COURT OF APPEALS
DECISION
DATED AND FILED

June 2, 2016

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2014AP2742-CR **Cir. Ct. No. 2012CF580**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT I

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

STEVEN D. HOPGOOD,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: DAVID L. BOROWSKI and DANIEL L. KONKOL, Judges. *Affirmed*.

Before Lundsten, Higginbotham, and Blanchard, JJ.

¶1 PER CURIAM. Steven Hopgood appeals a judgment of conviction for felony murder following a jury trial at which the State presented evidence that Hopgood and two other men participated in an armed robbery that resulted in a

fatal shooting. Hopgood also appeals the circuit court's order denying his motion for postconviction relief.[1]

¶2 Hopgood argues that: (1) his trial counsel provided ineffective assistance in multiple ways; (2) the State failed to disclose material, exculpatory evidence in time for use at trial; (3) the same material, exculpatory evidence constitutes newly discovered evidence warranting a new trial; (4) the circuit court erroneously exercised its discretion in denying two mistrial motions, each based on improper statements by a prosecutor; and (5) this court should grant Hopgood a new trial in the interest of justice. We reject each of Hopgood's arguments and affirm.

BACKGROUND

¶3 The following is a brief summary of undisputed facts. Extensive additional facts are included in the Discussion section below in connection with particular issues.

¶4 One evening in June 2010, Vincent Cort pulled his orange Oldsmobile sedan into a Milwaukee liquor store parking lot. Cort entered the store, exited with a bottle, and returned to his car. A person approached Cort, pointed a gun at him, and yelled, "Give it up." Cort did not immediately submit, and the person fired at least one round, hitting Cort. Cort managed to drive out of the parking lot, and he was transported to a hospital, where he later died.

[1] The Honorable David L. Borowski presided over pretrial and trial proceedings, and the Honorable Daniel L. Konkol presided over postconviction proceedings.

¶5 In February 2012, 20 months later, police arrested Paris Saffold in connection with a drug investigation unrelated to Cort's homicide. At that time, Saffold told police that he had been an eyewitness to events leading up to and including Cort's homicide. More specifically, Saffold said that, at the time of Cort's homicide, Saffold had been living in an apartment complex across the street from the liquor store where Cort was fatally shot, and that Saffold had witnessed three individuals—whom police identified as Hopgood, Laquan Riley, and George Taylor—plan the armed robbery. Saffold told police that Riley shot Cort using a gun that Hopgood had just provided to Riley.

¶6 The parties agree on appeal that, at the joint trial of Hopgood, Riley, and Taylor, the State relied heavily on Saffold's eyewitness testimony. The jury convicted Hopgood of felony murder in violation of WIS. STAT. § 940.03 (2013-14).[2]

¶7 Hopgood filed a postconviction motion alleging multiple instances of ineffective assistance of trial counsel. Also after trial, the State provided materials to Hopgood reflecting allegations that a police detective had expressed interest in receiving a share of reward money in the case and that Saffold had said that he would not testify without first receiving reward money. Disclosure of this material generated a supplement to Hopgood's postconviction motion, in which Hopgood argued that these allegations revealed that the State had violated its obligation to disclose material evidence at trial, and that the allegations constituted newly discovered evidence meriting a new trial.

[2] All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

¶8 Without holding an evidentiary hearing, the circuit court denied the postconviction motion in a written decision. Hopgood now appeals.

DISCUSSION

I. INEFFECTIVE ASSISTANCE OF COUNSEL

A. Legal Standards and Standard of Review

¶9 The following standards govern claims of ineffective assistance of counsel:

> To state a claim for ineffective assistance of counsel, the defendant must demonstrate: (1) that his counsel's performance was deficient; and (2) that the deficient performance was prejudicial.
>
> To prove deficiency, "the defendant must show that counsel's representation fell below an objective standard of reasonableness." The defendant must overcome the "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance."
>
> To prove prejudice, the defendant must show "that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." The prejudice inquiry asks whether "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."

State v. Romero-Georgana, 2014 WI 83, ¶¶39-41, 360 Wis. 2d 522, 849 N.W.2d 668 (citations omitted).

¶10 In reviewing a circuit court's resolution of an ineffective assistance of counsel claim, we uphold the court's findings of fact unless the findings are clearly erroneous, but "'the ultimate determination of whether counsel's assistance

was ineffective is a question of law, which we review de novo.'" ***State v. Shata***, 2015 WI 74, ¶31, 364 Wis. 2d 63, 868 N.W.2d 93 (quoted source omitted).

¶11 A circuit court may hold an evidentiary hearing when a defendant alleges that trial counsel provided ineffective assistance. ***State v. Machner***, 92 Wis. 2d 797, 804, 285 N.W.2d 905 (Ct. App. 1979). However, a circuit court may exercise its discretion to deny a postconviction motion without holding a ***Machner*** hearing if the motion fails to allege sufficient facts to raise a question of fact, presents only conclusory allegations, or the record conclusively demonstrates that the defendant is not entitled to relief. ***State v. Ortiz-Mondragon***, 2015 WI 73, ¶58, 364 Wis. 2d 1, 866 N.W.2d 717. The following standards of review apply:

> First, we determine whether the motion on its face alleges sufficient material facts that, if true, would entitle the defendant to relief. This is a question of law that we review de novo. If the motion raises such facts, the circuit court must hold an evidentiary hearing. However, if the motion does not raise facts sufficient to entitle the movant to relief, or presents only conclusory allegations, or if the record conclusively demonstrates that the defendant is not entitled to relief, the circuit court has the discretion to grant or deny a hearing…. We review a circuit court's discretionary decisions under the deferential erroneous exercise of discretion standard.

State v. Allen, 2004 WI 106, ¶9, 274 Wis. 2d 568, 682 N.W.2d 433 (citations omitted).

B. First Ineffective Assistance Argument: Alternative Suspects

¶12 Hopgood argues that his trial counsel should have sought to introduce evidence of allegations that any one of three alternative suspects—that is, any one of three persons other than Hopgood, Riley, or Taylor—killed Cort,

because this evidence was admissible and would have raised doubt about Hopgood's guilt.

¶13 The following additional background is necessary to address this argument.

1. Factual Background

¶14 Hopgood attached to his postconviction motion copies of police reports reflecting allegations made to police regarding three alternative suspects. The reports reflect that each interview occurred after Cort's 2010 homicide, but before Saffold's 2012 allegations to police regarding Hopgood, Riley, and Taylor.

