COURT OF APPEALS
DECISION
DATED AND FILED

October 14, 2010

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2009AP3115-CR **Cir. Ct. No. 2008CF575**

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

STATE OF WISCONSIN,

PLAINTIFF-APPELLANT,

V.

KONG MENG XIONG,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Winnebago County: BRUCE K. SCHMIDT, Judge. *Affirmed in part; reversed in part*.

Before Vergeront, P.J., Higginbotham and Sherman, JJ.

¶1 PER CURIAM. The State appeals from a pretrial order in a criminal proceeding that suppressed a portion of Kong Meng Xiong's statement to

police. *See* WIS. STAT. § 974.05(1)(d)3. (2007-08).[1] The State claims the circuit court erred in ruling that the challenged portion of Xiong's statement was inadmissible because it was given involuntarily and after an invocation of his right to remain silent. We conclude that Xiong did invoke his right to silence during police questioning, but that his statement was voluntarily given. We therefore affirm the circuit court's ruling that the State cannot introduce the statement in its case-in-chief, but reverse its ruling that the statement cannot be used for impeachment purposes if the defendant chooses to testify.

BACKGROUND

¶2 The circuit court made factual findings that Xiong was brought to the police station in a squad car and that, although his handcuffs were removed when he was taken into the interrogation room, it was clear that he was in custody. A detective read Xiong his ***Miranda*** rights, and Xiong signed a form acknowledging that he understood his rights, but was willing to answer questions. In the middle of the interrogation, Xiong stated: "That is the truth. I don't have nothing else to say," and "This is all I have to say." The police continued to ask questions, however, and Xiong continued to answer them. The circuit court found Xiong's testimony that he felt he had no choice but to continue answering the questions to be credible, given that Xiong had never before been arrested or interrogated by police.

[1] All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

STANDARD OF REVIEW

¶3 Before introducing a statement made by a defendant during custodial interrogation, the State must establish by the preponderance of the evidence both that the statement was given voluntarily, and that it was made after a knowing and intelligent waiver of applicable constitutional rights. ***State v. Hindsley***, 2000 WI App 130, 237 Wis. 2d 358, 614 N.W.2d 48; ***Miranda v. Arizona***, 384 U.S. 436 (1966). When reviewing a motion to suppress evidence, we will uphold the circuit court's findings of fact unless they are clearly erroneous. WIS. STAT. § 805.17(2); ***Hindsley***, 237 Wis. 2d 358, ¶22. However, we will independently determine whether the facts found by the circuit court satisfy applicable constitutional provisions. ***Hindsley***, 237 Wis. 2d 358, ¶22.

DISCUSSION

Right to Remain Silent

¶4 A suspect may invoke the Fifth Amendment right to remain silent at any point during police questioning, in order to control the time at which questioning occurs, the subjects discussed, or the duration of the interrogation. ***Michigan v. Mosley***, 423 U.S. 96, 102-04 (1975). Once a suspect has invoked the Fifth Amendment, all police questioning must cease unless and until the suspect initiates further communication and provides another valid waiver of his or her constitutional rights. ***Miranda***, 384 U.S. at 473-74. However, police need not stop an interrogation unless the invocation of the Fifth Amendment is unambiguous. ***State v. Ross***, 203 Wis. 2d 66, 552 N.W.2d 428 (Ct. App. 1996). The test is whether a suspect "articulate[s] his or her desire to remain silent or cut off questioning sufficiently clearly that a reasonable police officer in the

circumstances would understand the statement to be an invocation of the right to remain silent." ***Id.*** at 77-78 (internal citations omitted).

