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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 Denying Defendant's Motion to Admit Evidence, Entered in the Milwaukee County Circuit Court, the Honorable Mark A. Sanders, Presiding.

REPLY BRIEF OF DEFENDANT-APPELLANT

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ARGUMENT

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

The only evidence against Mr. Ramsey is his dubious confession, where he can be heard *guessing* where the victim was stabbed, and where he failed to provide a single fact that was not previously told to him by detectives. (16; 18:259.) The State has concluded that this questionable evidence is sufficient to charge Mr. Ramsey, but that there is insufficient evidence to even *suggest* Julian Teague—whose DNA was suspiciously under the victim's fingernails—committed the offense. The obvious absurdity of this outcome demonstrates the unconstitutionality of the ***Denny*** test.

The State has declined to brief the constitutionality of ***Denny***, instead arguing that the issue is not properly before this court. (Respondent's Brief at 19-21.) The State argues the issue was not raised in the petition for leave to appeal or in the circuit court.

First, Mr. Ramsey's petition for leave to appeal preserved an argument that his constitutional right to present a defense demanded that he be able to accuse Mr. Teague of the homicide, and that any contrary ruling required by ***Denny*** was unconstitutional. The petition specifically argued that excluding an accusation against Mr. Teague under ***Denny*** would violate his constitutional right to present a defense: "As stated, Mr. Ramsey argues the barring of his ability to name specifically and present evidence about Teague violates his constitutional right to present a defense." (21:17.) The petition also argued that reversal was warranted under the

constitutional right to present a defense, not simply an evidentiary rule:

> The circuit court's order barring Mr. Ramsey from presenting specific information about Teague is a constitutional violation that substantially and irreparably injures his right to have a fair trial. The right to present favorable evidence is substantial as it is found in the Compulsory Process Clause of the Sixth Amendment of the U.S. Constitution, which provides the right "to have compulsory process for obtaining witnesses in his favor."

(21:13-14.) Thus, Mr. Ramsey's constitutional right to implicate Mr. Teague was clearly identified as an appellate issue in the petition for leave to appeal.

Second, the constitutional challenge is properly before this court because it was raised in the circuit court. In a motion filed before the evidentiary hearing, Mr. Ramsey argued:

> Mr. Ramsey has the right to present a complete defense. The right to present a defense originates from the confrontation and compulsory process clause of the Sixth Amendment to the United States Constitution, and applies to the citizens of this state through Article I, Section 7 of the Wisconsin Constitution. Denying the Defendant's right to present a third party defense given the facts of this case would violate his constitutional protections.
>
> . . .
>
> Moreover, a defendant's right to present a defense may in some cases require the admission of testimony that would otherwise be excluded under applicable evidentiary rules.

(13:2, 9; App. 134, 141.)[1] This argument clearly and concisely preserved a constitutional challenge to the exclusion of evidence inculpating Mr. Teague.

Moreover, declining to address the constitutional issue in this case would simply waste the resources of the court and counsel. This case is not before this court on direct appeal following sentencing; therefore, should this court decline to decide the constitutional issue, Mr. Ramsey can simply re-raise it in the circuit court. There would be no procedural bar. Instead, there would be a second round of litigation over an issue that was already properly presented, and has been argued to this court. Therefore, in the interest of judicial economy, this court should address the preserved constitutional issue that has been raised on appeal.

Third, the State argues the court cannot grant the relief requested because it is unable to overrule ***Denny***. Mr. Ramsey agrees that the court cannot overrule ***Denny***, but the court can still grant the requested relief. First, the court can find that application of the ***Denny*** test in this case violates Mr. Ramsey's constitutional right to present a defense, so the test must be set aside in this instance. That ruling would be consistent with case law holding that rules of evidence (like ***Denny***) must occasionally be set aside where the rule conflicts with the defendant's constitutional right to present a defense. ***Davis v. Alaska***, 415 U.S. 308 (1974); ***State v. Pulizzano***, 155 Wis. 2d 633, 456 N.W.2d 325 (1990). Alternatively—if this court finds the ***Denny*** test

[1] Even if this argument can only be construed as an as-applied challenge, this court can still address an unpreserved facial challenge. *See* ***State v. Bush***, 2005 WI 103, ¶ 17, 283 Wis. 2d 90, 699 N.W.2d 80 (discussing facial challenges to statutes). And even if the court only rules on the as-applied challenge, Mr. Ramsey is still entitled to relief.

unconstitutional in all cases—it must disregard the test. ***State v. Jennings***, 2002 WI 44, ¶¶ 17-19, 252 Wis. 2d 228, 647 N.W.2d 142.

