COURT OF APPEALS
DECISION
DATED AND RELEASED

September 17, 1997

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

NOTICE

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

Nos. 96-2163-CR
96-3005-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DAVID A. PRUSINSKI,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Green County: DAVID G. DEININGER, Judge. *Affirmed.*

Before Brown, Nettesheim and Anderson, JJ.

PER CURIAM. David A. Prusinski appeals from a judgment of conviction of domestic abuse by two counts of disorderly conduct, two counts of battery, and one count of second-degree sexual assault. He also appeals from an order denying his postconviction motion alleging ineffective trial counsel. The issues on appeal are whether his statements to police should be suppressed and

whether trial counsel was ineffective for not seeking any curative measure when it was possible that members of the jury venire saw Prusinski in shackles before the trial started. We conclude that Prusinski's statements were not subject to suppression and that trial counsel was not deficient. We affirm the judgment and the order.

Prusinski was arrested on Wednesday, April 12, 1995, and did not make his first court appearance until Monday, April 17, 1995. On April 13 and 14, 1995, Prusinski obtained the phone number of the state public defender from jail personnel and contacted that office. Police officers interviewed Prusinski on Monday. He asked the officers, "Do I need an attorney?" After the officers responded that it was Prusinski's choice, Prusinski was informed of his ***Miranda*** rights. Prusinski waived those rights and made statements concerning the charges.

Prusinski argues that his statements were involuntary because he was subjected to a coercive environment and the officers proceeded in the face of his invocation of his right to counsel. "In determining whether a confession was voluntarily made, the essential inquiry is whether the confession was procured via coercive means or whether it was the product of improper pressures exercised by the police." ***State v. Clappes***, 136 Wis.2d 222, 235-36, 401 N.W.2d 759, 765 (1987). The determination of whether a confession is voluntary is made by examining the totality of the circumstances and requires the court to balance the personal characteristics of the defendant against the pressures imposed by police in order to induce him or her to respond to the questioning. *See* ***id.*** at 236, 401 N.W.2d at 766. However, if there was no evidence of either physical or psychological coercive tactics by police, the balancing test becomes virtually unnecessary. *See* ***id.*** at 239-40, 401 N.W.2d at 767.

Prusinski claims that the failure to bring him before a court in a reasonable period of time placed him in a coercive situation.[1] There is no claim and no evidence that any coercive tactics were employed over the weekend when Prusinski sat in jail. The mere lapse of time before Prusinski's initial appearance has no relationship to the voluntariness of his statement.

The validity of a confession made after a request for counsel involves questions of constitutional fact which are subject to independent appellate review and require an independent application of constitutional principles involved to the facts as found by the trial court. *See* ***State v. Turner***, 136 Wis.2d 333, 344, 401 N.W.2d 827, 832-33 (1987). In ***Edwards v. Arizona***, 451 U.S. 477, 484-85 (1981), the Supreme Court established a bright-line rule requiring law enforcement officers to immediately stop questioning once a suspect has invoked his or her right to counsel. The request for counsel must be sufficiently clear so that "a reasonable police officer in the circumstances would understand the statement to be a request for an attorney. If the statement fails to meet the requisite level of clarity, ***Edwards*** does not require that the officers stop questioning the suspect." ***Davis v. United States***, 512 U.S. 452, 459 (1994). Moreover, officers are not required to ask clarifying questions when faced with an ambiguous request for counsel. *See* ***State v. Long***, 190 Wis.2d 386, 395-96, 526 N.W.2d 826, 829-30 (Ct. App. 1994).

[1] Prusinski was not brought before the court on Thursday, April 13, 1995. The courthouse was closed on Friday, April 14, 1995, for a holiday. The record reflects that on Thursday, April 13 a judicial determination was made that probable cause existed to hold Prusinski in custody. There is no arguable merit to any claim that the failure to earlier produce Prusinski in court violated the requirements of ***County of Riverside v. McLaughlin***, 500 U.S. 44 (1991).

Prusinski points to his attempts while in jail to contact the state public defender. Even if the information that Prusinski had obtained the phone number of the public defender is imputed to the interviewing officers,[2] it does not rise to the level of invoking the right to counsel. "A request for counsel is a statement in which the person, 'express[es] his desire to deal with the police only through counsel.'" ***State v. Jones***, 192 Wis.2d 78, 94, 532 N.W.2d 79, 85 (1995) (quoted source omitted). When approached by the officers for an interview, Prusinski did not express a desire to wait until after counsel was obtained.

