COURT OF APPEALS
DECISION
DATED AND RELEASED

September 26, 1995

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.

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 94-3226-CR

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

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

COREY J. WISEMAN,

Defendant-Appellant.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: JEFFREY A. WAGNER, Judge. *Affirmed*.

Before Wedemeyer, P.J., Sullivan and Schudson, JJ.

PER CURIAM. Corey J. Wiseman appeals from a judgment of conviction for one count of first-degree intentional homicide, while armed; one count of armed robbery—threat of force; and one count of attempted armed robbery—threat of force; all as a party to a crime. He also appeals from an order denying his ineffective assistance of counsel postconviction motion. Wiseman presents four issues for our review: first, whether the trial court erroneously instructed the jury on the "while armed" penalty enhancer portion of the jury

instruction because it did not require that the jury find a nexus between the possession of the weapon and the underlying offense; second, whether the trial court erred when it denied his ineffective assistance of counsel motion without a ***Machner*** hearing;[1] third, whether the trial court's failure to give a lesser-included offense instruction for felony murder was plain error; and fourth, whether the trial court erroneously exercised its discretion when it failed to dismiss the homicide charge at the conclusion of the preliminary hearing based upon an insufficiency of the evidence.

We conclude that Wiseman's failure to specifically object to the "while armed" jury instruction in the trial court waived his right to challenge it on appeal; and that the trial court properly denied the ineffective assistance of counsel motion without a ***Machner*** hearing. We further conclude that the trial court did not commit "plain error" because the evidence did not support a lesser-included jury instruction for felony murder; and that a fair and errorless trial cured any alleged defect in Wiseman's preliminary hearing. Accordingly, we affirm the judgment and the order denying postconviction relief.

On the night of November 22, 1993, Wiseman and his accomplice, Anthony Peete, approached two young males walking down a street on Milwaukee's near north side. When Wiseman and Peete confronted the victims, Peete pulled out a semi-automatic handgun and Wiseman pulled out a revolver. Peete told them to "break yourself," which meant to submit to the robbery. During the course of the robbery, the coat, pants, and shoes of one of the victims were taken. Peete then stated that he had to "pop" them because they had seen his face. Wiseman left the robbery scene, but Peete shot and killed one of the victims, while the other escaped.

The police later arrested Wiseman and Peete and charged them both with the aforementioned crimes. Pursuant to plea negotiations, Peete pleaded guilty to the homicide and attempted armed robbery counts, and the armed robbery count was dismissed. Wiseman, however, proceeded to trial. The jury found Wiseman guilty of all three charges. Wiseman filed motions for postconviction relief, which the trial court denied without holding a hearing.

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[1] *See* ***State v. Machner***, 92 Wis.2d 797, 285 N.W.2d 905 (Ct. App. 1979).

On appeal, Wiseman first argues that the trial court erred in instructing the jury on the "while armed" penalty enhancer. He argues that the trial court failed to instruct the jury that they must find a nexus between the predicate crime of first-degree intentional homicide, as a party to a crime, and Wiseman's possession of the weapon. *See* ***State v. Peete,*** 185 Wis.2d 4, 14-23, 517 N.W.2d 149, 152-56 (1994). We need not address this issue because Wiseman never objected to the instruction at trial. In fact, Wiseman stipulated to the reading of the uniform jury instruction on the "while armed" penalty enhancer. Consequently, he waived the issue. ***State v. Schumacher,*** 144 Wis.2d 388, 409, 424 N.W.2d 672, 680 (1988) (failure to object to the proposed instructions at trial constitutes a waiver of any right to challenge them on appeal). Wiseman asks this court to use our discretionary power of reversal, *see* § 752.35, STATS., to review his claim of trial court error. We decline to do so; the real controversy has been fully tried.[2]

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[2] Nothing in ***State v. Peete,*** 185 Wis.2d 4, 517 N.W.2d 149 (1994), or ***State v. Avila,*** ___ Wis.2d ___, 532 N.W.2d 423 (1995), *requires* this court to review a waived issue. In this case the issue was fully tried, because the jury was instructed as follows:

> If you are satisfied beyond a reasonable doubt from the evidence in this case that the defendant, or a person he was party to a crime with, caused the death of [the victim] by an act committed with the intent to kill, you should find the defendant guilty of first degree intentional homicide party to a crime.
>
> ....
>
> That substantive instruction also includes the while armed portion which includes the following instruction you are to consider also.
>
> And that is, the information alleges not only that the defendant committed the crime of first degree intentional homicide but also that he did so while possessing, using, threatening to use a dangerous weapon.
>
> If you find the defendant guilty, you must answer the following question: Did the defendant commit the crime of first degree intentional homicide while possessing, using, threatening to use a dangerous weapon?
>
> Before you may answer this question yes, you must be satisfied beyond a reasonable doubt that the defendant committed the crime while possessing, using, threatening to use a dangerous weapon.

Wiseman next argues that the trial court erred when it denied his ineffective assistance of counsel motion without a ***Machner*** hearing. We disagree.

> Before a trial court must grant an evidentiary hearing on ineffective assistance of counsel claims, defendants must allege sufficient facts in their motion to raise a question of fact for the court. A conclusory allegation of ineffective assistance of counsel, unsupported by any factual assertions, is legally insufficient and does not require the trial court to conduct an evidentiary hearing.
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> ....
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> Upon appeal, we review the defendants's motion to determine whether it alleges facts sufficient to raise a question of fact necessitating a ***Machner*** hearing. This review is *de novo*.

