

**COURT OF APPEALS
DECISION
DATED AND FILED**

February 22, 2000

Cornelia G. Clark
Acting Clerk, Court of Appeals
of Wisconsin

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.

No. 98-2891

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

WARREN GOODMAN,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County:
DIANE S. SYKES, Judge. *Affirmed.*

Before Fine, Schudson and Curley, JJ.

¶1 PER CURIAM. Warren Goodman was convicted, following a jury trial, with one count of armed robbery, party to a crime, and one count of felon in possession of a firearm. Goodman appeals from the order denying his

postconviction motion for relief pursuant to WIS. STAT. § 974.06 (1997-98).¹ Goodman argues that: (1) the trial court erred in admitting evidence of threats allegedly made to two of the State's witnesses in an effort to keep them from testifying against Goodman, and that trial counsel was ineffective for failing to request a limiting instruction regarding this evidence; (2) the prosecutor engaged in misconduct by offering something of value to the State's witnesses in exchange for their testimony; (3) he was also denied the effective assistance of trial counsel for numerous other reasons, including trial counsel's failure to make an offer of proof and properly preserve the record when the trial court refused to allow testimony regarding the amount of prison time that Goodman's accomplices faced and the State's recommendation as to their sentences, and failure to request a mistrial based on prosecutorial misconduct; and (4) he was denied the effective assistance of postconviction counsel when postconviction counsel failed to raise issues in the postconviction motion and direct appeal regarding the ineffective assistance of trial counsel, and failed to claim that the trial court erred when it admitted testimony regarding the alleged threats.² We determine that Goodman's substantive claims are barred by *State v. Escalona-Naranjo*, 185 Wis. 2d 168, 517 N.W.2d 157 (1994), and only Goodman's claim of ineffective assistance of postconviction counsel survives. Therefore, we address the merits of each issue

¹ All references to the Wisconsin Statutes are to the 1997-98 version unless otherwise noted.

² It is not entirely clear which issues Goodman includes in his claim of ineffective assistance of postconviction counsel. It would appear that Goodman simply tries to avoid the procedural bar of *State v. Escalona-Naranjo*, 185 Wis. 2d 168, 517 N.W.2d 157 (1994), by incorporating by reference all of the issues raised in the preceding sections. Therefore, in section II B of this opinion we have only addressed the claims of ineffective assistance of postconviction counsel that Goodman has adequately briefed. See *State v. Pettit*, 171 Wis. 2d 627, 646-47, 492 N.W.2d 633, 642 (Ct. App. 1992) (arguments supported by only general statements or otherwise inadequately briefed will not be addressed).

only as they pertain to his claim of ineffective assistance of postconviction counsel. We are satisfied that Goodman received the effective assistance of postconviction counsel and, therefore, we affirm.

I. BACKGROUND.

¶2 Goodman was charged with armed robbery, party to a crime, and possession of a firearm by a felon, after participating in the robbery of a Kohl's Food Store. The events which led to these charges began in July of 1992, when an individual entered the Kohl's Food Store, pointed a gun at the store manager and a cashier and demanded money. The manager complied and the individual ran out of the store and climbed into a car driven by a second individual. The two individuals drove off, but abandoned the first car a few blocks away from the store, and drove off in a white Pontiac containing two other men.

¶3 Later that day, police stopped Mark Smith and Larry Ross in the white Pontiac. In one of Smith's pockets, the police found a gun that matched the description of the gun used in the robbery. Inside the car they found about \$200 and a second gun. Smith and Ross were placed in a lineup, but the manager identified someone other than Smith or Ross as the individual who robbed the store. The manager's identification turned out to be spurious because the individual he identified was not involved in the robbery at all. Later, after Goodman was arrested, the manager, after speaking with a detective, became uncertain about his initial identification and decided his first identification was in error. In a subsequent lineup, he identified Goodman as the robber. However, in that same lineup, the cashier identified an individual as the robber who, as it turned out, was also not involved in the robbery.

