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STATE OF WISCONSIN

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

DISTRICT III

Case No. 2022AP32-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

JACOB PERRY CAYER,

Defendant-Appellant.

APPEAL FROM A JUDGMENT OF CONVICTION ENTERED IN THE CIRCUIT COURT FOR BROWN COUNTY, THE HONORABLE TAMMY JO HOCK, PRESIDING

BRIEF OF THE PLAINTIFF-RESPONDENT

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TABLE OF CONTENTS

INTRODUCTION 5

ISSUES PRESENTED 6

STATEMENT ON ORAL ARGUMENT AND PUBLICATION 6

STATEMENT OF THE CASE 6

I. The charges 6

II. The pretrial proceedings 7

III. The trial 10

STANDARDS OF REVIEW 17

ARGUMENT 18

I. Cayer's constitutional right to present a defense was not violated by the exclusion of third-party perpetrator evidence. 18

A. The right to present a defense and the *Denny* "legitimate tendency" test 18

B. The circuit court properly denied Cayer's motion to admit evidence that his surviving stabbing victim was the real murderer 19

1. Cayer failed to satisfy the motive prong of the *Denny* test. 20

2. Cayer failed to satisfy the opportunity prong of the *Denny* test. 22

3. Cayer failed to satisfy the direct-connection prong of the *Denny* test. 23

C. Cayer has not shown a violation of his constitutional right to present a defense. 24

D. Any error excluding Cayer's *Denny* defense was harmless. 25

1. Legal principles 25

2. No reasonable jury would have acquitted Cayer even if he blamed Jason for the double homicide. 26

II. The trial evidence was sufficient to support each of Cayer's convictions. 27

A. Cayer faces a high burden to establish that the evidence supporting his conviction was lacking. 27

B. The trial evidence was sufficient for the jury to find that Cayer committed all six crimes for which he was charged. 28

CONCLUSION 30

TABLE OF AUTHORITIES

Cases

A.O. Smith Corp. v. Allstate Ins. Cos.,
222 Wis. 2d 475, 588 N.W.2d 285 (Ct. App. 1998) 20

Crane v. Kentucky,
476 U.S. 683 (1986) 18

Holmes v. South Carolina,
547 U.S. 319 (2006) 24, 25

Neder v. United States,
527 U.S. 1 (1999) 25

State v. Denny,
120 Wis. 2d 614,
357 N.W.2d 12 (Ct. App. 1984) 6, 8, 9, 19

State v. Jackson,
188 Wis. 2d 187, 525 N.W.2d 739 (Ct. App. 1994)..... 24, 25

State v. Kramer,
2006 WI App 133, 294 Wis. 2d 780,
720 N.W.2d 459 ..... 25, 27

State v. Langlois,
2018 WI 73, 382 Wis. 2d 414, 913 N.W.2d 812..... 18

State v. Muckerheide,
2007 WI 5, 298 Wis. 2d 553, 725 N.W.2d 930..... 18, 19

State v. Nelson,
2014 WI 70, 355 Wis. 2d 722, 849 N.W.2d 317..... 18

State v. Poellinger,
153 Wis. 2d 493, 451 N.W.2d 752 (1990) 18, 27, 28, 29

State v. Wilson,
2015 WI 48, 362 Wis. 2d 193, 864 N.W.2d 52.....17, *passim*

Statutes

Wis. Stat. § (Rule) 809.86 7

INTRODUCTION

It is well-settled that the constitutional right to present a defense has its limits. To that end, in Wisconsin, a criminal defendant who seeks to present evidence or argument implicating a third party in the crime for which he is tried must show, before trial, that the other person had a motive, opportunity, and direct connection to the crime charged. A defendant failing to satisfy all three showings is barred from pointing the finger at another possible perpetrator, even if it leaves him little or no means to mount a persuasive defense.

Defendant-Appellant Jacob Perry Cayer's arguments defy this established rule. Although he failed to make the requisite showing to implicate a third party perpetrator, he complains that the circuit court wrongly denied his request to incriminate the lone surviving victim of his murderous rampage, and he insists that the court's decision infringed on his constitutional right to present a defense. Additionally, he asserts that the trial evidence was insufficient to support his convictions despite being found covered in his victims' blood at the murder scene, confessing to the brutal stabbings, and directing police to the murder weapon.

This Court should reject his arguments and affirm for two overarching reasons. First, Cayer failed to show that his lone surviving victim had the requisite motive, opportunity, and direct connection necessary to implicate him as a possible third-party perpetrator, but even if he had, no reasonable jury would have acquitted Cayer given his absurd defense theory that conflicted with other powerful evidence. Second, Cayer's challenge to the evidence supporting his convictions is wholly meritless; eyewitness testimony, physical evidence, and his own confession easily proved beyond a reasonable doubt that he forced his way into a home and brutally murdered his ex-girlfriend and her mother before attempting to silence the sole surviving witness of his homicidal spree.

ISSUES PRESENTED

The State reframes Cayer's issues presented as follows:

1. Did the circuit court erroneously apply *Denny*[1] and violate Cayer's right to present a defense by prohibiting him from arguing or attempting to present evidence that one of his alleged stabbing victims was the true killer?

This Court should answer no.

2. Was the evidence presented at Cayer's trial so lacking in probative value and force that no reasonable jury could have drawn the requisite inferences to find him guilty of first-degree intentional homicide?

This Court should answer no.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Neither publication nor oral argument is warranted. The arguments are fully developed in the parties' briefs, and the issues presented involve the application of well-established principles to the facts presented.

