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STATE OF WISCONSIN

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

DISTRICT I

Case No. 2017AP1318-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

FREDRICK RAMSEY,

Defendant-Appellant.

On Appeal from a Nonfinal Order Denying Defendant's Motion to Admit Evidence, Entered in the Milwaukee County Circuit Court, the Honorable Mark A. Sanders, Presiding.

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

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ISSUES PRESENTED

1. Does the ***Denny*** test infringe on a defendant's constitutional right to present a defense?

The circuit court denied the defendant's argument that he had a constitutional right to present evidence inculpating a third-party perpetrator.

2. Did the circuit court err by excluding third-party-perpetrator evidence under ***Denny***?

The circuit court excluded the evidence, finding the defendant had not offered a plausible motive or opportunity for the third-party perpetrator to commit the crime.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Publication is warranted to address the constitutionality of Wisconsin's test for the admission of third-party perpetrator evidence. Further, oral argument is appropriate to address this important constitutional question.

STATEMENT OF FACTS

On June 11, 2016, Alexandria Taylor was killed by a single stab wound to the chest; she also had a superficial cut near her temple. (1; 30:13.) No one saw the stabbing, and even Ms. Taylor was unable to identify her attacker. In a statement shortly before she died, she told a friend, "somebody stabbed me." (21:24; 30:9; App. 107.)

Although there were no eyewitnesses, police recovered physical evidence inculpating Julian Teague, who lived four blocks from where Ms. Taylor was stabbed. (10:7-8, 11; App. 142-43.) Fingernail clippings taken from Ms. Taylor were checked for DNA, and a search at the State Crime Lab turned up a match for Mr. Teague. (13:7-8.) Police subsequently obtained a DNA swab from Mr. Teague to confirm the match. (21:28; App. 145.) After further testing, the crime lab confirmed that the DNA from Ms. Taylor's fingernails was consistent with Mr. Teague's profile, and that the odds of randomly selecting a comparable match was "one in 300 thousand." (21:26; App. 143.)

Police interviewed Mr. Teague, and he denied knowing Ms. Taylor, and declined to make a further statement. (21:28; App. 145.) Mr. Teague was later arrested for throwing rocks at cars. (10:11; App. 146.) During an interview, he said he was throwing the rocks because "he has been getting harassed in his neighborhood by people giving him the finger, and people at Walmart who bump into him." (*Id.*) Police asked Mr. Teague about Ms. Taylor. He denied knowing her, then related that "he does not know how his DNA got under her fingernails, but stated that he has had sex with girls in the neighborhood." (*Id.*) He said sex was the only explanation for his DNA under her fingernails, and that he had sex with 30 women who lived in his nearby apartment building. (*Id.*)

Before police had the DNA evidence implicating Mr. Teague, they interviewed Ms. Taylor's long-term boyfriend, Fredrick Ramsey. There was no DNA evidence connecting Mr. Ramsey to the crime, but he admitted arguing with Ms. Taylor earlier in the evening. Seven detectives then proceeded to interrogate Mr. Ramsey for 17 hours over three days.

(16:8.) Mr. Ramsey eventually admitted to stabbing Ms. Taylor.

An expert reviewed Mr. Ramsey's interrogation and concluded that nearly every possible "risk factor" for a false confession was present, thereby "undermin[ing] the reliability of Ramsey's self-incriminating statements." (16:6.) Specifically, the expert noted "physical and social isolation, confrontation, false evidence tactics (e.g., the bluff), ignoring claims of innocence, maximization (threatening the suspect with negative consequences if he does not confess), minimization (downplaying the moral seriousness of the offense), use of the alternative (forced choice) question, and leniency tactics (statements that lead the suspect to infer favorable treatment in exchange for an admission of guilt)." (*Id.*) The report pointed out that all seven interrogating detectives "repeatedly *confronted* Ramsey with *false evidence* of guilt," by falsely asserting they had video of the stabbing. (*Id.*) When he did "confess," Mr. Ramsey did not offer a single fact that had not already been provided by the detectives. The text of the confession reflects Mr. Ramsey's effort to satisfy the detective, rather to tell an independent story.[1]

[1] *E.g.*:

Ramsey: And I stab her two times in the chest.
Detective: (makes a 'no' noise)
Ramsey: I stab her on her [left/other] side.
Detective: Left side of what?
Ramsey: Left side of her back.
Detective: (makes a 'no' noise)
Ramsey: I stab her on the left side of her front?
Detective: (makes a 'no' noise)
. . .
Ramsey: Where did I stab her the second time, Jim? I know I hit her again. I stabbed her again.

When the interrogation ended, the State charged Mr. Ramsey with one count of second-degree reckless homicide. (1); Wis. Stat. § 940.06(1).[2]

Mr. Ramsey filed a ***Denny***[3] motion, allowing him to argue that Mr. Teague was the actual killer. (9; App. 127.) Mr. Ramsey further argued that admitting the DNA evidence was necessary to protect his "constitutional right [to present a defense]." (13:2.)

The State conceded that the court should admit evidence that someone else's DNA was found in the victim's fingernail clippings. (10:1-2; App. 129-30.) However, it argued the court should exclude any evidence specifically implicating Mr. Teague. (*Id.*) The State argued that under the ***Denny*** test, Mr. Ramsey was unable to identify a plausible motive or opportunity for Mr. Teague to commit the crime, so the evidence was inadmissible. (*Id.* at 2-4.)

The circuit court held a hearing on the motion where the parties briefly reiterated their arguments, then the court ruled on the motion. The court considered each of the three prongs of the ***Denny*** test: (1) motive, (2) opportunity, and (3) a direct connection between Mr. Teague and the crime. (30:20-27; App. 118-25.)

The court first found that Mr. Ramsey had not offered a "plausible motive" for Mr. Teague to commit the crime:

(18:259.)

