**COURT OF APPEALS**
**DECISION**
**DATED AND FILED**

**May 11, 2016**

**Diane M. Fremgen**
**Clerk of Court of Appeals**



**Appeal No. 2015AP954-CR** **Cir. Ct. No. 2011CF244**

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

**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**V.**

**TIMOTHY L. REDDICK,**

**DEFENDANT-APPELLANT.**

APPEAL from a judgment of the circuit court for Ozaukee County: JOSEPH W. VOILAND, Judge. *Affirmed*.

Before Neubauer, C.J., Gundrum and Hagedorn, JJ.

¶1 PER CURIAM. Timothy L. Reddick appeals from a judgment of conviction rendered after a jury found him guilty of first-degree reckless homicide

in violation of WIS. STAT. § 940.02(2)(a) (2013-14)[1]. Reddick contends that the circuit court erred in refusing to suppress statements he made to police after unequivocally invoking his right to counsel. We disagree that Reddick unequivocally invoked his right to counsel and, thus, we affirm the judgment.

¶2 In the course of an investigation into the death of Erik Anderson Yakowicz from a drug overdose, Reddick was suspected of having supplied Yakowicz with the drugs that killed him. Reddick was arrested, transported to the police station, and placed in an interview room with Detective James Knowles and Officer Cory Polishinski.[2] Polishinski read Reddick his ***Miranda***[3] rights and a waiver of those rights from a preprinted form.

¶3 Knowles testified that after Reddick was read his ***Miranda*** rights, Reddick said "he didn't know if he should talk to a lawyer" or "I don't know. Maybe I should get a lawyer." Polishinski testified that Reddick "mumbled several things" that Polishinski "had a hard time understanding," but he did hear Reddick say "maybe I should wait for a lawyer." Polishinski testified that he "waited for [Reddick] to be clear [as] to what he was saying," and after that Polishinski started questioning him. Polishinski testified that Reddick never requested the assistance of an attorney before he spoke with the officers.

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[1] All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

[2] At the time, Polishinski was working as a temporary detective.

[3] ***Miranda v. Arizona***, 384 U.S. 436 (1966). Under ***Miranda***, prior to any questioning of a suspect who is in police custody, the police must advise the suspect of the right to remain silent, that anything the suspect says may be used against him or her in court, that the suspect has the right to an attorney, and that if the suspect cannot afford an attorney one will be provided free of charge. ***Id.*** at 444.

¶4 A video recording of the interview was played for the circuit court. The circuit court said it would "have to listen to [the recording] again," but thought that Reddick had said, after being given ***Miranda*** warnings, "No, I'll just wait for a lawyer. I'm in trouble." However, the circuit court said, "I could be wrong." It was not the quality or the loudness of the recording, it "was the way [Reddick] said it. Perhaps he had his head down. But that's what I thought he said … I don't know."

¶5 The circuit court subsequently denied Reddick's motion to suppress based on the totality of the circumstances. Reddick, the circuit court said, was "not that easy to hear on the tape," but, after being given ***Miranda*** warnings and asked if he wanted to speak with the police, he "basically" said "no or nah, I'll just wait for a lawyer. I'm in trouble." Polishinski, in response, did not say anything; he just looked at his watch and made some notes. Polishinski then gave Reddick a ***Miranda*** form for his acknowledgment and said, "now I understand that you don't want to talk to us. Is that correct?" Reddick made some gestures, said he did not know, and then asked the police, "what you want to ask me?" Polishinski said something to the effect of, "what did you say, or what's that[?]" and Reddick replied, "what do you want to ask me[?]" Reddick then agreed to speak with the police, the circuit court said. Under these circumstances, the circuit court held, the police were permitted to follow up and clarify whether Reddick wanted an attorney.[4]

¶6 Reddick argues that he unequivocally invoked his right to counsel. He contends that Polishinski was precluded from asking the subsequent clarifying

[4] Reddick signed the acknowledgement and waiver.

question which prompted his continued communication with the police without an attorney present. Reddick contends that the statements following his invocation of counsel should have been suppressed.

