

**COURT OF APPEALS
DECISION
DATED AND FILED**

July 6, 2005

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. 2004AP1715-CR

Cir. Ct. No. 2002CF635

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JAMES E. LIPSCOMB,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: RICHARD J. SANKOVITZ, Judge. *Affirmed.*

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

¶1 PER CURIAM. James E. Lipscomb appeals from a judgment entered after a jury found him guilty of one count of first-degree intentional homicide, while using a dangerous weapon, contrary to WIS. STAT. §§ 940.01(1)(a) and 939.63 (2001-02). He also appeals from an order denying his

postconviction motion. Lipscomb claims his trial counsel provided ineffective assistance when he failed to object to the prosecutor's comments during closing argument regarding the credibility of one of the State's witnesses, Milwaukee Police Detective Alfonso Morales. Because Lipscomb failed to establish that his trial counsel provided ineffective assistance, we affirm.

BACKGROUND

¶2 On January 26, 2002, police were dispatched to an alley behind 2445 North 6th Street, Milwaukee, Wisconsin. There they found the body of Jerome Harris, who had died from exsanguination resulting from multiple gunshot wounds. The police took statements from several eyewitnesses. Jeffrey Moore told police that as he was speaking to Harris, he saw Lipscomb walking towards them. Moore told Harris to run. Harris attempted to enter a residence, but could not because the door was locked. Moore then observed Lipscomb grab Harris and state: "Bitch, I told you I was gonna kill you. Now you're gonna die, nigger." Moore then saw Lipscomb fire two shots from his handgun into Harris and Harris began to collapse. Lipscomb then threw Harris down to the ground behind the garage where Moore could not see what was happening. Moore heard two more shots fired. Then Harris stumbled out into the alley and collapsed. Lipscomb stood over Harris and fired several more shots into Harris's body before walking away.

¶3 On January 29, 2002, Police Detectives Alfonso Morales and Timothy Heier interviewed Lipscomb. Lipscomb waived his rights and agreed to answer questions. Lipscomb told the detectives that he and Harris were involved in a dispute because Harris thought Lipscomb had robbed Harris's drug house. During a car chase between Harris and his associates, and Lipscomb and his

associates, gunshots were exchanged and one of Lipscomb's friends was shot. Lipscomb started carrying his Mac-11 pistol because he heard Harris was looking for him. On January 26, 2002, Lipscomb decided to approach Harris and scare him. When he saw Harris on the street, he grabbed him and escorted him into an alley, keeping the gun pointed at Harris to scare him. When Harris tried to push the gun away, it discharged twice, striking Harris in the stomach and chest area. Lipscomb saw Harris stumble and fall to the ground. Lipscomb, concerned that Harris would kill him if he did not die from the gunshot wounds, pointed the gun at Harris and held the trigger until the gun was empty. Lipscomb then ran from the scene.

¶4 Based on this information, Lipscomb was charged and the case was tried to a jury. During the trial, Harris's girlfriend, Jacklyn Isabell, testified that she saw Lipscomb approach Harris and tell him, "I told you when I catch you, you was gonna die." She then saw Lipscomb pull Harris into an alley and heard a succession of gunshots. When she went to look for Harris, Moore stopped her, stating: "Buke [Lipscomb's nickname] let that whole MAC clip go on that boy." Floria and Famous Burks also testified at trial. They were sitting on a nearby porch when the shooting occurred. These witnesses identified Lipscomb as the person who chased Harris before they heard a succession of gunshots.

¶5 Lipscomb did not testify at trial. His defense was that he had been misidentified as the gunman and had given a false confession to police. The jury convicted. Lipscomb filed a postconviction motion alleging ineffective assistance of counsel. He contended that the prosecutor's statements regarding Detective Morales during rebuttal closing were improper comments on the credibility of the witness. He argued that his counsel's failure to object to these improper comments resulted in ineffective assistance. The trial court summarily denied the

motion, ruling both that the prosecutor's statements were not improper, and that Morales was not prejudiced by counsel's failure to object to them. Lipscomb now appeals.

DISCUSSION

¶6 Lipscomb argues that we should grant him a new trial on the basis that his counsel provided ineffective assistance for failing to object to comments the prosecutor made during the rebuttal closing argument. We are not persuaded.

¶7 In order to succeed on an ineffective assistance claim, Lipscomb must prove that counsel's performance constituted deficient conduct, and that such conduct prejudiced the outcome. *See Strickland v. Washington*, 466 U.S. 668, 687 (1984). A court need not address both components of this inquiry if the defendant does not make a sufficient showing on one. *Id.* at 697.