STATEMENT OF THE CASE

I. The charges

The State charged Cayer with two counts of first-degree intentional homicide, one count of attempted first-degree intentional homicide, one count of burglary, and two counts of bail jumping. (R. 1:1–2.) The State alleged that Cayer fatally stabbed his ex-girlfriend, Sandra, and Sandra's mother, Helen, before stabbing Sandra's current boyfriend, Jason,

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

who called 911 for help.[2] (R. 1:2–6.) Cayer later admitted to police that he had forced entry into Sandra's bedroom window, stabbed Sandra, and struck the other female in the home with a knife and a blunt object. (R. 1:6.)

II. The pretrial proceedings

Cayer filed an initial motion seeking to admit evidence implicating third-party perpetrators. (R. 194:1.) In his motion, Cayer asserted that he did not commit the charged offenses; instead, "drug-dealing gang members" Austin Green and Dillon Gray conspired with Jason to kill Sandra and Helen, abduct Cayer, and frame him for the murders by bringing him to the scene. (R. 194:1–2.)

Cayer argued that Green, Gray, and Jason shared the same motive to frame him for the murders: preventing him from cooperating with law enforcement in an unrelated investigation into their drug dealing and other criminal activity. (R. 194:1–2.) Cayer did not explain how being framed for murder would prevent him from cooperating with police. (R. 194:2.) And while Cayer claimed that Green and Gray were both involved in such illegal activity, he never identified any wrongdoing by Jason that would drive him to participate in such a scheme; rather, he clarified at a subsequent hearing that Jason would have been motivated to kill Sandra to gain access to her father's inheritance. (R. 194:2; 341:7.)

Cayer also argued that Jason, Gray, and Green had the opportunity to commit the murders. (R. 194:2.) He maintained that position even though Green was incarcerated at the time of the killings. (R. 194:2.) He also suggested that Gray had the opportunity to commit the murders not because there was any evidence of his involvement in the crimes but simply because he was not incarcerated at the time. (R. 194:2.) Finally, he

[2] The State uses a pseudonym to protect the identity of all three victims in accordance with Wis. Stat. § (Rule) 809.86.

pointed out that Jason could have committed the murders because he was present when police arrived. (R. 194:2.)

Cayer failed to examine whether Jason, Gray, or Green otherwise had a direct connection to the crime. (*See* R. 194:2–3.) Rather, he merely pointed to a private investigator's report indicating that (1) Green—who was jailed at the time of the murders—had told fellow inmates that he killed two people and "they arrested a white guy for it," and (2) one of Sandra's friends observed footprints in the snow outside of Sandra's window years before the homicide occurred. (R. 194:2–3.)

The circuit court issued a written order denying Cayer's motion, holding that he had "fail[ed] to meet any one prong of the legitimate tendency test under *Denny*. [3]" (R. 207:3–5.)

First, the court held Cayer's argument that the three named men had motives to kill Sandra and Helen was "not supported by logic or evidence." (R. 207:6.) The court noted that Cayer presented nothing to suggest that the three men were either drug dealers or gang members or that Cayer had valuable information to provide to police. (R. 207:6.) The court also recognized that, if Gray and Green were motivated to prevent Cayer from cooperating with police, framing him for the murder of two innocent people would be an illogical choice over just killing him themselves. (R. 207:6.) Finally, the court noted that, if Jason knew about Sandra's inheritance, killing her would have likely terminated his access to those funds. (R. 207:7.) Thus, the court concluded that Cayer failed to present any evidence to prove a "plausible reason" that Jason, Green, or Gray would murder Sandra or Helen. (R. 207:7.)

Examining next whether the men had the requisite opportunity to kill Sandra or Helen, the court recognized that Cayer presented no "evidence that Gray was anywhere near the murder scene" or that the men communicated with one

[3] *Denny*, 120 Wis. 2d 614.

another in the time leading up to the murders. (R. 207:8.) The court also noted that Green was indisputably in the Brown County Jail at the time of the murders. (R. 207:7.) Finally, while the court acknowledged that Jason was present at the scene, his mere presence alone did not equate to opportunity, particularly given the serious wounds he himself sustained and the digital forensic evidence devoid of any suggestion that plans were in motion to murder Sandra and Helen or kidnap Cayer to bring him to the murder scene. (R. 207:8.)

Next, the court rejected the notion that statements by one of Green's fellow inmates shored up the direct connection between him and the murders, noting that even the inmate to whom Green supposedly confessed to did not view Green's statements as "anything more than attempts to obtain credibility." (R. 207:9.) Moreover, the court opined that the discovery of footprints in snow outside of Sandra's home years before the homicide bore no relevance to whether Jason, Green, or Gray committed the murders. (R. 207:9.)

Ultimately, though it reaffirmed that Cayer maintained the constitutional right to present a defense, the court explained that the right was not unlimited and that "evidence that only suggests a possible ground of suspicion against another person should not be admissible." (R. 207:10 (citing *State v. Denny*, 120 Wis. 2d 614, 623, 357 N.W.2d 12 (Ct. App. 1984)).)

Months later, Cayer filed a second motion, renewing his request to implicate Jason in Sandra's and Helen's murders. (R. 228.) This time, Cayer insisted that Jason was motivated to kill Helen because she did not like him, she believed he was taking advantage of Sandra, and she wanted Jason to move out of their home. (R. 228:2.) He theorized that Jason murdered Helen first and then murdered Sandra to prevent her from reporting his crime after she happened upon the gruesome scene. (R. 228:3.) Cayer reiterated that Jason had the opportunity to commit the murders because he was

present when police arrived and had full access to the home while dating Sandra. (R. 228:3.) Finally, Cayer offered the court a police report detailing an incident in which Jason purportedly threatened to stab some children who threatened him in a park, and he also pointed to information found on Jason's phone, including an internet search for the terms "famous last words" and his interest in "death metal" genre music. (R. 228:3–4; 233:5.)

