**COURT OF APPEALS**
**DECISION**
**DATED AND FILED**

**November 19, 2013**

**Diane M. Fremgen**
**Clerk of Court of Appeals**



**Appeal No. 2012AP1828-CR** **Cir. Ct. No. 2010CF3240**

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

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**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**V.**

**NATHANIEL J. RICHMOND, JR.,**

**DEFENDANT-APPELLANT.**

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APPEAL from a judgment of the circuit court for Milwaukee County: GLENN H. YAMAHIRO, Judge. *Affirmed*.

Before Fine, Kessler and Brennan, JJ.

¶1 PER CURIAM. Nathaniel J. Richmond, Jr., *pro se*, appeals from an amended judgment of conviction for three counts of armed robbery as a party to

a crime, contrary to WIS. STAT. §§ 943.32(2) and 939.05 (2009-10).[1] He argues that his confession should have been suppressed for several reasons and that he was denied the effective assistance of trial counsel. We affirm.

## BACKGROUND

¶2 Richmond was arrested in connection with three armed robberies of retail stores that took place over a three-week period. He was interviewed by police detectives three times over two days. During the first interview, which lasted about an hour, Richmond denied involvement in the robberies. The second interview, which lasted about ninety minutes, is the interview at issue in this appeal. In that interview, Richmond at first denied his involvement, but ultimately incriminated himself. During the final interview, which lasted less than twenty minutes, Richmond again made incriminating statements. All three interviews were audio-recorded, although at Richmond's request, the recorder was turned off for about twenty-five minutes during the second interview.

¶3 After he confessed, Richmond was charged with three counts of armed robbery as a party to a crime. The complaint alleged that Richmond committed the robberies with his cousin, Christopher Young, and another man.

¶4 Richmond moved to suppress the statements he made to police. He argued that his "statements were the product of subtle coercive police tactics designed to extract a confession." His motion asserted that when one considered Richmond's personal characteristics—such as education, intelligence, physical

[1] All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

and emotion condition, and prior experience with police—the facts demonstrated that "Richmond's statements were not freely, voluntarily and intelligently given." The motion argued that the officers used "unrelenting police pressure" and that Richmond was suffering from a mouth infection that made him uncomfortable. The motion alleged that the detective who conducted the second and third interrogations, Detective Joe Groce, "informed Richmond that he would help him with his mouth pain and get him treatment if Richmond went along with the story and confessed to the armed robberies."

¶5 The trial court conducted an evidentiary hearing on Richmond's suppression motion at which the two detectives and Richmond testified. The testimony included Groce's explanation of the twenty-five minutes when the recorder was turned off during the second interview. Groce said that Richmond asked him to turn off the recorder because Richmond "did not want to speak on tape."[2] Groce said that during the twenty-five minutes that followed, they

[2] While some of the dialogue from the interrogation was read into the record at the motion hearing during direct and cross-examination, neither the complete transcripts of the interrogations that were prepared by the parties nor the audio recordings themselves are in the appellate record. "It is the appellant's responsibility to ensure completion of the appellate record and 'when an appellate record is incomplete in connection with an issue raised by the appellant, we must assume that the missing material supports the trial court's ruling.'" ***State v. McAttee***, 2001 WI App 262, ¶5 n.1, 248 Wis. 2d 865, 637 N.W.2d 774 (citation omitted).

We do note that Richmond's appendix includes what purports to be a page of the transcript of the second interrogation related to Richmond's request that the recording be turned off. That transcript appears to be consistent with testimony taken at the hearing. It states:

> [Richmond]: Can I talk?
>
> [Groce]: Go ahead.
>
> [Richmond]: Ahright. Could you …
>
> [Groce]: Nah, I can't turn that off.

(continued)

continued talking. Groce confronted Richmond with Young's statements implicating Richmond and Richmond expressed "concern[] about how much time he can get for doing those robberies because he didn't want to go to jail for a long time because he was concerned about seeing his daughter."

¶6 At the conclusion of the hearing, trial counsel argued that "the police conduct was coercive" and that the detectives "used subtle forms of psychological persuasion" to induce Richmond's confession. Addressing Richmond's personal characteristics, trial counsel said that Richmond was homeless at the time of the crimes, was suffering from a tooth abscess, and was not "sophisticated … as far as knowing how to interact with the police." Trial counsel said that the first detective suggested that Richmond would get probation for the crimes and that Groce "wore him down" by telling Richmond that he was "never gonna see the light of day."

