COURT OF APPEALS
DECISION
DATED AND RELEASED

October 17, 1996

NOTICE

No. 95-1470

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

STATE OF WISCONSIN,

Plaintiff, Respondent,

v.

HARLAN C. RICHARDS,

Defendant-Appellant.

APPEAL from an order of the circuit court for Dane County: MARK A. FRANKEL, Judge. *Affirmed*.

Before Eich, C.J., Paul C. Gartzke and Robert D. Sundby, Reserve Judges.

GARTZKE, Reserve Judge. Harlan Richards appeals from an order denying his motion for a new trial under § 974.06, STATS. We affirm the order.

I. Background

On April 12, 1984, Richards stabbed Dick Endres to death in a fight. Richards was charged with first-degree murder, § 940.01, STATS., 1983-84. On November 13, 1984, a jury found Richards guilty of first-degree murder, as charged.

Following his conviction, Richards, acting pro se, filed a postconviction motion for a new trial under § 974.02, STATS. The trial court allowed Richards to withdraw the motion and obtain counsel. On October 25, 1985, Richards' appointed appellate counsel, Brady Williamson, filed a motion for a new trial. In the course of that proceeding, the court ordered Richards' trial attorney, Bruce Rosen, to turn over to attorney Williamson all of the files, documents, and tape recordings Rosen had in his control and possession relating to one Lyle Wildes, a potential witness who did not testify at the trial.

Richards moved for a new trial on various grounds: the jury instructions on self-defense did not accurately state the law; the prosecution made improper use of a knife not introduced into evidence during the trial; newly discovered evidence because Wildes was now willing to testify; ineffective assistance of trial counsel; and a new trial in the interest of justice. On April 17, 1986, following an evidentiary hearing, the trial court denied Richards' motion.

Richards appealed his conviction to the court of appeals under § 974.02 and RULE 809.30, STATS., his first or direct appeal. He argued that the trial court erred in (1) denying his motion for a new trial based on the absence of a witness and ineffective assistance of counsel; (2) giving an instruction on self-defense which allegedly led the jury to conclude that a disputed fact had been established; (3) allowing the prosecution during closing argument to display a knife other than the knife Richards used to stab Endres and allowing photographs of the victim's body to be sent to the jury room; and (4) limiting Richards' access to his trial counsel's case file and requiring him, rather than the State, to call his trial counsel as a witness at the postconviction motion. The court of appeals affirmed the conviction. ***State v. Harlan C. Richards***, No. 86-

0841-CR, unpublished slip op. (Wis. Ct. App. Mar. 3, 1988).[1] On May 10, 1988, the Wisconsin Supreme Court denied Richards' petition for review.

Next, in August 1992, Richards moved for postconviction relief under § 974.06, STATS. He contended: (1) the instructions improperly required the jury to find him guilty of first- or second-degree murder before the jury could consider imperfect self-defense/manslaughter, and the instructions incorporated a disputed fact; (2) counsel provided ineffective assistance by failing to object to the jury instructions, to object to the court's ruling on the State's motion in limine, and to investigate and present evidence on a self-defense claim; (3) prosecutorial misconduct; (4) insufficiency of the evidence for the first-degree murder conviction; and (5) denial of due process in his original postconviction hearing when he was denied access to his attorney's defense files. On May 13, 1993, the trial court denied Richards' § 974.06 motion.

Richards appealed to the court of appeals from the May 13, 1993, order, his new or second appeal. We stayed the appeal pending the Wisconsin Supreme Court's decision in ***State v. Escalona-Naranjo***, 185 Wis.2d 168, 517 N.W.2d 157 (1994). On June 22, 1994, the ***Escalona-Naranjo*** court held that a criminal defendant may not raise constitutional issues under § 974.06, STATS., which could have been raised on direct appeal or in a § 974.02, STATS., motion for postconviction relief, unless the defendant establishes a "sufficient reason" why the issue was not asserted or was inadequately raised in his appeal or his original postconviction motion. ***Id***. at 185, 517 N.W.2d at 164. The court said that § 974.06(4) "requires a *sufficient reason* to raise a constitutional issue in a § 974.06 motion that *could have been raised* on direct appeal or in a § 974.02 motion." ***Id***. At Richards' request, on July 11, 1994, we remanded the matter to the trial court to allow him to show sufficient reasons for his failure to raise his § 974.06 contentions in his first appeal.