¶4 Ultimately, Smith confessed to participating in the robbery and alleged that Ross was also involved. Smith reached an agreement with the State that, in exchange for his testimony against his accomplices, the State would dismiss one felony charge against him and would make no recommendation as to sentence other than that any prison time run concurrent with his parole revocation. Smith then revealed that Goodman was the individual who entered the store. All three were charged with armed robbery, party to a crime. Smith pled guilty pursuant to his plea agreement. Ross eventually pled no contest. However, Goodman pled not guilty and his case went to trial.

¶5 During this first jury trial, Smith and the store manager testified for the State, identifying Goodman as the robber. However, the cashier testified that she had identified someone other than Goodman as the perpetrator. Goodman testified on his own behalf, denying any involvement in the robbery. The jury was unable to reach a verdict, and the trial court declared a mistrial.

¶6 After Goodman's first trial, Ross learned of the agreement between Smith and the State and he contacted the District Attorney's office seeking a similar agreement. Ross offered to testify against Goodman in the second trial and to identify the driver of the first getaway car in exchange for the State's agreement to support a motion to modify his sentence. The State declined to enter into an agreement and informed Ross that, because he had already been sentenced, there was no guarantee that anything could be done for him. Nevertheless, Ross identified Percy Sallis as the driver of the first car and testified against Goodman in the second trial. Sallis was arrested, and then, on the advice of counsel, he also testified against Goodman in the second trial.

¶7 At the second trial, Smith, Ross, Sallis, and the store manager testified against Goodman. Goodman, now represented by new counsel, again testified and denied any involvement in the robbery. However, the cashier who testified at the first trial that she was unable to identify Goodman as the robber, did not testify at the second trial because she was away on vacation and Goodman's new attorney failed to subpoena her. In addition, the trial court excluded as hearsay the cashier's testimony from the previous trial that she had identified someone other than Goodman as the robber. The jury found Goodman guilty of both charges.

¶8 Goodman filed a postconviction motion claiming that, in the second trial, he received ineffective assistance of trial counsel. The trial court denied Goodman's motion without a hearing, concluding that even if trial counsel's performance was deficient, Goodman was not prejudiced by the alleged errors. Goodman appealed and this court affirmed. *See State v. Goodman*, No. 96-0017-CR, unpublished slip op. (Wis. Ct. App. Mar. 11, 1997). Shortly thereafter, Goodman filed a postconviction motion pursuant to WIS. STAT. § 974.06, raising numerous claims of error. The trial court again denied Goodman's motion without a hearing. Goodman appeals.

II. ANALYSIS.

¶9 Because Goodman is appealing the order denying his WIS. STAT. § 974.06 motion, several general principles govern our review of his claims. The scope of a § 974.06 postconviction motion is limited to jurisdictional or constitutional issues. *See State v. Escalona-Naranjo*, 185 Wis. 2d 168, 177, 517

N.W.2d 157, 160 (1994). Section 974.06(4)³ requires criminal defendants to raise all postconviction claims in one motion or appeal. *See Escalona-Naranjo*, 185 Wis. 2d at 178, 517 N.W.2d at 161. This procedural bar effectively prohibits “[s]uccessive motions and appeals, which all could have been brought at the same time.” *Id.* at 185, 517 N.W.2d at 164. Issues that have already been finally adjudicated, waived, or not raised in a prior postconviction motion, cannot be raised in a § 974.06 motion unless there is “sufficient reason” for failing to raise them in the original, supplemental or amended motion. *See id.* at 181-82, 517 N.W.2d at 162; WIS. STAT. § 974.06(4).