[2] The charge was later amended to first-degree reckless homicide. (12); Wis. Stat. § 940.02(1).

[3] ***State v. Denny***, 120 Wis. 2d 614, 357 N.W.2d 12 (Ct. App. 1984).

> What is required of the defense is that they demonstrate not that there are motives to commit a crime but that the third party had a motive to commit the crime. Here the defense alleges by implication that Mr. Teague had a motive to commit the crime and that the motive was apparently frustration over a thwarted sexual opportunity. That is, certainly the motive for sexual opportunity is a motive. Human beings being sexual animals, anytime anybody had been killed or had been sexually assaulted, the motive could be thwarted sexual opportunity.
>
> The question here is whether there is any evidence that Mr. Teague had that motive. There doesn't have to be a lot of evidence, just some evidence. The defense suggests that Mr. Teague's Casanova-like amorous conquests of 20 to 30 women that he references in his statement is evidence that he randomly solicits sex or has some interest in sexuality or he, therefore, has some motive in -- to commit this particular crime.
>
> I don't think that it's sufficient evidence. That is evidence that Mr. Teague has sex. That same motive applies to everybody in the room. We're all adults. Nothing suggests that Mr. Teague had the motive to commit the crime. There are plausible reasons that people, in general, would commit the crime and sexual desire is one of them. But there is nothing that says that Mr. Teague had that particular motive any more than any other human being on the planet. The motive prong has not been satisfied.

(30:23-24; App. 121-22.)

As to opportunity, the court found this was the "strongest part of the defense position." (30:24; App. 122.) The court agreed that the Mr. Teague's DNA on the victim suggested recent contact between the two of them, so it found that prong satisfied. (30:24-25; App. 122-23.)

The court then found there was no direct connection between Mr. Teague and the crime. The court reiterated that the DNA was strong evidence connecting Mr. Teague to the location, but not to the crime:

> There is nothing that suggests perpetration of a crime by the third party. The defense suggests that: Well, it's his disturbing criminal history. His criminal history isn't disturbing. The defense suggests it's his level of sexual conquest. It is not for me to determine whether having 20 or 30 sex partners makes one more likely to perpetrate the crime of homicide. There just isn't any evidence of direct connection. The only evidence here is that Mr. -- that there is a partial profile under the victim's fingernails that matches Mr. Teague to a random probability of 1 in 300,000, that Mr. Teague lived four blocks away. That's the only evidence here.
>
> It is insufficient to meet the three-prong test for Denny evidence to be admitted.

(30:26-27; App. 124-25.) Therefore, the court denied the *Denny* motion. (30:26-27; 20; App. 124-25.)

Mr. Ramsey filed a petition to appeal the non-final order denying the motion to admit evidence that Mr. Teague was the killer. (21.) This court granted the petition. (24.)

ARGUMENT

Mr. Ramsey's constitutional right to present a defense protects his right to inculpate Mr. Teague at his trial. The unexplained presence of Mr. Teague's DNA under the victim's fingernails directly connects him to the offense, and is probative of Mr. Ramsey's possible guilt. Insofar as the ***Denny*** test is interpreted to exclude this evidence, it is unconstitutional. The constitutional right to present a defense

necessarily trumps any conflicting rule of evidence. ***Holmes v. South Carolina***, 547 U.S. 319, 324-25 (2006).

Though this court may not overrule its own prior decisions or those of the Wisconsin Supreme Court, it is unbound by those decisions insofar as they conflict with federal constitutional law. *See* ***State v. Jennings***, 2002 WI 44, ¶¶ 17-19, 252 Wis. 2d 228, 647 N.W.2d 142.

If this court finds the ***Denny*** test constitutional, Mr. Ramsey is still entitled to present evidence inculpating Mr. Teague. Mr. Ramsey has offered a "plausible motive" for Mr. Teague to commit the crime, and Mr. Teague's DNA provides evidence of both an opportunity and a direct connection to the crime.

This case presents two questions: (1) whether the ***Denny*** test unconstitutionally infringes on defendants' constitutional right to present a defense, and, alternatively, (2) whether the ***Denny*** test warrants admission of evidence inculpating Mr. Teague. These are both questions of law, which this court reviews *de novo*. ***State v. Wilson***, 2015 WI 48, ¶ 47, 362 Wis. 2d 193, 864 N.W.2d 52.

I. Mr. Ramsey's constitutional right to present a defense protects his right to present evidence that Mr. Teague's DNA was found under the victim's fingernails.

Mr. Ramsey, like every criminal defendant, has a constitutional right to present a complete defense. There is no singular source for this right; rather, it springs from the Due Process Clause in the Fourteenth Amendment, and the Compulsory Process and Confrontation clauses in the Sixth Amendment. ***Crane v. Kentucky***, 476 U.S. 683, 690 (1986). The Wisconsin Supreme Court has recognized a corresponding right in Article I, Section 7 of the Wisconsin

Constitution. ***State v. St. George***, 2002 WI 50, ¶ 14, 252 Wis. 2d 499, 643 N.W.2d 777. The right to present a defense includes the right to present evidence implicating someone else in the charged crime. *See* ***Chambers v. Mississippi***, 410 U.S. 284 (1973).

Occasionally, this right requires a court to set aside the rules of evidence, and admit what would otherwise be inadmissible. *E.g.,* ***id.***; ***Davis v. Alaska***, 415 U.S. 308 (1974); ***State v. Pulizzano***, 155 Wis. 2d 633, 456 N.W.2d 325 (1990).

Though the right to present a defense trumps any conflicting rule of evidence, a defendant is not entitled to admit whatever evidence he or she desires. For example, there is no constitutional right to present irrelevant evidence. ***State v. Robinson***, 146 Wis. 2d 315, 331-33, 431 N.W.2d 165 (1988). Nor is a defendant permitted to freely admit evidence where its probative value is substantially outweighed by its risk of unfair prejudice. ***Holmes***, 547 U.S. at 326; Wis. Stat. § 904.03.