If this court finds that the constitutional arguments in this case are preserved, it should not bail the State out and give it a second opportunity to file a brief. Mr. Ramsey's constitutional arguments were made in the trial court, in the petition for leave to appeal, and in his initial brief. The arguments in the initial brief were not disguised, and the State had an opportunity to respond to them. There is no compelling reason to give the State a second chance to respond when it chose not to do so in its first brief. Rather, the court should fairly apply the rule that arguments not rebutted on appeal are deemed conceded. ***Shadley v. Lloyds of London***, 2009 WI App 165, ¶ 26, 322 Wis. 2d 189, 776 N.W.2d 838.

II. Evidence inculpating Mr. Teague is admissible under ***Denny***.

If this court refuses to address Mr. Ramsey's argument that he has a constitutional right to implicate Mr. Teague, the only other issue is straightforward: has the ***Denny*** test been satisfied? The facts are undisputed; the parties simply disagree on the application of the three-prong test. The State argues *none* of the prongs can be satisfied, as contrasted with the trial prosecutor and the circuit court judge who agreed that Mr. Teague's DNA was sufficiently incriminating that it satisfied at least some of the prongs.[2]

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[2] Interestingly, the State's inflexible application of the three-prong ***Denny*** test highlights its unconstitutionality in this case.

A. Motive.

The State sets out the correct test to assess motive. (Respondent's Brief at 8-9.) Mr. Ramsey only needs to identify a "plausible reason" for the offense, not an actual motive. Further, Mr. Ramsey is "not required to establish the motive with substantial certainty. ***State v. Wilson***, 2015 WI 48, ¶¶ 57, 63, 362 Wis. 2d 193, 864 N.W.2d 52.

Here, Mr. Ramsey has identified a plausible motive, sufficient to satisfy ***Denny***: Mr. Teague made an unwanted or aggressive advance towards Ms. Taylor, which eventually (and possibly unintentionally) became violent. The plausibility of this motive is supported by evidence in the record. Mr. Teague had a record of unexplained antisocial behavior, which included lashing out at perceived slights. (21:29-30.)

This motive was also corroborated by the presence of his DNA. His only explanation was that he may have had sex with her, even though he had no idea who she was. And that sex only could have happened during a 12-14 minute window between when Mr. Ramsey left Ms. Taylor and when she was stabbed. (Respondent's Brief at 14.) Although they probably did not have sex, Mr. Teague's DNA is very telling because it demonstrates that he and Ms. Taylor were close enough that she was actually able to scratch him. ***Eby v. State***, 165 S.W.3d 723, 730 (Tex. App. 2005). Moreover, they had been in contact recently enough that his DNA had not degraded or been washed away. This DNA evidence strongly corroborates Mr. Teague's plausible motive for killing Ms. Taylor.

Although Mr. Ramsey and the State both cited to ***State v. Vollbrecht*** when discussing the motive prong, the facts of that case are so remarkable that they are not a very useful comparison. 2012 WI App 90, 27, 344 Wis. 2d 69, 820

N.W.2d 443. In that case, the defendant on trial for chaining a woman to a tree and shooting her was able to produce evidence that another man admitted that he liked to chain women to trees and shoot them. ***Id.***, ¶ 1. This overabundance of motive evidence is not reflective of the minimal burden ***Denny*** imposes. It is safe to assume that most people who commit homicides are savvier than the third party in ***Vollbrecht***, and do not admit to taking pleasure in chaining and shooting women.

