

**COURT OF APPEALS
DECISION
DATED AND FILED**

August 14, 2007

David R. Schanker
Clerk of Court of Appeals

NOTICE

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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. 2006AP1873

Cir. Ct. No. 2001CF5884

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

HENRY G. WAGNER,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County:
WILLIAM SOSNAY, Judge. *Affirmed.*

Before Curley, P.J., Wedemeyer and Kessler, JJ.

¶1 CURLEY, P.J. Henry G. Wagner, *pro se*, appeals the order denying his postconviction motion. He argues that the trial court erred in denying

his motion seeking a new trial because his trial attorney was ineffective.¹ Wagner also claims that the trial court failed to comply with the requirements of WIS. STAT. § 974.06(3)(a), (b) and (c) (2003-04).² Because Wagner’s trial attorney was not ineffective, his postconviction attorney was not ineffective for failing to raise this issue in his direct appeal. With respect to Wagner’s arguments regarding the trial court, these issues were not raised below and will not be addressed now. *State v. Rogers*, 196 Wis. 2d 817, 825-26, 539 N.W.2d 897 (Ct. App. 1995) (failure to raise specific challenges in the trial court waives the right to raise them on appeal).³ Consequently, we affirm.

I. BACKGROUND.

¶2 On November 6, 2001, Wagner was charged with the armed robbery of a bakery in Hales Corners that occurred a month earlier. The bakery clerk testified that the robber came into the store, touched nothing, asked some questions about prices, ordered some cookies, and then produced a knife and demanded money. The clerk gave him the money from the cash register, and the

¹ Like the trial court, we, too, will treat the arguments raised by Wagner in his brief as ineffective assistance of postconviction counsel claims because arguments challenging the ineffectiveness of trial counsel would be barred under *State v. Escalona-Naranjo*, 185 Wis. 2d 168, 185, 517 N.W.2d 157 (1994) (A defendant is barred from pursuing claims in a subsequent appeal that could have been raised in an earlier postconviction motion or direct appeal unless the defendant provides a “sufficient reason” for not raising them previously.). *But see State ex rel. Rothering v. McCaughtry*, 205 Wis. 2d 675, 682, 556 N.W.2d 136 (Ct. App. 1996) (postconviction counsel’s failure to preserve issues for appellate review may be sufficient reason under *Escalona*, 185 Wis. 2d at 185, to excuse the failure to previously raise an issue).

² All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

³ Moreover, a trial court need not follow the procedure found in WIS. STAT. § 974.06(3) if “the motion and the files and records of the action conclusively show that the person is entitled to no relief.”

robber fled. The police drew a composite picture of the robber from a description given by the victim.

¶3 After Wagner was arrested by the West Allis police approximately one month after the armed robbery based on outstanding warrants, apparently the police noticed the similarity of Wagner to the composite drawing of the robber. As a result, the police showed a photo array to the victim that included Wagner's photo, and the victim identified him as the armed robber. At the time of his arrest, during the booking procedure, Wagner told the arresting officer that he was a heroin addict with a \$100-a-day habit and that he had increased his drug use over the last six weeks because of the pain caused by injuries he suffered in a recent car accident.

¶4 After being charged, Wagner entered a plea of not guilty and the case was set for a jury trial. Shortly before the commencement of the jury trial, the trial court held a *Miranda-Goodchild*⁴ hearing on the statements Wagner gave to the arresting West Allis police officer. The trial court determined that the statements were admissible, and the case proceeded to a jury trial. Besides several police officers, the only other witness who testified was the sixteen-year-old bakery clerk. Wagner was found guilty and sentenced to twelve years of initial confinement and eight years of extended supervision.

¶5 In his direct appeal, Wagner challenged the trial court's decision to admit his statements about his heroin use made during the booking process. This court summarily affirmed the judgment, determining that Wagner's statements

⁴ *Miranda v. Arizona*, 384 U.S. 436 (1966); *State ex rel. Goodchild v. Burke*, 27 Wis. 2d 244, 133 N.W.2d 753 (1965).

