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STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT II

Case No. 2010AP411-CR

STATE OF WISCONSIN,
Plaintiff-Respondent,
v.

STEVEN A. AVERY,
Defendant-Appellant.

ON APPEAL FROM A JUDGMENT OF CONVICTION AND AN ORDER DENYING POSTCONVICTION RELIEF ENTERED IN THE MANITOWOC COUNTY CIRCUIT COURT, THE HONORABLE PATRICK L. WILLIS, PRESIDING

BRIEF OF PLAINTIFF-RESPONDENT

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STATE OF WISCONSIN

C O U R T O F A P P E A L S

DISTRICT II

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BRIEF OF PLAINTIFF-RESPONDENT

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State does not request oral argument. Publication of the court's decision may be warranted in light of the issues raised in this appeal.

STATEMENT OF THE CASE

Given the nature of the arguments raised in the brief of defendant-appellant Steven A. Avery, the State exercises its option not to present a statement of the case. *See* Wis. Stat. § (Rule) 809.19(3)(a). The relevant facts and procedural history will be discussed in the argument section of this brief.

ARGUMENT

Following a six week jury trial, Steven Avery was convicted of first-degree intentional homicide for killing Teresa Halbach (256:1; 288:1; A-Ap. 101). Avery raises three issues on appeal: first, that the search of his trailer on November 8, 2005, was unlawful because officers had fully executed the search warrant three days earlier; second, that the trial court erred when it barred him from presenting third-party liability evidence; and third, that he is entitled to a new trial because the court substituted an alternate juror after deliberations had begun.

The trial court rejected Avery's first and second claims in written pretrial decisions (151:1-21; 204:1-15; A-Ap. 209-44) and rejected his second and third claims in a thorough and thoughtful decision denying Avery's postconviction motion (370:1-102; A-Ap. 103-204). Because none of Avery's arguments has merit, this court should affirm the judgment of conviction and the order denying postconviction relief.

I. THE EVIDENCE SEIZED DURING THE NOVEMBER 8 SEARCH OF AVERY'S TRAILER WAS PROPERLY ADMITTED.

Within hours of the discovery on November 5, 2005, of Teresa Halbach's vehicle on the grounds of the Avery Salvage Yard, officers obtained a search warrant (337:133-34; A-Ap. 245-46). The warrant authorized a search of Avery's trailer and detached garage, a neighboring trailer and garage, the forty-acre salvage yard, and the outbuildings and vehicles associated with the salvage yard (*id.*).

While executing the warrant, officers searched Avery's trailer on multiple occasions between November 5 and November 9, when a new search warrant was obtained (337:47-49; R-Ap. 103-05). Avery moved to suppress all evidence seized from his trailer following the completion of the second entry of his trailer on the evening of November 5 (132:33). With one exception not relevant here, the trial court denied the motion, holding that the multiple entries were reasonable due to the size and complexity of the search (151:4-6; A-Ap. 227-29). The court alternatively held that if each entry into Avery's trailer were evaluated separately from the search of the remainder of the premises, all of the entries through November 8 were permissible as reasonable continuations of the original search (151:6-16; A-Ap. 229-39). The court further held that even if the reentries were impermissible, the evidence was admissible under the inevitable discovery doctrine (151:16-21; A-Ap. 239-44).

On appeal, Avery has narrowed his argument substantially, challenging only the search of his bedroom on November 8 and the

admission of one piece of evidence seized during that search, a key to Ms. Halbach's vehicle. *See* Avery's brief-in-chief at 23-46. Because the trial court correctly determined that the key was admissible, this court should reject that claim. Moreover, even if the trial court erred when it admitted the key into evidence, that error was harmless.

A. Applicable legal principles.

When reviewing a circuit court's decision on a motion to suppress, an appellate court accepts the circuit court's findings of fact unless they are clearly erroneous. *State v. Drew,* 2007 WI App 213, ¶11, 305 Wis. 2d 641, 740 N.W.2d 404. The application of constitutional principles to those facts presents a question of law that is reviewed de novo. *Id*. Avery does not argue that any of the trial court's factual findings are clearly erroneous. *See* Avery's brief-in-chief at 23-46.

Avery contends that "the multiple entries and searches of his home" violated the constitutional protection against unreasonable searches and seizures. *Id*. at 23. The Fourth Amendment requires that searches "must be conducted reasonably and appropriately limited to the scope permitted by the warrant." *State v. Sveum*, 2010 WI 92, ¶53, __ Wis. 2d __, 787 N.W.2d 317 (internal quotation marks omitted). "'[I]t is generally left to the discretion of the executing officers to determine the details of how best to proceed with the performance of a search authorized by the warrant – subject of course to the general Fourth Amendment protection 'against unreasonable searches and seizures.'" *Id*. (quoting *Dalia v. United States*, 441 U.S. 238, 257 (1979)). Whether a search was

reasonable depends on the particular circumstances of the case and requires a balancing of the nature and quality of the intrusion on the individual's Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion. *Id*., ¶54.

Avery claims that the November 8 search was unreasonable based on the "one warrant, one search" rule, which provides that "if police enter and search a premises pursuant to a warrant, regardless of whether they find anything to seize, police may not re-enter and conduct another search of the premises pursuant to that same warrant." Avery's brief-in-chief at 25 (citing *McDonald v. State*, 259 S.W.2d 524, 525 (Tenn. 1953); 2 Wayne R. LaFave, *Search and Seizure*, § 4.10(d), at 767 (4th ed. 2004)). As Avery recognizes, though, that rule is subject to the "reasonable continuation rule," which allows the police to temporarily suspend the initial execution of the warrant and continue the search at another time. LaFave, § 4.10(d), at 768. "Under this 'reasonable continuation rule,' there are two requirements: (1) 'the subsequent entry must indeed be a continuation of the original search'; and (2) 'the decision to conduct a second entry to continue the search must be reasonable under the circumstances.'" *Id*. (quoting *United States v. Keszthelyi*, 308 F.3d 557, 569 (6th Cir. 2002)).

Avery acknowledges that the reasonable continuation rule provides "the correct vehicle for analyzing the multiple entries into his trailer." Avery's brief-in-chief at 29. That acknowledgement is appropriate, as the reasonable continuation rule was recently adopted by the Wisconsin Supreme Court. *See Sveum*, 2010 WI 92, ¶¶64-67.

In *Sveum*, the police obtained court authorization to install and monitor a GPS tracking device on Sveum's vehicle after a woman reported that he was stalking her. *Id.*, ¶5. Pursuant to the order, the police monitored Sveum's vehicle for thirty-five days. *Id.*, ¶67.

Sveum argued that "each day the officers monitored [his] vehicle using the GPS device constituted a separate intrusion requiring a new search warrant." *Id.*, ¶64. The supreme court disagreed. *Id.* The court noted that in *United States v. Squillacote*, 221 F.3d 542 (4th Cir. 2000), the Fourth Circuit had rejected a similar argument in a case in which, in an investigation of suspected espionage activities, the defendant's home was searched over a period of six days pursuant to a single warrant. *Sveum*, 2010 WI 92, ¶65 (citing *Squillacote*, 221 F.3d at 557). The Fourth Circuit held that because of the complex, ongoing nature of the espionage-related activities and the nature of the evidence sought, the search necessarily was extensive and exhaustive and could not have been completed in a single day. *Squillacote*, 221 F.3d at 557. The *Squillacote* court characterized the subsequent entries not as separate searches requiring separate warrants but as reasonable continuations of the original search. *Id.*

In *Sveum*, the supreme court held that "the complex, ongoing nature of stalking justified the 35 days of GPS surveillance on a single search warrant." *Id.*, ¶67. The court concluded that "the daily, continuous monitoring of the GPS device on Sveum's vehicle 'were not separate searches requiring separate warrants, but instead were simply reasonable continuations of the original

search.'" *Id*. (quoting *Squillacote*, 221 F.3d at 557).

Sveum and *Squillacote* involved investigations of ongoing crimes. *See Sveum*, 2010 WI 92, ¶¶66-67. However, the reasonable continuation rule also has been applied to investigations into completed crimes. *See, e.g., United States v. Gerber*, 994 F.2d 1556, 1557-59 (11th Cir. 1993); *United States v. Carter*, 854 F.2d 1102, 1107 (8th Cir. 1988); *United States v. Huslage*, 480 F. Supp. 870, 874-75 (W.D. Pa. 1979); *State v. Finesmith*, 968 A.2d 715, 721-22 (N.J. Super. Ct. App. Div. 2009).

B. The November 8 search was a reasonable continuation of the original search.

The cornerstone of Avery's argument is his contention that officers "conducted a thorough search" of his trailer on November 5. Avery's brief-in-chief at 31. That argument ignores the testimony at the suppression hearing that established the enormity and complexity of the task facing officers executing the search warrant and that specifically refuted the claim that the search was completed on November 5.

After Ms. Halbach's vehicle was discovered at the salvage yard, Division of Criminal Investigation Special Agent Thomas Fassbender and Calumet County Sheriff's Department Investigator Mark Wiegert became the co-lead investigators in the case (126:59). Fassbender testified at the suppression hearing that initial search efforts focused on trying to find Ms. Halbach rather than collecting trace evidence (126:69, 73). The first entry into Avery's trailer

during the afternoon of November 5 was part of that effort, and it lasted ten minutes (126:6). Avery acknowledges that the warrant was not fully executed during this initial sweep. *See* Avery's brief-in-chief at 31.

It is a subsequent search of Avery's trailer that day, conducted from 7:30 p.m. to 10:05 p.m. (126:9), that Avery contends completed the search. Avery characterizes that search as "thorough," "full-blown" and "full-ranging." Avery's brief-in-chief at 31-32. He notes that one "officer testified he believed they had seized everything of evidentiary value" on Saturday evening. *Id*. at 32. However another officer involved in the search, Sergeant William Tyson, described the two and a half hour search as a quick search and explained that a thorough search would have taken "a whole lot longer than that" (310:176-79). Moreover, Avery himself recognizes that the search of his trailer was not completed Saturday evening, as he concedes that the next three entries – one on Sunday to retrieve guns, a vacuum cleaner and bedding, a second on Sunday by State Crime Laboratory personnel who used a special light to search for blood, and a third on Monday to obtain the serial number of Avery's computer – were reasonable continuations of the Saturday evening search. *See* Avery's brief-in-chief at 31.

The trial court found that the officer whose testimony Avery cites, Lieutenant James Lenk, "was really a mere foot soldier and not a commanding officer in the investigation" and that Fassbender and Wiegert determined how the search was to be conducted (151:9; A-Ap. 232). At the suppression hearing, Fassbender explained why it was not possible for investigators to complete the search of Avery's trailer on Saturday

evening or during the next three entries on Sunday and Monday. He testified that after Crime Lab technicians departed the salvage yard Saturday evening with Ms. Halbach's vehicle, he had only one evidence collection team available (126:79-80). The plan was to start searching the buildings, and they started with Avery's trailer (126:80).

Fassbender testified that when the evidence technicians entered the trailer Saturday evening, they were looking for "obvious" evidence as well as for trace evidence (126:82). Fassbender stated that the searchers' efforts were limited by the weather and the lateness of the hour. During the search, Fassbender explained, there was a "horrendous rain storm" that created a risk that evidence would be lost or destroyed as officers went in and out of the trailer to get the equipment they needed (126:82-83). As a result, the search focused on the types of evidence that would be the most susceptible to potential loss or destruction (126:83).

Fassbender also testified that "most of those investigators that went in that trailer are already going on 12 hours, or more, of work" and that "they are getting tired, there could be safety issues, and exhaustion's becoming a factor" (*id.*). Those factors could have affected the searchers' ability to locate and collect evidence (*id.*).

When the searchers left the trailer that night, they were debriefed by Fassbender and Wiegert (126:83-84). It became apparent, Fassbender testified, that "we [were] not done in that house" (126:84). Fassbender testified that "based on the weather and lighting conditions, exhaustion of the searchers, I knew that building,

even without Steven being the primary suspect necessarily, was going to be searched again. It was too likely that things would have been missed, based on those factors" (126:93-94).

The broad scope of the investigation required that resources be allocated to much more than a search of Avery's trailer. Of the forty acres to be searched under the warrant, the salvage business occupied about thirty-seven acres with approximately 3,600 to 3,800 junked cars (126:60-61).[1] On Sunday, November 6, search teams, each of which included a law enforcement officer, checked every one of those vehicles, opening hoods and trunks and looking inside and under the vehicles for a body or other potential evidence (126:86-87, 100-01; 308:65-66). In many instances, searchers found what might have been blood in a vehicle, in which case Crime Lab personnel were dispatched to determine if there was blood that needed to be collected (126:87). Investigators also brought in dogs trained to detect the presence of human blood or cadavers to search the property (126:133-35).

At the same time, other officers were searching six to eight hundred acres of surrounding property (126:77). Other investigators were busy interviewing individuals who may have had relevant information (126:85).

[1] The record includes ground level and aerial photographs of the property (333:Exhibits 25, 74-79, 82-86, 95-96) that graphically illustrate the size of the area that was searched. Copies of two of those photographs are included in the appendix to this brief (333:Exs. 78, 25; R-Ap. 101-102).

During that time, law enforcement resources, including evidence technicians, were frequently diverted from the search of the Avery property. For example, Fassbender testified that after the discovery of a possible burial site west of the salvage yard, "pretty much everyone" available who was trained in evidence processing was sent to that site and remained there until they determined that it was not a burial site (126:98, 136-37). The discovery of various items at a park and a roadside ditch caused the reallocation of evidence technicians to those locations (126:98-99).

