COURT OF APPEALS
DECISION
DATED AND FILED

October 6, 2009

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2008AP2657 **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 an order of the circuit court for Milwaukee County: RICHARD J. SANKOVITZ, Judge. *Affirmed*.

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

¶1 BRENNAN, J. James E. Lipscomb appeals *pro se*[1] from an order denying his WIS. STAT. § 974.06 (2007-08)[2] postconviction motion. Lipscomb raises two claims: (1) that his postconviction counsel provided ineffective assistance; and (2) that he is entitled to a new trial based upon newly discovered evidence. Because we resolve each claim in favor of upholding the trial court's order, we affirm.

BACKGROUND

¶2 The historical facts underlying Lipscomb's conviction were set forth in our opinion in response to Lipscomb's direct appeal:

> 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.

[1] Lipscomb was represented by counsel when his WIS. STAT. § 974.06 motion for postconviction relief was filed with the trial court. At some point thereafter, his counsel moved to withdraw, stating that Lipscomb no longer wished to be represented by counsel and instead wanted to pursue his motion *pro se*. The trial court granted the motion, and since then Lipscomb has represented himself.

[2] All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

> 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.
>
> 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.
>
> 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 … 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.
>
> 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.

State v. Lipscomb, No. 2004AP1715-CR, unpublished slip op. ¶¶2-5 (WI App July 6, 2005). The jury found Lipscomb 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). The trial judge sentenced Lipscomb to life imprisonment, setting January 2038 as the eligibility date for extended supervision. The judgment of conviction was filed thereafter.

¶3 By postconviction motion filed in April 2004, Lipscomb sought a new trial based on a claim of ineffective assistance of counsel. The trial judge summarily denied the motion, and we affirmed the judgment following his direct appeal. *See* ***State v. Lipscomb***, No. 2004AP1715-CR, unpublished slip op. The Wisconsin Supreme Court dismissed his petition for review after a notice of voluntary withdrawal of the petition was filed on Lipscomb's behalf.

¶4 In July 2006, through court-appointed counsel, Lipscomb filed a WIS. STAT. § 974.06 motion, seeking a new trial based on the discovery of new evidence. Attached to the motion was the affidavit of Joseph Jordan,[3] who stated that he was with Philip Jordan on the day of Harris's murder and that Philip confessed murdering Harris. After the court granted his counsel's motion to withdraw, Lipscomb filed an amended § 974.06 motion *pro se*, in which he added a second claim of newly discovered evidence based on the affidavit of Robert Canady, who stated he gave Philip Jordan the murder weapon, and an ineffective assistance of counsel claim. In a December 3, 2007 order, the trial court denied both claims.

[3] Throughout the opinion, the court refers to Joseph Jordan as Jordan. On the few occasions we refer to Philip Jordan, we do so by his full name.

¶5 Following the trial court's order, Lipscomb filed a motion for reconsideration, and the trial court held a hearing on whether the newly discovered evidence set forth by Lipscomb warranted a new trial.[4] Both Canady and Jordan testified at the hearing. In a written order following the hearing, the trial court denied the motion for reconsideration. Lipscomb now appeals.

DISCUSSION

I. Ineffective Assistance of Counsel

¶6 Lipscomb first asserts that his postconviction counsel was ineffective for failing to challenge the admission at trial of three pieces of evidence: (1) evidence that Lipscomb hid under a blanket when police came to arrest him and mention of that fact during the prosecutor's closing argument; (2) an impermissibly suggestive photo array; and (3) certain hearsay testimony. We disagree.

¶7 To sustain a claim of ineffective assistance of counsel, a defendant must show both that counsel's performance was deficient and that counsel's errors were prejudicial. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984); ***State v. Sanchez***, 201 Wis. 2d 219, 236, 548 N.W.2d 69 (1996). A court need not address

[4] Lipscomb's motion for reconsideration requested that the trial court hold hearings on both his ineffective assistance of postconviction counsel claim and his request for a new trial based on newly discovered evidence. The court only held a hearing on Lipscomb's request for a new trial and made no mention of Lipscomb's other request. In his appeal, however, Lipscomb does not claim error with respect to the lack of hearing on the ineffective assistance of counsel claim.

both components of the inquiry if the defendant does not make a sufficient showing on one. ***Strickland***, 466 U.S. at 697.