On June 30, 1995, Richards filed a supplement to his August 1992 motion under § 974.06, STATS. He had raised four instructional errors in his § 974.06 motion. He asserted in his supplement that on February 17, 1986, he wrote to attorney Williamson, requesting Williamson to raise three of those

[1] Unpublished cases are of no precedential value and may not be cited as precedent or authority, except to support a claim of *res judicata*, collateral estoppel or law of the case. RULE 809.23(3), STATS.

instructional errors in his first appeal. Williamson did not raise those issues, and Richards asserted in his supplement he was incapable of raising those issues himself. The fourth instructional error was the incorporation of a disputed fact. He had unsuccessfully raised that issue in his first appeal, but Richards asserted in his supplement that because in ***State v. Kuntz***, 160 Wis.2d 722, 467 N.W.2d 531 (1991), the state supreme court has since addressed that type of error, he was entitled to further review on the issue.

Richards asserted in his supplement that in his first appeal he did not raise trial counsel's ineffective assistance because Richards was not capable of doing so and because Attorney Williamson had not raised the instructional errors. He asserted because the trial court had denied him access to trial counsel's defense file in his first appeal, he did not raise an ineffective assistance claim based on trial counsel's failure to submit evidence regarding Dick Endres and his brother, Ron, who had accompanied Dick and was present at the stabbing. He asserted that, because of his lack of knowledge of the law, in his first appeal he did not raise the prosecutorial misconduct issue and trial counsel's ineffective assistance for failing to object or move for a mistrial. He asserted that in his first appeal, he did not raise the insufficiency of the evidence to convict him because Attorney Williamson had declined his request that he do so.

On May 3, 1995, the trial court ruled that the instructional, prosecutorial misconduct and sufficiency of the evidence issues were not properly addressed under § 974.06, STATS., because they were not of constitutional or jurisdictional dimension. The court ruled that the ineffective assistance claim could have and should have been raised in the first appeal. The court found that Richards failed to show a sufficient reason for not having raised the ineffective assistance claim in that appeal, and held that he therefore is precluded from raising it now in his § 974.06 motion.[2]

II. Issues

[2] Although Richards is proceeding pro se on this appeal, we note that he is an experienced litigator. We have found at least twenty-two appeals to which Richards was a party.

Richards raises the following issues in the order we have stated them. Our discussion does not necessarily follow the same order.

1. May the ***Escalona-Naranjo*** standard (barring raising constitutional errors under § 974.06, STATS., except when "sufficient reason" is shown for not raising them on direct appeal) be applied retroactively?

2. Did Richards show sufficient reason for not raising his new issues on his first appeal?

3. Is a denial of due process during postconviction proceedings under § 974.02, STATS., cognizable in the trial court under § 974.06, STATS.?

4. Was Richards denied his right to due process on direct appeal when the trial court refused to order trial counsel to turn over his case file to postconviction counsel?

5. Was the bridging jury instruction error which deprived Richards of his right to rely on the affirmative defense of manslaughter a constitutional error?

6. Did the jury instructions on murder and manslaughter deprive Richards of a fundamentally fair trial by preventing him from relying on the affirmative defense of manslaughter as a defense to murder?

7. Is Richards entitled to a new trial based on a previously raised jury instruction error, which incorporated a disputed fact in the jury instructions and deprived him of his right to absolute self-defense because a subsequent state supreme court decision prohibits changing of instructions after the jury instruction conference is held?

8. Was Richards denied a fair trial by the omission of evidence of Dick Endres' reputation for violence and the evidence of prior acts of Dick and Ron Endres?

9. Is Richards entitled to a new trial based on ineffective assistance of counsel for trial counsel's failure to object to improper jury instructions and improper closing arguments by the prosecutor, failure to introduce reputation evidence of the violent conduct of Dick Endres, failure to introduce prior acts of Dick and Ron Endres and failure to properly investigate Richards' claim of self-defense?

10. Did sufficient evidence of intent to kill beyond a reasonable doubt support a conviction for first-degree murder?

11. Was Richards denied a fair trial by improper closing arguments, withholding exculpatory evidence, knowing use of perjured testimony and improper questions and comments on Richards' postarrest silence?

