STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT I

No. 2011AP1803-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

GENERAL GRANT WILSON,

Defendant-Appellant.

Appeal from the Circuit Court of Milwaukee County,
The Honorable Victor Manian and
The Honorable Jeffrey A. Conen, Presiding,
Circuit Court Case No. 1993 CF 931541

BRIEF OF DEFENDANT-APPELLANT GENERAL GRANT WILSON

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Constitutional and Statutory Provisions and Rules

ISSUES PRESENTED FOR REVIEW

1. Whether the circuit court properly exercised its discretion in denying Mr. Wilson the defense provided in *State v. Denny*, 120 Wis. 2d 614, 357 N.W.2d 12 (1984), where there was a substantial showing of motive, opportunity, and proximity of third persons to the crime at issue, and the court could not give a clear reason for its denial of the defense.

Answer by the circuit court: "no."

2. Whether the State should have been permitted to offer collateral impeachment hearsay evidence against Mr. Wilson, so that witnesses attributed to him the ownership of a gun and disclosed to the jury highly prejudicial acts 0f domestic disturbance, even while foreclosing Mr. Wilson from submitting witness testimony critical to his defense.

Answer by the circuit court: "no."

3. Whether Mr. Wilson's trial counsel provided effective assistance where counsel failed to make necessary offers of proof (known witness testimony) as to elements of the third-person defense under *Denny*, 120 Wis. 2d at 624, 357 N.W.2d at 17, and failed to object properly to the introduction of prejudicial character evidence against Mr. Wilson, and additionally, whether the circuit court erred in denying a post-conviction hearing crucial for Mr. Wilson to question counsel's effectiveness.

Answer by the circuit: "no" (without reaching the additional issue).

STATEMENT CONCERNING ORAL ARGUMENT AND PUBLICATION

Oral argument is warranted given the nature of the errors involved and the severity of the sentence. Defendant-appellant takes no position on publication.

STATEMENT OF THE CASE

This direct appeal of General G. Wilson arises from his being denied a basic right: the opportunity to provide a full and fair defense in a criminal trial. Mr. Wilson was entitled to present fully all his defenses—including, significantly, his defense that third persons (viz., Willie Friend and Larnell Friend) had the motive, opportunity, and proximity to the crime—particularly under these circumstances, which the District Attorney termed a "close call." R.58:4; D-App. 252. The court also permitted the State to offer collateral impeachment hearsay evidence, highly prejudicial to Mr. Wilson.

In the early morning of April 21, 1993, Evania Maric was killed in a shooting. R.53:38. Willie Friend was there at the time. R:51:34. In fact, the shooting took place outside an illegal after-hours club owned by Willie Friend's brother, Larnell ("Jabo") Friend. R.51:31-33. Witness testimony, which Mr. Wilson sought to offer as proof in his defense, revealed that Willie Friend (who was in an intimate relationship with Ms. Maric, R.51:19) had threatened and hit Ms. Maric not more than two weeks before her death. R.56:15-17; D-App. 198-200.

Willie Friend turned the police towards Mr. Wilson. Friend told the police that Mr. Wilson had committed the shooting. R.51:140. The police went out and found Mr. Wilson at his job. R.51:175-176. Mr. Wilson was an eighteen-year veteran of the Army Reserves and a sixteen-year, full-time employee and union steward at Krause Milling (ADM). R.55:33,102. Mr. Wilson was a longtime friend of Ms. Maric. R.55:4. The police arrested Mr. Wilson, and he was charged with first-degree intentional homicide while using a dangerous weapon, as well as with attempted intentional homicide of Willie Friend while using a dangerous weapon. R.2:1; 4; 55:38. Mr. Wilson entered a plea of not guilty. R.44: 2.

During the State's case, which included testimony by Willie Friend, Mr. Wilson sought to examine the State's witnesses about third persons who had motive, opportunity, and proximity to the crime. The circuit court prohibited the defense. *See, e.g.*, R.51:76-77, 92-94; 53:231-234. The defense moved for dismissal of the case at the close of the State's evidence; the court denied the motion. R.53:120.

Counsel for Mr. Wilson presented his defense, but the circuit court continued to foreclose any questioning of witnesses regarding a third person connected with the crime. R. 56:13-24; D-App. 196-207. Counsel for Mr. Wilson moved for a mistrial challenging the State's offering of collateral impeachment evidence, which the court took under advisement. R.55:116; D-App. 184. Ultimately, the court rejected Mr. Wilson's

proffered jury instructions regarding the third-person defense. R.12:1-3; 58:5-25; D-App. 101-103. Mr. Wilson's motions for a mistrial were denied. R.58:4-6, 149-153; D-App. 253-259. The case went to the jury. R.58:148.

On July 7, 1993, the jury informed the court that it had reached an impasse. R.58:154-156. The court sent the jury home for the night. R.58:160. Later the next day, the jury found Mr. Wilson guilty of both charges. R.13, 14; 60:2-3. The circuit court denied Mr. Wilson's motion for judgment notwithstanding the verdict, R.60:8, and, on October 4, 1993, entered a judgment of conviction. R.19; D-App. 105.

That same day, the circuit court sentenced Mr. Wilson to life imprisonment with a potential for eligibility for parole in 30 years from the date of sentencing, as well as a consecutive sentence of an indeterminate term not to exceed 20 years for attempted first-degree intentional homicide. R.1:14-15; 19; 61:46-54; D-App.264-274.

Mr. Wilson's trial counsel, Peter J. Kovac, filed a notice to pursue post-conviction relief. R.20. Mr. Kovac did not file anything on Mr. Wilson's behalf for over two years, and then the filing consisted only of two pages. R.22. In June 1996, he filed a nine-page motion for a new trial and sentence modification. R.23. The circuit court denied the motion. R.24; D-App.106-108. Mr. Kovac did not file additional post-conviction motions. Mr. Kovac did not file a notice of appeal for Mr. Wilson. On April 21, 2008,

Mr. Kovac was publicly reprimanded over his misconduct in this case. *See* Public Reprimand of Peter J. Kovac, 2008-OLR-05.

On September 14, 2010, this Court granted Mr. Wilson's petition for habeas corpus, in which Mr. Wilson argued that Mr. Kovac had rendered ineffective assistance of counsel. R.1:19; 25; D-App. 109-110. As relief, this Court reinstated Mr. Wilson's right to pursue direct post-conviction and appellate relief under Wis. Stat. § 809.30. R.25:3, D-App. 110.

On January 21, 2011, Mr. Wilson, by appointed counsel, filed a motion for post-conviction relief. R.27; D-App. 111-134. On July 14, 2011, the circuit court denied Mr. Wilson's motion for post-conviction relief, without a hearing. R.39; D-App. 151-154. This appeal followed. R.40.

STATEMENT OF FACTS

Evania Maric was killed between 5:00 and 5:10 a.m. on April 21, 1993. R.53:38. Willie Friend was with her at the time. R.51: 33-34. He and Ms. Maric were outside an illegal nightclub, owned by his brother, Larnell (Jabo) Friend. R.51:31-33. Willie Friend testified that he had been involved in a relationship with Ms. Maric since 1992. R.51:19. Ms. Maric's acquaintance with Jabo went farther back. R.51:93; 55:6.

Willie Friend's Nighttime Activities with Ms. Maric

A primary witness for the prosecution was Willie Friend, the man with whom Ms. Maric was in an "intimate relationship" at the time of the shooting. R.51:19. Willie Friend had multiple convictions on his record.