¶8 An attorney's performance is not deficient unless he or she "made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." ***Id.*** at 687. To satisfy the prejudice prong, defendant must demonstrate that counsel's deficient performance was "so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." ***Id.*** In other words, there must be a showing "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." ***Id.*** at 694.

¶9 Whether counsel's actions constitute ineffective assistance is a mixed question of law and fact. *See* ***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 attorney's conduct resulted in a violation of a defendant's right to effective assistance of counsel is a question of law for which no deference to the trial court's decision need be given. ***Id.*** "[A]n accused is not entitled to the ideal, perfect defense or the best defense but only to one which under all the facts gives him reasonably effective representation." ***State v. Harper***, 57 Wis. 2d 543, 557, 205 N.W.2d 1 (1973). There is a strong presumption that counsel acted reasonably within professional norms. *See* ***Pitsch***, 124 Wis. 2d at 637.

A. Closing Argument

¶10 Lipscomb first contends that his postconviction counsel was ineffective for failing to challenge: (1) his trial counsel's failure to object to the admission of the evidence of hiding; (2) the trial court's admission of evidence that Lipscomb hid from police officers under a blanket when they came to arrest him; and (3) the prosecutor's use of that evidence during its closing argument. Because Lipscomb's trial counsel *did* object to the prosecutor's motion *in limine* seeking admission of the evidence of hiding and because the trial court properly admitted it as evidence of consciousness of guilt, the prosecutor's closing argument reference to it was proper and postconviction counsel was not ineffective.

¶11 By motion *in limine*, the prosecutor requested that the evidence that Lipscomb hid from police officers be admitted at trial. Lipscomb's trial counsel objected to the admission of this evidence. But the trial court concluded that evidence of hiding was probative of guilt and granted the motion. So, at the outset we note that Lipscomb was wrong on the facts. His trial counsel did object.

¶12 Lipscomb does not contest the fact that he hid under a blanket when police came to arrest him, but instead argues that the probative value of the evidence is outweighed by the danger of unfair prejudice. More particularly, Lipscomb seems to argue that the trial court did not properly consider that, at the time he was arrested, he was also being sought by police in connection with at least one other shooting, an armed robbery, and for absconding from probation, thereby making the evidence of hiding less probative of his guilt in Harris's murder.

¶13 Our inquiry into whether a trial court properly exercised its discretion in making an evidentiary ruling is highly deferential. We will not find an erroneous exercise of discretion if there is a rational basis for a trial court's decision. *See* ***State v. Hammer***, 2000 WI 92, ¶43, 236 Wis. 2d 686, 613 N.W.2d 629. As that applies to the trial court's decision to admit the evidence of Lipscomb hiding under a blanket, we look to see if the record discloses that the trial court had a rational basis for determining under WIS. STAT. § 904.03 that the evidence was relevant and that "its probative value [was] substantially outweighed by the danger of unfair prejudice." We conclude here that the trial court acted well within its discretion when it admitted the evidence.

¶14 It is well-established that evidence of flight and resistance-to-arrest has probative value as to guilt. *See* ***State v. Knighten***, 212 Wis. 2d 833, 838-39, 569 N.W.2d 770 (Ct. App. 1997). "Analytically, flight is an admission by conduct." ***State v. Miller***, 231 Wis. 2d 447, 460, 605 N.W.2d 567 (Ct. App. 1999) (citation omitted). "The fact of an accused's flight or related conduct is generally admissible against the accused as circumstantial evidence of consciousness of guilt and thus of guilt itself." ***Id.*** (citation omitted). "To be admissible, the defendant's flight need not occur immediately following commission of the crime." ***State v. Quiroz***, 2009 WI App 120, ¶18, ___ Wis. 2d ___, ___ N.W.2d ___.

¶15 WISCONSIN STAT. § 904.03 requires the trial court to balance the probative value of the evidence against any unfair prejudice. Here, the record reflects that the trial court did just that:

> [PROSECUTOR]: I do intend to introduce evidence … that [Lipscomb] was hiding under a blanket at the time of his arrest. I believe that goes to consciousness of guilt.
>
> THE COURT: [Defense counsel], your argument.

