

**COURT OF APPEALS
DECISION
DATED AND FILED**

February 18, 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. 2007AP2755

Cir. Ct. No. 2001CF174

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

IVAN T. JOHNSON,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Ozaukee County:
PAUL V. MALLOY, Judge. *Affirmed.*

Before Brown, C.J., Snyder and Neubauer, JJ.

¶1 PER CURIAM. Ivan Johnson appeals pro se from a circuit court order denying his motion for a new trial without an evidentiary hearing. We conclude that the circuit court did not misuse its discretion in denying the motion without a hearing, and we affirm.

¶2 We review the circuit court’s decision to deny Johnson’s WIS. STAT. § 974.06¹ motion without an evidentiary hearing for an erroneous exercise of discretion. *State v. Bentley*, 201 Wis. 2d 303, 310-11, 548 N.W.2d 50 (1996). A circuit court may deny a § 974.06 motion without a hearing when “the record conclusively demonstrates that the defendant is not entitled to relief...” *Bentley*, 201 Wis. 2d at 309-10.

¶3 We affirmed Johnson’s felony murder conviction in *State v. Johnson*, No. 2003AP3405-CRNM, unpublished slip op. (Wis. Ct. App. Jun. 21, 2006). In that opinion, we recited the following facts:

Johnson was convicted of felony murder as party to the crime arising out of a June 14, 2001 armed robbery and shooting at a Mequon, Wisconsin, storage facility. The evidence at trial, which the circuit court as the fact finder deemed credible, demonstrated that Johnson and three others followed the driver and passenger of a Ford Expedition to a storage facility with intent to steal the vehicle. The passenger was killed during the armed robbery at the storage facility. The Expedition driver, Antonio Aviles, testified at trial along with one of Johnson’s co-actors, Jeremy Harris, who participated in the armed robbery with Johnson, Alvin Cooley, a witness to the planning of the armed robbery who declined to participate, and Robert Finger, an inmate to whom Johnson related the crime in detail. These witnesses identified Johnson as a participant in the armed robbery and shooting. Johnson’s fingerprint was found on the vehicle he and the others used to follow the Expedition. Johnson’s inculpatory statement to police was admitted through the testimony of Mequon Police Captain Dennis Burch. Johnson testified and denied his involvement in the armed robbery and shooting. The court convicted Johnson.

¹ All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

Id., unpublished slip op. at 2. We held that the evidence was sufficient to convict Johnson. *Id.*, unpublished slip op. at 3. We rejected Johnson's claim that Aviles' identification testimony was not reliable. *Id.*, unpublished slip op. at 6. We also rejected Johnson's challenge to the testimony of Robert Finger, an inmate to whom Johnson related details of the crime. *Id.*, unpublished slip op. at 6-7. Finally, we rejected Johnson's challenges to identification of him by Alvin Cooley and Jeremy Harris. *Id.*, unpublished slip op. at 4, 8. Harris' testimony was the focus of Johnson's WIS. STAT. § 974.06 motion.

¶4 In his WIS. STAT. § 974.06 motion, Johnson argued that the State did not, prior to Johnson's February 2002 trial, disclose evidence that Jeremy Harris had extensive mental health issues. Harris attached to his motion a transcript of Harris' May 2000 sentencing hearing on a drug offense. During Harris' sentencing hearing, the circuit court acknowledged Harris' untreated mental health issues, including conduct disorder, drug abuse, schizoaffective disorder, evolving antisocial personality disorder, and bipolar disorder. Johnson's motion also included psychiatric reports about Harris from July 2000, September 2002, February 2003, and March 2003, a November 1997 juvenile psychiatric evaluation, and 1998 and 1999 psychiatric progress notes. Johnson alleged that he learned of Harris' mental health problems when he researched Harris' appeal file. Johnson argued that by failing to disclose Harris' mental health problems, the State deprived him of a fair trial and impeded his trial counsel's ability to effectively represent him in his felony murder trial.²

² Johnson also argues that the prosecutor did not correct false testimony. Johnson does not elaborate on this claim in any respect, and we do not consider it. A court need not grant an evidentiary hearing on a legally insufficient claim. *State v. Allen*, 2004 WI 106, ¶12, 274 Wis. 2d 568, 682 N.W.2d 433.

¶5 Among other reasons, the circuit court denied Johnson’s WIS. STAT. § 974.06 motion without a hearing because Johnson merely speculated that Harris’ mental health issues would have had an impact on his ability to evaluate Harris’ testimony, and he did not show that information regarding Harris’ mental status was in the State’s possession.

¶6 We may affirm the circuit court for reasons other than those relied upon by that court. *State v. Rogrud*, 156 Wis. 2d 783, 789, 457 N.W.2d 573 (Ct. App. 1990). We will assume without deciding that the evidence of Harris’ mental health issues was newly discovered. We turn to whether “a reasonable probability exists that a different result would be reached in a trial,” *State v. McCallum*, 208 Wis. 2d 463, 473, 561 N.W.2d 707 (1997), the final step in this newly discovered evidence analysis. We conclude that evidence of Harris’ mental health issues would not have yielded a different result at trial.

¶7 As we held in Johnson’s direct appeal, the evidence was sufficient to convict him. In addition to Harris’ testimony, the following evidence was before the court:

Antonio Aviles, testified at trial along with one of Johnson’s co-actors, Jeremy Harris, who participated in the armed robbery with Johnson, Alvin Cooley, a witness to the planning of the armed robbery who declined to participate, and Robert Finger, an inmate to whom Johnson related the crime in detail. These witnesses identified Johnson as a participant in the armed robbery and shooting. Johnson’s fingerprint was found on the vehicle he and the others used to follow the Expedition. Johnson’s inculpatory statement to police was admitted through the testimony of Mequon Police Captain Dennis Burch. Johnson testified and denied his involvement in the armed robbery and shooting.

Johnson, unpublished slip op. at 2. Even if Harris' testimony had been undermined or rendered incredible by evidence of his mental health issues, the other evidence was sufficient to convict Johnson. Because the record conclusively shows that Johnson was not entitled to relief on his WIS. STAT. § 974.06 motion, the circuit court did not misuse its discretion in denying the motion without a hearing.

By the Court.—Order affirmed.

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