Fassbender testified that because of these other investigative activities, it was not until Tuesday that he was able to send a team back to Avery's trailer to "hopefully do a final, thorough search of that trailer" (126:95). Indeed, it was not until Tuesday that it began to appear certain that the case was a homicide and that Avery was a prime suspect. On that day, investigators learned that Avery's DNA had been found in Ms. Halbach's vehicle and that bone fragments had been discovered in a burn pit behind Avery's garage (126:96). Those discoveries enabled law enforcement to concentrate their efforts on the search of the Avery property. Until it became clear that Teresa Halbach was dead and that her remains were located on the Avery property, the parallel efforts to locate her in other places were necessary.

Further evidence that the Tuesday entry into the trailer was a continuation of the original search is found in the fact the entire parcel, including Avery's trailer and garage, was secured for the entire week of November 5 through November 12 (126:155-70). Ingress and egress to the property was restricted by the use of

checkpoints (126:163-66). Law enforcement never left the scene. *See Moore v. State*, 429 S.W.2d 122, 125 (Ark. 1968) ("While there are numerous cases which state that a 'return' search, conducted on the basis of the warrant issued for the original search, is not permissible, these cases seem to involve situations where the officers have completely abandoned the premises for a substantial period of time.").

Given these circumstances, the November 8 search of Avery's trailer was indeed a continuation of the original search. The first prong of the reasonable continuation rule has been satisfied.

With regard to the rule's second prong, Avery argues that the search of his bedroom on November 8 was unreasonable because the trial court found that there were three reasons for entering his trailer that day: to seize a computer located in the living room pursuant to a new warrant, to swab blood spots in the bathroom, and to seize pornographic materials. *See* Avery's brief-in-chief at 33. Avery argues that because only the third purpose provided a reason for entering the bedroom, and because the trial court ruled that the warrant did not authorize the seizure of pornographic materials, the officers had no authority to enter and search the bedroom. *Id*.

The trial court did find that the officers had those reasons for entering Avery's trailer (151:14-15; A-Ap. 237-38). The court did not find, however, that those were the only reasons for reentering the trailer (*id*.). Fassbender's testimony, which the trial court implicitly found to be credible, established that the Saturday evening search was not complete. Fassbender testified that because of the weather conditions and the

searchers' exhaustion, he knew that it was unlikely that the Saturday evening search had found everything of evidentiary value (126:93-94) and that there remained a need to "do a final, thorough search of that trailer" (126:95).

The probable cause that supported the issuance of the search warrant had not dissipated between the initial search of the trailer and the reentry on November 8. *See Gerber,* 994 F.2d at 1561; *Huslage,* 480 F. Supp. at 875. To the contrary, it had increased. For example, on November 6, investigators searching Avery's garage observed possible bloodstains on the floor and seized .22 caliber shell casings (126:23). Also that day, the Crime Lab determined that blood found in Ms. Halbach's vehicle had tested presumptively positive for human blood (126:86).

In *Squillacote*, the Fourth Circuit held that multiple entries by FBI agents into the defendant's home on six consecutive days were reasonable because "given the number and type of items that can be evidence of espionage-related activities, the search was necessarily extensive and exhaustive." *Squillacote*, 221 F.3d at 557. Under the circumstances, the court held, "[t]o require the government to obtain a new search warrant for each continued day of searching would impose an undue burden on the government's efforts to investigate complex crimes, a burden that would be unjustifiable under the circumstances of this case." *Id*. at 558.

The same is true here. This was at least as complex an investigation as the espionage investigation in *Squillacote*. Given the scope and complexity of the investigation and the variety of the types of evidence that might be relevant to a

homicide investigation, it was not possible to fully execute the search warrant in one, two, or even three days. The search of Avery's bedroom on November 8 was reasonable under the circumstances.

The two requirements of the reasonable continuation rule were met in this case. The November 8 entry into Avery's trailer was, in fact, a continuation of the original search, and the decision to conduct that entry to continue the search was reasonable under the circumstances. Accordingly, the court should conclude that the November 8 search of Avery's trailer did not violate the Fourth Amendment.

C. The key was admissible under the inevitable discovery doctrine.

The trial court alternatively ruled that the evidence discovered during the later entries to Avery's trailer was admissible under the inevitable discovery rule (151:16-21; A-Ap. 239-44). The inevitable discovery rule applies when the prosecution demonstrates: (1) a reasonable probability that the evidence in question would have been discovered by lawful means but for the police misconduct; (2) that the leads making the discovery inevitable were possessed by the government at the time of the misconduct; and (3) that prior to the unlawful search the government also was actively pursuing some alternate line of investigation. *State v. Schwegler*, 170 Wis. 2d 487, 500, 490 N.W.2d 292 (Ct. App. 1992).

The trial court found that all three requirements had been satisfied in this case (151:16-21; A-Ap. 239-44). The trial court was correct.

1. *A reasonable probability that the evidence in question would have been discovered by lawful means but for the police misconduct.* The trial court found that this requirement was satisfied because a search warrant issued the next day again authorized a search of Avery's trailer (151:17-19; 337:47-49; A-Ap. 240-42; R-Ap. 103-05). Avery argues that it was not reasonably probable that the key would have been discovered in that search because the key had not been found in the two and one-half hour search conducted on November 5. But, as discussed previously, the November 5 search was not a thorough search.

Citing Sergeant Andrew Colborn's trial testimony, Avery contends that the key would not have been discovered in a subsequent search because it was discovered "only due to the twisting, shaking and pulling of the bookcase" and the prosecution presented "no evidence that this method of searching was standard procedure for its law enforcement officers." Avery's brief-in-chief at 39.

Sergeant Colborn testified that he was trying to determine if there were any items in the narrow space between the bookcase and an adjacent desk (311:125-26). To examine that area, he tipped the bookcase to the side and twisted it away from the wall (311:126).

Avery does not argue that it is not reasonably probable that officers conducting a thorough search of his bedroom would have moved

furniture in an attempt to find items of evidentiary significance. Rather, he argues that the tilting and twisting movement employed by Sergeant Colborn was the only method of moving furniture that would have disclosed the key. "Without proof that the police routinely searched items of furniture in this fashion," Avery claims, "the state cannot meet its burden of proving that the key would inevitably have been discovered in a subsequent lawful search." Avery's brief-in-chief at 39.

The problem with that argument is that it implies that the inevitable discovery doctrine can apply only where the police use routine practices to conduct the search that led to the discovery of the item, such as an inventory search or a search of the person incident to arrest. But that is not the case. In *Keszthelyi*, for example, the Sixth Circuit held that drugs found behind a stove during a second search were admissible under the inevitable discovery doctrine because there was "every reason to believe" that they would have been found when agents searched the apartment two days later pursuant to a second search warrant. S*ee Keszthelyi*, 308 F.3d at 575.

In this case, had the police not conducted a search of Avery's trailer on November 8 pursuant to the original warrant, they would have conducted a thorough search pursuant to the warrant issued on November 9. The first prong of the inevitable discovery doctrine has been satisfied.

2. *The leads making the discovery inevitable were possessed by the government at the time of the misconduct.* Avery acknowledges that at the time of the November 8 search of his trailer,

blood had been found in Ms. Halbach's vehicle, that the blood matched his DNA profile, and that human remains had been found in the burn pit behind his garage. *See* Avery's brief-in-chief at 42. He argues that those facts do not satisfy the second prong of the inevitable discovery test because "[t]he inevitability argued by the state is not the inevitability of discovery, but rather the inevitability that it would focus on Steven Avery as its chief suspect." *Id*.

Avery acknowledges that these "additional leads, such as the blood and human remains, focused the police on Avery, and may have led them to seek the second warrant on November 9." *Id*. With that acknowledgement, Avery's argument on the second prong fails, as he effectively concedes that as a result of other information that law enforcement had at the time of the November 8 trailer search, they would have focused their investigation on him and would have sought a new warrant to search his trailer.

Avery nonetheless argues that "the leads did not make it inevitable that the police would look for and find the Toyota key hidden in a bookcase in Avery's bedroom." *Id*. That contention is a reiteration of his argument with regard to the first prong of the inevitable discovery test rather than an argument directed at whether the police had other leads at the time of the challenged search.

3. *Prior to the unlawful search the government was actively pursuing an alternate line of investigation.* The trial court held that "[t]here is really no question that the State meets this requirement" because, apart from the entries into Avery's trailer, "the search of the salvage yard which yielded the independent leads pointing to

the defendant would constitute an 'alternative line of investigation'" (151:20-21; A-Ap. 243-44). Avery does not argue that the State was not pursuing these lines of investigation. Rather, he argues that the third prong of the inevitable discovery rule was not satisfied because "the police were not in the process of procuring a second search warrant when they discovered the Toyota key." Avery's brief-in-chief at 45.

It is not clear from the record whether that is factually correct. The Affidavit for Search Warrant is dated November 9, 2005 (337:55; R-Ap. 111), but the record is silent as to when preparation of the affidavit was begun. The November 5 search warrant was going to expire by law on November 10. *See* Wis. Stat. § 968.15(1) (search warrants must be executed and returned within five days). Given the impossibility of completing the search within five days and the discovery of new evidence during the initial days of the search, the investigators knew that they would have to seek a new warrant to continue the search (126:105-06).

In a case cited by Avery, the court noted that at the time of the unlawful search, "the agents had not even begun taking notes for the purpose of drafting an affidavit, a necessary prerequisite to the procurement of a warrant." Avery's brief-in-chief at 44 (quoting *United States v. Cherry*, 759 F.2d 1196, 1206 (5th Cir. 1985)). In this case, in contrast, prior to requesting the search warrant on November 9, officers had drafted other search warrant requests to collect DNA samples, to search the salvage yard's business office and other buildings, to search Avery's computer, and to obtain Ms. Halbach's cell phone records (337:47-131). Those warrant

affidavits documented the new information obtained between November 5 and November 8 (*id.*). Whether or not the officers actually had begun drafting the affidavit for the November 9 warrant at the time of the November 8 search, they unquestionably had been documenting the factual basis for requesting that warrant.

To support his contention that the police must be actively seeking a warrant at the time of the unlawful action, Avery cites decisions by three federal courts of appeals. *See* Avery's brief-in-chief at 43-46. However, other federal courts of appeals, including the Seventh Circuit, have rejected that proposition. *See United States v. Tejada*, 524 F.3d 809, 813 (7th Cir. 2008).

In *Tejada*, the Seventh Circuit noted that one possible approach would be to apply the inevitable discovery doctrine in any case in which the police have probable cause to obtain a warrant. *See id.* The court refused to endorse that approach, noting the "obvious objection . . . that if it were adopted the police might never bother to apply for a warrant, in order to avoid the risk that the application would be denied." *Id.* But the court also rejected as "untenable" the "opposite rule" that "would allow the doctrine to be invoked only if the police were in the process of obtaining a warrant . . . ." *Id.* Such a rule, the court said, would confer a windfall on the defendant in violation of the principle "'that a person can't complain about a violation of his rights if the same injury would have occurred even if they had not been violated.'" *Id.* (quoted source omitted).

Instead, the court adopted a middle ground: "to require the government, if it wants to use the doctrine of inevitable discovery to excuse its failure to have obtained a search warrant, to prove that a warrant would certainly, and not merely probably, have been issued had it been applied for." *Id.* That requirement, the court held "preserves the incentive of police to seek warrants where warrants are required without punishing harmless mistakes excessively." *Id.*

That requirement is easily satisfied in this case. The State can demonstrate that "a warrant would certainly, and not merely probably, have been issued had it been applied for" because a warrant actually was applied for and was issued on November 9.

Avery also cites *State v. Pickens*, 2010 WI App 5, 323 Wis. 2d 226, 779 N.W.2d 1, to support his contention that the State must show that the police were "in the process of procuring a second search warrant when they discovered the Toyota key." Avery's brief-in-chief at 45. In *Pickens*, the police suspected that the defendant, who was staying in a motel room, was engaged in illegal drug activity. When police went to the room, they encountered a woman who consented to a search of the room. *Pickens*, 323 Wis. 2d 226, ¶¶7, 37. Using a key that they had obtained from the defendant pursuant to what the court of appeals determined was an illegal detention, the police unlocked the room safe and found drugs. *Id.*, ¶¶7, 33, 37.

The court of appeals held that the woman's consent to search the room did not allow police to open the safe. *Id.*, ¶47. The court then addressed the State's inevitable discovery argument, which

the court described as: "because, by the time police illegally searched the safe, they had enough information to obtain a search warrant for the safe, it follows that the police would have inevitably acquired a warrant and legally obtained the contents of the safe." *Id.*, ¶49.

The court of appeals rejected that argument because the State did not "explain how its theory satisfies the requirement that police be actively pursuing the legal alternative – here, a warrant – prior to the unlawful search." *Id.* The court held that "[i]f the existence of probable cause for a warrant excused the failure to obtain a warrant, the protection afforded by the warrant requirement would be much diminished. *Id.* The court held that the inevitable discovery doctrine did not apply because it saw "nothing in the record to support the view that police were actively pursuing an alternative legal means of opening the safe . . . ." *Id.*, ¶50.