The circuit court denied Cayer's second motion, first in an oral ruling, (R. 338:12–15), and later in a written order, (R. 239). The court reaffirmed that Cayer had failed to establish Jason's motive to kill Sandra and Helen, observed that Jason likely lacked the opportunity to commit the killings based on his cell phone data, opined that Jason's 2012 park incident lacked probative value, and decided that Jason's internet searches for one of his favorite songs did not suggest he was involved in the killings. (R. 338:13–14.)

III. The trial

Based on his pleas of not guilty and not guilty by reason of mental disease or defect, (R. 195), Cayer proceeded to a four-day bifurcated jury trial, (R. 332; 333; 334; 335). The following is a summary of the evidence presented; it is not an exhaustive recitation of the evidence.

Jason testified that he previously lived with Sandra, his girlfriend, and Helen, Sandra's mother, at their home on Riverdale Drive. (R. 335:38–40.) Because he did not own his own car, Sandra regularly brought him to and from his job at Burger King. (R. 335:42.)

On June 7, 2016, Sandra took him to work in the afternoon and returned to bring him home that evening. (R. 335:41–45.) On their way, they stopped "at Wal-Mart to grab some food." (R. 335:44.) When they arrived at home, Sandra checked on her mother in the nearby bathroom.

(R. 335:49–51.) When she entered the bathroom, Jason heard Sandra cry out, "Oh, my God, mom" as she walked back in his direction and tried to call 911. (R. 335:51.) At that point, Jason watched Cayer exit the laundry room and repeatedly stab Sandra with a kitchen knife. (R. 335:52–54.) Jason heard Sandra call out Cayer's first name, "Jake," which Jason recognized to be Sandra's ex-boyfriend. (R. 335:67.)

Cayer then attacked Jason, thrusting the knife through Jason's arm and into his chest. (R. 335:54–55.) Cayer eventually pursued Jason into the garage, where Jason grabbed a shovel and struck Cayer in the face. (R. 335:56.) Terrified, Jason rushed back into the house, locked several doors, and called 911. (R. 335:56–58, 60.) As he ran through the house, Jason witnessed in the bathroom what he believed to be Helen's body wrapped in a blanket, surrounded by "stains all over the floor." (R. 335:57.) An ambulance later took Jason to the hospital, where he was treated for a severed artery and tendons, along with a chest lesion. (R. 335:61.)

Many police officers were dispatched to the scene in response to Jason's 911 call, (R. 335:118, 151, 162–63, 188–89, 208–09, 261–62), and they broke into groups to approach the residence from opposite sides, (R. 335:121). One group found an abandoned bicycle lying in the grass near a tree line. (R. 335:122, 153–54.) In that same group, Officer Randy Radloff noticed that one of the home's basement windows was popped open. (R. 335:155.) As they reached the house, Detective Bradley Dernbach asked dispatch to direct Jason to come to the front of the home to ensure his safety. (R. 335:125–26.)

Jason proceeded to the front door and told police that he believed Helen was still inside the residence. (R. 335:126.) He also would later surrender his phone to police and offered his permission to analyze the phone. (R. 335:83, 244.) The phone contained several indications that it had connected to a Wal-Mart Wi-Fi signal at 7:50 p.m. that day. (R. 335:244.)

On the other side of the home, Deputy Eric Mueller and Deputy Justin Raska found a woman lying face down in the grass. (R. 335:165–66, 190.) The woman, Sandra, was unresponsive and had suffered multiple stab wounds to her front and back sides. (R. 335:101, 158–59, 165–67, 170, 190–91.) Deputy Raska began performing CPR, (R. 335:167, 191), but Sandra did not survive; an autopsy revealed she was repeatedly stabbed in the head and torso, (R. 300:5–7). Chief Medical Examiner Vincent Tranchida ruled Sandra's death a homicide caused by "multiple stab wounds of her head and torso, with resulting internal injuries and hemorrhage." (R. 300:11.)

While searching the home, police located Helen's body in the bathtub. (R. 334:259; 335:127, 157, 232.) Dr. Tranchida ruled Helen's death a homicide resulting from homicidal violence. (R. 301:2.) He testified that Helen's injuries included (1) stab wounds to her head and her torso, which entered her heart, (2) compression to her neck caused by a ligature and manual force by use of one's hands, (3) blunt force trauma to various body parts, evidenced by numerous broken bones, bruising, and brain hemorrhaging. (R. 334:193–208.) He also recognized that some abrasions found on Helen's body were consistent with the edge of the tire iron found at the murder scene. (R. 334:213–16.)

Detective Dernbach's police canine eventually led officers to an area of deep brush behind the home where Cayer was lying on the ground. (R. 335:131–33, 179–81.) Cayer's pants were "full of blood." (R. 335:176.) Detective Dernbach asked Cayer where the knife was, and Cayer claimed he left it inside. (R. 335:133–34.) Police found some rope, two gloves, and a smartphone on Cayer's person. (R. 335:233–34.) A subsequent examination revealed the phone was actually Sandra's, and it contained nonthreatening messages between her and Jason. (R. 335:235, 242–44.)

Sergeant Zachary Holschbach interviewed Cayer at the hospital that evening, using a recording device to capture Cayer's statements.[4] (R. 334:15–21.) He recounted that Cayer looked to be injured, and he was "covered" in something "brownish-red" and "consistent with blood." (R. 334:22.) Cayer was responsive during questioning; he was able to provide his full name and birthdate, and they engaged in an "intelligent conversation back and forth." (R. 334:23, 27.)

