



OFFICE OF THE CLERK
WISCONSIN COURT OF APPEALS

110 EAST MAIN STREET, SUITE 215
P.O. BOX 1688
MADISON, WISCONSIN 53701-1688

Telephone (608) 266-1880
TTY: (800) 947-3529
Facsimile (608) 267-0640
Web Site: www.wicourts.gov

DISTRICT III/I

March 28, 2013

To:

Hon. Patrick M. Brady
Marathon County Circuit Court
500 Forest St.
Wausau, WI 54403

Diane L. Sennholz, Clerk
Marathon County Circuit Court
500 Forest St.
Wausau, WI 54403

Kenneth J. Heimerman,
District Attorney
Marathon County Courthouse
500 Forest St.
Wausau, WI 54403-5554

Steven L. Miller
Miller Appellate Practice, LLC
P.O. Box 655
River Falls, WI 54022

Gregory M. Weber
Assistant Attorney General
P.O. Box 7857
Madison, WI 53707-7857

Raul Ponce-Rocha, #570430
Waupun Correctional Inst.
P.O. Box 351
Waupun, WI 53963-0351

You are hereby notified that the Court has entered the following opinion and order:

2012AP374-CRNM State of Wisconsin v. Raul Ponce-Rocha
(L.C. #2009CF299)

Before Curley, P.J., Kessler and Brennan, JJ.

Raul Ponce-Rocha appeals from a judgment of conviction entered after a jury found him guilty of first-degree intentional homicide, burglary (armed with a dangerous weapon), and two counts of misdemeanor theft, contrary to WIS. STAT. §§ 940.01(1)(a), 943.10(2)(b), 943.20(1)(a) (2009-10).¹ The state public defender appointed Attorney Steven L. Miller as Ponce-Rocha's postconviction and appellate counsel. Attorney Miller filed and served a no-merit report

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

pursuant to *Anders v. California*, 386 U.S. 738 (1967), and WIS. STAT. RULE 809.32(1), to which Ponce-Rocha did not respond. After reviewing the no-merit report and conducting an independent review of the record as mandated by *Anders*, this court concludes that further proceedings would lack arguable merit.

BACKGROUND

The following background, as set forth in counsel's detailed statement of facts, is substantiated by the testimony and other evidence presented during the eight-day jury trial.²

[The victim] was an 18-year-old high school senior who lived with her fiancé, Sebastian Ramirez, and his brother, Hugo Ramirez, in a two bedroom apartment in Wausau. [The victim] and Sebastian shared a bedroom. The apartment was part of a multibuilding complex. Both of the Ramirez brothers worked as waiters at a Mexican restaurant called El Tequila Salsa. [The victim] worked at another Mexican restaurant called El Mezcal. Each had their own car, which they typically parked in the front of their apartment building when they were home.

On the morning of May 2, 2009, Sebastian and Hugo were scheduled to work at 10:00 a.m. Both were running late. Sebastian left the apartment shortly after 10:00 a.m. and, according to surveillance cameras at the restaurant, arrived there at 10:13 a.m. [The victim] had the day off and was in the bedroom with the door shut when Hugo left. Hugo never saw [the victim] that morning but had heard her and Sebastian talking in the bedroom earlier.

Hugo did not remember if he locked the door to the apartment when he left. The door didn't lock if it wasn't pulled tight. Hugo arrived at the restaurant at 10:1[9] a.m. The trip from the apartment complex to the restaurant was about 5 minutes. At that point, none of their cars were parked at the apartment complex as [the victim]'s car was elsewhere for brake repairs.

² For ease of reference, we refer to some of the individuals involved with this case by their first names.

The last use [the victim] made of her phone was a text she sent to a friend at 10:23 a.m.

