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STATE OF WISCONSIN
COURT OF APPEALS
District 3
Appeal No. 2022AP000032-CR
Circuit Court No. 2016CF902

State of Wisconsin,
Plaintiff-Respondent,

vs.

Jacob P. Cayer
Defendant-Appellant.

ON APPEAL FROM A JUDGMENT AND ORDER ENTERED IN BROWN COUNTY CIRCUIT COURT BRANCH 3 THE HONORABLE TAMMY JO HOCK PRESIDING.

REPLY BRIEF

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ARGUMENT

I. Jacob P. Cayer Was Entitled to Present Evidence that the Crimes Were Actually Committed by a Third Party.

A. Standard of Review

The standard of review appears to be agreed by the parties. (See, State's Brief p. 17-18) That is the appellate court ordinarily reviews the circuit court's evidentiary decisions for an erroneous exercise of discretion. *State v. Munford*, 2010 WI App 168, ¶ 27, 330 Wis. 2d 575, 794 N.W.2d 264. However, when the circuit court denies admission of proffered evidence that implicates a defendant's constitutional right to present a defense, the decision to bar the evidence is a question of constitutional fact that appellate courts review de novo. *State v. Wilson*, 2015 WI 48, ¶ 47, 362 Wis. 2d 193, 864 N.W.2d 52.

B. Third Party Perpetrator Evidence is Admissible Under the Standard Set Forth in State v. Denny.

The parties appear the agree that the test set forth in *State v. Wilson*, 2015 WI 48, ¶ 47, 362 Wis. 2d 193, 864

N.W.2d 52, is the proper test to determine the admissibility of the evidence here. (See, State's Brief p. 18-19) This was the test that was used by the trial court in this case. *Id*.

The Supreme Court in Wilson laid out how each of these prongs must be analyzed:

> First, did the alleged third-party perpetrator have a plausible reason to commit the crime? This is the motive prong. Second, could the alleged third-party perpetrator have committed the crime, directly or indirectly? In other words, does the evidence create a practical possibility that the third party committed the crime? This is the opportunity prong. Third, is there evidence that the alleged third-party perpetrator committed the crime, directly or indirectly? This is the direct connection prong. Logically, direct connection evidence should firm up the defendant's theory of the crime and take it beyond mere speculation. It is the defendant's responsibility to show a legitimate tendency that the alleged third-party perpetrator committed the crime. *Id.* ¶¶ 57-59.

Contrary to the State's analysis, *Wilson* appears to support Mr. Cayer's position in this case. Presence at the crime scene can be considered under both opportunity and direct connection, however presence alone does not ordinarily satisfy both prongs. *Id*. ¶ 60. Each piece of proffered evidence is not

required to satisfy all three prongs of the Denny. *Id*. ¶ 53. "'Facts give meaning to other facts,' and certain pieces of evidence become significant only in the aggregate, upon the proffer of other evidence." *Id*. (citing *State v. Vollbrecht*, 2012 WI App 90, ¶ 26, 344 Wis. 2d 69, 820 N.W.2d 443.)

Wilson, 2015 WI 48, ¶ 60-61, says that "A person's presence at the crime scene may be analyzed under "opportunity" but the opportunity prong may be eliminated during this analysis because of additional information. A person's presence at the crime scene also may be analyzed under the third prong, direct connection. What must be stressed is that "presence" alone will normally not satisfy both of these distinct prongs.

Wilson further states that to provide additional guidance, the three prongs are analyzed one by one, keeping in mind that it is unconstitutional to refuse to allow a defendant to present a defense simply because the evidence against him is overwhelming." *Id.*

C. The Circuit Court Erred in Denying Mr. Cayer's Request to Admit Denny Evidence

Without reiterating, the State in its reply, is asking that Mr. Cayer be held to a higher standard than is required for pleading on a motion to admit Denny evidence. The State essentially states that Mr. Cayer's hypothesis on J.K.'s involvement in the murders is simply not plausible, mirroring the trial court opinion.

