STATE OF WISCONSIN

IN SUPREME COURT

No. 2011AP1803-CR

STATE OF WISCONSIN,

Plaintiff-Respondent-Petitioner,

v.

GENERAL GRANT WILSON,

Defendant-Appellant.

ON REVIEW OF A DECISION OF THE COURT OF APPEALS REVERSING A JUDGMENT OF CONVICTION AND AN ORDER ENTERED IN MILWAUKEE COUNTY CIRCUIT COURT, THE HONORABLE VICTOR MANIAN AND THE HONORABLE JEFFREY A. CONEN PRESIDING

BRIEF AND APPENDIX OF PLAINTIFF-RESPONDENT-PETITIONER

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BRIEF OF PLAINTIFF-RESPONDENT-PETITIONER

ISSUES PRESENTED FOR REVIEW

1. Did Wilson satisfy the opportunity requirement for presenting third-party-perpetrator evidence under *State v. Denny*, 120 Wis. 2d 614, 357 N.W.2d 12 (Ct. App. 1984), with respect to Willie Friend?

The trial court and postconviction court said no.

The court of appeals said yes, finding that Friend had the opportunity to kill the victim, either directly by firing the first weapon or in conjunction with other unidentified persons by luring her to the killing site. The court of appeals held that exclusion of this evidence violated Wilson's constitutional right to present a defense.

2. Assuming Wilson satisfied *Denny*'s opportunity requirement, was the error in excluding the *Denny* evidence harmless beyond a reasonable doubt?

This question was not presented to the circuit court at either the trial or postconviction stage.

The court of appeals found the error prejudicial.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

As in any case important enough to merit this court's review, both oral argument and publication of the court's opinion are warranted.

STATEMENT OF THE CASE

The nature and procedural posture of the case

General Grant Wilson was charged with first-degree intentional homicide and attempted first-degree intentional homicide, both while armed, in a criminal complaint filed April 26, 1993

(2). The homicide victim was Evania (Eva) Maric; the victim of the attempted homicide was Willie Friend (*id.*).

At the conclusion of a preliminary hearing on May 5, 1993, Wilson was bound over for trial (43:46). The State filed an information charging him with the same crimes set forth in the complaint (4).

Following a seven-day trial before the Honorable Victor Manian (49-60), the jury convicted Wilson on both counts (60:2-3). He was sentenced to life imprisonment with parole eligibility after thirty years on count one and to a consecutive twenty-year term on count two (61:52-53).

Wilson filed a motion seeking a new trial and sentence modification (23). The trial court denied the motion without a hearing on June 17, 1996 (24). Wilson did not appeal from that order.

On September 14, 2010, the court of appeals reinstated Wilson's right to a direct appeal (25). Wilson filed a Wis. Stat. § (Rule) 809.30 motion on January 24, 2011 (27). The circuit court, the Honorable Jeffrey A. Conen presiding, denied the motion without a hearing on July 12, 2011 (39; Pet-Ap. 112-115).

On October 22, 2013, the Wisconsin Court of Appeals summarily reversed the judgment of conviction and the order denying Wilson's 2011 postconviction motion. *State v. Wilson*, No. 2011AP1803-CR (Dist. I), slip op. at 11 (Pet-Ap. 111). The State filed a petition for review of the court of appeals' decision. On February 19, 2014, this court granted the State's petition.

Statement of facts relevant to the issues in this court

Willie Friend had known Eva Maric for twelve years before the two began an intimate relationship in 1992 (51:18). On April 20, 1993 – the day before she was murdered – Eva picked up Friend at the courthouse in the late afternoon (*id.*:19). After they ran an errand together, Friend dropped Eva at her home and kept her car with the understanding he would return to pick her up around 10 p.m. (*id.*:20). Because of car trouble, he did not come back until 11 p.m. (*id.*).

While traveling to various destinations on Milwaukee's north side, Eva and Friend saw Wilson's car – a gold Lincoln with a personalized plate that read "G-Ball" (51:23-24) – on several occasions (*id.*:23, 26, 29). The first sighting occurred at the intersection of 5th and Center, where Wilson's car was parked in front of a closed bar (*id.*:23). Eva had pointed out the car to Friend, saying "there go General's car" (*id.*). Another sighting took place while Eva and Friend were parked outside his mother's home at 3859 North 9th Street (*id.*:25-26); there appeared to be a woman sitting in the passenger seat (*id.*:60). Before that night, Friend had only seen Wilson in a photo Eva had shown him (*id.*:26).

Friend testified that at some point after dropping him off at his mother's house shortly before 2 a.m. (*id.*:30), Eva came to his brother's house and reported that Wilson had just tried to run her off the road (*id.*:32). According to Friend, "she said the dude walked up to the car, supposed to have had a revolver and told her that if I see you and that nigger together again, I'm going to

kill you" (*id.*).[1] Friend reported that since the summer of 1992, Eva had been telling him that she was afraid of Wilson (*id.*:52).

Eva and Friend remained at his brother's house for a couple of hours, until she announced she had to leave so she could go to work (51:33). Friend estimated this announcement occurred at about 4:30 a.m. (*id.*). After walking Eva to her car, Friend entered the passenger side and closed the door (*id.*:34). While they sat talking, Wilson's car came down the hill and pulled up alongside them (*id.*).

Thinking that Wilson "wanted to talk about the situation," Friend exited the passenger side of Eva's car (51:38). Wilson, armed with "a blue steel large revolver," got out of his car without saying anything (*id.*). When he reached the driver's side of Eva's vehicle, he looked at Friend and "just started shooting" (*id.*:39). This caused Friend to duck down on the passenger side of the opened door and start running (*id.*:39-40). Shots were being fired at him while he fled (*id.*:41). After he ran away, Friend heard "rapid shots back to the [sic] back" (*id.*:43). He believed the second set of shots came from a smaller gun than the first because the impact of the first shots "was much louder and heavier" (*id.*:42-43).

