

**COURT OF APPEALS
DECISION
DATED AND FILED**

February 17, 2009

David R. Schanker
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2008AP2211-CR

Cir. Ct. No. 2007CM255

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

AARON S. LEAR,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Oconto County:
RICHARD DELFORGE, Judge. *Affirmed.*

¶1 HOOVER, P.J.¹ Aaron Lear appeals a judgment of conviction for fourth-degree sexual assault. Lear contends the circuit court erroneously denied his motion to suppress statements made to the police. We disagree and affirm.

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2). All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

BACKGROUND

¶2 Detective Frank Szczepaniec testified at the suppression hearing that he made several attempts to contact Lear regarding an alleged sexual assault. In response, Lear called Szczepaniec on May 22, 2007, and they spoke over the phone for about fifteen to twenty minutes. Several minutes into the conversation, when Szczepaniec asked when they could meet, Lear stated “he had called a lawyer and the lawyer told him not to talk to [Szczepaniec] because we would always blame him anyways.” Szczepaniec told Lear “his lawyer advised him correctly that he does not have to say anything more about this.”

¶3 Lear asked Szczepaniec what would happen next. Szczepaniec told Lear that because he spoke with the lawyer and was advised not to talk to him, he would finish up with a few details and submit the case to the district attorney for charges. Lear then asked whether the victim reported she had said no to his advances. Szczepaniec replied in the affirmative and told Lear he also had the gum Lear left in the victim’s hair that probably had saliva on it. Szczepaniec then reminded Lear “that he said the lawyer word and he would have to explicitly waive the right and that is up to him.” The conversation continued for approximately ten more minutes.

DISCUSSION

¶4 Lear cites *Edwards v. Arizona*, 451 U.S. 477, 485 (1981) for the proposition that once a suspect has invoked the right to counsel, questioning must cease until counsel has been provided. Lear acknowledges, however, that an equivocal or ambiguous request is insufficient to invoke the constitutional right to counsel. *Davis v. United States*, 512 U.S. 452, 461-62 (1994). Lear concedes, as he did in the circuit court, that his statement to Szczepaniec was insufficient to

invoke his right to counsel. However, Lear contends Szczepaniec “unequivocally and unambiguously, not once but twice,” advised Lear he had invoked his right to counsel. Based on this contention, Lear argues Szczepaniec interfered with Lear’s ability to invoke his right to counsel or, in the alternative, the State should be estopped from denying Lear invoked his right to counsel.²

¶5 We need not address Lear’s arguments. In fact, Lear would be no better off had he clearly told Szczepaniec he wished to invoke his right to counsel. Because Lear was not in custody, he had no Fifth Amendment right to counsel. *State v. Pheil*, 152 Wis. 2d 523, 534-35, 449 N.W.2d 858 (Ct. App. 1989) (citing *Edwards*, 451 U.S. at 485-86); *see also State v. Hambly*, 2008 WI 10, 307 Wis. 2d 98, 745 N.W.2d 48. Additionally, because Szczepaniec had not referred the case to the district attorney for charges yet, Lear had no Sixth Amendment right to counsel. *See Pheil*, 152 Wis. 2d at 534 n.5.³

¶6 To the extent Lear’s argument could be construed as a claim his telephonic statements were involuntary, we reject the argument. Statements will not be found involuntary unless there is some improper or coercive conduct by the police. *Id.* at 535. The circuit court found there were no threats, abuse, or promise of leniency, and the defendant did not appear to be under the influence of any intoxicants. The court further found Szczepaniec’s statements to Lear were not used to elicit or trick him to provide further information. We agree.

² Lear’s estoppel argument is not supported by citation to legal authority. We need not consider unsupported arguments. *See State v. Flynn*, 190 Wis. 2d 31, 39 n.2, 527 N.W.2d 343 (Ct. App. 1994).

³ The complaint was filed August 9, 2007, well after the telephone conversation.

By the Court.—Judgment affirmed.

This opinion will not be published. See WIS. STAT. RULE
809.23(1)(b)4.