Avery apparently reads *Pickens* to have established a rule that in all cases in which the State argues that the inevitable discovery would have resulted from the execution of a subsequently issued search warrant, the State must show that it actually was in the process of obtaining a search warrant at the time of the unlawful search. If that is what *Pickens* requires, it conflicts with the supreme court's decision in *State v. Weber*, 163 Wis. 2d 116, 471 N.W.2d 187 (1991).

In *Weber*, the defendant was charged with murdering and sexually assaulting his sister-in-law and sexually assaulting and attempting to murder his wife. *Id.* at 121. He moved to suppress the contents of an audio cassette tape in

which he described his crimes against his sister-in-law. *Id*. at 125-26.

The supreme court held that the police had lawfully seized the cassette and listened to it pursuant to the inventory search exception to the warrant requirement. *Id*. at 132-37. But the court also discussed whether, assuming the playing of the tape was illegal, it would be admissible under the inevitable discovery doctrine. *Id*. at 140-42. The court held that because a police interview with the defendant's wife revealed a connection between the tape and the offenses against his wife, it was inevitable that the police would have obtained a warrant to listen to the tape.

> Although the interview with Emily did not reveal the tape's connection with the murder of Carla Lenz, it revealed the tape's connection with the attempted murder and assault of Emily. With this knowledge, the police would inevitably have obtained a warrant to play the tape in an attempt to find out why the defendant was keeping the tape a "secret" during the night of the assault, after he had been talking about it, on and off, to Emily. The contents of the tape, revealing the recitation of Carla's murder and his intent to do the same thing to Emily, would then have inevitably been discovered.

Id. at 141. Thus, the court concluded, "[e]ven assuming that the tape was unlawfully played in the first instance . . . , that should not be grounds to suppress the tape once the doctrine of inevitable discovery is applied." *Id*. at 141-42.

The supreme court in *Weber* did not require a showing that the police were in the process of obtaining a warrant when they played the tape. Rather, it was sufficient that the police, with the

knowledge they had, inevitably would have obtained a warrant to play the tape.

This court need not determine whether *Pickens* conflicts with *Weber* and is not, therefore, good law. *See Madison Reprographics, Inc. v. Cook's Reprographics, Inc.*, 203 Wis. 2d 226, 238, 552 N.W.2d 440 (Ct. App. 1996) ("When a court of appeals decision conflicts with a supreme court opinion, we must follow the supreme court opinion."). The facts of this case differ significantly from *Pickens*. In *Pickens*, the police never obtained a search warrant. In this case, in contrast, officers not only had the original search warrant authorizing the search of Avery's trailer, but they obtained a new warrant reauthorizing the search of the trailer the day after the challenged search.[2] And regardless of whether the actual drafting of the new affidavit for search warrant had begun by the time of the November 8 search, law enforcement had begun the warrant application process by compiling and documenting the information that was supplied in the affidavit.

All of the requirements for the application of the inevitable discovery doctrine have been satisfied in this case. Accordingly, even if the court were to determine that the November 8 search was not a reasonable continuation of the

[2] While the November 9 affidavit for search warrant recounted the discovery of the key in Avery's trailer, the balance of the affidavit contained ample untainted information, such as the discovery of presumptive blood in Halbach's vehicle, the discovery of spent rifle shell casings and areas of apparent dried blood in Avery's garage, and the discovery of firearms, handcuffs, and leg irons in Avery's trailer, to provide probable cause for issuing the November 9 search warrant. *See Keszthelyi*, 308 F.3d at 575.

original search, the key nevertheless was admissible.

D. Any error in admitting the key was harmless.

Avery's challenge to the November 8 search of his trailer, if meritorious, would result in the suppression of a single piece of evidence – the key to Ms. Halbach's vehicle. *See* Avery's brief-in-chief at 34. However, because the State presented compelling evidence of Avery's guilt in addition to the key, and because the key provided the strongest evidence to support Avery's theory of the defense, any error in admitting the key was harmless.

The State acknowledges that the key was a significant piece of evidence at trial. The prosecution presented evidence that the key fit the ignition of Ms. Halbach's vehicle and that Avery's DNA was on the key (314:181-83). Whether erroneously admitted evidence was significant, however, is not the standard for determining whether the error was harmless.

The supreme court has articulated the test for harmless error two ways: (1) error is harmless if it is "'clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error;'" and (2) the error is harmless if the beneficiary of the error proves "'beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.'" *State v. Mayo*, 2007 WI 78, ¶47, 301 Wis. 2d 642, 734 N.W.2d 115 (quoted sources omitted). An assertion of harmless error is not defeated simply by showing that the jury likely relied on the erroneously admitted evidence.

Instead, reviewing courts "consider the error in the context of the entire trial and consider the strength of untainted evidence." *State v. Thoms*, 228 Wis. 2d 868, 873, 599 N.W.2d 84 (Ct. App. 1999). Courts "weigh the effect of the inadmissible evidence against the totality of the credible evidence supporting the verdict." *State v. Britt*, 203 Wis. 2d 25, 41, 553 N.W.2d 528 (Ct. App. 1996).

1. The other evidence of Avery's guilt was compelling.

The key to Teresa Halbach's vehicle was not the only evidence tying Avery to her murder. There was substantial other evidence of Avery's guilt, including DNA and ballistics evidence, that pointed clearly and directly to Avery as the killer.

The jury heard testimony that Ms. Halbach came to the Avery Salvage Yard on October 31, 2005, at Avery's request. Ms. Halbach supplemented her income as a professional photographer by taking photographs of vehicles for *Auto Trader* magazine (306:165-66). That morning, *Auto Trader*'s receptionist received a call from a man identifying himself as "B. Janda" who said that he was selling a minivan and wanted the photographer who had been out there before to take photos of it (307:75-76). Ms. Halbach had taken photographs at the Avery Salvage Yard on five previous occasions (307:49-50).

Avery's sister, Barbara Janda, lived in the trailer next door to Avery, together with three of her children, Bobby, Blaine, and Brendan Dassey (298:34; 316:59-60, 65). Bobby Dassey testified that he was at home at 2:30 p.m. on October 31 when a teal colored SUV drove into his driveway

(298:34-36). He saw Teresa Halbach get out of the SUV and take a picture of his mother's van (298:37). As Bobby went to take a shower, he saw Ms. Halbach walking towards Avery's trailer (298:38).

Bobby did not see Ms. Halbach again (298:39). When he left home around 2:45 p.m., her SUV was still there, but he saw no other sign of her (298:39-40). When Bobby returned around 5:00 p.m., the SUV was not visible (298:41).

There was no evidence adduced at trial that anyone saw or heard from Ms. Halbach after Bobby Dassey saw her walking towards Avery's trailer.

Blaine Dassey testified that when he arrived home from school that day around 3:50 p.m., he saw Avery putting a plastic bag into an actively burning burn barrel (316:66-68). Blaine left home to go trick-or-treating around 5:30 p.m. (316:64). When he returned home around 11:00 p.m., he saw Avery watching a bonfire that was burning behind Avery's garage (316:70-75).

Scott Tadych, who was then dating and later married Barbara Janda, testified that when he picked up Janda at her house at around 5:00 or 5:15 p.m. on October 31, he saw a purple vehicle in the driveway (316:124-27). When he dropped Janda off at her home around 7:30 to 7:45 p.m., he saw Avery standing beside a very large fire behind Avery's garage (316:129-30).

When Ms. Halbach's family and friends realized on November 3 that no one had seen or heard from her in several days, they launched a large-scale effort to find her (307:158-172). On the morning of November 5, two volunteer searchers

found her SUV in the Avery Salvage Yard, covered with branches, plywood, and a hood (307:209-12).

State Crime Laboratory employees transported the vehicle to the Madison Crime Lab that evening (309:96-97; 310:22). There, investigators found a large blood stain on the floor of the rear cargo area as well as several smaller blood stains in the cargo area (314:57-60, 135-141). A State Crime Laboratory forensic scientist who performs bloodstain pattern analysis testified that the blood stains in the cargo area were contact stains indicative of bloody hair transferring blood from a head to a surface (315:200, 222-24). A State Crime Lab DNA analyst testified that a DNA analysis of the blood stains revealed that Teresa Halbach was the source of that blood (314:156-57).

Crime Lab personnel also discovered blood stains at several locations in the vehicle's interior, including the instrument panel near the ignition switch, the driver's and front passenger's seats, and on a CD case on the front passenger seat (314:144-148). DNA analysis revealed that Avery was the source of those blood stains (314:185-96).

The bloodstain pattern analyst testified that the bloodstain near the ignition switch was consistent with someone who was actively bleeding from his right hand and that the other bloodstains in the passenger compartment similarly were consistent with blood dripping from a person who was actively bleeding (315:220, 232-33). An officer who was present when a physical examination was performed on Avery on November 9, 2005, testified that he observed a cut on the middle finger of Avery's right hand (310:223-24). The jury was shown a photograph that showed a deep cut approximately two

centimeters long on Avery's finger (*id.*; 333:Exhibit 193).

Crime Lab personnel discovered that the battery in Ms. Halbach's vehicle had been disconnected (315:230). A swab was taken of the exterior hood latch (314:172). DNA testing of the swab produced a profile that matched Avery (314:173-76).

Investigators discovered burned bone fragments, including skull fragments, in and around a burn pit behind Avery's garage (317:19). A forensic anthropologist testified that the bone fragments were those of a human female no older than thirty to thirty-five years old, that there were defects in two of the skull fragments caused by gunshots, and that those defects occurred before the body was burned (317:132-38, 150, 165-66).

Because of the charred condition of the remains, it was not possible to obtain a complete DNA profile that would allow the Crime Laboratory's DNA analyst to determine to a reasonable degree of certainty that the remains found in Avery's burn pit were those of Teresa Halbach (314:160-61). However, the analyst testified that based on a partial DNA profile that was developed, the probability that another random, unrelated person would have that profile was at most one in one billion (314:161-62).

There was other physical evidence that established that the remains found were those of Teresa Halbach. A forensic odontologist testified that he examined twenty-four charred and badly damaged tooth and root fragments that had been recovered from the scene (317:69-71). He was able to determine that one of the root fragments was

very consistent with Ms. Halbach's dental x-rays (317:89-90).

Searchers also found rivets from Daisy Fuentes brand jeans in the burn pit (313:161-63). Ms. Halbach's sister testified that Ms. Halbach owned a pair of Daisy Fuentes jeans and that those jeans were missing after her disappearance (314:39-40). They also found burned remnants of a cell phone, PDA, and camera in a burn barrel in Avery's front yard that were the same models as the cell phone, PDA, and camera that Ms. Halbach owned (306:160, 166-67; 310:151-57; 313:152-53; 318:58-70)).

Officers found .22 caliber cartridge casings, a nearly intact bullet, and a bullet fragment on the floor of Avery's garage (311:101-02; 312:165-70; 313:169-70, 174, 177). They also found two guns in a gun rack in Avery's bedroom, one of which was a .22 caliber rifle (311:92-93). A State Crime Laboratory firearms examiner testified that all of the casings and the more intact bullet had been fired from that rifle (318:108-09, 116).

The DNA analyst was able to extract DNA from the bullet (314:163-64). She testified that Teresa Halbach was the source of that DNA (314:168).

Over the course of a lengthy trial, prosecutors methodically built a compelling case against Avery. The key found during the search of Avery's trailer was only one of many pieces of evidence that pointed inexorably towards Avery as Teresa Halbach's killer. Under either formulation of the harmless error test, any error in admitting the key was harmless.

That conclusion is buttressed by the lack of emphasis placed on the key by the district attorney in closing argument. The prosecutor's closing argument encompasses one hundred pages of transcript (327:31-131). His discussion of the key consumes only seventeen lines of those one hundred pages (327:120-21). The prosecutor noted that the DNA on the key was a perfect match to Avery's DNA and reminded the jury that it had heard testimony that the most likely source of the DNA found on the key was the last person to handle it (327:120). From that, the prosecutor argued that Avery, in whose bedroom the key was found, was the last person to handle the key (*id.*). The prosecutor concluded by stating "[t]hat is significant evidence" (327:120-21).

In contrast, Avery's counsel discussed the key at length in his closing argument. Defense counsel argued that the best explanation for why the key was found in Avery's bedroom was that it had been planted and suggested that the source of the DNA on it was Avery's toothbrush or another personal item to which the police had access (327:162-72). In rebuttal, the prosecutor's discussion of the key focused primarily on refuting the defense contention that it had been planted rather than the key's evidentiary significance (328:58-63). Moreover, the prosecutor argued that even if the jury were to "set the key aside," it still should find Avery guilty because "that key, in the big picture, in the big scheme of things here, means very little" (328:64). The prosecutor told the jury that "I'm telling you that not because I don't want you to consider it, not because I think that it's not important," but because "if you buy [defense counsel's] argument that [the officers] were trying to make sure that a guilty person was

found guilty" it "shouldn't matter whether or not that key was planted" (328:64-65).

2. The key provided the strongest support for the theory of the defense.

Avery's defense at trial was "that police officers who had access to a vial containing Steven Avery's blood, which was located in the clerk of court's office, planted Steven's blood in Ms. Halbach's car, and that the ignition key was planted as well." Avery's brief-in-chief at 8. Avery identified two officers from the Manitowoc County Sheriff's Department, Lieutenant Lenk and Sergeant Colborn, as the perpetrators of the evidence planting scheme (306:117-20, 147; 327:151-52).