Photographs introduced as exhibits 3, 4, 14 and 15 depicted the bullet holes in the front passenger-side door of the victim's car (*see* 51:145-48). The trajectory of the bullet strikes was

[1] The defense as a matter of strategy decided to forego objecting to admission of this statement (49:250-52; 58:77).

consistent with the passenger door being open at the time shots were fired (*id.*:149). Photographs introduced as exhibits 22, 23 and 24 showed bullet strikes in the concrete and in the dirt on either side of the sidewalk (51:154).

Apart from Friend, the only eyewitness to a portion of the shooting was Carol Kidd-Edwards. As she was getting ready to take her husband to work around 5 a.m. on April 21, 1993 (51:96), Kidd-Edwards heard "very, very loud gunshots" ring out, causing her to take cover on her bedroom floor (*id.*:97). She estimated she heard five shots, "one right behind the other" (*id.*). When this sequence of shots ended, she ran to her bedroom window and saw a man she identified as Willie Friend running away from a car parked across the street (*id.*:97-98); she saw no objects in Friend's hand while he was running (*id.*:100-01). Kidd-Edwards saw "a [M]ark version" of a gold-toned Continental parked in front of the corner house on her side of the street (*id.*:101). The car depicted in exhibit 10 was like the car she observed from her window (*id.*:101-02).

After Friend had fled the scene, Kidd-Edwards saw another man approaching the victim's car while loading a gun (51:103). The man approached the driver's side of the car and, from a distance of two feet, unloaded five to seven rounds into the driver's side (*id.*:104, 105-06). He then walked back toward the gold-toned Lincoln (*id.*:106). Kidd-Edwards did not see him enter the car because the man was in her blind spot, but she heard the door slam and saw the car "pull off very fast" (*id.*).

Shortly after the car left, Friend banged on her front door, yelling "call 911, call 911" (51:109).

After calling 911, she went outside and saw "a lady who was shot up pretty bad" (*id.*:109-110).

The Milwaukee County medical examiner, Dr. Jeffrey Jentzen (53:100), recovered two large bullets and five smaller bullets from the body of Eva Maric during autopsy (*id.*:109). Dr. Jentzen opined that the larger caliber wounds were inflicted before the smaller caliber wounds (*id.*:113). His opinion was based on the hemorrhaging and stippling pattern he had observed (*id.*).

Firearms examiner Monty Lutz testified that the two .44 caliber bullets recovered from the victim's body were fired from the same gun as one of the three bullets recovered from the sidewalk area adjacent to the crime scene (53:58-59). Although he could not say that the other two bullets found in the sidewalk area were fired from the same weapon, they were the same caliber and "consistent" with having been fired from the same gun (*id.*:59).

Lutz also testified that the five .25 caliber bullets removed from Eva Maric's body during the autopsy all came from the same firearm (53:70-72). Lutz examined the two .25 caliber pistols, the .38 revolver and the .357 Smith & Wesson Wilson admitted owning (exhibits 45, 46, 47 and 48); he found that none of these weapons correlated with any of the fired cartridge cases or bullets he had examined in this case (*id.*:72-73). Lutz did not receive any .44 magnum revolvers to test in conjunction with this case (*id.*:53). Nevertheless, he determined that the fired .44 caliber bullets he

examined had rifling characteristics consistent with those manufactured by Sturm Ruger.[2]

In reference to Lutz's testimony, defense expert Richard Thompson said Lutz had "indicated that it [i.e., the .44 fired bullets] was consistent with the Ruger, could have been fired from the Stern [sic], Ruger" (54:36). However, Thompson conceded that he was "not definitively excluding a Smith and Wesson type of revolver" as the source of the bullets (*see id.*:37).

After he was arrested at his place of employment, Wilson consented to officers searching his work locker and his car (51:179). A .38 caliber revolver was recovered from the trunk of his car (*id.*:180). Wilson also consented to the search of his residence, where officers recovered a .357 caliber revolver from his bed (*id.*:181). The searching officers also located two empty cardboard boxes that formerly contained two .25 caliber handguns, one chrome and one blue, but no .25 caliber weapons (*id.*:182).

When Wilson was interviewed at the police station on April 22, 1993, Detective Young asked him if he owned any .25 caliber handguns (51:221). Wilson replied that he owned three .25 semiautomatic pistols: one was in police custody; his brother had one; and his mother had another (*id.*:221-22). When asked if he owned or had ever owned a .44 magnum revolver, Wilson stated he did not (*id.*).

[2] The manufacturer's name was incorrectly transcribed as "Stern Rouger" (53:55).

During an interview the next day, Detective Dubis informed Wilson that Terry Bethly told police she had accompanied him to J & J Sports, where Wilson had fired a .44 magnum revolver (53:30). Confronted with this information, Wilson continued to deny owning or ever possessing a .44 magnum (*id.*:31).

Bethly, a friend of Wilson who had known him for nine years (53:5), testified that on April 3, 1993 – less than three weeks before Eva Maric's murder – Wilson had shot his .44 caliber handgun at a firing range in Menomonee Falls (*id.*:5-6).

Wilson testified in his own defense (55:4-111). He admitted telling the police about a .45 caliber gun he owned that police had taken from him and about three .25 caliber pistols he had owned that were no longer in his possession (*id.*:82-84). He also admitted telling them about a .38 caliber gun in the trunk of his car and a .357 caliber firearm he kept under his pillow in the bedroom (*id.*:85). He conceded that the first time he admitted owning a .44 magnum was at trial, where he claimed that he had traded the gun for drugs in Alabama at some time between April 3, the date he was seen firing it at a sporting range, and April 21, the date of the homicide (*id.*:100).

