STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT I

Case No. 2017AP1318-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

FREDRICK RAMSEY,

Defendant-Appellant.

ON APPEAL FROM A NONFINAL ORDER ENTERED IN THE MILWAUKEE COUNTY CIRCUIT COURT, THE HONORABLE MARK A. SANDERS, PRESIDING

BRIEF OF PLAINTIFF-RESPONDENT

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ISSUE PRESENTED

The only issue that Fredrick Ramsey preserved in his petition for leave to appeal is the following:[1]

Did Ramsey satisfy the *Denny* test for admissibility of the identity of a third-party perpetrator, based on a partial profile of Julian Teague's DNA found under the victim's left fingernails, where there is no evidence that Teague knew the victim, had a motive to kill her, or was at the crime scene before or during the crime, and where there was no other evidence that he was involved in the murder?

The circuit court determined that Ramsey may introduce evidence at trial that the DNA of a male third party was found under the victim's left fingernails, but it barred Ramsey from identifying Teague as that third party because Ramsey failed to show that Teague had a motive or direct connection to the crime.

This Court should affirm.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State anticipates that the parties' briefs will adequately address the relevant facts and law, obviating the need for oral argument, but welcomes it if it will assist this Court.

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[1] In his brief, Ramsey identifies a constitutional challenge to *Denny* as his primary claim. (Ramsey's Br. 1.) The State briefly addresses that claim in this brief, *infra* Part II. But because Ramsey did not preserve this claim in his petition for leave to appeal, the State does not identify it in the Issue Presented section of its brief.

The State recommends publication. Although this Court's resolution of this issue requires the application of established law in *Denny* and *Wilson*, there are few published cases in which all three prongs of the test are contested. A published decision will likely assist the bench and bar in adjudicating subsequent *Denny* motions.

INTRODUCTION

Alexandria Taylor was stabbed to death; her longtime boyfriend, Ramsey, confessed to the crime during a police interrogation and was arrested. Police investigators gathered samples from Taylor and items at the crime scene for DNA testing. That testing produced one hit: under Taylor's left fingernails, a partial profile of male DNA was found that matched Teague, who lived roughly one half-mile from where Taylor was murdered.

Ramsey sought to admit evidence that Teague's DNA was found on Taylor to support a theory that Teague, not Ramsey, killed Taylor. After applying the *Denny* test for admissibility of third-party perpetrator evidence, the circuit court determined that Ramsey may present evidence at trial that male DNA that was not Ramsey's was found under Taylor's fingernails, but it precluded Ramsey from identifying Teague as that male contributor.

This Court should affirm because Ramsey failed to satisfy any of the three *Denny* prongs, i.e., motive, opportunity, and direct connection. Ramsey bases his theory that Teague had motive on speculation that in the 12- to 14-minute window during which the murder occurred, Teague—who did not know Taylor—encountered her, propositioned her, tried to force himself on her, and then became violent when she refused him. But Ramsey failed to meet his burden because there was no evidence that Teague and Taylor knew each other, no evidence of sexual assault or an attempt

thereof on Taylor, and no evidence that Teague had committed sexual assault or engaged in any similar violence.

Ramsey likewise failed to demonstrate opportunity because there is no evidence that Teague was at the crime scene at the time of the murder. Further, Ramsey cannot show a direct connection between Teague and the crime because Teague's partial profile of DNA under Taylor's fingernails does not establish a direct connection to her murder. That DNA could have transferred to her in numerous ways, and there was no other evidence of a link between Teague and Taylor's murder. Accordingly, this Court should affirm.

STATEMENT OF THE CASE

Ramsey faces a charge of second-degree reckless homicide with domestic abuse enhancements. (R. 1:1; 3.) The charge resulted from the June 11, 2016, fatal stabbing of Alexandria Taylor in Milwaukee. (R. 1:1.) According to the criminal complaint, Taylor and Ramsey had been in a relationship for eleven years and had two children together. (R. 1:2.) A friend of Taylor's reported to police that Taylor and Ramsey's relationship had been marked by domestic violence, and that on the day before Taylor's death, Taylor indicated that she was going to leave Ramsey. (R. 1:1.)

Additionally, Ramsey admitted to stabbing Taylor and provided police with details from that day. (R. 1:2.) Ramsey told police that on June 11, 2016, he got into an argument and physical struggle with Taylor behind a gas station. (R. 1:2.) Police arrived to separate them. (R. 1:2.)