A. Goodman’s substantive claims are barred.

¶10 Under WIS. STAT. § 974.06, and *Escalona-Naranjo*, Goodman is barred from raising claims of error that he could have raised, but failed to, in his original postconviction motion, unless he provides sufficient reason for his failure to raise the issues in the prior proceedings. Two claims of error are subject to the procedural bar of *Escalona-Naranjo*: (1) that the trial court erred in admitting evidence that two of the State’s witnesses were allegedly threatened in an effort to keep them from testifying; and (2) that the prosecutor illegally exchanged something of value for witnesses’ testimony against Goodman. Goodman fails to

³ WISCONSIN STAT. § 974.06(4) requires that:

All grounds for relief available to a person under this section must be raised in his or her original, supplemental or amended motion. Any ground finally adjudicated or not so raised, or knowingly, voluntarily and intelligently waived in the proceeding that resulted in the conviction or sentence or in any other proceeding the person has taken to secure relief may not be the basis for a subsequent motion, unless the court finds a ground for relief asserted which for sufficient reason was not asserted or was inadequately raised in the original, supplemental or amended motion.

provide sufficient reason why these claims were not raised in his original postconviction motion and direct appeal.

¶11 However, Goodman raises numerous other claims, arguing that his postconviction counsel was ineffective for failing to raise those claims in the original postconviction motion or on appeal. It is generally recognized that ineffective assistance of postconviction counsel constitutes sufficient reason for failing to raise a claim of error in a prior proceeding. *See, e.g., State ex rel. Rothering v. McCaughtry*, 205 Wis.2d 675, 682, 556 N.W.2d 136 (Ct. App. 1996). Therefore, the alleged ineffectiveness of Goodman's postconviction counsel constitutes sufficient reason for his failure to raise several claims of error and we must consider them here.⁴

B. Goodman's ineffective assistance of postconviction counsel claims fail.

¶12 Goodman claims that postconviction counsel was ineffective for failing to raise the following issues in the original postconviction motion: (1) that the trial court erred when it permitted testimony regarding threats that were allegedly made to the State's witnesses which, they claimed, were made to prevent them from testifying against Goodman, and that trial counsel was ineffective for failing to request a limiting instruction regarding the threats evidence; (2) that trial counsel was ineffective for failing to challenge the denial of Goodman's right to confront Smith, Ross, and Sallis with the details of their plea bargains and/or the maximum amount of prison time each individual faced; and (3) that trial counsel

⁴ Although Goodman's substantive allegations that the trial court erred when it permitted testimony at trial of the threats against the State's witnesses, and when it refused to allow Goodman's trial counsel to explore the accomplices' plea bargains, are barred by *Escalona-Naranjo*, these claims survive as a basis for his allegations that postconviction counsel was ineffective.

was ineffective for failing to claim prosecutorial misconduct. We shall address each issue in turn.

1. *Postconviction counsel was not ineffective for failing to argue on direct appeal that the trial court erred by admitting evidence of the threats allegedly made to the State's witnesses, or that trial counsel was ineffective for failing to request a limiting instruction..*

¶13 Two of the State's witnesses, Smith and Ross, were permitted to testify regarding threats they allegedly received prior to trial in an effort to prevent them from testifying against Goodman. Goodman objected to the admission of their testimony because neither witness asserted that Goodman threatened him personally or was present when the threats were made. Nevertheless, over Goodman's objection, the trial court admitted the testimony. Goodman contends that because there was no evidence presented to show that he personally made the threats or had any prior knowledge of the threats, the trial court erroneously exercised its discretion. However, postconviction counsel did not raise this claim of error either in the original postconviction motion or on direct appeal. Goodman concludes that postconviction counsel's failure to raise this claim of error constitutes ineffective assistance of counsel. Goodman also argues that trial counsel was ineffective for failing to request a limiting instruction regarding the threats evidence. We disagree.