Wilson denied telling police he had arrived home at 3 a.m. the morning of the shooting; he claimed he got home between 3:30 and 4 a.m. and that his roommate Pedro had already gone to work (55:104). Wilson said his car was parked in front of his house from 3:30 a.m. until he left for work (*id.*:106). Wilson's shift at Krause Milling began at 7 a.m. (*id.*:33).

At the conclusion of Wilson's testimony, counsel said the defense was resting (55:111-12). Following the Fourth of July weekend, however, counsel indicated he had changed his mind and wanted to call "a couple of brief witnesses" (56:3). The trial court permitted him to do so (*id.*).

One of those witnesses was Mary Lee Larson, a friend of Eva who had known her since junior high school (56:11; Pet-Ap. 117). Larson testified that in the two months before her death, Eva never said she was afraid of Wilson (56:12-13; Pet-Ap. 118-19). When counsel asked Larson if she knew "whether or not [Eva] was afraid of Willie [Friend]," the prosecutor objected and the trial court sustained her objection (56:13; Pet-Ap. 119). Defense counsel then made an offer of proof,[3] the crux of which was that within two weeks of Eva's death, Friend had threatened to kill her if she didn't stay "in check" (56:16; Pet-Ap. 122) and had slapped her in front of several witnesses (56:17; Pet-Ap. 123). Defense counsel argued that the evidence was relevant because "[o]ur theory is that it's Willie who did it" (56:19; Pet-Ap. 125).

Defense counsel advised the court that another witness, Barbara Lange, could provide similar testimony about Friend threatening Eva (56:27; Pet-Ap. 133).

During the State's rebuttal case, Detective Brian O'Keefe testified that during an interview on April 21, 1993, Wilson said he arrived home at 3 a.m. that morning; O'Keefe documented the time in his report (56:49). After preparing the report,

[3] The offer of proof is set out more fully in the Argument at 27-28.

detectives read it to Wilson and asked if he wanted to make any additions or corrections; Wilson declined (*id.*:50).

Also during rebuttal, Pedro Smith testified that on April 21, 1993, he woke up "around 3:35" to go to work and left home "about five minutes to 4:00" (56:56). He did not see Wilson in their home or hear him moving about from the time Smith awoke until he left for work (*id.*:57). Nor was Wilson's car parked in front of the house during that time (*id.*).

On the morning after testimony had closed (*see* 56:68), the parties informed the court that the night before, defense attorney Peter Kovac had gone to the home of the then-district attorney, E. Michael McCann, to ask him to intervene on behalf of the defense with respect to admission of the *Denny* evidence (57:2; Pet-Ap. 149). After this meeting, McCann instructed the prosecutor, Carol Kraft, not to object to admission of the evidence (*id.*). While Kraft did not object, she also did not agree that the evidence should be admitted (57:3; Pet-Ap. 150); she made clear her disagreement with McCann (57:4-5; Pet-Ap. 151-52).

Based on the physical evidence and Carol Kidd-Edwards' testimony, Kraft took the position that Friend "did not have the opportunity to commit this homicide" (57:9; Pet-Ap. 156). Kraft also advised the court that if the *Denny* evidence were admitted, she planned to "put in an additional wealth of other evidence to rebut the inferences that [defense counsel] seeks to raise with this" (57:4; Pet-Ap. 151); she warned that the rebuttal evidence "wouldn't be very brief" (57:3; Pet-Ap. 150).

After some heated discussion (57:5-21; Pet-Ap. 152-68), the prosecutor conferred with District Attorney McCann "at some length" (58:3-4; Pet-Ap. 171-72) and advised the court that although he was still instructing her not to object to the *Denny* evidence, he expected the judge to make an independent ruling based on the totality of the evidence and the arguments made (58:4; Pet-Ap. 172). The trial court adhered to its ruling excluding the evidence (58:4-5; Pet-Ap. 173).

During closing argument, defense counsel advanced the theory that Willie Friend was involved in Eva's murder, although not as one of the shooters, and that his motive was to avoid a paternity action (*see* 58:71-73). Counsel pursued this theory based on the evidence of record:

> [T]here is a case against Willie. If the District Attorney's office here in Milwaukee wanted to charge Willie with this crime, it could have done it. And they could have made a very strong argument to a jury just like you that Willie in fact had done it. Now, I'll tell you, right from the beginning . . . Willie did not fire the shots.
>
> There were two people who came by in that car, at least two people. There was nobody [sic, somebody] in the driver's area seat. There was somebody in the passenger seat. Those two people shot and killed Eva. I don't know who those people are.
>
> . . . .
>
> . . . [W]hen you look at what's going on here, it's reasonable to me that Willie was involved. Willie had her there at this location knowing that these guys were going to come by.
>
> . . . .

> Remember what Willie said he was doing that day and how this started? Eva picked him up in court because he was there on a legit case as he calls it, paternity case. Willie was there on a paternity case.
>
> Now, he wasn't really questioned about that. I assume it was somebody else other than Eva. And I think you can assume that it was somebody else other than Eva.
>
> But he's going with Eva now, and remember what Willie told Mrs. Edwards, the most important witness in the case, the one who is undeniably a truth teller, no ax to grind, she said Willie told her that Eva was pregnant, and at the time of her death she was, she had put on some weight, and it was believable.
>
> She looked pregnant, she thought. When she came into court she thought that Eva was pregnant.
>
> Why did she think that Eva was pregnant? Because she saw Eva and she heard what Willie said. So isn't it interesting that Willie thought she was pregnant and Willie had a legit case, and I can assume he wasn't too happy about it. Do you think he might have had some interest in not having another legit case?
>
> Now, I'm not here as the investigator and I hope somebody wouldn't do this for that reason, but that's a hell of a lot of reason than the no reason we get as to why Grant did it.