¶15 Hopgood alleged in his postconviction motion that all of the reports were available to Hopgood's trial attorney in pretrial discovery, and the State does not argue to the contrary now. We assume without deciding that this was the case.

¶16 In the following summaries from the police reports, we identify the interviewees as EC, KW, TW, and BB, the alternative suspects as RS, VA, and AA, and one person quoted by BB as SR.

- **Allegations of EC regarding RS**. While EC and RS were inmates in the same jail, RS told EC that RS had followed around in a Milwaukee neighborhood a white male who drove an orange Oldsmobile Delta 88. RS did this after RS heard from a friend of a sister of the driver that the driver "always had a lot of cash." One day, RS found the orange Oldsmobile, approached it, and argued with the driver. When the driver tried to drive off, RS fired a round at the driver.

- **Allegations of KW regarding VA; separate, related statements of TW to police**. VA told KW that VA had "killed a white dude for not giving up his" orange car during an armed robbery. More specifically, VA said that Cort's former girlfriend, whom VA identified to police only as "T," had "hired" VA to "set up a robbery" of Cort and shoot him. According to KW's statement, VA and "T" communicated via

prepaid cell phones, and "T" communicated with Cort via regular cell phones. "T" gave Cort "instructions to go purchase some liquor for her and 'T' in turn provided [VA] with instructions as to the location of Cort."

Separately, TW directly told detectives that, at the time of Cort's death, she had been a former girlfriend of Cort's. TW was the beneficiary of an insurance policy on Cort's life, resulting in a payout to TW of approximately $86,400 following his death. TW played no role in Cort's homicide; TW was "very willing to cooperate with police" in investigation of the homicide; TW could prove that at the time of the homicide she was in Indianapolis with her then boyfriend; and, when showed VA's photograph, TW said that she believed that she had seen VA before, but that she did not know VA.

- **Allegations of BB regarding AA**. BB had been aware of a person known as "White boy, Vince," before he was killed at 50th and Hampton.[3] SR told BB that AA had told SR, on the night of the homicide, that AA had killed Vincent. BB later chatted in a group that included SR and AA. At that time, AA bragged about killing people, including "White boy Vince." AA said that a woman had earlier told AA that Vincent had possessed pounds of marijuana. When AA went to rob Vincent, Vincent did not cooperate and AA shot him. AA showed BB a handgun, telling BB that he had used it in shooting Cort.[4]

¶17 With this background about the alternative suspect evidence, we now address in turn the two, alternative theories Hopgood offers to argue that his trial counsel was ineffective in failing to offer this evidence.

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[3] This is the correct location for the fatal shooting.

[4] We observe that the statements of EC, KW, and BB appear to be inadmissible because they are hearsay statements. *See* WIS. STAT. §§ 908.01, 908.02. On appeal, the State starts from the premise that it is a "fact" that "three separate individuals claimed to have killed Cort," but this is not a precise way of referring to the contents of the police reports. Instead, the reports reflect that identified individuals told police that others had told the police interviewees that the others had each killed a person who might have been Cort. As we discuss briefly below in the text, the hearsay nature of this evidence is pertinent to our analysis because it goes to the weight of the evidence presented to the circuit court. *Infra*, ¶24. However, we do not dwell on hearsay as a potential bar to admissibility, because the State fails to address the topic on appeal.

2. Hopgood's Primary Theory Regarding Alternative Suspects: *Denny* Evidence

¶18 Hopgood's primary theory is that trial counsel was ineffective in failing to seek admission of this evidence as so-called ***Denny***, or "third party perpetrator" evidence. *See* ***State v. Denny***, 120 Wis. 2d 614, 357 N.W.2d 12 (Ct. App. 1984). Hopgood contends that the evidence is sufficiently strong to show a "legitimate tendency" to believe that RS, VA, or AA killed Cort. *See* ***id.***; ***State v. Wilson***, 2015 WI 48, ¶10, 362 Wis. 2d 193, 864 N.W.2d 52. For the following reasons, we conclude, as did the postconviction court, that the postconviction motion was insufficient to establish a viable ***Denny*** "legitimate tendency" defense, and therefore fails to establish deficient performance or prejudice by his attorney.

¶19 Under the ***Denny*** "legitimate tendency" doctrine, a defendant must make a sufficient preliminary evidentiary showing to the circuit court that: (1) the third party had a motive to commit the crime; (2) the third party had an opportunity to commit the crime; and (3) the third party had a direct connection to the crime. *See* ***Wilson***, 362 Wis. 2d 193, ¶¶56-72. While strong evidence implicating the third party on one prong may lessen the need for evidence on the other two prongs, "[n]onetheless, the ***Denny*** test is a three-prong test; it never becomes a one-or two-prong test." ***Id.***, ¶64.

¶20 We begin our ***Denny*** discussion with several related observations regarding Hopgood's argument. Hopgood argues that his trial counsel should have used the contents of the reports at trial to suggest to the jury that one of the three alternative suspects might have committed the homicide, and Hopgood does not argue that this evidence suggests that any of the three alternative suspects operated in concert with any of the other alternative suspects in committing the homicide. Nor does Hopgood argue that any of the three alternative suspects

operated in concert with Riley or Taylor, but not with Hopgood. Moreover, Hopgood does not argue that any account alleging that an alternative suspect killed Cort is more plausible or better supported than the accounts implicating either of the other two alternative suspects. Instead, Hopgood makes only the general argument that it was ineffective assistance for his trial counsel not to introduce all of the evidence summarized above regarding the three alternative suspects, under the theory that one of them might have been responsible for the homicide, instead of Hopgood, Riley, and Taylor, as testified to by Saffold.

¶21 Bearing these observations in mind, we agree with a point made by the State on appeal to which Hopgood does not offer a persuasive response. The three accounts that Hopgood argues his trial counsel should have offered at trial would have been weakened by the fact that the three accounts are mutually exclusive. That is, instead of supporting each other, the accounts would likely have served to undermine each other, creating the impression with the jury that, after news of the basic facts circulated, multiple people falsely tried to take "credit" for the homicide, using generic stories.

¶22 In response, Hopgood states only that he "is not required to prove which suspect committed the crime, just that there is evidence that one of them did." This response does not come to grips with the problem presented by offering multiple, conflicting alternative theories. This is not to say that we believe that multiple conflicting alternative theories could never qualify as admissible ***Denny*** evidence, only that Hopgood fails to explain why it should not count here as a factor weighing against admissibility.

