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

**February 7, 2012**

**A. John Voelker**
**Acting Clerk of Court of Appeals**



**Appeal No. 2011AP939-CR** **Cir. Ct. No. 2009CF64**

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

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**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**V.**

**ZACHARY RYAN WIEGAND,**

**DEFENDANT-APPELLANT.**

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APPEAL from a judgment and an order of the circuit court for St. Croix County: ERIC J. LUNDELL, Judge. *Reversed and cause remanded with directions*.

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

¶1 HOOVER, P.J. Zachary Wiegand appeals a judgment of conviction for armed robbery and arson to property, both as party to a crime, and an order denying his suppression motion. Wiegand contends he was wrongly interrogated

after he invoked his constitutional rights to silence and to an attorney. We agree that the interrogating officer did not scrupulously honor Wiegand's unequivocal invocation of his right to remain silent. We therefore reverse and remand and direct the circuit court to suppress all statements and derivative evidence obtained following Wiegand's invocation of his right to remain silent.

## BACKGROUND

¶2 In 2003, a man driving a minivan used a handgun to rob an armored car. Police later discovered the minivan, which had been stolen in Minnesota the day before, burning nearby. In 2008, police recovered a gun with a partially obliterated serial number. Forensic testing linked the gun to the armed robbery, and the serial number linked the gun to Wiegand.

¶3 Police officers from Polk and St. Croix Counties in Wisconsin and Washington County, Minnesota conceived a plan to arrest and interrogate Wiegand. They arrested Wiegand near the Wal-Mart where he worked and transported him to the Polk County Law Enforcement Center. Wiegand's interrogation was video recorded. First, officer Ray Joy obtained a waiver of Wiegand's ***Miranda***[1] rights and questioned him about possible welfare fraud in Polk County. After approximately sixty to ninety minutes, officer Jeff Knopps took over the interrogation.

¶4 Eventually, Knopps started questioning Wiegand about the gun. Additionally, Knopps referred to his relationship with Wiegand's father, also a police officer, to encourage Wiegand to tell the truth. Knopps indicated

[1] *See* ***Miranda v. Arizona***, 384 U.S. 436, 467 (1966).

Wiegand's father was Knopps' mentor, was willing to forgive, and told Knopps to always seek the truth "so you can help everybody that you talked to." Forty-two minutes into Knopps' questioning, after Knopps suggested Wiegand had sold the gun subsequent to, rather than before, the date of the armed robbery, the following exchange occurred:

> Wiegand: I don't want to say anything more.
>
> Knopps: Well, only thing, Zach—
>
> Wiegand: —lawyer—[2]
>
> Knopps: —I am just trying to help you out. (Unintelligible, overlapping conversation[.])
>
> Wiegand: Yeah I know.
>
> Knopps: Okay? That's—that's the only reason that I am here—(unintelligible)—going by what your dad said.
>
> Wiegand:[3] So—
>
> Knopps: —only—
>
> Wiegand: —you are going to tell me honestly what was that officer waiting at Wal-Mart for. (Unintelligible, overlapping conversation.)
>
> Knopps: All I hear is that when I got contacted, okay, by the gun. And right now because you said that, you know, you had mentioned about an attorney, I—I can't talk to you

[2] Knopps testified he was not sure what Wiegand said because Wiegand turned his head away, but Weigand said something that included the word attorney or lawyer. The circuit court found that Wiegand said the word "lawyer." Wiegand asserts review of the videotape reveals Wiegand said, "I want a lawyer." Because we reverse on the right to silence issue, we need not reach the issue Wiegand raises concerning our independent review of the video recording. *See* ***State v. Castillo***, 213 Wis. 2d 488, 492, 570 N.W.2d 44 (1997) (appellate courts not required to address every issue raised when one issue is dispositive).

[3] The State asserts in its statement of facts, without record citation, that Wiegand started speaking without prompting. Our review of the video recording fails to confirm this representation.

> anymore. And that's why you said that, okay, —if you want to change your mind and continue talking—
>
> Wiegand: I want to change my mind and continue talking, but I want you to tell me honestly why was that officer ....

(Party names modified.) The interrogation continued and Wiegand confessed. His incriminating statements were subsequently used to obtain search warrants for his home and car.

¶5 Wiegand moved to suppress his statements and any derivative evidence, arguing the State continued to interrogate him after he invoked his rights to silence and to an attorney. Following the denial of his motion to suppress,[4] Wiegand pled guilty. He now appeals.