Afterward, Ramsey told police, he went looking for Taylor and found her "sitting on some porch steps" at a residence. (R. 1:2.) When he approached Taylor, she tried to enter the residence, but Ramsey "grabbed her by the arm and spun her around." (R. 1:2.) Taylor slapped Ramsey, to

which Ramsey responded by stabbing her in the chest once. (R. 1:2.) Ramsey told police that Taylor yelled, "Rick[,] you stabbed me!" (R. 1:2.) Taylor unsuccessfully tried to grab the knife and fell down the porch steps; Ramsey stabbed her again when she tried to crawl up the stairs. He then left the scene. (R. 1:2.)

During their interview of Ramsey, police estimated that 12 to 14 minutes elapsed between when Ramsey and Taylor went their separate ways at the gas station and when Taylor was stabbed. (R. 18:139–40, 155.) That estimate was based on police encountering Ramsey and Taylor at the gas station at about 3:50 a.m. and when they estimated Taylor was stabbed. (R. 18:139–40.)

When police responded to the crime scene, Taylor was pronounced dead with a fatal stab wound to her chest and an apparent stab wound to her temple. (R. 1:1.)

Police later interviewed Airimis Spinks, who had called 911 and attended to Taylor after the stabbing. (R. 21:23.) Spinks told police that he and Taylor had recently developed a sexual relationship and that he knew that Taylor was also in a relationship with a man named Rick. (R. 21:24.) Taylor had told Spinks that Rick was violent with her and had put her into "a hospital a couple of times," and that she wanted to leave him. (R. 21:24.)

Spinks told police that the address where Taylor was killed was his sister's house. Taylor had gone there on June 9, 2016, claiming that she and Rick "got into it real bad" the day before, and she wanted to get away from him. (R. 21:24.) Taylor stayed with Spinks at Spinks's sister's house for the weekend. According to Spinks, late on the night of June 10, Taylor said she wanted to leave Rick and be with Spinks. Spinks responded that "if she was serious about it they could do it." (R. 21:24.) Spinks laid on the couch to sleep, and Taylor went to the front porch. (R. 21:24.)

Spinks said he was awakened at 4:00 a.m. by the doorbell and banging on the front door, where he saw Taylor. Her wig was off and her face was swollen. (R. 21:24.) Taylor said, "Somebody stabbed me." (R. 21:24.) Spinks laid her on the living room floor, called 911, and tried to stop her bleeding. (R. 21:24.) Spinks also asked Taylor "who did this to her, but she was unable to answer" and was struggling to breathe. (R. 21:24.) Spinks stayed with Taylor until police arrived. (R. 21:24.)

During the investigation, police collected DNA from Taylor and items found at the crime scene. Material recovered from under Taylor's left fingernails produced a mixture of DNA from at least two individuals, including a partial minor male profile that was consistent with the DNA of Julian Teague. (R. 10:8.) Teague was excluded from DNA profiles found on other items and on Taylor. (R. 10:7–8.)

In October 2016, police interviewed Teague, who lived about one half-mile from the crime scene.[2] (R. 21:28.) Police showed him a photo of Taylor, and Teague stated he had never seen Taylor before. (R. 21:28.) He told police he had no idea how his DNA would have transferred to Taylor, but he consented to providing a DNA sample for follow-up testing. (R. 21:28.)

In November 2016, Teague was arrested for throwing rocks at cars and resisting arrest. (R. 10:10.) As for that crime, Teague told police that he was intoxicated and was

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[2] According to Google Maps, Teague's residence at 3920 North 6th Street in the City of Milwaukee (R. 10:10), is approximately one half-mile from the murder scene at 3601 North 5th Street. *See Cloe v. City of Indianapolis*, 712 F.3d 1171, 1177 n.3 (7th Cir. 2013), *overruled on other grounds by Ortiz v. Werner Enters.*, 834 F.3d 760 (7th Cir. 2016) (taking judicial notice of approximate geographic distances based on Google Maps).

throwing the rocks because "he was being harassed." (R. 10:11.) Teague acknowledged that he resisted police when they tried to arrest him. (R. 10:11.)