¶23 In addition, Hopgood's response fails to account for the high threshold evidentiary showing applied in ***Wilson***. In ***Wilson***, also a shooting case

that turned heavily on the identity of the shooter, the court rejected as insufficient proffered evidence that would have supported a far more developed defense theory of third-party liability than is presented in the three accounts here. *See* ***Wilson***, 362 Wis. 2d 193, ¶¶73-87. In ***Wilson***, a lone third-party suspect had a well-defined motive to commit the charged crime, and it was undisputed that this individual was on the scene of the shooting. *See* ***id.***, ¶74. Here, in contrast, Hopgood would have been presenting evidence of three different alternative suspects, and no corroborating evidence that any of the three were in fact on the scene when Cort was shot.

¶24 Also significant here is that—with the arguable exception of a small overlap between the KW account regarding VA and the TW account—each of the three accounts is a brief, largely non-specific and largely uncorroborated account of what one person told police about what a different person told the first person. *See* ***id.***, ¶69 (appropriate for circuit court considering potential ***Denny*** evidence to weigh "the strength of the defendant's evidence (that a third party committed the crime) directly against the strength of the State's evidence (that the third party did not commit the crime)"). Putting aside the potential hearsay issue we reference above in footnote 4, the specificity and detail of all three accounts pale in comparison with the direct, detailed eyewitness testimony from Saffold. Hopgood asserts that the alternative suspects evidence "is as strong as the evidence Saffold provided against Hopgood," but fails to support this assertion. The three accounts amount to "mere speculation." *See* ***id.***, ¶59 ("direct connection evidence" required "that the alleged third-party perpetrator committed the crime," which "should firm up the defendant's theory of the crime and take it beyond mere speculation.").

¶25 In sum, we conclude that the alternative suspects evidence failed to meet the bar set for the admission of this category of evidence by our supreme

court in ***Wilson***, and, therefore, Hopgood's trial counsel did not perform deficiently in failing to attempt to present the "third party perpetrator" evidence.

3. Suggested Second Theory: Curative Admissibility Doctrine

¶26 Hopgood's alternative ineffective assistance argument on this topic is thinly developed. As he clarifies in his reply brief, Hopgood argues that his trial counsel should have asked the trial court to admit the alternative suspects evidence under the curative admissibility doctrine, even if it did not qualify as ***Denny*** evidence. *See* ***State v. Dunlap***, 2002 WI 19, ¶32, 250 Wis. 2d 466, 640 N.W.2d 112 ("when one party accidentally or purposefully takes advantage of a piece of evidence that is otherwise inadmissible, the court may, in its discretion, allow the opposing party to introduce otherwise inadmissible evidence if it is required by the concept of fundamental fairness to cure some unfair prejudice") (citation omitted). Hopgood's argument is that his attorney should have argued for the admission of the alternative suspects evidence to "cure" an inaccurate statement the prosecutor made during his opening statement.

¶27 This alleged "door opening" by the prosecutor involved the following. The prosecutor told the jury that Saffold's informing police that Hopgood, Riley, and Taylor were responsible for Cort's homicide was "the first time the police [had] any names of anybody that could be involved … regarding the shooting." The prosecutor's statement was not accurate. As noted above,

before Saffold agreed to cooperate, police had in hand multiple statements reflecting "names of" individuals who "could be involved."[5]

¶28 Turning to the merits, we conclude that Hopgood has failed to demonstrate prejudice, because there is not a reasonable probability that the circuit court would have admitted the alternative suspects evidence under the curative admissibility doctrine.

¶29 Of course, we do not condone the prosecutor's making this inaccurate statement in opening, which as we discuss below the prosecutor unfortunately repeated during closing argument. However, the statement made during the course of an extended opening was merely a passing reference to what police knew about the suspects at one point in time. It came at the beginning of a trial that promised to focus primarily on the credibility of the testifying Saffold. If the circuit court took any curative action in response to an objection during opening, at most the court might have exercised its discretion to instruct the jury to disregard the prosecutor's statement, with a reminder that statements of counsel are not evidence. And in any case, as the State points out, the jury was instructed that its verdicts were to be based on the evidence and not on statements of counsel.

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[5] We reject the State's argument on appeal that the prosecutor's statement was accurate. The State's argument on appeal rests on the premise that the prosecutor distinguished between "suspects" and "persons of interest," but the prosecutor did not make this distinction.

Separately, we reject Hopgood's argument that, because the State does not address his argument alleging ineffective assistance involving curative admissibility on appeal, we should deem Hopgood's argument conceded by the State. We reject this argument because Hopgood's briefing on the topic in his principal brief failed to provide a clear target for the State. In his principal brief, Hopgood pointed to the circuit court's failing, rather than his trial counsel's failing. Hopgood wrote that "*the court* … should have applied the curative admissibility doctrine and allowed [alternative suspects] evidence."

It would have been out of proportion to the potential negative effect of the prosecutor's passing reference for the court to have ordered that the prosecutor's reference be "cured" through admission of evidence that was, as we explain above, otherwise inadmissible as ***Denny*** evidence.

C. Second Ineffective Assistance Argument: Prosecutor Comments

¶30 Hopgood argues that trial counsel was ineffective in failing to object to the prosecutor's inaccurate statements about alternative suspects evidence, both during opening statement, as discussed above, and also during closing argument.[6] We reject this argument on the ground that, assuming without deciding that counsel's failure to object constituted deficient performance, Hopgood fails to provide a persuasive argument on the prejudice prong under the ineffective assistance standards.

¶31 Hopgood's prejudice argument is that the prosecutor's inaccurate statements "improperly led [jurors] to believe that the co-defendants were the only suspects," which "bolstered Saffold's credibility by justifying the police's decision to only focus on the co-defendants." In contrast, Hopgood continues, "had the jury known that there was a larger pool of suspects, the jury may have discounted the police's decision to focus solely on Hopgood, Taylor and Riley."

[6] During closing argument, the prosecutor referred to Saffold's identification of Hopgood, Riley, and Taylor to police as the persons responsible for Cort's homicide in the following manner: "And [Saffold] has names. And that's the first that the police have names. And that allows [police] to further investigate."