(58:71-73.)

During her rebuttal argument, the prosecutor revisited Wilson's repeated lies to investigators about his ownership of a .44 revolver:

> It's so compelling . . . that he never explained the .44 magnum until the day we heard him testify in court. They checked out everything that he told them during the course of their statements that they took from him. He had every opportunity to say oh, yes, wait a minute, let me tell you about this one other gun.
>
> He didn't want to tell the police because he didn't think they would believe him? I don't think so.
>
> He didn't want to tell the police because he didn't want them to know that he owned and disposed of the murder weapon.

(58:143-44.)

The jury began deliberations on July 7, 1993 (58:148) and returned guilty verdicts the next day (60:2-3).

Additional facts will be presented in the Argument.

ARGUMENT

I. BECAUSE WILLIE FRIEND DID NOT HAVE THE OPPORTUNITY TO KILL EVA MARIC, THE EXCLUSION OF EVIDENCE THAT FRIEND HAD SLAPPED AND THREATENED TO KILL HER DID NOT VIOLATE WILSON'S RIGHT TO PRESENT A DEFENSE.

A. General principles and standard of review.

State v. Denny, 120 Wis. 2d 614, 357 N.W.2d 12 (Ct. App. 1984), sets forth the analysis for determining the admissibility of evidence that a third party committed the charged offense. The *Denny* court examined the general rule established in other jurisdictions – that a third party's motive to commit a crime may be excluded absent other proof directly connecting that person with the offense charged – in light of the definition of relevancy in Wis. Stat. § 904.01. The court of appeals rejected the standard of those jurisdictions that required the evidence of a direct connection be "substantial" and adopted a less strict test: there must be a "legitimate tendency" that the person could have committed the crime. *See id.* at 623.

Under the legitimate tendency test, 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. Evidence that "simply affords a possible

ground of suspicion against another person" is inadmissible. *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.'" *Denny*, 120 Wis. 2d at 622 (citation omitted). The *Denny* analysis strikes the balance between the accused's right to present a defense and the State's interest in excluding irrelevant evidence to avoid confusing the jury. Although *Denny* rejected the more demanding test employed in other jurisdictions, the third-party defense remains "difficult to establish." *State v. Oberlander*, 143 Wis. 2d 825, 836, 422 N.W.2d 881 (Ct. App. 1988), *rev'd on other grounds*, 149 Wis. 2d 132, 438 N.W.2d 580 (1989).

Decisions excluding third-party evidence under *Denny* are normally committed to the trial court's discretion and reversed only for an erroneous exercise of that discretion. *See State v. Vollbrecht*, 2012 WI App 90, ¶ 25, 344 Wis. 2d 69, 820 N.W.2d 443; *State v. Jackson*, 188 Wis. 2d 187, 194-96, 525 N.W.2d 739 (Ct. App. 1994). When the defendant asserts a due process right to introduce evidence, however, "the issue is more properly characterized as one of constitutional fact, and is, therefore, subject to de novo review." *State v. Avery*, 2011 WI App 124, ¶ 41, 337 Wis. 2d 351, 804 N.W.2d 216 (citation and footnote omitted).

B. Wilson failed to show that Willie Friend had the opportunity to kill Eva, either as the direct shooter or in conjunction with unknown persons he knew were planning to murder her.

The court of appeals held that Wilson was denied his constitutional right to present a defense when the circuit court barred him from introducing evidence that Willie Friend was involved in Eva's murder. *Wilson*, slip op. at 10; Pet-Ap. 110. The appeals court found that Friend "had a motive, the opportunity and a direct connection to the crime." *Id.* With respect to opportunity, the court declared that its review of the evidence "shows that Friend had the opportunity to commit this crime, either directly by firing the first weapon or in conjunction with others by luring Maric to the place where she was killed." *Wilson*, slip op. at 7; Pet-Ap. 107.

The court of appeals was undisputedly correct in finding Friend had a direct connection to Eva's murder. After all, he was at the scene, standing outside her car, when the first shots were fired into her and at him.

Similarly, the proffered testimony of Mary Lee Larson arguably was sufficient to satisfy *Denny*'s motive requirement. Larson, a friend of Eva who had known her since they attended junior high together (56:11; Pet-Ap. 117), said that two weeks before the shooting, Willie threatened that if Eva didn't keep "in check," he would kill her (56:15-16; Pet-Ap. 121-22). During the same time frame, Larson also saw Willie slap Eva

(56:16-17; Pet-Ap. 122-23). In addition to Larson, the defense named Barbara Lange as a witness who would provide similar testimony (56:27; Pet-Ap. 133).

While the evidence Wilson wanted to present satisfied *Denny*'s requirements of motive and direct connection with respect to Friend, the evidence failed to establish that Friend had the opportunity to kill Eva, either by firing the first weapon or by conspiring with others to lure her to the site where she was slaughtered. The State will show why the court of appeals erred in finding that there was sufficient evidence of opportunity under either of these scenarios.

1. The physical evidence shows that Friend could not have directly committed the murder by firing the first weapon, a point defense counsel ultimately conceded.

Contrary to the direct-shooter theory the court of appeals embraced, the evidence shows that Friend did not have the opportunity to fire the first weapon used to kill Eva Maric, a .44 magnum revolver.

The Milwaukee County medical examiner, Dr. Jeffrey Jentzen (53:100), recovered two large bullets and five smaller bullets from Eva's body (*id.*:109); he opined that the larger caliber wounds were inflicted prior to the smaller caliber wounds (*id.*:113). The entrance wounds caused by the larger caliber bullets were on the upper left side of her body (*see id.*:108-09).

Dr. Jentzen's expert opinion is consistent with Kidd-Edwards' testimony that the first series of gunshots was much louder than the shots she actually witnessed (51:119). As she told the jury, "The first sound, you know, was just so much louder than the second set that I know there were two different guns" (*id.*).