While Teague was in custody for those misdemeanors, police asked him additional questions related to Taylor's murder. Teague reiterated that he had never seen Taylor before, that he does not carry a gun or a knife, and that he has never killed anyone. (R. 10:11.) When pressed for how his DNA could have gotten under Taylor's fingernails, Teague eventually told police that he had an active sex life and had had sex with 30 or so women in his apartment. Perhaps Taylor was one of those women, Teague told police, but otherwise, he had no explanation for his DNA being on Taylor. (R. 10:11.) Teague also showed police his upper body, and it did not appear to have any scars and scratches. (R. 10:11.)

During the investigation, police interviewed people who lived at the building where the murder occurred and people who knew Taylor. When showed a photograph of Teague, none of them recalled having ever seen him before. (R. 10:13, 14–15, 16–17, 18–19, 20–21.)

Ramsey filed motions to suppress his statements to police as involuntary and to admit third-party perpetrator evidence pursuant to *State v. Denny*, 120 Wis. 2d 614, 357 N.W.2d 12 (Ct. App. 1984). (R. 8; 9.) With the latter motion, Ramsey sought to admit evidence that the DNA of a third party, Teague, "was found under the victim's fingernails." (R. 9:2.) Ramsey asserted that "Mr. Teague refused to give the police a full interview about how his DNA came to be under the victim's fingernails. Mr. Teague's violent past, proximity to the crime scene, consciousness of guilt in refusing to cooperate with the police, and unexplained DNA on the victim, all give rise to the proposition that he was the assailant, not defendant Ramsey." (R. 9:2.)

The court held a hearing and denied the motion, holding that the evidence that Teague was a minor contributor to DNA found under Taylor's fingernails failed the motive and direct-connection prongs of *Denny*. (R. 30:21–27.) The court determined that Ramsey may admit evidence at trial that police found DNA evidence of "some other contributor under the fingernails of the victim," but he could not admit evidence that Teague was identified as that contributor. (R. 30:27.)[3] The court memorialized its decision in a written order. (R. 20.)

Ramsey filed a petition for leave to appeal (R. 21), which this Court granted (R. 26).

STANDARD OF REVIEW

Appellate courts review a circuit court's decision to refuse to admit evidence for an erroneous exercise of discretion. *State v. Wilson*, 2015 WI 48, ¶ 47, 362 Wis. 2d 193, 864 N.W.2d 52 (citing *Weborg v. Jenny*, 2012 WI 67, ¶ 41, 341 Wis. 2d 668, 816 N.W.2d 191). When the circuit court's denial of proffered evidence implicates a defendant's constitutional right to present a defense, the decision barring the evidence is a question of constitutional fact subject to de novo review. *Id.* (citing *State v. Knapp*, 2003 WI 121, ¶ 173, 265 Wis. 2d 278, 666 N.W.2d 881, *vacated and remanded*, 524 U.S. 952 (2004), *reinstated in material part*, 2005 WI 127, ¶ 2 n.3, 285 Wis. 2d 86, 700 N.W.2d 899).

[3] The court also denied Ramsey's motion to suppress the statements he made to police in which he admitted stabbing Taylor. (R. 30:87.)

ARGUMENT

I. The circuit court correctly applied *Denny* in denying Ramsey's request to identify Teague as a third-party perpetrator.

A. *Denny* tests the relevance of proffered third-party perpetrator evidence.

A court may not refuse to admit evidence if doing so deprives the defendant of a fair trial. *Wilson*, 362 Wis. 2d 193, ¶ 48 (citing *Crane v. Kentucky*, 476 U.S. 683, 689–90 (1986)). That said, a defendant has no constitutional right to present irrelevant evidence or evidence that does not otherwise satisfy standard rules of admissibility. *See State v. Anthony*, 2015 WI 20, ¶ 48, 361 Wis. 2d 116, 860 N.W.2d 10 (citing *State v. Robinson*, 146 Wis. 2d 315, 332, 431 N.W.2d 165 (1988)).

A defendant seeking to admit evidence that a known third party could have committed the crime must satisfy all three prongs of the *Denny* "legitimate tendency" test. *Wilson*, 362 Wis. 2d 193, ¶¶ 52, 64. Those prongs involve the following inquiries: *First*, the motive prong asks, "[D]id the alleged third-party perpetrator have a plausible reason to commit the crime?" *Id.* ¶ 57. *Second*, the opportunity prong asks, "[D]oes the evidence create a practical possibility that the third party committed the crime?" *Id.* ¶ 58. *Third*, the direct-connection prong asks, "[I]s there evidence that the alleged third-party perpetrator actually committed the crime, directly or indirectly?" *Id.* ¶ 59.