Hugo worked at the restaurant until his break at 1:00 p.m. He had been up late the night before and needed a nap. He left the restaurant at [about] 1:15 p.m.... When he got to the apartment, the door was locked. He opened the door, walked in, and went straight down the hallway towards his bedroom. As he passed [the victim] and Sebastian's bedroom, he saw something on the floor but at first did not recognize what it was. He looked again and then noticed what appeared to be a body, a woman, face up, with her top pulled down, her breasts exposed, and a bloody towel on her face. He lifted the towel and saw a bloody, beaten face with stab wounds and a cut throat.... He cried for [the victim] to wake up, but she did not respond.

....

The police arrived within about 5 minutes.... [An officer] observed two knives in the bathroom sink across the hall from the bedroom. They had come from the kitchen. The smaller knife had a broken tip. In front of the sink was a green bathroom mat with blood and a footwear impression. Hugo also noticed money was missing from his bedroom....

... There was no sign of forced entry [at the crime scene].... [Police] observed a broken clothes iron. They noticed blood on the soap dispenser in the bathroom; and blood stains in the bathroom and in the hallway.

Police searched the apartment for [the victim]'s phone, but were unable to locate it. Fortunately, the phone was still on. Using GPS technology, they were able to get a general location at approximately 9:30 p.m. The phone was near, but not in, the El Tequila Salsa restaurant. By 11:15 p.m., police were able to pinpoint the location to either a white SUV located in the restaurant parking lot or the cardboard dumpster. Police decided to open the cardboard dumpster and dial [the victim]'s number. The phone lit up in the dumpster when it started "ringing." The police could see the phone was inside a white plastic bag.

The plastic bag was a take-out bag from the El Tequila Salsa restaurant. The top had been twisted shut. The bag was opened from the bottom and inside the police found [the victim]'s cell phone, two pairs of her underwear, a black glove, and a black strip[ed] glove. Sebastian later identified the underwear and the phone as [the victim]'s. He identified the black glove as coming from his apartment. He did not recognize the strip[ed] glove. The gloves were both wet but did not appear to have any blood.

The autopsy showed that [the victim] had been hit on the head and arms numerous times by a heavy object consistent with the clothes iron. This probably rendered her unconscious.... Defendant's blood expert concurred that the initial blows were probably to the head, which incapacitated [the victim] and knocked her to the floor. She would have initially been face down and then rolled over onto her back. She had multiple stab wounds on the back of her neck, her face, and on her chest. Her throat had been cut by a sawing motion back and forth and her carotid artery had been severed. The tip from the broken knife was recovered from her cheek....

The defendant, Raul Ponce-Rocha, was a 2006 Wausau High School graduate who lived with his parents and shared a room with his younger brother. He was employed at the El Tequila Salsa restaurant as a cook, and was in charge of the kitchen. He usually opened the restaurant every morning except Sundays.

[Ponce-Rocha] knew both Sebastian and Hugo from the restaurant and did some socializing with them, but they were not close. He had spent more time with Hugo....

On May 1, 2009, Hugo and [Ponce-Rocha] were both out quite late. [Ponce-Rocha] did not get home until about 5:30 a.m. Nonetheless, he was responsible for opening the restaurant that day. On his way to the restaurant with his mother's black VW Golf, [Ponce-Rocha] stopped to pick up Heber Sanchez. Heber was another restaurant employee who lived in the same apartment complex as [the victim], but in a different building. Surveillance cameras confirm [Ponce-Rocha] and Heber arrived at the restaurant at 8:40 a.m. [Ponce-Rocha] was wearing his brown hooded sweatshirt.

Sebastian arrived at 10:13 a.m. Hugo arrived at 10:1[9] a.m. [Roughly one minute] after Hugo arrived, [Ponce-Rocha] left the restaurant to pick up another employee, Luciano, who was due to begin his shift at 11:00 a.m. Luciano lived with Heber. As he had earlier that morning when he picked up Heber, [Ponce-Rocha] drove right past [the victim]'s apartment building on his way to Luciano's. [Ponce-Rocha] knew which cars they each drove, and could have seen whether any of their cars were there. He knew both Hugo and Sebastian were already at work. [Ponce-Rocha] left the restaurant wearing a brown hooded sweatshirt and a baseball cap.

