

**COURT OF APPEALS
DECISION
DATED AND FILED**

November 20, 2012

Diane M. Fremgen
Clerk of Court of Appeals

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.

**Appeal No. 2011AP1990-CR
STATE OF WISCONSIN**

Cir. Ct. No. 2008CF961

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

RAUL H. GONZALES,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Waukesha County:
MARK D. GUNDRUM,¹ Judge. *Reversed and cause remanded for further proceedings.*

Before Hoover, P.J., Peterson and Mangerson, JJ.

¹ The judgment was entered by Judge Gundrum after Gonzales entered a no-contest plea. The issues on appeal relate to an order denying Gonzales' suppression motion rendered by Judge Richard Congdon.

¶1 PER CURIAM. Raul Gonzales appeals a judgment convicting him of causing mental harm to a child. He entered a no-contest plea after the court denied his motion to suppress statements he made to detective Walter Wall. Pursuant to WIS. STAT. § 971.31(10) (2009-10), Gonzales seeks review of the order denying the motion to suppress. Because we conclude that Gonzales unequivocally invoked his right to counsel before making any incriminatory statements, we reverse the judgment and remand the matter for further proceedings at which Gonzales’ statements will not be admissible.

¶2 Gonzales was arrested on an allegation of sexual assault of a child in Waukesha County and on a warrant for an unrelated offense in another county. Wall, the only witness at the suppression hearing, spoke with Gonzales in a holding cell and asked whether he was willing to give a statement. Gonzales advised that he was willing to make a statement, but was “reluctant to talk about this specific allegation.” Wall then took Gonzales to an interview room where his statement was recorded. Although some words on the recording are not clear, the trial court made findings of fact regarding the conversation and the State does not contend those findings are clearly erroneous. Our review of the recording also confirms those findings.

¶3 Wall began by talking about the Waukesha County charges and reviewed the names and ages of the children living in the household with Gonzales. Wall then read Gonzales his *Miranda*² rights. The circuit court found that when Wall asked whether Gonzales was willing to make a voluntary statement, Gonzales responded, “I don’t think so, I think I’ll wait until I have a

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

lawyer.” Wall then had Gonzales complete a form and Wall summarized that Gonzales was willing to make a voluntary statement, but not about the Waukesha County allegations. Gonzales interrupted at that point saying, “without a lawyer.” Wall repeated “without a lawyer.” Gonzales then asked Wall whether he could see the victim’s statement. The questioning continued from that point and Gonzales ultimately made some inculpatory statements. On cross-examination, Wall admitted that Gonzales indicated he wanted a lawyer, but stated Wall kept the conversation going by asking more questions.

¶4 The circuit court’s findings of historical or evidentiary facts must be sustained unless they are clearly erroneous. *State v. Jennings*, 2002 WI 44, ¶20, 252 Wis. 2d 228, 647 N.W.2d 142. Whether Gonzales’ constitutional rights were violated is a question of constitutional fact, subject to independent review by this court. *See id.* Gonzales argues that he invoked his right to have counsel present during any questioning and his subsequent statements should have been suppressed.

¶5 We conclude Gonzales never waived his *Miranda* rights.³ Immediately upon being informed of his rights, when asked whether he would give a statement, he replied, “I don’t think so. I will wait to have a lawyer.” The State notes that the quoted statement appears only in a question asked by Gonzales’ attorney, and not in any testimony by a witness. However, the recording substantially confirms the quotation and the court’s findings are not clearly erroneous.

³ Because Gonzales did not waive his *Miranda* rights, the burden of proof did not shift to him to prove that he unambiguously invoked his right to an attorney. *See Davis v. United States*, 512 U.S. 452, 460-62 (1994).

¶6 Citing *Davis v. United States*, 512 U.S. 452 (1994), and *Jennings*, the circuit court held that Gonzales did not clearly and unequivocally request counsel. We disagree. In *Davis*, ninety minutes into an interview, Davis said, “Maybe I should talk to a lawyer.” *Davis*, 512 U.S. at 455. After the interrogating agent made clear that questioning would stop if Davis was asking for a lawyer, Davis responded, “No, I’m not asking for a lawyer ... I don’t want a lawyer.” *Id.* The Supreme Court concluded that Davis’ statement was not clearly and unequivocally a request for counsel. *Id.* at 462. In *Jennings*, when a detective asked Jennings if he would put a statement in writing, Jennings replied, “I think maybe I need to talk to a lawyer.” *Jennings*, 252 Wis. 2d 228, ¶9. The officer then asked, “Are you telling me you want a lawyer?” *Id.* Jennings responded with the same statement, “I think maybe I need to talk to a lawyer.” The detective testified that he was unable to clarify whether Jennings was specifically asking for an attorney and, to be on the safe side, he stopped questioning Jennings and left the interrogation room. *Id.* The supreme court held that “Maybe I should talk to a lawyer” was ambiguous or equivocal, and was not sufficient to invoke Jennings’ right to counsel. *Id.*, ¶36.

¶7 In contrast, Gonzales immediately responded to Wall’s reading of the *Miranda* rights by indicating unwillingness to talk without a lawyer. Minutes later, after Wall summarized Gonzales’ position that he would not speak to Wall about the Waukesha County charge, Gonzales interrupted and clarified, “without a lawyer.” To invoke his right to counsel, Gonzales merely needed to articulate his desire to have counsel present sufficiently clear so that a reasonable officer would have understood the statement to be a request for an attorney. *Davis*, 512 U.S. at 459. Because Gonzales invoked his right to have an attorney present for any

questioning, Wall should have stopped questioning him until an attorney was present. *See Edwards v. Arizona*, 451 U.S. 477, 484 (1981).

By the Court.—Judgment reversed and cause remanded for further proceedings.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5 (2009-10).