¶14 The familiar two-pronged test for ineffective assistance of counsel claims requires Goodman to prove (1) deficient performance and (2) prejudice. *See Strickland v. Washington*, 466 U.S. 668, 687 (1984); *see also State v. Sanchez*, 201 Wis.2d 219, 236, 548 N.W.2d 69, 76 (1996) (holding that the *Strickland* analysis applies equally to ineffectiveness claims under the state constitution). To prove deficient performance Goodman must show specific acts

or omissions of counsel which were “outside the wide range of professionally competent assistance.” *Strickland*, 466 U.S. at 690. To prove prejudice, “[Goodman] must show that there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.” *Id.* at 694. If we conclude that Goodman is unable to demonstrate one prong, we need not address the other. *See id.* at 697. Whether Goodman has established either prong is a question of law which we review *de novo*. *See State v. Pitsch*, 124 Wis. 2d 628, 634, 369 N.W.2d 711, 715 (1985). After our independent review of the record we are satisfied that even if postconviction counsel had raised the claim of error he would not have been successful and, therefore, Goodman is unable to establish that postconviction counsel’s failure to raise this issue was prejudicial.

¶15 Contrary to Goodman’s assertions, the trial court did not erroneously exercise its discretion when it admitted evidence of the threats made to the State’s witnesses. Relevant evidence is admissible if its probative value is not substantially outweighed by its unfair prejudicial effect. *See* WIS. STAT. § 904.03. The trial court concluded that the evidence of threats made to Smith was “relevant, highly relevant, to the jury’s evaluation of [Smith’s] testimony and what he has to gain or to lose by testifying,” and that the “relevance is not outweighed by the prejudice to [Goodman].” With regards to the threats made to Ross, the trial court found a sufficient link between the threats and Ross’s testimony against Goodman to allow the testimony. Similar to Smith’s testimony regarding the threats, Ross’s testimony was relevant to the jury’s evaluation of what Ross stood to gain or to lose by testifying, and the probative value of this testimony was not substantially outweighed by unfair prejudice to Goodman. For these reasons, the trial court

properly exercised its discretion in admitting evidence of the threats made to the State's witnesses and, consequently, even if postconviction counsel had raised this claim of error on appeal it would not have met with success. Therefore, Goodman cannot establish either deficient performance or prejudice because he cannot demonstrate that postconviction counsel's failure to raise this issue on appeal was "outside the wide range of professionally competent assistance," nor can he show that had postconviction counsel raised the issue, the result of the proceeding would have been different. For these reasons, we are satisfied that postconviction counsel was not ineffective for failing to raise this claim of error on appeal.

¶16 Moreover, Goodman's trial counsel was not ineffective for failing to request a limiting instruction regarding the alleged threats. Goodman argues that a limiting instruction was "essential to insuring that such highly prejudicial evidence not be used beyond the extremely limited purpose for which it was deemed admissible." However, the conclusory allegation that a limiting instruction was necessary to prevent the jury from considering the threats evidence for an improper purpose is insufficient to establish that counsel was ineffective for failing to request a limiting instruction. Goodman fails to demonstrate a reasonable probability that but for trial counsel's failure to request a limiting instruction the results of the proceeding would have been different. *See Strickland*, 466 U.S. at 694. Consequently, Goodman has not proven that trial counsel's claimed error was prejudicial and, therefore, we conclude that Goodman's trial counsel was not ineffective for failing to request a limiting instruction regarding the threats evidence.

2. Postconviction counsel was not ineffective for failing to challenge trial counsel's failure to claim that Goodman was denied the right to confront Smith, Ross and Sallis.

¶17 During the trial, the trial court would not allow Goodman's trial counsel to question Smith regarding the sentence he faced for his participation in the crime, nor would the trial court allow counsel to explore the State's recommendation regarding Smith's case.⁵ Goodman concludes that the trial court's exclusion of this testimony "deprived the jury of prototypical evidence of bias and interest, thus violating [his] right to confrontation."⁶ Goodman posits that his trial counsel was ineffective for failing to make an offer of proof regarding the testimony he sought or a sufficient record for the purposes of an appeal. Because postconviction counsel never raised this claim of error, Goodman argues that postconviction counsel was ineffective for failing to challenge trial counsel's failure to properly preserve the record on this issue. We disagree.