Luciano was ready when [Ponce-Rocha] arrived, and they drove straight back to the restaurant taking the shortest, most direct route. They arrived at [approximately] 10:53 a.m. From the time he left until his return, [Ponce-Rocha]'s car was off-video for a

total of 34 minutes, 7 seconds. [Ponce-Rocha] was no longer wearing the brown sweatshirt and baseball hat when he returned to the restaurant, but rather a white chef's shirt....

Restaurant surveillance cameras observed [Ponce-Rocha] making repeated trips out the rear door of the restaurant after his return. In one instance, he put on a rubber glove and grabbed a white plastic bag before he went outside. When he returned to the kitchen, the white bag was gone. He removed the rubber glove. He was also seen washing his hands repeatedly.

Surveillance cameras showed Hugo leaving the restaurant at 1:15 p.m. for his nap. [Ponce-Rocha] then began to pace around the kitchen. At 1:18 p.m., [Ponce-Rocha] picked up a pile of cardboard and walked out the back door. He was wearing a white shirt, baseball cap, and black pants. He was off-camera for two minutes, 30 seconds. Surveillance video from a nearby business showed, however, that at the same time [Ponce-Rocha] exited the restaurant, an individual dressed in a white shirt and black pants came walking towards the cardboard dumpster. This individual then stood by the dumpster for a period of time and appeared to be putting something into the dumpster.

Police were still reviewing surveillance video on May 6, 2009, when [Ponce-Rocha] voluntarily appeared at the police station as part of a general questioning of all El Tequila Salsa employees. At the time the police were aware [Ponce-Rocha] had left the restaurant at [approximately] 10:18 a.m., and returned at 10:53 a.m., when the trip should have been 11 minutes at most. This period also coincided with [the victim]'s last use of her cell phone at 10:23 a.m. When asked to account for the extra 20 minutes or so the trip took, [Ponce-Rocha] offered no explanation. He insisted he went straight to Luciano's and came straight back.

[Ponce-Rocha] also denied wearing the brown sweatshirt when he left to get Luciano. He insisted he left the restaurant and returned wearing his white shirt. [Ponce-Rocha] also denied taking anything to the dumpster. Confronted with the surveillance videos, [Ponce-Rocha] then admitted it was him leaving the restaurant with his brown sweatshirt. He also admitted he took cardboard outside but insisted he did not go the dumpster. Rather, he set the cardboard by the back door. He denied he ever had any physical contact with [the victim].

After the interview, [Ponce-Rocha] agreed to provide the police with a DNA sample as well as the clothes and shoes he was wearing. He agreed he wore the same "Dickie shoes" nearly all the time. He also consented to the police obtaining his brown sweatshirt and searching his residence. The police first retrieved the brown sweatshirt from [Ponce-Rocha]'s bedroom closet. Later,

they found a gray, white and black knit glove which appeared to match the glove found in the dumpster. A photo of the strip[ed] glove found in the dumpster had already been shown to [Ponce-Rocha]'s mother who stated she had seen one like it in the black VW Golf about a month prior, but that it wasn't there anymore. The police also found, under [Ponce-Rocha]'s bed, four pairs of women's underwear.

Items found at the scene, in the dumpster, and from [Ponce-Rocha]'s person and bedroom were forwarded to the crime lab for forensic testing.

Relevant items found at the scene include the broken clothes iron handle and [the victim]'s fingernail clippings. DNA testing of the iron handle produced a mixed sample to which [Ponce-Rocha] was a likely contributor. The probability of an unrelated individual other than [Ponce-Rocha] contributing to the DNA mixture on the iron handle was one in one million. [The victim]'s right-hand fingernail clippings were tested using Y-STR DNA[, a test used when a large amount of female DNA is present and the suspect is a male]. The results revealed [Ponce-Rocha] was a possible contributor].