The Supreme Court has held that evidentiary rules must yield to the right to present a defense where the rule is arbitrary or disproportionate to the purpose it is designed to serve, and infringes on a "weighty interest of the accused." ***Id.*** at 324-25.

The Supreme Court has recognized that a subset of potentially unconstitutional evidentiary rules address evidence showing that someone else committed the charged crime: third-party-perpetrator evidence. ***Id.*** at 327. The Court recognized the universality of rules governing this evidence, but it has not adopted a single constitutional standard for its admission. Although it has generally left this evidentiary decision to the states, the Court has addressed the constitutional need to admit third-party-perpetrator evidence

on three occasions, reversing the defendant's conviction in each instance. ***Alexander v. United States***, 138 U.S. 353, 356 (1891); ***Chambers v. Mississippi***, 410 U.S. 284 (1973); ***Holmes v. South Carolina***, 547 U.S. 319 (2006) (holding a defendant's right to present a defense cannot hinge on the strength of the State's case against the defendant).

A. Wisconsin's ***Denny*** test for third-party-perpetrator evidence conflicts with the constitutional right to present a defense.

Until 1984, Wisconsin did not have a bright-line rule for admitting third-party-perpetrator evidence. The court of appeals created the three-prong "legitimate tendency" test in ***State v. Denny***, 120 Wis. 2d 614, 357 N.W.2d 12 (Ct. App. 1984). In ***Denny***, the defendant was charged in a stabbing homicide after he made inculpatory statements to friends and acquaintances. ***Id.*** at 617. The defendant sought to present evidence at trial that other people had a motive to kill the victim, but the circuit court excluded the evidence, finding it irrelevant. ***Id.*** at 621-22.

The court of appeals observed that evidence of a third party's motive or opportunity to commit the crime is generally inadmissible without "other proof directly connecting that person with the offense charged." ***Denny***, 120 Wis. 2d at 622. Because there was no Wisconsin case addressing third-party-perpetrator evidence, the court turned to a then-recent case from California, ***People v. Green***, 609 P.2d 468 (Cal. 1980). Under ***Green***, a defendant could not freely admit evidence of a third party's motive to commit the crime; "rather, it must be coupled with substantial evidence tending to directly connect that person with the actual commission of the offense." ***Id.*** at 480.

The ***Denny*** court agreed that there must be a direct connection between the third party and the offense, but believed a requirement of "substantial" evidence was too high a burden. Intending to set a lower bar, the court created the "legitimate tendency" test, "a bright line standard requiring that three factors be present, i.e., motive, opportunity and direct connection." ***Id.*** at 625. Applying that test, the court found motive evidence the defendant sought to introduce was insufficient. ***Id.***

Since ***Denny***, defendants seeking to admit third-party-perpetrator evidence must prove: (1) the third party had a plausible motive to commit the crime, (2) the third party had the opportunity to commit the crime, and (3) the third party can be directly connected to the crime. ***Wilson***, 2015 WI 48, ¶¶ 57-59. The Wisconsin Supreme Court has affirmed that each prong must be satisfied; failure to prove one prong is fatal, even if the evidence implicating the third party is strong. ***Id.*** at ¶¶ 53-54.

The Wisconsin Supreme Court most recently affirmed use of the ***Denny*** test in ***State v. Wilson***. Although no party argued for a different standard, the court held: "We reaffirm the ***Denny*** test as the appropriate test for circuit courts to use to determine the admissibility of third-party-perpetrator evidence." 2015 WI 48, ¶ 10.[4]

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[4] A concurrence in ***Wilson*** claimed that it was an "approved" test because it was cited in a footnote in ***Holmes***, which listed a series of state cases addressing third-party-perpetrator evidence. The concurrence overstates the effect of the Court's citation: "The Court's citation to these cases [was] intended to acknowledge the universality of [rules regulating third-party-perpetrator evidence]; there is nothing in the ***Holmes*** opinion that suggests that the court was endorsing the application of the principle in each case." 2 Jones on Evidence § 13:38 (7th ed.).

In ***Wilson***, the defendant was charged with a shooting homicide. The prosecution argued that the defendant drove to where the victim and her boyfriend were sitting in a parked car, then began shooting at them. ***Id.***, ¶¶ 4-5. The victim died, but the boyfriend escaped uninjured. ***Id.***, ¶ 25. The boyfriend was the only person to identify the defendant as the shooter.[5] ***Id.***, ¶ 24.

The defendant sought to prove that the boyfriend was the actual killer, either by shooting the victim himself or by enlisting the help of another. ***Id.***, ¶ 38. In support, he attempted to introduce testimony from two witnesses who saw the boyfriend slap and threaten to kill the victim in the weeks leading up to the homicide. ***Id.***, ¶¶ 37-39.

The Wisconsin Supreme Court held this evidence insufficient to satisfy ***Denny***'s opportunity prong, finding there was overwhelming evidence that the boyfriend could not have killed the victim himself. ***Id.***, ¶ 84. The court also held there was insufficient evidence to show the boyfriend could have committed the crime indirectly, finding that doing so would have required the defendant to prove the boyfriend had the "contacts, influence, and finances to quickly hire or engage a shooter or shooters to gun down a woman on a public street." ***Id.***, ¶ 86.

Though Wisconsin has adhered to the ***Denny*** test since its inception, the test is based on a fundamental misreading of the cases purportedly supporting its adoption. ***Green***, the case on which the test was based, held:

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[5] Another witness saw the defendant's car at the scene of the shooting, but could not identify the shooter. ***Id.*** at ¶ 29.

> It is settled, however, that evidence that a third person had a motive to commit the crime with which the defendant is charged is inadmissible if it simply affords a possible ground of suspicion against such person; rather, it must be coupled with substantial evidence tending to directly connect that person with the actual commission of the offense.