State v. Toliver, 187 Wis.2d 346, 360, 523 N.W.2d 113, 118 (Ct. App. 1994). "We ordinarily review factual inferences deferentially. We do so because a trial court can see and hear witnesses and can more accurately draw factual inferences

(..continued)

> ....
>
> If you are satisfied beyond a reasonable doubt that the defendant committed the crime of first degree intentional homicide, party to a crime, while possessing, using or threatening to use a dangerous weapon, you should answer the question yes.
>
> If you are not so satisfied, you must answer the question no.

As stated by the trial court in denying Wiseman's postconviction motion on this issue: "The possession or use of the weapons is so intricately intertwined and interconnected with the commission of the robbery and subsequent homicide in this case that in the absence of a nexus instruction does not warrant the same result as in Peete." Based upon this instruction and the facts of this case, we conclude the matter was fully tried and that reversal is not required.

from testimony than can the appellate court." ***State v. Tatum***, 191 Wis.2d 548, 552, 530 N.W.2d 407, 408 (Ct. App. 1995) (citation omitted).

Wiseman alleged several bases for his claim of ineffective assistance of counsel in his postconviction motion, the most significant of which surround his trial counsel's failure to request the lesser-included jury instruction for felony murder, and that his trial counsel failed to object to the "while armed" penalty enhancer.[3] In support of these claims, his postconviction motion provides nothing more than conclusory allegations, none of which raises an issue of fact. Accordingly, the trial court properly denied his ineffective assistance of counsel motion without a ***Machner*** hearing. As such, we need not review the merits of Wiseman's ineffective assistance of counsel claim on appeal because the record is devoid of any specific factual findings on trial counsel's actions. *See* ***Strickland v. Washington,*** 466 U.S. 668, 698 (1984) (whether trial counsel's representation amounts to ineffective assistance of counsel is a mixed question of law and *fact*); ***Wurtz v. Fleischman***, 97 Wis.2d 100, 107 n.3, 293 N.W.2d 155, 159 n.3 (1980) (appellate courts cannot make findings of fact).

Wiseman next argues that the trial court's failure to *sua sponte* give a lesser-included jury instruction for felony murder was plain error, regardless of whether Wiseman requested the instruction. We disagree.

> A trial court engages in a two-step analysis in determining whether to submit a lesser-included offense jury instruction. First, the court must determine whether the crime is a lesser-included offense of the charged crime. Next, the court must weigh whether there is a

[3] Wiseman's remaining three claims present mere conclusory allegations which do not raise any questions of fact. Wiseman's allegation, that his counsel entered into stipulations regarding the qualifications of an expert witness, merely stated that Wiseman was not consulted on the matter and did not present how or why this resulted in any detriment to his case. Wiseman also provided no factual basis for his allegation that his counsel was ill-prepared and preoccupied during the course of the trial. Finally, Wiseman's assertion that his counsel failed to use the testimony of two people who spoke to Wiseman after the shooting did not explain how these witnesses would have done anything other than repeat previous testimony or would have added anything to the trial to accomplish a different result.

> reasonable basis in the evidence for a jury to acquit on the greater offense and to convict on the lesser offense. If both steps are satisfied, the trial court should submit the lesser-included instruction to the jury if the defendant requests it. ... Whether the evidence adduced at trial requires a jury charge on the lesser-included offense instruction is a question of law that we review *de novo*. In addition, we must view the evidence in a light most favorable to the defendant.

State v. Morgan, No. 93-2611-CR, slip op. at 41-42 (Wis. Ct. App. June 20, 1995). The parties do not dispute that felony murder is a lesser-included offense of first-degree intentional homicide; therefore, we turn to the second step of the analysis.

A lesser offense need not be given in the instructions to a jury when no reasonable basis in evidence exists to find that a crime less than first-degree intentional homicide occurred. ***State v. Weeks***, 165 Wis.2d 200, 209, 477 N.W.2d 642, 645 (Ct. App. 1991). The elements of first-degree intentional homicide consist of causing the death of another human being and intent to kill. WIS J I—CRIMINAL 1010. There is no dispute that Peete's shooting of the victim caused his death. Thus, the determinate question is whether there is any reasonable view of the evidence under which a jury could have had doubt about the shooter's intent to kill. ***Weeks***, 165 Wis.2d at 209, 477 N.W.2d at 646.

Intent to kill exists if the actor "either has a purpose to ... cause [death], or is aware that his or her conduct is practically certain to cause that result." Section 939.23(4), STATS. As in ***Weeks***, there can be no doubt that Peete harbored the proscribed intent to kill the victim—even when viewing the evidence in the light most favorable to Wiseman. Before shooting the victim, Peete announced his intent to shoot him because he had seen Peete's face. Peete shot the victim in the chest, causing a bullet to pass through the victim's lung, heart, and liver. Wiseman, as a party to the crime, was criminally liable for the natural and probable consequence of Peete's actions. *See* ***State v. Ivy***, 119 Wis.2d 591, 596-97, 350 N.W.2d 622, 625 (1984). The evidence did not support acquittal on first-degree intentional homicide, and a finding of guilt on felony

murder. Accordingly, there was no plain error in the trial court's failure to *sua sponte* give an instruction on felony murder.

Finally, Wiseman argues that the trial court erroneously exercised its discretion when it failed to dismiss the homicide charge at the conclusion of the preliminary hearing for insufficiency of evidence to support the charges. We reject this claim because Wiseman's fair and errorless trial cured any defects in the preliminary hearing. ***State v. Webb***, 160 Wis.2d 622, 628, 467 N.W.2d 108, 110 (1991). In sum, we reject all of Wiseman's arguments and affirm the judgment and order.

By the Court.—Judgment and order affirmed.

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