¶8 Whether counsel's actions constitute ineffective assistance is a mixed question of law and fact. *State v. Pitsch*, 124 Wis. 2d 628, 633-34, 369 N.W.2d 711 (1985). "The trial court's determinations of what the attorney did, or did not do, and the basis for the challenged conduct are factual and will be upheld unless they are clearly erroneous." *State v. Harvey*, 139 Wis. 2d 353, 376, 407 N.W.2d 235 (1987) (citation omitted). The ultimate conclusion, however, of whether the conduct resulted in a violation of defendant's right to effective assistance of counsel is a question of law for which no deference to the trial court need be given. *Id.*

¶9 Here, the ineffective assistance claim is based on counsel's failure to object during the following argument made by the prosecutor during the rebuttal closing:

[Lipscomb] isn't a guy who's been in an interrogation for five days, ten different statements, 14 different types of cops. It's not like that. In the year 2000, it's about respect. It's about creating that rapport with a prisoner, with the suspect. Getting him to trust you, to believe that it's going to be okay. If he tells you what happened, if he tells you what he did -- And that's what Al Morales did.

Al Morales, with all due respect, is a damn good cop. A cop you can be proud of, a cop we should be proud of. Why? Because he did his job. Does that make him a hero? No. He is a police officer. He is a human being. But he did the job well in this case. When [he] talked to the murderer, he got the murderer to believe him, got the murderer to trust him, got the murderer to think if I tell this guy what happened it's not going to be that bad and that's what he did.

¶10 The question then is whether these comments were improper so that Lipscomb's trial counsel's failure to object constituted deficient performance. Lipscomb argues that these statements constituted vouching for the credibility of Morales and resulted in comments about Morales's work ethic that were not a part of the record. We disagree.

¶11 A prosecutor is allowed to comment on the evidence and is afforded considerable latitude in closing arguments. *State v. Bergenthal*, 47 Wis. 2d 668, 681, 178 N.W.2d 16 (1970), *overruled on other grounds by State v. Escalona-Naranjo*, 185 Wis. 2d 168, 517 N.W.2d 157 (1994). "The line between permissible and impermissible final argument is not easy to [delineate] and is charted by the peculiar circumstances of each trial. Whether the prosecutor's conduct during closing argument affected the fairness of the trial is determined by viewing the statements in the context of the total trial." *State v. Smith*, 2003 WI App 234, ¶23, 268 Wis. 2d 138, 671 N.W.2d 854. The line of demarcation to which we refer is thus "drawn where the prosecutor goes beyond reasoning from the evidence to a conclusion of guilt and instead suggests that the jury arrive at a

verdict by considering factors other than the evidence.” *State v. Draize*, 88 Wis. 2d 445, 454, 276 N.W.2d 784 (1979). “Argument on matters not in evidence is improper.” *State v. Albright*, 98 Wis. 2d 663, 676, 298 N.W.2d 196 (Ct. App. 1980) (footnote omitted). The prosecutor, however, may comment on the credibility of witnesses as long as the comment is based upon evidence presented. *State v. Adams*, 221 Wis. 2d 1, 17, 584 N.W.2d 695 (Ct. App. 1998).

¶12 As noted by the trial court in its order denying the postconviction motion, these comments appeared to be a response to the defense’s closing argument. The challenged commentary occurred in rebuttal and did not actually constitute “vouching.” Rather, the comments, when read in context, were intended to “urge[] the jury to conclude ... that Detective Morales was a good cop and did his job because he got Mr. Lipscomb to confess without browbeating him.... the prosecutor [did not] add[] any personal assurance of veracity or any extraneous representation of fact that would add to what the evidence already contained.” We agree with the trial court’s analysis. Thus, the prosecutor’s comments did not cross the line.

¶13 In addition, even if we assume that the comments were improper and should have drawn an objection, Lipscomb has failed to prove prejudice. The evidence in this case was strong. There were several eyewitnesses tying Lipscomb to the shooting and the physical evidence was consistent with the testimony from those witnesses. Thus, even if Lipscomb’s attorney had objected and the jury did not hear the prosecutor’s commentary about Morales, there is no reasonable probability of a different outcome. The result of the trial is reliable based on the strong evidence presented during the State’s case.

¶14 Further, the jury was instructed to render its verdict on the evidence and to disregard arguments and remarks of the attorneys that were not supported by the evidence. Based on the foregoing, we reject Lipscomb's contention that his trial counsel provided ineffective assistance.

By the Court.—Judgment and order affirmed.

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