III. Retroactive Applicability of *Escalona-Naranjo*

Before ***Escalona-Naranjo*** was decided, criminal defendants were entitled to one § 974.06, STATS., motion as of right. ***Bergenthal v. State***, 72 Wis.2d 740, 748, 242 N.W.2d 199, 203 (1976). Richards asserts that to apply ***Escalona-Naranjo*** retroactively to all persons seeking relief under § 974.06 raises a procedural bar to relief on constitutional claims, contrary to ***Ford v. Georgia***, 498 U.S. 411 (1991). He asserts that under ***Ford***, the State cannot refuse to address his new ineffective assistance claims, because ***Escalona-Naranjo*** erected a state procedural bar when it is too late for him to comply with the new procedure the ***Escalona-Naranjo*** court mandated.

Richards filed his § 974.06 motion almost two years before the supreme court decided ***Escalona-Naranjo***. Pre-***Escalona-Naranjo*** law in Wisconsin allowed a criminal defendant to raise "an issue of significant constitutional proportions" in a § 974.06 motion even "though the issue might

properly have been raised on appeal ...." ***Bergenthal***, 72 Wis.2d at 748, 242 N.W.2d at 203.

The ***Escalona-Naranjo*** court overruled ***Bergenthal***. ***Escalona-Naranjo***, 185 Wis.2d at 181, 517 N.W.2d at 162. The ***Escalona-Naranjo*** court gave its reason for overruling ***Bergenthal***:

> The plain language of subsection (4) clearly provides when a sec. 974.06 motion is appropriate. First, all grounds for relief under sec. 974.06 must be raised in a petitioner's original, supplemental or amended motion....
>
> Second, if the defendant's grounds for relief have been finally adjudicated, waived or not raised in a prior postconviction motion, they may not become the basis for a sec. 974.06 motion. The language of subsection (4) does not exempt a constitutional issue from this limitation, *unless* the court ascertains that a "sufficient reason" exists for either the failure to allege or to accurately raise the issue in the original, supplemental or amended motion.[3]

Id. at 181-82, 517 N.W.2d at 162.

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[3] Section 974.06(4), STATS., provides:

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

The ***Escalona-Naranjo*** rule applies retroactively. That was the plain intent of the ***Escalona-Naranjo*** court. Escalona-Naranjo had unsuccessfully moved for a new trial in 1986 under § 974.02, STATS., after a jury found him guilty of a controlled substance crime. After the court of appeals affirmed his conviction, Escalona-Naranjo filed his § 974.06, STATS., motion in 1990. He amended the motion in 1991 to claim his trial counsel had provided ineffective assistance. ***Escalona-Naranjo***, 185 Wis.2d at 175, 517 N.W.2d at 159. Because he failed to show sufficient reason for not raising his ineffective assistance claim in his § 974.02 motion for a new trial, the supreme court held he could not raise it under § 974.06. ***Escalona-Naranjo***, 185 Wis.2d at 186, 517 N.W.2d at 164.

Richards asserts that the holding in ***Ford*** prohibits the retroactive application of ***Escalona-Naranjo*** to him. He contends the ***Ford*** Court held that after a defendant's criminal trial has been completed, a state cannot create a new procedural bar to his raising constitutional claims never before presented to the trial court. Richards overstates the ***Ford*** Court's holding.

The ***Ford*** Court held only that a new procedural rule adopted by a state after a defendant's criminal trial cannot prevent federal judicial review of the defendant's constitutional claims raised for the first time after his trial. The ***Ford*** Court granted certiorari to determine whether a new rule of procedure the Georgia supreme court adopted was an adequate and independent state procedural ground to bar review of defendant's claim that he had been denied equal protection in the jury selection process. ***Ford***, 498 U.S. at 418. The ***Ford*** Court concluded that the new rule, "adopted long after [Ford's] trial, cannot bar *federal* judicial review of [Ford's] equal protection claim." ***Id.*** at 425 (emphasis added). The ***Ford*** Court reversed the Georgia judgment and remanded to the Georgia supreme court for further proceedings not inconsistent with the ***Ford*** Court's opinion.[4] ***Id.***

