STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT II

Case No. 2018AP649-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

DANIEL A. GRIFFIN,

Defendant-Appellant.

APPEAL FROM A JUDGMENT OF CONVICTION
ENTERED IN FOND DU LAC COUNTY CIRCUIT COURT,
THE HONORABLE DALE L. ENGLISH, PRESIDING

PLAINTIFF-RESPONDENT'S BRIEF

JOSHUA L. KAUL
Attorney General of Wisconsin

DONALD V. LATORRACA
Assistant Attorney General
State Bar #1011251

Attorneys for Plaintiff-Respondent

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 267-2797
(608) 266-9594 (Fax)
latorracadv@doj.state.wi.us

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ISSUES PRESENTED

1. Did the circuit court erroneously apply *State v. Denny*[1] and violate Daniel A. Griffin's right to present a defense by prohibiting him from arguing that his girlfriend caused her twin son's death and injured her other twin son?

The circuit court answered: No.

This Court should answer: No.

2. Did the circuit court properly admit other act evidence under Wis. Stat. § 904.04?

The circuit court answered: Yes.

This Court should answer: Yes.

3. If the circuit court committed any evidentiary errors, were those errors harmless?

The circuit court did not answer.

This Court should answer: Yes.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State requests neither oral argument nor publication.

INTRODUCTION

A jury found Griffin guilty of first-degree reckless homicide for 14-month-old MHP's death, and two counts of physical abuse of a child for intentionally causing great bodily harm to 14-month-old MHP and his twin brother, MDP.

Griffin contends that the court erroneously excluded evidence that Airreale Smart, Griffin's girlfriend and the

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

twins' mother, caused MHP's death and abused both twins. While evidence suggests that Smart abused her twins, the abuse attributed to her would not have caused the injuries that resulted in MHP's death and MDP's hospitalization. Therefore, the court properly applied *Denny* based on its determination that Griffin failed to demonstrate a direct connection between Smart and the twins' injuries. The exclusion of this evidence also did not violate Griffin's constitutional right to present a defense.

Griffin also argues that the court erroneously admitted as other act evidence videos Griffin took on his phone showing him screaming at the sleeping twins. The court properly exercised its discretion and admitted this evidence because it showed Griffin's intent, provided a context for his relationship with the twins, and was not unduly prejudicial.

Finally, any error that occurred was harmless because the State presented strong evidence of Griffin's guilt. Further, even if the court had admitted Griffin's proffered *Denny* evidence, it did not credibly support his claim that Smart harmed the twins. Even if the court improperly admitted the other act videos, the videos themselves were not unduly inflammatory and comprised only a small portion of the trial evidence.

STATEMENT OF THE CASE

I. Procedural history

On July 7, 2015, first responders went to a residence where Griffin, Smart, and her children, including her twin 14-month-old boys, MHP and MDP, were staying. (R.2:3.) MHP was unresponsive and subsequently pronounced dead. (R.2:2–3.) Medical Examiner P. Douglas Kelley determined "the likely cause of death was determined to be a lacerated liver." (R.2:2.) Kelley also observed that MHP had broken ribs, bruising and bleeding on the penis, and additional internal

and external injuries consistent with child abuse. (R.2:2.) MDP was hospitalized for similar injuries, including a lacerated liver, broken ribs, and other internal injuries. (R.2:2.)

The State charged Griffin with first-degree reckless homicide, contrary to Wis. Stat. § 940.02(1), for the death of MHP, and two counts of physical abuse of a child—intentionally causing great bodily harm, contrary to Wis. Stat. § 948.03(2)(a), for injuries MHP and MDP sustained. (R.2:1.)

A. State's motion to exclude *Denny* evidence

The State moved to preclude Griffin from asserting that Smart or Shakita Pillow, the other adult who lived at the residence, were responsible for the MHP's death and the twins' injuries. (R.20:1.)

Griffin sought to admit evidence that Smart and Pillow were responsible for the twins' injuries. (R.31:1.) In support, Griffin offered the forensic interview of Pillow's five-year-old son, CJ, and Smart's statements to investigators. (R.31:1–2; 91:19.) Griffin asserted that CJ reported that Smart kicked MDP and MHP and whipped them with a belt.[2] (R.31:1–2.) CJ also said that both Smart and Pillow had hit him. (R.31:2.) Griffin noted that Smart made several incriminating statements when police interviewed her. (R.31:2.) Griffin asked the court to admit CJ's recorded statement under Wis. Stat. § 908.08. (R.32.)[3]

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[2] In his recorded statement, CJ referred to Smart as "TT," MDP as "Chocolate," and MHP as "Fat Fat." (R.31:1; 111:2.)

[3] The DVD is included in the record (R.115), but has not been assigned a record number; it will be referred to as (DVD:CJPart3:0:0:0pm).

The State asserted neither Smart nor Pillow had a motive to injure MDP or MHP. (R.20:2.) Further, there was "no evidence that Smart or Pillow directly caused the injuries to MDP or MHP." (R.20:2.) Based on Dr. Kelley's autopsy, the State noted that "the only known factor that would have caused MHP to become unresponsive and require CPR was MHP's lacerated liver, which was nearly split in half, and rib fractures." (R.22:3–4.)

Kelley reviewed CJ's statement, noting that CJ demonstrated Smart's kicks to the twins. (R.111:2; DVD:CJPart3:1:35:40pm.) CJ later pointed to the left shin area, describing where Smart kicked MHP, and the lower leg area, describing where Smart kicked MDP. (R.111:2; DVD:CJPart3:1:36:22pm.) Based on his review of CJ's statement, Kelley opined that Smart kicked MHP in the shin area and, to a reasonable degree of medical certainty, that "[s]uch kicks to [MHP's] leg alone" "would not have caused the injuries seen to the head, abdomen, or genitalia." (R.111:2.)

The court considered whether it should admit evidence that Smart or Pillow were responsible for the injuries to MDP and MHP under *State v. Denny*, 120 Wis. 2d 614, 357 N.W.2d 12 (Ct. App. 1984), and *State v. Wilson*, 2015 WI 48, 362 Wis. 2d 193, 864 N.W.2d 52. (R.91:28; 92:6.)

With respect to Pillow, the court determined Pillow may have had the opportunity to harm the twins. (R.91:28; 92:18.) But it determined no evidence existed of a motive or a direct connection between Pillow and the twins' injuries. (R.91:20, 28–29; 92:21.)

With respect to Smart, the court determined Smart had the opportunity because she was in the residence when the offenses occurred. (R.91:26, 28–29; 92:17–18.) It also determined Smart had the motive to harm the twins for two reasons: first, "Griffin's alleged statement to Mr. Luciano [Griffin's cellmate] that Ms. Smart was too lazy to care for the

kids and would kind of pawn the kids off on him for discipline"; second, Smart's statement that she was stressed raising children on her own. (R.91:28; 112:3.) In a letter to law enforcement, Luciano said Griffin told him the child would not "shut the fuck up," "he just snapped," and he always had to discipline the kids for Smart. (R.112:6.) After listening to Smart's recorded statement, the court said that there was still "arguable motive" because "she just got frustrated and couldn't deal with raising five kids by herself." (R.92:16–17.)

But the court also determined that Griffin had not established a direct connection between Smart and the offenses of reckless homicide and child abuse. (R.92:20.) In making this determination, the court considered CJ's recorded statement and Smart's statement to the officers. (R.91:28; 92:3.) The court concluded that "what CJ describes involving Smart would not be consistent with Dr. Kelley's mechanism of death and injury here." (R.91:30.) While recognizing that CJ's statement supported a claim that Smart and Griffin were "physically abusive," nothing that CJ described "comes remotely close to what's alleged to have occurred here." (R.91:38.)

