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August 28, 2017

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You are hereby notified that the Court has entered the following opinion and order:

2016AP250-CR State of Wisconsin v. Robert J. Forney (L.C. #2015CF115)

Before Lundsten, P.J., Sherman and Kloppenburg, JJ.

Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

Robert Forney appeals from a judgment of conviction for repeated sexual assault of a child, incest by a stepparent, and causing a child under thirteen to listen to or view sexual activity. Forney argues that the circuit court erroneously denied his motion to suppress his confession because he was questioned after invoking his right to an attorney, in violation of his constitutional rights. Forney also argues that the court committed sentencing errors. Based upon our review of the briefs and record, we conclude at conference that this case is appropriate for

summary disposition. *See* WIS. STAT. RULE 809.21 (2015-16).[1] We reject Forney's arguments and affirm.

Forney was arrested after his stepdaughter informed police that Forney had sexually assaulted her. Forney waived his Miranda rights. After around an hour of questioning, the officer told Forney that he would be unable to see his children due to child safety concerns. Less than a minute later, Forney stated, "I'm going to have to contact a lawyer, obviously." Shortly thereafter, the officer left and then returned with a Human Services worker in order to discuss a child safety plan. At the end of that discussion, Forney asked for time alone. The officer and the Human Services worker left. After a few minutes, Forney said, "I have some questions if anyone's available." The officer returned and Forney asked him, "So what exactly am I being accused of?" Forney subsequently admitted that some of the allegations were true.

Forney was charged with repeated sexual assault of a child, incest by a stepparent, and causing a child under thirteen to listen to or view sexual activity. He moved to suppress his confession on the ground that his constitutional rights were violated when the officer continued the interrogation after Forney had invoked his right to counsel. The circuit court denied his motion. At trial, Forney was convicted of all three counts. The court sentenced him to twenty years of initial confinement and ten years of extended supervision. Forney appeals.[2]

Forney's first argument is that the circuit court erred in denying his motion to suppress. He argues that the interrogation should have ended as soon as he stated "I'm going to have to

[1] All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

[2] Forney's briefing to this court reflects some confusion as to whether his argument is based on his Fifth Amendment right against self-incrimination or his Sixth Amendment right to counsel. The State argues that Forney has forfeited any claim under the Sixth Amendment, because his argument to the circuit court was based on the Fifth Amendment. We need not address the possibility of forfeiture, because Forney does not contest the State's assertion that the analysis is the same under both constitutional provisions for our purposes. *See* ***Montejo v. Louisiana***, 556 U.S. 778, 786-87 (2009).

contact a lawyer, obviously." *See* ***State v. Edler***, 2013 WI 73, ¶5, 350 Wis. 2d 1, 833 N.W.2d 564 (after a valid invocation of the right to counsel, questioning must cease). The State makes two arguments in response. First, Forney's statement was ambiguous and therefore did not require the officer to stop the interrogation. *See* ***State v. Subdiaz-Osorio***, 2014 WI 87, ¶87, 357 Wis. 2d 41, 849 N.W.2d 748 (finding no valid invocation where the context indicated that the defendant wanted to obtain a lawyer at some point in the future). Second, even if Forney validly invoked his right to counsel, Forney reinitiated contact when he asked, "So what exactly am I being accused of?" *See* ***Edwards v. Arizona***, 451 U.S. 477, 485-86 & n.9 (1981) (even where a suspect has invoked his right to counsel, a confession may be admitted if the suspect initiates further exchanges).

The question of whether a defendant has made a valid invocation of the right to counsel requires us to apply a constitutional standard to historical facts. *See* ***State v. Jennings***, 2002 WI 44, ¶25, 252 Wis. 2d 228, 647 N.W.2d 142. Here, there is a video recording of the interrogation and thus no dispute regarding the historical facts. Accordingly, our next step is to "independently measure[] the historical facts against a uniform constitutional standard, benefiting from, but not deferring to, the circuit court's decision." *See* ***id.***

The circuit court determined that Forney's statement "I'm going to have to contact a lawyer, obviously" was ambiguous. The court determined that it was reasonable to interpret this statement as Forney's realization that he would need to get a lawyer at some point in the future, either for possible criminal charges or to be able to see his children. The court concluded that this interpretation was more reasonable than the interpretation argued by the defense, that Forney was unambiguously telling the officer, "I want to have a lawyer here and now before I answer any more questions."

Forney disagrees with the circuit's court's conclusion that his statement was ambiguous. He draws on several examples from the case law to argue that his statement, "I'm going to have

to contact a lawyer, obviously," was the sort of clear, unequivocal and unambiguous invocation of the right to counsel sufficient to end the interrogation. Two of Forney's examples identify statements that were legally sufficient. *See* ***State v. Hampton***, 2010 WI App 169, ¶38, 330 Wis. 2d 531, 793 N.W.2d 901 (finding a valid invocation based on the defendant's second statement, "I'm not trying to be rude or nothing. I just want to talk to a lawyer."); ***State v. Edler***, 2013 WI 73, ¶82, 357 Wis. 2d 1, 833 N.W.2d 564 ("Can my lawyer be present for this?"). In contrast, three of his examples identify statements that were not legally sufficient. *See* ***Jennings***, 252 Wis. 2d 228, ¶22 ("I think maybe I need to talk to a lawyer."); ***Subdiaz-Osorio***, 357 Wis. 2d 41, ¶28 ("How can I do to get an attorney here because I don't have enough to afford one."); ***Hampton***, 330 Wis. 2d 531, ¶5 (finding an insufficient invocation in the defendant's first statement, "I really don't want to say nothing. I don't have no lawyer.").