> [DEFENSE COUNSEL]: Well, I would just argue that its admission is substantially outweighed by the danger of unfair prejudice.
>
> THE COURT: What is the unfair prejudice?
>
> [DEFENSE COUNSEL]: Well, I think that it seems to show that Mr. Lipscomb committed the crime and at the time he was only a suspect in the crime, and that it will be prejudicial for the jury to hear he was hiding under a blanket. So, therefore, I would ask that it be excluded.
>
> THE COURT: Whenever a defendant hides it's prejudicial. Hiding might be unduly prejudicial if the person was hiding for reasons that are pretty clearly not involved with the allegations that the State is prosecuting. But in this case the connection is so clear that I think evidence is probative and not at all unfairly prejudicial. And I'll allow it.

¶16 Lipscomb seems to argue that because he has now presented an independent reason for his flight, to wit, his participation in other crimes, that evidence of his flight is inadmissible. We recently held to the contrary in ***Quiroz***, stating that:

> [f]light evidence is *not* inadmissible anytime a defendant points to an unrelated crime in rebuttal. Rather, when a defendant points to an unrelated crime to explain flight, the trial court must, as it must with all evidence, determine whether to admit the flight evidence by weighing the risk of unfair prejudice with its probative value.

Id., 2009 WI App 120, ¶27 (citing WIS. STAT. § 904.03).

¶17 Admittedly, the record does not reflect that the trial court took into account the reasons Lipscomb had to hide from police that were independent of Harris's murder. But when given the opportunity to do so, Lipscomb failed to present to the trial court the independent reasons for hiding that he articulates here

and, therefore, waived[5] his opportunity to do so.[6] *See* ***State v. Edwards***, 2002 WI App 66, ¶9, 251 Wis. 2d 651, 642 N.W.2d 537 (holding that "parties waive any objection to the admissibility of evidence when they fail to do so before the [trial] court"). Even if he had argued it, the record shows that the trial court would still have admitted the hiding-under-a-blanket evidence because of its relevance to consciousness of guilt. The court rationally weighed the evidence before it, and we will not overturn that ruling here. Accordingly, it cannot be said that trial counsel was ineffective for failing to present what would have been unsuccessful arguments.

¶18 Lipscomb next takes issue with the prosecutor's use of the evidence during its closing argument. The portion of the closing argument at issue, in relevant part, states as follows:

> And you don't have the Tactical Enforcement Unit come to your house for a ticket. You know good and gosh darn well the police are looking for you for a murder. That's why he hid in the basement. Why? How did James Lipscomb know he was being sought for a murder? And if you hear the police are looking for you for a murder you

[5] In using the term "waiver," we are aware of the recently decided case of ***State v. Ndina***, 2009 WI 21, 315 Wis. 2d 653, 761 N.W.2d 612, where our supreme court clarified the distinction between the terms "forfeiture" and "waiver." *See* ***id.***, ¶29 ("Although cases sometimes use the words 'forfeiture' and 'waiver' interchangeably, the two words embody very different legal concepts. 'Whereas forfeiture is the failure to make the timely assertion of a right, waiver is the intentional relinquishment or abandonment of a known right.'") (citation omitted). Although forfeiture is applicable in the context, we use waiver to be consistent with the cases cited.

[6] Lipscomb does not contend that his trial counsel was ineffective for failing to present the independent reasons for hiding to the trial court.

> didn't commit or a crime you didn't commit, what do you do? Hide in the basement under a blanket? No. That's when you don't want them to find you because you're guilty. That's what guilty people do.
>
> Guilty people, murderers try and hide from the police. That's what they do.

¶19 We agree with the trial court that the "prosecutor's argument was well [with]in bounds." The Wisconsin Supreme Court "has said that counsel in closing argument should be allowed 'considerable latitude,' with discretion to be given to the trial court in determining the propriety of the argument." ***State v. Draize***, 88 Wis. 2d 445, 454, 276 N.W.2d 784 (1979) (citation omitted). "The prosecutor may 'comment on the evidence, detail the evidence, argue from it to a conclusion and state that the evidence convinces him and should convince the jurors.'" ***Id.*** (citation omitted). That is what the prosecutor did here. That one or more reasonable inferences can be drawn from the evidence does not make the prosecutor's inference—that Lipscomb hid because he murdered Harris—less reasonable. We therefore decline to overrule the trial court's discretionary ruling.