Unfamiliar with the facts surrounding the incident at the time, Sergeant Holschbach asked Cayer open-ended questions like, "What do you remember?" (R. 334:32.) Cayer recounted leaving on his bicycle after his father yelled and his mother cried. (R. 334:33–34.) He also mentioned three women: Nicole, Wendi, and Sandra. (R. 334:36.) Sergeant Holschbach was unaware of the victims' names at the time, but it was apparent that Cayer was "having some issues with or anger towards" the three women. (R. 334:36.)

Cayer claimed that Sandra falsely accused him of rape and blackmailed his family. (R. 334:46–47, 57–58; 409, Ex. 1-J1.) Asked what happened before he came to the hospital, Cayer claimed he began to "fill with anger" because "women treat[ed him] like shit," so he put his headphones on and rode his bicycle past various businesses while listening to music. (R. 334:49–50; 409, Ex. 1-J2.)

Cayer eventually asked if Sandra was okay. (R. 334:52–53; 409, Ex. 1-J3.) Cayer referred to Sandra's mother, Helen, as "a really nice lady" and said it was "unfortunate how things

[4] At the beginning of Cayer's trial, the district attorney identified Exhibit 1 as a "thumb drive" containing audio, video, and photograph files bearing unique identifying file names that were referenced, identified, and admitted throughout trial. (R. 335:35; 409.) Consistent with that identification process, the State refers to various trial exhibits by referencing the appellate record number assigned to the digital storage drive, followed by the unique exhibit filename used during trial. (*See* R. 297.)

turned out." (R. 334:54–55; 409, Ex. 1-J4.) The interview continued while Cayer was transported to a different hospital. (R. 334:55–56.) He acknowledged that he "stabbed her" in the "neck or torso" while holding the knife in his right hand, and he remembered "a lot of blood." (R. 334:57; 409, Ex. 1-J5.) He also claimed that he used a broken window to gain access to the bedroom. (R. 334:56.) He went into detail about where Sandra's body could be found as she ran from the garage towards the fence, and he described a "bathroom person" and a blanket he used to cover up the blood in the hallway. (R. 334:59, 61.) He admitted that Sandra was trying to defend herself and get away from him. (R. 334:61–62.)

Cayer eventually explained that there were three total people involved in the attack: Sandra, a person in the bathroom believed to be Sandra's mother or a friend, and a person wearing a "gas station shirt." (R. 334:62.) Later in the interview, Cayer clarified that a "gas station shirt" meant a Burger King or Subway shirt. (R. 334:59, 81; 409, Ex. 1-J16.) Cayer explained that the knife would be somewhere "between the garage and the foliage." (R. 334:81; 409, Ex. 1-J17.) Cayer recalled Sandra falling in that same area. (R. 334:82; 409, Ex. 1-J17.)

Using a pen, Cayer reenacted with another officer how he stabbed Sandra. (R. 334:91–92; 409, Ex. 1J Video 1.) Cayer also drew a map for police to show where Sandra fell and where the knife would be located. (R. 298:3; 334:82–86, 233–36.) Cayer described how he made a "hacking motion" with a blunt object in the bathroom, but it was not a hammer. (R. 334:63, 69–70; 409, Ex. 1-J6.) He remembered one of the victims escaping to call 911 when he attacked "a houseful of people." (R. 334:63.)

Sergeant Hoschbach later learned from other officers that the people attacked in the home were Sandra, Helen, and Sandra's boyfriend. (R. 334:64–65.) When asked if he thought Sandra was alive, Cayer eventually stated, "Doctors better be

swift, I guess" before recalling where he stabbed her. (R. 334:71–72; 409, Ex. 1-J9.) Cayer recounted washing blood off his feet in the bathroom sink. (R. 334:76; 409, Ex. 1-J13.) He eventually told police that he was struck in the face with a shovel when he was attacking Sandra and the "gas station shirt person." (R. 334:75; 409, Ex. 1-J12.) Cayer never denied his role in the incident. (R. 334:129.)

During the interview, forensic nurse Dana Stueber inspected Cayer's body and documented his injuries, which included scratches and cuts on his arms, legs, torso, feet, and face. (R. 299:1–5; 334:132–33, 138–39.) She also swabbed various portions of his body, including his hands and feet. (R. 334:153–55.) Sergeant Baugniet Janke assisted in the evidence collection, placing the swabs in labeled boxes. (R. 334:232.)

Amber Lind, a forensic scientist in the DNA analysis unit of the Wisconsin State Crime Laboratory, analyzed those swabs and some of the physical evidence discovered at the murder scene. (R. 303:1–13; 333:17–50.) Of note, the swab of Cayer's left and right palms contained mixtures of Sandra's and his own DNA. (R. 303:3; 333:31.) Sandra's DNA was discovered at three locations on the knife recovered from the murder scene. (R. 303:6–7; 333:36.) Helen's and Cayer's DNA were also found on the tire iron recovered at the murder scene. (R. 333:38–41.)

Finally, Cayer testified in his own defense. (R. 333:80.) He recalled dating Sandra for two and a half years before breaking up in 2008. (R. 333:86–87.) He was also familiar with Sandra's mother, Helen, with whom he claimed to have had no issues. (R. 333:92.) He maintained that he had "no idea who" Jason was prior to the incident. (R. 333:93.)

Cayer denied any recollection of what occurred on June 7, 2016, besides waking up in the hospital. (R. 333:82.) He instead recounted an argument between his mother and

father that occurred over dinner on June 6, 2016. (R. 333:82–83.) This led Cayer to gather a backpack full of essentials and leave home on his bicycle, headed to the workplace of his roommate and former girlfriend who shared the same first name as Sandra. (R. 333:83–84, 93–95.)