When applying the holding in ***Ford***, 498 U.S. at 423-24, that a state court may interpose only a firmly established and regularly followed state practice to prevent federal review on habeas corpus of a federal constitutional

[4] One state court described itself as "frankly puzzled" at the remand in the court in ***Ford v. Georgia***, 498 U.S. 411, and a similar remand in ***Trevino v. Texas,*** 503 U.S. 562 (1992). ***Rosales v. State***, 841 S.W.2d 368, 380 (Tex. Crim. App. 1992), *cert. denied*, 510 U.S. 949 (1993). We too are puzzled. We have not seen a proposed solution to the puzzle.

claim, United States courts of appeals have, in the absence of such a practice, ruled on the merits or remanded to a federal district court without a remand to the state court. *See* ***Messer v. Roberts***, 74 F.3d 1009, 1015-17 (10th Cir. 1996); ***Reed v. Scott***, 70 F.3d 844, 846 (5th Cir. 1995), *cert. denied*, 116 S. Ct. 1452 (1995); ***Forgy v. Norris***, 64 F.3d 399, 401-03 (8th Cir. 1995); ***Pearson v. Norris***, 52 F.3d 740, 742-43 (8th Cir. 1995); ***Cochran v. Herring***, 43 F.3d 1404, 1410-12 (11th Cir. 1995), *modified on denial of reh'g*, 61 F.3d 20 (11th Cir. 1995), *cert. denied*, 116 S. Ct. 776 (1996); ***English v. U.S.***, 42 F.3d 473, 478-79, 484 (9th Cir. 1994); ***Easter v. Endell***, 37 F.3d 1343, 1345-47 (8th Cir. 1994); ***Del Vecchio v. Illinois Dep't of Corrections***, 31 F.3d 1363, 1381 (7th Cir. 1994) (***en banc***), *cert. denied*, 115 S. Ct. 1992 (1995); ***Wells v. Maass***, 28 F.3d 1005, 1010-11, 1013 (9th Cir. 1994); ***Hansbrough v. Latta***, 11 F.3d 143, 145-46 (11th Cir. 1994), *cert. denied*, 115 S. Ct. (1994); ***Harmon v. Ryan***, 959 F.2d 1457, 1462-63 (9th Cir. 1992).

Richards has cited no authority supporting his claim that Wisconsin courts cannot apply ***Escalona-Naranjo*** retroactively to bar his new constitutional claims. ***Liegakos v. Cooke***, 928 F. Supp. 799 (E.D. Wis. 1996), is contrary to his position.

In ***Liegakos***, the defendant was convicted of first-degree murder in a Wisconsin circuit court. For the history of the case, see 928 F. Supp. at 803-04. In his direct appeal, he unsuccessfully raised numerous claims of error. In 1992 he filed a § 974.06, STATS., motion, raising new constitutional claims. The trial court denied his motion. While his appeal was pending, the state supreme court decided ***Escalona-Naranjo***. The court of appeals summarily affirmed the order denying Liegakos' § 974.06 motion, on the basis of ***Escalona-Naranjo***. The Wisconsin Supreme Court denied his petition for review challenging the retroactive application of ***Escalona-Naranjo***, and he petitioned the Federal District Court for the Eastern District of Wisconsin for habeas corpus. That court held that ***Escalona-Naranjo*** did not bar federal review of Liegakos' new constitutional claims and rejected them. The court said on reconsideration that his proper remedy for the state's retroactive application of ***Escalona-Naranjo*** to bar state appellate review was federal review of his federal constitutional claims. ***Id***. at 811.

IV. Insufficiency of Reasons for Not Raising Issues on Direct Appeal

A. Bridging Instruction

The first claim asserted by Richards in his § 974.06, STATS., motion is that he is entitled to the benefit of the ruling in ***State v. Harp***, 150 Wis.2d 861, 443 N.W.2d 38 (Ct. App. 1989), *overruled in part by* ***State v. Camacho***, 176 Wis.2d 860, 881-82, 501 N.W.2d 380, 388 (1993). He contends that the bridging instruction in his trial constitutes error. We conclude that the claim cannot be raised under § 974.06.