Because the court did not "think there was enough . . . with respect solely to C.J.'s comments to allow introduction of [C.J.'s statement]," it reviewed Smart's statement, which occurred eight days after the charged offenses. (R.92:8, 10.) The court extensively summarized Smart's six-hour statement. (R.92:10–15.) It noted that Smart repeatedly denied hurting or killing her child, professed her innocence, and denied giving the children alcohol. (R.92:10–13.)

When officers confronted Smart with CJ's recorded statement, the court observed that Smart denied kicking the twins, did not remember kicking her babies, and stated that CJ's statement was false. (R.92:10–11.) At times, Smart questioned whether she killed her child, but on other occasions, she insisted she did not do it, even accidentally.

(R.92:12–13.) While Smart admitted that she had before used a belt "to whoop her kids," she denied touching her children that day. (R.92:11, 13.) While Smart at times said she should take responsibility, she also said "she can't confess to something she didn't do." (R.92:13.)

After Smart began to cry, she explained how she saw "Griffin standing on one of the twins with his foot kind of diagonally over the chest and stomach area, kind of balancing on the twin." (R.92:14.) Smart said she did not "say anything to Griffin" because "she was in shock and she was afraid." (R.92:14.) According to the court, Smart expressed relief that "she could finally tell someone[,] but felt it was her fault that she didn't protect her kids." (R.92:14.)

Based on its review of Smart's entire interview, viewing "everything in context and how things were said," the court did not "believe that anybody could draw a conclusion from that interview that Ms. Smart ever admitted to hurting or killing the twins." (R.92:15.) Based on Smart's statement that she "should just admit it and this would all be over," the court believed that Smart felt pressure. (R.92:15.) It observed that Smart's body language changed after she began to cry. (R.92:15–16.)

In contrasting Griffin's summary of Smart's statement with the recording of her statement, the court observed: "Because when you look at the context, the lead-ups, how [Smart] said things, one gets a completely different perception of" her statement. (R.92:9.) Later, the court observed that "if somebody read the quotations [from Smart's interview that] [Griffin] put in his memorandum, that could . . . potentially provide a basis for arguing that she was the actual perpetrator. When you actually watch the interview . . . I don't think one can draw that conclusion." (R.92:16.)

The court acknowledged Smart admitted using a belt to discipline the children and that CJ said that Smart used a

belt, a hanger, and kicked the children to discipline them. (R.92:19.) But based on its assessment of the record, the court determined that Smart's actions did not explain the injuries MHP suffered: "[T]he mechanism of injuries was consistent with somebody stepping on the child." (R.92:19.) The court also considered Griffin's text messages to Hahn in which Griffin blamed Pillow for the harm to the twins and insisted that Smart was innocent. (R.92:20; 113:2–3.)

The court said: "unless one takes [Smart's interview] out of context and just reads it on paper[,]" "I don't think there's enough there . . . that would establish evidence that suggested that she committed these crimes and not somebody else." (R.92:20.) The court determined that a direct connection was missing between Smart and the crimes. (R.92:20–21.)

In assessing Griffin's request to admit CJ's recorded statement in support of his *Denny* motion, the court questioned the admissibility of CJ's statement under Wis. Stat. § 908.08(3). (R.91:40.) It determined that Griffin's trial would occur before CJ's 12th birthday, that the recording was accurate and free of excision, alteration, and distortion, and that its admission would not result in unfair surprise. (R.91:40, 42.)

While CJ admitted that it was bad to tell a lie, the court questioned whether CJ understood that false statements were punishable, because CJ did not "explicitly acknowledge that if a kid lies he can get in trouble." (R.91:41.) The court also questioned whether CJ's statement satisfied the requirements of trustworthiness. (R.91:42.) The court observed that "[s]ome of the answers that [CJ] gave were inconsistent with answers he had given 10 minutes earlier" and that some of the things that CJ said "just didn't make any sense at all." (R.91:44.) While noting that CJ was explicit about Smart kicking and hitting the twins with a hanger and a belt, it observed that the interviewer's questions became

more leading because "open-ended questions weren't doing the trick." (R.91:44.)

Because CJ made statements that incriminated Griffin, the court adjourned the hearing to give Griffin an opportunity to decide whether he still wanted CJ's recorded statement admitted. (R.91:45–48, 51–52.) Griffin withdrew his motion to admit CJ's recorded statement based on the court's decision to deny his *Denny* motion. (R.92:22–23.)

B. State's motion to admit other acts evidence

The State moved to introduce other acts evidence under Wis. Stat. § 904.04(2). (R.22:1.) In an accompanying affidavit, the State asserted officers reviewed three video files extracted from Griffin's cellphone. (R.21:1–2.) An eight-second video dated July 5, 2015, showed Griffin on the bed next to MHP and MDP, who were sleeping. (R.21:1.) A six-second video shot the same day showed Griffin yelling at the sleeping twins. (R.21:2.) A third video, dated June 26, 2015, showed Griffin interacting with Smart and a child whom the State identified as MDP. (R.21:2.)[4]

The State asserted the videos were admissible to place Griffin's actions in the proper context and complete the story of his criminal behavior. It also argued that the evidence was admissible to prove Griffin's motive, intent, and plan to verbally abuse and physically discipline them. (R.21:3.)

Griffin argued that the videos did not fall within any of the enumerated purposes in section 904.04(2). He also asserted that the twins' injuries and MHP's death were not related to Griffin's attempts to scare or discipline the twins. (R.34:2.)

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[4] The court initially admitted the third video (R.91:17), but excluded it at trial when it determined it did not concern the twins. (R.100:139, 144–46.)

At a pretrial hearing, the court discussed relevant legal standards and case law associated with other acts evidence. (R.91:5–10.) It reviewed the elements of first-degree reckless homicide and physical abuse of a child—intentionally causing great bodily harm. (R.91:10–11.) The court determined that the evidence was offered for an acceptable purpose and related to a fact or proposition of consequence. (R.91:12.) "At the very least[,]" it related to the intent element associated with the two counts of physical abuse. (R.91:12.) The videos also provided context showing Griffin's relationship with the twins. (R.91:13–14.)

The court also determined that the videos showing Griffin approaching and scaring the sleeping twins were probative to proof of intent and the context of the relationship between Griffin and the twins. (R.91:15–16.)

The court determined that the videos showing Griffin yelling at the sleeping twins were not as serious as the charged offenses and their probative value substantially outweighed the danger of unfair prejudice. (R.91:16.)

Two videos of Griffin yelling while the babies slept were received at trial. (R.62:2; 100:156–159; Exs. 1/25 and 26.)[5] The court provided a cautionary instruction, directing the jury to consider the evidence of Griffin yelling at the sleeping

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[5] While the trial exhibit list appears in the record as "R.62," the exhibits were not assigned record numbers. The State will refer to the exhibits by the number assigned at trial.

Exhibits 25 and 26 are in a folder labeled "Phone Videos" on a flash drive labeled "Exhibit 1" that appears in a white envelope in the record and is designated on the exhibit list as "Court Exhibit # 1-Flash Drive containing exhibits from State." (R.62:5.) Undersigned counsel experienced difficulties playing the videos from the flash drive. The three videos also appear in the record. (R:37:1:Ex.1) (DVD labeled "Griffin Cell Videos".

children only on the issues of intent and background. (R.59:35; 107:93.)

II. Griffin's Trial

Shakita Pillow testified that she lived in the same apartments as Smart and Griffin and had known Smart since 2011. (R.101:24–26, 31.) Pillow first met Griffin on July 4, 2015. (R.101:26.) On July 5, Pillow saw an injury to the back of MHP's head; she described it as a rug burn the size of a quarter. (R.101:54–55, 70.) According to Pillow, Griffin said he was present when MHP got the rug burn and told Smart MHP caused the rug burn himself. (R.101:56, 59, 71.)