Cayer could not explain how he arrived at Sandra's home the following day. (R. 333:97.) He instead suggested that he was "at war" with a man named Dylan Gray, who was dating another of his ex-girlfriends. (R. 333:106, 141, 202.) He claimed that he was riding a bike and going to Gray's aunt's house to determine the identity of some individuals who supposedly followed and threatened him with knives when some people in a sports utility vehicle or sedan knocked him off his bike and put him in the vehicle, held down by the vehicle's occupants. (R. 333:106–07.) Cayer next recounted "struggling with somebody" in Sandra's residence that was not Sandra or Jason but someone named Adam. (R. 333:107.)

Cayer also described waking up in the hospital, covered in blood in the presence of police. (R. 333:111–12.) He was "extremely confused" and did not know what was happening. (R. 333:112–13.) He also explained why he believed, based on his injuries, that he was possibly involved in a car crash. (R. 333:118.) He also assumed, based on the officers' conversation with him, that he must have beaten someone up, though it did not make sense why he would attack Sandra. (R. 333:120.)

Cayer denied confessing to Sandra's or Helen's murder; he claimed that he merely experienced several visions, but the arm stabbing Sandra was not his own. (R. 333:122–23.) He also complained that police misunderstood or deliberately feigned ignorance about some of his interview statements. (R. 333:139–40.) He insisted that he was innocent, stating that he had "multiple copies of what they are hiding" and that Jason "got psychotic killing shit in his home" and had "tried to stab [him] before." (R. 333:154.)

Cayer reiterated that he did not stab Jason or kill Sandra or Helen. (R. 333:157–58.) Cayer suggested that the blade would have entered Jason's heart had he stabbed Jason as described. (R. 333:157.) He also claimed that when he told police that he had stabbed Sandra, he always prefaced his statements with the caveat, "I think" or "I must," suggesting he only assumed what had happened. (R. 333:191.) Finally, Cayer testified that he was "physically incapable of committing a crime." (R. 333:193.) He maintained that there was evidence that "somebody else" was there, moving him around and dropping him in blood. (R. 333:200.) And he complained that someone else dragged him to the spot where police found him. (R. 333:204.)

The verdicts and disposition

The jury found Cayer guilty of all six charges at the end of the first phase of his bifurcated trial. (R. 333:342–43.)

The court accepted the jury's verdicts and proceeded to the second phase of Cayer's bifurcated trial the following day, where the jury determined that Cayer suffered from a mental disease or defect when he committed the crimes alleged and lacked a substantial capacity to appreciate the wrongfulness of his conduct or conform his conduct to the requirements of the law. (R. 332:230–31; 333:345–46.)

Based on the jury's verdicts, the circuit court ordered Cayer committed to the Department of Health Services for the remainder of his life. (R. 274:2; 332:241–42.)

Cayer appeals. (R. 383.)

STANDARDS OF REVIEW

"This court reviews a circuit court's decision to admit or 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. "When the circuit court's denial of admission of the proffered evidence implicates a defendant's

constitutional right to present a defense, however, the decision not to admit the evidence is a question of constitutional fact that this court reviews de novo." *Id.*

Should it decide that the circuit court improperly excluded evidence or infringed upon Cayer's right to present a defense, this Court reviews de novo whether such alleged errors were harmless. *State v. Nelson*, 2014 WI 70, ¶ 18, 355 Wis. 2d 722, 849 N.W.2d 317.

Finally, this Court reviews de novo whether trial evidence is sufficient to support Cayer's convictions. *State v. Langlois*, 2018 WI 73, ¶ 35, 382 Wis. 2d 414, 913 N.W.2d 812. However, even under de novo review, this Court may not reverse Cayer's conviction "unless the evidence, viewed most favorably to the state and the conviction, is so lacking in probative value and force that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt." *State v. Poellinger*, 153 Wis. 2d 493, 507, 451 N.W.2d 752 (1990)).

ARGUMENT

I. Cayer's constitutional right to present a defense was not violated by the exclusion of third-party perpetrator evidence.

A. The right to present a defense and the *Denny* "legitimate tendency" test

"Although a circuit court generally has the discretion to deny the admission of evidence, that discretion is subject to constitutional limitations; 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 (citing *Crane v. Kentucky*, 476 U.S. 683, 689–90 (1986)).

However, a court may exclude irrelevant or otherwise inadmissible evidence without violating a defendant's right to present a defense. *State v. Muckerheide*, 2007 WI 5, ¶ 40, 298

Wis. 2d 553, 725 N.W.2d 930. Wisconsin courts have often recognized, "[E]vidence that simply affords a possible ground of suspicion against another person should not be admissible." *Wilson*, 362 Wis. 2d 193, ¶ 51 (quoting *Denny*, 120 Wis. 2d at 623).

"The *Denny* test attempts to balance a meaningful opportunity to present a complete defense, namely that a third party perpetrated the crime, with the requirement that such evidence meet established standards for admissibility." *Id*. ¶ 93 (Ziegler, J., concurring). A defendant seeking to admit evidence that a known third party could have committed the crime must therefore satisfy all three prongs of *Denny*'s "legitimate tendency" test. *Id.* ¶¶ 52, 64.

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. That said, 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 that of the State's evidence. *Id.* ¶ 69.

B. The circuit court properly denied Cayer's motion to admit evidence that his surviving stabbing victim was the real murderer.

As a preliminary matter, Cayer has abandoned his claim that Austin Green and Dillon Gray had the requisite

motive, opportunity, and direct connection to the charged crimes to satisfy *Denny*; while Cayer argued as much in his first pretrial motion, he omitted that claim from his second motion and the argument contained in his appellate brief. *A.O. Smith Corp. v. Allstate Ins. Cos.*, 222 Wis. 2d 475, 491, 588 N.W.2d 285 (Ct. App. 1998) ("[A]n issue raised in the trial court, but not raised on appeal, is deemed abandoned.").