Richards asserts that the instructions prevented the jury from considering the affirmative defense of imperfect manslaughter before finding him guilty of first- or second-degree murder. The "bridging instruction" told the jurors they should make every effort to agree that Richards was not guilty of first-degree murder before considering the offense of second-degree murder. The instruction was wrong. We so held in ***Harp***, 150 Wis.2d at 883-86, 443 N.W.2d 47-48.

However, § 974.06, STATS., reaches only errors of jurisdictional or constitutional magnitude. ***Peterson v. State***, 54 Wis.2d 370, 381, 195 N.W.2d 837, 845 (1972). Richards does not claim jurisdictional error. A § 974.06 motion does not reach faulty jury instructions, at least when the error is not constitutional. In ***State v. Langston***, 53 Wis.2d 228, 232, 191 N.W.2d 713, 715 (1971); ***State v. Whittemore***, 166 Wis.2d 127, 130 n.1, 479 N.W.2d 566, 568 (Ct. App. 1991); ***State v. Nicholson***, 148 Wis.2d 353, 355, 435 N.W.2d 298, 299 (Ct. App. 1988).

Richards contends that the unobjected-to error in the bridging instructions deprived him of a fair trial. Although the instruction was erroneous under ***Harp***, Richards does not explain why the error was constitutional. No appellate court in this state has held that the error is constitutional.

Richards insists the error is elevated to a constitutional level because after he was convicted, we decided ***Harp***. He relies on ***Falconer v.***

Lane, 905 F.2d 1129 (7th Cir. 1990), for the proposition that if the state grants any defendant relief on an unobjected to error, then it must grant relief to other defendants who fail to object to the same error. We reject the contention.

In ***Falconer***, the defendant was tried and convicted in Illinois for murder. She claimed self-defense. She did not object to the instructions. She unsuccessfully appealed to the Illinois Court of Appeals and then petitioned the Illinois Supreme Court for leave to appeal. While her petition was pending, the state supreme court held in ***People v. Reddick***, 526 N.E.2d 141 (Ill. 1988), that it was error to give instructions identical to those given in Falconer's trial. Her amended petition raised ***Reddick*** as authority for reversing her conviction, but the Illinois Supreme Court denied her petition without comment. Falconer petitioned the United States District Court for habeas corpus, and that court granted the writ. The state appealed. The Seventh Circuit concluded that although the ***Reddick*** court did not use the term "due process," it "obviously considered the errors resulting from the invalid instructions to be of constitutional magnitude." ***Falconer***, 905 F.2d at 1134. The Seventh Circuit affirmed the district court's judgment granting habeas corpus, noting that the state had not objected under ***Teague v. Lane***, 489 U.S. 288 (1989), to the retroactive application of the ***Reddick*** holding.

Falconer is not on point. As we said, no Wisconsin case has held that the bridging instruction found erroneous in ***Harp***, 150 Wis.2d 861, 443 N.W.2d 38, is constitutional error. A § 974.06 motion reaches only constitutional or jurisdictional error. ***Peterson***, 54 Wis.2d at 381, 195 N.W.2d at 845.[5]

[5] Moreover, with exceptions not pertinent here, "the court of appeals does not have the power to review unobjected-to jury instructions," even when the instructions are claimed to have deprived the appellant of the right to a unanimous jury and to have the state prove each element of the offense beyond a reasonable doubt. ***State v. Schumacher***, 144 Wis.2d 388, 395-96, 416, 424 N.W.2d 672, 674-75, 683 (1988). For that reason alone, our recent decision in ***State v. Howard***, 199 Wis.2d 454, 544 N.W.2d 626 (Ct. App. 1996), *petition for review granted*, Apr. 16, 1996, that a post-conviction appellate decision may provide the sufficient reason ***Escalona-Naranjo*** requires, is inapplicable here. ***Howard*** involved a post-conviction decision on a weapons enhancer, not a jury instruction. Additionally, on April 16, 1996, the Wisconsin Supreme Court granted a petition for review in ***Howard***. Whether our decision in ***Howard*** will survive scrutiny by our high court remains to be seen.