Relevant items from the plastic bag found in the dumpster were the strip[ed] glove and the twisted upper part of the plastic bag. The inside wrist area of the strip[ed] glove found in the dumpster was tested for DNA. The results showed a DNA mixture to which [Ponce-Rocha] was a likely contributor. The probability that a randomly selected individual other than [Ponce-Rocha] would have contributed to this DNA mixture profile was about one in two million. The upper, twisted portion of the white plastic bag found in the dumpster was also tested for DNA. The results again showed a DNA mixture to which [Ponce-Rocha] was a possible source. The probability of an unrelated individual other than [Ponce-Rocha] contributing to this DNA mixture was one in one million.

The relevant items obtained from [Ponce-Rocha] were the brown sweatshirt and his shoes. Several hairs removed from the waistband of the brown sweatshirt were tested for mitochondrial DNA. The results from one of the hairs showed [the victim] could not be excluded as the source. [Ponce-Rocha]'s left shoe was compared to the bloody footwear impression found on the bathroom mat. Although no evidence of blood was found on the shoe itself, and no unique aspect of the shoe could be found in the impression, the footwear impression was nonetheless consistent in tread pattern and size (U.S. 10 1/2) with the left shoe Ponce-Rocha was wearing that day and therefore could not be ruled out as a source.

The four pairs of women's underwear found under [Ponce-Rocha]'s bed were also tested for DNA. All had semen stains but only three had sufficient DNA for testing. [Ponce-Rocha] was positively identified as the source of the semen.³

....

[Ponce-Rocha] testified at trial and for the first time admitted he had not gone directly to and from Luciano's apartment. Heber Sanchez had asked [Ponce-Rocha] to get some music CDs [Ponce-Rocha] had left at home. [Ponce-Rocha] left early because he planned to go home and get them before retrieving Luciano. Heber confirmed he spoke with [Ponce-Rocha] about getting CDs before he left. [Ponce-Rocha] also stated he needed his phone charger. On the way home, however, [Ponce-Rocha] found some of the CDs Heber wanted in the car. He was also concerned that if he went home his mother would scold him for leaving work. He also testified that he didn't actually need the phone charger he had at home because he kept one at the restaurant. So, part way home, he decided to turn[] around, and drove back towards Luciano's apartment.

When he got to the apartment complex, he met a car coming from the side in front of him. He recognized the driver as someone he knew and had worked with, a man named Sergio Gutierrez. Sergio parked in front of [the victim]'s apartment and [Ponce-Rocha] parked behind him. [Ponce-Rocha] did not pay any attention to whether [the victim]'s car was there or not. They both got out of the car, and Sergio acknowledged him with a nod of the head. They started talking, and Sergio said he needed help moving a TV. They went to [the victim]'s apartment. Sergio opened the door and they walked in. He didn't knock. [The victim] was in the hallway, walking, and was surprised to see [Ponce-Rocha] there. Sergio then went towards her and they were talking. [Ponce-Rocha] didn't recall whether they went down the hall or into her room, but they were out of sight and whispering. He couldn't hear what they said. [Ponce-Rocha] stayed in the living room by the door. Sergio and [the victim] talked for five minutes, maybe. Sergio then came back out and began talking to [Ponce-Rocha], and [Ponce-Rocha] told him he was leaving. Sergio opened the door and [Ponce-Rocha] was about to walk out, when someone grabbed his arm and pulled him. It was [the victim]. She told [Ponce-Rocha] not to tell Sebastian. [Ponce-Rocha] responded that it wasn't any of his business, whatever it was, and that he didn't care. [Ponce-Rocha] left and Sergio stayed. [Ponce-Rocha]

³ The underwear found under Ponce-Rocha's bed did not belong to the victim.

then got in the car and went directly to Luciano's apartment building. He honked the horn, Luciano looked out, and in a few minutes came down to the car. They went straight to the restaurant.

