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

REPLY BRIEF AND SUPPLEMENTAL APPENDIX OF PLAINTIFF-RESPONDENT-PETITIONER, STATE OF WISCONSIN

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TABLE OF CONTENTS

TABLE OF AUTHORITY

CASES

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ARGUMENT

I. WILSON FAILED TO PRODUCE SUFFICIENT EVIDENCE TO SHOW THAT WILLIE FRIEND HAD THE OPPORTUNITY TO KILL EVA MARIC; THUS, THE EXCLUSION OF EVIDENCE THAT FRIEND HAD SLAPPED AND THREATENED HER DID NOT VIOLATE WILSON'S RIGHT TO PRESENT A DEFENSE.

A. Contrary to Wilson's belief, there is a meaningful distinction between a third party's direct connection to a crime and his opportunity to commit it.

In its opening brief at 15-25, the State argued that Wilson failed to show that Willie Friend had the opportunity to kill Eva Maric, so that exclusion of evidence that Friend had slapped and threatened to kill her weeks before her murder did not violate *State v. Denny*, 120 Wis. 2d 614, 357 N.W.2d 12 (Ct. App. 1984). In response, Wilson contends that under the "factual circumstances" of his defense, "there is no meaningful distinction between direct connection and opportunity." Wilson's brief at 25-26. Specifically, he claims that the evidence showing he was at Eva's car, then outside the car and running away from it at the moment of her shooting and death simultaneously satisfies *Denny*'s requirements of direct connection and opportunity. *Id.* at 26. For the following reasons, Wilson is wrong.

The mere fact Friend was present when Eva was shot and killed does not mean Friend had the opportunity to fire the shots that killed her. Rather, as the State explained at length in its brief-in-chief, the medical and ballistics evidence, coupled with the testimony of Carol Kidd-Edwards – the only eyewitness to a portion of the

shooting other than Friend – showed it was physically impossible for Friend to have fired the .44 bullets that killed Eva. Wilson's trial attorney recognized this physical impossibility, repeatedly conceding during closing argument that Friend had not fired any of the shots that killed Eva (*see* 58:71, 74, 84, 89, 90, 95, 110). On appeal, Wilson conveniently ignores this concession, a concession trial counsel made after viewing all of the State's trial exhibits, including photographs of the crime scene and a diagram of the surrounding area (*see* 11:1-3), an advantage appellate counsel lacks.[1]

While Wilson accuses the State of trying to isolate "opportunity" from *Denny*'s other requirements of motive and direct connection (Wilson's brief at 26), he offers no support for his unspoken premise that the strength of the evidence with respect to one prong of the *Denny* test should absolve him from satisfying all three prongs. The court of appeals has rejected this notion. *See State v. Moore*, No. 2009AP3167-CR, 2010 WL 5114736, ¶¶ 26-28 (Wis. Ct. App. Dec. 15, 2010) (Supp. App. 111-13). *Cf. Winfield v. United States*, 676 A.2d 1, 5 (D.C.1996)

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[1] Wilson says that because it is the State's fault that photographs and diagrams introduced as trial exhibits are no longer available, this court should refuse to credit the State's opening-brief argument that the trial court was in a superior position vis-à-vis the court of appeals with respect to understanding the trial testimony and other evidence. Wilson's brief at 44 n.9. Presumably, Wilson would make the same pitch in reply to the State's argument that trial counsel was in a more advantageous position than appellate counsel in evaluating whether it was physically possible for Friend to have shot Eva.

Given that the exhibits were not destroyed until 2011 (*see* letter from Marguerite Moeller to Diane Fremgen dated September 25, 2012) (Supp. App. 115-16), eighteen years after Wilson's conviction, the State should not be faulted for their unavailability. Rather, any blame for the exhibits' destruction before completion of Wilson's direct appeal lies with trial counsel, whose abandonment of Wilson caused this court to reinstate his direct appeal rights long after conviction. Accordingly, the destruction of the exhibits nearly two decades post-trial should not cause this court to discount either of the State's arguments.