were admissible as a routine booking exception to *Miranda v. Arizona*, 384 U.S. 436 (1966), recognized in *Pennsylvania v. Muniz*, 496 U.S. 582, 601 (1990), and adopted in *State v. Stevens*, 181 Wis.2d 410, 434, 511 N.W.2d 591 (1994), *overruled on other grounds by Richards v. Wisconsin*, 520 U.S. 385, 396 (1997). *See State v. Wagner*, No. 03-1878-CR (WI App Aug. 27, 2004) (*Wagner I*). Wagner then filed a petition for review with the Wisconsin Supreme Court, which was granted and later dismissed as having been improvidently granted. Wagner then filed a *pro se* writ of habeas corpus in this court, alleging ineffective assistance of appellate counsel based on his failure to argue that Wagner's trial attorney was ineffective. This court denied the writ *ex parte*, concluding that the proper forum for his claims was the trial court. *See State ex rel. Wagner v. Wallace*, No. 2006AP863-W, unpublished slip op. (WI App Apr. 27, 2006) (*Wagner II*). Wagner then filed a postconviction motion in the trial court; however, in it he did not raise the issue of his postconviction attorney's ineffectiveness, but instead argued that his trial attorney was ineffective. Nevertheless, the trial court proceeded to address Wagner's claims of ineffective assistance of trial counsel as though he raised an ineffective assistance of postconviction counsel claim and denied Wagner's postconviction motion. This appeal follows.

II. ANALYSIS.

¶6 Wagner contends that his trial attorney was ineffective for: (1) failing to conduct an investigation of witnesses listed in the police report; (2) failing to produce evidence that Wagner was limping on the day of the robbery and exploring with the other witnesses whether the robber had a limp; (3) failing to file a motion to prevent the jury from hearing statements he made during the booking procedure; and (4) failing to object to the prosecutor's closing argument.

Our review of the record supports the trial court’s determination that Wagner’s trial attorney was not ineffective. Thus, Wagner’s postconviction counsel was not ineffective for failing to raise these issues concerning the ineffective assistance of trial counsel.

¶7 In order to prevail on a claim of ineffective assistance of counsel, a defendant must show that his attorney’s performance was deficient and that he was prejudiced as a result of his attorney’s deficient conduct. See *Strickland v. Washington*, 466 U.S. 668, 687 (1984); see also *State v. Pitsch*, 124 Wis. 2d 628, 633, 369 N.W.2d 711 (1985). To prove deficient performance, the defendant must show specific acts or omissions of his attorney that fall “outside the wide range of professionally competent assistance.” *Strickland*, 466 U.S. at 690. To show prejudice, the defendant must demonstrate that the result of the proceeding was unreliable. *Id.* at 687. If the defendant fails on either prong—deficient performance or prejudice—his ineffective assistance of counsel claim fails. *Id.* at 697. In our review, “counsel is strongly presumed to have rendered adequate assistance.” *Id.* at 690.

A. Failure to Investigate Witnesses

¶8 Wagner first claims that his trial attorney was ineffective because he failed to investigate other witnesses to the robbery. He submits that a private investigator took pictures to a witness listed on the police report and this person could not identify him. He claims this witness “stood by his initial description to

the police that was inconsistent with defendant's actual appearance."⁵ However, as noted by the State, "Wagner has presented only conclusory allegations that fail to demonstrate that his trial attorney was ineffective." This is because little is known about the witnesses to this crime other than the victim's testimony that an elderly couple entered the store shortly after the robbery. What descriptions, if any, these other witnesses gave to the police are unknown. Wagner supplies us with no record citations. Consequently, Wagner has not alleged sufficient specific facts that would permit a finding of deficient performance on behalf of his trial attorney. Therefore, his postconviction attorney was not ineffective for failing to raise this argument.

B. Evidence of Limping

¶19 Next, Wagner faults his trial attorney for failing to investigate his injuries in the accident that Wagner told the police he sustained approximately six weeks before the armed robbery. Unfortunately, Wagner neglects to explain what an investigation of these injuries would have revealed or how it would have influenced the outcome of the case.⁶ Assuming that an investigation would confirm that Wagner walked with a limp on the day of the robbery, it is quite likely that, had the victim been asked whether the robber had a limp, her answer would have been that she did not know. The robber was three feet away from her when the knife was displayed. The robbery did not last long, and it is doubtful

⁵ The record contains an affidavit from the private investigator who claims to have reviewed the police reports and interviewed the witness. No witness descriptions of the robber are contained in the affidavit. As a result, we are unable to verify the alleged inconsistency between the witness's description and Wagner's actual appearance.

⁶ Wagner's motion contains a medical record of Wagner's dated September 4, 2001, which reflects that Wagner complained of pain in his right ankle.

that the shocked and scared sixteen-year-old victim would have had her attention drawn to the gait of the robber as he fled out the door. Again, since Wagner has not established what an investigation would have revealed as to his condition on the date of the robbery, we can find no fault with Wagner's trial attorney's failure to investigate Wagner's injuries, and consequently, we see no deficiency in Wagner's postconviction attorney's failure to raise this issue on appeal.

