

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**December 14, 2004**

Cornelia G. Clark  
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. 04-0611  
STATE OF WISCONSIN**

**Cir. Ct. No. 99CF001105**

**IN COURT OF APPEALS  
DISTRICT I**

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**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**v.**

**ROBERT D. BATES,**

**DEFENDANT-APPELLANT.**

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APPEAL from an order of the circuit court for Milwaukee County:  
MARY M. KUHNMUENCH, Judge. *Affirmed.*

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

¶1 PER CURIAM. Robert Bates appeals, *pro se*, from an order denying his WIS. STAT. § 974.06 (2001-02) motion for postconviction relief.<sup>1</sup> The trial court denied the motion on both procedural and substantive grounds. Bates argues: (1) the trial court erroneously denied Bates’s motion for postconviction relief without an evidentiary hearing; (2) there was insufficient evidence to convict him; (3) the trial court should have granted Bates a new trial based on newly discovered evidence; (4) his due process rights were violated when the court refused to address an alleged recantation by the State’s witness; (5) he is entitled to a new trial in the interest of justice; and (6) he should be provided a new trial on grounds of plain error. We reject these arguments and affirm the order.

## BACKGROUND

¶2 A jury convicted Bates of first-degree recklessly endangering safety, party to a crime. The victim, Ramarus Hogan, testified that Bates drove up alongside Hogan’s car and shot at Hogan numerous times. One of the bullets hit Hogan, wounding his shoulder. Bates’s defense at trial was that he was at home at the time of the incident and had no involvement in the shooting.

¶3 Bates filed a postconviction motion seeking a new trial, which the trial court denied. Bates appealed to this court, arguing that his trial counsel was ineffective for not redacting certain hearsay statements and referring to Bates’s probation revocation hearing. *State v. Bates*, No. 00-1632-CR, unpublished slip

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<sup>1</sup> Although Bates’s motion was entitled “Petition for Habeas Corpus,” the trial court construed it to be a WIS. STAT. § 974.06 motion for postconviction relief. Bates does not object to this designation.

All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

op. at 1-2 (WI App Dec. 14, 2001). He argued that he was entitled to a new trial in the interest of justice and because of plain error. *Id.* at 2. We rejected his arguments and affirmed his conviction. *Id.* at 6.

¶4 Nineteen months later, Bates filed the postconviction motion that is the subject of this appeal. The trial court denied the motion without a hearing. This appeal followed.<sup>2</sup>

## DISCUSSION

### I. Legal standards

¶5 “Whether a defendant’s postconviction motion alleges sufficient facts to entitle the defendant to a hearing for the relief requested is a mixed standard of review.” *State v. Allen*, 2004 WI 106, ¶9, \_\_\_ Wis. 2d \_\_\_, 682 N.W.2d 433. First, this court determines whether the motion on its face alleges sufficient material facts that, if true, would entitle the defendant to relief. *Id.* This is a question of law that we review *de novo*. *Id.* If the motion raises such facts, the trial court must hold an evidentiary hearing. *Id.* “However, if the motion does not raise facts sufficient to entitle the movant to relief, or presents only conclusory allegations, or if the record conclusively demonstrates that the defendant is not entitled to relief, the [trial] court has the discretion to grant or deny a hearing.” *Id.* We review a trial court’s discretionary decisions under the deferential erroneous exercise of discretion standard. *Id.*

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<sup>2</sup> On appeal, Bates has chosen to address only some of the issues raised in his WIS. STAT. § 974.06 postconviction motion. His other issues are therefore waived and will not be addressed. See *Reiman Assocs., Inc. v. R/A Adver., Inc.*, 102 Wis. 2d 305, 306 n.1, 306 N.W.2d 292 (Ct. App. 1981) (contentions not briefed are waived).

¶6 Issues that were previously adjudicated cannot be raised in a WIS. STAT. § 974.06 motion. *State v. Escalona-Naranjo*, 185 Wis. 2d 168, 181-82, 517 N.W.2d 157 (1994). Issues that could have been, but were not, raised in earlier appeals may not be raised in a later motion under § 974.06 unless the party establishes “sufficient reason” for failing to raise the issues in earlier postconviction motions, petitions and appeals. *See id.* The Wisconsin Supreme Court recently restated the central holding of *Escalona-Naranjo*:

[A] criminal defendant [is] required to consolidate all postconviction claims into his or her original, supplemental, or amended motion. If a criminal defendant fails to raise a constitutional issue that could have been raised on direct appeal or in a prior § 974.06 motion, the constitutional issue may not become the basis for a subsequent § 974.06 motion unless the court ascertains that a sufficient reason exists for the failure either to allege or to adequately raise the issue in the appeal or previous § 974.06 motion.