B. State of Mind Instruction

Again relying on the claimed retroactive effect of ***Harp***, Richards asserts in his § 974.06 motion that the jury should have been instructed that the State must prove beyond a reasonable doubt that he did not actually believe he was acting in self-defense before the jury could find him guilty of first or second-degree murder. We held in ***Harp***, 150 Wis.2d at 885, 443 N.W.2d at 48, that a defendant's lack of that belief disproves perfect self-defense and manslaughter/imperfect self-defense.[6]

However, we said in ***Harp***, "The requirement that the state disprove an affirmative defense beyond a reasonable doubt is statutory. It is not based on the United States Constitution or the Wisconsin Constitution." ***Harp***, 150 Wis.2d at 884 n.8, 443 N.W.2d at 47. Because § 974.06 reaches only errors of constitutional or jurisdictional dimension, ***Peterson***, 54 Wis.2d at 381, 195 N.W.2d at 845, and the error Richards relies on is neither, the question whether he showed sufficient reason for not raising this issue in his postconviction motion under § 974.02, STATS., or in his initial appeal is not before us.

C. Disputed Fact

After the instruction conference and without notice to either party, the trial court added words to the self-defense instruction. The added words were "in shoving Dick Endres." The instruction with the added words was as follows:

> If you find the defendant provoked a fight by engaging in unlawful conduct *in shoving Dick Endres*, he is not privileged to resort to the use force intended or likely to cause death or great bodily harm to Mr. Endres unless he reasonably believes he has exhausted every other reasonable means to escape from or otherwise

[6] ***State v. Camacho***, 176 Wis.2d 860, 872-74, 501 N.W.2d 380, 384-85 (1993), overruled ***Harp*** to the extent that ***Harp*** failed to take into account the reasonableness of the defendant's actual belief. The ***Camacho*** court's discussion of reasonableness is not pertinent to the burden of proof issue Richards raises in this appeal.

> avoid death or great bodily harm at the hands of Mr. Endres.

(Emphasis added.) According to Richards, the instruction erroneously treated a disputed fact—whether he shoved Endres—as an undisputed fact, and the instruction advised the jury that he was the aggressor and merely permitted the jury to determine whether the shove was an unlawful act.

However, in Richards' 1988 appeal, we concluded that the instruction properly and adequately explained the law applicable to the facts of the case and that the trial court had not erred. ***State v. Richards***, No. 86-0841-CR, unpublished slip op. at p. 4. He cannot relitigate the same issue under § 974.06, STATS., no matter how artfully it is rephrased. See ***State v. Witkowski***, 163 Wis.2d 985, 990, 473 N.W.2d 512, 514 (Ct. App. 1991), and cases cited.

Richards nevertheless asserts the right to reraise the same issue because after his first appeal, the Wisconsin Supreme Court decided ***Kuntz***, 160 Wis.2d at 722, 467 N.W.2d at 531. The ***Kuntz*** court held that the trial judge must notify the parties if the judge changes the jury instructions after the instruction conference. ***Id***. at 735, 467 N.W.2d at 535, and relieving the state from proving an essential element is error. ***Id***. at 736, 467 N.W.2d at 536.

The ***Kuntz*** court exercised its superintending authority under Article VII, Section 3(1) of the Wisconsin Constitution when it declared the rule that a trial court must advise counsel of changes the court makes to the instructions after the instructions conference.[7] ***Id.*** at 735, 467 N.W.2d at 535. The ***Kuntz*** court did not declare that the rule was constitutionally required, and we see no reason to hold that it is. Because the claimed error is neither jurisdictional nor constitutional, Richards cannot raise it under § 974.06, STATS.

Like the trial court, we reject Richards' argument that the added words released the State from the burden of proof. The defendant in ***Kuntz*** was charged with arson. The statute defining the crime required the State to prove

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[7] In such a situation, the lack of advance notice probably makes inapplicable the holding in ***Schumacher*** that the court of appeals lacks the power to review unobjected-to instructional error. ***Schumacher***, 144 Wis.2d at 416, 424 N.W.2d at 683.

that a building had been damaged by fire. A separate statute covered arson which damaged property other than buildings and provided a smaller penalty. The trial court instructed the jury that a "mobile home is a building." The ***Kuntz*** court held that the instruction erroneously created a mandatory conclusive presumption that required the jury to find that the State had proved a building had been damaged by fire if the jury found that the structure damaged by fire was a mobile home. ***Kuntz***, 160 Wis.2d at 738, 467 N.W.2d at 536.