¶7 Under ***Miranda*** and its progeny, if a suspect requests an attorney during a custodial interrogation, one must be provided before continuing any questioning. ***State v. Jones***, 192 Wis. 2d 78, 93, 532 N.W.2d 79 (1995). A suspect's request for counsel must be unambiguous, that is, "the suspect 'must articulate his desire to have counsel present sufficiently clearly that a reasonable police officer in the circumstances would understand the statement to be a request for an attorney.'" ***State v. Linton***, 2010 WI App 129, ¶8, 329 Wis. 2d 687, 791 N.W.2d 222 (quoting ***Davis v. United States***, 512 U.S. 452, 459 (1994)). "If a suspect makes a reference to an attorney that is ambiguous or equivocal in that a reasonable officer in light of the circumstances would have understood only that the suspect *might* be invoking the right to counsel," the police are not required to cease questioning the suspect. ***State v. Jennings***, 2002 WI 44, ¶29, 252 Wis. 2d 228, 647 N.W.2d 142 (quoting ***Davis***, 512 U.S. at 459). The police may, but are not required to, ask clarifying questions, although it will often be good practice to do so. *See* ***Davis***, 512 U.S. at 461; ***State v. Ward***, 2009 WI 60, ¶43, 318 Wis. 2d 301, 767 N.W.2d 236; ***State v. Ross***, 203 Wis. 2d 66, 78, 552 N.W.2d 428 (Ct. App. 1996). The test as to whether a suspect unequivocally invoked his or her right to counsel is an objective one. ***Berghuis v. Thompkins***, 560 U.S. 370, 381 (2010); ***State v. Edler***, 2013 WI 73, ¶34, 350 Wis. 2d 1, 833 N.W.2d 564.

¶8 We review the sufficiency of a suspect's invocation of counsel under a two-pronged standard: we uphold the circuit court's findings of fact unless clearly erroneous, but we independently review the application of constitutional principles to those facts. ***Linton***, 329 Wis. 2d 687, ¶9.

¶9 The State and Reddick present us with different versions of what Reddick said—either the circuit court's rendition: "basically," "no, I'll just wait for a lawyer. I'm in trouble" or Polishinski's and Knowles' rendition—maybe I should wait for (or get) a lawyer. Here, the circuit court found that perhaps Reddick had his head down, and it was "not that easy to hear" Reddick "on the tape." The circuit court's use of "basically" to describe what Reddick said further suggests that, like Polishinski, it was also unsure as to what Reddick said exactly. Indeed, after first hearing the recording, the court stated that it didn't know and "could be wrong." The circuit court, however, had the benefit of a recording, which it was able to play back more than once. Polishinski did not. He testified that Reddick did not request the assistance of counsel. Polishinski testified that Reddick mumbled such that he "had a hard time understanding," but heard Reddick say "maybe I should wait for a lawyer." Notably, the circuit court did not find that Reddick clearly said "no," much less that Polishinski heard him say "no."

¶10 We do not have the benefit of reviewing the recording ourselves, since Reddick did not include it in the record on appeal. *See* ***State v. Marks***, 2010 WI App 172, ¶20, 330 Wis. 2d 693, 794 N.W.2d 547 (stating that it is the appellant's responsibility to ensure that the record on appeal is complete). We must assume that the material missing from the record supports the circuit court's ruling, including the court's finding that Reddick was hard to hear. *See* ***Fiumefreddo v. McLean***, 174 Wis. 2d 10, 26-27, 496 N.W.2d 226 (Ct. App. 1993); ***State v. Halverson***, No. 2011AP240-CR, unpublished slip op. ¶20 (WI App Sept. 14, 2011) (applying same rule to a video recording). In any event, Reddick does not even challenge the circuit court's findings of fact. Instead, Reddick avoids any mention of the difficulty the police and the circuit court had in hearing his responses.