C. Introduction of Circumstances and Statements Surrounding Wagner's Arrest

¶10 Wagner's next argument is confusing. He apparently faults his trial attorney for failing to file a motion *in limine* to exclude the evidence concerning statements given at the time of his arrest and the circumstances surrounding his arrest. He states:

Defendant contends that trial counsel's failure to file a motion in limine to exclude the above constituted ineffective assistance of counsel. Incredulously, counsel failed to object or ask the court for a curative instruction to the jury to disregard this and that it had no probative value and should not enter into their deliberations. That entire scenario of the arrest on 11-4-01, had no probative value or relevance concerning the trial at hand for an offense that took place 10-6-01, and served only to further prejudice the jury against the defendant.

¶11 First, it would appear that Wagner misunderstands the purpose of the *Miranda-Goodchild* hearing: "The *Miranda-Goodchild* hearing is a combined procedure designed to determine the following issues: (1) the voluntariness of a defendant's statement; (2) whether proper *Miranda* warnings were given; and (3) whether the defendant's statement was made as a result of a knowing and intelligent waiver of the *Miranda* privilege." *State v. Hockings*, 86 Wis. 2d 709, 715-16, 273 N.W.2d 339 (1979) (footnote omitted). At the hearing, the trial court is to make its determination based upon the "totality of the circumstances"

surrounding the arrest and the statement. *Id.* at 717. At the hearing, the trial court determined that the statements given by Wagner to the arresting officer were either volunteered statements or answers to routine booking questions not designed to elicit incriminating statements from offenders, neither requiring *Miranda* warnings. Consequently, the trial court ruled that they were admissible. As to the information surrounding Wagner's arrest admitted into evidence, this information was admitted to give context to his statements.⁷ There would have been little purpose in asking the court to exclude what it had previously determined was admissible. As a consequence, Wagner's postconviction attorney was not ineffective for failing to raise this issue.

D. Closing Arguments of the Prosecutor

¶12 Wagner's last argument is that his trial attorney was ineffective for failing to object to the prosecutor's closing argument in which he stated:

Ladies and Gentlemen, based on West Allis Police Officer Saftig you know why the defendant committed that armed robbery. Ladies and Gentlemen, in October of 2001 the defendant was lost in heroin addiction. He had a \$100 a day heroin addiction. That heroin addiction was paid for by the desperate act that made a 16 year old girl the victim of an armed robbery.

....

... What this case is about, Ladies and Gentlemen, is holding Henry Wagner responsible, holding the heroin addict who was out stealing money to fuel his addiction responsible for exactly what he did.

⁷ The arresting officer did discuss Wagner's conduct that led to his arrest in great detail. Had an objection been raised on this other acts evidence, it may have been sustained. However, while Wagner's trial counsel's failure to object may have been deficient, Wagner was not prejudiced by the comments concerning the circumstances surrounding his arrest on traffic charges.

Wagner submits that because the officer testified that he never asked Wagner how he earned the money to pay for his heroin addiction, the prosecutor was not allowed to assume that the heroin addiction was the motive for Wagner committing an armed robbery. We disagree.

¶13 In closing argument, the prosecutor “may comment on the evidence, detail the evidence, [and] argue from it to a conclusion.” *State v. Adams*, 221 Wis.2d 1, 19, 584 N.W.2d 695 (Ct. App. 1998). ““The [demarcation] line between permissible and impermissible [closing] argument is thus drawn where the prosecutor goes beyond reasoning from the evidence to a conclusion of guilt and instead suggests that the jury arrive at a verdict by considering factors other than the evidence.”” *State v. Nielsen*, 2001 WI App 192, ¶46, 247 Wis. 2d 466, 634 N.W.2d 325 (citation omitted).

¶14 Here, evidence was admitted that Wagner was a heroin addict, and that one month after the armed robbery, he had a \$100-a-day habit caused, in part, because of pain from injuries resulting from a recent auto accident that occurred before the robbery. The prosecutor’s inference that a source of money for such a significant drug habit would be armed robberies was a fair inference given the evidence in the record. The fact that no specific question was ever posed to Wagner as to how he got the money to afford his drug use was no impediment to the prosecutor deducing that it came from armed robberies. Wagner’s postconviction attorney was not ineffective for failing to raise this issue.

¶15 For the reasons stated, the order denying the postconviction motion is affirmed.

By the Court.—Order affirmed.

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