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> [Richmond]: I wanna … just, just a hot second and I'm ah come at you right.
>
> [Groce]: Okay, tell the tape what you want me to do. Because I, I …
>
> [Richmond]: Oh okay. I want him to cut the tape. Could you cut the tape for like two minutes?
>
> [Groce]: Okay. You just heard Mr. uh, Mr. Richmond asked me to cut the tape off, the recording. Time is 10:47[.]
>
> Okay, this is Detective Groce I'm gonna uh restarting the tape. The time is 11:12 pm. Um as you know, before the tape was turned off Mr. Richmond did acknowledge that the tape was being turned off at his request but now it's being turned back on and we gonna resume the uh, the interview. Uh while that tape was off Mr. Richmond did express, express some concerns to me, I'll let him say that on tape if he wants to but I am gonna ask him more questions regarding the armed robberies that was mentioned when the tape was turned on.

(Ellipses in original; some occurrences of the word "uh" omitted.)

Trial counsel argued: "I think the []cumulative effect of all these statements began to obviously scare Mr. Richmond." Trial counsel said that when Richmond's "will to resist Detective Groce's interrogation was overcome … he believed that he didn't have a choice, and that is exactly what involuntariness is." Notably, trial counsel did not argue—as Richmond does on appeal—that Groce's decision to turn off the recording at Richmond's request justified automatic suppression of the confession or that Richmond had invoked his right to remain silent.

¶7 The trial court denied the suppression motion. It found that taking "into consideration the totality of the circumstances, balancing the personal characteristics of the defendant against any police pressures that were applied," the statements were voluntarily made. The trial court, which listened to the recordings of the interrogations, said that during all three, "the interaction is one of I would say general conversation" and was "not by any means in any statement a high pressure situation that the police have created." The trial court explained: "There is no yelling. There is no banging on the table. There are not threats…. [I]t's certainly within the range of acceptable practices here to express skepticism towards statements by the defendant that the police did not believe are true."

¶8 The trial court also said that Groce's discussion of "potential penalties or other potential adverse consequences of conviction for armed robbery" did not "cross[] the line in terms of being overly coercive."

¶9 The trial court did, however, find that "it was a mistake here to turn off the recorder" during the second interrogation. It explained:

> I don't care whether or not the defendant requested it or not, and I acknowledge that he did in this case, but I do not believe that is a practice that should be done, and in some cases it could create problems in terms of whether or not a statement is going to be admissible.

¶10 With respect to Richmond's tooth pain, the trial court specifically found that Richmond "did experience some physical pain based upon his tooth problems," but it rejected Richmond's testimony that the detectives "conditioned access to medical treatment upon … admission to crimes."

¶11 After Richmond's suppression motion was denied, he proceeded to a jury trial. He was found guilty of all three robberies and sentenced to three concurrent terms of ten years of initial confinement and five years of extended supervision. Postconviction/appellate counsel was appointed. She filed a motion to modify Richmond's sentence based on assistance he provided to law enforcement in another case. The trial court granted the motion and reduced Richmond's sentence to seven years of initial confinement and five years of extended supervision on each count, still concurrent to one another.

¶12 Postconviction/appellate counsel filed a notice of appeal and a brief on Richmond's behalf. Subsequently, Richmond moved to proceed with his appeal *pro se*. This court granted the motion and gave Richmond the option of filing a postconviction motion or proceeding with his appeal. Richmond elected to proceed directly with his appeal and filed a new appellant's brief. It is that *pro se* brief, as well as Richmond's *pro se* reply brief, that we consider in this appeal.

## DISCUSSION

¶13 Richmond argues that his confession should have been suppressed for three reasons: (1) it was a violation of WIS. STAT. § 968.073(2) not to record the entire second interview; (2) he invoked his right to remain silent during the second interview and the detective nonetheless resumed questioning; and (3) his confession was involuntary because Groce used "coercive and improper police

tactics." Richmond also argues that his trial counsel provided ineffective assistance. We consider each issue in turn.

**I. Turning off the recorder during the second interview.**

¶14 Richmond argues that Groce violated WIS. STAT. § 968.073(2) when he failed to record the entire second interview. That statute provides:

> It is the policy of this state to make an audio or audio and visual recording of a custodial interrogation of a person suspected of committing a felony unless a condition under s. 972.115 (2)(a)1. to 6. applies or good cause is shown for not making an audio or audio and visual recording of the interrogation.

Richmond contends that if this statute is violated, then his "'Due Process' was violated." Citing a case which he identifies only as "U.S v. Stiles, 2009 U.S. Dist.," Richmond quotes the following language: "This court finds that the statement made after the tape recorder was turned off should be suppressed."

¶15 We reject Richmond's argument because it is raised for the first time on appeal. While the circumstances concerning the recording being turned off were discussed at the motion hearing and the trial court said that the recording should not have been turned off, Richmond never argued that stopping the recording constituted a violation of WIS. STAT. § 968.073(2) that required suppression. We generally refuse to address issues raised for the first time on appeal. ***State v. Huebner***, 2000 WI 59, ¶10, 235 Wis. 2d 486, 611 N.W.2d 727.