The plausibility standard is not as high as the probability standard. See, *Data Key Partners v. Permira Advisers LLC*, 2014 WI 86, ¶ 17, 356 Wis.2d 665, 849 NW2d 693 and *Ashcroft v. Iqbal*, 556 US 662, 678, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009). (These cases concern the pleading requirements to survive a motion to dismiss a complaint.) It is not enough to simply say that the ability to prove the facts alleged are doubtful. See, *Ashcroft*, 129 S.Ct. at 1959. The court should have taken the allegations made by Mr. Cayer, in this case, as true, no matter how skeptical the court may have been. *Id*.

The court erred in its denial of Mr. Cayer's motion to admit third-party evidence.

2. The Circuit Court Erroneously Exercised its Discretion by Improperly Considering Certain Evidence

When considering whether a defendant is allowed to present Denny evidence the circuit court must conduct its inquiry without reference to the state's evidence because it is unconstitutional to deny a defendant the right to present a defense based on seemingly overwhelming evidence against him. *Wilson*, 2015 WI 48, ¶ 61; see also *Holmes*, 547 U.S. at 330-31.

It is difficult to see how, as the State claims, this is a harmless error. In it brief, the State merely states facts in support of the jury verdicts. This does not consider what the jury did not hear at the trial. The jury did not hear the evidence that the court excluded. This would bear on the jury verdicts. Excluding the evidence that Mr. Cayer did not commit the crimes charged was not harmless.

II. Jacob P. Cayer was denied the constitutional right to present a defense.

The State suggests that it is acceptable to deprive Mr. Cayer of his only potentially successful defense. (State's Brief p. 25)

Mr. Cayer like every criminal defendant, has a constitutional right to present a complete defense. *Wilson*, 2015 WI 48, ¶ 48. In the exercise of its discretion to admit or exclude the evidence, the circuit court must give consideration to constitutional claim that exclusion of the evidence deprived him of his right to present a defense. Id. The circuit court's failed to consider the constitutional claims presented by Mr. Cayer in exercising its discretion.

The trial was reduced to Mr. Cayer arguing the sufficiency of the evidence and attempting to show that J.K. was not a credible witness, when there was other relevant evidence that could have been used to enhance his argument that he did not commit the crimes charged. (See, 333:304-318)

In this case, Jacob P. Cayer was prohibited from presenting a defense of his choosing when the court denied his motion to present third party evidence. This was a denial of a fundamental right to defend against the charges in this case.

III. The Evidence Presented in the Trial was Insufficient for a Jury to have Found Jacob P. Cayer Guilty.

The State in its Response Brief, at p. 27, appear to agree that the standard of review is set forth in *State v. Poellinger*, 153 Wis. 2d 759, 451 N.W.2d 752, 757 (Ct. App. 1989).

In its response, at p. 27-28, the State appears to suggest that the decision by a jury is above review by an appellate court. *Poellinger* says otherwise.

Nevertheless, it is maintained that no jury could reasonably have found Jacob Cayer guilty as charged in the Criminal Information. Looking at the evidence presented at the trial, even under the rubric of viewing the evidence in the light most favorable to the State, it is maintained that there was not sufficient evidence to have proven the charges submitted to the jury and to have found guilt beyond a reasonable doubt.

The evidence presented was wholly insufficient for a reasonable jury to have convicted Jacob Cayer of the charges

here. Something more than this was required for these felony convictions.

CONCLUSION

The trial court erred when it denied Jacob P. Cayer's motion to admit third party evidence. This matter should be remanded for a new trial.

Jacob P. Cayer's was denied the right to present a complete defense to the charges against him. This matter should be remanded for a new trial.

There was insufficient evidence for the guilty verdicts in this case. This matter should be remanded for a judgment of acquittal.

Dated: August 22, 2022

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 1493 words.

A paper copy of this brief and certificate has been served on all non-electronic parties.

Dated: August 22, 2022

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