On July 7, between 11:30 a.m. and 12:00 p.m., before Pillow took a bath, she saw MHP sleeping on a bed and noted that MDP was alert. (R.101:31–34.) A truck with lunches for children arrived at the apartments around 11:30 a.m., and Griffin took Smart's older child and Pillow's two children to the truck. (R.101:60–63.) Pillow explained that while she took her bath, Griffin was at the truck for ten minutes and Smart remained in the residence with MHP. (R.101:63–64, 74.) When Pillow finished her bath, she went to her son's room. (R.101:36.) Smart, Griffin, MDP, and MHP were there, while the other children were downstairs eating lunch. (R.101:36, 66.) MDP crawled on the floor and MHP slept on the bed. (R.101:37.)

Pillow went to her room, and 10 to 15 minutes later Smart started screaming that MHP was not breathing and was dead. (R.101:48–49, 66.) Pillow called 911. (R.101:50.) Smart paced back and forth and Griffin knelt with MHP, checking for a pulse. (R.101:50–51.) MDP was on the floor, "alert." (R.101:67.)

Pillow said Griffin took MHP from the bed; the 911 operator told Pillow to lay the baby down and instructed them to perform CPR. (R.101:49–51.) Pillow saw Griffin perform

CPR, MHP's "hands and feet were already blue." (R.101:52–53, 69.)

Officer Ryan Williams arrived at approximately 2:00 p.m. (R.97:209.) Williams began performing CPR but was unable to detect a pulse or breathing. (R.97:220–21.) He did not see any injuries on MHP. (R.98:27.)

Paramedic Jacob Fisher also arrived at approximately 2:00 p.m. (R.100:16, 18–19.) Fisher noticed a healed mark on the child's forehead, bruising under the eye, and blood in the eye, typically caused by trauma. (R.100:20–21, 40.) Fisher observed cyanosis of the lips and ears, which results from a lack of blood flow and oxygen to the skin and is indicative of a lack of respiration and no beating heart. (R.100:47.) Paramedics transported MHP to the hospital where he was pronounced dead. (R.100:21–37, 43.)

After the paramedics arrived, Williams secured the scene and attempted to gather information. (R.98:1.) Williams said Smart's emotional state made it difficult to get information from her, but she showed him the bedroom where MHP stopped breathing. (R.98:3–4.) After paramedics took MHP to the ambulance, Williams returned to the bedroom with a camera. (R.98:24, 55.) Williams photographed two beds, a blanket on the ground between the beds, a computer, and a cup on the floor. (R.98:8, 13; Ex. 9.) Griffin held MDP while Williams photographed the bedroom. (R.98:2, 10; Ex. 9.)

According to Williams, Griffin said the twins had breathing problems and had to be checked. (R.98:25.) Griffin said he fed the twins and put them to bed 10 to 20 minutes before Williams arrived. (R.98:58, 67.) When Griffin returned to the bedroom, he noticed MHP was not breathing and that he tried to perform CPR. (R.98:25–26.) Griffin said blue fluid came out of MHP's lungs. (R.98:26.) Williams noticed a little bit of blue fluid by MHP's nostrils and some on the floor. (R.98:60.) Detective Lee Mikulec later recovered a sample of

a blue liquid, which he described as Kool Aid, from a pitcher in the kitchen. (R.103:211.)

Williams briefly left the apartment, and when he returned and knocked, no one answered the door. (R.98:29–30.) Lieutenant Andrew Gill said he and Williams pounded on the door, and then went to the patio door and noticed that the interior of the apartment was dark. (R.100:75.) Officers tried for 20 minutes to enter the apartment. (R.100:84.) At approximately 2:20 p.m., Williams went to the hospital while other officers remained behind. (R.98:14, 32.)

At 2:32 p.m., Griffin sent a text message to Pillow asking if "Are yall there?? Cause the police act like they wanna put me in jail they still here." (R.100:120; Ex. 23.)

Gill noticed blinds move in a second story window and ordered the person to come downstairs and open the door. (R.100:80.) Griffin opened the door and officers accessed the apartment at 2:50 p.m. (R.100:84, 106.) Gill testified that Griffin said he did not answer because he was putting his children to sleep. (R.100:91.) According to Detective Matthew Bobo, Griffin claimed he did not hear the officers knocking. (R.100:109.) Griffin also said the four children in the apartment were fine. (R.100:107–08.)

After the officers regained entry, they took additional photographs of the twin's bedroom. (R.103:59; Ex. 12.) Detective Nicholas Hahn testified that a cup and computer had been moved and blankets had been rearranged since the earlier photograph of the room was taken. (R.103:60.)

Griffin's statements at the apartment. Griffin spoke to officers at the apartment. He told Detective Bobo that the twins were in their beds when he checked on them before the 911 call. (R.100:112.) Griffin later told Hahn that he took the children to the lunch truck and fed one twin a banana and cereal. (R.103:30.) Griffin said he laid both twins in the same bed and showed how he positioned them. (R.103:30.) He

explained what he and Smart did while the twins slept. (R.103:30.) When Hahn asked Griffin about the absence of a sheet and a wet mattress on one of the beds, Griffin explained he had stripped the sheet and flipped the mattress after he discovered that one of the twins wet through his diaper. (R.103:33.) With respect to a scratch to MHP's eye, Griffin explained that MHP's eye was gummed shut and Smart wiped it. (R.103:44–45.) Griffin said he fed MDP a banana, but MHP would not eat, and Smart put MHP to bed before the 911 call. (R.103:119–20.)

Hahn asked Griffin about MDP's condition after Hahn observed that MDP had labored breathing and appeared dazed. (R.103:31.) Griffin said it was normal behavior for MDP—that the twins were born premature and receive breathing treatments. (R.103:31, 47.) Griffin said one twin had recently turned blue, requiring treatment. (R.103:47.) Bobo testified that when he asked Griffin about MDP's lethargic condition, Griffin said it was normal. (R.100:127–28.)

Bobo explained that officers often ask people to demonstrate how a baby was positioned before a 911 call, to understand how a child may have died. (R.100:126.) Griffin agreed to the reenactment, using MDP to show officers what happened. (R.100:126.) Griffin also demonstrated how he performed CPR. (R.100:131.)

When Smart returned to the apartment, she took MDP from Griffin and then took MDP to the hospital because he was not acting right. (R.100:134.)

Griffin's statements at the hospital. Pillow testified that when she saw Griffin at the hospital, "he said we're going to stick to the story." (R.101:75.)

Hahn testified that Griffin wanted to know why detectives were at the hospital, at one point becoming angry. (R.103:70.) Griffin used the term "killed" in referring to MHP

and also "referenced what was going on as a homicide investigation." (R.103:70.) Officers had not informed Griffin of MHP's injuries. (R.103:70.)

In a recorded statement,[6] Griffin told Hahn nothing happened to the children and that they were not neglected. (R.103:77; Ex. 1/37 Griffin//St.Agnes/7-7-15-843,1m:55s.) Griffin said "no one harmed that little boy. He had a carpet burn on his back and a little scratch on his eye." (R.103:77; Ex. 1/37 Griffin//St.Agnes/7-7-15-843,2m:40s.) Griffin also claimed that Smart cared for the children and that he was never alone with them. (R.103:77; Ex. 1/37 Griffin//St.Agnes/7-7-15-843,7m:35s; 103:88.) According to Hahn, Griffin said MHP received a rug burn to the back of his head when Smart changed his diaper. (R.103:86–87.) Other officers questioned Griffin later that evening, into the early morning of July 8. (R.103:89.)

Griffin told investigators he would be staying at the apartment. (R.103:89–90.) But in a July 10 call, Griffin told Hahn he was in Milwaukee and agreed to meet investigators there. He did not show up. (R.103:91–94.)