The State devoted a substantial portion of its case-in-chief to demonstrating that no evidence had been planted. The State presented evidence that Ms. Halbach's vehicle was locked when searchers found it at the Avery salvage yard Saturday morning, that from the time of its discovery until it was placed in an enclosed trailer that evening and transported to the Crime Lab, the vehicle was under continuous observation by law enforcement and no one entered or disturbed it, and that its doors were locked when it arrived at the Crime Lab (298:7-8, 32; 307:209-10, 224; 308:148-49, 171-74; 309:93-97, 104; 310:17). With regard to access to the vial of Avery's blood, the State presented evidence that the court file containing the blood vial was kept in a locked inner office in the clerk of court's office that

required a numerical access code to enter (321:18, 26).

Avery responded by arguing that because the Manitowoc Sheriff's Department is responsible for courthouse security, "they have master keys that fit all the doors," so "how difficult, really, would it be for someone like Lieutenant Lenk or Sergeant Colborn, veteran officers, to come in after hours, or on Saturday morning, and get what they needed" (327:175-76). Anticipating that the State would respond that there was no evidence that that had happened, defense counsel argued that the jury should not expect that there would be any such evidence (327:176).

With regard to how Lenk or Colborn could have planted the blood in Ms. Halbach's SUV, defense counsel argued that what probably happened was that, as darkness approached on November 5, one of the officers snuck up to the vehicle, unobserved by the other officers who were watching it (327:181-82). As to how the officer was able to enter a locked vehicle, defense counsel noted that the searcher who testified that the vehicle's doors were locked had not checked the rear tailgate, and further argued that even if the vehicle were locked, "[w]ho better knows how to open up a car, quickly, than police?" (327:182-83). Defense counsel did not, however, point to any evidence that remotely suggested that anyone actually had entered the vehicle between the time it was discovered at the salvage yard and transported to the Crime Lab the same day (327:179-85).

The coup de grâce to the blood-planting theory was delivered by Dr. Marc LeBeau, who is the unit chief of the Chemistry Unit at the Federal

Bureau of Investigation Laboratory in Quantico, Virginia (321:73). Dr. LeBeau testified that blood collection tubes typically contain a preservative or anticoagulant agent (321:90-91). The type of agent is indicated by the color of the tube's stopper (321:91). Purple-stoppered blood collection tubes use ethylenediaminetetraacetic acid (EDTA) as the anticoagulant agent (*id.*). Avery's blood was in a purple-stoppered tube (321:94).

Dr. LeBeau testified that the FBI laboratory tested a number of items of evidence for the presence of EDTA, including swabs taken from the bloodstains in Ms. Halbach's RAV4, control swabs taken from areas near the bloodstains, and Avery's blood from the purple-stoppered tube (321:94-99, 103, 114). The testing protocol used by the FBI was able to detect the presence of EDTA in a sample as small as one microliter of EDTA-preserved blood, a minute amount equivalent to about one-fiftieth of a drop (321:129).

According to Dr. LeBeau, if the bloodstain swabs from Ms. Halbach's vehicle tested positive for EDTA and the control swabs tested negative, that would be an indication that the blood came from a purple-stoppered tube and had been planted (321:127). On the other hand, if EDTA were not found on the bloodstain swabs, that would suggest that the blood came from active bleeding and not from an EDTA-preserved tube (*id.*).

Dr. LeBeau testified that the FBI Laboratory was unable to identify any presence of EDTA in the bloodstain swabs or the control swabs from Ms. Halbach's vehicle (321:133-34). The blood from the tube containing Avery's blood, in contrast, contained "significant amounts of

EDTA in it" (321:134). Dr. LeBeau testified, to a reasonable degree of scientific certainty, "that the bloodstains that were collected from the RAV4 could not have come from the EDTA tube" (321:135).

In an attempt to counter that evidence, the defense called Janine Arvizu, an independent contractor who works as a laboratory quality auditor (324:5-6). Ms. Arvizu agreed that when the FBI's testing protocol produces a positive result, that is a valid indication that there is EDTA in the sample (324:23). She also testified that if the result were negative, she could not tell whether that meant that there was no EDTA or that the level of EDTA was below the testing method's detection limit (324:23-24). In Ms. Arvizu's opinion, it was "quite plausible" that the bloodstains swabbed from the RAV4 contained EDTA, "but the lab simply was not able to detect it" (324:59). However, Ms. Arvizu did not testify that EDTA was present in the swabs. Nor did she explain why, if Avery's blood vial was the source of the bloodstains in the vehicle, the EDTA levels in those bloodstains would have been below the FBI's detection limit given the FBI's finding that the blood in the vial contained significant amounts of EDTA (324:5-104).

With the blood-planting theory substantially undermined by the EDTA testing, the defense turned to the key. Defense counsel, in his closing argument, ridiculed it as the "magic key" and called it "the biggest, most glaring suspicious piece of evidence in this case" (327:161-62). Indeed, counsel attempted to use the circumstances surrounding the discovery of the key to compensate for the lack of any evidence that the

blood had been planted. He argued to the jury that

> if you believe that those police officers put that key in his room, that they are capable of planting that kind of evidence to try and link him, they why not plant -- why couldn't they have also planted blood. If they go to that extent that they . . . plant Teresa Halbach's key in his bedroom to try and convict him, then that's it, it's over, case over, because you can't rely on anything else they have given you.

(327:162).

Defense counsel argued that it made no sense for Avery to keep an incriminating item in his own bedroom (327:163). He pointed out that the key was not found in the prior searches and attributed that to the presence of a Calumet County officer who was watching the Manitowoc officers "like a hawk" (327:163-65). He then mocked the officers' account of how they found the key.

> Lieutenant Lenk is right here with his back to [Calumet County Sheriff's Deputy Daniel Kucharski], like this, crouched down on the floor, so he's not going [to] see what's going on. Lenk gets up, walks out the door, comes back in a minute later, oh, my gosh, look at that, there's a key. Lo[] and behold, it's in plain view.
>
> And so they come up with this theory, this absolutely preposterous theory on how this magic key, that no one ever finds before, suddenly appears in plain view, out of this bookcase. They find it right there, where those slippers are. Right like that.

> And how does it happen, well, they decide, maybe they help the back of this cabinet a little bit, but they decide that somehow this key must be secreted in this cabinet, by Mr. Avery, in his own bedroom, with everybody looking at him, and that it somehow magically fell out this -- this gap, bounces off the wall. And by the way, we're talking about key, fob, and plastic clip. Somehow bounces off the wall, turns around the corner and lands, what is it 90 degrees from where it should be, where it would have fallen.

(327:166-67).

As the district attorney pointed out in his rebuttal argument (328:67-70), there were serious flaws in the key-planting theory, not the least of which was: where did the police get the key? The person who killed Teresa Halbach would have had access to her key, but defense counsel disclaimed any contention that the police killed her (327:132). Nowhere in their closing arguments did either defense counsel offer any suggestion as to where, when or how Lenk or Colborn obtained the key (327:132-214; 328:4-53).

Nevertheless, because of the circumstances surrounding its discovery, the key offered the best support for Avery's defense that the police planted evidence. While the State had a very strong case against Avery without the key, the theory of the defense was untenable without it. Because the State's case was very strong even without the key, and because the key provided the strongest support for the theory of the defense, the admission of the key, if erroneous, was harmless error.

II. THE TRIAL COURT PROPERLY EXCLUDED THIRD-PARTY LIABILITY EVIDENCE.

Avery contends that he is entitled to a new trial because the trial court prevented him from introducing evidence that other persons may have killed Teresa Halbach.[3] Avery argues that the trial court erred when it concluded that *State v. Denny*, 120 Wis. 2d 614, 357 N.W.2d 12 (Ct. App. 1984), provides the framework for determining whether to allow that evidence. *See* Avery's brief-in-chief at 46-63. He further argues that even if *Denny* applies, the evidence he sought to introduce was admissible. *See id.* at 63-66.[4]

Because the decision whether to admit evidence is a discretionary determination, this court has reviewed decisions excluding evidence under *Denny* for an erroneous exercise of discretion. *See State v. Jackson*, 188 Wis. 2d 187, 194-96, 525 N.W.2d 739 (Ct. App. 1994). However,

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[3] The court permitted Avery to offer evidence that Brendan Dassey was responsible for the charged crimes (204:1; A-Ap. 209). Avery did not offer any such evidence, presumably because Dassey gave a statement to the police describing how he and Avery raped and murdered Ms. Halbach (22:2-5). According to online CCAP records, Brendan Dassey was convicted in Manitowoc County case no. 2006CF88 of being a party to the crimes of first-degree intentional homicide, mutilating a corpse, and second-degree sexual assault.

[4] Avery also argues that *Denny* was wrongly decided. *See* Avery's brief-in-chief at 66-67. He acknowledges that under *Cook v. Cook*, 208 Wis. 2d 166, 560 N.W.2d 246 (1997), this court lacks the authority to overrule *Denny* and states that he raises the issue to preserve it for review by the supreme court. Avery's brief-in-chief at 66. Because Avery is correct that this court lacks the authority to overrule *Denny*, the State will not address the issue further.

"when the focus of a circuit court's ruling is on a defendant's asserted due process right to introduce evidence, the issue is more properly characterized as one of constitutional fact, and is, therefore, subject to de novo review." *State v. Knapp*, 2003 WI 121, ¶173, 265 Wis. 2d 278, 666 N.W.2d 881, *vacated and remanded,* 542 U.S. 952 (2004), *reinstated in material part,* 2005 WI 127, ¶2 n.3, 285 Wis. 2d 86, 700 N.W.2d 899.

A. Avery has not shown that the trial court's order prevented him from presenting any significant evidence.

Before discussing whether *Denny* applies in this case or whether Avery carried his burden under *Denny*, the State will summarize the evidence of third-party guilt that Avery was precluded from introducing at trial. The State does so because Avery's brief fails to answer a critical question: Even if *Denny* were not applicable, what evidence would Avery have introduced that had even the remotest chance of altering the outcome of the trial? The answer to that question is that Avery failed to identify, in either his pretrial proffer or postconviction motion, any such evidence. Indeed, the trial court held that "the third party liability evidence offered by Steven Avery would not be admissible whether or not it was required to meet the *Denny* legitimate tendency test" (370:102; A-Ap. 204) and that Avery had not offered "any meaningful evidence . . . to suggest that any of the persons named were directly connected to the crimes in any way" (204:15; A-Ap. 223).

Although Avery's pretrial proffer identified ten people as the subject of potential third-party liability evidence (169:9), Avery's appellate argument discusses only four individuals: Bobby Dassey, Scott Tadych, Charles Avery, and Earl Avery. *See* Avery's brief-in-chief at 46-67. Accordingly, the State will limit its discussion to the evidence discussed in Avery's brief regarding those individuals.

Bobby Dassey. Avery's brief summarizes some of the trial evidence involving Bobby Dassey that demonstrated "timing discrepancies" between Bobby's testimony and that of other witnesses concerning Bobby's location and activities on October 31, 2005. *See* Avery's brief-in-chief at 57-58. Avery acknowledges that he was able to pursue these discrepancies in his cross-examination of Bobby. *Id*. at 58. He argues, however, that "[w]hile the defense could point out these timing discrepancies in its cross-examination of Bobby, it could not connect for the jury why it mattered: that Bobby may have killed Teresa Halbach." *Id*.

Avery is wrong. As the trial court stated in its postconviction decision, its ruling did not prevent the defense from arguing that the evidence that was admitted at trial demonstrated that other individuals, named or unnamed, may have committed the crime (370:62; A-Ap. 164). The court noted that defense counsel had, in closing argument, argued that "when the state tells you that Bobby Dassey is this credible witness, who's the last person to see Teresa Halbach alive, maybe he's right, if he's the killer. Or Scott Tadych, his only alibi" (370:62-63; A-Ap. 164-65 (citing 327:208)). The State objected to that argument on the ground that it violated the court's third-party liability ruling (327:209).

The court did not explicitly rule on the State's objection because defense counsel said that his purpose was to suggest that the investigators focused on Avery to the exclusion of other possible suspects (370:64; A-Ap. 166). But the court observed that:

> [t]he result of the court's action was that the jury heard the defense argument suggesting other individuals may have been responsible for the murder of Teresa Halbach on the precise terms defense counsel indicated they wished to present the argument. Moreover, the court's comments on the record outside the presence of the jury certainly notified Avery's counsel that if they wished to argue third party liability in their closing argument, the court's pretrial third party liability ruling did not prevent them from doing so.

(*Id*.).

Avery argues that the trial court's ruling prevented him from cross-examining Bobby Dassey as a suspect rather than simply as a witness. *See* Avery's brief-in-chief at 57. He notes that Bobby testified that Avery had asked him and a friend if they wanted to help dispose of a body. *Id*. at 58-59. Avery acknowledges that "the defense was able to diffuse this through testimony that Avery intended this remark as a joke." *Id*. at 59. He argues, however, that but for the court's ruling, Bobby's testimony could have been addressed as a blame-shifting effort by someone who himself was culpable. *Id*.

But Bobby testified on *direct* examination that "it sounded like [Avery] was joking, honestly" when he made that remark (298:47). Given that Bobby himself downplayed the significance of what he characterized as a joke, it would have been strange to suggest through cross-

examination that Bobby had invented the conversation to shift the blame from himself to Avery.