Dr. Jentzen's expert opinion is also consistent with Friend's testimony that the second set of shots he heard after fleeing the shooting scene came from a smaller gun, with the first shots being "much louder and heavier" (51:42-43).

Although neither of the two murder weapons was ever recovered, the State's firearms examiner determined that the two .44 caliber bullets recovered from Eva's body were fired from the same gun as one of the three bullets recovered from the sidewalk area adjacent to the crime scene (53:58-59). Although the expert, Monty Lutz, could not say that the other two bullets found in the sidewalk area were fired from the same weapon, they were the same caliber and "consistent" with having been fired from the same gun (*id.*:59).

This means that the person who pumped the .44 bullets into Eva's body was the same person who shot into the passenger door of Eva's car and was firing at Friend as he fled from the shooting scene. This is why defense counsel in his closing argument told the jury "Willie did not fire the shots" (58:71) and instead argued that two other men whom Willie knew committed the murder:

> The shots go across the car but they didn't hit Willie. He's not worried about getting hit, because he knows these guys. He knows that

> they're coming. *He didn't fire the gun himself,* but he knows they're coming.

(58:84-85; emphasis added.)

Based on the ballistics evidence, it was impossible for Willie to have fired two .44 bullets into Eva Maric and then had someone else discharge the same gun towards him while he ran from the scene. Carol Kidd-Edwards testified that the first "maybe five" shots she heard "came one right behind the other" (51:97). She described them as "coming fast and consecutive" (*id.*:113). There was no pause between the shots fired from the .44 revolver, the first and larger of the two guns used in the slaying. Kidd-Edwards explained that "when the rhythm of the shots stopped," she instantly went to her bedroom window to see what was happening (51:97). By that time, Friend was running from the shot-up car (*id.*). There was simply no time for Friend to shoot Eva in her left side through the driver's side window of the car and then transfer the weapon to another unknown gunman who in turn used it to shoot at Friend. And, as the trial court noted, Friend's hands were swabbed right after the crime and tested negative (57:14; Pet-Ap. 120). This finding is consistent with Kidd-Edwards' testimony that she saw nothing in Friend's hands as he ran from the scene (51:101).

Other physical evidence also supported Friend's eyewitness account of the shooting involving the .44 magnum revolver and shows that Friend did not have the opportunity to fire the first weapon. Specifically, exhibits 3, 4, 14 and 15 depicted the bullet holes in the front passenger-side door of the victim's car (51:145-48), supporting Friend's testimony that he was shot at

while ducking down behind the opened door. As Detective Dennis Kuchenreuther testified, the trajectory of the bullet strikes was consistent with the passenger door being open at the time shots were fired (*id.*:149).

Friend's testimony that he was still being shot at while running away (*see* 51:41) was also corroborated by exhibits 22, 23 and 24, showing bullet strikes in the concrete and in the dirt on either side of the sidewalk (51:154).

After hearing all of the State's testimony and seeing all of the State's exhibits, defense counsel repeatedly conceded during closing argument that Friend had not fired any of the shots that killed Eva (58:71, 74, 84, 89, 90, 95, 110).[4] In light of this concession, which was dictated by the physical evidence presented at trial, it is surprising that the court of appeals found that Friend had the opportunity to commit the crime "directly by firing the first weapon" *Wilson*, slip op. at 7; Pet-Ap. 107.

Contrary to the court of appeals' statement, the physical evidence shows it was impossible for Friend to have shot Eva with the .44 magnum revolver, the same gun used to shoot at him. Insofar as the appellate court's holding that the evidence implicating Friend was sufficient under *Denny* rests on the court's conclusion that he could have directly fired the first gun used to kill Eva,

[4] Most of the time, defense counsel explicitly conceded that Friend was not one of the two unnamed gunmen the defense claimed killed Eva (*see*, *e.g.*, 58:71, 84, 89). At other times, the concession was implicit, e.g., "[Willie] knows who the shooter is and he knows it's not Grant" (58:122).

that conclusion is erroneous, as even trial defense counsel conceded.

2. Wilson did not show how Friend had the opportunity to arrange for two unnamed gunmen, with access to the same distinctive type of car Wilson was driving that night, to murder Eva.

The court of appeals' alternate theory of opportunity was that Friend could have committed the crime "in conjunction with others by luring Maric to the place where she was killed." *Wilson*, slip op. at 7; Pet-Ap. 107. That alternate theory of opportunity fails to account for the uncontested fact that the car Kidd-Edwards saw parked at the shooting scene and then watched fleeing the scene after the last shots from the smaller caliber gun were fired was the same distinctive type of car Wilson was driving that night: a gold two-door Lincoln Continental.

Kidd-Edwards saw what she described as "a gold toned Continental, a [M]ark version of the Continental" parked on the street where the shooting occurred (51:101); the car was definitely a two-door (*id.*:131). The gold-toned Lincoln "pull[ed] off very fast" after the shooter fired the last bullets into Eva's car (*id.*:106). When shown photographs of Wilson's car (exhibits 9 and 10), she said it looked like the one she saw parked (*id.*:101-02). Kidd-Edwards' description of the car involved in the shooting jibed with Friend's description of the

vehicle as a "two door gold Lincoln with personalized plates, B-Ball" (151:140).

Wilson confirmed that on the day of the homicide he was driving the car shown in exhibits 9 and 10 (55:108). He had driven that car to various locations in the hours before the shooting (*see generally id.*:22-32).

