COURT OF APPEALS
DECISION
DATED AND RELEASED

October 16, 1996

No. 96-0098-CR

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

STATE OF WISCONSIN,

Plaintiff-Appellant,

v.

SCOT A. CZARNECKI,

Defendant-Respondent.

APPEAL from an order of the circuit court for Walworth County: MICHAEL S. GIBBS, Judge. *Reversed*.

Before Anderson, P.J., Brown and Nettesheim, JJ.

PER CURIAM. The State appeals from an order which suppresses a statement made by Scot A. Czarnecki. The issue is whether the police officer's inability to recite the statement verbatim precludes its admissibility. We conclude that a statement was made and reverse the order.

In investigating four house burglaries, Czarnecki was taken to the police station for an interview. The police investigator testified at the

Miranda/Goodchild[1] hearing that after receiving and waiving his *Miranda* rights, Czarnecki admitted that he had done two of the four break-ins. The investigator further testified that when Czarnecki was asked why he was carrying a towel with a brick in it, Czarnecki stated, "`What do you think I had it for,' or words to that effect."

The trial court found that Czarnecki's statement that, "I did those two, but I didn't do the others," was made after the *Miranda* warnings and prior to the request for counsel. That statement was held admissible. Although the court found that the statement regarding possession of the brick was voluntary, it suppressed the statement because the investigator could not give an exact recitation of what was said. The court ruled that "words to that effect" lacked sufficient reliability. The State appeals from the suppression of Czarnecki's admission regarding possession of the brick.

At the *Miranda/Goodchild* hearing, the trial court performs two functions: first, it determines the evidentiary or historical facts of the circumstances surrounding the giving of the oral statement; and second, it applies those facts to resolve the constitutional questions as to adequate advisement of *Miranda* rights and constitutionality of a waiver of those rights. *See* ***State v. Woods***, 117 Wis.2d 701, 714-15, 345 N.W.2d 457, 464 (1984). Findings of evidentiary or historical facts will not be upset on appeal unless clearly erroneous. We independently determine the constitutional questions. ***Id.*** at 715, 345 N.W.2d at 465.

This appeal involves neither the trial court's fact-finding function nor a determination of constitutional law. Rather, it calls into play a function of the *Miranda/Goodchild* hearing rarely ever questioned—the trial court's implicit determination that the defendant made a statement or confession. Whether a statement was made is a threshold requirement of admissibility. *See* § 908.01(4)(b)1, STATS.

[1] At the ***Miranda/Goodchild*** hearing, the issues to be decided are the voluntariness of the statements, the proper giving of the ***Miranda*** warnings and the intelligent waiver of the ***Miranda*** rights. ***Norwood v. State***, 74 Wis.2d 343, 362, 246 N.W.2d 801, 811 (1976).

Section 908.01(1), STATS., defines "statement" as an oral assertion or nonverbal conduct of a person, if it is intended by the person as an assertion. The determination of whether the police investigator was testifying about a "statement" Czarnecki made is a question of law which we review without deference to the trial court. *See* ***State v. Zimmerman***, 185 Wis.2d 549, 554, 518 N.W.2d 303, 304 (Ct. App. 1994).

The investigator related Czarnecki's response to a question about his possession of the brick. The investigator's use of the phrase "or words to that effect" does not diminish the fact that Czarnecki's response was generally "What do you think I was doing with it?" Czarnecki intended an assertion in response to the question about possession of the brick and the investigator conveyed that response.

It was not necessary that the police investigator be able to repeat verbatim what Czarnecki said in response to the question. All that is necessary is that police officers be able to state in general terms the content of the admissions.[2] *See* ***State v. Miller***, 35 Wis.2d 454, 464-65, 151 N.W.2d 157, 161-62 (1967) (sufficient for officers to state in general terms the substance of confession or statement). The investigator's use of the phrase "or words to that effect" signals to the jury whatever ambivalence there might be in the investigator's memory as well as the tenor of Czarnecki's response. Quite clearly, the credibility of the investigator's testimony was not for the trial court to determine at the ***Miranda/Goodchild*** hearing. ***Miller***, 35 Wis.2d at 465, 151 N.W.2d at 162, holds that "[i]t is not the function of the court at that stage to determine the weight and credibility of confession or admission nor the accuracy of the witness relating it at the trial. These are functions of the jury (or the court) at the trial."

We conclude that the trial court made an error of law in suppressing the investigator's testimony that Czarnecki replied, "`What do you think I had it for,' or words to that effect." It was a statement. It was found to be

[2] Although general statements may be enough, it is a risky proposition to rely on them rather than on written accounts. Police officers are subject to credibility challenges, particularly if they do not give a verbatim report of the defendant's admissions.

voluntary. It is for the jury to determine the reliability of the investigator's recollection.

By the Court.—Order reversed.

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