[Ponce-Rocha] also admitted he had been wearing the brown hooded sweatshirt when he left the restaurant, with his white chef's shirt underneath. He also had on his black pants and Dickie shoes. He took the sweatshirt off and put it in the car when he returned to the restaurant because it was getting wet when he tried putting cold water on his face and hair. He was tired and trying to wake himself up.

[Ponce-Rocha] admitted he brought cardboard to the dumpster. It was around 1:00 p.m. when he picked up some cardboard in the kitchen and brought it outside. Once outside, he saw Hugo walking to his truck. Hugo saw him and called to him, pointing to some cardboard sitting outside, and told him "don't forget that one," so [Ponce-Rocha] grabbed it. [Ponce-Rocha] noticed that one of the boxes he was taking out had a white plastic bag inside. He threw it into the dumpster with the cardboard. He did not recall ever touching the white bag.

....

[Ponce-Rocha] didn't tell the police about Sergio because he was afraid something bad might happen to his family if he said anything....

[Ponce-Rocha] admitted the strip[]ed glove found in the plastic bag was his, and that he had lost one of them. He admitted the underwear under his bed w[ere] his. He denied having seen the black glove before. He also testified that he washed his hands frequently, and frequently wore rubber gloves, because he was constantly working with food. He always washed his hands when he came in from outside. He went outside the back door of the kitchen on a regular basis so he could smoke. He was also the one who put food in the take-out bags most of the time.

The [S]tate presented two points in rebuttal.

First, by using the video surveillance tapes, it showed that [Ponce-Rocha] could not have spoken with Hugo when he was bringing the cardboard outside, as Hugo's car had already left the parking lot by the time [Ponce-Rocha] exited the rear door.

Second, the [S]tate presented a witness from the Ramos Tax Service Office who confirmed Sergio was in Madison on May 2, 2009, meeting with his income tax advisor. While the actual time of his office visit was not established, records show[ed] his

tax return was electronically filed at 3:06 p.m. Sergio came straight up from Mexico once he was informed of [Ponce-Rocha]'s accusations. Luckily for the [S]tate, he arrived in time to testify the last day of trial.⁴ Both Sergio and his brother Jorge confirmed they were in Madison on May 2, 2009, at the Ramos Tax Service office. They left Wausau at 9 or 9:30 in the morning and ... [t]hey were [at Ramos Tax Service] about an hour. They stopped at a toy store on the way back. Sergio also removed his left shoe and confirmed his shoe size was U.S. 7 1/2. The footwear impression left at the scene was U.S. 10 1/2.

(Record citations and footnotes omitted.)

The jury convicted Ponce-Rocha of the charges against him. During the sentencing hearing, the prosecutor presented evidence—obtained after the trial—that Sergio's DNA was not found on any of the evidence that had been offered during the trial.⁵ On the charge of first-degree intentional homicide, Ponce-Rocha received a life sentence without eligibility for extended supervision. On the charge of burglary, he received a concurrent sentence of fifteen years bifurcated as ten years of initial confinement followed by five years of extended supervision. On the two counts of misdemeanor theft, he received two concurrent sentences of nine months in jail.

The no-merit report addresses one issue: the trial court's ruling that evidence of Ponce-Rocha's possession of the four pairs of women's underwear found under his bed was admissible. In addition to addressing this issue, we discuss whether there would be any merit to challenging the trial court's ruling on Ponce-Rocha's suppression motion or the trial court's exercise of sentencing discretion.

⁴ When Sergio became available as a witness, the State obtained his DNA sample. The State advised the defense of this fact and offered to get the DNA tested. The defense, however, made a tactical decision to continue with the trial without having the DNA tested. Defense counsel went on to stipulate that it would not raise the issue of the unavailability or lack of Sergio's DNA in the case.

⁵ The prosecutor indicated that defense counsel had previously been provided with a copy of the crime lab report, and counsel confirmed that she had reviewed it. The trial court received it into evidence. There is no indication in the record before us that counsel could argue she was somehow deprived of a fair opportunity challenge the report.