R.51:242. Friend testified that he spent the early evening of April 20 with Ms. Maric, dropped her at home, and picked her up again at 11 p.m. R.51:19-20. They left Ms. Maric's house in South Milwaukee and went to the north side. R.51:22. In Friend's characterization, "[w]e was just out." *Id.* They went to a tavern for an hour or two for a few drinks and left. *Id.* While Mr. Friend and Ms. Maric were driving around on Center Street, Ms. Maric pointed out a car. Tr.51:22-23. She called the car "General's car." R.51:23. She indicated "a gold Lincoln with that design license plates." *Id.* No one was in the car. *Id.*

Mr. Friend and Ms. Maric stopped for chicken and sat outside his mother's house on 9th and King Drive in Milwaukee. R.51:25. While there, Willie Friend testified he thought he saw the "General c[o]me around the bend" in a car with a female. R.51:26, 60. He made that observation based on seeing the "car first," R.51:50, which Willie Friend testified was a "gold Lincoln" like the one he had seen on Center Street. R.51:27. Mr. Wilson, who was out that night with a friend, testified that his destinations took him on and off the highway ramp near that area. R.55:23-30.

Ms. Maric left the home of Mr. Friend's mother sometime before 2 a.m. R.51:30. Mr. Friend then walked towards his brother's house at 9th and Concordia. R.51:31. Willie Friend's brother, Larnell Friend, operated an illegal after-hours club there. R.51:31-32, 46. Willie Friend had been at

his brother's club in the late evening hours before and so had Ms. Maric. R.51:31-32, 93.

That evening Willie Friend and Ms. Maric ended up together at the after-hours club. R.51:32. Ms. Maric came to the after-hours club, where they stayed for some three or more hours. R.51:32-33, 56. Ms. Maric prepared to leave around 4:30 a.m. because she had to go to work as a crossing guard and as a security person. R.51:33.

Willie Friend walked out with Ms. Maric to her car, parked about fifteen to twenty feet from his brother's club, and they sat talking in the car for some time, while it was running. Tr.51:34, 57. At some point, according to Friend, a car pulled up alongside Ms. Maric's car. R.51:34.

Willie Friend explained that a "medium" man with gold-rim glasses got out of the car. R.51:38, 61. Friend testified that the individual walked over with a gun to the passenger side of Ms. Maric's car. R.51:38. Mr. Friend stated that the individual "looked at me, and he just started shooting." R.51:39. Mr. Friend testified that he did not "know if he shot in the car first or he shot over the car." R.51:40. He testified that the gunman was left-handed. R.51:67-68.

Friend ran away. R.51:40. He ran past a house, through a gangway, and came around the alley back to the car. R.51:41. He heard shots from a "smaller gun" and a door slam, and saw a car pass. R.51:42-43. Willie Friend was not shot. R.51:41.

Willie Friend testified that he went to Jabo's house. R.51:45. Only after, did Willie Friend arrive at the front door of a neighbor, Mrs. Carol Kidd Edwards, and tell her to call 911, which she did. R.51:109.

Carol Edwards's Testimony About the Shooting and Two Men

Ms. Carol Kidd Edwards, who lived in a house across the street from the house operated by Jabo Friend, testified that she heard five loud gunshots early in the morning, around 5 a.m. R.51:96-98, 109. After hearing the first shot, she threw herself to the ground without looking outside. R.51:97.

After the five shots had ended, Ms. Edwards got off the floor and looked out the window. R.51:97. At that time, she "saw a man with a brown leather jacket on running away from a car parked across the street from my house." *Id.* Ms. Edwards identified the man as Willie Friend. R.51:98.

Ms. Edwards testified that she "first saw him [Willie Friend], here, right in the vicinity of the car." R.51:100. She explained that Willie Friend was "running from the car." R.51:97. She elaborated that he was "almost sideways running." R.51:115. He was running between the houses. R.51:97. According to Ms. Edwards, "he was running from this vehicle." R.51:100.

Of the cars parked across the street from Ms. Edwards (besides the car with Ms. Maric), another car located there was a "gold-toned

Continental." R.51:101. Ms. Edwards could not remember if the plate was a specialty or a regular plate. R.51:128-130. She could not identify the plate. R.51:124-125.

Ms. Edwards testified that "as I observed Willie running from the car [with Ms. Maric] across the street, I also saw a man coming from my blind side, which is the passenger side of [another] car . . . and then approach the car across the street [with Ms. Maric] where the car was still running." R.51:103. Ms. Edwards saw a gun in the man's hand. R.51:103. She testified that this was a slightly built man, about 6 feet tall, wearing a leather jacket. R.51:123. Ms. Edwards testified that she "couldn't recognize him if [she] saw him today." R.51:107-108.

Ms. Edwards saw the man approach the driver's side of the running car with Ms. Maric and shoot into the driver's side of the car. R.51:104. The shooter was about two feet from the car when he was firing the shots. *Id.* These shots were not as loud as the first shots she heard. R.51:119. She knew that "there were two different guns." *Id.*

Ms. Edwards said that the man returned to the other car. R.51:106. The man walked in front of the car to the passenger side, outside of her view. R .51:102, 106, 120. She heard a door shut, and the car pull away. R.51:106.

The police received a call about the shooting at 5:16 a.m. R.51:136. The police found Willie Friend by Ms. Maric's car. R.51:46. No other car

was there. R.51:44. Ms. Maric had been shot and was lying on the seat facing the passenger side. *Id.*

Willie Friend told the police that it was Mr. Wilson who had shot Ms. Maric. R.51:46-47, 140. According to Mr. Friend, while he and Ms. Maric were in her car, "Mr. Wilson come down the hill, come past the stop sign, pulled up beside us." R.51:34. Mr. Friend testified that he came to the conclusion that it was Mr. Wilson's car because he saw the "color, fresh paint job, clean car." R.51:36. He stated that, in the reflection of the light, it was "the color in the car that I had saw earlier." R.51:37. He also stated the car had a specialty plate. R.51:47. Mr. Friend was the only witness who gave testimony about a specialty license plate linked to the car. R.51:47, 128-130. He also explained that "I gave them information where this gentleman supposed to have lived, but I never did find the house." R.51:47.

Ms. Carol Edwards could not identify the shooter. R.51:107-108. Willie Friend identified Mr. Wilson in a line up. R.51:48. However, Willie Friend admitted at the preliminary hearing that he told his mother in a phone call from the courthouse that he "had to get his story together" about what happened that night. R.43:42-43; 51:88-89.

Bullets from a .44 magnum and a .25 caliber semi-automatic pistol were recovered from Ms. Maric's body. R.53:50-51, 71-72. The state technician testified that the "large caliber type holes . . . indicated a very close contact shot." R.53:77. The technician testified that "[i]t would be

right in contact or the muzzle being held up at the surface of the clothes or back slightly, possibly three inches, no more than three inches back from the muzzle to the garment itself. . . . It was pressed up into the clothes." *Id.* The medical examiner testified that the larger-caliber bullets had come before the smaller-caliber bullets. R.53:113. According to the medical examiner, at least one of the larger-caliber bullets could have killed Ms. Maric. R.53:117-118.

Mr. Wilson's Defense

Mr. Wilson took the stand. R.55:3. He testified that he was not at the after-hours club and, indeed, had never been there. R.55:7. Mr. Wilson testified he came home from work around 3:00 p.m. on April 20, 1993, to fill out his tax forms. R.55:16. Afterwards, he called a friend, Terry Bethly. R.55:16. Terry Bethly testified that Mr. Wilson arrived at her house at 6 p.m. R.53:9. Mr. Wilson testified that they "got together and had a drink or two and went to a shopping mall on the east side, went, and filed my taxes." R.55:17. Ms. Bethly testified that around 8:30 or 9 p.m. they went to Mr. Wilson's house. R.53:10. Ms. Bethly made a call to set up a meeting with another friend. *Id.* They left Mr. Wilson's house and, Ms. Bethly testified, he drove her back to her house. R.53:11; 55:17.

