

**COURT OF APPEALS
DECISION
DATED AND FILED**

July 7, 1999

Marilyn L. Graves
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 § 808.10 and RULE 809.62, STATS.

No. 98-2953-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

BRIAN TODD PHEIL,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Douglas County:
MICHAEL T. LUCCI, Judge. *Affirmed.*

Before Cane, C.J., Myse, P.J., and Hoover, J.

PER CURIAM. Brian Pheil, pro se, appeals a trial court order that denied his § 974.06, STATS., postconviction motion. Pheil sought to vacate his 1988 convictions for armed robbery, armed burglary, felony theft, and first-degree murder, all as a party to the crime. After midnight on June 18, 1987, Pheil and two coassailants attacked and killed an inebriated, retired firefighter in his home.

One of Pheil's coassailants who was awaiting sentencing turned State's evidence. He testified at Pheil's trial that Pheil masterminded the crime, broke into the home, sprayed the victim with a fire extinguisher, struck him with the extinguisher, cut his throat, stabbed him in the chest, and strangled him with a vacuum cleaner cord. We upheld Pheil's convictions on direct appeal. *See State v. Pheil*, 152 Wis.2d 523, 449 N.W.2d 858 (Ct. App. 1989).

Pheil did not file postconviction motions before that appeal. Pheil's appellate briefs now allege, however, that his trial counsel, postconviction counsel, and appellate counsel in the original proceedings were all ineffective. Parts of Pheil's briefs are unclear, and we do not know with certainty what he is arguing on some issues. We will not examine those claims that he does not make with clarity. Pheil argues that his trial counsel and postconviction counsel ineffectively failed to raise a "mere presence" and other defenses to the charges. According to Pheil, his passive, "mere presence" at the crime scene would have exonerated him of all criminal liability. Pheil also argues that trial counsel, postconviction counsel, and appellate counsel failed to attack a photograph that Pheil claims misrepresented part of the crime scene. We reject these arguments and affirm the postconviction order.

First, Pheil waived his "mere presence" issue by not raising it in a RULE 809.30, STATS., postconviction motion. *See State v. Escalona-Naranjo*, 185 Wis.2d 168, 181, 517 N.W.2d 157, 162 (1994) (litigants must raise all issues in a RULE 809.30 motion). Pheil gives no good cause for not raising the issue by that procedure. The issue should have been apparent, as the coassailants hotly contested their roles at trial. *See Pheil*, 152 Wis.2d at 526 n.1, 449 N.W.2d at 859

n.1. Pheil cannot avoid *Escalona* without showing good cause.¹ See *id.* at 181-82, 517 N.W.2d at 162. Second, regarding ineffective postconviction and appellate counsel, Pheil has not made this claim with clarity. Litigants have an obligation to so make all arguments, and appellate courts may summarily dispose of unclear arguments.² See *State v. Shaffer*, 96 Wis.2d 531, 545-46, 292 N.W.2d 370, 378 (Ct. App. 1980). In short, Pheil has given no basis to vacate his convictions.

By the Court.—Order affirmed.

¹ We note that the trial court did instruct the jury on the innocence of bystanders and spectators. This was the equivalent of a “mere presence” instruction, and we therefore see no prejudice to Pheil. We doubt that use of the extra terms “mere presence” would have changed the verdict. See *State v. Zelenka*, 130 Wis.2d 34, 49, 387 N.W.2d 55, 61 (1986) (single instructions are only one part of trial, along with evidence and argument of counsel).

² The transcript of the § 974.06, STATS., hearing adds some clarity to Pheil’s arguments. Pheil may be arguing that postconviction counsel and appellate counsel ineffectively failed to challenge the trial court’s refusal to give the jury certain lesser-included offenses under the old criminal code: second-degree murder, felony murder, manslaughter, and homicide by reckless conduct. Trial counsel had asked the trial court for these lesser-included offenses in the original trial court proceedings. Regardless, Pheil has not shown ineffective representation by postconviction and appellate counsel. Pheil has cited no evidence that the killing was anything but intentional, which rules out any lesser-included offenses resting on some other state of mind.

Pheil may be arguing that his RULE 809.30, STATS., postconviction counsel ineffectively let stand trial counsel’s failure to seek a coercion-based lesser-included offense. The trial court rejected this claim in Pheil’s § 974.06, STATS., motion. Pheil has cited no evidence to us of who coerced him and how the coercer carried out those acts. He also testified to none during his trial or the hearing on his § 974.06 motion.

Finally, Pheil may be arguing that trial counsel ineffectively failed to refute a prosecution wintertime photograph depicting a trash collection area near Pheil’s house. At trial, a coassailant testified that Pheil cut the electrical cord from his stereo console to use in the crime. The prosecution suggested that Pheil then put his stereo console in the trash outside his mother’s house three houses away to hide evidence. Pheil claimed that there was no trash collection area near his apartment and that he left the console at his mother’s for that reason. The prosecution offered the photograph to counter this claim. According to Pheil, the wintertime photograph postdates the June 1987 crime by several months and misleadingly shows a trash collection area that did not exist at the time of the crime. Regardless, Pheil has not demonstrated that the verdict turned on this evidence. In addition, his trial counsel pointed out during the trial that the photograph was not contemporaneous with the crime.

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