Avery also notes that his trial counsel testified that he would have cross-examined Bobby "more fully" on the mutual alibi that he and Scott Tadych offered for each other. *See* Avery's brief-in-chief at 59. Avery does not argue, however, that the court's ruling actually prohibited him from more fully cross-examining Bobby on that point. Instead, he argues that because the defense "could not accuse Bobby as a possible perpetrator, it would have made no sense to attack Bobby on cross-examination as to his alibi." *Id.*

But had the defense attempted to attack Bobby's alibi, what would that have yielded? Whatever effect the trial court ruling may have had on the defense's trial strategy, nothing prevented Avery from calling witnesses at the postconviction hearing to elicit evidence that called Bobby's testimony into question. He did not do that, however, so Avery can only speculate that cross-examining Bobby on his alibi would have produced anything helpful to the defense.

Scott Tadych. Avery notes that his trial counsel testified that, if not for the court's ruling, "he would have projected to the jury in his attitude, tone of voice and manner of questioning 'the view that he was a probable murderer.'" Avery's brief-in-chief at 60. Counsel's attitude, tone of voice and manner of questioning are not evidence, however.

Avery also argues that he would have attacked Tadych's account of where he was that day and his mutual alibi with Bobby Dassey. *See* Avery's brief-in-chief at 60-61. The State's

response to Avery's similar argument regarding Bobby Dassey applies here as well.

Avery further notes that defense counsel testified that but for the trial court's ruling he "would have considered calling witnesses to testify about Tadych's temper, his attempt to sell a .22 caliber long rifle shortly after Halbach's murder, and his 'bolting out of work, ashen faced, shortly after this, when he heard that one of the Dassey boys either had been arrested or was being questioned by the police.'" *Id*. at 61. However, Avery does not explain the significance of this evidence. *See State v. O'Connell,* 179 Wis. 2d 598, 609, 508 N.W.2d 23 (Ct. App. 1993) ("We do not consider undeveloped arguments").

In its postconviction decision, the trial court analyzed the evidence that Avery identified in his postconviction motion concerning Tadych's temper and concluded that it was inadmissible other-acts evidence (370:89-93; A-Ap. 191-95). Avery's brief does not discuss that ruling, and his failure to attempt to refute the ruling is a concession of its validity. *See Schlieper v. DNR*, 188 Wis. 2d 318, 322, 525 N.W.2d 99 (Ct. App. 1994).

With regard to the rifle, Avery asserted that a police report indicates that Tadych tried to sell a .22 rifle that belonged to one of the Dassey brothers (169:11; 351:22). Avery provided no further details about this purported attempted sale (*id*.). He did not say when Tadych tried to sell the rifle, other than that it was sometime – days? weeks? months? – after Ms. Halbach died (169:11). Moreover, the .22 caliber rifle found in Avery's bedroom – the rifle that fired the bullet that had Ms. Halbach's DNA on it (314:168;

318:116) – did not belong to any of the Dassey brothers but to a friend of Avery (323:160-61).

Finally, with regard to evidence that Tadych "bolt[ed] out of work, ashen faced . . . when he heard that one of the Dassey boys either had been arrested or was being questioned by the police," Avery fails to explain why that is evidence of Tadych's guilt, rather than Tadych's shocked response to learning that the police believed that the son of his then-girlfriend (and soon-to-be wife) was a suspect in Ms. Halbach's killing.

Charles Avery and *Earl Avery*. Avery asserts that Charles and Earl Avery had the opportunity to kill Ms. Halbach because they worked at the salvage yard and "would have known about the photographer who came to take photos for Auto Trader magazine" Avery's brief-in-chief at 64-65. He also contends that both had access to guns. *Id*. at 66. Even assuming the accuracy of those assertions (Avery admits that there was no testimony regarding Charles' access to guns, *see id*.), the issue is whether the trial court erred by excluding evidence of Charles and Earl Avery's guilt. Yet Avery does not identify any evidence relating to Charles or Earl that he was prevented from introducing at trial.

Indeed, as this summary demonstrates, Avery has not identified any admissible evidence that he was precluded from presenting that would have any conceivable impact on the outcome of his trial. Avery may protest that the trial court's order prevented him from developing such evidence at trial. However, there was nothing to prevent him from doing so at the postconviction hearing.

Avery has not shown, therefore, that he was prejudiced by the court's ruling. Put another way, regardless of whether *Denny* applies in this case, if the trial court erred by excluding evidence of third-party liability, the error was harmless. The strength of the State's case cannot be a factor in determining whether to admit third-party liability evidence. *See Holmes v. South Carolina*, 547 U.S. 319, 329-31 (2006). However, it is a central consideration when determining whether the exclusion of that evidence was harmless error. *See Thoms*, 228 Wis. 2d at 873. There was abundant evidence that Avery murdered Teresa Halbach. Weighed against that evidence is the lack of any showing that, absent the trial court's order, the defense would have introduced any evidence of third-party liability that would have raised the faintest of doubt about Avery's guilt. Accordingly, even if the trial court erred when it excluded third-party liability evidence, the error was harmless.

B. *Denny* provides the proper framework for determining the admission of the third-party liability evidence.

In *Denny*, the defendant was precluded from presenting evidence that other people had a motive to commit the homicide with which he was charged. *Denny*, 120 Wis. 2d at 621. He argued on appeal that he had a constitutional right to present that evidence in his defense. *Id.* at 621-22. The court of appeals held that evidence of third-party guilt is admissible if the defendant demonstrates a "legitimate tendency" that the third person could have committed the crime. *Id.* at 623.

The legitimate tendency test "asks whether the proffered evidence is so remote in time, place or circumstances that a direct connection cannot be made between the third person and the crime." *Id.* at 624. Evidence of third-party guilt is admissible "as long as motive and opportunity have been shown and as long as there is also some evidence to directly connect a third person to the crime charged which is not remote in time, place or circumstances . . . . " *Id.* at 624. However, evidence that "simply affords a possible ground of suspicion against another person" is not admissible. *Id.* at 623. "The [legitimate tendency test] is designed to place reasonable limits on the trial of collateral issues . . . and to avoid undue prejudice to the [state] from unsupported jury speculation as to the guilt of other suspects." *Id.* at 622 (citation and internal quotation marks omitted).

Avery offers three reasons why *Denny* should not be applied in this case.

1. Avery argues that his constitutional right to present a defense "trumps the evidentiary rule articulated in *Denny*." Avery's brief-in-chief at 49. But *Denny* held that "even though the right to present witnesses in his own defense is a fundamental constitutional right, that evidence must be relevant to the issues being tried." *Denny*, 120 Wis. 2d at 622. The court adopted the legitimate tendency test to balance the accused's right to present a defense against the State's interest in excluding irrelevant evidence that would confuse the jury.

In *Holmes*, the Supreme Court held that a South Carolina evidentiary rule that barred a defendant from introducing evidence of third-party

guilt when there is strong evidence, especially forensic evidence, of the defendant's guilt, violated the constitutional right to present a defense. *See Holmes*, 547 U.S. at 330-31. In reaching that conclusion, however, the Court reaffirmed that:

> [w]hile the Constitution . . . prohibits the exclusion of defense evidence under rules that serve no legitimate purpose or that are disproportionate to the ends that they are asserted to promote, well-established rules of evidence permit trial judges to exclude evidence if its probative value is outweighed by certain other factors such as unfair prejudice, confusion of the issues, or potential to mislead the jury.

Id. at 326. The Court stated that a "specific application of this principle is found in rules regulating the admission of evidence proffered by criminal defendants to show that someone else committed the crime with which they are charged." *Id*. at 327. The Court said that "[s]uch rules are widely accepted" and cited *Denny* as an example of such a rule. *Id*. at 327 & n.*.

2. Avery argues that "*Denny* does not apply in this case because the facts in *Denny* are very different." Avery's brief-in-chief at 52. He contends that "the *Denny* court's concern that the trial would turn into a parade of witnesses with animus against the victim is simply inapplicable in this case." *Id*. Avery is correct. His trial would not have involved a parade of witnesses with animus against Ms. Halbach. Rather, the parade would have included anyone who set foot on the Avery Salvage Yard property during the afternoon and early evening of October 31, 2005.

In his statement of facts, Avery says that prior to trial he filed a Statement on Third-Party Responsibility that "identified several persons as potential alternative perpetrators, including Scott Tadych, Charles and Earl Avery, and the Dassey brothers." Avery's brief-in-chief at 13. However, in that proffer, Avery cast a far wider net: "Avery identifies each customer or family friend and each member of his extended family present on the Avery Salvage Yard property at any time during the afternoon and early evening on October 31, 2005, as possible third-party perpetrators of one or more of the charged crimes. These include at least Andres F. Martinez, Robert M. Fabian, Jr., James J. Kennedy, Scott Tadych, Charles Avery, Earl Avery, Bryan Dassey, Bobby Dassey, Brendan Dassey, and Blaine Dassey" (169:9).

Avery notes that one of his lawyers testified at the postconviction hearing that the defense "would have settled on one or more people as to whom we thought we had the best case, that they had committed the crime" (362:111). But the trial court based its ruling on Avery's proffer (204:1-15; A-Ap. 209-23). There is nothing in the record that indicates that the defense ever informed the trial court that it had narrowed its focus and asked the court to reconsider its ruling in that light.

Avery also argues that *Denny* should be limited to cases in which the defendant seeks to identify others with a motive to commit the crime. *See* Avery's brief-in-chief at 52-53. He cites two Wisconsin Supreme Court cases as "precedent for the court to conclude that [when] the *Denny* framework cannot be molded to the particular facts of a case . . . the existing rules of evidence suffice to control admission of evidence." *Id.* at 53.

In the first of those cases, *State v. Richardson*, 210 Wis. 2d 694, 563 N.W.2d 899 (1997), the defendant was charged with sexually assaulting a fourteen-year-old girl. *Id.* at 699. The issue on appeal was whether the trial court properly excluded evidence that supported the defense theory that the defendant's estranged wife had framed him because he had filed for divorce. *Id.* at 697, 700.

The supreme court rejected the State's argument that the admissibility of evidence to support the frame-up defense should be determined under *Denny*'s legitimate tendency test. *Id.* at 705. The court stated that it saw no reason to adopt that test because "Richardson's proposed defense alleged that the victim was lying in an effort to frame him, not that someone else had committed the crime." *Id.*

Avery "concedes that the facts in *Richardson* are different in that Richardson evidently did not admit that a crime had occurred, but instead claimed that he was framed for a crime that did not occur." Avery's brief-in-chief at 54. Avery argues, however, that "the cases are analogous in that in *Richardson*, as here, the defendant sought to make a frame-up defense." *Id.* But as the trial court pointed out in its postconviction decision (370:74; A-Ap. 176), and as the State discussed above, Avery was permitted to introduce evidence that he was framed. Moreover, the court noted, Avery's proffer "related to opportunity evidence on the part of those individuals to have committed the crime, not to any effort on the part of any one of the individuals to frame him for the crime" (370:74; A-Ap. 176).

Avery also argues that *Richardson* is "instructive" because the supreme court said that it did not consider whether the "legitimate tendency" test is an appropriate standard for the introduction of third-party defense evidence. Avery's brief-in-chief at 55. However, six years after *Richardson*, the supreme court applied *Denny*'s legitimate tendency test when it held that the circuit court had properly admitted evidence that third parties had committed the charged crime. *See Knapp*, 265 Wis. 2d 278, ¶¶157-93. *Denny* now bears the supreme court's imprimatur.

The other case cited by Avery, *State v. Scheidell*, 227 Wis. 2d 285, 595 N.W.2d 661 (1999). is equally unhelpful. In *Scheidell*, the trial court, applying *Denny*, barred the defendant, who was charged with sexual assault, from introducing evidence of a similar crime committed by an unknown third party while the defendant was in jail. *Id*. at 290-92. The supreme court held that *Denny*'s legitimate tendency should not "be molded to fit a situation where the defendant seeks to show that some *unknown* third party committed the charged crime based on evidence of another allegedly similar crime." *Id*. at 296.

Avery acknowledges that "*Scheidell* is different from this case in that the defendant there sought to present evidence of the signature or *modus operandi* of a crime committed while he was in jail," while Avery "does not claim that someone else unknown to him had committed a similar crime at another time." Avery's brief-in-chief at 56. He argues, however, that, as in *Scheidell*, "putting the burden on a defendant to prove motive, opportunity and direct connection when the defendant does not know who did the

crime is virtually impossible" and "fundamentally unfair." *Id*. at 56-57.

The trial court noted in its postconviction order that, unlike the defendant in *Scheidell*, Avery did identify the individuals who, he claims, may have murdered Teresa Halbach (370:80; A-Ap. 182). The trial court correctly concluded, therefore, that "[u]nder the circumstances it is not 'virtually impossible for the defendant to satisfy the motive or opportunity prongs of the legitimate tendency test'" (370:80-81; A-Ap. 182-83).

3. Avery argues that *Denny* should not be applied here because the State "introduced evidence that other persons were excluded as perpetrators by forensic evidence, opening the door to the defense to present evidence tending to show others may have killed Ms. Halbach." Avery's brief-in-chief at 49. He specifically notes that the State was able to introduce evidence that DNA profiles developed from the Toyota key and from the blood in Ms. Halbach's vehicle did not match DNA profiles from Barb Janda, the Dassey brothers, or Earl, Chuck, Delores and Allen Avery, but that when the defense asked the State's fingerprint evidence expert "whether a print which did not match Steven Avery was compared to Scott Tadych, the court sustained the state's relevance objection, and the expert's answer was stricken." *Id*. at 62-63. Avery contends that the State "ought not be able to introduce evidence that others on the salvage yard were excluded by scientific evidence as the perpetrators while preventing the defense from introducing evidence to the contrary." *Id*. at 63.