Griffin's July 15 phone call with Smart. On July 15, Detectives Hahn and Ledger listened as Smart made a recorded phone call to Griffin. (R.100:175.) According to Ledger, Griffin acknowledged something was wrong with MDP, but Griffin "couldn't say anything because the police were at the apartment." (R.105:91.) During the call, Griffin also said he was the only adult present when MHP received

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[6] The jury heard three recordings of Hahn's conversations with Griffin. (R.103:75–79.) Those clips are in the record as Exhibits 36 through 38. (R.62:2.) They are located in a folder labeled "Griffin St. Agnes," on a flash drive labeled "Exhibit 1," which is in a white envelope in the record and designated as "Court Exhibit # 1-Flash Drive containing exhibits from State." (R.62:5.) Undersigned counsel was unable to play Exhibits 36 and 38.

the rug burn. (R.105:92.) Hahn also heard Griffin say that the injuries to the back of MHP's head happened when his head rubbed against the carpet while Griffin changed a diaper. (R.103:99.) Griffin also denied that (1) there were videos with the twins on his phone; (2) he hit, kicked, or did anything to the twins; and (3) he stepped on MHP. (R.103:99–100, 112–14.)

Hahn testified that Griffin asked Smart what she told the police and what she knew about the investigation. (R.103:132–33.) Griffin also said there was an agreement to tell police that MHP sustained the rug burn to his head when Smart changed his diaper when, in fact, Griffin was changing MHP's diaper and caring for him. (R.103:133.) According to Hahn, "There's talk by Mr. Griffin about how the twins had alcohol in their system and that's why he denied drinking." (R.103:133–34.)

Griffin's disappearance and apprehension. Pillow last saw Griffin on July 8. (R.101:59.) Hahn's last contact with Griffin occurred on July 19, when they exchanged text messages. (R.103:95.)

Federal Marshal Jonathan Walker arrested Griffin the following month in a Dallas, Texas hotel. (R.101:77, 80–82.) Destiny Adams was with Griffin when he was arrested. (R.103:19.) Griffin told Adams he would run if he saw officers because an incident happened in Wisconsin with "his ex," and he would be arrested. (R.103:20–21.)

Griffin's jailhouse statements. Angel Luciano and Griffin were housed together in jail before trial. (R.103:241–44.) Luciano testified he befriended Griffin, and Griffin told him was he "fed up" because Smart wanted him to "play daddy" to her children. (R.105:19, 21, 26, 32.) Griffin complained that Smart spent money on alcohol; he was also upset about having to change diapers. (R.105:32–33.) He told Luciano that when he changed one child's diaper, the other

child ran away; Griffin grabbed that child's leg, causing the child to fall and hit his head. (R.105:33.)

According to Luciano, Griffin said he stepped on one child who lay on his back and grabbed the other child, throwing him toward the bed. (R.105:36.) When the child that ran away started kicking and screaming, Griffin put his foot on him because he did not want to touch him. (R.105:37.) Griffin told Luciano that he applied pressure because he wanted the child "to shut the fuck up," and the child eventually stopped making noise. (R.105:38.) Griffin stated that Smart was in the bathroom with her friend. (R.105:39.) Griffin said he was constantly flipping the mattresses because the children peed on them. (R.105:40.)

According to Luciano, Griffin said both he and Smart had been drinking and that Hennessey was their favorite drink. (R.105:39.) Luciano claimed he never saw a reference to Hennessey in the media. (R.105:39–40.) Officers recovered an empty Hennessey bottle from the garbage. (R.103:211.) Detective Bobo did not share information about the Hennessey bottle with Luciano or the public. (R.100:116.) Pillow confirmed that she and Smart purchase a bottle of Hennessy on July 4, and that Griffin had the bottle on July 6. (R.101:27, 29.) In a call with Smart, Griffin said he had been drinking Hennessy into the morning hours of July 7. (R.103:99.)

Luciano testified Griffin told him that "he was always dressed in Nikes and Jordan's." (R.105:38.) Luciano denied seeing anything in the media about Nikes. (R.105:38.) When Detective Bobo interviewed Luciano, Bobo did not know Griffin owned a pair of Nike shoes. (R.100:118.) Bobo said this information was not shared with the public or other non-law enforcement persons. (R.100:118–19.) Hahn was unaware of any references to the Nike shoes in the reports until the interview with Luciano. (R.103:106–08.) Photographs taken

on July 7 show Griffin wore a pair of red and black Nike shoes. (R.98:40.)

According to Luciano, Griffin said he went to Texas, stayed with a girl in a hotel, and told her he was on the run. (R.105:43.) Griffin also told Luciano he "had to get up out of there" "because them bitches couldn't keep their story straight." (R.105:43–44.)

Luciano testified that authorities did not offer him any consideration for the information he provided, but acknowledged telling his girlfriend that he would not provide information unless authorities helped him get probation. (R. 105:44, 47–49, 80.) Detective Bobo confirmed that authorities made no promises or offers to Luciano. (R.100:164.)

Griffin and the State stipulated that while in the jail, Luciano sent a letter to his girlfriend that included a letter Griffin wrote to Smart. (R.105:22.) Luciano testified Griffin did not want to send the letter directly to Smart because he knew that he was not to have contact with her. (R.105:24.)

Luciano denied that Griffin ever shared any legal documents, police reports, or other court documents with him. (R.105:24–25.) Luciano acknowledged he had access to the drawer where Griffin kept his paperwork but denied looking in the drawer. (R.105:25, 59–60.)

Luciano admitted he had been convicted of a crime on 12 previous occasions. (R.105:45.) Jason Numerdoor, who had known Luciano since 2000, testified that Luciano "lies a lot" and is "untruthful." (R.105:167–68.)

Autopsy of MHP. Dr. Kelley concluded that MHP died from "blunt force traumatic injury," characterizing the injury to his liver as "the most lethal injury." (R.105:149; Ex.69.) Kelley characterized the liver as "basically torn in two," causing significant blood loss. (R.105:126–29, 130, 137, 149–150.) Kelley said the time frame between infliction of the liver

injury and death was minutes. (R.105:149.) Kelley explained the liver injuries could have been caused by a punch, a kick, or someone placing a foot on a child's abdominal area and slowly pressing down. (R.105:151–52.)

Kelley observed several other internal injuries, including injuries to the pancreas and 16 rib fractures. (R.105:131–33.) While CPR could result in rib fractures, Kelley observed that the pliable nature of an infant or toddler's bones makes it "very difficult to fracture ribs during resuscitation"; he also opined that the liver injuries were unrelated to CPR compressions. (R.105:139–42.) Kelley noticed bruising to MHP's penis, which he characterized as a "blunt force injury" attributable to a punch, kick, pinch, or twist. (R.106:135–36.)

Kelley documented several external head injuries, including bruises to the left and right side of MHP's jaw, a scrape to an eyelid, a hemorrhage to the white of the eye—indicating "some kind of blunt force traumatic injury had occurred there." (R.105:142–43.) Kelley saw a scrape with a subtle bruise on the forehead and a scrape to the back of MHP's head. (R.105:143–44.) He characterized the injury to MHP's head as "recent . . . actually still moist." (R.105:144.) Kelley believed that the hemorrhages to MHP were less than 48 hours old. (R.105:147.)

Medical examination of MDP. Dr. Lynn Sheets, board certified in child abuse pediatrics, examined MDP. (R.103:141, 145.) She diagnosed MDP with "severe life threatening or potentially life threatening child physical abuse." (R.103:189–90, 192.) Sheets observed a laceration in MDP's liver, which she characterized as a "very severe injury where the inside of the organ has actually been ripped apart." (R.103:168–69.) She also detected injuries to MDP's pancreas and a kidney. (R.103:187–88.) Sheets said these organs are not easily injured, and characterized the injuries as "severe-force blunt abdominal trauma." (R.103:191–92.)

Sheets also counted six rib fractures, describing several as "acute, new, not healed." (R.103:173, 175–76, 183, 186.) She said broken ribs "are distinctly an uncommon injury" in children because their ribs are "very flexible and not broken easily." (R.103:191.) Sheets observed external injuries, including multiple abrasions under MDP's neck and bruising on the edges of his right and left ears. (R.103:161, 163–65; Ex. 42–46.) She attributed the ear injuries to child abuse. (R.103:190.) Finally, Sheets opined MDP had a serum alcohol level of .02. (R.103:153.)

