



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](http://www.wicourts.gov)

**DISTRICT III**

February 15, 2022

To:

Hon. Sarah Mae Harless  
Circuit Court Judge  
Electronic Notice

Gary King  
Electronic Notice

Susan Schaffer  
Clerk of Circuit Court  
Eau Claire County Courthouse  
Electronic Notice

Sara Lynn Shaeffer  
Electronic Notice

Richard A. Johnson 670858  
Oshkosh Correctional Inst.  
P.O. Box 3310  
Oshkosh, WI 54903-3310

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

---

2020AP1101

State of Wisconsin v. Richard A. Johnson  
(L. C. No. 2017CF1174)

Before Stark, P.J., Hruz and Nashold, JJ.

**Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).**

Richard Johnson, pro se, appeals an order denying his WIS. STAT. § 974.06 (2019-20),<sup>1</sup> motion for a new trial. Based upon our review of the briefs and record, we conclude at conference that this case is appropriate for summary disposition. We determine that Johnson's claims are procedurally barred under § 974.06(4) and *State v. Escalona-Naranjo*, 185 Wis. 2d 168, 517 N.W.2d 157 (1994). Therefore, we summarily affirm the order. See WIS. STAT. RULE 809.21.

---

<sup>1</sup> All references to the Wisconsin Statutes are to the 2019-20 version unless otherwise noted.

The State charged Johnson with sexual assault of a child under age sixteen; child enticement; delivering one gram or less of cocaine; and delivering not more than 200 grams of THC. The complaint alleged that Johnson, then sixty-four years old, had been giving then thirteen-year-old Jane<sup>2</sup> money and illegal drugs in an attempt to gain sexual favors. The complaint further alleged that Johnson gave Jane money in exchange for allowing him to perform oral sex on her.

A jury acquitted Johnson of the cocaine delivery charge, but it found him guilty of the other charged offenses. On the sexual assault and child enticement counts, the circuit court imposed concurrent ten-year sentences, consisting of five years' initial confinement and five years' extended supervision. The court withheld sentence on the delivery of THC count and imposed a concurrent two-year probation term.

Johnson appealed pro se from the judgment of conviction, and he advised this court that transcripts were not necessary for prosecution of his appeal. On direct appeal, Johnson presented five challenges to his conviction, arguing that the circuit court erred by: (1) denying his motion for a mistrial when one of the State's witnesses allegedly "ignore[d] two subpoenas"; (2) denying the jury's request to listen to both Jane's and Johnson's police interviews during deliberations; (3) denying Johnson's motion for a continuance of the trial; (4) allowing the prosecutor to file "improper charges" in violation of Johnson's due process and equal protection rights; and (5) allowing the prosecutor to disregard discovery requests and withhold exculpatory evidence.

---

<sup>2</sup> Pursuant to the policy underlying WIS. STAT. RULE 809.86(4), we use a pseudonym instead of the victim's name.

In addition to noting Johnson’s incomplete appendix, as well as his failure to provide this court with transcripts of any circuit court proceedings, we determined that Johnson’s arguments were largely undeveloped and conclusory. We consequently affirmed the judgment of conviction. *See State v. Johnson*, No. 2018AP1368-CR, unpublished slip op. and order at 6 (WI App Oct. 16, 2019).

In June 2020, Johnson filed the underlying motion for a new trial alleging that the circuit court erred by: (1) denying his request for a mistrial; (2) allowing the State to violate his Fourteenth Amendment right to equal protection; (3) allowing the State to conceal exculpatory evidence; (4) refusing to allow the jurors to review certain transcripts; and (5) not allowing stand-by counsel to take over the case. Johnson also claimed he had “new evidence and information which would raise many constitutional issues, and would entitle him [to] the relief sought.” The circuit court denied the motion without a hearing, and this appeal follows.

We conclude that Johnson’s claims are procedurally barred under WIS. STAT. § 974.06(4) and *Escalona-Naranjo*. In *Escalona-Naranjo*, our supreme court held that “a motion under [§] 974.06 could not be used to review issues which were or could have been litigated on direct appeal.” *Escalona-Naranjo*, 185 Wis. 2d at 172. The statute, however, does not preclude a defendant from raising “an issue of constitutional dimension which for sufficient reason was not asserted or was inadequately raised in his [or her] original, supplemental or amended postconviction motions.” *Id.* at 184 (emphasis omitted).

We determine the sufficiency of a defendant’s reason for circumventing *Escalona-Naranjo*’s procedural bar by examining the “four corners” of the subject

postconviction motion.<sup>3</sup> See *State v. Allen*, 2004 WI 106, ¶27, 274 Wis. 2d 568, 682 N.W.2d 433. Although Johnson’s motion acknowledged the “sufficient reason” standard, the motion offered no reason, much less a sufficient reason, for failing to raise his present claims on direct appeal.

Even Johnson’s newly discovered evidence claim cannot circumvent the procedural bar. Johnson argues that this evidence—related to the validity of a sealed no-knock search warrant and the “blatantly false” presentence investigation report—was not known during trial proceedings or the sentencing phase of this case. However, Johnson has not established that this information only became known between his direct appeal and the filing of his current appeal. Therefore, we are not persuaded that this claim could not have been raised earlier.

Beyond the procedural bar, the newly discovered evidence claim was insufficiently pled to warrant an evidentiary hearing. The circuit court may deny a postconviction motion without a hearing if the motion presents only conclusory allegations or if the record otherwise conclusively demonstrates that the defendant is not entitled to relief. See *id.*, ¶9. To obtain an evidentiary hearing, a defendant must show specific facts to establish “clear and convincing proof” that the evidence was discovered after conviction, that the defendant was not negligent in seeking the evidence, that the evidence is material to an issue in the case, and that the evidence is not merely cumulative. See *State v. McAlister*, 2018 WI 34, ¶31, 380 Wis. 2d 684, 911 N.W.2d 77. Where

---

<sup>3</sup> For the first time in his appellate brief, Johnson appears to challenge the sufficiency of the evidence supporting his convictions. Although a defendant is not required to raise a challenge to sufficiency of the evidence with the circuit court in order to preserve the issue for review in a direct appeal as of right, see *State v. Hayes*, 2004 WI 80, ¶54, 273 Wis. 2d 1, 681 N.W.2d 203, this is not Johnson’s direct appeal. As with his other claims, we conclude this challenge is procedurally barred, as Johnson fails to offer a sufficient reason for failing to raise it earlier.

all four criteria are met, it must then be determined whether a reasonable probability exists that had the jury heard the newly discovered evidence, it would have had a reasonable doubt as to the defendant's guilt. *Id.*, ¶32. Johnson's conclusory claims fail to satisfy any of the criteria by clear and convincing proof. As the circuit court recognized in denying Johnson's motion: "Simply calling something 'newly discovered evidence' does not make it so." The circuit court, therefore, properly denied that claim without an evidentiary hearing.

Finally, to the extent any of Johnson's current arguments may be an attempt at repackaging issues raised in his direct appeal, he cannot relitigate those claims no matter how artfully they are rephrased. See *State v. Witkowski*, 163 Wis. 2d 985, 990, 473 N.W.2d 512 (Ct. App. 1991). Because Johnson's claims either were or could have been raised on direct appeal, he is barred from raising or relitigating them now.

Upon the foregoing,

IT IS ORDERED that the order is summarily affirmed pursuant to WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that this summary disposition order will not be published.

---

*Sheila T. Reiff*  
*Clerk of Court of Appeals*