B. Ramsey failed to satisfy the motive prong.

"The admissibility of evidence of a third party's motive to commit the crime charged against the defendant is similar to what it would be if that third party were on trial himself." *Wilson*, 362 Wis. 2d 193, ¶ 63. "Because motive is not an

element of any crime, the State never needs to prove motive; relevant evidence of motive is generally admissible regardless of weight." *Id.* (citing *State v. Berby*, 81 Wis. 2d 677, 686, 260 N.W.2d 798 (1977)). "The same applies to evidence of a third party's motive—the defendant is not required to establish motive with substantial certainty." *Id.*

To satisfy the motive prong by identifying a "plausible reason" for the third party to have committed the crime, *Wilson*, 362 Wis. 2d 193, ¶ 57, a defendant may present a set of circumstances that, taken together, create evidence of a specific motive to commit the crime. For example, this Court upheld the circuit court's exercise of discretion in determining that a third-party perpetrator had motive to sexually assault and kill the victim where there was a congruence of unusual but uncanny parallels between the crime and the third-party's other acts. *See State v. Vollbrecht*, 2012 WI App 90, ¶ 27, 344 Wis. 2d 69, 820 N.W.2d 443. In *Vollbrecht*, the victim was found nearly totally naked, with torn clothing, chained to a tree, and shot in the back. *Id.* That, paired with the fact that the alleged third-party perpetrator had bragged of chaining women to trees, slapping them around, setting them on fire, and shooting them, "provide[d] 'strong specific evidence of motive to sexually assault and kill'" the victim in Vollbrecht's case. *Id.*

Here, the circuit court soundly determined that Ramsey failed to satisfy the motive prong. It explained that "[w]hat is required . . . is that [the proponent] demonstrate not that there are motives to commit a crime but that the third party had a motive to commit the crime." (R. 30:22.) "Here," the court explained, Ramsey "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." (R. 30:22–23.) The court observed that

any time someone is murdered or sexually assaulted, a thwarted sexual opportunity could be the motive; the question, however, was whether there was sufficient evidence that *Teague* had that motive. (R. 30:23.)

The court found that, even with the low "some evidence" burden of production, Ramsey failed to satisfy the motive prong with his suggestion that Teague's claim of having had sex with 30 or so women meant that he randomly solicits sex and, "therefore, has some motive . . . to commit this particular crime" of stabbing and murdering Taylor. (R. 30:23.) The court explained, "That is evidence that Mr. Teague has sex," which Teague had in common with most adults. (R. 30:23.) But "[n]othing suggests that Mr. Teague had the motive to" murder Taylor. (R. 30:23.) In other words, "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." (R. 30:23–24.)

The court's assessment was correct. To start, there was no evidence that Taylor's assailant was motivated by sexual rejection, such as evidence of attempted sexual assault. Unlike in *Vollbrecht*, there was no evidence that Taylor's clothing was removed or torn or that she suffered injuries consistent with a sexually motivated attack. While Taylor appeared to have been struck in the face and stabbed, those injuries did not create an inference that her assailant did those things because she rejected a solicitation for sex. Moreover, even presuming that Teague regularly approached women in public and solicited them for sex, there was no evidence that Teague had, either generally or specifically, a motive to kill or seriously injure any women who rejected him.

Ramsey argues that Teague's "bizarre statements and conduct" to police create plausible motives. Those statements include his telling police that he had some 30 claimed sex partners in the neighborhood and his speculation that his DNA possibly was under Taylor's fingernails because she was one of those women, though Teague did not remember her. (Ramsey's Br. 25.) Ramsey also argues that Teague has a "record of unexplained antisocial behavior," including his past arrest for throwing rocks at cars based on what Teague perceived to be harassment. Ramsey posits that that behavior supports his theory that Teague attacked Taylor with the motive to sexually assault her, the motive to hurt or kill her after she rejected him, or that he randomly attacked her with "no rational motive." (Ramsey's Br. 25–26.)

Ramsey's reasoning feels like a grasp for straws. That Teague was arrested for throwing rocks at cars in response to perceived harassment does not infer a motive to attempt to sexually assault Taylor or to stab her to death. And that Teague had—or claimed to have—a prolific sex life does not suggest that he resorts to violence or forcible sexual intercourse when he is rejected. If Teague truly had 30-odd sexual partners, in reaching that number, he likely had to have experienced rejection from numerous other would-be conquests. Yet there is no evidence that Teague had acted out violently against women who had spurned his advances, let alone that he has responded to perceived slights any more violently than throwing rocks at vehicles.