The jury convicted Griffin of first-degree reckless homicide for 14-month old MHP's death and two counts child abuse—intentionally causing great bodily harm, for injuries to MHP and MDP. (R.68:1.) The court imposed a 60-year term of imprisonment on the homicide conviction, and 40-year term of imprisonment on the child abuse convictions. (R.68:1.)

Griffin appeals.

STANDARD OF REVIEW

"This court reviews a circuit court's decision to admit or refuse to admit evidence for an erroneous exercise of discretion." *Wilson*, 362 Wis. 2d 193, ¶ 47. A court errs if it exercises its discretion in a manner that deprives a defendant of the constitutional right to present a defense. *State v. Muckerheide*, 2007 WI 5, ¶ 49, 298 Wis. 2d 553, 725 N.W.2d 930. Whether a court's evidentiary ruling implicates a defendant's right to present a defense is a question of constitutional fact that this Court independently reviews. *Wilson*, 362 Wis. 2d 193, ¶ 47.

ARGUMENT

I. Because Griffin did not prove a direct connection between Smart and her twins' injuries, the court properly excluded Griffin's *Denny* defense, and the exclusion did not violate Griffin's right to present a defense.

A. Legal principles

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, 65. 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. The defendant must satisfy all three criteria; it is not a balancing test, in which one prong can make up for a defendant's failure to establish another. *Id.* ¶ 64.

A court may not evaluate only the strength of the State's evidence to exclude evidence of a third party's opportunity or direct connection to the crime; but a court is not prohibited from weighing the strength of the defendant's evidence against the strength of the State's evidence. *Wilson*, 362 Wis. 2d 193, ¶ 69.

"[A] circuit court may not refuse to admit evidence if doing so would deny the defendant's right to a fair trial." *Wilson*, 362 Wis. 2d 193, ¶ 48. Whether the exclusion of evidence violated the right to present a defense asks "whether the proffered evidence was 'essential to' the defense, and whether without the proffered evidence, the defendant had

'no reasonable means of defending his case.'" *State v. Williams*, 2002 WI 58, ¶ 70, 253 Wis. 2d 99, 644 N.W.2d 919 (citation omitted). A court may exclude irrelevant and otherwise inadmissible evidence without violating a defendant's right to present a defense. *Muckerheide,* 298 Wis. 2d 553, ¶ 40. Unless a court applies the rules of evidence in an arbitrary manner, or in a manner disproportionate to the rules' purposes, application of the rules does not abridge a defendant's right to present a defense. *State v. St. George*, 2002 WI 50, ¶ 52, 252 Wis. 2d 499, 643 N.W.2d 777.

B. The court properly denied Griffin's *Denny* motion.

Applying *Denny's* legitimate tendency test, the court determined that Smart had motive and opportunity to cause MHP's death and harm MHP and MDP. (R.91:27–29; 92:17.) The court denied Griffin's request because he failed to show a direct connection between Smart and the charged harm to her children. (R.92:21.)

Griffin, of course, does not challenge the court's exercise of discretion in concluding Smart had motive and opportunity (the first and second *Denny* prongs). (R.91:28; 92:17–18.) The only question, therefore, is whether the court erroneously exercised its discretion when it concluded that Griffin failed to show Smart had a direct connection to the crimes. The record supports the court's exercise of discretion.

1. The court did not erroneously determine that Griffin did not establish a direct connection between Smart and her twins' injuries.

The court properly recognized that Smart's mere presence on the scene was insufficient to establish a direct connection. (R.92:18.) *Wilson*, 362 Wis. 2d 193, ¶ 72.

As part of its analysis, the court considered CJ's statement about Smart's conduct toward the twins and the injuries they actually sustained. (R.91:30, 38.) It determined that "nothing CJ said would implicate Smart and the offenses in question." (R.91:30.)

Put simply, after a thorough review of the evidence and standards, the court concluded that the possibility that Smart may have caused some other past physical injury to her children was not enough to establish a "direct connection" to the charged offenses. This conclusion makes sense in light of the nature of the charged injuries to the twins and the injuries that caused MHP's death:

Both MHP's and MDP's most significant injuries resulted from blunt force trauma to the abdomen area, causing broken ribs and significant trauma to their livers. According to Dr. Kelley, "the only known factor that would have caused MHP to become unresponsive and require CPR was MHP's lacerated liver, which was nearly split in half, and rib fractures." (R.22:3–4.)

Kelley explained that MHP died from a "blunt force traumatic injury[,]" characterizing the injury to his liver, which was "basically torn in two," as "the most lethal injury." (R.105:136, 149.) Kelley said that the time frame from the infliction of the injury to MHP's liver to his death was *minutes*. (R.105:149.) He explained a punch, a kick, or someone placing a foot on a child's abdomen and slowly pressing down could have caused these liver injuries. (R.105:151–52.)

MDP sustained similar injuries, including a lacerated liver and broken ribs. (R.2:2.) Dr. Sheets observed a laceration in MDP's liver—a "very severe injury where the inside of the organ has actually been ripped apart." (R.103:168–69.) Sheets counted six rib fractures, describing several as "acute, new, not healed." (R.103:173, 175–76, 183, 186.) She detected an

injury to MDP's pancreas and a kidney. (R.103:187–88.) Sheets said that these organs are not easily injured, and resulted from "severe-force blunt abdominal trauma." (R.103:191–92.)

CJ, on the other hand, described Smart kicking both twins in the lower leg or shin area. (R. 111:2.) Dr. Kelley reviewed CJ's recorded statement, focused on CJ observations of Smart's conduct toward the twins. (R.111:2.) Kelley opined to a reasonable degree of medical certainty that the kicks to MHP's "leg alone" "would not have caused the injuries seen to the head, abdomen, or genitalia." (R.111:2.)

Based on Dr. Kelley's assessment, the court determined that what CJ described "would not be consistent with Dr. Kelley's mechanism of death and injury" and was "not consistent with the injuries that the twins suffered in this case." (R.91:30, 45.) It thus reasonably concluded that CJ's comments were insufficient "to allow the introduction of evidence that [Smart] may have been the perpetrator" of the charged offenses. (R.92:8.)

Griffin asserted that Smart's statements to investigators supported his *Denny* defense. (R.31:2.) According to Griffin, Smart's statements included: "I think that I did it—I don't know how I did it"; when confronted with CJ's statement, "[I]t might seem like I did this;" "it could have been a possibility that I hurt my baby"; and "I feel I just need to go ahead and take responsibility for everything." (R.31:2–3.)

In light of Griffin's assertions about Smart's statements, the court also reviewed Smart's six-hour interview with investigators. (R.92:2, 10–15.) For example, Griffin relied on Smart saying, "if CJ seeing me do it, than I must have—he don't lie." (R.31:3.) While recognizing Smart made this statement, the court detailed Smart's extensive statements to the contrary: Smart denied kicking and did not

remember kicking the twins (R.92:11, 13); she asserted CJ's statements were false (R.92:11); she said she did not hurt her children or kill MHP (R.92:12–13); and while stating that she had to take responsibility for her child's death, Smart said she "can't confess to something she didn't do." (R.92:13.)

Viewing Smart's statements in context, the court reasonably determined it did not "believe that anybody could draw a conclusion from that interview that Ms. Smart ever admitted to hurting or killing the twins." (R.92:15.) The court stressed that reading Smart's statements out of context gave a different impression than "actually watch[ing] the interview." (R.92:16.)

To be sure, Smart admitted using a belt to discipline the children, and CJ said that Smart kicked the twins. (R.92:11, 19.) But the court reasonably determined that Smart's actions do not explain the charged injuries: "[T]he mechanism of injuries was consistent with somebody stepping on the child." (R: 92:19.)