¶18 Postconviction counsel's failure to raise this issue does not amount to ineffective assistance of postconviction counsel because it was not deficient performance. *See Strickland*, 466 U.S. at 687 (requiring defendants to prove both deficient performance and prejudice to establish a claim for ineffective assistance). Goodman's postconviction counsel did not engage in deficient performance when postconviction counsel failed to raise this issue, because even though trial counsel

⁵ We note that we have already determined that Goodman's assertion that trial counsel was ineffective for failing to object to the trial court's ruling is barred from consideration here by *Escalona-Naranjo*, 185 Wis.2d at 181-82, 517 N.W.2d at 162, along with Goodman's other claims of ineffective assistance of trial counsel raised in this appeal.

⁶ Trial counsel did not attempt to elicit similar testimony from either Ross or Sallis, who both testified after Smith. Goodman notes that trial counsel could reasonably conclude that the court's exclusion applied equally to all three witnesses. However, Goodman charges that trial counsel "should have made a record of that fact."

was not permitted to question the State's witnesses regarding the specifics of their respective sentences, trial counsel introduced evidence of all three witnesses' motivation for testifying against Goodman via a different vehicle.

¶19 With regard to Smith, although the trial court refused to permit any questions concerning the amount of time Smith faced or the State's recommendation at his sentencing, the relevant information was put before the jury when both sides stipulated to the admissibility of a letter that outlined the full terms of the agreement between Smith and the State. The letter fully informed the jury of the consideration that Smith received for cooperating in this case. The letter conveyed to the jury a possible motive for Smith's testimony. Therefore, because the relevant information regarding the plea agreement was presented to the jury, Goodman's postconviction counsel's failure to raise this issue did not constitute deficient performance.

¶20 Moreover, Goodman's trial counsel was also able to introduce evidence regarding both Ross's and Sallis's motivation for testifying. Goodman's trial counsel was able to elicit the relevant information from Ross on cross-examination when Ross testified that in exchange for his testimony against Goodman he anticipated that the State would join in a motion for sentence modification.

¶21 Similarly, Goodman's trial counsel was able to elicit testimony from Sallis on cross-examination that Sallis's attorney told him that it would be in his best interest, for sentencing purposes, to testify against Goodman. With respect to Sallis's sentencing exposure, Sallis had pled guilty to armed robbery for his participation in the crime, but he had not yet been sentenced at the time of Goodman's trial. Unlike Smith or Ross, Sallis had not been offered anything by

the State for testifying, nor had he sought a deal with the State in exchange for his testimony.

¶22 Consequently, counsel was able to introduce evidence of all three witnesses' motivation for testifying and Goodman was not prejudiced when counsel failed to introduce evidence of the length of their respective or possible sentences. For these reasons, postconviction counsel's failure to raise these issues did not constitute ineffective assistance of counsel.

3. Postconviction counsel was not ineffective for failing to challenge trial counsel's failure to raise the issue of prosecutorial misconduct.

¶23 Finally, Goodman asserts that the prosecutor engaged in misconduct during closing argument when she was allowed to argue that Ross and Sallis had no motive for falsely accusing Goodman and, therefore, their testimony must be truthful. Goodman contends that these arguments were false and he contends that the prosecutor's knowing use of false arguments rendered the conviction fundamentally unfair, depriving him of due process. Goodman asserts that his trial counsel erred by failing to object or request a mistrial, and postconviction counsel was ineffective for never raising this claim of error. We disagree.

¶24 First, trial counsel's failure to object to the prosecutor's statements regarding Ross was not deficient performance, thus we will not conclude that postconviction counsel was ineffective for failing to raise this issue. During her closing arguments, the prosecutor asserted:

Detective Orlowski goes out and sees Larry Ross. Tells Larry Ross, you've already been sentenced. We can't offer anything to you at all. There is nothing that can be done and how do we even know that we should believe you. That's what Detective Orlowski tells Larry Ross.