¶5 This court has ruled a suspect's statement, "I don't want to talk about this any more.… I've told you everything I can tell you," to be sufficiently clear to invoke the Fifth Amendment. ***State v. Goetsch***, 186 Wis. 2d 1, 519 N.W.2d 634 (Ct. App. 1994). In contrast, we have ruled a suspect's statement, "Then put me in jail. Just get me out of here. I don't want to sit here anymore, alright. I've been through enough today," was not sufficiently clear to invoke the Fifth Amendment. ***State v. Markwardt***, 2007 WI App 242, ¶¶35-36, 306 Wis. 2d 420, 742 N.W.2d 546.

¶6 We are persuaded that the only reasonable interpretation of Xiong's statement, "I don't have nothing else to say," is that he did not wish to answer any further questions. The State argues that a statement that a suspect has nothing else to say could also be reasonably interpreted as part of the give and take, or "fencing" of an interrogation, as in ***Markwardt***. *See* ***id.***, ¶36. However, the statements in ***Markwardt*** were ambiguous because, on their face, they related to the suspect's dissatisfaction with being in the interrogation room, rather than a desire to stop answering questions. A statement that a suspect has nothing more to say, on the other hand, directly expresses a desire to say nothing further. The plain implication of an expressed desire to say nothing further is that the suspect is invoking the right to silence.

¶7 The mere fact that the invocation occurred in the midst of the give and take of an interrogation does not make it ambiguous. For instance, the statements in ***Goetsch*** were also made after the suspect there had already given different accounts of events, and the police were directly confronting him about

whether he was telling the truth. ***Goetsch***, 186 Wis. 2d at 7. In short, when the police continue an interrogation after a suspect makes a statement that clearly articulates a desire to say nothing more, the State cannot rely on the fact that the suspect continued to answer the improperly asked additional questions to save itself from the consequences of the Fifth Amendment violation. We therefore affirm the circuit court's ruling that the portion of the interrogation following Xiong's statement that he had nothing further to say was inadmissible in the State's case-in-chief.

Voluntariness

¶8 A statement gained though a violation of the defendant's ***Miranda*** rights may still be admissible for the limited purposes of impeachment and rebuttal, if it was voluntarily given. ***Oregon v. Elstad***, 470 U.S. 298, 307-08 (1985). A statement is considered voluntary when it is "the product of a free and unconstrained will, reflecting deliberateness of choice, as opposed to the result of a conspicuously unequal confrontation in which the pressures brought to bear on the defendant by representatives of the State exceeded the defendant's ability to resist." ***State v. Jerrell C.J.***, 2005 WI 105, ¶18, 283 Wis. 2d 145, 699 N.W.2d 110 (internal citations omitted). While some form of coercion or improper conduct is a prerequisite for a finding of involuntariness, police conduct need not be egregious or outrageous to be coercive if the defendant's condition renders him or her uncommonly susceptible to police pressures. ***Id.***, ¶19. Thus, the court must balance the personal characteristics of the defendant (such as age, intelligence, physical and emotional condition, and prior law enforcement contacts) against the tactics used by law enforcement (such as the length of questioning, delay in arraignment, conditions under which the statement took place, and threats or

inducements) to determine whether a particular statement was voluntary under the totality of the circumstances. ***Id.***, ¶20.

¶9 Here, the improper police conduct at issue was continuing an interrogation after the defendant invoked his right to stop the questioning. Whether that conduct had a coercive effect depends upon the defendant's personal characteristics. Although the circuit court did not make specific factual findings in this regard, it was undisputed that Xiong was nineteen years old and had a high school education. English was not Xiong's native language, but the court had previously found that he did not require an interpreter. There was no indication that Xiong had limited cognitive ability or any physical or emotional conditions that would make him particularly susceptible to coercion.

¶10 The court did find that Xiong had no previous law enforcement contacts. However, Xiong cites no cases in which that factor alone was sufficient to conclude that a custodial statement was involuntary. Given the totality of the circumstances, and having viewed the video of the interrogation, we conclude that Xiong's statement was voluntarily given. We therefore reverse the circuit court's ruling that the statement could not be used for impeachment or rebuttal purposes.

By the Court.—Order affirmed in part; reversed in part.

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