What remains before this Court is Cayer's claim that the circuit court improperly excluded trial evidence and argument that Jason was the true killer. (Cayer's Br. 24–25, 28, 31.) He is wrong. Under the three-part *Denny* test, Cayer did not have a right to introduce evidence that Jason forced his way into a home and fatally stabbed two people. Cayer's attempt to satisfy the motive prong of the *Denny* test is patently illogical, his attempt to satisfy the opportunity prong defies common sense and other evidence, and his brief argument on the direct-connection prong lacks merit. This Court should therefore affirm.

1. Cayer failed to satisfy the motive prong of the *Denny* test.

According to Cayer, Jason had a "plausible reason" to murder both Sandra and Helen because: (1) Helen disliked him, thought he was taking advantage of Sandra, and wanted him out of her daughter's life; and (2) Sandra discovered that he killed her mother. (Cayer's Br. 22.) The circuit court held that Cayer failed to satisfy the first *Denny* prong because avoiding potential eviction was not a "plausible reason" for Jason to brutally murder Helen and Sandra. (R. 239:3–4.)

The circuit court was correct. For starters, Cayer offered the circuit court *nothing* to substantiate his theories that Helen wanted Jason out of her home or planned to stop his relationship with her daughter. He simply declared, without offering any evidence, that "the police questioned numerous witnesses, at least one of whom pointed out that

[Helen] disliked [Jason]" and that Helen "did not like the fact that [Jason] had been mostly unemployed during his relationship with [Sandra] and [Helen] wanted [Jason] to move out of the house that he was figuratively 'squatting' in." (R. 228:2.)

Even at the ensuing hearing, defense counsel provided nothing to back up those allegations. (R. 338:6.) Besides clarifying that one of his mystery witnesses was a man who formerly dated Helen, counsel failed to connect the dots to explain why Jason would be motivated to kill Helen, other than an unsubstantiated accusation that Helen had plans to evict him from her home. (R. 338:6.)

The prosecutor was quick to dispel Cayer's theory that there was animosity between Jason and Helen, pointing out that the witness statement Cayer referenced revealed only that Helen had early concerns about Jason living with them, but things were going well after he lived there for several days. (R. 338:9.) Moreover, the prosecutor pointed out how Helen's death left Jason homeless—a counterproductive result if his motive was to remain in her home. (R. 338:10.)

Likewise, Cayer provided nothing to substantiate his theory that Jason killed Sandra to prevent her from reporting him for murdering her mother. Indeed, that theory made no logical sense; if Jason were the true killer and murdered both Helen and Sandra, why would he immediately call 911 to report it? Surely leaving the scene undetected would have been a much easier route to getting away with murder than plunging a knife through his own arm and immediately drawing police attention by calling 911. Cayer simply provided nothing but conjecture to support a theory that Jason killed Sandra to cover up Helen's murder.

Ultimately, the circuit court correctly decided that Cayer failed to show that Jason had a plausible reason to kill Helen and Sandra. (R. 239:3–4.) Having failed to satisfy the

first of three *Denny* prongs, the court was entitled to deny Cayer's pretrial motion to implicate Jason in his charged crimes. *Wilson*, 362 Wis. 2d 193, ¶ 64.

2. Cayer failed to satisfy the opportunity prong of the *Denny* test.

Cayer maintains that Jason had the opportunity to commit the charged crimes just because he was dating Sandra and had full access to Sandra's and Helen's home. (Cayer's Br. 24–25.) The circuit court held that Cayer failed to satisfy the second *Denny* prong given the evidence which revealed that it would have been virtually impossible for Jason to murder Sandra and Helen as Cayer imagined. (R. 239:4–5.)

The circuit court was correct. As the prosecutor explained, Jason's cell phone connected to a Wal-Mart Wi-Fi network at 7:51 p.m., and he called 911 to report Sandra's and Helen's murders 20 minutes later. (R. 338:10–11.) Jason admitted at trial that he did not have his own vehicle, and he relied on Sandra for transportation. (R. 335:42.) Putting those facts together, Jason could not have murdered Sandra and Hellen unless he (1) found alternative transportation to get from his workplace to Wal-Mart and to Sandra's home, somehow killed Helen without Sandra noticing, and then killed Sandra, or (2) went home with Sandra and somehow stabbed her and her mother to death without either victim fleeing or contacting 911 themselves.

Confronted with the State's anticipated evidence, which it was allowed to consider, *Wilson*, 362 Wis. 2d 193, ¶ 69, the circuit court correctly recognized that it "was not a '*practical* possibility'" that Jason murdered Sandra and Helen as Cayer imagined, (R. 239:5). Having failed to satisfy the second of the three *Denny* prongs, the court was entitled to deny Cayer's pretrial motion to implicate Jason in his charged crimes. *Wilson*, 362 Wis. 2d 193, ¶ 64.

3. Cayer failed to satisfy the direct-connection prong of the *Denny* test.

Finally, Cayer contends that Jason had a direct connection to Sandra's and Helen's murders because he had an interest in so-called "death metal music" and was convicted of disorderly conduct following an incident involving a knife in August 2012. (Cayer's Br. 25–28.) The circuit court rejected that argument, holding that neither Jason's dated disorderly conduct conviction nor his music and YouTube searches suggested that he "'actually committed' the crimes" for which Cayer was charged. (R. 239:5–6.)

The circuit court was correct. As far as Jason's prior criminal conviction, there was genuine dispute about the circumstances that caused him to produce a knife during an incident that provoked his disorderly conduct charges. While Jason admitted that he engaged in a verbal altercation with three juveniles and shoved a cigarette into one of their faces, he was adamant that he drew a pocketknife only to defend himself when others approached him, not as an unprompted act of aggression. (R. 233:4–5.)