After Mr. Wilson dropped off Ms. Bethly, he went back to his house and made a few phone calls, including one to Rosanne Potrikus, at her place of work. R.55:17,19. These calls are reflected in the telephone

company records. R.55:19. Ms. Potrikus was a bartender at Throttle Twisters on Center Street. R.53:154. Around 10 p.m., Mr. Wilson went to Twisters to see Ms. Potrikus. R.55:20. Ms. Potrikus explained (as did Mr. Wilson) that Mr. Wilson visited with her while she closed down the bar. R.53:156; 55:20. Mr. Wilson's unoccupied car was on Center outside Twisters (where Ms. Maric pointed it out to Willie Friend, R.51:23) while she and Mr. Wilson were inside the bar. R.53:153-154; 55:20-21.

Once Ms. Potrikus closed down the bar, she and Mr. Wilson headed to another bar owned by a friend. R.55:21-22. But that bar was closed, and they decided to get chicken somewhere on Capitol Drive. R.53:158; 55:23-25. In the course of buying chicken and heading to their next destination, Ms. Potrikus and Mr. Wilson drove on and off the freeway a couple of times using ramps near Capitol, and they ultimately ended up at Brown's Lounge, a bar located on Green Bay, which also was closed. R.55:24-29.

Mr. Wilson drove Ms. Potrikus back to her car at Twisters. R.53:161; 55:30. Ms. Potrikus got into her car, and they drove away in separate cars, with Mr. Wilson following her until she reached her exit. R.55:30-33. Mr. Wilson went to his house at 74th and Carmen and arrived around 3:30 or 4 a.m. R.55:31-32, 104.

Mr. Wilson testified that he woke up around 5:15 a.m. and called Ms. Potrikus, as she had asked him for a wake-up call. R.55:32. Ms. Potrikus testified that Mr. Wilson called her around 5:30 a.m. to wake her up for

work. R.53:163. The phone records from Mr. Wilson's house confirmed the telephone call was made at 5:33:53. R.53:145.

Mr. Wilson started his shift at Krause Milling (ADM) at 7 a.m. R.55:33. Mr. Wilson was a senior miller for the production department and a union steward. *Id.* Somewhere after 7:20 a.m., police officers arrived at Krause. R.51:175. They stopped at Mr. Wilson's car, which was close enough to the street that the officers could see it as they drove by. R.51:176, 184. Mr. Wilson testified that he saw a police officer looking at his car. R.55:36. He approached an officer stationed in the lunch room to see what was happening. *Id.* The officer took Mr. Wilson to the plant manager's office, where he was taken into custody. R.51:202-203. Mr. Wilson recognized one of the police officers as a fellow drill sergeant from the Army Reserves. R.55:37. The police officers told Mr. Wilson that they "were investigating a shooting." R.51:177.

Mr. Wilson cooperated with all the officers' requests. R.51:188. He permitted the officers to look into his two work lockers. R.51:179. Mr. Wilson consented to the search of his car. R.51:180. He consented to a search of his house. R.51:181. En route to his house, Mr. Wilson heard from the police radio "information about a shooting on 9th Street." R.55:44. The officers recovered a gun from Mr. Wilson's car and some guns from his house. R.51:180-182.

Mr. Wilson told the officers "about all the guns [he] had at that time." R.55:54. Sometime later, about two days into his being held in custody, Mr. Wilson was asked about a .44 caliber gun that he had taken to a firing range with Ms. Bethly on April 3. R.55:54, 57. Mr. Wilson told the police that he "didn't own a .44." R.55:54. For, although he had owned a .44, he had taken it with him for protection while on vacation to Florida during the weeks preceding the shooting, and had ended up bartering the .44 caliber to a man in Alabama for drugs and girls, because he did not have enough money. R.55:57-60.

When he was being booked, Mr. Wilson overheard that he was being held for the charge of homicide and thereby learned that someone was dead. R.55:209. Officer Raspberry stated that he thought Mr. Wilson said "'she's dead? You guys didn't tell me she was dead." R.51:209. Mr. Wilson testified that he asked the officers whether someone died. R.55:49. He knew that the shooting was on 9th Street. R.55:50. Mr. Wilson and the police officer both agree that this is the first time that Mr. Wilson realized that he was being arrested for a murder. R.51:216; 55:50. Later that day, the officers told Mr. Wilson that he was being charged with the homicide of Evania Maric. R.55:51.

In his defense, Mr. Wilson introduced facts in response to those contained in the testimony of Willie Friend. Witnesses testified that he has never worn gold-rim glasses. R.53:8, 124, 128, 139-140. Colleagues in the

Army Reserves testified that Mr. Wilson shoots right-handed, not left-handed, which his military records confirmed. R.53:139; 54:39, 42-44. Mr. Wilson also testified that he shoots right-handed. R.55:107. Evidence was introduced that there are a number (at least four) of gold-colored Lincoln cars registered in Milwaukee County area near the shooting. R.53:175-181.

Mr. Wilson was not permitted to introduce evidence of third-persons connected with Ms. Maric's death. Counsel argued to the court that Willie Friend and Jabo had "motive and opportunity." R.51:231. Counsel had witness testimony (ultimately permitted only as an offer of proof) that Willie Friend, in the weeks before the shooting, was abusive towards Ms. Maric. Mary Lee Larson, a friend of Ms. Maric, witnessed Willie slap Ms. Maric; she further explained that, two weeks before Ms. Maric's death, Willie made a death threat:

> A. 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.

R.56:16-17.

Counsel for Mr. Wilson cited the decision in *State v. Denny*, R.51:233, and outlined the proof that he wanted to present regarding Larnell (Jabo) Friend:

> My offer of proof is that Jabo, and others who are mentioned in the police report, I didn't just make this up on my own, if you read the police reports it says that the victim in this case had been working as a prostitute, that her pimp was Jabo, that she was trying to get out.

R.51:247.

But the circuit court intimated that it would not admit the evidence since it "sounds to me like it's speculation." R.51:248. There was no ruling, so counsel for Mr. Wilson continued to argue the defense. In the end, the court permitted only partial testimony from one witness and an offer of proof. R.56:15-17, 38-39; D-App. 198-200, 221-22. Counsel for Mr. Wilson went to the District Attorney, who, as recounted by Ms. Kraft, stated the *Denny* testimony should be admitted. R.57:2; D-App. 230.

Nonetheless, Ms. Kraft asked the court for a ruling because "[the District Attorney] and I disagree with this." R.58:3-4; D-App. 252-253. The court told the parties that it had "an opportunity to confer informally with a Circuit Court Judge who's a long time member of the Criminal Jury Instructions committee." R.58:4-5; D-App. 253-254. The court denied the *Denny* defense. *Id.*

ARGUMENT

I. THE CIRCUIT COURT ERRED IN PREVENTING MR. WILSON FROM PRESENTING A FULL DEFENSE DESPITE HIS MEETING THE REQUIREMENTS OF *STATE V. DENNY*.

The judgment against Mr. Wilson should be reversed and this case remanded for a new trial allowing Mr. Wilson to introduce evidence establishing that Willie Friend and Larnell (Jabo) Friend had the motive, opportunity, and proximity to commit the crime for which Mr. Wilson was on trial. Mr. Wilson has a constitutional right to present a defense, *see* U.S. Const. Amends. VI, XIV; Wis. Const. Art. I, § 7, and that right was infringed upon when the circuit court prevented him from presenting relevant witness testimony in his defense.

