felony proceeding of a one-party recording, made with vicarious consent of a parent on behalf of a child. We do not suggest that the same admissibility analysis which follows would apply in civil litigation. We are not considering here the impact of the limitations found in WIS. STAT. § 885.365 which provides:

> **Recorded telephone conversation. (1)** Evidence obtained as the result of the use of voice recording equipment for recording of telephone conversations, by way of interception of a communication or in any other manner, shall be totally inadmissible in the courts of this state in civil actions, except as provided in ss. 968.28 to 968.37.
>
> **(2)** Subsection (1) shall not apply where:
>
> (a) Such recording is made in a manner other than by interception and the person whose conversation is being recorded is informed at that time that the conversation is being recorded and that any evidence thereby obtained may be used in a court of law; or such recording is made through a recorder connector provided by the telecommunications utility as defined in s. 196.01 (10) or a telecommunications carrier as defined in s. 196.01 (8m) in accordance with its tariffs and which automatically produces a distinctive recorder tone that is repeated at intervals of approximately 15 seconds;
>
> (b) The recording is made by a telecommunications utility as defined in s. 196.01 (10), a telecommunications carrier as defined in s. 196.01 (8m) or its officers or employees for the purpose of or incident to the construction, maintenance, conduct or operation of the services and facilities of such public utilities, or to the normal use by such public utilities of the services and facilities furnished to the public by such public utility; or
>
> (c) The recording is made by a fire department or law enforcement agency to determine violations of, and in the enforcement of, s. 941.13.

¶36 That the recording is "not unlawful" does not end our inquiry. Two sorts of disclosures occurred in this case. First, the parents disclosed the interception to Officer Wells by playing the recording. Next, the district attorney disclosed not just the existence of the recording, but detailed the contents thereof in the criminal complaint. We examine these disclosures separately.

May the recording be turned over to law enforcement?

¶37 In 1978, our supreme court decided ***Waste Management*** in which a private party secretly recorded conversations with one of defendant's employees. ***Id.***, 81 Wis. 2d at 569. The recordings were justified by the party as done to protect himself from being accused of criminal activity. ***Id.*** at 571. The party turned the tapes over to law enforcement. ***Id.*** at 570. Defendant argued that the interceptions were not court authorized and thus could not be disclosed to law enforcement under WIS. STAT. § 968.29(1), (2) or (5). ***Waste Mgmt.***, 81 Wis. 2d at 571-72. The court explained that the statutes only limited admission of intercepted information as evidence in court, but did not prohibit turning over the recordings to law enforcement. ***Id.*** at 573 ("The … tapes were not 'authorized' under sec. 968.29 (3). They were turned over to a law enforcement agent and were not admitted as evidence. Sec. 968.29 (3) does not prohibit this use."). As in ***Waste Management***, there is no prohibition against a private party turning over a lawful consent recording to law enforcement in order to protect themselves, or by extension, their child.[30]

[30] The trial court initially came to the same conclusion, stating that the decision in ***State v. Waste Management of Wisconsin, Inc.***, 81 Wis. 2d 555, 26, N.W.2d 147 (1978),

> makes it quite clear that such a tape may be turned over to a law enforcement agent but may not be admitted as evidence under the statute. The plain language of the statute makes that clear as

(continued)

May the recording be used as evidence?

¶38 In 1995, this court determined, in ***State v. Gilmore***, 193 Wis. 2d 403, 535 N.W.2d 21 (Ct. App. 1995), that because the district attorney is a law enforcement officer authorized by WIS. STAT. § 968.29(2) to receive the communication from the police and to disclose the communications in the performance of his or her official duties, the State could refer in a criminal complaint to the contents of police-intercepted oral communications which had been disclosed to the district attorney. ***Gilmore***, 193 Wis. 2d at 405. The interception in ***Gilmore*** was apparently an interception by a person cooperating with police. ***Id.*** at 408.