2. Based on CJ's, Smart's, and Griffin's statements and the medical evidence, the court reasonably determined that Griffin failed to demonstrate a direct connection between Smart's actions and the twins' serious injuries. The court therefore reasonably denied his *Denny* motion. Griffin's arguments fail.

Griffin contends that the court "abused its discretion" when it impermissibly relied on overwhelming evidence against him, including his own statements, to deny his *Denny* motion. (Griffin's Br. 14–15.)

To be sure, the court could not rely on overwhelming evidence against Griffin alone as the basis to exclude evidence of Smart's opportunity and direct connection to the crimes. *Wilson*, 362 Wis. 2d 193, ¶ 69. But the court could weigh "the

strength of the defendant's evidence (that a third party committed the crime) directly against the strength of the State's evidence (that the third party did not commit the crime)." *Id*. This is precisely what the court did.

In rejecting Griffin's *Denny* defense, the court considered the nature of the twins' undisputed injuries. (R.91:30.) The court also reviewed and considered CJ's recorded statement. (R.91:17, 40.) It determined that CJ only described Smart "whooping" the twins with a belt, kicking one twin in the leg, and hurt the other twin's hands. (R.92:9–10.) Considering CJ's statement in light of Dr. Kelley's observations, the court determined that CJ's description of Smart's behavior was inconsistent with the twins' injuries. (R.91:45; 92:19.) Therefore, it determined that CJ's statement did not establish a direct connection between Smart and the charged offenses. (R.92:20.)

Griffin also offered Smart's statement in support of his *Denny* defense. When "asked if she had ever stepped on the children[,] [Smart] admitted she had done that in past but asserted it was in a 'playful' manner." (R.31:2.) Griffin offered no other details about the circumstances surrounding this otherwise vague statement, including when, where, and on which of her five children she "playful[ly]" stepped. (R.31:2.) Even assuming Smart made this statement, the court determined that nothing in Smart's six-hour recorded interview established a direct connection between Smart and her twins' charged injuries. (R.92:10–15, 20.) In reviewing Smart's statement, the court noted that Smart said she saw Griffin standing on one twin with his foot over the twin's chest and stomach area. (R. 92:14.) Without more, Griffin did not meet his burden of demonstrating a direct connection between Smart's actions and the charged offenses.

Griffin also challenges the court's consideration of his text messages to Detective Hahn in denying his *Denny* motion. (Griffin's Br. 15.) In his messages, Griffin repeatedly

asserted Smart was innocent and Pillow was responsible. (R.92:20–21; 113:2–3.) Griffin's messages shortly after the crimes undermine his subsequent claim that Smart committed these crimes. The court was entitled to consider this evidence when it weighed the strength of the evidence Griffin offered in support of his *Denny* claim. *Wilson*, 362 Wis. 2d 193, ¶ 69.

Finally, Griffin's claim before the court and this Court rests substantially on his assumption that CJ's recorded statement was admissible under section 908.08. Putting aside CJ's unflattering observations of Griffin's abusive behavior toward the twins (R.91:33, 38), the court expressed substantial reservations about the admissibility of CJ's recorded statement. CJ's recorded statement was admissible only if subsections 908.08(2)'s and (3)'s requirements were met. (R. 91:41–44.) *State v. Snider*, 2003 WI App 172, ¶ 12, 266 Wis. 2d 830, 668 N.W.2d 784.

The court questioned whether CJ understood that a false statement could be punished, because he did not "explicitly acknowledge that if a kid lies he can get in trouble." (R.91:41.) But even assuming CJ's statement satisfied the oath requirement (R. 91:44), the court expressed serious reservations about its trustworthiness. Wis. Stat. § 908.08(3)(d). (R. 91:42, 44.) It observed CJ gave inconsistent and at times nonsensical answers. (R.91:43.) The court also observed that the interviewer's questions became more leading because "open-ended questions weren't doing the trick." (R.91:44.)

In light of the court's concerns about the trustworthiness of CJ's statement and Griffin's failure to demonstrate that it was admissible under section 908.08, this Court should decline to rely on CJ's statement in assessing Griffin's *Denny* claim. Without that, all Griffin presented were Smart's own statements, which the court reasonably concluded did not establish a direct connection to the crimes.

C. The court's application of *Denny* did not violate Griffin's right to present a defense.

Griffin did not preserve his constitutional right-to-present a defense argument, (Griffin's Br. 14), in the circuit court. He never referenced the constitutional right to present a defense when he objected to the State's motion to preclude a third-party liability defense. (R.31:1–3.) At the hearings on his motion, Griffin never asserted that the court's application of *Denny* violated his right to present a defense. (R.91; 92.) Therefore, this Court should determine that Griffin forfeited this issue by failing to preserve it below. *In re Guardianship of Willa L.,* 2011 WI App 160, ¶ 25, 338 Wis. 2d 114, 808 N.W.2d 155.

On appeal, Griffin does no more than assert that the court's erroneous application of *Denny* violated his right to present a defense. (Griffin's Br. 14.) He does not explain why, or make any claim that—even if not an erroneous exercise of discretion—the court's ruling still somehow violated his right to present a defense. This Court should also reject his constitutional claim as undeveloped. *State v. Pettit*, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992).

In any event, the court's application of *Denny* did not abridge Griffin's constitutional right to present a defense, because it did not apply *Denny* in an arbitrary manner. *St. George*, 252 Wis. 2d 499, ¶ 52. The court's *Denny* application served legitimate state interests of excluding prejudicial, speculative evidence about a third person's guilt at Griffin's trial. *See Wilson*, 362 Wis. 2d 193, ¶¶ 102–03. Circuit courts may apply the rules of evidence, including rules that exclude *Denny*-type evidence, without violating a defendant's constitutional rights. *Id.* ¶ 103 (citing *Holmes v. South Carolina,* 547 U.S. 319, 327–28 (2006)). Here, where the court carefully considered the evidence offered in support of Griffin's *Denny* claim under the proper legal standards, its determination did not violate his right to present a defense.

II. The court reasonably exercised its discretion under section 904.04 when it admitted two videos from Griffin's cellphone.

A. Legal principles

Wisconsin Stat. § 904.04(2)(a) permits the introduction of other act evidence. Courts apply a three-step analysis to determine the admissibility of other acts evidence. *State v. Sullivan*, 216 Wis. 2d 768, 771–73, 576 N.W.2d 30 (1998).

First, the evidence must be offered for an admissible purpose under section 904.04(2)(a), such as to establish motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident, although this list is not exhaustive or exclusive. *Sullivan*, 216 Wis. 2d at 772. Other act evidence is also admissible to show the context of the crime, to provide a complete explanation of the case, and to establish the credibility of victims and witnesses. *State v. Hunt*, 2003 WI 81, ¶¶ 58, 59, 263 Wis. 2d 1, 666 N.W.2d 771.

Second, the evidence must be relevant, which means it must both be of consequence to the determination of the action, and must also have a tendency to make a consequential fact or proposition more probable or less probable than it would be without the evidence. *Sullivan*, 216 Wis. 2d at 772; *see also* Wis. Stat. § 904.01. "To be relevant, evidence does not have to determine a fact at issue conclusively; the evidence needs only to make the fact more probable than it would be without the evidence." *State v. Hartman*, 145 Wis. 2d 1, 14, 426 N.W.2d 320 (1988).

Third, the probative value of the evidence must not be substantially outweighed by the considerations set forth in section 904.03, including the danger of unfair prejudice. *Sullivan*, 216 Wis. 2d at 772–73. The opponent of the evidence must demonstrate that any unfair prejudice substantially outweighs its probative value. *Hunt*, 263 Wis. 2d 1, ¶ 53.

When a charged offense concerns an alleged violation of Chapter 948 (crimes against children), the greater latitude rule also guides the admission of other acts evidence. *State v. Dorsey*, 2018 WI 10, ¶ 33, 379 Wis. 2d 386, 906 N.W.2d 158 (for the types of cases enumerated under Wis. Stat. § 904.04(2)(b)1., courts should admit evidence of other acts with greater latitude under *Sullivan*).