¶16 Even if we were to consider the merits of Richmond's argument, it fails because Richmond has not shown that the remedy for failing to record an interrogation is automatic suppression. As the State points out, the statutory

remedy where law enforcement fails to record an interrogation is found in WIS. STAT. § 972.115(2)(a), which provides in relevant part:

> If a statement made by a defendant during a custodial interrogation is admitted into evidence in a trial for a felony before a jury and if an audio or audio and visual recording of the interrogation is not available, upon a request made by the defendant as provided in s. 972.10(5) and unless the state asserts and the court finds that one of the following conditions applies or that good cause exists for not providing an instruction, the court shall instruct the jury that it is the policy of this state to make an audio or audio and visual recording of a custodial interrogation of a person suspected of committing a felony and that the jury may consider the absence of an audio or audio and visual recording of the interrogation in evaluating the evidence relating to the interrogation and the statement in the case.

The statute then goes on to list several conditions that could excuse not recording the interrogation. In this case, the trial court gave the jury instruction outlined in § 972.115(2)(a).[3] *See* WIS JI—CRIMINAL 180. Thus, the trial court applied the statutory remedy.

¶17 Further, Richmond's reference to a federal case does not persuade us that automatic suppression was required. Richmond appears to be referencing an unreported federal district court decision from Nevada: ***United States v. Stiles***, 2009 WL 1046119 (D. Nev. April 20, 2009). That decision did not involve a mandatory policy that interrogations be recorded. Rather, the issue before the court was whether statements made after a recorder was turned off should be suppressed because the defendant had invoked his right to counsel. We are

[3] The instruction was included in the State's list of proposed jury instructions. The jury instruction conference took place off the record, so it is unknown whether the parties specifically discussed the instruction or if the trial court simply included it at the State's request.

unpersuaded that Richmond is entitled to suppression solely because the recorder was turned off for a period of time during his second interrogation.

**II. Allegation that Richmond invoked his right to remain silent.**

¶18 Richmond argues that he invoked his right to remain silent and that Groce continued the interrogation anyway. In support, he points to Groce's testimony that Richmond asked to stop the interview. We are unpersuaded.

¶19 First, Richmond never asserted in his suppression motion or at the motion hearing that he asked to stop the interview. Similarly, he did not assert that he had invoked his right to silence. We need not consider issues raised for the first time on appeal. *See* ***Huebner***, 235 Wis. 2d 486, ¶10. Further, we agree with the State that Richmond has mischaracterized Groce's testimony at the hearing. The testimony concerned Richmond's request to stop the recording, not the interview. Indeed, the trial court clarified that when it said: "The recording stopped. The interrogation didn't stop." Groce replied: "Right." Richmond's argument fails.

**III. Challenge to the trial court's voluntariness finding.**

¶20 Richmond challenges the trial court's finding that his confession during the second interrogation was voluntary. Recently, our supreme court summarized the legal standards that apply when a defendant challenges the voluntariness of his or her confession. *See* ***State v. Lemoine***, 2013 WI 5, 345 Wis. 2d 171, 827 N.W.2d 589. ***Lemoine*** states:

> The due process test of voluntariness takes into consideration the totality of all the surrounding circumstances—both the characteristics of the accused and the details of the interrogation. A statement is voluntary if the pressures exerted by the police do not exceed the

> defendant's ability to resist. The State must show voluntariness by a preponderance of the evidence.
>
> Motions to suppress evidence on constitutionality grounds are reviewed by this court with a two-prong analysis. First, we review the circuit court's findings of historical fact, and will uphold them unless they are clearly erroneous. Second, we review the application of constitutional principles to those facts de novo.

***Id.***, ¶¶14-15 (citations and quotation marks omitted).

¶21 Here, as in ***Lemoine***, the defendant on appeal does not challenge the trial court's findings of historical fact, "so we turn to the determination of whether [the defendant's] statements were voluntary." *See* ***id.***, ¶16. Richmond argues that his statements were involuntary for several reasons.

¶22 First, Richmond argues that turning off the recording device was an "improper practice." For the reasons explained above, we reject Richmond's argument that Groce's decision to grant Richmond's request to turn off the recording device requires automatic suppression of the confession.

¶23 Second, in a related argument, Richmond asserts that Groce should have again read his ***Miranda*** rights to him after restarting the recorder.[4] We reject this argument. Police officers are not required to read a suspect ***Miranda*** warnings before each segment of an interview. ***State v. Berggren***, 2009 WI App 82, ¶28, 320 Wis. 2d 209, 769 N.W.2d 110. Further, we note that this issue is raised for the first time on appeal, so we need not address it. *See* ***Huebner***, 235 Wis. 2d 486, ¶10.