¶32 Hopgood does not specify what instruction trial counsel should have requested from the circuit court that would have properly informed the jury about "a larger pool of suspects." In Hopgood's favor, we assume without deciding that it was deficient performance for trial counsel not to have requested an instruction to the effect that, contrary to the prosecutor's statements, it was not disputed that, at the time Saffold made his initial statements to police implicating Hopgood, Riley, and Taylor, police were in possession of statements from three individuals quoting three other individuals who each purportedly claimed to have fatally shot a person who might have been Cort.

¶33 Even with that assumption, in part for reasons we have already discussed, Hopgood fails to persuade us that such an instruction from the court could have affected the outcome of the trial. First, Hopgood fails to establish that police in fact focused on the charged defendants to the exclusion of other suspects, as opposed to the possibility that the alternative leads simply did not pan out as credible. That is, Hopgood fails to explain why jurors would have had a reasonable basis to conclude that the alternative suspect leads were promising. Second, regardless of that failure, such an instruction from the court would not have directly undermined the credibility of any witness called by the State. Instead, it would have corrected the inaccurate statement made by the prosecutor about what police knew at a given point in their investigation. More specifically, such an instruction would not have provided the jury with meaningful evidence to weigh in assessing the veracity of Saffold's eyewitness testimony, which both sides agree was the primary focus for both sides at trial. The information at issue here would not have given the jury a significant reason to question the truth of Saffold's testimony more than jurors might already have done.

¶34 For these reasons, we conclude that Hopgood fails to develop a viable, stand alone prejudice argument in connection with trial counsel's failure to object to the prosecutor's inaccurate statements.

D. Third Ineffective Assistance Argument: Witness Identifications

¶35 Hopgood argues that trial counsel was ineffective in failing to call as witnesses at trial two persons who had been sitting in cars near Cort at the time of the shooting. Both of these individuals told police that they had seen the shooting, but both also told police that they could not identify a photo of Riley in a photo array as the face of the shooter. We reject this ineffective assistance argument because a reasonable strategy of trial counsel, reflected in the record, establishes that trial counsel's challenged performance was not deficient.

¶36 In support of this argument, Hopgood attached to his postconviction motion police reports reflecting statements of individuals whom we identify as AJ and CS:

- On the evening of Cort's murder, AJ and his sister were sitting in their mother's car, waiting for her to come out of the liquor store. AJ saw a black male, displaying a black pistol, approach the driver of an orange car and shoot the driver before fleeing. AJ thought that he could "possibly" identify the suspect.

  Shown photos of six black males, including Riley, AJ could not identify any as the shooter.

- At the same time, CS was sitting in a car, waiting for a friend to come out of the liquor store, when she saw a black male wearing a black hoodie, with the hood covering his head, approach Cort, and shoot him. CS "could not fully see" the face of the shooter.

  Shown a photo array of faces that included Riley's image, CS could not identify any as the shooter.

¶37 We agree with the State that a fatal defect in Hopgood's argument regarding AJ and CS as potential witnesses is that Hopgood's attorney took a firm position at trial that the jury should *not* learn about the failure of AJ and CS to identify Riley as the shooter in the photo arrays. We also agree with the State that this position was supported by strategy of trial counsel that falls within an acceptable range of competent strategic decisions. *See* ***State v. Balliette***, 2011 WI 79, ¶25, 336 Wis. 2d 358, 805 N.W.2d 334 (citing ***Strickland v. Washington***, 466 U.S. 668, 690 (1984)) ("Importantly, counsel is 'strongly presumed to have rendered' adequate assistance within the bounds of reasonable professional judgment."). The defense strategy involved an attempt to suggest that police had improperly coached witnesses to identify Riley as the shooter. The State sought to counter the suggestion of coaching by introducing evidence that AJ and CS had not identified Riley, on the theory that if police had improperly coached witnesses it was unlikely that multiple witnesses would have failed to make identifications. In response and as part of its "coaching" theory, trial counsel opposed admission of this evidence regarding failures to identify Riley, on multiple legal grounds.

¶38 After the State on appeal argues this point about trial counsel's "coaching" theory strategy, Hopgood replies that the State "invents a strategic reason for counsel's actions" and that this is "a hypothesized strategy." Factually, Hopgood's position is incorrect. That the strategy was used at trial is evident from the trial transcript. Trial counsel told the circuit court that he "absolutely" was trying to convince the jury that police were trying to bolster Saffold's testimony by coaching witnesses to identify Riley as the shooter, and trial counsel vigorously

opposed allowing testimony about failures to identify Riley.[7] As the trial unfolded, the State ultimately convinced the court to allow brief testimony stating that two witnesses (in fact AJ and CS, but not identified by name to the jury) had been unable to identify Riley in photo arrays. However, this ruling by the court does not undermine the proposition that Hopgood's trial counsel pursued a reasonable strategy on this topic, which reasonably included trying to prevent references to the AJ and CS testimony.

¶39 We further observe that, even if the State had come up with "a hypothesized strategy" after the fact, the argument would still be persuasive. "Deficient performance is judged by an objective test, not a subjective one." ***State v. Jackson***, 2011 WI App 63, ¶9, 333 Wis. 2d 665, 799 N.W.2d 461. Thus, "regardless of defense counsel's thought process, if counsel's conduct falls within what a reasonably competent defense attorney could have done, then it was not deficient performance." ***Id.*** (citation omitted). Applying this objective standard here, regardless of what was actually in the mind of Hopgood's trial counsel, it was objectively reasonable to pursue a "coaching" argument and, thus, to forego calling AJ and CS as witnesses.

E. Fourth Ineffective Assistance Argument: Video Images of Shooting Scene

¶40 Hopgood argues that his trial counsel was ineffective in failing to impeach two witnesses called by the State at trial, Saffold and Latoria Dodson,

[7] Hopgood makes an additional argument that is unclear and unsupported involving the level of certainty that AJ and CS expressed to police in indicating that they could not identify Riley's image in the photo array as the face of the shooter. Whatever argument Hopgood intends to make in this regard appears to be off topic, and in any case we reject it as undeveloped.

based on alleged conflicts between their testimony and security camera video images of the liquor store parking lot taken around the time of the shooting. We reject this argument as inadequately unsupported by concrete allegations of discrepancies.

¶41 Dodson was at the liquor store at the time of the shooting. At trial, Dodson could not identify Riley as the shooter, but the court admitted Dodson's prior photo array identification of Riley (an evidentiary decision that Hopgood does not challenge on appeal).