Wilson presented no evidence indicating that Friend had associates or acquaintances who just happened to own, or have access to, the same distinctive type of car Wilson was driving that night and Kidd-Edwards observed at the shooting scene and watched depart immediately after the last shots were fired. Absent any such evidence, the court of appeals was wrong in concluding that Friend had the opportunity not just of ensuring that Eva would be sitting in her car outside his brother's home at 5 a.m. but also that the unnamed persons who shot her would coincidentally be driving the same kind of car as Wilson owned and had been driving in some of the same locations as Friend and Eva that night. In this regard, Wilson confirmed that he and Roseanne Potrikus, riding in Wilson's car (55:22), had traveled the 3800 block of North 9th Street twice that night while entering the freeway (*id.*:78). This testimony corroborated Friend's testimony that he and Eva had seen Wilson's car pass them twice within the span of three to four minutes while they were parked in front of Friend's mother's home at 3859 North 9th Street (*see* 51:25-29).

In finding that its review of the evidence showed that Friend had the opportunity to commit the crime by luring Eva to the place where she was killed, the court of appeals never explained

what evidence supported the defense theory. That theory required that confederates of Friend not only were willing to kill Eva but also that they secured a gold, two-door Lincoln Continental of the Mark series as their mode of transportation, either coincidentally or to make it appear that Wilson was the killer. The court of appeals failed to acknowledge this point when it asserted that Friend's presence at the crime scene "is consistent with Wilson's contention that Friend was involved in the murder by luring Maric to a place where she would be ambushed." *Wilson*, slip op. at 7; Pet-Ap. 107. The court of appeals' conclusion ignores the undisputed fact that Carol Kidd-Edwards, a neutral eyewitness to a portion of the shooting, testified that the shooter she saw fled the crime scene in the same distinctive type of car Wilson owned and had been driving that night. Without evidence tying Friend to someone who had access to such a vehicle, there is insufficient proof of opportunity to satisfy *Denny*.

In addition to ignoring the absence of evidence tying unknown confederates of Friend to the type of car Wilson drove, the appellate court's theory that Friend had the opportunity to set up Eva so others could kill her wrongly assumes that the shots fired at Friend as he fled the murder scene were not intended to hit him (s*ee Wilson*, slip op. at 10; Pet-Ap. 110). This assumption overlooks the ballistics evidence showing that the shooter fired at Friend while he was hunkering down behind the opened passenger-side door of Eva's car.

Consistent with Friend's testimony about ducking down on the passenger side of the car (51:40), the photographs introduced as exhibits 3,

4, 14 and 15 depicted the bullet holes in the front passenger-side door of the victim's car (*see id.*:145-48). The trajectory of the bullet strikes was consistent with the passenger door being open at the time shots were fired (*id.*:149).

While it is plausible that someone not intending to kill or harm Friend might shoot in his direction as he was running away, and purposely miss him, the same is not true of bullets fired through an open car door behind which he was crouching. Given the risk that bullets hitting a car door could ricochet and hit the person behind the door, the latter shots are consistent with a shooter attempting to kill Friend, but inconsistent with a shooter trying to make it look like Friend was not involved in Eva's murder. This is an additional reason the court of appeals erred in finding that Friend had the opportunity to kill Eva in conjunction with other unnamed persons.

Because the court of appeals erred in concluding that there was evidence showing that Friend had the opportunity to kill Eva either by firing the first weapon or by luring her to the location where other unnamed persons killed her, the court erred in holding that exclusion of the *Denny* evidence violated Wilson's right to present a defense.

II. ASSUMING THE *DENNY* EVIDENCE RELATING TO WILLIE FRIEND SHOULD HAVE BEEN ADMITTED, ITS EXCLUSION WAS HARMLESS ERROR.

A. Applicable law.

A violation of the right to present a defense is subject to harmless-error review. *Crane v. Kentucky*, 476 U.S. 683, 691 (1986); *State v. Kramer*, 2006 WI App 133, ¶ 26, 294 Wis. 2d 780, 720 N.W.2d 459. An error is harmless when it is clear beyond a reasonable doubt that the jury still would have found the defendant guilty absent the error. *State v. Harvey*, 2002 WI 93, ¶ 49, 254 Wis. 2d 442, 647 N.W.2d 189 (citation omitted). "In making this determination, [this court] weigh[s] the effect of the [excluded] evidence against the totality of the credible evidence supporting the verdict." *State v. Buck,* 210 Wis. 2d 115, 125, 565 N.W.2d 168 (Ct. App. 1997). This standard is the same when assessing a defendant's claim that evidence was improperly *excluded*. *See Kramer*, 294 Wis. 2d 780, ¶¶ 26-29.

B. Even if error, the exclusion of evidence that within two weeks of her murder, Friend had slapped and threatened Eva was harmless beyond a reasonable doubt.

The evidence excluded from trial consisted largely of testimony from two female friends of Eva indicating that within two weeks of the murder, Friend had threatened to kill her if she

didn't stay "in check" and had slapped her in the presence of several witnesses (56:16-17, 27). The defense offer of proof regarding this evidence was elicited from Mary Lee Larson:

> Q. Did you, within the two weeks before Eva's death, ever hear Willie Friend make any threats against Eva?
>
> A. Yes.
>
> Q. What did you hear? Who was there, where was it and what did you hear?
>
> A. It was in my house in the kitchen. Willie and Eva were sitting there, and me and my girlfriend Barb.
>
> THE COURT: And what?
>
> A. Were sitting at my kitchen table. Willie and Eva had come over. And Willie stated right to me and my girlfriend that he had to keep Eva in check. If—
>
> THE COURT: He said what?
>
> A. Eva. He said he had to keep Eva in check.
>
> THE COURT: Oh.
>
> A. If he didn't keep – if she wouldn't be in check, he'd kill her, and she knew it.
>
> Q. And did Eva respond to that?
>
> A. She said yes, he would.
>
> Q. Okay. Did you – During this time or about this time, did you ever observe any physical contact between Eva and Willie?