Finally, Ramsey argues that the partial profile of Teague's DNA under Taylor's left fingernails, and Taylor's statement to Spinks that "somebody" stabbed her support his premise that Teague had a motive. (Ramsey's Br. 24–26.) Those points are irrelevant to whether Teague had a motive: the partial DNA profile is pertinent, at most, to the opportunity and the direct connection prongs, and Taylor's

statement is simply evidence supporting the defense theory that someone other than Ramsey committed the act, not whether Teague had a motive.

Hence, because Ramsey failed to satisfy the motive prong, he has failed his burden under *Denny*. *See Wilson,* 362 Wis. 2d 193, ¶ 64 ("[T]he *Denny* test is a three-prong test; it never becomes a one- or two-prong test."). Alternatively, assuming for the sake of argument that Ramsey satisfied the motive prong, he has not shown a strong motive that would impact the analysis of the other prongs. *See id.* ("It may be that the strength and proof of a third party's motive to commit the crime is so strong that it will affect the evaluation of the other prongs."). In any event, he has not satisfied the opportunity or direct connection prongs, as discussed below.

C. Ramsey failed to satisfy the opportunity prong.

"The second prong of the 'legitimate tendency' test asks whether the alleged third-party perpetrator *could have* committed the crime in question." *Wilson*, 362 Wis. 2d 193, ¶ 65. "[O]ften, but not always," this prong requires the proponent to show that the third party "was at the crime scene or known to be in the vicinity when the crime was committed." *Id.*

"It is incumbent on the proponent . . . to show the relevance of 'opportunity' evidence." *Wilson*, 362 Wis. 2d 193, ¶ 67 (quoted source omitted). Moreover, the defendant's theory of the third party's involvement guides the court's relevance analysis under the opportunity prong. *Id.* ¶ 68. For example, if the defendant claims that the third party actually committed a shooting crime, "then opportunity might be shown by the party's presence at the crime scene." *Id.* "In all but the rarest of cases, however, a defendant will

need to show more than an unaccounted-for period of time to implicate a third party." *Id.* (citation omitted).

In *Wilson*, Wilson failed to demonstrate opportunity when he sought to admit evidence that a third party had the opportunity to hire a shooter to kill the victim in that case. There, the court observed that based on Wilson's theory of defense and the evidence available, the third party would have had to arrange for a murder of a woman in a public street in a matter of one to two hours at most. *Wilson*, 362 Wis. 2d 193, ¶ 85. But there was no evidence that the third party "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.* There was no evidence that the third party had access to the vehicle—which witnesses identified as Wilson's—seen chasing the victim. *Id.* Wilson provided no phone records supporting the theory that the third party arranged for a hit. *Id.* He presented nothing tying the third party to the weapons used nor offered the identities of anyone that the third party likely hired to commit the crime. *Id.*

Likewise, here, Ramsey failed his burden of showing relevant evidence that Teague had the opportunity to develop a motive to attack and kill Taylor. To start, the only evidence of Teague's presence at the crime scene is (1) the partial profile of his DNA found under Taylor's left fingernails, and (2) that he lived within about one half-mile of where Taylor was murdered. But that Teague lived within blocks of where Taylor was murdered simply means that he lived nearby, just like the hundreds of people who lived in this northside Milwaukee neighborhood.

Further, that a partial profile of Teague's DNA was found under Taylor's nails simply means that Teague's DNA directly or indirectly transferred to Taylor at some point before the murder, but that does not necessarily place him at

the crime scene. In fact, Teague's DNA was found nowhere else at the crime scene. The State Crime Lab tested numerous samples from items at the scene—including debris from Taylor's right fingernails, DNA from a blade, cigarette butts, a bottle of Mike's Hard Lemonade, a bottle of Everfresh, and a styrofoam cup—and excluded Teague as a contributor to DNA on those items. (R. 10:7–8.)