¶42 We first briefly address video images *not* shown to the jury, which Hopgood merely alludes to in his briefing on appeal. As Hopgood acknowledges, jurors had an opportunity to view at least some of the video images and to compare those images to all testimony given, including that of Saffold and Dodson. As to images *not* shown to the jury, Hopgood makes only conclusory assertions and fails to present a developed argument that any images from the video not shown to the jury could have made a positive difference for the defense.

¶43 Turning to the images that the jury did see, Hopgood asserts that it is "unreasonable to expect a juror to pick out all of the important discrepancies from a video without a defense lawyer pointing them out." However, it is not clear that the alleged discrepancies cited by Hopgood are "important." Hopgood does not present a reason for us to conclude that his counsel did not adequately weigh the potential values against the potential disadvantages of attempting impeachment regarding these alleged discrepancies. Weak efforts at impeachment can seriously undermine the credibility of a defense. To cite one example, Hopgood asserts that the video shows that Dodson's car and Cort's car were not as close as Dodson testified, but Hopgood does not explain how trial counsel's focus on this car-

distance issue would have made a positive difference for the defense, instead of sounding like a quibble intended to distract the jury from relevant evidence of guilt.

¶44 It is also significant, given how central Saffold's testimony was to the State's case, that Hopgood points to only one discrepancy between Saffold's testimony and the video images that Hopgood now argues his trial counsel should have exploited, namely, that Saffold recalled Riley wearing plaid shorts, while the video shows the shooter wearing dark pants. Hopgood fails to persuade us that this discrepancy regarding one article of clothing would have been significant to the jury.

F. Fifth Ineffective Assistance Argument: Video Images of Saffold's Arrest

¶45 Hopgood argues that trial counsel was ineffective for failing to offer as evidence two video recordings made by police reflecting at least some of Saffold's behavior and statements after his arrest on a cocaine charge in 2012, because the videos would have demonstrated "how truly desperate Saffold was to strike a deal or curry favor with authorities." We reject this argument on the ground that Hopgood does not persuade us that it was deficient performance for his trial counsel to fail to seek admission of these videos of Saffold.

¶46 At trial, Saffold testified that he told police about the Cort homicide following his arrest on suspicion of cocaine-related activity because he was hoping that this would result in his not being charged in the cocaine case. Under cross-examination, Saffold acknowledged that he had considered the stakes high, because if he were convicted in the cocaine case then he could not obtain an expungement on a separate marijuana conviction.

¶47 The State argues that the videos would have been cumulative, given the extensive time that both the State and defense counsel devoted at trial to addressing issues surrounding Saffold's bias and potential lack of credibility. This is consistent with the circuit court's conclusion, post-trial, that the videos would not "have added anything to what was addressed at trial" regarding Saffold's bias as a witness in this case due to his desire to curry favor with police.

¶48 Hopgood does not dispute that Saffold's potential for bias and his credibility issues were extensively aired at trial. However, Hopgood argues that the two videos would have had an obvious added impact on the jury by showing Saffold "crying, sobbing, and begging" not to be taken to jail, including asking police in a desperate manner, "Can we please work this out? What can we do to work this out?"

¶49 We conclude that, had this issue been raised at trial, the circuit court would likely have been concerned that the videos were merely cumulative evidence on the bias issue. In addition, the court would likely have been legitimately concerned that the videos would have amounted to a side show about the particulars of Saffold's arrest, which in itself had nothing to do with Cort's homicide, and therefore potentially more distracting than additionally probative. Hopgood fails to persuade us that it was deficient performance for trial counsel not to seek admission of the videos.

G. Sixth Ineffective Assistance Argument: Issues Involving Detective Gomez

¶50 Hopgood argues that his trial counsel was ineffective in failing to seek to introduce at trial evidence of two allegations involving one of the lead detectives on the Cort homicide case, Rodolfo Gomez, because this evidence

would have revealed to the jury that Gomez had a "motive to use dishonest tactics in developing cases." We reject this argument on the ground that Hopgood fails to persuade us that admission of these allegations would have mattered to the jury in light of the fact that Gomez was not called as a witness at trial.

¶51 The first allegation against Gomez is not directly tied to the Cort homicide case. The allegation is that in 2006, while working as a Milwaukee police officer, Gomez recklessly made false or misleading representations in a sworn affidavit submitted to a judge to obtain a "no knock" warrant, as alleged in a federal civil lawsuit pending at the time of Hopgood's trial.

¶52 The second allegation involves Gomez's conduct during the Cort homicide investigation. The allegation is that Hopgood's girlfriend, a potential alibi witness for Hopgood in this case, told a defense investigator that Gomez had come to her home, told her that Hopgood "is a murderer" who is "trying to kill you," and that Gomez had threatened to take Hopgood's girlfriend to jail and told her not to testify in the case.

¶53 Hopgood asserts that evidence regarding both allegations was available to trial counsel in advance of Hopgood's trial in December 2012, and the State does not dispute the point. Hopgood argues that these allegations were admissible as "other acts" evidence under WIS. STAT. § 904.04(2), because the evidence would not be used to show that Gomez acted in conformity with a character trait suggested by the evidence. *See* ***State v. Sullivan***, 216 Wis. 2d 768, 576 N.W.2d 30 (1998).

¶54 We conclude that, assuming without deciding that the circuit court at trial would have granted a motion to admit evidence of the two allegations (whether as "other acts" evidence or otherwise), Hopgood fails to persuade us that

it would have affected the outcome at trial. Gomez did not testify at trial, and therefore the jury was not called on to assess his credibility as a witness. Hopgood fails to persuade us that such evidence would have significantly contributed to a decision by jurors that, as Hopgood contends, the investigation of Cort's homicide lacked "integrity," such that the evidence presented at trial was tainted in a significant matter.

¶55 The authority on which Hopgood relies at least to a degree undermines his argument, because it highlights the significance of the fact that Gomez did not testify at trial. Hopgood cites ***State v. Missouri***, 2006 WI App 74, 291 Wis. 2d 466, 714 N.W.2d 595, in which this court concluded that evidence that a police officer had previously mistreated witnesses and planted evidence under circumstances similar to those alleged by the defendant was relevant and admissible, where the defense offered the evidence to show bias and prejudice of the police officer witness. *See* ***id.***, ¶13-22 ("Thus, we conclude that the trial court erroneously exercised its discretion in refusing to allow the defense to present its witnesses who would have *attacked the credibility of* Officer Mucha.") (emphasis added). ***Missouri*** involves impeachment, not as here a generalized attack on the "investigation tactics" of a person who did not testify at trial.