A. Yes, I had.

Q. What did you observe in that regard? Tell us.

A. It was at a motel room. And he went and was slapping her right in front of us.

Q. Okay.

A. There was quite a few of us there.

(56:15-17; Pet-Ap. 121-23.)

While the State does not believe exclusion of the above evidence was error, even if the evidence should have been admitted, for the following reasons its exclusion was harmless beyond a reasonable doubt.

Although the jury did not learn that Friend had slapped and threatened Eva within two weeks of her death, they did hear other evidence from prosecution witnesses that the defense ultimately relied on to establish that Friend had a motive for killing Eva: preventing her from filing a paternity suit against him. Counsel advanced this argument during his closing:

> If the District Attorney's office here in Milwaukee wanted to charge Willie with this crime, it could have done it. And they could have made a very strong argument to a jury just like you that Willie in fact had done it. Now, I'll tell you, right from the beginning . . . Willie did not fire the shots.
>
> There were two people who came by in that car, at least two people. There was nobody [sic, somebody] in the driver's area seat. There was somebody in the passenger

seat. Those two people shot and killed Eva. I don't know who those people are.

. . . .

. . . [W]hen you look at what's going on here, it's reasonable to me that Willie was involved. Willie had her there at this location knowing that these guys were going to come by.

. . . .

Remember what Willie said he was doing that day and how this started? Eva picked him up in court because he was there on a legit case as he calls it, paternity case. Willie was there on a paternity case.

Now, he wasn't really questioned about that. I assume it was somebody else other than Eva. And I think you can assume that it was somebody else other than Eva.

But he's going with Eva now, and remember what Willie told Mrs. Edwards, the most important witness in the case, the one who is undeniably a truth teller, no ax to grind, she said Willie told her that Eva was pregnant, and at the time of her death she was, she had put on some weight, and it was believable.

She looked pregnant, she thought. When she came into court she thought that Eva was pregnant.

Why did she think that Eva was pregnant? Because she saw Eva and she heard what Willie said. So isn't it interesting that Willie thought she was pregnant and Willie had a legit case, and I can assume he wasn't too happy about it. Do you think he might have had some interest in not having another legit case?

> Now, I'm not here as the investigator and I hope somebody wouldn't do this for that reason, but that's a hell of a lot of reason than the no reason we get as to why Grant did it.

(58:71-73.)

Even without Larson's testimony[5] that Friend had slapped and threatened Eva shortly before her murder, Wilson was able to argue that Friend had a motive for killing her – to eliminate another paternity action being filed against him – and that alleged motive was more concrete than the amorphous motive suggested by Friend's statement that if Eva "wouldn't be in check," he would kill her (*see* 56:16; Pet-Ap. 122).

Adding Larson's testimony to the already established motive the defense argued during closing would not have altered the physical impossibility of Friend having directly killed Eva by firing the .44 caliber gun used in the crime. *See* section I.B.1, *supra*. Contrary to the appellate court's determination, the trial court – having the advantage of viewing the numerous photographs and diagrams introduced as exhibits[6] – explained why the physical evidence at the crime scene showed that Friend was not Eva's killer:

---

[5] A second witness, Barbara Lange, was prepared to give testimony similar to that of Larson (*see* 56:35-36; Pet-Ap. 141-42). For brevity's sake, the State refers only to "Larson's testimony."

[6] As explained in footnote 3 of the State's court of appeals' brief, by the time the record was assembled, the photographs and other trial exhibits had been destroyed. The trial court was therefore in a superior position to the court of appeals with respect to understanding the testimony and other evidence presented at trial.

> There were bullet fragments recovered in the door where – where he was sitting on the side where he was sitting, there were chips in the concrete and the dirt.
>
> That confirmed that he was being shot at while he was running down the street, as he says, and there's a lady across the street [Carol Kidd-Edwards] that was looking out the window that confirms that he was running away when the shots were being fired.

(57:14-15; Pet-Ap. 161-62.)[7]

Nor would Larson's testimony have altered the implausibility of the defense theory that Friend committed the crime in cahoots with unnamed persons by luring Eva to the location where she was murdered. As the State has previously explained, this theory of opportunity would have required the jury to believe that unnamed persons who Wilson says killed Eva just happened to be riding in the same distinctive type of car – a gold, two-door Lincoln Continental of the Mark series – that Wilson was driving through some of the same locations as Eva and Friend just hours before the shooting. Even if the jury had heard Larson's testimony about Friend slapping and threatening Eva, there is no reasonable probability they would have had a reasonable doubt as to Wilson's guilt, given that the

[7] When defense counsel referred to the above evidence as "the State's interpretation," the court disagreed: "No, all I'm saying, that's the physical evidence, that's not an interpretation" (57:15; Pet-Ap. 162). Although that statement was made in the context of the trial court denying Wilson's request to present *Denny* evidence, it also helps explain why any error in that ruling was harmless.

additional testimony would not have rendered the defense ambush theory any more plausible.

Given the logistics of the situation and the apparent spontaneity of Friend's and Eva's plans during the hours before her murder, Friend would have had little time to locate two confederates to kill Eva and to direct them to where her car would be parked. Eva and Friend did not get together until 11 p.m. the night before she was murdered (51:20). According to Friend, they "rode around in South Milwaukee for a minute" and then "went practically just a little bit of everywhere on the north side" before stopping at a tavern on 3rd and Center for a few drinks (*id.*:22). After spending "an hour or two" there, they left and drove up Center Street (*id.*); that is where they first saw Wilson's car, parked in front of a closed bar at 5th and Center (*id.*:23). Based on the testimony of Wilson and defense witness Roseanne Potrikus, the bar was Throttle Twisters at 508 West Center (*see* 53:150, 153, 156; 55:19-21). Wilson testified that he and Potrikus did not leave Throttle Twisters until after closing, because her job required her to shut down the bar and clean up (55:20-21).