Finally, there was nothing else to establish that Teague had the opportunity to attack Taylor. Ramsey identifies no witnesses who had seen Teague before, let alone placed him at the scene. Police talked to Teague, who denied having ever seen Taylor before. (R. 10:11; 21:28.) Law enforcement also talked to people who lived at the address where Taylor was killed and others close to Taylor, and none of those people had ever seen Teague before. (R. 10:13, 14–15, 16–17, 18–19, 20–21.) And here, like in *Wilson*, the opportunity time window was small: police estimated that, based on their contact with Taylor and Ramsey just before her murder, 12 to 14 minutes elapsed between when Ramsey and Taylor separated at the gas station and when Taylor was stabbed to death. (R. 18:155.) There is nothing to suggest that during that short time, Teague happened to encounter Taylor, develop a motive to stab her, and committed the crime.

Ramsey relies on the circuit court's determination that Ramsey satisfied the opportunity prong based on the partial profile of Teague's DNA, which, in the court's view, "indicate[s] that there would have to have been some relatively recent contact between the defendant and the victim." (Ramsey's Br. 27; R. 30:24.) For the reasons above, however, the circuit court's decision on opportunity, based on nothing more than the DNA evidence—was inconsistent with *Wilson* and its guidance on how courts are to assess that prong. That Teague had either direct or indirect contact

with Taylor at some point before her murder establishes a connection between Teague and Taylor, but it does not necessarily connect Teague to the crime scene as is required under the opportunity analysis. *Cf. Wilson*, 362 Wis. 2d 193, ¶ 68 (stating that opportunity generally requires defendant to place the third party at the scene or to show he otherwise had the ability to carry out the specific act). In sum, Ramsey's offer of proof of opportunity does not pass muster.

D. Ramsey failed to demonstrate a direct connection.

The third prong of *Denny* requires courts to consider "whether the proffered evidence is so remote in time, place or circumstances that a direct connection cannot be made between the third person and the crime." *Denny,* 120 Wis. 2d at 624 (citation omitted). When assessing the direct connection prong, circuit courts "assess the proffered evidence in conjunction with all other evidence to determine whether, under the totality of the circumstances, the evidence suggests that a third-party perpetrator *actually committed* the crime." *Wilson*, 362 Wis. 2d 193, ¶ 71 (citations omitted). "In sum, courts are not to look merely for a connection between the third party and the crime, they are to look for some direct connection between the third party and the *perpetration of* the crime." *Id.*

There are any number of ways a proponent can establish a third-party's direct connection to a crime, such as evidence of a third party's self-incriminating statement or evidence showing that the third party had exclusive control of the weapon used in the crime. *Wilson*, 362 Wis. 2d 193, ¶ 72 (citations omitted). But "[m]ere presence at the crime scene or acquaintance with the victim . . . is not normally enough to establish direct connection. *Id.* (citation omitted).

Setting aside the DNA evidence, Ramsey offers nothing else connecting Teague to the perpetration of the crime. Teague has not made any self-incriminating statements. Rather, he has consistently maintained that he does not know Taylor, that he does not carry a gun or knife, and that he has never killed anyone. There is no evidence linking Teague to the knife that the killer used to stab Taylor. Nor is there anything about Taylor's murder that makes it an unusual "signature" crime of which Teague has either committed or claimed to have committed in the past. *Cf. Vollbrecht*, 344 Wis. 2d 69, ¶ 28 (affirming a finding of direct connection where the third-party made self-incriminating statements about committing the crime at issue as well as other crimes with the same unusual features). Here, someone stabbed Taylor to death; Teague's record shows that he has thrown rocks at cars while intoxicated and, in 2012, committed substantial battery of a younger family member. (R. 10:3 n.1.) Those crimes do not establish a signature pattern supporting the direct connection prong.

In arguing for a direct connection, Ramsey offers the same proof—the partial profile of Teague's DNA under Taylor's left fingernails—that he offered to support the opportunity prong. (Ramsey's Br. 28–29.) While the opportunity and direct connection prongs overlap in some ways, they require different proof. The opportunity prong requires a showing connecting the third party to the crime scene or weapon, whereas the direct connection requires a step further, i.e., showing connecting the third party to the actual commission of the crime. *See Wilson*, 362 Wis. 3d 193, ¶¶ 68, 71. Ramsey has made neither showing here.

To be sure, that a partial profile of Teague's DNA was found under Taylor's left fingernails is pertinent to the direct-connection analysis. But while there is no obvious

innocent explanation for how Teague's DNA likely got there, there likewise is no obvious incriminating explanation, given the dearth of any other evidence linking Teague to the commission of the crime.

