

**COURT OF APPEALS
DECISION
DATED AND FILED**

November 5, 2009

David R. Schanker
Clerk of Court of Appeals

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.

Appeal No. 2008AP2567

Cir. Ct. No. 2002CF336

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ROBERT PRICE,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Dodge County:
BRIAN A. PFITZINGER, Judge. *Affirmed.*

Before Vergeront, Lundsten and Bridge, JJ.

¶1 PER CURIAM. Robert Price appeals from an order denying his postconviction motion filed under WIS. STAT. § 974.06 (2007-08).¹ We affirm.

¶2 Price’s motion alleged that his trial counsel was ineffective in certain respects. The circuit court denied the motion without a hearing on the ground that it was barred by WIS. STAT. § 974.06(4), as interpreted by *State v. Escalona-Naranjo*, 185 Wis. 2d 168, 517 N.W.2d 157 (1994), because Price had not alleged a sufficient reason for not raising these issues in his direct appeal. Although Price alleged he did not raise the issues earlier because his appellate counsel had been ineffective, the court concluded that this could not be a sufficient reason because, if it was, the *Escalona-Naranjo* bar “would be a virtual nullity.”

¶3 On appeal, the State concedes that the circuit court’s analysis is probably in error. See *State ex rel. Panama v. Hepp*, 2008 WI App 146, ¶¶7-12, 314 Wis. 2d 112, 758 N.W.2d 806 (reviewing case law and noting the “circular analysis” in which a court deciding a motion under WIS. STAT. § 974.06 may be required to review the merits of the newly raised issue to determine whether the defendant is procedurally barred from obtaining review of the issue). Therefore, we turn to the merits. We may affirm on a ground different from that used by the circuit court. *Doe v. General Motors Acceptance Corp.*, 2001 WI App 199, ¶7, 247 Wis. 2d 564, 635 N.W.2d 7.

¶4 Although Price’s postconviction motion alleged several claims of ineffective assistance by trial counsel, his brief on appeal appears to address only one of those. Price argues that his trial counsel was ineffective by not objecting

¹ All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

to, or by actively engaging in, questioning that Price claims was in violation of the rule against one witness commenting on the credibility of another witness. *See State v. Haseltine*, 120 Wis. 2d 92, 96, 352 N.W.2d 673 (Ct. App. 1984). However, as we read the testimony in question, the witnesses were not vouching for the credibility of the victim; instead, counsel was attempting to get the witnesses to make such absolute statements about the victim never lying so as to raise a question about whether that was actually true. Therefore, this testimony was in the nature of impeachment, and was not contrary to *Haseltine*.

¶5 In the State's response brief, it addresses two other ineffectiveness theories Price alleged in the postconviction motion. Price did not file a reply brief to dispute the State's analysis of those issues. Because those were matters that Price had not addressed in his opening brief, we take the lack of a reply brief as a concession on those points, and also affirm as to those theories. *See State v. Drew*, 2007 WI App 213, ¶20, 305 Wis. 2d 641, 740 N.W.2d 404, *review denied*, 2008 WI 6, 306 Wis. 2d 48, 744 N.W.2d 297.

By the Court.—Order affirmed.

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