## DISCUSSION

¶6 A person who initially waives his or her ***Miranda*** rights may subsequently cut off questioning by invoking his or her right to remain silent, subject to the clear articulation rule. ***Berghuis v. Thompkins***, 130 S. Ct. 2250, 2259-60 (2010) (adopting the right to attorney clear articulation rule in context of invoking right to remain silent);[5] ***State v. Ross***, 203 Wis. 2d 66, 74-76, 552 N.W.2d 428 (Ct. App. 1996) (same, although U.S. Supreme Court had not yet

[4] As we discuss later, the circuit court's decision did not resolve Wiegand's argument that he invoked his right to silence. Rather, the decision briefly mentioned the topic, but then rejected only Wiegand's argument that he invoked his right to counsel.

[5] The State cited an unpublished 2010 court of appeals opinion that discusses ***Berghuis v. Thompkins***, 130 S. Ct. 2250 (2010). While the State cited WIS. STAT. RULE 809.23(3), it failed to comply with RULE 809.23(3)(c), which requires that a copy of the unpublished opinion be filed and served along with the brief in which it is cited.

All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

ruled). Thus, to invoke the right to remain silent and terminate questioning, the person must unambiguously request to remain silent. ***Berghuis***, 130 S. Ct. at 2260; ***Ross***, 203 Wis. 2d at 74-75.

¶7 "Once the right to remain silent ... is invoked, all police questioning must cease[.]" ***Ross***, 203 Wis. 2d at 74. An invocation of the right precludes further questioning on any offense, not just the one that was the subject of the interrogation. ***Arizona v. Roberson***, 486 U.S. 675, 685 (1988). Where an individual in custody invokes the right to remain silent, subsequent statements will be admissible only where the individual's "right to cut off questioning" was "scrupulously honored." ***Michigan v. Mosley***, 423 U.S. 96, 104 (1975). Determining whether the right to silence was unambiguously invoked and whether it was scrupulously honored requires the application of constitutional principles and is subject to independent appellate review. *See* ***Berghuis***, 130 S. Ct. at 2260, 2264; ***Ross***, 203 Wis. 2d at 79. However, we defer to the circuit court's factual determinations unless clearly erroneous. ***Ross***, 203 Wis. 2d at 79.

¶8 This is a straightforward case. During the course of a custodial interrogation, Knopps asked Wiegand a question meant to elicit an incriminating response. Wiegand responded, "I don't want to say anything more." We discern no ambiguity in the meaning of that statement. This is particularly so given that the statement was immediately followed with a mention of "lawyer." Indeed, Wiegand's statement is substantially similar to the Supreme Court's examples of unambiguous statements. In ***Berghuis***, the Court explained: "[The defendant] did not say that he wanted to remain silent or that he did not want to talk with the police. Had he made either of these simple, unambiguous statements, he would have invoked his 'right to cut off questioning.'" ***Berghuis***, 130 S. Ct. at 2260 (citations omitted).

¶9 It is also apparent that Knopps did not scrupulously honor Wiegand's invocation of his right to silence and immediately terminate the interrogation. Instead, Knopps pressed on with the interrogation, stating he was just trying to help Wiegand, and then applying further pressure by referring again to Wiegand's police officer father.

¶10 The State nonetheless argues we should affirm because the circuit court's "finding that Wiegand's remark was equivocal was not clearly erroneous." We must reject the State's argument for two reasons. First, the argument applies the wrong standard of review. The determination of *what* Wiegand said presents a question of fact subject to the clearly erroneous standard. However, whether that statement was an unambiguous invocation of Wiegand's right to remain silent is a question subject to independent appellate review. *See* ***Berghuis***, 130 S. Ct. at 2260, 2264; ***Ross***, 203 Wis. 2d at 79. Second, the circuit court never concluded Wiegand's statement was equivocal as to whether he was invoking his right to *remain silent.* In fact, the court's analysis in its written decision never addresses or resolves whether Wiegand's right to silence was unambiguously invoked or, if so, scrupulously honored. Instead, the decision holds only that Wiegand's statements were ambiguous as to whether he was invoking his right to *counsel*.

¶11 Because we reverse based on the State's failure to immediately cut off the interrogation upon Wiegand's unambiguous invocation of his right to remain silent, we need not reach Wiegand's alternative argument that the State failed to honor his invoked right to counsel. *See* ***State v. Castillo***, 213 Wis. 2d 488, 492, 570 N.W.2d 44 (1997) (appellate courts not required to address every issue raised when one issue is dispositive).

¶12 Having concluded the State failed to immediately cut off its interrogation upon Wiegand's unambiguous invocation of his right to remain silent, we reverse and remand and direct the circuit court to suppress all statements and derivative evidence obtained following Wiegand's invocation of the right. *See* ***State v. Harris***, 199 Wis. 2d 227, 248-49, 544 N.W.2d 545 (1996).

*By the Court*.—Judgment and order reversed and cause remanded with directions.

Not recommended for publication in the official reports.