Further, while DNA evidence can often, by its nature, provide strong evidence of that person's involvement in a crime, the evidence of Teague's DNA here lacks the context that would normally make it compelling. To start, Teague's DNA was found nowhere else at the scene or on Taylor's body. If Teague was physically contacting Taylor by attempting to assault her and she was fighting off his advances, as Ramsey suggests, presumably Teague's DNA would have appeared as a major contributor, with a full profile, on more locations on her body, and in other locations.

Moreover, Teague's DNA could have transferred to Taylor's left fingernails in any number of direct or indirect ways—the two of them did not have to have come into direct contact. Ramsey insists that the DNA had to have transferred when Teague was close enough to touch Taylor "and clearly did something" to cause Taylor to "penetrate into his living tissue" with her left hand. (Ramsey's Br. 26.) "DNA under the fingernails," Ramsey writes, "requires a scratch sufficient to 'penetrate into the person's living tissue.'" (Ramsey's Br. 28 (citing *Eby v. State*, 165 S.W.3d 723, 730 (Tex. App. 2005)).

Eby does not support Ramsey's statement that the DNA *had* to transfer by way of direct and penetrative contact. Indeed, the expert in *Eby* also testified that in addition to direct contact, "DNA can be transferred from one person to another without any direct contact between the individuals." *Eby*, 165 S.W.3d at 730.

And none of the articles that Ramsey lists (Ramsey's Br. 28)—to the extent one can draw any conclusions from

them without expert testimony—stands for the proposition that DNA under fingernails must be transferred by direct, intimate contact, and cannot be transferred by casual or indirect means. In fact, the literature appears to acknowledge that indirect transfer can happen, albeit much less often than it would with direct contact.[4] Hence, that it may be less likely that a person will transfer detectable DNA indirectly does not mean that Teague and Taylor necessarily had direct contact, let alone that they had direct contact at the time of her murder. In any event, nothing precludes Ramsey from presenting evidence at trial that indirect transfer is much less likely than direct when arguing that the male third-party DNA detected here compels reasonable doubt as to his guilt. But that evidence does not support his burden of production under the direct-connection prong.

Finally, Ramsey urges this Court to reverse because doing so will allow him to present "[e]vidence of an unknown stranger's DNA under [Taylor's] fingernails, along with her dying declaration, [which] tends to prove that Mr. Ramsey is not guilty." (Ramsey's Br. 29.) But Ramsey is permitted to present precisely that evidence. Nothing about the court's decision bars Ramsey from presenting evidence and arguing that (1) no physical evidence tied Ramsey to the murder and

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[4] *See, e.g.*, Olivia Cook & Lindsey Dixon, *The Prevalence of Mixed DNA Profiles on Fingernail Samples Taken from Individuals in the General Population*, 1 Forensic Sci. Int'l: Genetics 62, 62–63 (2007); Edward A. Dowlman et al., *The Prevalence of Mixed DNA Profiles on Fingernail Swabs*, 50 Sci. & Just. 64, 70 (2010); A. Fernandez-Rodriguez et al., *Genetic Analysis of Fingernail Debris: Application to Forensic Casework*, 1239 Int'l Congress Series 921, 923–24 (2003); Melinda Matte et al., *Prevalence and Resistance of Foreign DNA Beneath Fingernails*, 6 Forensic Sci. Int'l: Genetics 236, 242 (2012).

none of Ramsey's DNA was detected at the scene, (2) a partial profile of another man's DNA was detected under Taylor's left fingernails, (3) Ramsey's confession to Taylor's murder was false, and (4) other evidence supporting his defense that a stranger attacked Taylor, including Taylor's statement to Spinks that "[s]omebody stabbed me." The only thing that the circuit court's decision excludes is Teague's *identity*. This is a fair result given that Ramsey cannot establish a legitimate tendency that Teague committed the crime.

In sum, because Ramsey failed his burden of satisfying any of the three required prongs of the *Denny* test and failed to establish a legitimate tendency that Teague could have committed the crime, the circuit court properly excluded evidence that Teague was the source of the partial profile detected in the mix of DNA found under Taylor's left fingernails. That decision was a sound application of *Denny*, and it did not violate Ramsey's right to present a defense. This Court should affirm.

II. Ramsey did not preserve a constitutional challenge to *Denny* in this appeal.

Ramsey proposes that this appeal involves two issues, arguing that *Denny* is unconstitutional in addition to challenging the circuit court's application of *Denny*. (Ramsey's Br. 6–24.) This Court should not address Ramsey's constitutional challenge to *Denny*.

