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**DISTRICT II**

April 19, 2023

*To*:

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Circuit Court Judge
Electronic Notice

Monica Paz
Clerk of Circuit Court
Waukesha County Courthouse
Electronic Notice

Daniel J. O'Brien
Electronic Notice

Matthew S. Pinix
Electronic Notice

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

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2022AP960 State of Wisconsin v. Kevin M. Lipscomb (L.C. #2015CF188)

Before Neubauer, Grogan and Lazar, 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).**

Kevin M. Lipscomb appeals an order denying his motion for postconviction relief based on ineffective assistance of both his trial and direct appeal counsel. Lipscomb asserts that his previous counsel should have argued that the trial court's decision not to permit him to demonstrate his limp before the jury (without being exposed to cross-examination) was a violation of his constitutional right to put on a defense rather than simply an erroneous evidentiary ruling. He further asserts that he was prejudiced because if counsel had so argued, there is a reasonable probability that this evidence would have been admitted and resulted in a different jury verdict. Based upon our review of the briefs and record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21

(2021-22).[1] As this court held in Lipscomb's direct appeal, "[w]e are persuaded that, beyond a reasonable doubt, the verdict would have been the same" even if Lipscomb had demonstrated his limp to the jury. ***State v. Lipscomb***, No. 2018AP2353-CR, unpublished slip op. ¶16 (WI App Apr. 15, 2020). Thus, we conclude that Lipscomb cannot show prejudice based on his previous attorneys' performance and that his postconviction motion was properly denied without an evidentiary hearing. We affirm.

Lipscomb was charged with armed robbery, as party to a crime, for the 2014 robbery of DK.[2] DK ran a salvage yard with her husband that paid cash for scrap metal from customers. Lipscomb was a customer of this salvage yard. His live-in girlfriend, Andria Noel, was a bank teller who frequently assisted DK with her daily cash withdrawals for the business. One Friday, about fifteen minutes after DK had withdrawn $61,000 from the bank—assisted by Noel—a masked man came to DK's house, pointed a gun at her, and demanded the cash, which she gave him.

DK told police that the robber left "quickly" and had a limp. A police dog followed the robber's scent along his escape route and alerted to a latex glove located a few minutes' walk from DK's house. The outside of the glove contained Lipscomb's DNA. After Lipscomb's arrest, police found a package of similar latex gloves (containing three of the four gloves originally in it) and a gun case underneath the basement stairs in his home. Additional evidence

[1] All references to the Wisconsin Statutes are to the 2021-22 version unless otherwise noted.

[2] Pursuant to the policy underlying WIS. STAT. RULE 809.86(4), we use initials when referring to the victim.

introduced at trial included the fact that Lipscomb's mobile phone "pinged" off of a cell tower six-tenths of a mile from DK's house at the time of the robbery.

In his defense, Lipscomb—who has a limp due to below-the-knee paralysis—maintained that his limp is so severe that he would not have been able to leave the scene of the robbery "quickly." His attorney asked for the trial court's "opinion" on whether Lipscomb could "just demonstrate … how he walks." When the trial court responded that such a demonstration would "open[] the door for [the State] to ask any questions [it] wanted on cross-examination," Lipscomb decided not to take the witness stand. Instead, Noel demonstrated how Lipscomb would "hop" or "skip" when he walks and testified that he cannot run, but "it's more of a skip hop skip."[3] Noel also testified (as did Lipscomb's brother) that Lipscomb uses latex gloves for personal hygiene reasons related to his paralysis.[4] As for why Lipscomb might have been in the vicinity of the robbery at the time in question, Noel and Lipscomb's brother explained that Lipscomb often flew his drone as a hobby in rural areas like the area near DK's house where the glove was found. The jury convicted Lipscomb, apparently rejecting the defense theory that he happened to have been in the area flying his drone at the time of the robbery and must have dropped one of the gloves that he regularly carried with him.

Lipscomb filed a direct appeal after his conviction asserting (among other things) that the trial court's refusal to allow him to demonstrate his gait for the jury without being sworn or

[3] In the State's rebuttal case, a detective also demonstrated his impression of Lipscomb's walk for the jury.

[4] Although Noel and Lipscomb's brother testified that Lipscomb needed such gloves to use the bathroom, police found no used gloves in the bathroom, and there was no bathroom in the basement of the home where the package of gloves was found.

subject to cross-examination was erroneous. This court held that while a demonstration of Lipscomb's limp would not have been testimonial in nature and should have been allowed, the trial court's failure to allow the demonstration was harmless error. ***Lipscomb***, No. 2018AP2353-CR, ¶¶10, 16. Upon review of the record, this court drew a legal conclusion about the evidence's likely effect on the verdict: "[g]iven the ample evidence of his guilt," we could not "see how allowing Lipscomb to demonstrate his gait would have helped his defense."[5] ***Id.***, ¶16. In other words, this court was "persuaded that, beyond a reasonable doubt, the verdict would have been the same." ***Id.***