There are two problems with that argument. First, Avery does not support it with any citation to legal authority. *See id*. at 62-63. This court does not consider arguments unsupported by references to relevant legal authority. *State v. Pettit*, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992).[5]

Second, the only line of questioning relating to forensic evidence that Avery identifies as being precluded was the question he put to the State's fingerprint evidence expert whether he had compared a print from Ms. Halbach's vehicle that did not match Avery to Scott Tadych. After the witness answered that he had not, the court sustained the State's objection and ordered the answer stricken (322:145).

However, defense counsel then asked the witness whether the fingerprint standards "that you listed on direct are the only ones you got to compare to these eight unknown fingerprints on

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[5] In his postconviction motion, Avery relied on *State v. Dunlap*, 2002 WI 19, 250 Wis. 2d 466, 640 N.W.2d 112, for the proposition that "[w]hen one party opens the door to an issue, the court may allow the opposing party to introduce otherwise inadmissible evidence as is required by fundamental fairness" (364:55). Avery noted that "[o]pening the door, or the curative admissibility doctrine, applies when one party accidentally or purposefully takes advantage of a piece of evidence that is otherwise inadmissible" (*id*.).

In its postconviction order, the trial court held that Avery's "open the door" argument failed because, among other reasons, Avery had not articulated why the State's forensic evidence was "otherwise inadmissible" (370:82; A-Ap. 184). In a tacit admission that the trial court was correct, Avery does not cite *Dunlap* on appeal. That leaves him with no legal authority in support of his "open the door" argument.

the RAV4," and the witness answered, without objection, "[t]hat's correct" (*id.*). On direct examination, the witness had testified that he had compared the unknown prints to those of Allen Avery, Steven Avery, Charles Avery, Earl Avery, Delores Avery, Bobby Dassey, Brian Dassey, Brendan Dassey, Barb Janda, and Scott Bloedorn (322:111-12). Because the witness testified that he had compared the unknown fingerprints only to those individuals, Avery was able to establish that the expert had not compared the unidentified print to Tadych or any other individual not on that list.

C. Avery did not carry his burden under *Denny*.

Denny requires that a defendant who seeks to introduce evidence of a third party's guilt must establish a "legitimate tendency" that makes the proposition plausible by showing proof of motive, opportunity, and a direct connection to the crime charged. *Denny,* 120 Wis. 2d at 623-24. Avery has not met that burden.

With regard to motive, Avery argues that "[g]iven that the state failed to prove that anyone had a motive, one is left with only possibilities, such as a sexual assault that led to a homicide, or an effort to hide evidence of a crime such as sexual assault." Avery's brief-in-chief at 64. That is not proof of motive, however, but speculation.

Avery suggests an additional motive: if someone else killed Ms. Halbach, that individual "would have a motive to save his own skin" by blaming Avery. Avery's brief-in-chief at 64. The trial court held that that argument, offered for the first time in Avery's postconviction motion, had

been waived because Avery did not raise it in his pretrial proffer (370:85; A-Ap. 187). Forfeiture aside, the problem with that theory is that it provides a motive for someone to frame Avery but not for killing Ms. Halbach.

Avery says that he has satisfied the opportunity and direct connection to the crime prongs of the *Denny* test because Scott Tadych, Bobby Dassey, Earl Avery, and Charles Avery were at the Avery Salvage Yard at some point during the period when Ms. Halbach likely was killed. Under Avery's reasoning, if someone was stabbed to death during halftime at a Milwaukee Bucks game, the defendant could put forth evidence regarding any or all 15,000 attendees as the possible killer. That is why proof of motive is an essential feature of *Denny*'s legitimate tendency test. Because Avery has not offered any proof that any third person had a motive to kill Ms. Halbach, he has not met *Denny*'s requirements.

D. Even if *Denny* does not apply, Avery has not shown that he was precluded from introducing any admissible evidence.

Avery has not identified any evidence relating to Charles or Earl Avery that he was precluded from introducing as a result of the trial court's ruling. *See supra*, pp. 42-43. The evidence that Avery says that he might have introduced regarding Bobby Dassey and Scott Tadych falls into two categories: 1) evidence that would have impeached their testimony about their whereabouts on October 31, 2005; and 2) evidence

about Tadych's temper, his attempt to sell a .22 caliber long rifle shortly after Halbach's murder, and his leaving work when he heard that one of the Dassey boys had been arrested or was being questioned by the police.

As discussed above, Avery has not identified any specific impeachment evidence relating to Tadych or Bobby Dassey that he was precluded from introducing. *See supra*, pp. 38-42. With regard to the non-impeachment evidence relating to Scott Tadych, the State previously has pointed out that the trial court ruled in its postconviction decision that the evidence regarding Tadych's temper was inadmissible other-acts evidence (370:89-93; A-Ap. 191-95). In his appellate brief, Avery does not address that ruling, thereby conceding its validity. *Schlieper*, 188 Wis. 2d at 322.

Avery's brief also fails to explain the relevance of the purported evidence that, at some unspecified time after Ms. Halbach's death, Tadych attempted to sell a .22 caliber rifle that belonged to one of the Dassey brothers (169:11; 351:22). The .22 caliber rifle that fired the bullet that tested positive for Ms. Halbach's DNA was found in Avery's bedroom, and that rifle did not belong to any of the Dassey brothers (314:168; 318:116; 323:160-61). Moreover, the State's firearms expert testified on cross-examination that the Marlin .22 caliber rifle is very common, with tens of thousands of them having been made over the years (318:146-47). Because Avery has not developed an argument explaining why Tadych's attempt to sell a rifle is relevant and, if relevant, sufficiently so to be admissible under Wis. Stat. § 904.03, his claim that the court erroneously excluded that evidence should be rejected. *See O'Connell,* 179 Wis. 2d at 609.

Finally, with regard to evidence that Tadych left work suddenly when he heard that one of the Dassey boys had been arrested or was being questioned by the police, Avery has failed to explain why that would be probative of Tadych's guilt or anything else, for that matter. Again, Avery's failure to provide a basis for admitting this evidence prevents this court from determining that the trial court erred when it excluded the evidence.

III. AVERY IS NOT ENTITLED TO A NEW TRIAL BECAUSE AN ALTERNATE JUROR WAS SUBSTITUTED AFTER DELIBERATIONS BEGAN.

Avery also seeks a new trial because the court removed a deliberating juror – without cause, he says – and substituted an alternate juror. If Avery were to prevail on this claim, his remedy would be a new trial at which twelve jurors who heard all of the evidence would decide his guilt. He would, therefore, receive the same trial he just had.

Avery's brief cites numerous decisions, primarily by federal courts of appeals, to support his claim. However, Avery has not cited a single case in which an appellate court has ordered a new trial after the defendant consented to the removal of a juror and to the substitution of an

alternate juror.[6] Because twelve jurors who heard all of the evidence decided this case, and because Avery expressly consented to the juror's substitution, neither the Constitution, the statutes, nor common sense requires that Avery be granted a new trial.

A. All but one of Avery's claims regarding the substituted juror have been forfeited or are barred under the invited error and judicial estoppel doctrines.

The jury began its first day of deliberations in the afternoon of March 15, 2007, and deliberated for about four hours before stopping for the day (362:13, 136). At around 9:00 p.m. that evening, the court received a call from the sheriff, who said that one of the jurors, Richard Mahler, wished to be excused because of a family emergency (359:1; A-Ap. 250). The court was informed that "the juror felt it was vital for his marriage that he be excused" (*id.*).

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[6] In only two of the cases cited by Avery was a new trial ordered after a new juror was substituted for a dismissed juror and the case decided by a twelve-member jury. In both of those cases, however, the defendant either objected to the juror's removal or moved for a mistrial before the jury returned its verdict. *See United States v. Symington*, 195 F.3d 1080, 1084 (9th Cir. 1999); *Hinton v. United States*, 979 A.2d 663, 669 (D.C. 2009). In the other cases cited by Avery in which a new trial was ordered, the defendant was convicted by an eleven-member jury after a juror was removed over the defendant's objection. *See United States v. Ginyard*, 444 F.3d 648, 650 (D.C. Cir. 2006); *United States v. Curbelo*, 343 F.3d 273, 278-85 (4th Cir. 2003); *United States v. Araujo*, 62 F.3d 930, 932 (7th Cir. 1995); *United States v. Essex*, 734 F.2d 832, 834 (D.C. Cir. 1984).

The court held a telephone conference with defense counsel and one of the prosecutors to discuss how to proceed (*id.*). At that time, Judge Willis was in Manitowoc, Avery's lawyers, Dean Strang and Jerome Buting, were having dinner at a restaurant in Appleton, the prosecutors were in Chilton and Appleton, and Avery was in jail in Chilton (362:230; 370:3-4; A-Ap. 105-06). Counsel agreed that if the information conveyed by the sheriff was correct, excusing the juror was appropriate (359:1; A-Ap. 250). Counsel authorized the court to speak with the juror and to excuse the juror if the information was verified (*id.*).

The court then spoke with Mr. Mahler (359:2; A-Ap. 251). Mahler confirmed the information that had been reported to the court about several issues relating to his marriage, leading the court to conclude that Mahler "felt the future of his marriage was at stake if he was not excused" (*id.*). The court excused Mahler from service (*id.*).

The next morning, the court held an in-chambers conference with counsel (362:95). The court and counsel agreed that the three available options were to continue deliberations with eleven jurors, to declare a mistrial, or to allow the alternate juror to join the deliberations, with the jury instructed to begin deliberations anew (362:96). Avery's lawyers then left to consult with Avery (362:97). They recommended to him that he not choose a mistrial and that the deliberations should proceed with twelve jurors (362:101-02, 153-54).

The court then went on the record with Avery present and recounted the events of the previous evening (329:4-8; R-Ap. 113-17). Avery

did not object to anything that the court had done (329:4-5; R-Ap. 113-14). Defense counsel then proposed a stipulation: "One, if the Court gives a proper instruction that jury deliberations must begin entirely anew[,] [a]nd, two, if each of the 11 presently deliberating jurors provides satisfactory assurance that they can and will follow an instruction to begin deliberations anew, then, three, the defense will agree that the person who has been the alternate to date should join the ranks of the 11, becoming the 12th regular juror and the deliberations may begin anew with this newly composed group of 12" (329:5-6; R-Ap. 114-15). The prosecutor joined the stipulation (329:6; R-Ap. 115).

The court then conducted a colloquy with Avery that confirmed Avery's understanding that he had the right to request a mistrial or require a jury of twelve, that he had sufficient time to discuss the matter with counsel, and that he was in agreement with the proposed stipulation (329:7-8; R-Ap. 116-17). The court found that Avery had knowingly and voluntarily consented to the stipulation (329:8; R-Ap. 117).

By failing to object to the procedures followed by the trial court, to the court's decision to remove the juror, or to the substitution of the alternate juror, Avery has forfeited his challenges to those actions. *See State v. Holt*, 128 Wis. 2d 110, 124, 382 N.W.2d 679 (Ct. App. 1985). Moreover, because he offered the stipulation that resulted in the alternate juror participating in the deliberations, the doctrines of invited error and judicial estoppel bar Avery from challenging the substitution of the alternate juror.

An appellate court will generally not review an error that was "invited" or induced by the appellant in the trial court. *Shawn B.N. v. State*, 173 Wis. 2d 343, 372, 497 N.W.2d 141 (Ct. App. 1992). The concept of invited error is closely related to the doctrine of judicial estoppel, which recognizes that "[i]t is contrary to fundamental principles of justice and orderly procedure to permit a party to assume a certain position in the course of litigation which may be advantageous, and then after the court maintains that position, argue on appeal that the action was error." *State v. Gove*, 148 Wis. 2d 936, 944, 437 N.W.2d 218 (1989). Having proposed the stipulation that led to the seating of the alternate juror, Avery cannot now be heard to complain that it was erroneous to do that.

There is one exception to the State's preclusion argument. When a defendant has the right to be present at a proceeding, he must personally waive that right. *State v. Anderson*, 2006 WI 77, ¶71, 291 Wis. 2d 673, 717 N.W.2d 74. Accordingly, the State will not argue that Avery is precluded from arguing that his right to be present when the court spoke with Juror Mahler was violated.

B. The court employed procedures appropriate to the circumstances of the case.

Avery argues that the trial court failed to follow the procedures prescribed in *State v. Lehman*, 108 Wis. 2d 291, 321 N.W.2d 212 (1982), when a juror seeks to be excused because (1) he had an unwaiveable right to be present with counsel when the court spoke with the juror; (2) there was no contemporaneous record of that

discussion; and (3) the court did not conduct an adequate inquiry into the juror's concerns. Those claims are without merit.

1. Any violation of Avery's right to be present during questioning of the juror was harmless error.

Avery argues that he had the right to be present when the court spoke with Juror Mahler and that his lawyers' consent to the court's *ex parte* communication with the juror was ineffective because "only Avery himself could waive [that] right." Avery's brief-in-chief at 74. The State agrees that, as a general rule, a defendant has the right to be present personally and by counsel during *voir dire* and that the defendant must personally waive that right. *See Anderson*, 291 Wis. 2d 673, ¶71; *State v. Tulley*, 2001 WI App 236, ¶6, 248 Wis. 2d 505, 635 N.W.2d 807.