[4] *See* ***Miranda v. Arizona***, 384 U.S. 436 (1966).

¶24 Third, Richmond argues that the trial court's choice of language, which described the interrogation as not "overly coercive," demonstrates that the trial court found that there was, in fact, improper coercion. Richmond argues: "When read in context, the court was cognizant that there was some coercive and improper police tactics used." We are unpersuaded by Richmond's argument. The trial court's language recognized that the detective attempted to persuade Richmond to admit his involvement in the crime, which was not improper. *See, e.g.*, ***Lemoine***, 345 Wis. 2d 171, ¶24 (holding that the facts did not "demonstrate inappropriate police pressure or tactics" where police spoke with defendant for eighty minutes in a "normal tone[] of voice" without applying "physical or significant psychological pressure"). We agree with the State that the trial court's statements "are appropriately viewed as a finding that Groce's actions had not risen to the level of coercion that is a necessary prerequisite for a finding of involuntariness." Moreover, whether the facts found by the trial court—such as the facts that Groce did not yell or threaten Richmond—demonstrate that Richmond's statement was voluntary is an issue for this court to decide. *See* ***id.***, ¶15.

¶25 Looking at the totality of the circumstances, including "'the characteristics of the accused and the details of the interrogation,'" *see* ***id.***, ¶14 (citation omitted), we conclude that Richmond's statement was voluntary. While Richmond reportedly had limited prior experience with law enforcement, there is nothing in the record that indicates he was unable to understand the interrogation. He was twenty-four years old and had obtained a GED. He testified that he was homeless, although he also acknowledged spending time at the home of a friend. Although he had limited experience with law enforcement, he had been arrested at least twice before. Finally, while he "experience[d] some physical pain based

upon his tooth problems," his statements during the interrogation and the tone of the interview as described by the trial court do not suggest that the pain was overwhelming or that it prohibited Richmond from participating in the interview. Indeed, Groce testified that Richmond did not mention pain in his tooth until after the recorder was turned off.[5]

¶26 Turning to the details of the interrogation as found by the trial court, we note that during the ninety-minute interrogation, Groce did not threaten or yell at Richmond. Richmond "was allowed freedom to be unrestrained in the interrogation room." He was provided with "creature comforts" such as cigarettes. He "made no other requests that were denied during that time period with respect to food, facilities, or other references." He was not under physical duress or deprived of sleep. Further, the interactions consisted of "general conversation."

¶27 Having considered the totality of the circumstances and balanced Richmond's characteristics against the tactics used by Groce, *see* ***id.***, ¶¶14, 24, we conclude that Richmond's statement was voluntary. We are not convinced that the pressures exerted by the detective exceeded Richmond's ability to resist. *See* ***id.***, ¶14. We affirm the trial court's order denying the motion to suppress Richmond's statements.

**IV. Claim of ineffective assistance of trial counsel.**

¶28 Richmond argues that his trial counsel provided ineffective assistance by failing "to investigate and identify a key witness" of one of the

[5] We also note that it is undisputed that Richmond did not mention any tooth pain to the detective who interviewed him about ten hours before Richmond's interview with Groce.

robberies. (Capitalization and bolding omitted.) Richmond also alleges that "trial counsel fail[ed] to put forth what in hindsight was a winning argument" at the suppression hearing. Richmond did not file a postconviction motion alleging ineffective assistance and did not seek a ***Machner*** hearing.[6] We decline to consider the merits of Richmond's ineffective assistance claims because he failed to raise them at the trial court.[7] *See* ***Huebner***, 235 Wis. 2d 486, ¶10; ***State v. Beauchamp***, 2011 WI 27, ¶39 n.32, 333 Wis. 2d 1, 796 N.W.2d 780) ("A ***Machner*** hearing is 'a prerequisite to a claim of ineffective representation on appeal to preserve the testimony of trial counsel.'") (citation omitted).

*By the Court*.—Judgment affirmed.

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

[6] *See* ***State v. Machner***, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979). A ***Machner*** hearing is "[t]he evidentiary hearing to evaluate counsel's effectiveness, which includes counsel's testimony to explain his or her handling of the case." ***State v. Balliette***, 2011 WI 79, ¶31, 336 Wis. 2d 358, 805 N.W.2d 334.

[7] We note that after Richmond elected to proceed *pro se* on appeal, this court gave him the option of returning to the trial court to file a postconviction motion or proceeding directly with his appeal. He elected to proceed with his appeal.