The instruction in Richards' case did not create a mandatory conclusive presumption that he had shoved Endres and therefore was the aggressor. The instruction was conditional. It begins with a condition: "*If* you find the defendant provoked a fight by engaging in unlawful conduct in shoving [Dick] Endres, ..." (Emphasis added.) Given the conditional nature of the instruction, a reasonable juror would not conclude he or she was to assume Richards had shoved Dick Endres. The instruction was not error.

Because the claimed error regarding treatment of a disputed fact in the instruction is not of constitutional or jurisdictional dimension, Richards cannot raise it under § 974.06, STATS.[8]

D. Ineffective Assistance of Counsel

1. Failure to Object to Instructional Error

In Richards' postconviction motion for a new trial under § 974.02, STATS., he charged ineffective assistance of trial counsel. The claimed ineffectiveness related to the absence of a witness, Wildes, from the trial. The trial court rejected Richards' ineffectiveness claim, and we affirmed that ruling in Richards' first appeal.[9]

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[8] As for the possible retroactive application of ***Kuntz*** in view of ***Howard***, 199 Wis.2d at 454, 544 N.W.2d at 626, see n.5, *supra*, regarding the status of that case before the Wisconsin Supreme Court.

[9] Although the court of appeals lacks the power to review unobjected-to instructional error, it may review such error for the purpose of determining whether counsel was ineffective, since ineffectiveness is not an issue that ordinarily can be raised during the

To support his § 974.06 motion, Richards asserts in his supplement that he did not earlier raise his ineffective assistance claim regarding the jury instructions because attorney Williamson failed to comply with Richards' request that he do so. He asserts that after Richards' § 974.02, STATS., motion for a new trial was orally denied, he asked Williamson to return to the trial court and raise the issue in that motion. Williamson did not respond, and Richards claims he lacked the knowledge to raise the issues on his own in his pro se brief on appeal.

Richards is in no position to blame attorney Williamson for his own failure to raise the instruction issues on appeal. Richards eventually proceeded pro se in his direct appeal. It is undisputed that he knew before he submitted his pro se appellate brief that the bridging instruction had been revised. The revision was made in June 1985. In his letter of February 17, 1986, to Williamson, Richards referred to the new instruction. On August 25, 1986, he filed his pro se brief in that appeal, without raising the bridging instruction question.

Knowing that the instructions had been revised after his trial, Richards never sought to supplement his motion for a new trial by asking for a hearing on the ineffectiveness of trial counsel's failure to object to the bridging instruction. Had he done so, the trial court could have resolved the issue, and if the trial court held against him, he could have obtained a review of that decision in the court of appeals. As a matter of law, Richards has not shown sufficient reason for raising the new ineffective assistance issues in his § 974.06, STATS., motion.

We affirm the trial court's conclusion that Richards has failed to show sufficient reason for his failure to raise his new issue of ineffective assistance in his postconviction motion under § 974.02, STATS., and in his initial appeal. He therefore cannot raise the new issue in his § 974.06 motion. ***Escalona-Naranjo***, 185 Wis.2d at 185, 517 N.W.2d at 164.

(..continued)
trial. *See* ***Schumacher***, 144 Wis.2d at 408-09 n.14, 424 N.W.2d at 680.

2. Failure to Object to Closing Arguments, Introduce Reputation Evidence, Introduce Prior Acts Evidence, and Properly Investigate Self-Defense Claim

In his statement of the issues, Richards asserts he is entitled to a new trial on the basis not only of ineffective assistance of counsel for trial counsel's failure to object to improper jury instructions but also trial counsel's failures in various other respects: to object to closing arguments by the prosecutor, to introduce reputation evidence on the violent conduct of Dick Endres, to introduce prior acts of Dick and Ron Endres and to properly investigate Richards' claim of self-defense.

Richards failed to raise these ineffective assistance issues in his first appeal, and he failed even to attempt to show a sufficient reason in support of his § 974.06 motion for that failure. ***Escalona-Naranjo*** prevents his raising the issues now. His claim that as a pro se appellant he lacked sufficient knowledge of the law does not establish a sufficient reason. If we were to accept that excuse, that would create a wholesale exemption to pro se litigants from the rule in ***Escalona-Naranjo***. That would gut ***Escalona-Naranjo***, interfere with the goal of finality the ***Escalona-Naranjo*** court emphasized, ***Escalona-Naranjo***, 185 Wis.2d at 185, 517 N.W.2d at 163, and encourage appellants in criminal appeals to proceed without counsel, to the detriment of orderly and efficient appeals.