609 P.2d at 480. In other words, before evidence of a third party's *motive* to commit the crime can be introduced, the defendant must produce other evidence "directly connecting" the person to the crime. The ***Denny*** court flipped this reasoning on its head by requiring evidence of both motive and opportunity in *all* cases, even when the defendant wants to introduce non-motive evidence incriminating a third party.

As the ***Denny*** court held—and essentially every other jurisdiction has agreed—a third party's motive or opportunity is inadmissible without more. David McCord, *"But Perry Mason Made It Look So Easy!": The Admissibility of Evidence Offered by A Criminal Defendant to Suggest That Someone Else Is Guilty*, 63 Tenn. L. Rev. 917, 952-55 (1996). Like ***Green***, most jurisdictions hold that "it is not enough to simply show that another had the motive to commit the crime"; there must be evidence that "directly connects" the third party to the crime. ***State v. Mark***, 154 A.3d 572, 578 (Conn App. Ct. 2017); *see also* ***People v. Elmarr***, 351 P.3d 431, 439-40 (Co. 2015); ***State v. McKay***, 459 S.W.3d 450, 458 (Mo. Ct. App. 2014); ***People v. Kaurish***, 802 P.2d 278, 295-96 (Ca. 1990) (en banc); 41 C.J.S. Homicide § 328; 2 Jones on Evidence § 13:38 (7th ed.).

These cases are motivated by a legitimate desire to prevent trials from devolving into endless litigation about who else had a motive to commit the crime. As the ***Denny*** court wrote: without something connecting the third party to

the crime, "a defendant could conceivably produce evidence tending to show that hundreds of other persons had some motive or animus against the deceased—degenerating the proceedings into a trial of collateral issues." ***Denny***, 120 Wis. 2d at 623-24.

But the ***Denny*** test significantly overcorrects for this potential risk. Take, for example, a simple battery case. The State has a legitimate interest in preventing a defendant from introducing evidence of every person with a plausible motive to hit the victim. But where the third party has confessed, or can be seen on camera committing the battery, the defendant cannot constitutionally be prevented from implicating the third party simply because there is no apparent motive. Maybe the perpetrator thought he was striking someone else, or maybe he truly had no reason for striking the victim. Under either scenario, the constitutional right to present a defense cannot hinge on the defendant's ability to show motive where there is otherwise strong evidence connecting the third party to the crime.

Though this proposed scenario is useful, there is little need for hypotheticals here. The undisputed facts of this case capture the absurd—and unconstitutional—rigidity of Wisconsin's rule. A woman is found stabbed in the chest, and in her last moments utters, "somebody stabbed me," suggesting she did not know her assailant. (30:9; App. 107.) Under her fingernails, police find DNA belonging to a man who lives down the street. (21:26; App. 143.) When confronted with this fact, the man's only explanation is that

he has sex with a lot of girls in the neighborhood, so maybe he had sex with the victim. (21:32; App. 149.).[6]

Under these facts, Mr. Teague could have fairly been charged for killing Ms. Taylor; the suspicious presence of his DNA coupled with Ms. Taylor's dying declaration would satisfy probable cause. And had a jury convicted him, the appellate courts surely would uphold the conviction for sufficient evidence. *See* ***State v. Poellinger***, 153 Wis. 2d 493, 507, 452 N.W.2d 752 (1990).

This case demonstrates the constitutional deficiency in the ***Denny*** test. Evidence connecting Mr. Teague to the offense has been deemed too speculative to admit at Mr. Ramsey's trial, but would be sufficiently concrete to constitute proof beyond a reasonable doubt.

A test for excluding third-party-perpetrator evidence should only present a minimal and justified burden on defendants to prove that the proffered evidence is not overly speculative or irrelevant. Instead the test unconstitutionally forces defendants to prove three prongs with a degree of specificity not even required to secure a conviction.[7] This burdensome test violates "fundamental standards of due process" and highlights that the ***Denny*** test is disproportionate to the purpose it is designed to serve, and is therefore unconstitutional. ***Holmes***, 547 U.S. at 324-25 (a rule

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[6] Any evidence inculpating Mr. Ramsey is irrelevant in assessing his right to present evidence inculpating another. ***Wilson***, 2015 WI 48, ¶ 61; ***Holmes***, 547 U.S. at 331.

[7] For example, in ***State v. Avery***, the defendant's third-party-perpetrator evidence was excluded because he could not show what motive the third parties had to kill the victim—even though the State did not articulate what motive the defendant had to commit the murder. 2011 WI App 124, ¶ 45, 337 Wis. 2d 351, 804 N.W.2d 216.

that infringes on a weighty interest of the accused and is disproportionate to the purpose it is designed to serve violates the constitutional right to present a defense).

B. Admission of third-party-perpetrator evidence in other jurisdictions.

The ***Denny*** test is a national outlier.[8] Every other jurisdiction either uses a "direct connection" test, or has abandoned specialized tests altogether, recognizing that existing rules of evidence (i.e. relevance and weighing probative value against unfair prejudice) adequately regulate the admission of third-party-perpetrator evidence. In practice, these two tests function similarly. John H. Blume et. al., *Every Juror Wants A Story: Narrative Relevance, Third Party Guilt and the Right to Present A Defense*, 44 Am. Crim. L. Rev. 1069, 1080-81 (2007).

Those jurisdictions applying a "direct connection" test are essentially applying the last prong of the ***Denny*** test, without separately requiring proof of motive or opportunity. *E.g.,* ***Rogers v. State***, 280 P.3d 582, 586 (Alaska 2012) ("evidence of the third party's guilt is admissible only if the defense can produce evidence that tends to directly connect such other person with the actual commission of the crime charged."); ***People v. Elmarr***, 351 P.3d 431, 439 (Co. 2015) ("The touchstone of relevance in this context is whether the alternate suspect evidence establishes a non-speculative connection or nexus between the alternate suspect and the

[8] Only Vermont and Rhode Island impose tests as demanding as Wisconsin's, requiring proof of motive, opportunity, *and* a direct connection. ***State v. Covington***, 69 A.3d 855, 865 (R.I. 2013). ***State v. Grega***, 721 A.2d 445, 454 (Vt. 1998).

crime charged."); ***Watson v. State***, 604 S.E.2d 804 (Ga. 2004).