Using a pocketknife for self-defense is a far cry from brutally strangling, bludgeoning, and stabbing an elderly woman and violently and repeatedly stabbing her daughter. Accordingly, Jason's 2012 community park altercation with several preteens did not constitute evidence that he "directly or indirectly committed" the crimes of murdering Sandra and Helen four years later. *Wilson*, 362 Wis. 2d 193, ¶ 59.

Moreover, Jason's interest in a particular music genre said nothing about whether he could or would kill his girlfriend or her mother. Neither wearing clothing supporting a band—whatever the musical genre—nor using YouTube to listen to a music video by alternative rock band, My Chemical Romance, would suggest that a person is willing and capable of committing a double homicide. Indeed, if that were the case,

thousands of individuals who regularly attend annual death metal concerts could find themselves implicated in homicides for which they have no connection, whatsoever.

In sum, the circuit court correctly decided that Cayer's proffered evidence, viewed in the context of the evidence of his case, "d[id] not suggest that [Jason] 'actually committed' the crimes." (R. 239:6.) Having failed to satisfy the final of the three *Denny* prongs, the court was entitled to deny Cayer's pretrial motion to implicate Jason in his charged crimes. *Wilson*, 362 Wis. 2d 193, ¶ 64.

C. Cayer has not shown a violation of his constitutional right to present a defense.

Cayer stresses that he, "like every criminal defendant, has a constitutional right to present a complete defense." (Cayer's Br. 31.) True, but a defendant has no constitutional right to present evidence that fails the *Denny* test. *See*, *e.g.*, *State v. Jackson*, 188 Wis. 2d 187, 196, 525 N.W.2d 739 (Ct. App. 1994) (Because the defendant's proffered evidence "failed to meet the Denny standard, [the defendant] had no constitutional right to present it to the jury."). And should there be any question that Wisconsin courts have improperly employed that test to deprive criminal defendants the constitutional right to present a defense, Cayer cannot dispute that "the Supreme Court has gone on to cite the *Denny* case with approval." *Wilson*, 362 Wis. 2d 193, ¶ 52 (citing *Holmes v. South Carolina*, 547 U.S. 319, 327–28 n. * (2006)).

Cayer offers no authority suggesting that his right to present a defense was violated by the circuit court's decision if he failed to satisfy all three prongs of the *Denny* test. (Cayer's Br. 32–34.) Rather, he offers a litany of cases that have nothing to do with exclusion of third-party perpetrator evidence, with the lone exception of *Wilson*, all to support the uncontested point that "[c]ourt[s] have historically permitted

defendants to present the defense of their choosing and not one forced upon them by the courts." (Cayer's Br. 32–34.)

But the circuit court did not force Cayer to employ any particular defense. The court merely applied the well-settled *Denny* test, which served legitimate state interests of excluding prejudicial, speculative evidence about a third person's guilt at Cayer's trial. *See Wilson*, 362 Wis. 2d 193, ¶¶ 102–03 (Ziegler, J., concurring). 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,* 547 U.S. at 326, 327 & n. *). The circuit court did just that when it correctly held that Cayer failed to satisfy even one of *Denny*'s requirements, let alone all three.

In short, even if the circuit court's decision left him with no persuasive defense, Cayer still had no constitutional right to present the defense of his choosing if that meant allowing him to present irrelevant or inadmissible evidence. *Jackson*, 188 Wis. 2d at 196. Cayer has simply not shown that his constitutional right to present a defense was violated.

D. Any error excluding Cayer's *Denny* defense was harmless.

1. Legal principles

Alleged violations of the right to present a defense or improper applications of the *Denny* test are each subject to harmless error analysis. *See Wilson*, 362 Wis. 2d 193, ¶ 87; *State v. Kramer*, 2006 WI App 133, ¶ 26, 294 Wis. 2d 780, 720 N.W.2d 459. In assessing harmless error, the relevant inquiry for this Court "is whether it is 'clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error.'" *Kramer*, 294 Wis. 2d 780, ¶ 26 (quoting *Neder v. United States*, 527 U.S. 1, 18 (1999)).

2. No reasonable jury would have acquitted Cayer even if he blamed Jason for the double homicide.

Should this Court determine that the circuit court erred in its *Denny* analysis or deprived Cayer of his constitutional right to present a defense, it should still affirm because any error was harmless. *Wilson*, 362 Wis. 2d 193, ¶ 87.

It would be an understatement to label the evidence implicating Cayer in Sandra's and Helen's brutal murders overwhelming. The jury heard unrefuted testimony that Cayer was found a short distance from the lifeless corpse of his ex-girlfriend, who was repeatedly stabbed in the head and torso. (R. 300:11; 335:101, 131–33, 158–59, 165–67, 170, 179–81, 190–91.) Cayer directed police to the knife used to stab Sandra. (R. 298:3; 334:83–86, 233–36.) His palms contained the DNA of one victim, and his DNA was found on the tire iron used to bludgeon the other victim. (R. 303:6–7; 333:36–41.) He admitted he was angry with Sandra for accusing him of sexual assault. (R. 334:46–47, 57–58; 409, Ex. 1-J1.) Most damning of all, he described how he stabbed Sandra and beat Helen to death, reenacting his stabbing and slashing motions. (R. 334:63, 69–70, 91–92; 409, Ex. 1-J6, Ex. 1J Video 1.)

Presented with that evidence, there is no chance the jury would have believed it was Jason and not Cayer who killed Sandra and Helen, especially since the State had additional evidence revealing that Jason was at Wal-Mart 20 minutes before he called 911 to report the murders. (R. 335:245.) Indeed, the jury would have been hard-pressed to believe that Jason connected to a Wal-Mart Wi-Fi signal right after leaving work, rushed to Sandra's and Helen's home without access to a motor vehicle, brutally stabbed and beat two women to death with neither escaping or seeking help, called police to frame Cayer for the murders, planted Sandra's DNA on Cayer and Cayer's DNA on Helen's murder weapon,

and convinced Cayer to confess to heinous crimes he did not commit—all in under 20 minutes.