"[T]he greater latitude rule applies to the entire analysis of whether evidence of a defendant's other crimes was properly admitted at trial." *State v. Davidson*, 2000 WI 91, ¶ 51, 236 Wis. 2d 537, 613 N.W.2d 606. "[C]ourts still must apply the three-step analysis set forth in *Sullivan*." *Id.* ¶ 52. The greater latitude rule permits "more liberal admission of other crimes evidence." *Id.* ¶ 51.

Importantly, "Evidence is not 'other acts' evidence if it is part of the panorama of evidence needed to completely describe the crime that occurred and is thereby inextricably intertwined with the crime." *State v. Dukes*, 2007 WI App 175, ¶ 28, 303 Wis. 2d 208, 736 N.W.2d 515.

B. The court properly admitted two short videos showing Griffin screaming at the sleeping twins.

The court correctly applied *Sullivan*'s three-step analysis when it admitted videos of Griffin screaming at the twins as they slept, taken just two days before MHP's death and MDP's hospitalization. (R.91:12–17.)

1. The videos were offered for an acceptable purpose.

The court properly determined that the two videos were offered for acceptable purposes under section 904.04(2)(a), including intent and background or context. (R.91:14.) First, the court reviewed the appropriate legal standards. Relying on *State v. Gray*, 225 Wis. 2d 39, 56, 590 N.W.2d 918 (1999),

it noted that "intent involves knowledge, hostile feeling, or 'the absence of accident, inadvertence, or casualty—a varying state of mind which is the contrary of an innocent state of mind.'" *Id*. (R.91:8.) Relying on *State v. Payano*, 2009 WI 86, ¶ 63 n.12, 320 Wis. 2d 348, 768 N.W.2d 832, the court noted that evidence related to context or background also constitutes an acceptable purpose under section 904.04(2)(a), because it provides "a more complete presentation of the evidence relating to the offense charged." (R.91:8–9.)

The court next reviewed the requisite elements for each charged offense. With respect to first-degree reckless homicide under section 940.02(1), the State had to prove that Griffin caused MHP's death by reckless conduct that showed an utter disregard for human life. (R.91:10–11.) With respect to child abuse under section 948.03(2), the State had to show that Griffin intentionally caused great bodily harm to MDP and MHP. (R.91:11.)

The court reasonably recognized that Griffin's act of intentionally screaming at the sleeping twins just two days before they were harmed revealed an intent to deliberately mistreat them. (R.91:12–15.)

At a minimum, Griffin's screaming at the twins while they slept reveals a callousness that demonstrates an utter disregard for the twins' well-being. The court questioned "why anyone would walk up to a sleeping [children] and scream," and determined that these actions demonstrated the nature of Griffin's relationship with the twins. (R.91:14.) The videos also undermined Griffin's claims that Smart exclusively cared for the children and he was never alone with them. (R.103:77; Ex. 1/37 Griffin//St.Agnes/7-7-15-843, 7m:35s; 103:88.) The videos provided necessary background or context to help the jurors understand Griffin's relationship to the twins. *Hunt*, 263 Wis. 2d 1, ¶¶ 58, 59.

In addition to first-degree reckless homicide, the State charged Griffin with physical abuse of a child, a crime that falls within the greater latitude rule's scope. *See* Wis. Stat. § 904.04(2)(b)(1). While the court did not consider the rule when it applied the *Sullivan* analysis, this Court may nonetheless consider the greater latitude rule to affirm the court's decision. *See State v. Holt*, 128 Wis. 2d 110, 124–26, 382 N.W.2d 679 (Ct. App. 1985) ("An appellate court may sustain a lower court's holding on a theory or on reasoning not presented to the lower court."). Application of the greater latitude rule reinforces the court's determination that the videos were offered for acceptable purposes including intent and background or context. The court reasonably determined that the videos were offered for an acceptable purpose.

2. The videos were probative.

Based on the application of the correct legal standards, the court determined that the two videos constituted relevant evidence. (R.91:6, 12.) It determined that the videos were probative to intent and context. (R.91:15–16.)

As the court noted, nearness in time, place, and circumstances are all relevant considerations in assessing whether other acts evidence has probative value. (R.91:7 citing *Gray*, 225 Wis. 2d at 51.) While Griffin's act of yelling at the twins was dissimilar from the crimes, the court noted the videos occurred just two days before the charged crimes. (R.91:15.) Further, at trial, the State presented testimony that Griffin was growing increasingly fed up "play[ing] daddy to the kids that wasn't his" and taking care of them. (R.105:32–33.)

Particularly in light of the greater latitude rule, the court reasonably deemed probative videos showing Griffin's hostility to the twins just days before he allegedly stepped on their chests.

3. The videos were not unduly prejudicial.

The court found that Griffin's act of yelling at the sleeping twins was nowhere near as egregious or serious as the underlying allegations against him. (R.91:16.) Therefore, it determined that the probative value of the videos was not "substantially outweighed by the danger of unfair prejudice." (R.91:16.) The record supports this determination.

First, the fact that videos did not depict physical assaults limited their prejudicial weight. No unfair prejudice arose. *See Payano*, 320 Wis. 2d 348, ¶ 90. Compared to the medical evidence presented at Griffin's trial concerning the injuries to MHP and MDP, the videos were not unfairly prejudicial because they did not tend to "arouse [the jury's] sense of horror" or "provoke its instinct to punish." *See Sullivan*, 216 Wis. 2d at 789–90. Griffin's yelling at the twins was not "so similar in nature to the charged act that there [was] danger the jury [would] simply presume [Griffin]'s guilt in the current case." *Payano*, 320 Wis. 2d 348, ¶ 94 (citation omitted).

Second, the videos played a small part in the trial. They lasted eight seconds and six seconds, respectively. (R.100:158–59.) The jury saw these videos twice: they were presented during Detective Bobo's testimony and during closing arguments. (R.100:158–59; 107:126–27.)

Griffin has not met his burden of demonstrating that the unfair prejudice that flowed from the two videos substantially outweighed its probative value. *See Hunt*, 263 Wis. 2d 1, ¶ 53. Therefore, this Court should determine that the court did not erroneously exercise its discretion when it admitted this probative evidence for an acceptable purpose.

III. Any errors in excluding Griffin's *Denny* defense or admitting the videos were harmless.

A. Legal principles

"An erroneous exercise of discretion in admitting or excluding evidence does not necessarily lead to a new trial. The appellate court must conduct a harmless error analysis to determine whether the error 'affected the substantial rights of the party.'" *Martindale v. Ripp*, 2001 WI 113, ¶ 30, 246 Wis. 2d 67, 629 N.W.2d 698. "An error affects the substantial rights of a party if there is a reasonable probability of a different outcome." *State v. Kleser*, 2010 WI 88, ¶ 94, 328 Wis. 2d 42, 786 N.W.2d 144.

B. Any errors would be harmless.

Even if the court erroneously admitted the other acts evidence or excluded Griffin's *Denny* defense, the errors were harmless. The State presented compelling evidence of Griffin's guilt.

First, the twins suffered remarkably similar injuries. Dr. Kelley determined that MHP's liver was "basically torn in two" as a result of "blunt force traumatic injury" and would have resulted in death within a matter of minutes. (R.105:149.) Kelley also observed rib fractures. (R.105:133.) Similarly, Dr. Sheets identified several injuries to MDP, including broken ribs and injuries to the liver and pancreas, resulting from "severe-force blunt abdominal trauma" associated with "severe life threatening child physical abuse." (R.103:191–92.) She characterized the laceration to MDP's liver as a "very severe injury where the inside of the organ has actually been ripped apart." (R.103:168–69.) Kelley described the mechanism of MHP's death as a punch, kick, or slowly pressing a foot down on a child's abdominal area. (R.105:151–52.)