The next time Friend and Eva spotted Wilson's car, they were sitting outside his mother's home at 3859 North 9th Street, eating chicken (51:25-26). Friend's report of seeing the car pass them twice while they were parked at that location was consistent with Wilson's testimony that he and Potrikus had traversed the 3800 block of North 9th Street twice that night while entering the freeway (55:78).

Friend estimated he and Eva parted company at around 2 a.m., after which he went to his brother's home at 3288 North 9th Street

(51:30-31). Friend was still there when Eva arrived and told him Wilson had just tried to run her off the road (*id.*:32). According to Friend, Eva said Wilson threatened to kill her "if I see you and that nigger together again" (*id.*). Eva remained with Friend at his brother's home until announcing at around 4:30 a.m. that she had to leave (*id.*:33). Friend said they talked inside her car with the motor running until they saw Wilson's car coming down the hill toward them (*id.*:34). Given that Officer Strasser was dispatched to the scene of the shooting at 5:16 a.m. (51:136), Eva must have been killed shortly after 5 a.m.

In light of the foregoing chronology, Friend would not have had much time to arrange for unnamed persons to show up outside his brother's home around 5 a.m. on April 21, 1993. Twenty-one years ago, Friend would not have had a cell phone to call or text someone to let them know he and Eva were sitting outside in her car. The logistics of the situation renders the defense theory – and the court of appeals' determination – that Friend had the opportunity to set up Eva highly unlikely. This is another reason any error in excluding Mary Larson's testimony was harmless.

Even had the jury heard the excluded testimony, the set-up theory would have required them to find that Friend's apparent emotional distress immediately after the shooting was phony. Detective Strasser, the first officer to arrive on the scene (51:136, 138), testified that Friend approached his squad "with his hands flagging" and said "She's been shot, she's been shot" (*id.*:137). Strasser described Friend as "very upset" and "stuttering" (*id.*:141).

Because Friend testified at length, the jury had the opportunity to view his demeanor when he described the events surrounding the shooting. Their observation of Friend on the stand undoubtedly assisted them in evaluating whether he had the cunning and capability to plan a murder and pin it on Wilson. Their observation of Friend also assisted them in deciding whether he could have feigned the type of emotional upset Detective Strasser witnessed immediately after the crime, or whether Friend was a traumatized victim who had just seen his girlfriend murdered.

Because the jury, having had an opportunity to view Friend's demeanor, found beyond a reasonable doubt that he was truthful when he testified that Wilson attempted to kill him, there is no reasonable probability that learning Friend had slapped and threatened Eva would have caused them to find that Friend was not a victim but, rather, an accomplice to murder. This is yet another reason that excluding Larson's testimony was harmless beyond a reasonable doubt.

Finally, any error in excluding Larson's testimony was harmless because it would not have detracted from circumstantial evidence of Wilson's guilt arising from his post-crime behavior. Above all, Wilson's repeated denial to police of having owned a .44 magnum revolver despite his willingness to admit his ownership of numerous other types of weapons was circumstantial proof of guilt. Wilson told Detective Young he did not own a .44 magnum revolver but did own three .25 caliber Raven semi-automatic pistols, none of which was in his possession (51:221-222). Rather, the police had one; his mother had another; and his brother Willie had the third (*id.*:222). When

asked if he'd ever owned a .44 magnum, Wilson stated he never did (*id.*). Even after Detective Dubis confronted Wilson with information from Terry Bethly, indicating that he had fired his .44 magnum at a shooting range during the month of the murder, Wilson continued to deny owning that type of weapon (53:31).

While Wilson testified that the reason he lied about owning this type of weapon was because he no longer had it (55:55), that explanation was severely undercut by his willingness to tell police about other guns he no longer had in his possession. The prosecutor exploited this inconsistency in cross-examining Wilson (*see id.*:85-86).

Apart from his repeated lies about owning a .44 caliber revolver, other circumstantial evidence of Wilson's guilt included his spontaneous question "She's dead? You didn't tell me she was dead" (51:209) at a time when none of the officers had revealed the identity of the shooting victim (*see id.*:209, 217). Other circumstantial evidence of guilt included Wilson's admission on cross-examination that he knew Friend's mother lived on North 9th Street "[b]y Capitol drive and Green Bay" (55:79). This admission supported the prosecution's theory that Wilson was stalking Eva before he killed her and that it was not mere coincidence that Friend saw Wilson's car drive by twice while he and Eva were parked outside his mother's home eating chicken (*see* 51:25-29).

As the foregoing discussion reveals, any error in excluding evidence that Friend had slapped and threatened Eva was harmless beyond a reasonable doubt. Even without the motive evidence Wilson wanted to introduce, the jury

knew he was at the scene and had a different ostensible motive to kill Eva. Adding the excluded evidence to the evidence already before the jury would not have removed the physical impossibility of Friend directly shooting Eva. Nor would the addition of the excluded evidence have explained how Friend had managed to find willing killers with access to the same type of vehicle Wilson was driving that night. Nor would the excluded evidence have affected the jury's ability to evaluate Friend's credibility during his lengthy testimony. Lastly, the excluded evidence would not have detracted from the circumstantial evidence of guilt arising from Wilson's post-crime behavior and his admitted knowledge of where Friend's mother lived.

For all these reasons, even if this court finds error in the exclusion of *Denny* evidence relating to Willie Friend, it should find the error harmless and remand to the court of appeals to allow that court to decide the remaining issues Wilson raised on appeal.

CONCLUSION

This court should reverse the court of appeals' decision and remand to the appellate court with directions to decide the remaining issues Wilson raised on appeal.

Dated this 9th day of April, 2014.

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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. The length of this brief is 8,699 words.

_____
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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 9th day of April, 2014.

_____
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