¶56 Two points emphasized by Hopgood in making his Gomez-related argument are weak. First, he contends that "Saffold's testimony" was "developed by Gomez," by which we take Hopgood to be pointing to Gomez's involvement in interviews with Saffold. However, the jury had the opportunity to evaluate the direct and cross-examination of Saffold, and Hopgood fails to explain how the alleged negative evidence about Gomez would have made a difference in that evaluation. Second, in support of his "integrity of the investigation" theory, Hopgood points to a topic we address in the next section of this opinion, involving

a bullet that police reported finding in Cort's car after they conducted a second search of the car. However, as we discuss below, the defense theory that Hopgood now says his trial attorney should have pursued at trial—that police faked the second search and came up with the bullet themselves—rests heavily on speculation. It would have been asking the jury to layer speculation on top of speculation to argue, based on the negative Gomez evidence here, that Gomez "planted" the bullet in a fake search staged with another detective. In sum, Hopgood's "integrity of the investigation" theory is amorphous, and we see no reason to conclude that its pursuit at trial would have influenced the jury.

H. Seventh Ineffective Assistance Argument: Evidence Regarding Bullet

¶57 Hopgood's next argument focuses entirely on the bullet that the State offered as evidence at trial as the one used to kill Cort. As referenced above, Hopgood argues that trial counsel was ineffective in failing to challenge the authenticity of the bullet. More specifically, Hopgood contends that trial counsel should have pursued a theory that the bullet was a never-fired round that was planted as evidence by Gomez alone or by Gomez conspiring with other officers. We reject this argument on the ground that Hopgood fails to persuade us that it was deficient performance for trial counsel to accept as accurate the written professional opinions of State Crime Laboratory employees regarding the bullet, or that it was deficient performance not to take further steps to challenge police reports and testimony regarding the bullet.

¶58 The following background facts are pertinent. A police report disclosed to the defense in advance of trial stated that, in January 2012, Gomez and another detective reviewed the investigative file and noticed that no items of evidentiary value had been recovered during an earlier police search of Cort's car.

The detectives decided to conduct a new, "methodical search" of the car "with a new set of eyes." After removing the front passenger seat, the floor mats, and other items, Gomez observed "a copper-jacketed bullet, which was stained with a red substance, laying on the front passenger door threshold."[8]

¶59 The bullet that police reported discovering was transported to the Crime Lab, where:

- A firearms examiner produced a report stating the following: "Examination of the one (1) fired full metal jacket bullet … revealed it is 380 caliber and fired through a firearm barrel rifled with six (6) lands and grooves with a right hand twist."
- A DNA analyst produced a report stating that "swabs" were taken "from the exterior side of the bullet," and "[a]n attempt was made to isolate DNA from the swabs," but "an insufficient amount of DNA for further testing was detected."

¶60 At trial, the parties stipulated that: a "bullet recovered from the victim's vehicle … was transported to the Wisconsin Crime Lab … and subjected to scientific testing"; a DNA analyst at the crime lab "made an attempt to isolate DNA from the exterior of the bullet, but an insufficient amount of DNA for further testing was detected on this item"; a Crime Lab firearms examiner "examined the bullet and determined that it was a fired full metal jacket bullet which is a .380 caliber."

[8] We note for context that photographs taken by police in connection with their second search of the car, submitted to the court by the State in response to Hopgood's postconviction motion, appear to reveal that police in the second search did not merely lift up what are commonly referred to as floor mats, but instead they ripped out carpeting and padding covering the metal floor of the car, and there, police reported, found the bullet on the metal floor.

¶61 Hopgood's argument rests heavily on opinions of a retired police officer retained by Hopgood as part of postconviction investigation. The retired officer opined in a letter submitted to the circuit court with Hopgood's postconviction motion that he had observed the bullet referred to above, without benefit of magnification and through a plastic bag, and was surprised to observe that it lacked "deformation of the nose … and at least some types of irregularities in size and shape" of the type that he would expect to see had it passed through Cort and come to rest on the floor of the car. The retired officer also stated, "I would expect that there would be some DNA residue on the projectile after totally passing through a human body."

¶62 Hopgood's argument is difficult to track, but it appears to boil down to the following. Trial counsel should have been highly skeptical about the bullet for two reasons: because police reported discovering it only after a second search, and because an insufficient amount of DNA was present on the bullet for testing purposes. Based on these suspicious facts, the argument continues, trial counsel was deficient in failing to retain an expert to present evidence supporting the argument that the bullet was planted, which would have undermined the jury's confidence in Saffold's testimony.

¶63 For three reasons, Hopgood fails to persuade us that it was deficient performance for trial counsel not to seek out and make use at trial of expert testimony regarding the bullet.

¶64 First, the opinions of the former police officer are a weak indication that there was a problem with the State's bullet evidence. The officer cites to no authority or body of research on either the apparent-lack-of-damage issue or the lack-of-sufficient-DNA issue, much less does he explain why an attorney

providing professionally competent assistance would have discerned an issue requiring investigation. Part of the problem is that the opinions he now offers are vague. At best, he seems to suggest that an expert with more detailed information about the bullet than he has, and perhaps more expertise on these topics than he has, *might* be able to raise questions about its authenticity.

¶65 The second point is closely related to the first. Hopgood fails to persuade us that there is anything about the written opinions of the firearms examiner and the DNA analyst that should have alerted trial counsel to potential malfeasance or incompetence by police or Crime Lab employees. Even now, with the full benefit of hindsight, Hopgood fails to point to any fact that should have alerted his trial counsel that either the Crime Lab report was inaccurate or was the result of flawed methodology or reasoning.

¶66 The third point involves the fact of an initial search and a purported second, more "methodical" search. Hopgood fails to explain what steps a constitutionally effective trial counsel would have taken, and which steps trial counsel failed to take, in connection with the two reported searches. We readily acknowledge that trial counsel should have been skeptical about the State's position that police missed the bullet in the course of a first search and discovered it only in a second search. These are circumstances in which evidence *could* have been planted. But the information available to counsel also indicated that the first search was less thorough than the second, which police alleged entailed ripping up floor carpeting and exposing the bullet. This situation might be grounds for suspicion, but it does not show that counsel deficiently failed to take some identified, potentially fruitful action.