¶20 Because the trial court did not err in admitting the evidence and because trial counsel was not ineffective for failing to object to the admission of the evidence, it logically follows that appellate counsel was not ineffective for failing to raise these issues in Lipscomb's first postconviction motion.

B. In-Court Identification

¶21 Lipscomb next asserts that his postconviction counsel was ineffective for failing to challenge: (1) the trial court's admission of a photo array, which Isabell, who testified for the State, used to identify Lipscomb; and (2) the effectiveness of his trial counsel for failing to object to the photo array. Lipscomb

argues that the photo array had writing on the back identifying Lipscomb as the shooter, which violated his due process rights because it was overly suggestive. We do not address his claim on the merits, however, because Lipscomb explicitly waived this argument during trial.

> THE COURT: Good morning. We have some issues that we're going to need to resolve before we begin jury selection. Any particular issue that we should take up first?
>
> [PROSECUTOR]: Well, I think there is still outstanding, although it's my understanding [defense counsel] is going to withdraw it, is the motion to suppress the identification which I think is still before the court.
>
> THE COURT: [Defense counsel]?
>
> [DEFENSE COUNSEL]: That's correct, Your Honor. I have reviewed the law on witness identification and as well as the facts. I think under the particular facts of this case, the evidence would not support the eye-witness identification motion, and for that reason I'll withdraw it.
>
> THE COURT: Have you had a chance to discuss that with Mr. Lipscomb and he agrees?
>
> [DEFENSE COUNSEL]: I have discussed it with Mr. Lipscomb and he agrees.
>
> THE COURT: Mr. Lipscomb, do you agree with [defense counsel]'s decision to withdraw that motion?
>
> THE DEFENDANT: Yeah, yes.

Wisconsin case law has repeatedly held that parties waive any objection to the admissibility of evidence when they fail to raise the issue before the trial court. ***Edwards***, 251 Wis. 2d 651, ¶9. Lipscomb has not presented any reason not to apply waiver here.

C. Hearsay

¶22 Lipscomb also contends that his postconviction counsel was ineffective for failing to challenge the admission of hearsay testimony, repeated by Isabell, that "Man, Buke let that whole MAC clip go on that boy."[7] Both parties agree that the statement, made by Moore to Isabell in the moments immediately following the shooting, is hearsay. But the trial court concluded that the statement fell within the present sense impression exception to the hearsay rule. The exception permits the admission of hearsay when it is "[a] statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter." WIS. STAT. § 908.03(1).

¶23 The trial court properly admitted the utterance pursuant to the present sense impression exception. Moore made the statement to Isabell immediately after witnessing Lipscomb murder Harris. Other than arguing that the statement is hearsay, Lipscomb fails to explain why the exception does not apply. Because the trial properly admitted the evidence pursuant to WIS. STAT. § 908.03(1), Lipscomb's postconviction counsel was not ineffective for failing to raise the issue in Lipscomb's first postconviction motion.

II. Newly Discovered Evidence

¶24 Lipscomb next asserts that the trial court erred in denying his WIS. STAT. § 974.06 motion for a new trial based upon newly discovered evidence and

[7] Lipscomb does not contend that his trial counsel was ineffective for failing to object to the admission of the hearsay testimony.

in denying his subsequent motion for reconsideration. We conclude that Lipscomb fails to meet his burden, which requires him to establish that the Canady evidence was "newly discovered" and that there is a reasonable probability that the Jordan evidence would lead to a different result. Accordingly, we affirm the trial court's order.

¶25 In order to succeed on a motion for a new trial based on newly discovered evidence, "a defendant must establish by clear and convincing evidence that: (1) the evidence was discovered after conviction; (2) the defendant was not negligent in seeking evidence; (3) the evidence is material to an issue in the case; and (4) the evidence is not merely cumulative." ***State v. Edmunds***, 2008 WI App 33, ¶13, 308 Wis. 2d 374, 746 N.W.2d 590 (citation omitted). After a defendant has established these four criteria, the court looks to "whether a reasonable probability exists that a different result would be reached in a trial." ***Id.*** (citation omitted). "The motion is addressed to the trial court's sound discretion and we will affirm the [trial] court's decision if it has a reasonable basis and was made in accordance with accepted legal standards and facts of record." ***State v. Carnemolla***, 229 Wis. 2d 648, 656, 600 N.W.2d 236 (Ct. App. 1999).