Although the admission of evidence is within the discretion of the circuit court, the circuit court must apply the proper legal standards, must assess the relevant facts, and must utilize a rational process to reach a decision of a reasonable jurist. *See Denny*, 120 Wis. 2d at 625, 357 N.W.2d at 18; *State v. Hunt*, 2003 WI 81, ¶34, 263 Wis. 2d 1, 25, 666 N.W.2d 771, 782. Here, the court did not articulate a legal standard for its determination and then improperly discounted the substantial evidence of the connection of Willie and Larnell Friend to the shooting. These were harmful errors requiring reversal and a new trial.

A. Mr. Wilson Satisfied the Criteria of *State v. Denny*.

Mr. Wilson sought to introduce especially relevant evidence that met the requirements of *Denny*, 120 Wis. 2d at 622-625, 357 N.W.2d at 16-18. The presumption that relevant evidence is admissible is set forth in Wis. Stat. § 904.02: "[a]ll relevant evidence is admissible, except as otherwise provided." Introduction of testimony pertaining to another suspect—as Mr. Wilson sought here—is assessed under the standard set forth in *Denny*, 120 Wis. 2d at 622-625, 357 N.W.2d at 16-18.

The court in *Denny* sought to eliminate concerns about relevancy, speculation, and admissibility by setting forth certain criteria: where "motive and opportunity have been shown and as long as there is some evidence to directly connect a third person to the crime charged which is not remote in time, place or circumstances, the evidence should be admissible." *Denny*, 120 Wis. 2d at 624, 357 N.W.2d at 17. Thus, the showing does not "simply afford[] a possible ground of suspicion against another person." *Id.* at 623. Importantly, the evidentiary burden on the defendant is not the same as the State's burden for "sustain[ing] a conviction." *Id.*

The State, in its post-conviction motion, did not challenge Mr. Wilson's ability to meet *Denny*'s criteria of "motive" and "opportunity." R.36:6; D-App. 140. This makes sense given the evidence. Willie and Jabo Friend were third parties with motive, opportunity, and proximity to the

shooting. Willie Friend had been in an intimate relationship with Eva Maric at the time that she was killed. R.51:19.

The fact that Ms. Maric had reason to fear death from Willie Friend came out in the testimony offered by Mary Lee Larson, a longstanding friend of Ms. Maric, who provided an offer of proof for the defense. Ms. Larson told what she had witnessed:

> 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. [We] [w]ere 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.

R.56:15-17; D-App. 198-200.

Ms. Larson also testified to Willie Friend's violence against Ms. Maric:

> 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.

R.56:16-17; D-App. 199-200.

Barbara Lang, the above-mentioned friend of Ms. Larson and Ms. Maric, testified before the jury, but the court only permitted her to testify that she had observed the relationship between Ms. Maric and Willie Friend and the relationship between Ms. Maric and Mr. Wilson. R.56:38-39; D-App. 221-222. Ms. Lang stated that she had not seen Ms. Maric afraid of Mr. Wilson. *Id.*

Both Ms. Larson's observation that Willie Friend was a threat to Ms. Maric and Ms. Lang's impressions further surfaced in the testimony of a witness for the State, Officer Dubis, who interviewed Ms. Larson and Barbara Lang. R.56:30; D-App. 213. Officer Dubis confirmed that Ms. Larson and Ms. Lang had informed him of an incident at a motel near 27th and Edgerton in which Willie Friend had slapped Eva Maric. *Id.* Importantly, Ms. Larson and Ms. Lang told Officer Dubis that it "was their feeling" that Willie Friend was involved in the murder of Eva—not Mr. Wilson. R.56:31-32; D-App.214-215.

The testimony offered by Ms. Larson and Ms. Lange itself should have been admitted. As the court found in *Denny*, "where a third person has committed or actively seeks to commit violent acts against the victim,

or has threatened the victim in a manner not remote in time, place or circumstances, the evidence might likewise be admissible." *Denny*, 120 Wis. 2d at 624, 357 N.W.2d at 17. These witnesses told a story of Willie Friend's violence towards Ms. Maric that fit all these possibilities. At a minimum, the testimony establishes Willie Friend's motive, as seen in the threats uttered just two weeks before Ms. Maric's death as part of his violent relationship Ms. Maric.

The motive of Jabo, Willie Friend's brother, was supported as well. A police report detailed statements from the mother (Clara Maric) and sister (Deja Maric) of Ms. Maric, recounting that Ms. Maric had been involved in prostitution business and that Jabo was her pimp. R.27:21-24; D-App. 131-134. Ms. Maric's mother stated that Ms. Maric had been trying to break free from the prostitution business and, thus, Jabo, to change her life.[*] *Id.*

Nor can there be a question of opportunity. The shooting occurred outside Jabo's after-hours club while the club was operating. R.51:32-33. Willie Friend was at the scene of the shooting. R.51:34. He testified that he was in the car with Ms. Maric for some time. *Id.* Mrs. Edwards testified

[*] The State argued in its post-conviction motion that Mr. Wilson's evidence of these criteria was not admissible as it was based on hearsay in this police report. However, these statements should have been considered excited utterances, not hearsay. *See Phifer v. State*, 64 Wis. 2d 24, 34-35, 218 N.W.2d 354, 359 (1974). The statements occurred within 45 minutes of the shooting and during stressful circumstances as they were made during the same interview in which these individuals were notified that their daughter/sister was dead. In all events, as explained below in Part III, any admissibility problem should have been avoided by Mr. Wilson's counsel calling these witnesses to provide testimony, which he failed to do.

that she saw Willie Friend at Ms. Maric's car after five shots from a large-caliber gun had been fired. R.51:100. At least some of those large-caliber bullets had been shot from within inches of Ms. Maric. R.53:77. Ms. Edwards then saw Willie run away from the car. R.51:97-98. Willie Friend testified that he ended up at Jabo's house. R.51:45. Jabo and he went out to Ms. Maric's car. *Id.* They then went to the home of Mrs. Edwards and told her to call the police. R.51:109.

Instead of challenging motive and opportunity, the State disputed the third criterion of the *Denny* test: whether "the *circumstances* of the crime show a *legitimate tendency* that someone else could have committed the crime." R.36:7; D-App. 141. However, the evidence that Mr. Wilson sought to introduce comports with the very "illustration" set out in Denny: "where it is shown that a third person not only had the motive and opportunity to commit the crime but also was placed in such proximity to the crime as to show he may have been the guilty party, the evidence would be admissible." *Denny*, 120 Wis. 2d at 624, 357 N.W.2d at 17. Substantial evidence shows that Willie Friend and Jabo were in this sort of proximity to the shooting of Ms. Maric.

The connection between the third persons (Willie and Larnell Friend) and Ms. Maric was direct and clear. The offer of proof from Ms. Larson established that Ms. Maric was involved in a relationship with Willie Friend, in which he had threatened her with death and been abusive.

R.56:15-17; D-App. 198-200. Willie Friend was at Ms. Maric's car *after* all five of the larger-caliber bullets had been fired, according to the testimony of Mrs. Edwards. R.51:97-98. The shooter of the higher-caliber bullets was inches away from Ms. Maric. R.53:77.

Mrs. Edwards gave testimony involving two men in the shooting. One of those men she identified as Willie Friend, whom she saw at Ms. Maric's car. R.51:98. Mrs. Edwards saw Willie Friend run away from Ms. Maric's car. *Id.* Mrs. Edwards saw the other, slightly built man get out of the passenger side of a car, go around the front of that car, approach Ms. Maric's car and shoot into the driver's side. R.51:103. After running, Willie Friend ended up with Jabo. R.51:45.