Additionally, Prusinski's question to the officers about whether he needed counsel did not invoke his right to counsel. *See* ***State v. Walkowiak***, 183 Wis.2d 478, 485-86, 515 N.W.2d 863, 867 (1994) (the question "Do you think I need an attorney?" was equivocal). Prusinski was merely contemplating whether to wait for counsel. No definite request was made and the officers were not required to cease questioning. No basis exists to suppress Prusinski's subsequent statements.[3]

On the first day of trial, Prusinski was brought to court in ankle shackles. Court had not yet convened but prospective jurors were present in the courtroom. Trial counsel complained to the assistant district attorney about the shackles, and Prusinski was removed from the courtroom and the shackles were removed. Trial counsel did not make any motion for a new jury venire, for a mistrial, for a curative instruction, and did not voir dire the prospective jurors

[2] The trial court found that jail personnel were not aware of what Prusinski did with the phone number provided to him.

[3] There is no suggestion that the actual waiver of Prusinski's ***Miranda*** rights was unknowingly or involuntarily made.

about what they had seen.[4] Prusinski contends that counsel's failure to take any action to eliminate the potential bias was ineffective assistance of counsel.

"There are two components to a claim of ineffective trial counsel: a demonstration that counsel's performance was deficient, and a demonstration that such deficient performance prejudiced the defendant. The defendant has the burden of proof on both components." ***State v. Smith***, 207 Wis.2d 259, 274, 558 N.W.2d 379, 386 (1997) (citation omitted). Whether counsel's actions constitute ineffective assistance is a mixed question of law and fact. *See* ***State v. Sanchez***, 201 Wis.2d 219, 236, 548 N.W.2d 69, 76 (1996). The trial court's findings of what counsel did and the basis for the challenged conduct are factual and will be upheld unless clearly erroneous. *See* ***id.*** However, whether counsel's conduct amounted to ineffective assistance is a question of law which we review de novo. *See* ***id.*** at 236-37, 548 N.W.2d at 76.

At the ***Machner***[5] hearing, trial counsel testified that he did not voir dire jury members about Prusinski's appearance in shackles or ask for a curative instruction because he did not want to "redirect [the jurors'] attention to what had happened in the courtroom." Counsel indicated that he "didn't want to make it a bigger issue than I believed it to be at the time." This was a strategy decision by counsel.

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[4] During a recess after voir dire and outside the presence of the jury, trial counsel explained on the record what had occurred with respect to Prusinski being brought into the courtroom in shackles. The trial court noted that some thirty to thirty-two prospective jurors were present and that "some of the jurors may have seen what [trial counsel] is referring to." Although there is no record of the exact number of jurors who may have observed Prusinski in shackles, trial counsel made an adequate record of the incident and was not deficient for not making a record.

[5] ***State v. Machner***, 92 Wis.2d 797, 285 N.W.2d 905 (Ct. App. 1979).

A court considering the performance prong of the test must assess the reasonableness of trial counsel's performance under the facts of the particular case, viewed as of the time of the counsel's conduct. *See* ***State v. Marcum***, 166 Wis.2d 908, 917, 480 N.W.2d 545, 550 (Ct. App. 1992). We are not to second-guess trial counsel's selection of trial tactics or the exercise of professional judgment after weighing the alternatives. *See* ***State v. Felton***, 110 Wis.2d 485, 502, 329 N.W.2d 161, 169 (1983). Trial counsel properly considered the negative impact any curative measures may have had. *Cf.* ***Watson v. State***, 64 Wis.2d 264, 279, 219 N.W.2d 398, 406 (1974) (recognizing that defense counsel faces a difficult choice when considering a corrective instruction which again calls to the jury's attention a potentially prejudicial circumstance). *See also* ***State v. Williquette***, 180 Wis.2d 589, 608, 510 N.W.2d 708, 714 (Ct. App. 1993), *aff'd*, 190 Wis.2d 677, 526 N.W.2d 144 (1995) (if counsel considered the pros and cons of an instruction which highlights some feature of the trial and rejects its use, counsel's performance is not ineffective). The desire not to call the jury's attention to the fact that Prusinski had been brought to court in shackles was reasonable.

Additionally, Prusinski was not prejudiced by trial counsel's conduct. The trial court found that the incident was an "inadvertent encounter." "Courts have generally found brief and inadvertent confrontations between a shackled accused and one or more members of the jury insufficient to show prejudice." ***Harrell v. Israel***, 672 F.2d 632, 637 (7th Cir. 1982). Prusinski's transportation into the courtroom was a time when one might expect him to be in shackles. A juror's observation of a restrained defendant is not likely to arouse a juror's prejudice because people expect to see a prisoner in restraint when the prisoner is in a position where he or she could escape. *See* ***State v. Clifton***, 150

Wis.2d 673, 683, 443 N.W.2d 26, 30 (Ct. App. 1989). Prusinski was not denied the effective assistance of counsel.

By the Court.—Judgment and order affirmed.

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