These tests are indistinguishable from the direct connection prong of the ***Denny*** test. The ***Wilson*** court framed that prong as: "whether there is evidence that the alleged third-party perpetrator actually committed the crime . . . . Logically, direct connection evidence should firm up the defendant's theory of the crime and take it beyond mere speculation." 2015 WI 48, ¶ 59. As an example, Missouri's direct connection test asks the same question, but without the need for separate proof of motive or opportunity: "If the defendant satisfies the direct connection rule's threshold showing by establishing a clear link between the alleged alternative perpetrator and the corpus delicti[9] of the crime, then all evidence tending to show that the alleged alternative perpetrator had a motive and opportunity to commit the crime is admissible even if that evidence would not independently establish a direct connection to the crime." ***State v. McKay***, 459 S.W.3d 450, 458 (Mo. Ct. App. 2014).

Many jurisdictions do not rely on a specialized standard at all.[10] First, they ask whether the evidence of the third-party perpetrator is relevant: does it tend to "make the existence of any fact that is of consequence to the

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[9] "The fact of a transgression. The phrase reflects the simple principle that a crime must be proved to have occurred before anyone can be convicted for having committed it." Black's Law Dictionary (10th ed. 2014).

[10] *Eg.*, ***United States v. Jordan***, 485 F.3d 1214, 1219 (10th Cir. 2007); ***Winfield v. United States***, 676 A.2d 1, 5 (D.C. 1996) (en banc); ***Commonwealth v. Milligan***, 693 A.2d 1313 (Pa. Super. Ct. 1997); ***United States v. Johnson***, 904 F. Supp. 1303, 1311 (M.D. Ala. 1995); ***State v. Adams***, 124 P.3d 19, 28 (Kan. 2005).

determination of the action more probable or less probable than it would be without the evidence"? Wis. Stat. § 904.01; ***People v. Hall***, 226 Cal. Rptr. 112, 117 (Cal. 1986). Next, is the probative value of the evidence substantially outweighed by the risk of unfair prejudice, undue delay, or confusion of the issues? Wis. Stat. § 904.03; ***State v. Larson***, 512 N.W.2d 732, 739 (S.D. 1994). These jurisdictions recognize there is no reason to distinguish third-party-perpetrator evidence from any other evidence.

Tellingly, California abandoned the test on which ***Denny*** was based. ***People v. Hall***, 226 Cal. Rptr. 112 (Cal. 1986). The court recognized that its version of the ***Denny*** test imposed an unconstitutionally high burden on defendants. It held that the better test was to "treat third-party culpability evidence like any other evidence: if relevant it is admissible unless its probative value is substantially outweighed by the risk of undue delay, prejudice, or confusion." ***Id.*** at 117.

The trend in other states is toward abandoning specialized rules in favor of a traditional 401/403 test.[11] Idaho, for example, adopted a direct connection test for third-party-perpetrator evidence before the state had adopted formal rules of evidence. ***State v. Kerchusky***, 67 P.3d 1273, 1286 & n.2 (Idaho Ct. App. 2003) (abrogated on other grounds, as recognized in ***State v. Galvan***, 326 P.3d 1029 (Idaho Ct. App. 2014)). However, after rules of evidence were enacted, the court recognized it made more sense to simply apply a 401/403 analysis to the evidence. ***Id.*** at 1286-87. The court recognized that its prior rule—requiring a "direct connection" between the third party and the offense—

[11] Labeled after the traditional rules governing relevance (i.e. Wis. Stat. § 904.01) and weighing probative value against unfair prejudice (Wis. Stat. § 904.03).

was meaningfully indistinguishable from standard rules of evidence for relevance and unfair prejudice. ***Id.*** at 1286-87. Therefore, the court explained its review of the third-party evidence "is essentially an inquiry into whether the district court correctly applied [Rule 403] . . . ." ***Id.*** at 1287.[12]

This approach was implicitly endorsed by the Supreme Court in ***Holmes***. The unanimous Court, in overruling South Carolina's specialized test for third-party-perpetrator evidence, affirmed the constitutionality of evidentiary rules that "exclude evidence if its probative value is outweighed by certain other factors such as unfair prejudice, confusion of the issues, or potential to mislead the jury." 547 U.S. at 326.

Peculiarly, even Wisconsin employs a 401/403 test when a defendant seeks to present evidence that an *unknown* third party committed the offense. ***State v. Scheidell***, 227 Wis. 2d 285, 595 N.W.2d 661 (1999). In ***Scheidell***, the defendant was charged with a sexual assault and wanted to introduce evidence of a similar sexual assault that occurred five weeks later, at which time the defendant was in jail. ***Id.*** at 290-91. Essentially, he wanted to argue that both assaults were committed by the same person, and he could not be that person because he was in jail when the second assault took place. The State argued the evidence should be excluded because the defendant could not satisfy ***Denny***, but the Wisconsin Supreme Court held that ***Denny*** did not apply: "In a situation where the perpetrator of the allegedly similar crime is unknown, it would be virtually impossible for the defendant to satisfy the motive or opportunity prongs of the

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[12] Arizona and New York have also abandoned direct connection tests in favor of 401/403 tests. ***State v. Gibson*** 44 P.3d 1001, 1003 (Ariz. 2002) (en banc); ***People v. Primo***, 753 N.E.2d 164, 168 (N.Y. 2001).

legitimate tendency test of ***Denny***." ***Id.*** at 295, 296-97. The court held that evidence of an unknown third party would be admitted under the test for other acts evidence. ***Id.*** at 306.