("[E]vidence of third-party motivation unattended by proof that the party had the practical opportunity to commit the crime" may justify exclusion of third-party evidence).

Wilson attempts to conflate *Denny*'s requirements of direct connection and opportunity where, as here, the evidence shows the third party was present with the victim at or immediately before the moment of the crime. This court should reject Wilson's attempt because it ignores the very real possibility that a third party's physical presence at the crime scene is insufficient to satisfy *Denny*'s opportunity requirement.

For example, a third party could have a motive to kill the victim and also have a direct connection to the crime by virtue of his presence at the crime scene yet lack the opportunity to have committed the crime due to a physical disability. To illustrate, if the third party is a quadriplegic unable to hold and fire a gun, and the victim dies of a gunshot wound, the third party would not have had the opportunity to commit the crime, regardless of how strong a motive he had and regardless of his presence at the crime scene. In that situation, the defendant should not be allowed to present evidence of the third party's motive absent proof that the third party was acting in concert with the person who actually fired the murder weapon.

Similarly, Wilson was properly prevented from introducing evidence of Friend's violence toward Eva as proof that Friend had a motive to kill her because Wilson did not show that Friend had the physical opportunity to fire the gun that killed Eva, nor did Wilson show Friend had the opportunity to set him up by securing a confederate with the same type of car as Wilson to murder her.

While the State agrees that Wilson did not have to establish Friend's guilt of the crime beyond a reasonable doubt (*see* Wilson's brief at 30), the State disagrees with

Wilson's assertion that he showed by a preponderance of the evidence Friend's opportunity to have committed the crime. Rather, after conceding at trial that Friend did not directly shoot Eva, Wilson merely speculated that Friend could have set her up so that two unknown gunmen who just happened to have access to the same type of car Wilson owned and was driving that night could murder her. This was insufficient to satisfy *Denny*'s opportunity prong.

B. This court should disavow *State v. Vollbrecht*'s concept of what opportunity under *Denny* requires.

In arguing that the court of appeals correctly concluded that Wilson had shown opportunity under *State v. Denny* with respect to Willie Friend, Wilson says the result here falls squarely within the holding in *State v. Vollbrecht*, 2012 WI App 90, 344 Wis. 2d 69, 820 N.W.2d 443. Wilson's brief at 28. The State has two responses: 1) *Vollbrecht* was wrongly decided, and this court should disavow *Vollbrecht*'s concept of what opportunity under *Denny* means; and 2) even if this court agrees with the court of appeals' take on opportunity in *Vollbrecht*, that case is factually distinguishable.

In the context of a claim of newly discovered evidence, the court of appeals in *Vollbrecht* agreed with the circuit court that Vollbrecht had shown Kim Brown had the opportunity to kill Angela Hackl. 344 Wis. 2d 69, ¶ 26. But, as the State unsuccessfully argued in the appellate court, the circuit court only required Vollbrecht to show that it was physically possible for Brown to have killed Hackl, given the distance between the murder scene and Brown's residence and place of work. In rejecting the State's criticism of the circuit court's ruling, the court of appeals stated:

> [T]he postconviction court's determination as to opportunity was made in light of the evidence

> presented as to motive and direct connection. We agree with Vollbrecht that facts give meaning to other facts and that the significance of Brown's opportunity to commit the crime depends on his alleged motive and direct connection.

Id.

In essence, the circuit court and court of appeals in *Vollbrecht* weakened *Denny*'s opportunity requirement in light of what those courts perceived as Kim Brown's singular motive to do to women generally what was done to Angela Hackl. Because those courts were so convinced that Brown's murder of a different woman in the same general geographic location bore marked similarities to Hackl's murder, they found that Vollbrecht had shown opportunity under *Denny* just because it would have been possible for Brown to have encountered and killed Hackl within a small time frame. *See* Petition for Review in *State v. Vollbrecht*, No. 2011AP425 (Wis. Sup. Ct.), at 26-27 ("Essentially, the court found it theoretically possible for Brown to have encountered Hackl during a ninety-minute window of opportunity").