To start, Ramsey failed to present this claim in his petition for leave to appeal. A party who obtains the right to appeal from a nonfinal order may raise only those issues outlined in the petition in the later filed briefs. *State v. Aufderhaar*, 2004 WI App 208, ¶ 12, 277 Wis. 2d 173, 689 N.W.2d 674, *rev'd on other grounds*, 2005 WI 108, 283 Wis. 2d 336, 700 N.W.2d 4. Here, the sole issue Ramsey

raised in his petition was a challenge to the circuit court's application of *Denny*: "Did the defense meet its burden of production to the circuit court to provide a 'legitimate tendency' that a third party may have committed the homicide and therefore should be allowed to present specific information about a third party at trial?" (R. 21:6.) In its order granting the petition, this Court did not identify any additional issues that the parties could raise. (R. 26:1–2.) Accordingly, Ramsey cannot raise—let alone obtain relief on—this claim raised for the first time in his brief.

Moreover, Ramsey did not raise his constitutional challenge to *Denny* before the circuit court. "It is a fundamental principle of appellate review that issues must be preserved at the circuit court. Issues that are not preserved at the circuit court, even alleged constitutional errors, generally will not be considered on appeal." *State v. Huebner*, 2000 WI 59, ¶ 10, 235 Wis. 2d 486, 611 N.W.2d 727 (citing *State v. Caban*, 210 Wis. 2d 597, 604, 563 N.W.2d 501 (1997)). "Raising issues at the trial court level allows the trial court to correct or avoid the alleged error in the first place, eliminating the need for appeal. It also gives both parties and the trial judge notice of the issue and a fair opportunity to address the objection." *Id.* ¶ 12 (citing *State v. Erickson*, 227 Wis. 2d 758, 766, 596 N.W.2d 749 (1999)). Here, before the circuit court, Ramsey challenged that court's application of *Denny*. He did not challenge *Denny*'s constitutionality. Therefore, his claim is unpreserved for this court's review.

Finally, even if this claim is somehow properly before this Court in these proceedings, this Court cannot grant Ramsey relief on it. Ramsey is asking this Court to overrule its own decision in *Denny* and *Denny*'s progeny, including *Wilson*, in which the Wisconsin Supreme Court most recently affirmed the *Denny* framework. This Court cannot

overrule itself or the Wisconsin Supreme Court. *Cook v. Cook*, 208 Wis. 2d 166, 189–90, 560 N.W.2d 246 (1997). Ramsey invokes *State v. Jennings*, 2002 WI 44, ¶ 19, 252 Wis. 2d 228, 647 N.W.2d 142, and its holding that this Court "must not follow a decision" of the supreme court "if it conflicts with a subsequent controlling decision of the United States Supreme Court." (Ramsey's Br. 7.) But he fails to identify a "subsequently controlling decision of the United States Supreme Court" with which *Denny* conflicts.

At most, Ramsey suggests that *Holmes v. South Carolina*, 547 U.S. 319 (2006), conflicts with *Denny* and *Wilson* and therefore controls. (Ramsey's Br. 18, 21.) But *Holmes* was not issued subsequent to the supreme court's 2015 decision in *Wilson*. Nor does *Holmes* conflict with *Denny* or *Wilson*. The *Holmes* Court held that courts may not weigh the strength of the case against the defendant when determining whether to admit third-party perpetrator evidence. 547 U.S. at 330–31. *Denny* and *Wilson* are consistent with that holding. *See Wilson*, 362 Wis. 2d 193, ¶ 69 (explaining that "[o]verwhelming evidence against the defendant may not serve as the basis for excluding evidence" of a third-party perpetrator (citing *Holmes*, 547 U.S. at 331)).

Thus, this Court should decline to address Ramsey's constitutional challenge. If this Court disagrees with the State and wishes to consider the merits of Ramsey's newly raised constitutional challenge to *Denny*, the State respectfully requests an opportunity to file a supplemental brief on the merits.

CONCLUSION

This Court should affirm the non-final order of the circuit court denying Ramsey's *Denny* motion.

Dated this 27th day of June, 2018.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 5,975 words.

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SARAH L. BURGUNDY
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CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § 809.19(12)

I hereby certify that:

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

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

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

Dated this 27th day of June, 2018.

_____
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