I. Eighth Ineffective Assistance Argument: Cumulative Effect of Alleged Deficiencies

¶67 Hopgood briefly argues that he was prejudiced by the alleged cumulative effect of all of trial counsel's deficiencies, because the case was "grossly under-tried." For reasons that should be evident from our discussion above, we are not persuaded that a cumulative effect of multiple instances of ineffective assistance of counsel resulted in prejudice to Hopgood.

II. *BRADY* ISSUE

¶68 Hopgood argues that a new trial is merited because the State failed to disclose evidence favorable to him that was material to guilt, and there is a reasonable probability that defense use of the suppressed evidence would have produced a different verdict. As we now summarize, this involves documents disclosed by the State after Hopgood filed his postconviction motion, generating a supplemental motion from Hopgood. We reject this argument because we conclude that, assuming without deciding that the material has exculpatory value (including impeachment value for the defense), there is not a reasonable probability that, had it been disclosed to the defense, the result of the proceeding would have been different.

A. Background

¶69 The materials at issue can be divided into two pertinent parts. The first pertinent part reflects notes taken by staff of the district attorney's office in advance of Hopgood's trial. The DA office staff notes reflect communications between DA office staff and Saffold, and between DA office staff and a person identified as Saffold's girlfriend. These notes reflect that Saffold repeatedly inquired with the DA's office about getting reward money that had been offered

by the Cort family, and that Saffold "was very upset that the family was prolonging in paying him" reward money because he was being evicted. One related passage reads in part: "Paris stated that [if] no reward, he will not be testify[ing]." Another passage states: "Mr. Saffold seemed to be very agitate[d] and angr[y] about Det. Gomez asking for $300.00 of the reward to take him to get the money [sic]. He stated Gomez wanted to recoup [Gomez's] overtime money he would be losing…. [Saffold] claimed the family gave Det[.] Gomez $300.00 to give [Saffold] and [Saffold] only got $200.00." The notes also reflect that Saffold's "girlfriend" said that "the money was given to them to help move and that Det. Gomez kept a portion."

¶70 The second pertinent part of the materials is a report by a DA office investigator reflecting an interview with Saffold after Hopgood's trial. In this interview, Saffold allegedly made statements that included the following: "Gomez is not dirty and did not take money from" Saffold; Saffold asked Gomez early in their interactions "if the $10K [reward] was still on the table"; Saffold "didn't testify just to collect the money. [Saffold] stated [that testifying] was the right thing to do…. [T]he homicide was just 'Dirty evil'"; after the trial, Saffold received a check for $9,875 from the Cort family.

B. Legal Standards

¶71 The State has a duty to disclose evidence favorable to an accused if the evidence is material either to guilt or to punishment. ***State v. Harris***, 2004 WI 64, ¶12, 272 Wis. 2d 80, 680 N.W.2d 737 (citing ***Brady v. Maryland***, 373 U.S. 83, 87 (1963)). "Evidence is favorable to an accused, when, 'if disclosed and used effectively, it may make the difference between conviction and acquittal.'" ***Harris***, ¶12 (quoting ***United States v. Bagley***, 473 U.S. 667, 676 (1985)).

Evidence may be favorable to the accused either because it is exculpatory or because it has value in impeaching a witness. ***Harris***, 272 Wis. 2d 80, ¶12.

¶72 The evidence at issue must be material, which means that "there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different," which is the same as the prejudice prong for ineffective assistance of counsel, as discussed above. *See* ***id.***, ¶14. Thus, "'strictly speaking, there is never a real "Brady violation" unless the nondisclosure was so serious that there is a reasonable probability that [defense use of] the suppressed evidence would have produced a different verdict.'" ***Id.***, ¶14 (quoting ***Strickler v. Greene***, 527 U.S. 263, 281 (1999)).

C. Analysis

¶73 We assume, in favor of Hopgood, that aspects of the late-disclosed materials constitute exculpatory evidence and impeachment topics of value to the defense. However, for the following reasons, we conclude that Hopgood fails to show that there is a reasonable probability that the materials represent admissible evidence which, if presented, would have led to a different result.

¶74 We first briefly address Hopgood's materiality argument that the jurors would have viewed Saffold's testimony more critically if they had learned of Saffold's alleged demand for reward money before he would testify. Hopgood acknowledges that "Saffold admitted at trial that the reward money played some role in his decision to testify." Having made this concession, Hopgood asserts that evidence of the demand would have been more "definitive" proof of motive than the jury heard. We conclude that the potential marginal additional value of this reward-money-related impeachment of Saffold would likely have been both small and cumulative, and reject this part of Hopgood's argument on that basis.

¶75 This leaves Hopgood's primary materiality argument, which involves Gomez. Hopgood contends that, had the jury learned of the allegation that Gomez "requested part of the reward money," jurors "might have concluded that police relied on Saffold not because he was a truthful witness, but because Gomez wanted to use Saffold to obtain some of the reward money for himself." That is, Hopgood argues that the allegation that Gomez requested reward money from Saffold would have given jurors reason to doubt *police confidence* in Saffold's veracity, which in turn would have caused jurors to doubt Saffold's veracity. We reject this argument because it is based on tenuous possibilities, not reasonable probabilities.

¶76 If Gomez had asked Saffold to give Gomez part of the reward money, it would no doubt have been viewed by the jury as disreputable conduct by Gomez. But even if Hopgood could have proven to the jury that this occurred, it would be a large leap from this disreputable conduct by Gomez to the proposition that police lacked confidence in Saffold's veracity. And, it would have been yet another leap from the question of how much confidence police had in Saffold's veracity to the ultimate question of whether Saffold testified truthfully at Hopgood's trial. For that matter, the level of confidence that police had in Saffold's veracity is ultimately relevant only to the extent that it might involve some pertinent action that police took or failed to take during the course of the investigation, and again Hopgood's references to the "integrity of the investigation" are amorphous and thinly supported.

III. NEWLY DISCOVERED EVIDENCE

¶77 Hopgood argues that the late-disclosed materials discussed immediately above also constituted newly discovered evidence meriting a new

trial. Given our discussion above, one aspect of the law governing newly discovered evidence is dispositive. A new trial is merited only when "'there is a reasonable probability that a jury, looking at both the [old evidence] and the [new evidence], would have a reasonable doubt as to the defendant's guilt.'" ***State v. Love***, 2005 WI 116, ¶44, 284 Wis. 2d 111, 700 N.W.2d 62 (quoted source omitted). We have explained above that Hopgood has failed to persuade us of this as a reasonable probability.