While *Vollbrecht* remains good law, the State continues to believe it was wrongly decided and that this court should disavow *Vollbrecht*'s concept of what opportunity under *Denny* means. Otherwise, in cases where evidence of a third party's motive is strong, trial courts will allow defendants to present third-party perpetrator evidence with only a minimal showing of opportunity.

Even if this court agrees with *Vollbrecht*'s take on motive, however, *Vollbrecht* is distinguishable. Unlike the situation there, here the physical evidence showed that Willie Friend did not shoot Eva, i.e., he lacked the opportunity to have directly committed the crime, a point defense counsel conceded. Also unlike the situation in *Vollbrecht*, the motive Wilson ascribed to Friend for killing Eva – i.e., his threat to kill her if she failed to

remain "in check" (56:15-16) – is not the type of singular motive the court of appeals ascribed to Kim Brown.

II. ANY ERROR IN EXCLUDING THE *DENNY* EVIDENCE WITH RESPECT TO WILLIE FRIEND WAS HARMLESS BEYOND A REASONABLE DOUBT.

A. Absent the excluded evidence, Wilson was able to establish a credible motive for Friend to have killed Eva.

In its brief-in-chief at 28-30, the State argued that one reason any error in excluding the *Denny* evidence was harmless was that Wilson was able to argue from the testimony of prosecution witnesses that Willie Friend had a motive to kill Eva, i.e., to forestall her from filing a paternity action against him. In response, Wilson points out that the arguments of counsel are not evidence – a point the State does not dispute – and says that "in no way can an attorney's remarks *establish* for the jury the critical elements of motive, direct connection, and opportunity needed to advance a third-party defense." Wilson's brief at 37.

This argument contradicts Wilson's earlier claim that both the direct-connection and opportunity requirements of *Denny* were satisfied by the undisputed evidence showing he was at Eva's car, then outside the car and running away from it at the moment of her shooting. *See* Wilson's brief at 26. By Wilson's own estimate, even without the evidence that Friend had slapped and threatened Eva two weeks before her murder, the evidence actually introduced at trial was sufficient for the jury to find that Friend had a direct connection to the crime and an opportunity to kill Eva. Those two requirements of *Denny* did not have to be established by the arguments of defense counsel.

As for the motive suggested by defense counsel in his closing argument, it was supported by evidence supplied by the State's witnesses, i.e., Carol Kidd-Edwards and Friend himself. Kidd-Edwards testified that at the scene of the shooting, Eva "looked . . . like she was pregnant" (51:121). Kidd-Edwards said she asked Friend later whether Eva was pregnant, and he confirmed that she was (*id.*:122).

Friend himself supplied evidence that he was already involved in a paternity action. Specifically, he testified that on the day preceding the shooting, Eva picked him up at the courthouse, where he had appeared "on a legit case," which he explained was a child support action (51:19).

Defense counsel's closing argument as to motive was therefore based on the evidence of record, not on unsupported speculation by counsel. And, as the State observed in its brief-in-chief at 30, killing one's paramour to avoid a paternity action is a more understandable motive[2] than the amorphous motive suggested by the excluded evidence that Friend threatened to kill Eva if she "wouldn't be in check" (*see* 56:16).

B. Wilson's challenges to Friend's credibility do not show that Friend's testimony is "suspect."

In arguing that the exclusion of the *Denny* evidence was not harmless error, Wilson correctly notes that Friend's testimony played an important role in the State's case. Wilson is wrong, however, in characterizing that testimony as "suspect." Wilson's brief at 39.

[2] *See*, *e.g.*, *Wiggins v. Boyette*, 635 F.3d 116 (4th Cir. 2011), an appeal involving football player Rae Carruth's murder of his girlfriend to avoid paying child support for their unborn child.