3. Denial of Fair Trial by Improper Closing Arguments, Withholding Exculpatory Evidence, Knowing Use of Perjured Testimony, and Improper Questions and Comments on Postarrest Silence

Richards is not assisted by his phrasing in terms of having been denied a fair trial, as opposed to using them in support of ineffective assistance claim. He did not raise these issues in his first appeal. He has offered no reasons for his failure to do so, and ***Escalona-Naranjo*** prevents him from raising those issues now.

E. Insufficient Evidence

As the State points out, at no place even in his brief does Richards explain why he failed to claim in his first appeal that the evidence of his intent to kill Richard Endres was insufficiently proven at the trial. ***Escalona-Naranjo*** therefore prevents him from raising that issue now.

F. Denial of Fair Trial by Omission of Reputation and Prior Acts Evidence

We do not reach Richards' claim in this appeal that he was denied a fair trial by the omission of evidence of Dick Endres's reputation for violence and omission of evidence of the prior acts of Dick and Ron Endres. Richards asserts this issue was never raised in his direct appeal because he was denied access to his trial attorney's case file, which would have revealed the existence of facts and information upon which the issue is based, and he points out that he has a constitutional right to present a defense to the charges against him. ***State v. Klimas***, 94 Wis.2d 288, 302, 288 N.W.2d 157, 164 (1979), *cert. denied*, 449 U.S. 1016 (1980).

However, as we have said, in his first appeal Richards raised the issue regarding access to his trial counsel's entire file. In his brief-in-chief on direct appeal, he devoted one paragraph to that issue:

> The appellant moved, before the post conviction hearing for an order giving him access to all the papers the trial counsel used in preparing for the trial. Without examining the case file, the appellate counsel could not make an effective inquiry into trial counsel's ineffective assistance. With the lack of documentary evidence on the part of appellant, the evidentiary hearing came down to a question of credibility between an attorney and a convicted felon. Access to the case file was particularly important in that it was obvious that someone caused the appellant to have a fundamentally unfair trial, but responsibility could not be effectively determined by testimony alone. It was vital that appellate counsel be allowed to examine the papers. Instead, the trial court ruled that appellate counsel

> was only allowed to examine those that trial counsel determined related to Wildes as a witness. Appellate counsel renewed their motion at the evidentiary hearing, but it was denied.

Brief of Defendant-Appellant in ***State v. Richards***, No. 86-0841-CR, at 47.

In his first appeal, we properly affirmed Richards' conviction without directly addressing the access issue. His conclusory argument, which we have quoted, contained no "citations to the authorities" he relied on, as required by RULE 809.19(1)(e), STATS., of the Rules of Appellate Procedure. Early in the history of this court we warned that we "will refuse to consider such an argument, or summarily affirm on [the] issue." ***State v. Shaffer***, 96 Wis.2d 531, 546, 292 N.W.2d 370, 378 (Ct. App. 1980). To permit Richards to raise the access issue a second time by way of a § 974.06 motion, merely because we did not expressly address the issue Richards never properly argued, would be contrary to the purpose of ***Escalona-Naranjo***.

As for Richards' specific claim that at the time of his trial he did not know of Dick Endres's reputation for violence, his 1992 affidavit in support of his § 974.06 motion is to the contrary. In that affidavit Richards states:

From the time I was a teenager, I heard stories about Dick Endres and his violent conduct; ... Had I known that Dick Endres and his brother were the people coming to Shirley Dunwald's apartment the night I ended up stabbing Dick Endres, I would have fled on foot rather than stayed to face Dick Endres; from my past discussions with other people who knew Dick Endres, I am aware that an aura of fear surrounded his name whenever it came up in a conversation; ....

Thus, Richards did not need access to his trial attorney's case file for information regarding the reputation of Dick Endres for violence.

V. Conclusion

For the reasons stated we conclude that the trial court properly denied Richards' § 974.06 motion for a new trial, and we therefore affirm that order.

By the Court.—Order affirmed.

Recommended for publication in the official reports.