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DISTRICT I

February 27, 2024

To:

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Circuit Court Judge
Electronic Notice

Anna Hodges
Clerk of Circuit Court
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Donald V. Latorraca
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P.O. Box 2000
New Lisbon, WI 53950-2000

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

2022AP1733-CR State of Wisconsin v. James E. Lipscomb (L.C. # 2002CF635)

Before White, C.J., Donald, P.J., and Geenen, J.

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).

James E. Lipscomb, *pro se*, appeals an order of the circuit court denying his second motion for postconviction relief. 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]

We have discussed the facts of Lipscomb's case in his previous two appeals. *See* ***State v. Lipscomb***, No. 2004AP1715-CR, unpublished slip op. (WI App July 6, 2005); ***State v.***

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

Lipscomb, No. 2008AP2657, unpublished slip op. (WI App Oct. 6, 2009). For purposes of this appeal, it suffices to say that a jury convicted Lipscomb of first-degree intentional homicide for the 2002 shooting death of Jerome Harris. At trial, witnesses testified that they saw Lipscomb chase Harris into an alley and then heard a series of gunshots. A detective testified that Lipscomb admitted to taking Harris into an alley and shooting him. Lipscomb's defense was that witnesses misidentified him and that he gave a false confession to the police to avoid a harsher sentence. This court affirmed his conviction on direct appeal. Lipscomb later filed a WIS. STAT. § 974.06 motion alleging the existence of newly discovered evidence and ineffective assistance of counsel. Following an evidentiary hearing, the circuit court denied Lipscomb's § 974.06 motion. This court affirmed.

In 2022, Lipscomb filed his second WIS. STAT. § 974.06 motion. Lipscomb sought a new trial based on newly discovered evidence and in the interest of justice. Lipscomb's motion relied on an affidavit from Marcus Glenn, who swore that he was present when Harris was shot and that Lipscomb was not the shooter. Glenn said that Lipscomb "was present but did not go anywhere near the victim nor the area where the shots were fired." Glenn said that he was "reluctant" to become involved but later came forward when Lipscomb's brother contacted him and Glenn "figured that enough time had passed so he relented and was willing to give his statement."

The circuit court denied the motion without a hearing, finding that Glenn's "evidence," although discovered after conviction, was not new. The circuit court found that Lipscomb could not "establish that Glenn's affidavit is new because he has not shown that evidence of an alternative shooter was not previously available to him." The circuit court also determined that Lipscomb did not prove that he was not negligent in seeking Glenn's statement. The circuit

court stated that since Glenn and Lipscomb were both present during the shooting, Lipscomb failed to show that Glenn's statement was not previously available. Moreover, Glenn failed to actually identify an alternative shooter, saying only that Lipscomb was not the shooter. The circuit court also rejected Lipscomb's interest of justice argument. This appeal follows.

On appeal, Lipscomb contends that the circuit court's ruling was based on the circuit court's "misunderstanding of the location where Harris was shot, Lipscomb's presence on the scene, and Marcus Glenn's two arrivals at that location." He argues that he was diligent in his attempts to find witnesses and that many individuals were unwilling to help him; therefore, he was not negligent in failing to obtain Glenn's statement earlier.

"The decision to grant or deny a motion for a new trial based on newly[ ]discovered evidence is committed to the circuit court's discretion." ***State v. Plude***, 2008 WI 58, ¶31, 310 Wis. 2d 28, 750 N.W.2d 42. "A circuit court erroneously exercises its discretion when it applies an incorrect legal standard to newly[ ]discovered evidence." ***Id.***

Courts use a two step process to determine if newly discovered evidence warrants a new trial. ***State v. Watkins***, 2021 WI App 37, ¶42, 398 Wis. 2d 558, 961 N.W.2d 884. First, the defendant must prove, by clear and convincing evidence, that: "(1) the evidence was discovered after conviction; (2) the defendant was not negligent in seeking the evidence; (3) the evidence is material to an issue in the case; and (4) the evidence is not merely cumulative." ***Plude***, 310 Wis. 2d 28, ¶32 (citation omitted). If the defendant proves these four criteria, the trial court must determine "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.*** Whether a reasonable probability of a different result exists is a question of law that we review *de novo*.

See ***Watkins***, 398 Wis. 2d 558, ¶44. Furthermore, "[i]f the newly discovered evidence fails to satisfy any one of these … requirements, it is not sufficient to warrant a new trial." ***State v. Eckert***, 203 Wis. 2d 497, 516, 553 N.W.2d 539 (Ct. App. 1996).

We agree with the circuit court that Lipscomb has not met the criteria necessary to establish that Glenn's affidavit constitutes newly discovered evidence. As the court explained, Lipscomb cannot establish that the information alleged in "Glenn's affidavit is new because [Lipscomb] has not shown that evidence of an alternative shooter was not previously available to him." According to Glenn's affidavit, he and Lipscomb were both present "just as the shots were fired." As the circuit court stated:

> [I]f Glenn's affidavit is to be believed, and both he and [Lipscomb] were at the scene of the shooting and Glenn observed [Lipscomb] [multiple times], it follows that [Lipscomb] could and should have investigated Glenn before his conviction—whether based on independent knowledge of Glenn, or via others at the house and/or scene of the shooting as described in Glenn's affidavit.

In short, if Glenn is to be believed, the information that Glenn provided in the affidavit existed before Lipscomb's conviction, and minimally, Lipscomb was aware of an alternate shooter.[2] Lipscomb has not adequately explained why he did not obtain this information prior to his conviction.

Moreover, there is no reasonable probability that Glenn's information would have altered the outcome of the trial. Glenn could not identify the shooter and the evidence against Lipscomb

[2] Lipscomb testified at the 2007 hearing on his first postconviction motion that prior to trial, he and his attorney decided not to tell the jury about the other shooter because Lipscomb was unable to identify the person or a motive; Lipscomb also testified that during the investigation, he chose not to tell detectives about the other shooter, either.

was overwhelming. The jury heard testimony from multiple witnesses who identified Lipscomb as the shooter, as well as testimony that Lipscomb confessed to the shooting. We conclude that the circuit court properly applied the correct legal standard for assessing newly discovered evidence in its decision and did not erroneously exercise its discretion in rejecting Lipscomb's claim. *See* ***Plude***, 310 Wis. 2d 28, ¶31.

In the alternative, Lipscomb contends that this court should use its discretionary reversal authority to grant him a new trial because real controversy—the identity of the shooter—was not fully tried. We may grant a new trial in the interest of justice if our independent review of the record reveals that the real controversy was not fully tried. *See* WIS. STAT. § 752.35; ***State v. Williams***, 2006 WI App 212, ¶12, 296 Wis. 2d 834, 723 N.W.2d 719. "Although the court has exercised its power of discretionary reversal in numerous different situations, it does so only in exceptional cases." ***State v. Bannister***, 2007 WI 86, ¶42, 302 Wis.2d 158, 734 N.W.2d 892. A case in which the evidence of guilt was strong is not exceptional. *See generally* ***id.***, ¶¶43-51. Our review of the evidence convinces us that this is not an exceptional case.

For the foregoing reasons, we affirm the circuit court.

IT IS ORDERED that the order is summarily affirmed. *See* WIS. STAT. RULE 809.21.

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

Samuel A. Christensen
Clerk of Court of Appeals