IV. DENIALS OF MISTRIAL MOTIONS

¶78 Hopgood argues that the circuit court erred in failing to grant two defense motions to declare a mistrial. We conclude that Hopgood fails to make a sufficient showing that the court erred in the exercise of its discretion in the manner in which it responded to either of the mistrial motions.

A. Background

1. "It's the truth" Comment

¶79 The first motion for mistrial at issue followed a statement made by the prosecutor during cross-examination of Saffold. One of the defense attorneys walked Saffold through a portion of a transcript of prior testimony that Saffold had given in this case. After quoting some of that testimony to Saffold, the defense attorney said, "And there's more there that I'm sure the State can follow up with." The prosecutor responded: "Because it's the truth."

¶80 Out of the presence of the jury, Hopgood's counsel moved for a mistrial on the grounds that the statement "because it's the truth" amounted to improper vouching for the veracity of the witness. In response, the prosecutor told the court that he believed that the defense attorney was using the transcript in a

selective and misleading way, and that what the prosecutor meant to express was that the transcript is "the truth," that is, an accurate representation of what Saffold had previously testified. "I was frustrated because bits and pieces were being taken out," and misleading the jury about "not seeing the whole transcript."

¶81 The court later found that the prosecutor's "it's the truth" statement came during "a very chippy, confrontational morning" of trial proceedings between defense attorneys and the prosecutor, even after the court had previously "asked a couple of times that [all attorneys] dial it back actually not just one or two inches but more like three or four inches." The court also questioned whether all members of the jury actually heard the prosecutor's "it's the truth" statement. The court denied the mistrial motion, instead instructing the jury "to disregard any comment made by either side, specifically disregard the comment about the truth, if they heard it," and rely in the general instruction that comments by counsel are not evidence.

2. Witness List and Evidence Reference

¶82 The second motion for mistrial at issue arose from statements that the prosecutor made early in his rebuttal argument:

> [Prosecutor]: … This is not a situation where somehow the police have done a poor job or the police have done an illegal job [as defense counsel are] insinuating. On the witness list are 38 members of the Milwaukee Police Department that are on here. In terms of

	discs and interviews and photographs turned over to the defense, A through X –[9]
[Defense counsel]:	I'm going to [o]bject.
[Prosecutor]:	In terms of the "M" file, that's provided to the defense.
[Defense counsel]:	I have an objection.
The Court:	Hang on. Hang on. Hang on. Hang on. Hang on.

The court then twice said, "Sustained." The prosecutor proceeded on to a different line of argument.

¶83 Later during rebuttal argument, the prosecutor suggested that the State had trimmed its presentation to "get on with the case, let's not delay—let's not call 38 people from the Milwaukee Police Department because certainly then— " At this point, the prosecutor was interrupted with a speaking objection: "I object again to who was on the witness list. That is not a part of the evidence." The court said: "Correct. Sustained. Move on."

¶84 Defense counsel moved for a mistrial, on the grounds that the prosecutor in the first passage quoted above "was suggesting that the State possessed all of this evidence that wasn't presented to" the jurors, and then did so a second time in the second quoted passage, even after the first set of objections had been sustained. The prosecutor took the position that his intended message to the jury was that the police "did a thorough job," in order to rebut defense arguments "attacking the police and the investigation in this case," and that this

[9] The circuit court subsequently made a factual finding that, in making these statements, the prosecutor had "grabbed" and in some manner displayed "15 or 20" compact discs and a brown object that resembled a folder or brief case.

police work had been reflected in extensive evidentiary stipulations that had been presented to the jury.

¶85 The court denied the mistrial motion "under the totality of the circumstances," in part because the prosecutor's arguments came in specific response to defense argument that police had acted inappropriately and in part because the jury had "been told in the instructions more than once" that the comments and opinions of attorneys "are not evidence."

B. Legal Standards

¶86 "A motion for mistrial is committed to the sound discretion of the circuit court. An erroneous exercise of discretion may arise from an error in law or from the failure of the circuit court to base its decisions on the facts in the record." ***State v. Ford***, 2007 WI 138, ¶28-29, 306 Wis. 2d 1, 742 N.W.2d 61 (circuit court has discretion to order mistrial after considering whether "in light of the entire facts and circumstances ... the defendant can receive a fair trial").

C. Analysis

¶87 We begin with the easier of the two topics, the blurted out "it's the truth" comment, which we conclude would have had little to no impact on the jury. The circuit court questioned whether all jurors heard it, and suggested that it might have been lost in a series of overly sharp exchanges among counsel. And, while we do not condone the comment, we observe that blurted comments of this type would seem to be as likely to hurt as to help the case of the advocate who makes them. Finally, the jury was repeatedly instructed to consider no statements coming from counsel to be evidence and we assume jurors follow such instructions. *See* ***State v. Marinez***, 2011 WI 12, ¶41, 331 Wis. 2d 568, 797

N.W.2d 399 (reviewing courts "presume that juries comply with properly given limiting and cautionary instructions").

¶88 More concerning is the reference to the witness list and evidence. The circuit court observed that this reference to lists of witnesses and volumes of evidence came in response to attacks on the police investigation, but we fail to see how that would justify what sounds like an invitation to the jury to place weight on evidence *not* presented at trial. The prosecutor's contemporaneous explanation involving stipulations is confusing. It does not seem to line up with what the prosecutor said in his objected-to statements.

¶89 Nevertheless, the record reflects that the defense objections were sustained in each instance, including in an unmistakable manner, following a speaking objection, in the final instance ("Correct. Sustained. Move on."). In addition, the prosecutor's comments were somewhat truncated, thanks to prompt objections that were immediately sustained. It is hard to see how a reasonable juror would have been able to reach any particular conclusion about any issue in the case based on these comments. For these reasons, although the prosecutor's comments are troubling, we cannot say that the circuit court erroneously exercised its discretion in determining that they did not prevent a fair trial.

V. NEW TRIAL IN THE INTEREST OF JUSTICE

¶90 Hopgood asks us to exercise our discretionary power to reverse his conviction and order a new trial in the interest of justice because "it appears from the record that the real controversy has not been fully tried, or that it is probable that justice has for any reason miscarried." *See* WIS. STAT. § 752.35. However, in making this request, Hopgood does not raise any issue not already addressed and rejected for the reasons stated above.

By the Court.—Judgment and order affirmed.

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