Willie Friend's ending up with Jabo brought things back full circle to the after-hours club and Jabo. Police officers testifying for the State admitted that the after-hours club was operating illegally with their knowledge. R.53:39. The police handled the investigation of Jabo delicately. They did not send a uniformed policeman to talk with Jabo; instead, he talked to Detective Moore "who had previous knowledge of Jabo's house and knew Jabo." *Id.*

The extent of Ms. Maric's mother's fears of Jabo, Willie, and the after-hours club were detailed in the police report, which stated that Ms. Maric had recently left the prostitution business and Jabo threatened to kill her as a result. R.27:21-24; D-App. 131-134. Indeed, Mr. Wilson

testified that, as to Ms. Maric, "She just basically pointed out the house out to me [Jabo's house] and said, if somebody – something ever happened to her that there would be the place." R.55:8-9.

Still the State wanted to hold someone other than Willie Friend accountable for the crime. That is no hyperbole. In a report submitted to the crime lab, Detective Dubis expressly wrote that he wanted to show that Willie Friend did not do the shooting. R.53:80. But to do so, the State had to overlook Ms. Edwards's testimony, the testimony of other State witnesses, and problems with Willie's story.

There were other inconsistencies in Willie Friend's story. Willie Friend testified that the shooter was left-handed, but colleagues from the Army Reserve, Mr. Wilson's records from the Army Reserve, and Mr. Wilson provided evidence that he is right-handed. R.53:139; 54:39, 42-44. Willie Friend testified that the shooter wore gold-rim glasses. R.51:61. But Mr. Wilson did not wear gold-rim glasses. R.53:8, 124, 128, 139-140. Ms. Edwards described the man shooting the second round of bullets as a slightly built man. R.51:123. The description given by Ms. Edwards of the shooter (in addition to her identification of Willie Friend at the car) does not match Mr. Wilson.

The District Attorney himself, E. Michael McCann, identified this as a "close call," R.58:4; D-App. 253, and advocated admitting the evidence.

Yet the circuit court denied Mr. Wilson the opportunity to present the defense, which was error.

B. The Circuit Court Lacked an Articulable Standard for Refusing the *Denny* Defense.

The circuit court could not articulate a reasoned basis in law and fact for refusing Mr. Wilson the defense under *State v. Denny*; this "failure to delineate the factors that influenced its decision constitutes an erroneous exercise of discretion." *Hunt*, 2003 WI 81 at ¶34, 263 Wis. 2d at 25, 666 N.W.2d at 782. Here, as detailed below, the circuit court engaged in a convoluted discussion of the defense, which culminated in the court's informal consultation with a (unnamed) fellow circuit court judge and the court's denying the defense.

The court's ever-shifting rulings on the *Denny* defense compromised Mr. Wilson's defense. At the start of trial, defense counsel argued that Mr. Wilson should be entitled to adduce evidence of alternate suspects as outlined in *State v. Denny*. R.51:233; D-App. 158. The circuit court told counsel for Mr. Wilson, Mr. Kovac, that he "should probably prepare an offer of proof." *Id*. Mr. Kovac responded:

> My offer of proof is that Jabo, and others who are mentioned in the police report, I didn't just make this up on my own, if you read the police reports it says that the victim in this case had been working as a prostitute, that her pimp was Jabo, that she was trying to get out, she was trying to better her life, trying to get out of the business, and that Jabo wanted her to continue to work. That's the proof that we want to put in.

R.51:247; D-App. 162. The circuit court replied only that it "sounds to me like it's speculation." R.51:248; D-App. 163.

On the basis of that abbreviated ruling, the court forced counsel for Mr. Wilson to sit on his hands (and Mr. Wilson's rights) during the State's case and forgo questioning the State's witnesses regarding key circumstances connecting the alternative suspects. Of particular importance: counsel could not question Willie Friend, one of the primary witnesses for the State, regarding his "motive," opportunity, and proximity to the shooting or about Jabo's relationship with Ms. Maric. *See, e.g.*, R.51:66-67, 76-77, 91-94.

Counsel for Mr. Wilson brought up the defense again when it was time to present the defense case. Counsel argued that Mr. Wilson should be permitted to bring forward witnesses, such as Mary Larson, showing the connection of third persons. R.56:18; D-App. 201. The court did not give weight to the defense request; it instead embraced the State's case, saying that:

> [t]he evidence that the State has put in, in my view, is very strong. To allow this witness [Ms. Larson] to – who wasn't on the witness list, as I understand it, and came in as kind of an afterthought here after the defense had rested and the case was reopened, seems to me is just going to lead to speculation.

R.56:22; D-App. 205.

But the circuit court could not have been especially troubled by the last-minute nature of the witness since the court had just told counsel for defense that: "I assumed that with the three-day interval that you'd think of some more witnesses to call, so I assumed that we would reopen the defense and allow you to put them on. Okay." R.56:3; D-App. 193. Moreover, counsel for Mr. Wilson explained that he had difficulty producing Ms. Larson previously because she had no telephone. R.56:23; D-App. 206.

Nor would have the State's position been prejudiced by the introduction of witnesses to show the motive, opportunity, and proximity of third persons. The State would have had the opportunity to question these witnesses on cross-examination and on rebuttal. Indeed, the State told the court it was planning to "call one or maybe more detectives who questioned the defendant" in rebuttal. R.56:37; D-App. 220.

The court did not make a decision on the defense, and counsel for the State sought a recess to consult with her office. R.58:3; D-App. 252. After the recess, Ms. Kraft reiterated that the District Attorney's office was divided on this "close call:"

> I talked at some length with Mr. McCann about this, about the facts of the case. Mr. McCann instructed me to tell the Court as follows: that he as the District Attorney believes that this is a close call, that he is considering the sentence that this man faces and probably will result if convicted. He has read the Denny case. He [instructed] me not to object. But he's also

> indicated to me that I could convey to the Court that he and I disagree about this, and that we fully expect the Judge to make an independent ruling based on all of the evidence that has come forth in this case at this point and all of the arguments that have been set forth in the record up until this point. He also indicated that I should say that we don't intend to confess error at a later time.

R.58:3-4; D-App. 252-253.

For its part, the circuit court used the recess to consult a third party, which led to a decision refusing the defense:

> Well, in the interim, I also had an opportunity to confer informally with a Circuit Court Judge who's a long time member of the Criminal Jury Instructions committee, and his response was the same as mine, he thinks that this will lead to speculation, that it's not a proper procedure, and that if it is a close issue, which apparently everyone agrees it is, it should be decided by the Supreme Court sooner rather than later. Therefore, I'm going to proceed with the closing arguments.

R.58:4-5; D-App.253-254.

The court's decision-making process was in error. Mr. Wilson was not forewarned that the Court intended to consult another judge on the matter. Nor did the court disclose the name of the judge consulted. Yet the court relied on the other judge in a meaningful way. *Cf.* SCR 60.04(1)(g)(3) ("A judge may consult with other judges or with court personnel whose function is to aid the judge in carrying out the judge's adjudicative responsibilities.").

Finally, the manner of the consultation and disclosure to the parties was problematic. "A judge may obtain the advice of a disinterested expert on the law applicable to a proceeding before the judge *if* the judge gives notice to the parties of the person consulted and the substance of the advice and affords the parties reasonable opportunity to respond." SCR 60.04(1)(g)(2) (emphasis added). Given the circumstances, Mr. Wilson effectively had no opportunity to respond to the circuit court's argument.

In this consultation, the circuit court was no longer exercising its discretion; the court was effectively ceding to another some of *its* decision-making discretion.