¶39 Under the ***Gilmore*** rationale, if the interception in this case had been obtained "under color of law," that is, through police involvement, references to the interception in the complaint would be permitted. A repeat interception in the present case could have been supervised by law enforcement with the resulting information obtained "under color of law." That would have made the contents of such a recording admissible in this felony prosecution under WIS. STAT. § 968.29(3) and properly disclosed in the complaint. However, in the present case, Duchow pled guilty and therefore, the content of the interception was not used at trial. Whether the complaint itself, with disclosure of the content of the interception, would have been admissible at trial, we need not decide. ***Gross v. Hoffman***, 227 Wis. 296, 300, 277 N.W. 663 (1938) (need only decide dispositive issues).

> well. So that while the tape recording can be part of the criminal investigation, the tape recording itself would not be admissible at trial pursuant to the statute.

¶40 Jacob's parents acted responsibly and in the best interests of their child when they took reasonable action to protect their child from a reasonably suspected threat of harm. As the private party under the rationale of the ***Waste Management*** case, they promptly disclosed what they recorded to a law enforcement officer. There was nothing more appropriate they could have done under the circumstances. Likewise, the officer acted appropriately in investigating the information that properly came to his attention. He interviewed Duchow, and could properly communicate what he learned from the interview. *See* ***Gilmore,*** 193 Wis. 2d at 408.

¶41 However, the recording by Jacob's parents, while "not unlawful," was not one they obtained "under color of law." Therefore, law enforcement officers or agents were not permitted by WIS. STAT. § 968.29(3) to disclose the contents of the interception, because they had not obtained the interception from someone acting under color of law. *See* WIS. STAT. §§ 968.29(3)(b) and 968.31(2)(b). This problem might have been easily remedied if another secret recording under the supervision of the police had occurred. Had that step been taken, we have little doubt that such a follow-up interception would have been obtained under color of law and admissible under § 968.29(3).

¶42 For all the foregoing reasons, we conclude that Duchow's electronically-intercepted communications were "oral communications" under WIS. STAT. § 968.27(12), that Jacob's parents properly consented on his behalf to the electronic interception under WIS. STAT. § 968.31(2)(c), that they properly delivered the recording to law enforcement, and that law enforcement officers properly used the information they learned in their investigation. However, because the interception was not obtained under color of law, the contents of the interception were not admissible in the felony prosecution against Duchow under

WIS. STAT. § 968.29(3). Therefore, we reverse and remand to the trial court for further proceedings consistent with this opinion.

By the Court.—Judgment and order reversed and cause remanded.

Recommended for publication in the official reports.

¶43 CURLEY, J. (*concurring/dissenting*). I agree with the majority's conclusions that the recorded statements of Duchow were oral communications and that the child victim's parents could give vicarious consent to tape record the conversation the child victim had with Duchow. However, I disagree with the majority's conclusion that the tape recording was inadmissible.

¶44 ***State v. Maloney***, 2005 WI 74, 281 Wis. 2d 595, 698 N.W.2d 583, is the most recent supreme court case dealing with oral communications. In ***Maloney***, the court held that videotapes taken by a person not acting under color of law were "still admissible at trial under WIS. STAT. § 968.31(2)(c) because [the person] consented to their interception by police and did not do so for the purpose of committing an illegal act." ***Maloney***, 281 Wis. 2d 595, ¶35. Similarly, here the child victim's parents consented on the child's behalf to intercept the conversation between the child and Duchow, and the recording was turned over to the police. Further, their purpose in doing so was not to commit "a criminal or tortuous act." Thus, following the ***Maloney*** holding, the tape was admissible.

¶45 Moreover, under the circumstances present here, it seems illogical and contrary to common sense to approve the parents' actions to protect their child by tape recording the conversation, but prevent the State from prosecuting the offenses revealed by the recording. I am also concerned with the majority's solution that "[t]his problem might have been easily remedied if another secret recording under the supervision of the police had occurred." Majority, ¶41. Clearly, this child had already been victimized by Duchow. The tape revealed Duchow yelling such things as, "Stop before I beat the living hell out of you," and

"I'm going to slap the hell out of you." Duchow also admitted to the police that he had slapped the child twice on the bus ride. To suggest that the victim be subjected to another such incident, just to make the recording admissible, is cruel and inhumane.

¶46 Therefore, although I agree with the majority's analysis in all other respects, I respectfully dissent with regard to the admissibility of the recordings at trial.