

**COURT OF APPEALS
DECISION
DATED AND FILED**

November 28, 2000

Cornelia G. Clark
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. 00-0007

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JOHN R. JAGUSCH,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Polk County:
GARY B. SCHLOSSTEIN, Judge. *Affirmed.*

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

¶1 PER CURIAM. John Jagusch appeals from an order denying his WIS. STAT. § 974.06¹ motion for postconviction relief. Jagusch argues that (1) he

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

was denied the effective assistance of trial counsel; and (2) the evidence was insufficient to support his conviction for attempted mayhem. Because Jagusch failed to preserve trial counsel's testimony, we refrain from addressing his claim of ineffective assistance of counsel. Additionally, because Jagusch's challenge to the sufficiency of the evidence could have been litigated on direct appeal and, further, because he has failed to provide any justification for the omission of this issue on direct appeal, we conclude that this claim is procedurally barred under WIS. STAT. § 974.06(4) and the holding of *State v. Escalona-Naranjo*, 185 Wis. 2d 168, 517 N.W.2d 157 (1994). Therefore, we affirm the trial court's order.

BACKGROUND

¶2 In June of 1996, Jagusch was convicted of two counts of attempted mayhem, as party to a crime, contrary to WIS. STAT. §§ 940.21, 939.05 and 939.32. This case arose during Jagusch's incarceration for a 1995 battery conviction, for which Judge Robert H. Rasmussen sentenced him to 120 days in the county jail. At trial, the State presented evidence that Jagusch had discussed with two fellow inmates an intent to find somebody to harm both a pilot from Amery and Judge Rasmussen. One of the inmates indicated to Jagusch that he could get a "friend of a friend" to do the job. The inmate informed authorities of his discussions with Jagusch. Subsequently, a special agent for the Wisconsin Division of Criminal Investigation, posing as a hitman, contacted Jagusch and arranged a meeting. At the videotaped meeting, Jagusch discussed details of what he wanted done to the intended victims and offered the agent money for the job. At trial, Jagusch argued entrapment as a defense to the crime. He was convicted and appealed that conviction.

¶3 In that appeal, Jagusch, represented by at least one of the members of his trial counsel team, argued that the court erred by: (1) excluding psychological testimony regarding his susceptibility to being induced to commit the offense; (2) denying his request for two jury instructions; and (3) denying his objection to the prosecutor's closing argument. We rejected Jagusch's arguments and affirmed the judgment. *See State v. Jagusch*, No. 96-3457, unpublished slip op. (Wis. Ct. App. July 1, 1997).

¶4 In March of 1999, Jagusch filed a WIS. STAT. § 974.06 motion with the trial court, arguing that he was denied the effective assistance of counsel. Specifically, Jagusch contended that "trial counsel failed to argue that the offense of attempted mayhem does not, as a matter of law, lie here and that the evidence only establishes solicitation to commit mayhem." At the hearing on Jagusch's § 974.06 motion, trial counsel did not testify. Rather, Jagusch argued, as a jurisdictional matter, that the crime of attempted mayhem did not exist under Wisconsin law and, alternatively, that the evidence was insufficient to support his conviction for attempted mayhem. The trial court denied his motion and this appeal followed.

ANALYSIS

¶5 Jagusch argues that the trial court erred by denying his WIS. STAT. § 974.06 motion because he was denied the effective assistance of counsel. Specifically, Jagusch contends that counsel was ineffective for failing to argue that Jagusch solicited, rather than attempted, to commit the crime of mayhem. However, "it is a prerequisite to a claim of ineffective representation on appeal to preserve the testimony of trial counsel." *State v. Machner*, 92 Wis. 2d 797, 804, 285 N.W.2d 905 (Ct. App. 1979). Because Jagusch failed to preserve trial

counsel's testimony, we refrain from addressing his claim of ineffective assistance of counsel.²

¶6 Jagusch additionally contends that the evidence was insufficient to support his conviction for attempted mayhem. Jagusch's challenge to the sufficiency of the evidence, however, is procedurally barred under both WIS. STAT. § 974.06(4) and *Escalona-Naranjo*. Section 974.06 provides, in pertinent part, the following:

(1) After the time for appeal or postconviction remedy provided in s. 974.02 has expired, a prisoner in custody under sentence of a court or a person convicted and placed with a volunteers in probation program under s. 973.11 claiming the right to be released upon the ground that the sentence was imposed in violation of the U.S. constitution or the constitution or laws of this state, that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

....

(4) 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

² We note that at the WIS. STAT. § 974.06 motion hearing, counsel stated that trial counsel was ineffective for failing to recognize that "there is no such crime of attempted mayhem ... [and] ... inasmuch as there isn't the crime of attempted mayhem, this court lacked jurisdiction at the outset." Indicating that trial counsel's testimony was unnecessary to the court's determination of the jurisdictional argument, counsel stated that "if there's not a jurisdictional defect, there was no ineffective assistance." On appeal, Jagusch has abandoned his argument that the crime of attempted mayhem does not exist under Wisconsin law. Thus, we refrain from addressing it. See *Reiman Assocs. v. R/A Adver.*, 102 Wis. 2d 305, 306 n.1, 306 N.W.2d 292 (Ct. App. 1981). In any event, Jagusch's failure to preserve trial counsel's testimony precludes our review of the matter.

relief asserted which for sufficient reason was not asserted or was inadequately raised in the original, supplemental or amended motion.

¶7 In *Escalona-Naranjo*, our supreme court held that “a motion under sec. 974.06 could not be used to review issues which were or could have been litigated on direct appeal.” *Id.* at 172. The statute, however, does not preclude a defendant from raising “an issue of constitutional dimension which for sufficient reason was not asserted or was inadequately raised in his original, supplemental or amended postconviction motions.” *Id.* at 184. Because Jagusch’s challenge to the sufficiency of the evidence could have been litigated on direct appeal, and further, because Jagusch has failed to provide any justification for the omission of this issue on direct appeal, we conclude that this issue is procedurally barred under WIS. STAT. § 974.06(4) and the holding of *Escalona-Naranjo*.

By the Court.—Order affirmed.

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