Vollbrecht does not mean that Mr. Ramsey needs to present a statement from Mr. Teague, admitting that he likes to threaten women with knives and stab them. He only needs to show a "plausible reason," which he has done. ***Wilson***, 2015 WI 48, ¶ 57. General evidence of a non-specific motive is enough. ***Id.***, ¶¶ 57, 63. And here, there is sufficient evidence for a jury to at least hear that Mr. Ramsey may have committed the offense.

B. Opportunity

Though the circuit court found this prong satisfied, the State disagrees, pointing out that Mr. Teague's DNA was *only* under her fingernails, and not on the bottles or cigarette butts found at the scene of the stabbing. (Respondent's Brief at 13-14.) It does not help the State that Mr. Teague's DNA was only found in the most incriminating location.

It is irrelevant that Mr. Teague's DNA was not on the bottles or cigarette butts; he may have never touched them. But we know Ms. Taylor touched him. And she did so in such a way that she actually scratched some of him off and under her fingernails. ***Eby***, 165 S.W.3d at 730. As the circuit court found, 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.)

The State also argues 12-14 minutes is too narrow a window of opportunity for Mr. Teague to kill her. (Respondent's Brief at 14.) But 12-14 minutes was obviously enough time for someone to stab Ms. Taylor. And it was also enough time for Mr. Teague's DNA to find its way under Ms. Taylor's fingernails. Mr. Teague had—at minimum—the same opportunity to kill Ms. Taylor that Mr. Ramsey had, but the jury will only hear the accusation directed at Mr. Ramsey. And the evidence taken as a whole is seemingly more incriminating of Mr. Teague than Mr. Ramsey. The case against Mr. Ramsey turns on an interrogation that has been thoroughly discredited. The evidence against Mr. Teague includes his DNA under the fingernails, his connection to the area, his bizarre antisocial conduct, and the victim's dying declaration that "somebody" stabbed her.

The presence of Mr. Teague's DNA, and his general proximity to the area of the offense, are sufficient to satisfy the opportunity prong.

C. Direct connection.

The State complains that the DNA evidence is insufficient to connect Mr. Teague to the crime. But contrary to the State's argument, Mr. Teague's DNA under Ms. Taylor's fingernails is extremely damning evidence.[3] What if

[3] The State attempts to distinguish ***Eby***, arguing that DNA turns up on people's hands without scratching. Mr. Teague's DNA may have shown up on Ms. Taylor's hands as a result of innocent contact, 165 (continued)

it were Mr. Ramsey's DNA under her fingernails? It would be preposterous to suggest the State would not use that evidence to connect Mr. Ramsey to the homicide. That is because DNA evidence does not simply wind up under the fingernails from shaking hands or sharing the same bottle. (*See* articles cited in Mr. Ramsey's Brief-in-Chief at 28.) And as the circuit court noted, that contact "would have to have been some relatively recent contact," which directly connects Mr. Teague to the crime. (30:24; App. 122.) Mr. Teague's DNA connects him to the location of the homicide and the time of the homicide. And the fact that the DNA is under the fingernails connects him to the commission of the homicide.

Although Ms. Taylor's dying declaration on its own does not directly connect Mr. Teague to the crime, when taken with the DNA evidence, it is incriminating. Ms. Taylor told her friend "somebody stabbed me." She did not accuse Mr. Ramsey. Rather, her comment suggested that it was a stranger, like Mr. Teague.

Between Mr. Teague's DNA, his other antisocial behavior, and Ms. Taylor's dying declaration, there is sufficient evidence to satisfy ***Denny***. The jury should not be kept in the dark on this evidence, and should be allowed to hear that Mr. Teague *might have* committed the crime. Therefore, this court should reverse, and allow Mr. Ramsey to present evidence inculpating Mr. Teague.

S.W.3d at 730, but DNA under the fingernails comes from a "scratch penetrat[ing] into the person's living tissue." ***Id.***

CONCLUSION

For the reasons argued above, and in his initial brief, 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 16th day of July, 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 2,255 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 16th day of July, 2018.

Signed:

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