For purposes of admitting third-party-perpetrator evidence, the other acts test is meaningfully indistinguishable from a 401/403 test. First, the court asks whether the evidence is being introduced for a permissible purpose. ***Whitty v. State***, 34 Wis. 2d 278, 149 N.W.2d 557 (1967). In third-party-perpetrator cases there will always be a permissible purpose, and it will always be the same permissible purpose: to establish identity. ***Scheidell***, 227 Wis. 2d at 306-07. At this point, the test mirrors the relevancy test for third-party-perpetrator evidence. The evidence is admissible if it is relevant, and its probative value is not substantially outweighed by the danger of unfair prejudice. ***Id.*** at 307; ***Whitty***, 34 Wis. 2d 278.

Though given different names, the direct connection and 401/403 tests are functionally the same. As explained by one court:

> [P]hrases like "clear link [and direct connection] are usually shorthand for weighing probative value against prejudice in the context of third party culpability evidence: if there is some "clear link" or "direct connection" between the third party evidence and the charged crime, courts generally conclude that it is of sufficient probative value to be admissible.

Primo, 753 N.E.3d at 168.[13]

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[13] The similarity of these tests can also be observed in ***McGaha v. State***, 926 N.E.2d 1050 (Ind. Ct. App. 2010) and ***People v. Elmarr***, 351 P.3d 431, ¶ 31 (Co. 2015).

Regardless of which test is preferred, these cases illuminate the ***Denny*** test's uniquely dismissive approach to third-party-perpetrator evidence. There is no dispute that the State has a legitimate interest in excluding speculative or irrelevant evidence suggesting third-party guilt. But evidence reasonably connecting the third party to the offense is admissible.

C. The ***Denny*** tests is unconstitutional; therefore, Wisconsin should rely on existing evidentiary standards under Wis. Stat. §§ 904.01 and 904.03 to govern third-party-perpetrator evidence.

Wisconsin's three-prong test for admitting third-party-perpetrator evidence unconstitutionally violates a defendant's right to present a complete defense. Though every jurisdiction requires more than motive or opportunity, almost no other jurisdiction imposes a burden as heavy as ***Denny***.

Denny was designed to address a legitimate concern: that a defendant may cause significant distractions at trial by trying to admit evidence of every third party with a motive to commit the charged crime. The ***Denny*** court wrote that without something connecting the third party to the crime, "a defendant could conceivably produce evidence tending to show that hundreds of other persons had some motive or animus against the deceased—degenerating the proceedings into a trial of collateral issues." ***Denny***, 120 Wis. 2d at 623-24. The problem is that the ***Denny*** test vastly overcorrected in its attempt to address that risk. Consequently, the rule is disproportionate to the purposes it was intended to serve, and it is therefore unconstitutional. ***Holmes***, 547 U.S. at 324-25.

As discussed above, the ***Denny*** test—particularly the motive prong—has the effect of excluding probative evidence

of third-party guilt. Even overwhelming evidence of third-party guilt will be excluded because the ***Denny*** test requires proof of all three of its prongs. ***Wilson***, 2015 WI 48, ¶¶ 53-54. A third party could be found with the victim's blood on his hands at the crime scene of a murder, but the defendant would be barred from implicating that individual without a plausible motive for the third party. This may be an impossible burden in the case of an unprovoked attack, or where the defendant cannot sufficiently mine the third party's history for evidence of a possible motive.

Applying the ***Denny*** test to fact patterns known to violate the right to present a defense demonstrates its conflict with Supreme Court precedent. Take ***Chambers*** as an example. There, the defendant wanted to introduce a third-party's confession to the crime for which the defendant was charged, but was barred from doing so by state hearsay rules. 410 U.S. at 292-93. Without requiring any evidence of the third party's motive, the Court held that exclusion of the evidence was unconstitutional, noting that "[f]ew rights are more fundamental than that of an accused to present witnesses in his own defense." ***Id.*** at 302. But that same evidence likely would have been excluded under ***Denny***. The same result occurs when applying ***Denny*** to the facts discussed in ***Holmes***, where a defendant was again barred from admitting evidence of a third-party confession. These examples demonstrate that the ***Denny*** test is necessarily suppressing third-party-perpetrator evidence that the defendant has a constitutional right to present. Therefore, the ***Denny*** test must be disregarded. *See* ***Jennings***, 2002 WI 44, ¶ 18.

In lieu of ***Denny***, Wisconsin should follow the most widely accepted standard, and assess third-party-perpetrator evidence under longstanding rules of evidence. Under such a

test, circuit court's would begin by assessing relevance under Wis. Stat. § 904.01. If the evidence tends to make the existence of any fact (i.e. the defendant's guilt) more or less probable, it should be admitted. The burden would then shift to the State to prove that the danger of unfair prejudice or confusion of the issues outweighs the probative value of the evidence. Wis. Stat. § 904.03.

There is no legitimate reason to subject third-party-perpetrator evidence to a different standard of admissibility than other evidence. In fact, the defendant's closely guarded right to present a defense suggests this evidence should be admitted more liberally than other evidence, not the other way around.

Such a test would always pass constitutional muster because it always advances the State's legitimate interest in excluding irrelevant or speculative evidence, but permits defendants to freely admit *relevant* evidence of third-party guilt. This rule would also be easy to apply; lower courts already apply these rules regularly, even in third-party-perpetrator cases with an unknown third party. ***Scheidell***, 227 Wis. 2d at 306.

D. Mr. Ramsey is entitled to admit evidence implicating Mr. Teague under a constitutional test for third-party-perpetrator evidence.

Applying Wis. Stat. §§ 904.01 and 904.03, evidence implicating Mr. Teague would be admissible.