The trial court acknowledged this general rule but noted that there are no reported Wisconsin decisions that address the issue "in the context of the facts of this case, that is, when a juror reports an emergency during late evening hours while court is not in session and the parties and counsel are not readily available" (370:15; A-Ap. 117). The court observed that federal courts have held that the constitutional requirement that the defendant be present during communications between the court and a jury is not without exception (370:15-16; A-Ap. 117-18). The court noted that in *United States v. Gagnon*, 470 U.S. 522, 526 (1985), the Supreme Court held that "[t]he defense has no constitutional right to be present at every interaction between a judge and a

juror" (370:16; A-Ap. 118), and that in *United States v. Carson*, 455 F.3d 336, 354 (D.C. Cir. 2006), the D.C. Circuit held that the trial court had not erred when it communicated *ex parte* with a sick juror because the communications were unrelated to the merits of the case and their substance was reported in open court (370:16-17; A-Ap. 118-19).

The circuit court further held that even if its contact with Juror Mahler violated Avery's right to be present, the error was harmless (370:18-19; A-Ap. 120-21). In his appellate brief, Avery does not address the court's harmless error ruling, *see* Avery's brief-in-chief at 72-74, thereby conceding its validity. *Schlieper*, 188 Wis. 2d at 322. Moreover, the trial court was correct.

Violations of a defendant's right to be present are subject to a harmless error analysis. *Tulley*, 248 Wis. 2d 505, ¶¶10-11. In *Tulley*, the trial court, during *voir dire*, interviewed three potential jurors in chambers outside the presence of the defendant and counsel and then excused those jurors for cause. *Id.*, ¶3. The court of appeals held that the trial court's discussion with the jurors violated the defendant's right to be present during *voir dire*, but that the error was harmless. *Id.*, ¶¶10-11.

> Tulley was present during the entire *voir dire* of all prospective jurors who served on the panel that convicted him. He does not assert that the jurors who served were not fair and impartial. He does not claim that the outcome of the trial was affected by the court's *in camera* discussions with the three jurors. Because the three prospective jurors with whom the court spoke *in camera* did not serve on the jury, we conclude that the State has met its burden to show that there is no reasonable possibility that the court's error

> contributed to Tulley's conviction. Therefore, we conclude that the circuit court's *in camera* interview of three prospective jurors, though error, was harmless error.

Id., ¶11 (citation and footnote omitted); *see also United States v. Doherty,* 867 F.2d 47, 72 (1st Cir. 1989) (finding harmless error because judge's *ex parte* conversation with the subsequently dismissed juror "could not have influenced the excused juror's further deliberations, for there were none; nor could it have influenced the remaining eleven jurors, because the excused juror had no further contact with them").

The same reasoning applies here. Avery was present during the *voir dire* of all of the jurors who served on the panel that convicted him. The court's discussion with Juror Mahler could not have influenced Mahler's further deliberations, because there were none, nor could it have influenced the remaining jurors because Mahler had no further contact with them. Accordingly, the trial court's *ex parte* discussion with Juror Mahler, if erroneous, was harmless error.

2. *Lehman* does not require that the court's inquiry be recorded.

Noting that *Lehman* requires that the record support the court's decision to discharge a juror, Avery argues that the court erred by not questioning the juror on the record. *See* Avery's brief-in-chief at 74-75. However, as the trial court noted (370:12; A-Ap. 114), *Lehman* states that "[t]he circuit court's efforts depend on the circumstances of the case." *Lehman*, 108 Wis. 2d at 300. In this case, given the lateness of the hour and the apparent urgency of the situation, the

court reasonably chose to memorialize the discussion in a memorandum it prepared the next day (359:1-2; A-Ap. 250-51) rather than attempting to locate a court reporter to record it.

Avery suggests that the record is inadequate because Juror Mahler's testimony at the postconviction hearing conflicted with the court memo's description of events. He fails to mention, however, that the trial court found that "[t]o the extent Mr. Mahler's testimony at the postconviction motion hearing differs from the court's March 16, 2007 file memo and the testimony of Attorneys Strang and Buting at the postconviction hearing, the court finds such testimony not credible" (370:8; A-Ap. 110).

3. The court made a sufficient inquiry that established cause for discharging the juror.

Avery argues that the trial court failed to make a careful inquiry into the reasons why Juror Mahler sought to be excused. *See* Avery's brief-in-chief at 75-79. The court's memorandum summarized its discussion with Mr. Mahler as follows:

> I could immediately sense that Mr. Mahler was distraught. He sounded depressed. He spoke quietly and slowly. He confirmed the information I'd been told. He indicated he and his wife had had some marital problems before the trial and the trial was putting an extra strain on the relationship. He again mentioned, as he had during individual voir dire of the jurors on Monday, that his wife was upset about the trust fund reports involving a musician juror on the news. Things apparently boiled over when his stepdaughter was involved in a vehicle

> accident this evening and he was not there to provide support. My reading, without pressing him with questions too specific, was that he felt the future of his marriage was at stake if he was not excused. At that point I told him I'd heard all I needed to know.

(359:2; R-Ap. 251).

Avery argues that the court should have made more specific inquiries into Mahler's marital difficulties. But the specifics of those difficulties were not what mattered so much as their impact on the juror. As the court explained in its postconviction decision,

> [t]he question is not so much fact-based as behavioral-based. That is, whatever the facts were behind Mahler's marital problems, his behavior suggested he was preoccupied by those problems and could not continue to serve as a juror. The court had no reason to believe Juror Mahler was lying. He was very distraught on the phone and there was a reported incident, a serious property damage accident involving his stepdaughter, which provided factual corroboration for his request. The court concluded that his concern over his marriage seriously jeopardized his ability to devote himself to his duties as a juror. If his request was denied, there was a very real danger that he would overtly or subconsciously engage in a rush to judgment in order to get home to save his marriage.

(370:22-23; A-Ap. 124-25).

The court noted that that was the conclusion reached not only by the court, but by Avery's "two able and experienced trial attorneys" (370:23; A-Ap. 125). Attorney Strang testified at the postconviction hearing that the information that the court conveyed to him was that "this car

accident was sort of a last straw and [the juror's wife] was threatening to walk out of the marriage" (362:91). Strang said that he "certainly did have a concern that if [the juror] was distracted by a family tragedy, or something that was weighing heavily on him, that he might be someone who would be inclined not to deliberate fully or with . . . an exclusive focus on the case" (362:88).

After an unusually lengthy and factually complex trial, it was likely that it would take the jury a significant amount of time to reach a verdict. (The jury in fact deliberated for three days (329:13; 331:2).) Under these circumstances, the court reasonably concluded that a distraught and distracted juror should be excused.

C. No structural error occurred.

Avery argues that the "removal of Juror Mahler without cause, which left 11 deliberating jurors, is structural error." Avery's brief-in-chief at 84. For the reasons just discussed, Avery's contention that Juror Mahler was removed without cause is incorrect. Moreover, Avery's assertion that the removal of Juror Mahler "left 11 deliberating jurors" is not accurate, either. While there were only eleven jurors between the time Juror Mahler was removed and the time that the alternate juror was substituted, the jury did not deliberate during that time. When the jury began its deliberations anew, there were twelve jurors, and those twelve jurors decided this case.

In *Neder v. United States,* 527 U.S. 1, 8 (1999), the Court stated that it had found structural error requiring automatic reversal in a "very limited class of cases." Those cases, the Court observed, involved the complete denial of

counsel, a biased trial judge, racial discrimination in selection of grand jury, the denial of self-representation at trial, the denial of a public trial, and a defective reasonable doubt instruction. *Id*. The Court held that "if the defendant had counsel and was tried by an impartial adjudicator, there is a strong presumption" that the error was not structural. *Id*. (quoted source omitted).

Avery cites several federal cases for the proposition that "removal of a juror without a record establishing cause, thereby resulting in the case . . . proceeding with only 11 jurors" constitutes structural error. Avery's brief-in-chief at 85. However, Avery does not cite any case in which a court found structural error when an alternate juror was substituted and the case was decided by twelve jurors.

Avery was tried by an impartial jury of twelve, each of whom heard all of the evidence, and who began deliberations anew following the substitution (329:10-13; R-Ap. 119-22). There was no structural error here.

D. Wisconsin Stat. § 972.10(7) does not prohibit the substitution of a juror with the parties' consent.

Avery argues that under Wis. Stat. § 972.10(7), the court had no authority to substitute jurors once deliberations had begun because the statute requires that jurors not participating in the deliberations be discharged. *See* Avery's brief-in-chief at 87. The trial court, in its postconviction decision, agreed that the statute "does not authorize the substitution of a juror after deliberations have begun" and that "[t]he

unobjected to decision of the court in this case to sequester one additional juror in addition to the 12 jurors who were deliberating was error" (370:46; A-Ap. 148).

The court further observed, however, that the dispositive issue in this case is whether the statute prohibits the substitution of an alternate juror with the consent of the parties, under the procedures described in *Lehman* (370:46; A-Ap. 148). The court held that "[t]he fact that a juror has been discharged does not necessarily mean the juror cannot be called back as a substitute at some point in the future" and noted that the supreme court in *Lehman* had recognized that distinction (370:46-47; A-Ap. 148-49).

In *Lehman*, the trial court discharged a juror and substituted, over the defendant's objection, an alternate juror who had been discharged prior to the submission of the case to the jury. *Lehman*, 108 Wis. 2d at 294-95. The defendant argued on appeal that the predecessor statute to Wis. Stat. § 972.10(7), Wis. Stat. § 972.05 (1979-80), required that the alternate juror be discharged after jury selection had begun. The supreme court observed that "[w]hether or not sec. 972.05 requires the circuit court to discharge an alternate juror on final submission of the cause, the alternate juror in the instant case was discharged by the circuit judge." *Id*. at 305. The supreme court held, therefore, that the "ultimate question is not whether the alternate juror is to be discharged upon final submission but whether sec. 972.05 allows a circuit judge, during jury deliberations, to order an alternate juror, whether or not previously discharged, to take the place of a regular juror who is discharged after jury deliberations have begun." *Id*.

The statute in question in *Lehman* provided for substitution of a juror before the cause was submitted to the jury, but said nothing about substituting jurors after submission. *Id*. at 302. The State argued that the statute governed only mandatory substitution before final submission and that the legislature, by failing to address the issue, intended to permit the circuit court to exercise its discretion whether to substitute a juror during deliberations. *Id*. at 305. The supreme court rejected that reading of the statute, "declin[ing] to infer from a silent statute that the legislature approves substitution during jury deliberations." *Id*. at 305-06. The court held that "in the absence of express authorization by statute or rule for substitution of an alternate juror for a regular juror after jury deliberations have begun or in the absence of consent by the defendant to such substitution, hereafter it is reversible error for a circuit court to substitute an alternate juror for a regular juror after jury deliberations have begun." *Id*. at 313 (footnote omitted).

Avery argues that the option recognized in *Lehman* allowing the parties to stipulate to the substitution of an alternate juror was available only because § 972.05 was ambiguous, while the current statute prohibits substitution of an alternate once deliberations have begun. *See* Avery's brief-in-chief at 86. Avery misreads *Lehman*. The court did not find the statute ambiguous, nor did it link the stipulation option to the statute's ambiguity or silence. *See Lehman*, 108 Wis. 2d at 301-13. Rather, the court held that the statute did not authorize post-submission juror substitution, and then held that "[u]ntil there is express authorization permitting a circuit court to substitute an alternate juror during jury deliberations, the circuit court has only three

options available to it if a regular juror is discharged after jury deliberations have begun: first, to obtain a stipulation by the parties to proceed with fewer than twelve jurors; second, to obtain a stipulation by the parties to substitute a juror; and third, to declare a mistrial." *Id.* at 313. *Lehman* allowed the parties to stipulate to the substitution even though the statute did not allow it.

Avery notes that when it enacted the current statute, Wis. Stat. § 972.10(7), the legislature rejected an amendment that would have allowed substitution during deliberations. *See* Avery's brief-in-chief at 90. As the trial court correctly observed, however,

> [t]he purpose of [t]his proposed amendment was to go beyond the authority given to the trial judge in *Lehman* to substitute a juror with the consent of the parties, and give the trial judge the discretion to substitute a juror with or without that consent. The legislature's failure to adopt his amendment served merely to leave the parties in a criminal action in the same position they were in under *Lehman.*

(370:50; A-Ap. 152).

Avery also attempts to find support for his position in a 1996 amendment to the civil jury statute, Wis. Stat. § 805.08(2), that allows courts to retain additional jurors to replace a juror who is unable to complete deliberations. *See* Avery's brief-in-chief at 91. Avery finds it significant that "while the supreme court made a technical change in the parallel criminal statute, § 972.10(7), it did *not* alter the language requiring the court to discharge any additional jurors at final submission of the cause." *Id.* (footnote omitted).

The trial court correctly noted that this contention suffers from the same flaw as Avery's previous argument: "Avery's argument fails to appreciate the distinction between §805.08(2), which contains no requirement that the parties stipulate to the substitution of an additional juror in a civil case, and the holding in *Lehman*, which prohibits a trial court from substituting an alternate juror, whether previously discharged or not, unless both parties stipulate to the substitution and the other safeguards provided for in *Lehman* are followed" (370:51; A-Ap. 153).