The rest of the circuit court's reasoning was no better. The court worried that the trial would "take another couple of days to finish." R.57:6; D-App. 234. The court did not want Ms. Kraft, counsel for the State, "hanging out there on a limb at the last minute just because Mr. McCann wanted to play it safe." R.57:7; D-App. 235. At this point, the court's decision in some measure appears to have been driven by scheduling. But that was not appropriate. Counsel for Mr. Wilson had informed the circuit court that he was ready to go with his witnesses (those who had earlier provided offers of proof) to provide evidence on the third-persons defense. R.57:3; D-App. 231. While the State told the court it would present rebuttal witnesses, *id.*, Mr. Wilson informed the court that he would not

object to the State's taking whatever time it needed to secure the rebuttal witnesses. R.57:5; D-App. 233.

Perhaps the court wanted *more* evidence, but as counsel for Mr. Wilson explained to the court, the *Denny* requirement of connection of third persons need not be "substantial" and it was satisfied here. R.57:11-12; D-App. 239-240. That troubled the circuit court: "That's my problem with this decision. This is a Court of Appeals decision, it's not a Supreme Court decision." R.57:12; D-App. 240.

In fact, the circuit court was bound to follow the Court of Appeals decision. *See* Wis. Stat. § 752.41(2) ("officially published opinions of the court of appeals shall have statewide precedential effect"). The circuit court was bound to follow *Denny* as it was (and is) good Wisconsin law. *See Cook v. Cook*, 208 Wis. 2d 166, 189, 560 N.W.2d 246, 256 (1977).

Likewise, the court erred in its application of *Denny* because it focused on the court in *Denny* talking about "tendencies," when, as the circuit court put it, "[w]e're talking about beyond a reasonable doubt . . . as far as the State's burden is concerned." R.57:12; D-App. 240. As the court characterized it, "the defense doesn't have to do anything except throw out these allegations . . . and the State has to respond to all of that and disprove it. I don't think that that's what this case stands for, I don't think that's the law." R.57:13;D-App.241. The court continued, "what bothers me within the facts of this case, the evidence that you want to proffer and just throw

out to the jury is in my view just going to result in jury speculating." R.57:13-14; D-App. 241-242. The court concluded, "I'm not sure that within the framework of this case that's what Denny holds." R.57:18; D-App. 246.

The circuit court does not appear to have been applying the correct evidence burden—consistently with a tendency to establish motive, opportunity, and proximity—but rather something like the "substantial" burden rejected in *Denny*. In all events, as explained above in Part IA, substantial evidence supported Mr. Wilson's defense; it was not "speculative," as the circuit court suggested. If Mr. Wilson had named a random person as a third person connected to the crime, it would have been speculation. But, as here, where the *Denny* requirements are met, the evidence is relevant.

C. Mr. Wilson's Inability to Introduce the *State v. Denny* Evidence Prejudiced his Defense.

The circuit court's denial of the *Denny* defense affected Mr. Wilson's "substantial rights" and he was prejudiced. *See* Wis. Stat. § 805.18(2). Mr. Wilson's inability to introduce information that third persons were connected to the crime deprived the jury of information critical to evaluating the defense and deciding the case before it.

The State's case against Mr. Wilson was a circumstantial case presented primarily by Willie Friend. Friend had multiple convictions on his record. R.51:242. Willie Friend told police officers that Mr. Wilson was

the shooter. R.51:46-47. But there was no weapon, fingerprints, or other hard evidence supporting Willie Friend's account. *See* R.51:162; 53:53,62. Willie Friend testified that he thought it was Mr. Wilson's car at the illegal after-hours bar operated by Willie's brother. R.51:36-37. Conveniently, earlier that evening, as Willie Friend testified, Ms. Maric had pointed out to him an unoccupied gold-toned Lincoln with a specialty plate as belonging to Mr. Wilson. R.51:23. Willie Friend was the only witness who testified regarding the license plate. R.51:47. Ms. Edwards could not identify the plate of the car that she had seen at the scene of the shooting, R. 51:128-130, and there was evidence that a number of cars were owned in the vicinity were gold-toned Lincolns. R.53:175-181.

While the circuit court at the post-conviction stage dismissed arguments about this evidence, *see* R.39:1-3; D-App. 151-153, the court (like the jury) could not have considered a complete picture of the offense and the role of Willie Friend and Jabo.

Mr. Wilson was denied the opportunity to present critical relevant evidence in his defense. In *State v. Boykins*, 119 Wis. 2d 272, 278-279, 350 N.W.2d 710, 713-714 (1984), the defendant similarly was deprived of the opportunity to present relevant witness testimony (character evidence supporting an assertion of self-defense). The appellate court found that in denying Boykins relevant witness testimony "the jury was denied the opportunity to evaluate his defense in light of all the relevant evidence";

therefore, his judgment of conviction was reversed and a new trial ordered. *Id.* The same result should obtain here.

II. THE CONVICTION SHOULD BE REVERSED BECAUSE THE STATE IMPROPERLY INTRODUCED PREJUDICIAL EVIDENCE OF GUN OWNERSHIP AND OTHER ACTS.

The circuit court's error in precluding Mr. Wilson's introduction of highly relevant evidence of third persons connected to the crime is particularly troubling because the State was permitted to introduce prejudicial hearsay other-acts evidence concerning the character of Mr. Wilson and his propensity to commit the charged crimes. The ruling cannot be upheld because the court did not "examine[] the relevant facts, apply a proper standard of law, use[] a demonstrated rational process and reach[] a conclusion that a reasonable judge could reach." *Hunt*, 2003 WI 81 at ¶ 34, 263 Wis. 2d at 25, 666 N.W.2d at 782.

The challenged (and inappropriate) questions from the State revolved around the State's seeming intent to prove two theories concerning Mr. Wilson: (1) it wanted to depict Mr. Wilson as a man who owned guns and used them; and (2) it wanted to show Mr. Wilson used violence and allegedly did so in situations of domestic disturbance. The State's pursuit of both theories was highly prejudicial error. The State cannot seek to show propensity or to present irrelevant prior acts to the jury at trial. *See McClelland v. State*, 84 Wis. 2d 145, 156, 267 N.W.2d 843,

848 (1978); *State v. Alsteen*, 108 Wis. 2d 723, 731, 324 N.W.2d 426, 430 (1982).

The State's pursuit of the gun-using theory began when it surprised Mr. Wilson and his counsel with this colloquy based on hearsay:

> Q. Okay. Pedro Smith was your roommate at the time, isn't that correct?
> A. He is still my roommate, yes.
> (Pause)
> Q. Did you talk about the .44's as being your Dirty Harry gun?
> A. No.
> Mr. Kovac (on behalf of Mr. Wilson) Objection, talk about – I think we gotta put it – I'll withdraw the objection, he answered anyway.
> Q. During the time you owned the .44, you never referred to it as your Dirty Harry gun?
> A. No, I didn't refer to it as my Dirty Harry gun.

R.55:106-107, D-App. 181-182.

Counsel for Mr. Wilson attempted an objection at the time (which was thwarted given the answer) and moved for a mistrial. *Id.* The State sought to appease the defense, by responding that she "fully expect[ed] to be able to call Mr. Smith." R.55:116; D-App. 184. The court erred in not granting a mistrial then, and instead taking the mistrial motion under advisement to see whether Mr. Pedro Smith testified. *See id.*

The State called Mr. Smith, but it did not remedy the problem. Indeed, counsel for the State did not even ask Mr. Smith about any guns. R.56:54-57. Even though counsel did not object again, at that point, Mr. Wilson was entitled to a mistrial as it was plain error.

That was because the State put into evidence "other crimes, wrongs or acts" to show the propensity of Mr. Wilson. Wis. Stat. § 904.04(2) expressly states that other wrongs or acts cannot be admitted "to prove the character of a person in order to show that he acted in conformity therewith." The only exceptions set forth in the rule are for acts showing "proof of motive, opportunity, intent, preparation, plan, knowledge, or absence of mistake or accident." *Id.*

Here, the State did not even bother to argue that its use was consistent with the exceptions of Section 904.04(2). R.55:116-117; D-App. 184-185. The State's gun questions were designed for the argument that Mr. Wilson was a gun-using individual, and that was why they were asked.