Second, Griffin's words and actions following MHP's death and MDP's hospitalization circumstantially demonstrated his guilt. After Officer Williams spoke to Griffin at the scene and then briefly left, police then had to pound and knock on the door for at least 20 minutes before Griffin opened the door, claiming he did not hear them. (R.100:74, 83, 109.) Griffin sent Pillow a text in which he said that "the police act like they wanna put me in jail they still here." (R.100:120; Ex. 23.) When Griffin texted Pillow, officers had no reason to believe that MHP stopped breathing as a result of a crime. In fact, later that day, officers asked Griffin to reenact how the baby was positioned in an effort to understand how MHP might have died. (R.100:126.)

While detectives first spoke to Griffin at the house, as he held MDP, they asked Griffin about MDP's condition because he appeared lethargic or dazed and had labored breathing. (R.100:127; 103:31.) Griffin told the officers that the twins were born premature and received breathing treatments but that MDP's condition was normal. (R.100:127; 103:31.) But when Smart returned from the hospital, she took MDP from Griffin, noted that MDP was not acting right, and took him to the hospital. (R.100:134.) Smart's reaction to MDP's condition stands in stark contrast to Griffin's representations to the officer that MDP was normal. Additionally, in the police-monitored call that Smart placed to Griffin a week later, Griffin "couldn't say anything because the police were at the apartment." (R.105:91.) The jury could reasonably infer that Griffin had acted deliberately to conceal MDP's condition, undoubtedly the result of physical abuse.

Griffin's behavior at the hospital also demonstrated consciousness of guilt. He told Pillow, "we're going to stick to the story." (R.101:75.) Even before officers had informed Griffin of MHP's injuries, Griffin became angry, and was using the words "killed" and "homicide investigation." (R.103:70.) Griffin distanced himself from having any

responsibility for the children, insisting that Smart cared for them and he was never alone with them. (R.103:88; Ex. 1/37 Griffin//St.Agnes/7-7-15-843, 7m:35s.) Griffin asserted nothing had happened to the children and noted that the scratch to the back of MHP's head came from a rug burn that occurred when Smart was changing a diaper, but later told Smart that MHP suffered the rug burn when *he* was changing the diaper. (R.103:77, 86–87; 105:92.) Griffin also said they had agreed to tell police that the rug burn to MHP's head occurred when Smart was changing the diaper, though it was Griffin who changed the diaper and was caring for MHP. (R.103:133.) Griffin later told Luciano that he was changing one child's diaper when the other child ran away, prompting him to grab the child's leg, which caused the child to fall and hit his head. (R.105:33.) Griffin's inconsistent statements undermine his assertions that he was not alone with the twins, did not take care of them, and did not cause the abrasion to the back of MHP's head.

Griffin's flight also demonstrated consciousness of guilt. Through text messages, Griffin agreed to meet with investigators, but he never showed up. (R.103:91–94.) Griffin disappeared until federal marshals located him in Texas. (R.101:77.) Griffin told his hotel companion that he would run if he saw police officers because an incident happened in Wisconsin with "his ex," and he would be arrested. (R.103:20–21.) Griffin later explained to Luciano that he fled "because them bitches couldn't keep their story straight." (R.105:44.)

Third, Griffin's statements to Luciano also established a motive for his conduct toward the children and explain how MHP sustained the injuries that resulted in his death. Griffin became "fed up" caring for Smart's children, because Smart would not change their diapers and spent money on alcohol rather than diapers. (R.105:32–33.)

According to Luciano, Griffin admitted stepping on one child who was laying on his back and grabbing the other child

and throwing him toward the toddler bed. (R.105:36.) Griffin placed his foot on a child who was kicking, screaming, and crying and applied pressure because he wanted the child "to shut the fuck up." (R.105:37–38.) Griffin told Luciano that this happened when Smart and Pillow were in the bathroom. (R.105:39.)

The parties vigorously contested Luciano's credibility. The State suggested that Luciano was believable because he knew information that was not reported and detectives did not share with him, including Griffin's preference for Nike shoes. (R.98:39; 100:118–19; 103:106–08; 105:38–39.) In addition, Griffin told Luciano that he and Smart had been drinking Hennessey and officers recovered an empty Hennessey bottle from the garbage. (R.100:116; 103:211; 105:38–39.) The jury also considered evidence that undermined Luciano's credibility, including his prior convictions, his character for untruthfulness, his motives for testifying adversely to Griffin's interests, and his access to Griffin's case related materials that were kept in an unlocked drawer in their cell. (R.105:25, 43–49, 59–60, 80, 168.)

In sum, the absence of physical evidence or other eyewitnesses to the trauma that MHP and MDP suffered does not undermine the strength of the State's case against Griffin.

Moreover, Griffin cannot show a reasonable probability of a different outcome had the court granted his *Denny* motion, because CJ's recording would not have been admissible, and Smart's purported abuse of the children would not have accounted for the charged injuries. The court legitimately questioned the admissibility of CJ's statement because it marginally, at best, satisfied the oath requirement under section 908.08(3)(c). (R.91:41, 44.) *See* Section I.B.2., *supra*. In addition, based on CJ's inconsistent and, at times, nonsensical answers, and the interviewer's use of leading questions, the court also questioned whether CJ's statement

satisfied section 908.08(3)(d)'s trustworthiness requirement. (R.91:41–44.) *See* Section I.B.2., *supra*.

And even if CJ's statement were admissible, both Dr. Kelley and the court determined that the conduct that CJ attributed to Smart would not have accounted for the twins' injuries. (R. 91:45; 92:19; 111:2.) *See* Section I.B.2., *supra*. Further, while Griffin relied heavily on Smart's statement to support his claim that Smart was responsible for the twins' injuries, the circuit court reasonably determined, based on its thorough review of her statement, that Griffin had taken Smart's statements out of context and her statements did not support the conclusion that she admitted harming the twins. (R. 92:16). *See* Section I.B.1.–2., *supra*.

Additionally, Griffin cannot show a reasonable probability of a different outcome from the court's admission of the videos because (1) all the other evidence against him and (2) the court's limiting instruction that minimized the risk of unfair prejudice to Griffin from the videos. (R.107:93.) *See State v. Hammer*, 2000 WI 92, ¶ 21, 236 Wis. 2d 686, 613 N.W.2d 629. It told the jury that it could consider the evidence "only on the issues of intent and background." (R.107:93.) It explained, "The evidence was received on the issues of intent, that is, whether the defendant acted with the state of mind that is required for two of the offenses charged. And background, that is, to provide a more complete presentation of the evidence relating to the offenses charged." (R.107:93.) The court admonished the jury not to "consider this evidence to conclude that [Griffin] has a certain character or a certain character trait and that [Griffin] acted in conformity with that trait or character with respect to the offenses charged in this case." (R.107:93.) It told the jury that it should not use this evidence "to conclude that [Griffin] is a bad person and for that reason is guilty of the offenses charged." (R.107:93–94.) Consistent with the court's cautionary instruction, the prosecutor told the jury that the

jury could consider them for "intent and background." (R.107:127.) Because jurors are presumed to follow cautionary instructions, the court's instruction reduced the risk of prejudice to Griffin from the videos' admission. *See State v. Grande*, 169 Wis. 2d 422, 436, 485 N.W.2d 282 (Ct. App. 1992).

Thus, any error in admitting or excluding evidence was harmless.

CONCLUSION

This Court should affirm Griffin's judgment of conviction.

Dated this 16th day of January, 2019.

Respectfully submitted,

JOSHUA L. KAUL
Attorney General of Wisconsin

DONALD V. LATORRACA
Assistant Attorney General
State Bar #1011251

Attorneys for Plaintiff-Respondent

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 267-2797
(608) 266-9594 (Fax)
latorracadv@doj.state.wi.us

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 10,745 words.

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DONALD V. LATORRACA
Assistant Attorney General

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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 16th day of January, 2019.

_____
DONALD V. LATORRACA
Assistant Attorney General