¶26 Lipscomb presented two pieces of "new evidence" to the trial court: the statements of Canady and of Jordan. We will address each in turn.

¶27 In his affidavit, Canady asserts that he gave a "tech 9 [sic]" to Philip Jordan who was the real shooter. Canady also stated in his affidavit that he spoke with Philip Jordan the day after Harris's murder and that Philip Jordan told him that:

> when he and the person he shot entered the alley, Lipscomb was walking up just as the shots were fired. He said that he was gonna shoot Lipscomb, but Lipscomb pulled his gun as

> he started coming towards him. He [Philip Jordan] says he then told Lipscomb not to say anything, and that Lipscomb said something to Jeffrey Moore and then walked off.

Canady's testimony at the evidentiary hearing was brief, stating only that he told Philip Jordan that he had a "pistol." At that point in the hearing, after conferring with his counsel at the court's suggestion, Canady declined to answer more questions, citing his Fifth Amendment right against self-incrimination.

¶28 The trial court rejected Canady's affidavit because, if true, it would have meant Lipscomb was present at the shooting with the real shooter, Philip Jordan, and therefore the evidence was not "new" to Lipscomb. The court's reasoning for disregarding Canady's statement—that Lipscomb failed to demonstrate that evidence of an alternative shooter was not previously available to him—is amply supported by the evidence. Canady's statement indicates that Lipscomb was at the scene of the murder, with a weapon, and interacted with the alleged shooter. Certainly, if true, the identity of the shooter was apparent to Lipscomb before now. The trial court's conclusion was reasonable.

¶29 The second claim of "newly discovered" evidence involved Joseph Jordan's affidavit and testimony. The trial court found that there was no reasonable probability of a different result if the evidence had been admitted. *See* ***Edmunds***, 308 Wis. 2d 374, ¶13. Essentially, Joseph Jordan said that Philip Jordan (no relation and deceased at the time of the hearing) was the real shooter. The trial court gave an excellent summary of Joseph Jordan's affidavit and testimony in its written decision following the evidentiary hearing:

> Here is what I [the trial court] was told: Joseph Jordan says that on the day of the murder, he was riding around with Philip Jordan (no relation). Mr. Jordan says that Philip Jordan, [was] also was known as "Bookie" and "JP." Mr. Jordan explained to me why they were riding around, based on what Philip Jordan told him. They were

> looking for a person who allegedly shot up a car that belonged to a friend of Philip Jordan. (Because the testimony consists of statements made to Mr. Jordan by Philip Jordan, the testimony is hearsay, and would not be admissible in a trial. Philip Jordan would be permitted to tell a jury why they were riding around, but he is dead, himself murdered on June 20, 2003.)
>
> The person Philip Jordan said they were looking for was Jerome Harris, the victim of this murder. Joseph Jordan would testify that the two of them parked on Wright Street not far from a backyard where Philip Jordan said that he saw Mr. Harris. Philip Jordan got out of the car and went to talk to Mr. Harris. Joseph Jordan stayed with the car. Philip Jordan was gone for five minutes. When he returned, he came out of the mouth of the alley that led from the location of the murder, which the trial testimony showed was about six or seven lots down the block. When he sat down in the car, he removed a TEC-9 semiautomatic pistol (of the type the police say was used to kill Mr. Harris) from the front pouch of his hooded sweatshirt. Mr. Jordan says that when Philip Jordan removed it, the barrel was still smoking. Mr. Jordan went on to explain what Philip Jordan told him about how the shooting took place, but these statements, too, are hearsay and would not be shared with a jury.

¶30 The trial court then articulated the factors set forth above and found only one to be contested with respect to Jordan: "whether it is 'reasonably probable' that Mr. Lipscomb would be acquitted if the jury heard the testimony of Joseph Jordan." The court did not find such an outcome probable and set forth six detailed reasons to support its finding:

> First, Mr. Jordan cannot supply a motive for the murder. Mr. Jordan believes he knows why Philip Jordan was pursuing Mr. Harris, but the jury would not be so informed, because Joseph Jordan has no personal knowledge of why Philip Jordan was pursuing him….
>
> Second, Mr. Lipscomb offers no reason why the jury should not believe the account of the shooting that we learn from his confession….
>
> Third, Mr. Jordan's account, and the circumstances in which it came to light, are simply too convenient to be believed. If Mr. Lipscomb were given a new trial, the next

jury would learn how Mr. Lipscomb came to discover Mr. Jordan's knowledge of the murder. The jury would learn that Mr. Lipscomb was in fact present at the murder (and armed) and that he supposedly saw who shot Mr. Harris but that he did not tell the police or the prosecutor or the first jury. Then the jury would learn that Mr. Lipscomb learned what Mr. Jordan had to say only by virtue of the happy coincidence that the only person on the face of the earth still alive and able to tell Mr. Lipscomb about it also happened to be convicted of homicide and sentenced to a long stretch at the same prison. The jury would learn that the person who Mr. Lipscomb believes should take the blame for the murder is now dead and cannot defend himself. These coincidences would severely undermine the credibility of Mr. Jordan's account of the shooting. At a minimum, the jury would be skeptical of whether Mr. Jordan truly was disinterested in the outcome of the case.

Fourth, the jury would learn that Mr. Jordan has been convicted eight times, which would put a considerable dent in whatever stock of credibility there was in the story, even if the circumstances of its discovery could be put to one side.

Fifth, the jury would learn that if what Mr. Jordan tells is the truth about how Mr. Harris was killed, Mr. Jordan had a perfect opportunity years earlier to tell the police what happened, but did not. The jury would be told that not long after Mr. Harris's murder[,] detectives were investigating the murder for which Mr. [Jordan] is now doing time and explicitly invited [Mr. Jordan] to give them any information he had about other crimes. The jury would be told that Mr. [Jordan] was invited to do so under the protection of anonymity, and was offered the usual incentive to help himself out of by demonstrating his cooperation with law enforcement…. Yet, the jury would be told, he did not come forward with any information about Mr. Harris's murder, until, that is, three and a half years later when Mr. Jordan and Mr. Lipscomb end up doing time together – and he came forward to Mr. Lipscomb, not to detectives, from whom he might have sought the usual *quid pro quo*.

Sixth, Mr. Jordan's story unravels at three significant junctures. First, Mr. Jordan says that when Philip Jordan returned to the car the barrel of the gun was still smoking – after he ran nearly half a block to reach the

> automobile and after concealing it in his sweatshirt. That claim is laughable. In fact, when Mr. Jordan was questioned about its plausibility, he laughed. It was a sheepish laugh, and a telltale one.
>
> Second, Mr. Jordan says that when Philip Jordan returned to the car he removed the weapon from the front pouch of his hooded sweatshirt…. I believe that if Mr. Jordan were to testify, the State's weapons expert would tell the jury that the a [sic] TEC-9 is no less than 9 inches long and possibly as long as a foot, and that the distance from the bottom of the clip – even a clip holding only 20 rounds – to the sights along the top of the weapon is no less than 5 inches and could have been up to a foot. It is highly unlikely that a weapon of these dimensions could be slipped swiftly into the pouch pocket on the front of a hooded sweatshirt as a shooter is attempting to flee the scene of a shooting.
>
> Third, Mr. Jordan told me that he was travelling with Philip Jordan for two or three hours, watching him get in and out of the car, and not until Philip Jordan supposedly returned from shooting Mr. Harris did Mr. Jordan notice that he had a TEC-9 in his front pocket. Given the dimension of such a weapon, not to mention its weight - which, I believe a competent weapons expert would estimate to be four pounds or more – the claim that Mr. Jordan never noticed the weapon before would be met with extreme skepticism.

¶31 We quote the trial court's decision at length because if ever there were a trial court decision that set forth a thorough, thoughtful, reasoned basis for its ruling, it is this one. In his brief, Lipscomb adamantly disagrees with the trial court's conclusions, but he fails to persuade us that the trial court's opinion is not reasonable. In fact, other than arguing that the trial court is wrong, Lipscomb does not contend that the trial court's decision does not have a "reasonable basis" or that it was not "made in accordance with accepted legal standards and facts of record." *See* ***Carnemolla***, 229 Wis. 2d at 656.

¶32 Because Lipscomb does not establish that the court's findings with regard to the statements of either Canady or Jordan are unreasonable, we affirm the trial court.

By the Court.—Order affirmed.

Not recommended for publication in official reports.