Since the questions came during the cross-examination of Mr. Wilson, the State might suggest them as an attack on credibility under Wis. Stat. § 906.08(2). But the State's gun questions at this point of the examination would not have been digging into Mr. Wilson's credibility on this issue. Mr. Wilson already had admitted at an earlier point in the cross-examination that he had not told the authorities the backstory and whereabouts of the .44 caliber gun that he previously had owned. R.55:96-99. So this set of questions from State, grounded in hearsay, came because the State wanted to tell the jury—in a high-stakes way—that Mr. Wilson had a propensity for using guns. It was for this reason as well that the

State point-blank asked Mr. Wilson whether he was "an expert marksman." R.55:107.

The State's gun questions were prejudicial in their phrasing and in the manner they were asked. The State did not give Mr. Wilson notice that it would be using this statement despite the fact that it had promised counsel for Mr. Wilson to provide notice if other acts were to be introduced. R.55:120; D-App. 188. In surprising Mr. Wilson with the use of these gun questions, the State did not give Mr. Wilson notice or the court an opportunity to exercise its discretion consistently with the law and facts. For instance, the court would have had the opportunity to bar the questions as improper and prejudicial. *See State v. Sullivan*, 216 Wis. 2d 768, 772, 576 N.W.2d 30, 32 (1998). The circuit court should have granted counsel's motion for a mistrial.

The State also wanted to show Mr. Wilson as a violent man. To do so, the State asked of a prosecution witness, Ms. Terry Bethly:

> Q. Did you tell them [the officers] that Grant is a very jealous person?
> A. No, I did not.
> Q. Did you tell them that, um, in fact, um, on previous occasions he was so jealous that he beat you?
> A. No, I did not.

R.53:16-17; D-App. 168-169. Defense counsel objected as "not appropriate"; the court overruled the objection. *Id.*

> Q. Did you tell them that there as an occasion that, in fact, he beat you and, um, was placed on supervision by the Court and had to attend Batterers' Anonymous?

Id. Again, the defense sought to stop the questioning, but, upon the witness's answer, backed off so that the witness could explain:

> A. I don't think that I said that he beat me. I think that, um, I told them – If I told them – Let me – Can you repeat the question?
>
> Q. Yes. Did you tell them that there was an occasion that he had beat you and as a result of that he was placed on supervision and had to attend Batterer's Anonymous?
>
> A. Not that he beat me, no, and yes, that he did have to go to Batterer's Anonymous.

Id. Multiple times the State told the jury that Mr. Wilson had beaten a woman and was sent to Batterers Anonymous. This was highly improper conduct by the State.

Counsel for Mr. Wilson asked for a mistrial, arguing that the State had improperly put in evidence regarding the defendant's character. R.53:66; D-App.171. The State argued that counsel for Mr. Wilson had opened the door by seemingly seeking testimony that Mr. Wilson was not a jealous man. R.53:67; D-App.172. The State contended that it is permitted to "rebut that with the evidence that, in fac[t] he was a jealous person." *Id*.

The court overruled Mr. Wilson's counsel's objection, explaining that "[t]he witness was then asked about a specific incident, not about his

reputation or what she thought about him, and under the circumstances, it appeared to me that that was appropriate rebuttal." R.53:68; D-App.173.

But the circuit court should never have permitted the State to admit this extrinsic evidence on character. This evidence was not relevant to the proceedings at hand; indeed, it served only to tell the jury and in the most graphic way ("Batterers' Anonymous") that Mr. Wilson supposedly had a tendency to use physical force and he acted in conformity with that behavior to commit the charged offense. Notably, the State did not claim to admit it for purposes outlined in Wis. Stat. § 906.08(2).

The State's questions were all the more prejudicial because they were not asked of Mr. Wilson, but came in as extrinsic evidence through Ms. Bethly. The circuit court countered that it was just "a specific incident." R.53:68; D-App.173. But Wis. Stat. § 906.08(2) expressly provides that "*[s]pecific instances* of the conduct of a witness, for the purpose of attacking or supporting the witness's credibility, other than conviction of crimes ... *may not be proved by extrinsic evidence*." (emphasis added).

And the State's collateral impeachment of Mr. Wilson was not intended to be about a "specific incident;" rather it was intended to attack Mr. Wilson's credibility and portray him as a violent, gun-using man. Because, when the court permitted this evidence, the State continued to pursue a theme of violence by Mr. Wilson. In its cross-examination of Mr.

Wilson the very next day, the State asked Mr. Wilson, "[d]id you tell them [police officers] that one of the pistols that you have was taken in 1986 during a domestic disturbance?" R.55:83.

In this question, the State was improperly asking Mr. Wilson about an incident that had occurred seven years earlier. Even if the State were angling to inquire into credibility consistent with Wis. Stat. § 906.08(2), the State should have asked the question without adding the "domestic disturbance" piece. But the State wanted to cement the idea that Mr. Wilson owned guns and he was violent. Any probative value was outweighed by the prejudicial nature of the question, and the inquiry should have been excluded. *See* Wis. Stat. § 904.03.

The State's admission of extrinsic evidence through witness testimony about Mr. Wilson's character was, as explained in *McClelland*, 84 Wis. 2d at 160, 267 N.W.2d at 850, "a violation of the generalized rule prohibiting impeachment on collateral matters," and the mistrial requested by counsel for Mr. Wilson was warranted. The offer of a curative instruction would not have undone the harm; rather, it would have only served to emphasize the issue, as counsel for Mr. Wilson explained. R.55:121-122; D-App. 189-190. In *McClelland*, the admission of extrinsic evidence was ruled "plain error" requiring reversal and remand for a new trial. 84 Wis. 2d at 162, 267 N.W.2d at 851.

Here, the State based its case on the word of Willie Friend, many-times convicted, and its two theories seeking to associate Mr. Wilson with guns, violence, and thus the death of Ms. Maric. The State's proof of those two theories rested on improperly admitted prejudicial extrinsic character evidence and cross-examination questions. The circuit court did not properly exercise its discretion in admitting this other-acts evidence. The judgment should be reversed and the case remanded.

III. ALTERNATIVELY, MR. WILSON'S RIGHT TO A DEFENSE WAS INFRINGED UPON BY TRIAL COUNSEL'S INEFFECTIVENESS AND THE COURT'S UNWILLINGNESS TO HOLD A POST-CONVICTION HEARING.

A. Alternatively, Trial Counsel Did Not Provide A Full Defense and Was Ineffective.

Alternatively, Peter Kovac, counsel for Mr. Wilson, did not effectively represent Mr. Wilson during trial. Counsel's representation must be "equal to that which the ordinary prudent lawyer, skilled and versed in criminal law, would give to clients who had privately retained his services." *See State v. Machner*, 92 Wis. 2d 797, 803, 285 N.W.2d 905, 908 (1979). This court reviews *de novo* whether Mr. Wilson received constitutionally ineffective assistance of counsel. *See State v. Domke*, 2011 WI 95, ¶33, 337 Wis. 2d 268, 287, 805 N.W.2d 364, 374.