First, the evidence is plainly relevant. To reiterate, this is a low bar: any evidence tending to make it less likely that Mr. Ramsey is the killer should be admitted. Here, a jury could reasonably interpret Mr. Teague's unexplained DNA as evidence that Mr. Ramsey may not be the killer. Even if Mr.

Teague's DNA is only circumstantial evidence of his involvement in Ms. Taylor's death, it necessarily tends to show that Mr. Ramsey is not guilty.

Mr. Teague's DNA takes on added relevance when coupled with other evidence that will be admitted at trial, particularly the victim's dying declaration that "somebody killed me." (30:14; App. 112.) This statement tends to show that the killer was unknown to the victim. That statement bolsters (and is bolstered by) the DNA evidence, because the statement and the DNA evidence both tend to show that someone other than Mr. Ramsey committed the homicide; and any evidence showing he was not the killer is relevant under Wis. Stat. § 904.01.

Second, no plausible argument can be made that Mr. Teague's DNA is unfairly prejudicial, or will confuse the jury. Mr. Ramsey has offered *one* alternative perpetrator; he has not sought to introduce evidence of everyone who previously argued with the victim. The parties will be able to straightforwardly present evidence of Mr. Teague's DNA, and how his DNA could have come to be under the victim's fingernails. Moreover, the circuit court has already found—and the State conceded—that the jury can hear evidence that a third party's DNA was found under the victim's fingernails. (30:27-28; App. 125-26.) There is no unfair prejudice to the State in simply adding the name of the third party so the jury may know that the DNA came suspiciously from a stranger, rather than a close friend or family member.

By allowing evidence of Mr. Teague's DNA—but without identifying him—the circuit court has also necessarily concluded that the evidence satisfies a 401/403 analysis. In other words, Mr. Ramsey is being allowed to introduce evidence of an unknown third-party-perpetrator,

which simply requires admission under sections 904.01 and 904.03. ***Scheidell***, 227 Wis. 2d at 306. Therefore, this court should reverse and allow Mr. Ramsey to introduce evidence incriminating Mr. Teague at trial.

II. Mr. Ramsey is entitled to present evidence inculpating Mr. Teague under the ***Denny*** test.

Even if this court finds no fault in the ***Denny*** test, Mr. Ramsey is still entitled to present evidence inculpating Mr. Teague. Mr. Teague's DNA and his unusual statements supply sufficient evidence of motive, opportunity, and a direct connection to the crime.

Although the court generally reviews a decision to admit or exclude evidence for an erroneous exercise of discretion, this court must review *de novo* whether the defendant's constitutional right to present a defense requires admission of the evidence. ***Wilson***, 2015 WI 48, ¶ 47.

A. Motive.

To satisfy the motive prong, Mr. Ramsey is only required to offer a third party's "plausible reason to commit the crime." ***Wilson***, 2015 WI 48, ¶ 57. "[T]he defendant is not required to establish motive with substantial certainty." ***Id.***, ¶ 63. The defendant is not required to prove a specific or personal motive; even general evidence of motive is enough. ***State v. Vollbrecht***, 2012 WI App 90, ¶ 27, 344 Wis. 2d 69, 820 N.W.2d 443.

In ***Vollbrecht***, the court of appeals held that evidence of a general motive is all that is required. ***Id.***, ¶ 27. There, the defendant was convicted of sexual assault and homicide after the victim was found hanging from a tree by a tire chain, with three gunshot wounds to the back. ***Id.***, ¶ 1. Twenty years

later, the defendant was granted a new trial based on new evidence of a third-party perpetrator. ***Id.***, ¶ 2. The evidence included statements by a third party that he liked to "chain women to a tree, slap them around, light them on fire, and shoot them." ***Id.*** ¶ 27. The court held that this evidence of a general motive—rather than a motive directed at a particular victim—was sufficient. ***Id.***

Mr. Teague's plausible motives are best judged from his bizarre statements and conduct. When asked by police why his DNA was under the victim's fingernails, he bragged about having sex with many women in the neighborhood, including at least 30 claimed sex partners in his new apartment. (10:11; App. 149.) Although he did not recognize Ms. Taylor, he guessed that his DNA got under her fingernails while they were having sex. (*Id.*)

Mr. Teague also has a record of unexplained antisocial behavior. A few months after Ms. Taylor was killed, Mr. Teague was arrested after police saw him throwing rocks randomly at cars. (21:29.) When asked why, all he had to say was "Those bitches have been harassing me." (21:29.) The occupants of one car insisted that they had no idea who Mr. Teague was. (21:29-30.) In a later interrogation, Mr. Teague said he was throwing the rocks because "he was being harassed in his neighborhood by people giving him the finger, and people at Walmart who bump into him." (21:31.) He also complained about harassment by the homeless, and people working at a temp service. (21:32.)[14]

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[14] This court does not need to find that evidence of Mr. Teague's claimed sexual prowess or his criminal record is admissible in order to find that it satisfies the motive prong of the ***Denny*** test.

Mr. Teague's statements about his sex life, whether real or made up, suggest he may have made an aggressive or unwanted approach of the victim for purposes of an assault. Or she may have resisted his attempts to find another sexual partner. Either way, it is plain that there would not be an articulated intent to assault the victim. "Sexual gratification is inherent in the crime of sexual assault, and [the perpetrator's] conduct reveals this purpose." ***State v. Davidson***, 2000 WI 91, ¶ 96, 236 Wis. 2d 537, 613 N.W.2d 606 (Bradley, J., dissenting). Indeed, one rarely expects to find evidence of a motive to sexually assault; the assault speaks for itself. Nor would there be extrinsic evidence of a motive to commit homicide after an attempted assault goes wrong.

The presence of Mr. Teague's DNA under the victim's fingernails tends to corroborate this general motive, as it demonstrates Mr. Teague got close enough to touch Ms. Taylor, and clearly did something to warrant her "penetrat[ing] into [his] living tissue," which would generally be required for foreign DNA to be found under her fingernails. ***Eby v. State***, 165 S.W.3d 723, 730 (Tex. App. 2005).