During the second trial, Detective Orlowski's testimony was consistent with what the prosecutor argued in closing arguments. He stated that he met Ross at the prison and he told Ross that nothing could be done for him. Ross also testified that he had been told that nothing could be done because he had already been sentenced. The prosecutor was simply restating testimony introduced at trial, which she is clearly allowed to do.⁷ Consequently, trial counsel's failure to object does not constitute deficient performance, and postconviction counsel's failure to include this issue in the postconviction motion was certainly neither deficient performance, nor prejudicial.

¶25 Second, trial counsel was deficient for failing to object to the prosecutor's statements during closing argument regarding Sallis, but we conclude that postconviction counsel was not ineffective for failing to raise this issue because the prosecutor's inaccurate remarks were harmless error. During her closing arguments, the prosecutor made the following limited comments regarding Sallis:

Now Percy Sallis was found two years after this offense....The judge already instructed you about [uncorroborated] testimony of the co-defendant not being enough for you to consider. It's not enough for me to charge either so Percy Sallis [is] arrested or he voluntarily comes in....

⁷ After the trial, Ross did, in fact, file a motion for sentence modification, which the State did not oppose. However, the State's subsequent agreement in the motion does not render the prosecutor's statements during closing arguments improper. As indicated by the testimony of both Detective Orlowski and Ross, at the time of Goodman's trial, the State had not offered anything to Ross in exchange for his testimony. In fact, both witnesses testified that Ross had been told that nothing could be done for him. The prosecutor was simply reiterating testimony offered at trial, not making false arguments, and the State's subsequent appearance at Ross's sentence modification does not change that fact.

Now how in the world could [] Sallis have been charged or convicted of anything without [] Sallis' own statement. [Sallis] put himself down when there was no other way that [he] could have been charged with anything....

So [] Sallis who's got no way that he would ever have been charged or convicted of this offense puts himself down, puts these other people down. Now isn't that reliable.

In deciding Goodman's WIS. STAT. § 974.06 postconviction motion, the trial court found that the prosecutor's comments regarding Sallis were not improper because they simply referred back to jury instruction WIS JI—CRIMINAL 245 (1991), regarding the testimony of accomplices, which was given to the jury immediately before closing arguments began. However, in its decision the trial court also found that the comments were not "such a formidable component of the prosecutor's closing argument as to undermine the fairness of the trial."

¶26 Although the prosecutor was obviously referring to the fact that the trial court had already instructed the jury regarding the uncorroborated testimony of an accomplice, contrary to the trial court's conclusions, her subsequent comments expanded her argument beyond mere reference to the jury instruction. Her comments did, in fact, imply that Sallis could not have been charged with or convicted of anything absent his own confession. The prosecutor was mistaken. Although the prosecutor's assumption was inaccurate, we adopt the trial court's reasoning that the comment was inconsequential and we conclude that the prosecutor's comments are harmless error. *See, e.g., State v. Dyess*, 124 Wis. 2d 525, 543, 370 N.W.2d 222, 232 (1985) (An error is harmless if there is no reasonable possibility that the error contributed to the conviction.). The prosecutor's incorrect argument was directed at only one of the three accomplices. Even discounting all of Sallis's testimony implicating Goodman in the robbery, two other accomplices testified against Goodman, as well as one of the victims.

As a result, we are satisfied that the error did not contribute to the jury's verdict. Consequently, we are satisfied that trial counsel's failure to object to the prosecutor's comments was not prejudicial. Therefore, because postconviction counsel would not have been able to demonstrate that trial counsel was ineffective for failing to object to the prosecutor's comments, we will not hold that postconviction counsel was ineffective for failing to raise this issue.

By the Court.—Order affirmed.

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