In this case, the key component of Mr. Wilson's defense was the argument that third persons had motive, opportunity, and proximity to the crime. Mr. Kovac provided the rhetoric for the defense. But, critically, he

failed to support the rhetoric with the substance—in particular, the offers of proof that are statutorily necessary in providing the evidentiary basis for future consideration of the defense at trial and on appeal. See Wis. Stat. § 901.03(1)(b),(2); *see also State v. Moffett*, 46 Wis. 2d 164, 168, 174 N.W.2d 263 (1970). This trial ineffectiveness was a preview of Mr. Kovac's later court-determined ineffectiveness on appeal. Deficient performance such as this, below objective standards of reasonableness, is ineffective assistance of counsel. *See State v. Marcum*, 166 Wis. 2d 908, 916-917, 480 N.W.2d 545, 550 (1992) (citing *Strickland v. Washington*, 466 U.S. 668, 687 (1984)). And because counsel deprived Mr. Wilson of a fair trial with his ineffectiveness, Mr. Wilson was prejudiced and a new trial is warranted. *See Strickland*, 466 U.S. at 687.

In its post-conviction response, the State argued that Mr. Wilson should not have access to the *Denny* defense because, according to the State, he failed to rely on admissible evidence, only on information in a police report. R.36:5; D-App. 139. To the extent that the State is correct that there is a deficiency in Mr. Wilson's ability to offer a defense under *Denny*, counsel for Mr. Wilson was ineffective because he did not seek testimony at trial from the witnesses named in the police report.

The police report dated April 23, 1993, contained details about Willie Friend and Jabo Friend that were highly relevant to Mr. Wilson's defense. As included in the police report from Clara Maric, mother of the victim:

"Eva told 'Jabo' she wanted to get out of the prostitution business. Upon doing so, 'Jabo' threatened to kill Eva if she attempted to leave him and that type of business." R.27:22; D-App. 132.

The police report also explained Deja Maric's knowledge of violence in the relationship of her sister, Eva, and Willie Friend:

> she believed sometime after Eva bailed Willie out of jail, the two of them had a fight and Eva informed Deja that Willie had beaten her with a coat hanger about the arms. Deja stated that she observed considerable bruising on Eva's arms and body.

R.27:23; D-App. 133.

On the strength of this information and the circumstantial nature of the evidence against Mr. Wilson, counsel for Mr. Wilson should have called either or both Clara Maric and Deja Maric as witnesses at trial or, at least, made an offer of proof. He did not.

Mr. Kovac's representation also was deficient in that he failed to develop other evidence in the record consistent with the individuals' statements in the police report. For example, the partial offer of proof given by Ms. Larson showed that Willie Friend had a violent relationship with Ms. Maric and was to be feared. *See infra* at 19-21. The testimony of another of Ms. Maric's friends, Barbara Lange, would have provided confirmation of the violence. R.56:38-39; D-App. 221-222. However, Mr. Kovac never asked the court for the chance to make an offer of proof of Ms.

Lange's testimony. Mr. Wilson cannot prove more because, here again, Mr. Kovac was deficient in his representation.

The ineffective assistance of Mr. Wilson's counsel—the failure to present a complete offer of proof, as indicated in Part I, supporting defendant's right to submit a defense under *Denny*—was critical to the outcome of the case, and there is a "reasonable probability" the outcome would have been different. *See Strickland*, 466 U.S. at 694. Counsel for Mr. Wilson called the *Denny* defense "the heart" of the defense. R.56:19. The court agreed that it understood the *Denny* defense to be "the theory of the defense." R.56:22. The absence of proof is all the more glaring when the State could introduce prejudicial character evidence, to which Mr. Kovac, at times, did not effectively object. *See, e.g.*, R.55:83; 56:115-116. In further failing to make a complete offer of proof, counsel for Mr. Wilson was ineffective and with "reasonable probability" it changed the outcome of Mr. Wilson's trial.

B. Mr. Wilson Should Be Afforded A Hearing On His Post-Conviction Motion, Which the Circuit Court Improperly Denied.

The circuit court denied Mr. Wilson's long-delayed post-conviction motion without affording him a hearing. Wis. Stat. § 974.06(3)(c) provides that a "court shall" "[g]rant a prompt hearing" on a post-conviction motion unless "the motion and the files and records of the action conclusively show that the person is entitled to no relief." The statutory presumption in

favor of a hearing should have prevailed here, where, based on the motion and the record of this case, no "conclusive" determination could be made that Mr. Wilson was "entitled to no relief." To the contrary, Mr. Wilson had good reason for relief. Mr. Wilson deserved the opportunity to demonstrate to the court the heart of his defense—the existence of third persons connected to the crime—by presenting testimony at the hearing supporting the existence of such individuals. At a minimum, Mr. Wilson should have been permitted to question his trial counsel during the post-conviction hearing to demonstrate ineffective assistance of counsel, consistently with *Machner*, 92 Wis. 2d at 803, 285 N.W.2d at 908.

This Court's review of Mr. Wilson's post-conviction motion to determine whether it contains facts that, if true, would entitle Mr. Wilson to relief, is *de novo*. *State v. Bentley*, 201 Wis. 2d 303, 310, 548 N.W.2d 50, 53 (1996). If, as here, sufficient facts were contained in the post-conviction motion, an evidentiary hearing is warranted. *See id.* It is only where insufficient facts are included in the post-conviction motion that the circuit court has the discretion to deny a hearing. *Id.* at 309-310. In that circumstance, the court's decision is reviewed for an erroneous exercise of discretion. *Id.*

In his post-conviction motion, Mr. Wilson requested a hearing for a reason critical to his defense: "the post-conviction motion requests an evidentiary hearing because the witness statements summarized in the

police report should have been introduced at trial." R.38:7; D-App. 149. Mr. Wilson's reasoning was significant in at least two respects. Throughout his trial and in the post-conviction proceedings, Mr. Wilson sought to argue that others were connected to the crime committed. Indeed, as was described in detail in Part I, Mr. Wilson had grounds for arguing before the jury, as *Denny* requires, that others had motive, opportunity, and the legitimate tendency to commit the charged crimes. Yet the circuit court denied Mr. Wilson this defense.

Mr. Wilson deserved an opportunity to call his trial counsel as a witness during the post-conviction hearing. The court should have permitted Mr. Wilson to show that his counsel's failure to call material witnesses who had given statements to the police and his failure to fully make offers of proof for certain witnesses, all of whom would have provided relevant evidence of third persons' motive, opportunity, and proximity to the crime, was deficient performance that undermined Mr. Wilson's defense. This court should remand so that a *Machner* hearing can proceed.

* * *

In its Post-Conviction response, the State states that "defendant is not entitled to a perfect trial." R.36:7; D-App. 141. But, certainly, Mr. Wilson must be entitled to present a defense with highly relevant information about others who have motive, opportunity, and proximity to

the crime. Mr. Wilson, as well, is entitled to be free of a double standard where the State successfully challenged his relevant evidence as inadmissible, but itself introduced prejudicial hearsay evidence with questionable value of relevancy. That was not harmless error.

CONCLUSION

For the foregoing reasons, the judgment of conviction against General Grant Wilson should be reversed and the matter remanded for a new trial. Alternatively, the circuit court's decision and order denying Mr. Wilson's post-conviction motion should be reversed and a post-conviction motion hearing held.

Respectfully submitted,

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FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in s. 809.19(8)(b) and (c) for a brief and appendix produced with a proportional serif font. The length of this brief is 10,779 words.

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CERTIFICATION REGARDING ELECTRONIC BRIEF
PURSUANT TO SECTION 809.19(12)(f), STATS.

I hereby certify that I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of section 809.19(12), Stats.

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.

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MAILING CERTIFICATION

I, Anne Berleman Kearney, do hereby certify that the Brief of Defendant-Appellant General G. Wilson and Appendix of Defendant-Appellant General G. Wilson was hand-delivered to a third-party carrier (Federal Express) on Tuesday, May 29, 2012 for delivery to

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