After that ruling, Lipscomb filed the WIS. STAT. § 974.06 motion leading to this appeal, asserting that his conviction was the result of both his trial and appellate attorneys' ineffectiveness for failing to argue that the trial court's prohibition of his demonstration of his limp (without cross-examination) violated his constitutional right to present a defense. The trial court denied the motion without a hearing, finding that, regardless of whether "specific language was there or not, [trial and direct appeal counsel] were arguing that this deprived Mr. Lipscomb of his right to present his defense" and that, given the State's "very powerful evidence" against Lipscomb, "there is no basis to conclude there would be a reasonable probability of a different outcome if Mr. Lipscomb had gotten up and demonstrated his walk to the jury." On this appeal, Lipscomb seeks remand with directions to conduct a hearing during which he would try to

[5] We disagree with Lipscomb's assertion that "this Court's prior decision seems to do what federal courts have said the federal harmless error test is not supposed to do: assess whether the other evidence is sufficient." *See* ***Jensen v. Clements***, 800 F.3d 892, 902 (7th Cir. 2015). On the contrary, it evaluated the record in view of the statutory factors listed in ***State v. Monahan***, 2018 WI 80, ¶35, 383 Wis. 2d 100, 913 N.W.2d 894, that apply in the evidentiary context and determined that, "beyond a reasonable doubt," erroneously excluding Lipscomb's gait evidence did not affect the outcome of the case. *See* ***State v. Lipscomb***, No. 2018AP2353-CR, unpublished slip op. ¶16 (WI App Apr. 15, 2020).

establish that his former attorneys did not make a reasonable strategic decision to present the issue as they did.

We review de novo the issue of whether a WIS. STAT. § 974.06 postconviction motion sufficiently alleges ineffective assistance of counsel to require an evidentiary hearing. ***State v. Balliette***, 2011 WI 79, ¶18, 336 Wis. 2d 358, 805 N.W.2d 334. To show constitutionally ineffective assistance, a convicted defendant must establish both that counsel's performance was deficient and that the deficient performance resulted in prejudice. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). It is within the trial court's discretion to deny an evidentiary hearing when the record conclusively shows that the defendant is not entitled to relief. ***Balliette***, 336 Wis. 2d 358, ¶18. "Whether the record conclusively demonstrates that the defendant is entitled to no relief is also a question of law we review independently." ***State v. Ruffin***, 2022 WI 34, ¶27, 401 Wis. 2d 619, 974 N.W.2d 432.

The critical issue in this case is whether Lipscomb can show that he was prejudiced by the exclusion of his limp demonstration; if he cannot show that his counsel's alleged errors "*actually* had an adverse effect on the defense" in view of the surrounding circumstances, his motion must be denied. *See* ***Balliette***, 336 Wis. 2d 358, ¶24 (quoting ***Strickland***, 466 U.S. at 693). This court determined that exclusion of the same evidence constituted harmless error on direct appeal where it was deemed to have been improperly excluded under the rules of evidence. ***Lipscomb***, No. 2018AP2353-CR, ¶16. Lipscomb argues that the standard for prejudice under ***Strickland***—whether there is a "reasonable probability" that, absent the errors of his attorneys (which he alleges resulted in exclusion of the same evidence, albeit under a different legal theory), the factfinder would have had a reasonable doubt respecting guilt—leads to a different result. *See* ***Strickland***, 466 U.S. at 694. To the extent there is a meaningful difference between

the harmless error standard under which a reviewing court must consider several factors including "the importance of the … excluded evidence" and "the overall strength of the State's case," *see* ***State v. Monahan***, 2018 WI 80, ¶35, 383 Wis. 2d 100, 913 N.W.2d 894, in deciding whether the jury would have come to the same conclusion absent the error and the aforementioned prejudice standard in an ineffective assistance analysis, we conclude that the record in this case forecloses any reasonable probability of a different outcome under either standard.

As noted by the postconviction trial court, the evidence against Lipscomb was very powerful. This evidence included the fact that Lipscomb's girlfriend helped the victim withdraw the large sum of cash from the bank a mere fifteen minutes before the robbery occurred, DNA and cell phone evidence placing Lipscomb near the robbery at the time in question and on the robber's escape route, the discovery of the same type of glove found in Lipscomb's home and on said escape route (with his DNA on it), and the fact that Lipscomb matched the physical description of the robber right down to having a limp (the severity of which, of course, he contests). This court already concluded that, had Lipscomb been permitted to demonstrate his gait without being subjected to any credibility safeguards, the verdict would have been the same beyond a reasonable doubt. ***Lipscomb***, No. 2018AP2353-CR, ¶16. We now conclude that even if his attorneys had argued constitutional violations and the gait evidence had been presented to the jury, there is no reasonable probability that this evidence would have led the jury to a different conclusion. *See* ***Strickland***, 466 U.S. at 694. Both the evidence presented and the evidence withheld (Lipscomb's own limp demonstration) remain the same and the strength of the former leads inexorably to the same conclusion under either circumstance. The demonstration of Lipscomb's limp in front of the jury would not have altered the jury's verdict.

For the foregoing reasons, we affirm the trial court's order denying Lipscomb's motion for postconviction relief without an evidentiary hearing.

IT IS ORDERED that the order of the circuit court is affirmed. *See* WIS. STAT. RULE 809.21.

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

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