The "[f]irst and foremost" reason Wilson characterizes Friend's testimony as suspect is Friend's description of the shooter as a "'medium'" man with "'gold rimmed glasses'" who shot left-handed. Wilson's brief at 39-40. Presumably, Wilson is not arguing that he does not have a medium build. Rather, he notes that numerous witnesses testified they had never known Wilson to wear gold-rimmed glasses and that Army records reflect that he shoots right-handed. *Id.* at 40.

Given that Friend had only seconds to view the gunman before he started shooting at Friend, a mistake in observing or recalling the type of glasses the gunman was wearing would not be surprising and hardly renders Friend's testimony suspect. Significantly, the witnesses whose testimony Wilson cited all confirmed that he does in fact wear glasses. Friend's description therefore accurately described Wilson in this regard.

Nor does the fact Wilson is right-handed render Friend's testimony suspect. Wilson acknowledged that he is somewhat ambidextrous, e.g., that he bats left-handed and can write with his left hand (55:107). He also admitted that he can shoot with either hand (*id.*:107-08).

Wilson's description of the shooter therefore does not render his testimony suspect.

Wilson further suggests that Friend's testimony doesn't make sense because bullet holes should have been found in the upper half of the passenger door "where the chance of hitting Friend was more serious" if the shooter was trying to kill him. Wilson's brief at 40. But Friend testified that he had "ducked down" on the passenger-side door of the car when Wilson started firing (51:39-40). If Friend had ducked down far enough, a shot through the upper half of the door may have missed him entirely. Aiming lower would be consistent with Friend's testimony that he ducked down behind the door when the shooting started.

As for the three alleged "instances of Friend's untruthfulness" enumerated by Wilson (Wilson's brief at 42), none of them renders his version of the shooting suspect.

With respect to the first instance Wilson cites, Friend explained at trial that the reason he did not tell police he and Eva had been at his brother's after-hours club the night of her murder was to prevent her mother from learning that her daughter had been in such a disreputable establishment (51:90-91, 93-94).

As for Wilson's claim that Friend gave conflicting accounts of whether he first went to his brother's home as opposed to knocking on Kidd-Edwards' door immediately after returning to the scene once the shooting ended, Wilson improperly cites to the preliminary hearing transcript. Wilson's brief at 42, citing 43:24. Unless the discrepancy between Friend's preliminary-hearing and trial testimony was pointed out to the jury, it is irrelevant to the harmless-error analysis. In any event, such an inconsistency does not mean Friend was being untruthful when he described what he did right after the shooting. More likely, the inconsistency is attributable to the trauma he experienced from being shot at and seeing his girlfriend killed.

As for the third instance of Friend's alleged untruthfulness, Friend's admission that he had told his mother during a telephone call before the start of the preliminary hearing that he had to get his story together (51:88-89) is not an example of untruthfulness. Friend explained that he meant he "had to get my story right in order for them to understand what [was] happening" (*id.*:91).

Finally, Wilson's reliance on the preliminary hearing testimony of Detective Dubis (*see* Wilson's brief at 40, citing 42:10[3]) to cast doubt on the credibility of

[3] The correct record cite is 43:10, not 42:10.

Friend's testimony that shots were fired at him as he fled the scene is improper. The jury did not hear this testimony so this court cannot consider it in deciding whether any error in excluding the *Denny* evidence was harmless.

For the foregoing reasons and those previously set forth in the State's brief-in-chief, any error in excluding the *Denny* evidence regarding Willie Friend was harmless beyond a reasonable doubt.

CONCLUSION

For the reasons set forth above and in the State's brief-in-chief, this court should reverse the decision of the court of appeals and remand to the appellate court to decide the remaining issues Wilson raised on appeal.

Dated this 4th day of June, 2014.

Respectfully submitted,

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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)2. for a reply brief produced with a proportional serif font. The length of this brief is 2776 words.

_____
Marguerite M. Moeller
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 4th day of June, 2014.

_____
Marguerite M. Moeller
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