Avery also argues that he "could not validly consent to substitution of an additional juror during deliberations because that procedure is not authorized by statute and it diminished, rather than enlarged, his right to a jury trial as contemplated by the Wisconsin Constitution." Avery's brief-in-chief at 93. As the trial court observed, that argument "simply flies in the face of the court's holding in *Lehman*" (370:53; A-Ap. 155) because the supreme court expressly held in *Lehman* that the parties may stipulate to the substitution of a juror even though that procedure is not authorized by statute. *See Lehman*, 108 Wis. 2d at 313; *see also Opinion of the Justices (Alternate Jurors)*, 623 A.2d 1334, 1335-36 (N.H. 1993) (if proper procedures are followed, post-submission substitution of a juror does not violate the state constitutional right to a jury trial).

The trial court noted that Wis. Stat. § 972.10(7) is "essentially identical" to the prior version of Rule 24(c) of the Federal Rules of Criminal Procedure (370:47; A-Ap. 149). That rule provided that "an alternate juror who does not replace a regular juror shall be discharged after

the jury retires to consider its verdict." *See United States v. Josefik*, 753 F.2d 585, 587 (7th Cir. 1985). In *Josefik*, the Seventh Circuit held that "[t]here is no provision for recalling an alternate after he is discharged" and that "policy as well as the [rule's] language . . . forbid the practice." *Id.* Nevertheless, the court held that a new trial was not required in that case because the defendant consented to the substitution:

> Although *United States v. Lamb,* 529 F.2d 1153, 1156-57 (9th Cir.1975) (en banc), states in dictum that a violation of Rule 24(c) cannot be waived, we cannot understand why not. No other circuit has followed the dictum. Even panels of the Ninth Circuit have repeatedly rejected it. If the defendant would prefer to take his chances with the jury in its reconstituted form rather than undergo the expense and uncertainty of a new trial, why should he not be allowed to?

Id. at 588 (citations omitted).

Indeed, the cases cited by Avery also demonstrate that even when the applicable statute or rule requires discharge of alternate jurors when the case is submitted to the jury, the substitution of an alternate juror does not require automatic reversal. Avery cites *State v. Dushame*, 616 A.2d 469 (N.H. 1992), in which the New Hampshire Supreme Court held that the statutorily prohibited substitution of a juror after submission of the case to the jury was reversible error. *Id.* at 470-72. However, the same court held three years later that reversal is required under *Dushame* only when the defendant makes a contemporaneous objection. *State v. Colbert*, 654 A.2d 963, 965-66 (N.H. 1995).

In *People v. Burnette*, 775 P.2d 583, 589-91 (Colo. 1989), and *Commonwealth v. Saunders*, 686 A.2d 25, 28-29 (Pa. Super. 1996), also cited by Avery, the courts held that a statutorily unauthorized juror substitution creates a presumption of prejudice, but that that presumption can be overcome by evidence that sufficient protective measures were taken to ensure the integrity of the jury function. Those measures include ascertaining that the alternate juror was not exposed to outside influences, informing the remaining jurors that the discharge of the juror was for personal reasons, and directing the recomposed jury to begin anew. *See Saunders*, 686 A.2d at 29; *see also Lehman*, 108 Wis. 2d at 317 (discussing precautionary measures adopted by other courts).

Those precautions were followed here. The alternate juror was sequestered prior to participating in the deliberations (328:122). The jurors were informed that the replaced juror had been excused because of an unforeseen family emergency (329:9; R-Ap. 118). The court instructed the members of the reconstituted jury that each of them "must have the opportunity to persuade the other members of the jury and to be persuaded by them" and that if they had "formed any views about the evidence up until now, you must set those views aside and start over" (329:10; R-Ap. 119). The court told the jury that it "must commence your deliberations anew" by electing a foreperson and "then proceed to evaluate all the evidence as though you are just beginning to deliberate" (*id.*). The court then questioned the jurors individually to ascertain that they would be able to follow its instructions and begin deliberations anew (329:11-13; R-Ap. 120-22). Additionally, the bailiff removed and destroyed

the sheets from the flip chart in the jury room that had been written upon and returned the photographic exhibits that had been taped to the flip chart to the albums from which they had been removed (359:2; A-Ap. 251).

E. Avery is not entitled to a new trial based on plain error or the interest of justice.

Avery argues that even if he waived his challenges to removal and substitution of the juror, he should be granted a new trial under the plain error doctrine. As the State has discussed above, however, the only error of note relating to the juror substitution issue was the absence of Avery's personal waiver of his right to be present during the court's discussion with Juror Mahler, and that error was harmless.

Avery alternatively asks the court to grant him a new trial in the interest of justice because the controversy was not fully and fairly tried. Avery's guilt was decided by twelve jurors, each of whom heard all of the evidence and who assured the court that they would begin deliberations anew. Avery's case was fully and fairly tried.

F. Avery's lawyers did not provide ineffective assistance.

Finally, Avery argues that he received ineffective assistance from his two highly experienced lawyers (362:126-31, 227-29) because they authorized the court to speak with Juror Mahler privately and to discharge the juror if the court verified the information that had been provided to the court, and because they entered

into a stipulation allowing the court to substitute an alternate juror after Mahler was removed. Avery's brief-in-chief at 99. Avery has not established that his lawyers performed deficiently or that he was prejudiced by their allegedly deficient conduct. *See Strickland v. Washington*, 466 U.S. 668, 687 (1984).

The State will begin its discussion with the prejudice prong of the *Strickland* test. To demonstrate prejudice, the defendant must affirmatively prove that the alleged defect in counsel's performance actually had an adverse effect on the defense. *Strickland*, 466 U.S. at 693; *State v. Reed*, 2002 WI App 209, ¶17, 256 Wis. 2d 1019, 650 N.W.2d 885. The defendant cannot meet his burden merely by showing that the error had some conceivable effect on the outcome. *Id.* Rather, he must show that there is "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694.

Avery argues that prejudice should be presumed in this case because counsel's errors "taint[ed] the process by which guilt was determined" and "inherently cast doubt on the reliability of the proceeding." Avery's brief-in-chief at 103. But neither of the cases he cites in support of that argument involved the substitution of a juror, resulting in a trial by twelve jurors. Rather, in both of those cases, the defendant was convicted by an eleven-member jury after a juror was removed over the defendant's objection. *See Curbelo*, 343 F.3d at 278-85; *Essex*, 734 F.2d at 834.

In contrast, in *State v. Colbert*, the New Hampshire Supreme Court held that the defendant was not prejudiced for failing to object to a juror substitution that violated the applicable statute. *See Colbert*, 654 A.2d at 966-67. The court rejected the defendant's argument that prejudice should be presumed because he was denied the constitutional right to a twelve-person jury. The court held that the defendant, having been tried by a recomposed jury of twelve, had not been denied a twelve-person jury. *Id*. at 966.

A court "will presume prejudice only in rare instances." *State v. McDowell*, 2004 WI 70, ¶58, 272 Wis. 2d 488, 681 N.W.2d 500. Prejudice has been presumed "when the effective assistance of counsel has been eviscerated by forces unrelated to the actual performance of the defendant's attorney." *State v. Erickson*, 227 Wis. 2d 758, 770, 596 N.W.2d 749 (1999). "In such cases the inquiry is not on the conduct of the defendant's counsel but on the environment in which the judicial proceeding occurs. For example, courts have presumed prejudice when a defendant was denied counsel altogether at critical stages of the adjudicative process." *Id*.

Prejudice also has been presumed when, although the defendant is actually given counsel, "'the likelihood that any lawyer, even a fully competent one, could provide effective assistance is so small that a presumption of prejudice is appropriate.'" *Id*. (quoting *United States v. Cronic*, 466 U.S. 648, 659-60 (1984)). In other, more limited, circumstances "the actual assistance rendered by a particular attorney has been deemed so outside the bounds necessary for effective counsel that a court has presumed prejudice." *Id*. at 771.

Avery's case "presents none of these scenarios." *Id.* "'[T]he right to the effective assistance of counsel is recognized not for its own sake, but because of the effect it has on the ability of the accused to receive a fair trial.'" *Id.* (quoting *Cronic*, 466 U.S. at 658). "With this underlying purpose in mind . . . prejudice need not be presumed in this case," *id.*, because nothing Avery's lawyers did or did not do affected his ability to receive a fair trial.

Avery also has failed to demonstrate actual prejudice. He argues that Mahler's removal "significantly altered the jury's makeup in that a juror whose preliminary vote was not guilty was erroneously let go." Avery's brief-in-chief at 104. But, as the court noted at the outset of the postconviction hearing, because Wis. Stat. § 906.06(2) prohibits a juror from testifying in an inquiry into the validity of a verdict, Mahler's testimony regarding jury deliberations was admitted solely "as it relates to the procedure used to excus[e] the juror" (362:6). Avery may not use Mahler's testimony about his preliminary vote to demonstrate that he may have been inclined to vote for an acquittal. *See Anderson v. Burnett County*, 207 Wis. 2d 587, 593, 558 N.W.2d 636 (Ct. App. 1996).

Moreover, even if Mahler's testimony on this point were considered, what Mahler actually said was that he preliminarily "voted not guilty, based on I wanted to look at all the evidence and make a decision based on that evidence" (362:18-19). There is nothing in that statement to suggest that Mahler was leaning towards an acquittal. Speculation that the dismissed juror may have been a lone dissenter in favor of acquittal is not sufficient to demonstrate prejudice. *See Colbert*, 654 A.2d at 967.

This court need not reach the deficient performance prong of *Strickland* if it finds no prejudice. *See Strickland*, 466 U.S. at 697. The trial court did address both prongs, however. It found that Avery had not been prejudiced because "[h]e sought and received jury verdicts rendered by 12 persons who not only heard the entire case, but rendered their verdicts without danger of personal distractions that could well have worked to his prejudice" (370:59-60; A-Ap. 161-62).

The trial court also correctly found that Avery had not demonstrated deficient performance. The court noted that "[m]uch of Avery's argument attempting to show the performance of his trial counsel was defective is based on testimony Juror Mahler gave at the postconviction motion hearing which the court finds to be incredible" (370:58; A-Ap. 160). Avery's appellate brief repeats that error. *See* Avery's brief-in-chief at 101.

The trial court also found that "[t]he reported information [about Juror Mahler] would have raised legitimate concerns on the part of any competent defense attorney about the willingness of Juror Mahler to give Avery the time and attention to which his case was entitled" (370:59; A-Ap. 161). The court concluded that:

> [g]iven the time of the evening when the problem with Juror Mahler was reported, the distance of all parties from the Calumet County courthouse, and the difficulty of attempting to convene court at what probably would have been some time around midnight, Attorneys Strang and Buting did not perform deficiently in trusting the judge to verify that cause existed to excuse Juror Mahler when they knew an untainted alternate juror was available.

(*Id*.).

Avery also asserts that his lawyers performed deficiently by recommending that he forego a mistrial and substitute the alternate juror. *See* Avery's brief-in-chief at 102. However, according to defense counsel, his lawyers recommended against a mistrial because, as they told Avery, "we won some, we lost some but . . . overall . . . it went in about as well as it could have, for the defense" (362:158). They recommended against proceeding with an eleven-person jury because "we were pretty clear that neither one of us would ever have agreed to losing . . . one 12th of the minds required for a jury" (362:214).

In *Josefik*, the Seventh Circuit held that defense counsel did not perform deficiently when he recommended that an alternate juror be substituted even though the applicable rule did not permit substitution after the case was submitted to the jury. *See Josefik*, 753 F.2d at 587-88. The court held that there was "no evidence that the lawyer's advice to Josefik to accept the reconstituted juror was bad advice; the jury may have seemed (before it delivered its verdict) as friendly to the defense as the jury at a new trial could be expected to be, or even more friendly. We certainly have no basis for concluding that the lawyer's advice was so bad (viewed *ex ante*, of course, not *ex post* – as matters turned out Josefik could not have done worse by getting a new trial) as to fall below minimum professional standards and thus violate Josefik's rights." *Id*. at 588.

Avery has not demonstrated that his trial counsel performed deficiently or that he was prejudiced by their actions. Accordingly, the court should reject his claim of ineffective assistance of counsel.

CONCLUSION

For the reasons stated above, the court should affirm the judgment of conviction and order denying postconviction relief.

Dated this 5th day of November, 2010.

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font other than the word length limitation. The length of this brief is 20,332 words. A motion seeking permission to file a brief of this length has been filed with this brief.

Dated this 5th day of November, 2010.

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Jeffrey J. Kassel
Assistant Attorney General

CERTIFICATE OF COMPLIANCE
WITH WIS. STAT. § (RULE) 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § (Rule) 809.19(12).

I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 5th day of November, 2010.

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Jeffrey J. Kassel
Assistant Attorney General

CERTIFICATE OF COMPLIANCE
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I hereby certify that:

I have submitted an electronic copy of this appendix, which complies with the requirements of Wis. Stat. § (Rule) 809.19(13).

I further certify that:

This electronic appendix is identical in content to the printed form of the appendix filed as of this date.

A copy of this certificate has been served with the paper copies of this appendix filed with the court and served on all opposing parties.

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Jeffrey J. Kassel
Assistant Attorney General

APPENDIX CERTIFICATION

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is a supplemental appendix that complies with the content requirements of Wis. Stat. § (Rule) 809.19(2)(a); that is, the record documents contained in the respondent's supplemental appendix fall into one of the categories specified in sub. (2)(a).

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

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Jeffrey J. Kassel
Assistant Attorney General