*State v. Lo*, 2003 WI 107, ¶31, 264 Wis. 2d 1, 665 N.W.2d 756 (citations omitted).

With this in mind, we examine Bates’s arguments.

## II. Bates’s arguments

¶7 We conclude that three of Bates’s arguments are procedurally barred pursuant to *Escalona-Naranjo* and, therefore, affirm the trial court’s order with respect to those issues. Bates challenges the sufficiency of the evidence used to convict him. He provides no reason why this issue was not previously litigated on his direct appeal and, therefore, his claim is procedurally barred. *See Escalona-Naranjo*, 185 Wis. 2d at 181-82. In addition, we have already rejected his request for a new trial in the interest of justice and based on plain error. These claims are likewise procedurally barred. *See id.* We also note that Bates’s plain error argument is insufficient because he has failed to identify the plain error, other than

to say “the above described errors should be reviewed under the plain error doctrine....” This failure to specifically identify the alleged plain error provides an additional basis to reject this argument. *See State v. Pettit*, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992) (we decline to address issues inadequately briefed).

¶8 Bates’s remaining issues are related. They all concern Bates’s motion for a new trial based on newly discovered evidence. Specifically, Bates argues that the State’s primary witness, Hogan, has recanted his testimony. Bates contends that this should entitle him to a new trial.

¶9 In his motion for postconviction relief, Bates asserted, *verbatim*:

The petitioner has newly discovery evidence of exculpatory in nature and eye witnesses to both this evidence and testimony by those new witnesses as well as Hon. magistrate holding a proceeding question witness whom recanted statement to police see attached exhibit #C in support of 1<sup>st</sup> and 14<sup>th</sup> amendments. violation with.

There is no additional argument or discussion of this assertion. Nowhere in the motion did Bates identify the witness who allegedly recanted or describe the circumstances of the alleged recantation. Although there was a reference to Exhibit C, no exhibit was attached.

¶10 Based on the conclusory nature of the assertion made in Bates’s motion, as well as the lack of any information concerning the alleged recantation, the trial court correctly determined that Bates’s postconviction motion, on its face, failed to allege sufficient material facts that, if true, would entitle Bates to relief. *See Allen*, 682 N.W.2d 433, ¶9. His motion utterly fails to allege the “who, what, where, when, why, and how” information that is required in order to entitle him to a hearing on his postconviction motion. *See id.*, ¶23. Without this information,

the motion fails to provide the kind of material facts that are necessary for “reviewing courts to meaningfully assess a defendant’s claim.” *See id.*

¶11 On appeal, Bates has included in his appendix the alleged affidavit from Hogan and has expanded his argument on this issue. The State argues, “Bates cannot introduce new evidence to support his claims that he failed to introduce in his post-conviction motion.” We agree. Although parties on appeal are not precluded from expanding their legal arguments and providing additional legal support for their positions, the ultimate issue before this court when reviewing the denial of a WIS. STAT. § 974.06 postconviction motion is whether the motion filed with the trial court “on its face alleges sufficient material facts that, if true, would entitle the defendant to relief.” *Allen*, 682 N.W.2d 433, ¶9. Considering the motion based on an affidavit that was not part of the original motion and has not been considered by the trial court would circumvent our appellate process by placing this court, rather than the trial court, in the position of evaluating the document for the first time. Such an approach is inconsistent with the basic principles of appellate review. *See State v. Flynn*, 190 Wis. 2d 31, 46, n.4, 527 N.W.2d 343 (Ct. App. 1994) (appellate court would not consider affidavit from defendant that was not part of record because court is “limited to the record as it comes to us from the trial court”). For these reasons, we decline Bates’s invitation to consider the affidavit and we do not address the State’s arguments with respect to the effect of the alleged recantation.

*By the Court.*—Order affirmed.

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