¶11 In light of the circuit court's findings and ruling that clarification was permitted, we agree that Reddick's mumbled responses are the equivalent of an equivocal or ambiguous response. *See* ***United States v. Quintana-Rascon***, Nos. 89-10346, 89-10347, 940 F.2d 1537, at *2 (9th Cir. July 31, 1991) (where defendant did not contend that her statement, "I cannot afford [an attorney]" was clear, the circuit court expressly found that the statement was barely audible on tape, and the agent testified that he did not hear it, even assuming defendant's statement was equivocal, the agent's inquiry as to whether she wanted to continue talking with him without a lawyer was an effort to clarify whether counsel was being requested).[5]

¶12 Polishinski "scrupulously honored" Reddick's ***Miranda*** rights by asking for clarification. *See* ***Michigan v. Mosley***, 423 U.S. 96, 103 (1975); ***State v. Lagar***, 190 Wis. 2d 423, 430, 526 N.W.2d 836 (Ct. App. 1994); *see also* ***Davis***, 512 U.S. at 461 ("Clarifying questions help protect the rights of the suspect by ensuring that he gets an attorney if he wants one, and will minimize the chance of a confession being suppressed due to subsequent judicial second-guessing as to the meaning of the suspect's statement regarding counsel."). The question Polishinski posed to Reddick—"I understand you do not want to talk with us; is that correct?"—afforded Reddick the "right to cut off questioning." ***Mosley***, 423 U.S. at 103. Reddick retained control over "the time of which questioning occur[ed], the subjects discussed, and the duration of the interrogation." ***Id.*** at 103-04.

[5] WISCONSIN STAT. RULE 809.23(3) does not prohibit us from citing unpublished opinions from other jurisdictions. We are citing to the opinion not for its precedential value but for its persuasive value. *See* ***State v. Stenzel***, 2004 WI App 181, ¶18 n.6, 276 Wis. 2d 224, 688 N.W.2d 20.

¶13 However, rather than exercising his right to remain silent and/or to have counsel present by simply answering yes to Polishinski, Reddick immediately and tellingly said he "didn't know," and then promptly sought to continue the interview without counsel, asking what they wanted to inquire of him. *See* ***State v. Berggren***, 2009 WI App 82, ¶¶33-36, 320 Wis. 2d 209, 769 N.W.2d 110 (where defendant twice asked if he could use the telephone to call his parents so that they could obtain an attorney for him, and then said, "I think I do need an attorney," these were equivocal requests for counsel, especially considering that after the last claimed invocation, the defendant immediately signed another waiver of rights form and agreed to talk with police).

¶14 While the circuit court's understanding of what Reddick said may have been clearer because it was not conditional, there can be no doubt that what Polishinski and Knowles heard Reddick say was equivocal. Reddick's mumbled reference to an attorney—something along the lines of "maybe I should wait for a lawyer," promptly followed by his willingness to talk with police after being asked for clarification, was insufficient to unequivocally invoke the right to counsel. *See* ***Davis***, 512 U.S. at 455 ("[m]aybe I should talk to a lawyer" was not an unambiguous request for counsel); ***Jennings***, 252 Wis. 2d 228, ¶¶9, 31, 36 (statement, "I think maybe I need to talk to a lawyer," was not unequivocal).

¶15 We agree with the circuit court that this is a close case. But, it is only close because the record is unclear as to what actually transpired—because Reddick mumbled his initial response. We do know that Reddick immediately made clear that he was prepared to proceed without counsel once the officer sought clarification. In light of the circuit court's undisputed finding that it was hard to hear Reddick, that perhaps he had his head down, and that its own understanding after listening to the recording once "could be wrong," that the

judge didn't know, and our duty to assume that the recording supports the circuit court's ruling, along the assumption that the facts in the record support the circuit court's ruling, we cannot conclude that Polishinski was precluded from seeking clarification, given what he testified he heard—"maybe I should wait for a lawyer." ***State v. Martwick***, 2000 WI 5, ¶31, 231 Wis. 2d 801, 604 N.W.2d 552 ("[I]f a circuit court fails to make a finding that exists in the record, an appellate court can assume that the circuit court determined the fact in a manner that supports the circuit court's ultimate decision."); *see also* ***State v. Watkins***, 2002 WI 101, ¶76, 255 Wis. 2d 265, 647 N.W.2d 244. A reasonable police officer in these circumstances—based on Reddick's actions and words—would not understand Reddick's response to be an unequivocal request for an attorney.

¶16 Under the totality of the circumstances, we conclude that Reddick did not unequivocally invoke his right to counsel and, thus, the circuit court properly denied his motion to suppress the statements he made to police. We, therefore, affirm the judgment.

*By the Court*.—Judgment affirmed.

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