The jury that found Cayer guilty of all charges during the first phase of his bifurcated trial was instructed that reasonable doubt meant "doubt based upon reason and common sense." (R. 333:272.) Having been so instructed, there is no possibility the jury would have reached a different verdict had it known that Helen was not fond of Jason when he first dated her daughter, that Jason was a fan of death metal music, or that Jason used a pocketknife to defend himself during an altercation that occurred years earlier. Thus, any error in denying Cayer's *Denny* motion or otherwise precluding him from presenting his preferred defense was harmless beyond a reasonable doubt. *Kramer*, 294 Wis. 2d 780, ¶ 26. This Court should therefore affirm.

II. The trial evidence was sufficient to support each of Cayer's convictions.

A. Cayer faces a high burden to establish that the evidence supporting his conviction was lacking.

When assessing whether the State met its trial burden, this Court may not reverse Cayer's convictions "unless the evidence, viewed most favorably to the state and the conviction, is so lacking in probative value and force that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt." *Poellinger*, 153 Wis. 2d at 507.

This is a difficult test to satisfy because, as factfinder, the jury was tasked with assessing witness credibility, resolving conflicts in testimony, weighing the evidence, and drawing reasonable inferences from it. *Id.* at 506. Even at trials where the evidence could support contrary inferences, this Court "must accept and follow the inference drawn by the trier of fact unless the evidence on which that inference is based is incredible as a matter of law." *Id.* at 506–07.

"If any possibility exists that the trier of fact could have drawn the appropriate inferences from the evidence adduced at trial to find the requisite guilt, an appellate court may not overturn a verdict even if it believes that the trier of fact should not have found guilt based on the evidence before it." *Id.* at 507. Furthermore, criminal convictions do not require direct evidence; circumstantial evidence will suffice. *Id.* at 501. The standards remain the same. *Id.*

B. The trial evidence was sufficient for the jury to find that Cayer committed all six crimes for which he was charged.

As the State has thoroughly explained, the evidence supporting Cayer's homicide convictions was not only enough to convince the jury that he murdered Sandra and Helen; it was overwhelming. *See supra* I.D.2.

Indeed, given his presence at the homicide scene, his admitted anger toward Sandra flowing from her sexual assault allegations, the DNA evidence linking him to one of the murder weapons and to one of his victims, and his detailed confession, it should surprise no one that the jury found that Cayer intentionally killed Sandra and Helen before trying to kill Jason. Since Cayer stipulated that he was released on bond at the time and admitted to sneaking into his ex-girlfriend's home and attacking three of its occupants, it is equally unsurprising that the jury found that Cayer committed burglary and bail jumping, too.

Still, in the face of this powerful evidence, Cayer insists the evidence supporting his convictions was lacking based on his view that Jason's statement was "self-serving" and "without substantial corroboration," paired with the fact that he was outside of the home when police arrived. (Cayer's Br. 36.) But it is the jury that gets to weigh evidence, assess witness credibility and resolve conflicts in the testimony, not Cayer. *Poellinger*, 153 Wis. 2d at 504, 506. In exercising those

duties, it was reasonable for the jury to believe Jason's story since it *was* corroborated in several ways.

First, recall that Jason testified that he did not have his own car and relied on Sandra to bring him to and from work. (R. 335:42.) He also claimed that Sandra picked him up from work on the day of the murders, took him to Wal-Mart to get food around 7:45 pm., and went home thereafter. (R. 335:44.) Jason's phone corroborated that timeline by revealing that he had connected to a Wal-Mart Wi-Fi signal at 7:50 p.m. (R. 335:245.)

Second, Jason testified that Cayer brutally stabbed him and Sandra with a knife while in the home. (R. 335:52–54.) Physical evidence suggested that Cayer entered the home because he had Sandra's phone when he was arrested, and the discovery of Sandra's DNA on Cayer's hands further reinforced the theory that Cayer—not Jason—was the person who stabbed her. (R. 303:3; 333:31; 335:234–35.) Moreover, Cayer had rope in his possession when arrested, (R. 335:233), his and Helen's DNA were found on the tire iron left at the scene, (R. 333:38–41), and Helen's autopsy showed signs of being beaten with a tire iron and strangled with a ligature, (R. 334:193–208, 211–12).

In all, while one cannot question the force that Cayer's recorded confession and Jason's testimony likely had on the jury, it is easy to see how digital and scientific forensic evidence tied up any loose ends in the State's case and convinced the jury, beyond a reasonable doubt, that Cayer snuck into his ex-girlfriend's home while on bond, brutally murdered two people, and unsuccessfully tried to kill a third. Because this Court cannot possibly hold that the evidence presented at Cayer's trial, viewed most favorably to the state, was so lacking in probative value and force that no reasonable jury could have found guilt beyond a reasonable doubt, this Court must affirm. *Poellinger*, 153 Wis. 2d at 507.

CONCLUSION

This Court should affirm the judgment of conviction.

Dated this 5th day of August 2022.

Respectfully submitted,

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FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § (Rule) 809.19(8)(b), (bm) and (c) for a brief produced with a proportional serif font. The length of this brief is 7,640 words.

Dated this 5th day of August 2022.

Electronically signed by:

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CERTIFICATE OF EFILE/SERVICE

I certify that in compliance with Wis. Stat. § 801.18(6), I electronically filed this document with the clerk of court using the Wisconsin Court of Appeals Electronic Filing System, which will accomplish electronic notice and service for all participants who are registered users.

Dated this 5th day of August 2022.

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