DISCUSSION

A. Whether the trial court erred when it admitted other acts evidence.

Counsel addresses whether Ponce-Rocha’s possession of four pairs of women’s underwear was properly deemed admissible.⁶ The admissibility of evidence rests within the trial court’s discretion and the decision to admit other acts evidence is reviewed for an erroneous exercise of discretion. *State v. Marinez*, 2011 WI 12, ¶17, 331 Wis. 2d 568, 797 N.W.2d 399. We will sustain the ruling if we find that the trial court “‘examined the relevant facts, applied a proper standard of law, used a demonstrated rational process and reached a conclusion that a reasonable judge could reach.’” *Id.* (citation omitted). “Even if a [trial] court fails to set forth the basis for its ruling, we will nonetheless independently ‘review the record to determine whether it provides an appropriate basis for the [trial] court’s decision.’” *Id.* (citation omitted).

“[E]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that the person acted in conformity therewith.” WIS. STAT. § 904.04(2)(a). However, § 904.04(2)(a) permits other acts evidence when the evidence is “‘offered for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.’” *Id.*

When deciding whether to allow other acts evidence, Wisconsin courts apply the three-step analytical framework set forth in *State v. Sullivan*, 216 Wis. 2d 768, 772-73, 576 N.W.2d

⁶ The State actually filed two motions related to the underwear, one regarding Ponce-Rocha’s possession of the underwear and the other regarding the circumstances surrounding the defendant’s alleged theft of underwear from a former roommate. The trial court granted both motions. However, as counsel notes, the State did not present any evidence relating to how Ponce-Rocha obtained the underwear, so there is no basis for challenging that part of the trial court’s ruling on appeal.

30 (1998). See *Marinez*, 331 Wis. 2d 568, ¶19. Under *Sullivan*, courts must consider: (1) whether the evidence is offered for a proper purpose under WIS. STAT. § 904.04(2); (2) whether the evidence is relevant; and (3) whether the probative value of the evidence is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury. *Sullivan*, 216 Wis. 2d at 772-73. The proponent of the other acts evidence bears the burden of establishing that the first two prongs are met by a preponderance of the evidence. *Marinez*, 331 Wis. 2d 568, ¶19. Once the first two prongs of the test are satisfied, the burden shifts to the opposing party “to show that the probative value of the [other acts] evidence is substantially outweighed by the risk or danger of unfair prejudice.” *Id.*

Here, the State sought to admit the evidence to show Ponce-Rocha’s motive to burglarize the residence in order to steal the victim’s underwear and to further show Ponce-Rocha’s intent to permanently deprive the victim of the two pairs of underwear. As to relevancy, the State asserted that Ponce-Rocha’s underwear collection answered the question of why he would burglarize the victim’s residence and leave with two pairs of her underwear. In addition, the State claimed the fact that Ponce-Rocha kept the collection in the bedroom he shared with his brother, in a home he shared with his family—despite the potential embarrassment he would suffer if the collection was found—showed the value that he placed on it. The value was also evident from the fact that Ponce-Rocha had apparently used the underwear for sexual gratification, given the semen stains.

The trial court went through the *Sullivan* analysis. After noting that Ponce-Rocha’s DNA was found on the underwear, which indicated that Ponce-Rocha collected it for sexual gratification, the trial court agreed with the State that the evidence was proof of motive and intent to permanently deprive the victim of her underwear. The trial court further concluded that

the evidence was relevant to the burglary and theft counts. Finally, the trial court noted that the fact that Ponce-Rocha collected women's underwear was not in itself a crime, so the trial court concluded it was less prejudicial than any of the charged offenses. In addition, the trial court explained that a cautionary instruction was available and that compared to the evidence that was going to be presented on the homicide charge, it could not say that the probative value of the evidence was substantially outweighed by the danger of unfair prejudice.⁷ This court agrees with counsel's assessment that there would be no arguable merit to an appeal of the trial court's decision to admit evidence of Ponce-Rocha's possession of women's underwear.