Forney contends that his statement was even clearer than the invocation in ***Edler*** and that it is not capable of alternate interpretation. He argues that under the circuit court's overly broad approach to finding ambiguity, even the statements in ***Hampton*** and ***Edler*** could be considered ambiguous.[3] We disagree. The defendant's second invocation in ***Hampton***, 330 Wis. 2d 531, ¶38—"I'm not trying to be rude or nothing. I just want to talk to a lawyer"—made clear that the defendant wanted a lawyer at that moment, and that he did not want to continue talking without a lawyer present. Similarly, the defendant's invocation in ***Edler***, 350 Wis. 2d 1, ¶82—"Can my lawyer be present for this?"—made clear that the defendant already had a lawyer and that he wanted his lawyer to be present for the interrogation. In contrast, Forney's statement, "I'm going to have to contact a lawyer, obviously" was ambiguous in two ways. First, on its face, Forney's statement is prospective and does not make clear that Forney wanted a lawyer at that moment.

[3] In his reply brief, Forney argues for the first time that we should consider the officer's response to Forney's statement as part of our analysis of whether the statement was ambiguous. We do not consider arguments raised for the first time in a reply brief. *See* ***Bilda v. County of Milwaukee***, 2006 WI App 57, ¶20 n.7, 292 Wis. 2d 212, 713 N.W.2d 661.

Second, the statement does not specify what Forney planned to contact a lawyer for. As the circuit court explained, the immediate context of Forney's statement makes it reasonable to assume that he was planning to contact a lawyer in order to be able to see his children.

Forney makes two other arguments to challenge these determinations regarding ambiguity. First, he argues that the circuit court drew the wrong conclusion from the context of his statement, which came shortly after the "significant and upsetting" news that he would not be able to see his children. Forney argues that this context is "of extreme relevance" to the timing of when he would need a lawyer—i.e., right now—but is not at all relevant to whether he needed a lawyer for the purpose of seeing his children. Forney cannot have it both ways: if the news about not being able to see his children was significant and upsetting enough to have prompted him to say he was going to contact a lawyer, then it certainly creates ambiguity about whether the purpose of contacting a lawyer was to be able to see his children. Moreover, his argument that the context demonstrates a clear and immediate need for a lawyer is not sufficient to overcome the ambiguity of a statement that is prospective on its face.

Second, Forney argues that the Supreme Court has "essentially already disagreed" with any requirement that the defendant must say that he wants a lawyer right now in order to sufficiently invoke his right to counsel. Forney does not tell us what decision he is referring to, nor does he specify whether he is talking about the United States Supreme Court or the Wisconsin Supreme Court. In contrast, the State refers us to ***Subdiaz-Osorio***, 357 Wis. 2d 41, ¶¶86-87, for the proposition that a defendant's statement that he will want counsel at some future time is not a legally sufficient invocation of the right to counsel. Forney has given us no basis to question the application of ***Subdiaz-Osorio*** here.

Because we conclude that Forney did not clearly and unequivocally invoke his right to counsel, we need not address the parties' arguments regarding whether Forney reinitiated contact

under ***Edwards***, 451 U.S. at 485-86 & n.9. The circuit court did not err in denying Forney's motion to suppress his confession.

We now turn to Forney's arguments regarding sentencing. Forney's main argument is that the circuit court misused its discretion when sentencing him because it failed to consider his rehabilitation needs. *See* ***State v. Borrell***, 167 Wis. 2d 749, 768-69, 482 N.W.2d 883 (1992) (a sentencing court must consider the nature of the offense, the public's need for protection, and the rehabilitative needs of the defendant). The State argues that Forney is incorrect in his assertion that the circuit court did not consider Forney's rehabilitation needs. It points to the circuit court's statement that, "The need to protect the public is also significant in this case. I believe a person in Mr. Forney's position who is prepared and willing to lie about committing a crime is a long way from rehabilitation."

Sentencing is left to the discretion of the circuit court and appellate review is limited to determining whether there was an erroneous exercise of discretion. ***State v. Gallion***, 2004 WI 42, ¶17, 270 Wis. 2d 535, 678 N.W.2d 197. We presume that the circuit court acted reasonably, because the sentencing court is in the best position to observe the defendant's demeanor and evaluate the relevant factors. ***See id.***, ¶¶17-18. In his reply brief, Forney does not respond to any of the State's arguments regarding sentencing. Because Forney has not explained why he believes that the circuit court's reference to his rehabilitation was inadequate, we deem him to have conceded the merits of the State's argument. *See* ***Schlieper v. DNR***, 188 Wis. 2d 318, 322, 525 N.W.2d 99 (Ct. App. 1994) (failure to refute respondent's arguments in a reply brief can be taken as a concession to those arguments).

We can dispense with Forney's remaining arguments briefly. He argues that the State impermissibly presented new allegations at sentencing. However, he does not point us to any legal authority and, therefore, we reject this argument as undeveloped. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992) (we may decline to review arguments

unsupported by legal authority). Second, Forney argues in conclusory fashion that the court punished him for exercising his right to testify. He does not provide any record facts from which we could evaluate this argument and, therefore, we do not consider it. *See* ***State v. Jackson***, 229 Wis. 2d 328, 337, 600 N.W.2d 39 (Ct. App. 1999) ("A party must do more than simply toss a bunch of concepts into the air with the hope that either the [circuit] court or the opposing party will arrange them into viable and fact-supported legal theories.").

Upon the foregoing reasons,

IT IS ORDERED that the judgment is summarily affirmed pursuant to WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that this summary disposition order will not be published.

Diane M. Fremgen
Clerk of Court of Appeals