It is also plausible that Mr. Teague attacked Ms. Taylor with no rational motive, but out of the same misguided, delirious motivation that led him to throw rocks randomly at cars. Mr. Teague proved himself to be a person who irrationally engages in violent behavior based only on perceived slights that "people" are harassing him. His conduct revealed a motive and intent to engage in randomly menacing acts.

Ms. Taylor's dying declaration also corroborates these plausible motives. Shortly after she was stabbed, Ms. Taylor told a friend, "Somebody stabbed me." Had her attacker been

her long-term boyfriend, one assumes she would have said "Fred stabbed me," "my boyfriend stabbed me," or even "*he* stabbed me." Instead, her non-specific identification of her attacker suggests it was an unknown person, who may have been motivated either by a desire for sexual gratification, or to engage in randomly violent acts.

These plausible motives satisfy the ***Denny*** standard, which, as discussed above, is necessarily a low standard. Though evidence of this motive alone would be inadmissible, when coupled with evidence of Mr. Teague's opportunity and direct connection, it requires admission under ***Denny***.

B. Opportunity.

To satisfy the opportunity prong, Mr. Ramsey must show that Mr. Teague "could have" committed the crime. ***Wilson***, 2015 WI 48, ¶ 65. The easiest way to prove opportunity would be to simply show that the third party was present near the scene of the crime. ***Id.***, ¶ 68.

Here, the circuit court correctly concluded that Mr. Teague had the opportunity to commit the crime. The presence of Mr. Teague's DNA "does indicate that there would have to have been some relatively recent contact between the defendant and the victim. That contact could be an array of different things. But there would have to have been some relatively recent contact. That means that there could have been an opportunity for the—for Mr. Teague to have committed this crime." (30:24; App. 122.)

Corroborating the DNA evidence was evidence that Mr. Teague lived only a few blocks from where Ms. Taylor was killed. (13:7.)

C. Direct connection.

Finally, the DNA evidence provides a direct connection between Mr. Teague and the crime. The ***Wilson*** court recognized that no bright line could define evidence establishing a direct connection between the third party and the crime, but held that the evidence should suggest that the third party committed the crime. 2015 WI 48, ¶ 71. The court suggested that the direct connection is what will take the case "beyond mere speculation" that the third party committed the crime. ***Id.***, ¶ 59.

In the circuit court, the State conceded Mr. Ramsey's case was the strongest on the direct connection prong. (10:3; App. 131.) There has been no innocent explanation for the presence of Mr. Teague's DNA, and the prosecutor's speculation that it may have been passed through "dirty dollar bills" and a handshake is incredible. The DNA evidence establishes that they were not simply in close physical proximity. DNA under the fingernails requires a scratch sufficient to "penetrate into the person's living tissue." ***Eby v. State***, 165 S.W.3d 723, 730 (Tex. App. 2005). It is unusual in the first place to find a third party's DNA under a person's fingernails; and when such DNA is found, it often attributable to a partner or significant other. Olivia Cook & Lindsey Dixon, *The Prevalence of Mixed DNA Profiles in Fingernail Samples Taken from Individuals in the General Population*, 1 Forensic Sci. Int'l: Genetics 62 (2007); Melinda Matte, et al., *Prevalence and Persistence of Foreign DNA Beneath Fingernails*, 6 Forensic Sci. Int'l: Genetics 236 (2012); A. Fernandez Rodriguez et al., *Genetic Analysis of Fingernail Debris: Application to Forensic Casework*, 1239 Cong. Int'l Series 921 (2003).

Thus, the DNA evidence establishes there was some intimate proximity between Mr. Teague and Ms. Taylor. Not only did they come into physical contact, but Ms. Taylor essentially scratched off enough of Mr. Teague that it could be tested at the crime lab.

Mr. Ramsey is not required to conclusively establish that Mr. Teague was the killer. He only needs evidence suggesting a reasonable doubt as to his own guilt. The suspicious appearance of Mr. Teague's DNA under the victim's fingernails, coupled with his unusual statements and behavior, is directly relevant to Mr. Ramsey's guilt. Evidence of Mr. Teague's DNA tends to make it less likely that Mr. Ramsey is guilty. Wis. Stat. § 904.01.

This case does not present the fears outlined in ***Denny***, where a defendant is seeking to implicate every person with a conceivable motive to kill the victim. Mr. Teague's DNA was under the victim's fingernails, a surefire sign connecting him to the crime. Whether it was a sexual encounter gone wrong, an unprovoked attack, or something else entirely, the DNA directly connects him to the crime. Moreover, the connection is far from speculative. Ms. Taylor was killed under unknown circumstances and was only able to say "somebody stabbed me" before she passed away. She did not implicate Mr. Ramsey, and the only direct evidence connecting Mr. Ramsey to the crime was elicited under truly unreliable circumstances. Evidence of an unknown stranger's DNA under her fingernails, along with her dying declaration, tends to prove that Mr. Ramsey is not guilty; therefore, this court should reverse.

CONCLUSION

For the reasons stated above, Mr. Ramsey asks that this court reverse the decision of the circuit court, and remand with instructions that he be allowed to present evidence at trial implicating Mr. Teague in the homicide, and showing that his DNA was found under the victim's fingernails.

Dated this 9th day of April, 2018.

Respectfully submitted,

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CERTIFICATION AS TO FORM/LENGTH

I hereby certify that this brief conforms to the rules contained in § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 7,821 words.

CERTIFICATE OF COMPLIANCE WITH 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 § 809.19(12). I further certify that this electronic brief is identical in content and format to the printed form of the brief filed on or after 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, 2018.

Signed:

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CERTIFICATION AS TO APPENDIX

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with § 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; (3) a copy of any unpublished opinion cited under § 809.23(3)(a) or (b); and (4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

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

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APPENDIX

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