B. Whether Ponce-Rocha's statements and any derivative evidence obtained as a result of those statements should have been suppressed.

Counsel does not address it but we also consider whether there is any basis on which to pursue the suppression motion filed by Ponce-Rocha. Prior to trial, Ponce-Rocha argued that the statements he made were not voluntary and that any derivative evidence obtained as a result of those statements should be suppressed. Ponce-Rocha explained that he voluntarily went to the police station and was told that he was not under arrest, but at the end of the interview, he was not allowed to leave. He argued that it was clear that the questions the police asked him were designed to elicit incriminating statements and that the detectives should have reasonably foreseen that immigration officials would place a detention hold on Ponce-Rocha after the interview was complete. Ponce-Rocha asserted that he was in custody when he made the statements and that the failure to read him his *Miranda* warnings violated his constitutional rights. See *Miranda v. Arizona*, 384 U.S. 436 (1966).

⁷ The record reveals that trial counsel, after discussing the issue with Ponce-Rocha, ultimately
(continued)

The trial court conducted a *Miranda-Goodchild* hearing.⁸ The trial court listened to the testimony of the two officers who interviewed Ponce-Rocha and reviewed the video and audio recordings of the interview. The trial court noted that the interview lasted four hours and nineteen minutes and that that was an hour longer than it needed to be due to the fact that some of the interview had to be repeated based on a malfunction with the recording equipment. The trial court found Ponce-Rocha was told he was not under arrest, and he was asked on a number of occasions if he wanted water or a bathroom break. The trial court concluded that Ponce-Rocha was not in custody until the end of the interview when he was placed in handcuffs based on a detention hold.

The historical facts as found by the trial court are supported by the record. If a person is not in custody when questioned, the procedural safeguards of *Miranda* do not apply. See *State v. Armstrong*, 223 Wis. 2d 331, 351-52, 588 N.W.2d 606 (1999). The facts here demonstrate that Ponce-Rocha was questioned in a noncustodial context. Accordingly, the failure to advise Ponce-Rocha of his *Miranda* rights prior to questioning him did not require suppression of Ponce-Rocha's statements. See *State v. Gruen*, 218 Wis. 2d 581, 594, 582 N.W.2d 728 (Ct. App. 1998) (Whether a person is in custody for purposes of *Miranda*, is determined by considering the totality of the circumstances.).

On the issue of voluntariness, the trial court found that Ponce-Rocha was receiving telephone calls during the interview and that he was not denied the opportunity to use his

made a tactical decision not to provide the jury with a cautionary instruction.

⁸ See *Miranda v. Arizona*, 384 U.S. 436 (1966); *State ex rel. Goodchild v. Burke*, 27 Wis. 2d 244, 133 N.W.2d 753 (1965).

telephone. In addition, the trial court found Ponce-Rocha, a high school graduate, was not handcuffed and seemed to understand the purpose of the interview. The trial court did not hear any threats being made during the interview and noted that although two detectives were involved in the interview, which lasted for a “fairly long period of time,” it did not appear to be a “relay situation.”

This court agrees with the trial court that the statements were freely and voluntarily given. There would be no arguable merit to asserting that the trial court erred by not suppressing Ponce-Rocha’s statements and the derivative evidence obtained as a result of those statements.

C. Whether the trial court erroneously exercised its sentencing discretion.

We also conclude that there would be no arguable basis to assert that the trial court erroneously exercised its sentencing discretion, *see State v. Gallion*, 2004 WI 42, ¶17, 270 Wis. 2d 535, 678 N.W.2d 197, or that the sentence was excessive, *see Ocanas v. State*, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975).

The trial court must consider the principal objectives of sentencing, including the protection of the community, the punishment and rehabilitation of the defendant, and deterrence to others, *State v. Ziegler*, 2006 WI App 49, ¶23, 289 Wis. 2d 594, 712 N.W.2d 76, and it must determine which objective or objectives are of greatest importance, *Gallion*, 270 Wis. 2d 535, ¶41. In seeking to fulfill the sentencing objectives, the trial court should consider a variety of factors, including the gravity of the offense, the character of the offender, and the protection of the public, and it may consider several subfactors. *State v. Odom*, 2006 WI App 145, ¶7, 294 Wis. 2d 844, 720 N.W.2d 695. The weight to be given to each factor is committed to the trial court’s discretion. *See Gallion*, 270 Wis. 2d 535, ¶41.

In this case, the trial court applied the standard sentencing factors and explained their application in accordance with the framework set forth in *Gallion* and its progeny. The trial court concluded that the maximum available sentences were warranted on the burglary and misdemeanor theft charges. It went on to explain that because Ponce-Rocha's conviction for first-degree intentional homicide carried with it a mandatory life sentence, *see* WIS. STAT. §§ 940.01(1)(a) & 939.50(3)(a), the trial court was required to make a determination as to Ponce-Rocha's eligibility for extended supervision, *see* WIS. STAT. § 973.014(1g)(a). The trial court, after detailing the vicious nature of the attack and the "total lack of emotion and remorse" on Ponce-Rocha's part, concluded that Ponce-Rocha was not eligible for release to extended supervision.

The trial court's sentencing remarks reveal no erroneous exercise of discretion. Given the circumstances of the victim's death, the sentences imposed were not so excessive that it shocks the public's sentiment. *See Ocanas*, 70 Wis. 2d at 185.

The trial court went on to order approximately \$15,700 in restitution, which was the full amount requested. In addition, the trial court—without elaboration—ordered Ponce-Rocha to provide a DNA sample and pay the surcharge along with other court costs.

Counsel did not address the trial court's imposition of a DNA surcharge. *See State v. Cherry*, 2008 WI App 80, ¶8, 312 Wis. 2d 203, 752 N.W.2d 393. While under WIS. STAT. § 973.047(1f), providing the sample is required, the surcharge is not: in *Cherry*, this court held that a sentencing court must exercise its discretion when determining whether to impose the DNA analysis surcharge under WIS. STAT. § 973.046(1g). *Cherry*, 312 Wis. 2d 203, ¶¶9-10. To that end, we held that the court "should consider any and all factors pertinent to the case before

it, and that it should set forth in the record the facts it considered and the rationale underlying its decision.” *Id.*, ¶9.

We recently explained that “*Cherry* does not require a [trial] court to use any ‘magic words’” and specifically declined to adopt a rule requiring a trial court to “explicitly describe its reasons for imposing a DNA surcharge.” *See State v. Ziller*, 2011 WI App 164, ¶¶2, 12, 338 Wis. 2d 151, 807 N.W.2d 241. The trial court’s imposition of the DNA surcharge in this case, considered in connection with the remainder of the sentencing record, reveals an appropriate exercise of sentencing discretion. *See id.*, ¶13. In *Ziller*, given that the trial court found that the defendant had the ability to pay \$10,000 in restitution, we held that there was no reason for the court to restate that the defendant had the ability to pay the \$250 surcharge: “What is obvious need not be repeated.” *Id.* Similar logic applies to the circumstances presented here where the trial court ordered the full amount of restitution requested and then proceeded to order Ponce-Rocha to pay the DNA surcharge. We conclude there would be no arguable merit to challenging the trial court’s exercise of its sentencing discretion.

Our independent review of the record reveals no other potential issues of arguable merit.

Upon the foregoing, therefore,

IT IS ORDERED that the judgment is summarily affirmed. *See* WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that Attorney Steven L. Miller is relieved of further representation of Ponce-Rocha in this matter. *See* WIS. STAT. RULE 809.32(3).

Diane M. Fremgen
Clerk of Court of Appeals