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Case No. 2023 AP 001556

In the State of Wisconsin Court of Appeals District II

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

STEVEN A. AVERY,

Defendant-Appellant.

On Appeal from the Order Denying Postconviction Relief Entered on August 22, 2023
in the Circuit Court of Manitowoc County, Case Number: 2005CF000381.
The Honorable **Angela W. Sutkiewicz**, Presiding Judge.

CORRECTED BRIEF OF DEFENDANT-APPELLANT STEVEN A. AVERY

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ISSUES PRESENTED

I. Whether the circuit court improperly imposed a burden on Mr. Avery to conclusively prove the *Denny* motive element in order to satisfy the materiality prongs of *State v. Edmunds*, 2008 WI App 33, 308 Wis. 2d 374, 746 N.W.2d 590 and *Brady v. Maryland*, 373 U.S. 83 (1963)?

The circuit court answered: No.

II. Whether the circuit court erred when it did not correctly apply *State v. Denny*, 120 Wis. 2d 614, 357 N.W.2d 12 (Ct. App. 1984) to Mr. Avery's potential third-party suspect evidence?

The circuit court answered: No.

III. Whether the circuit court erroneously exercised its discretion in denying Mr. Avery an evidentiary hearing because its factual findings are unsupported by the evidence?

The circuit court answered: No.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Pursuant to Wis. Stat. § 809.22 (2022), Appellant does not request oral argument. A publication is warranted because the case is of interest to the public.

INTRODUCTION

Mr. Avery appeals the circuit court's denial of his amended third postconviction motion because the opinion erroneously relies upon false facts and misapplies the law in denying Mr. Avery's request for an evidentiary hearing. The circuit court misinterprets S*tate v. Denny,* 120 Wis.2d 614, 357 N.W.2d 12 (Ct. App. 1984) as requiring conclusive proof of motive to satisfy the materiality requirement of *State v. Edmunds,* 208 WI 33, 308 Wis, 2d 374, 746 N.W.2d 590. It further erroneously requires the alleged third party suspect to have the "necessary skills" to manipulate evidence in a manner that would implicate the defendant to satisfy the opportunity prong of *Denny.*

The circuit court concludes Bobby's possession of Ms. Halbach's car does not directly connect him to her murder or the framing of Mr. Avery because "Bobby could have been in possession of the car that night . . . to help hide evidence to protect *the two individuals* directly linked by forensic evidence to this murder and convicted of the crime." (1132:27, emphasis added).[1] Furthermore, the circuit court relies upon Brendan Dassey's "confession" stating that the confession "specifically implicated" Mr. Avery in this crime, to support its decision denying Mr. Avery relief. (1132:24-25). Brendan Dassey's confession was not admitted as evidence in Mr. Avery's trial (486:1-2), and the circuit court should know this basic fact. Second, the circuit court mistakenly believes Brendan was linked to the crime forensically. He was not, another basic fact that has escaped detection by the circuit court.

[1] Citations to the record on appeal appear with the document number before the colon and the page number after the colon. Citations to different documents in the record are separated by semicolons. Mr. Avery shall cite to the concurrently filed Separate Appendix as "App. [page number(s)]."

The circuit court proposes a completely irrational justification to explain Bobby's actions in moving Ms. Halbach's vehicle onto the Avery property: Bobby was trying to help his uncle by hiding evidence. In the circuit court's nonsensical conclusion, because these actions could be seen as an effort by Bobby to help Mr. Avery, Bobby cannot be considered a valid *Denny* suspect. The circuit court fails to explain why if Bobby was simply lending a helping hand to his homicidal uncle, he would then become the State's primary eyewitness against Mr. Avery or why all of the forensic evidence used to convict Mr. Avery is not discovered until Bobby moves Ms. Halbach's vehicle onto the Avery property.

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

This case began in early November 2005 with the disappearance of Teresa Halbach, a twenty-five-year-old professional photographer. On November 5, 2005, volunteer searchers found Ms. Halbach's Toyota RAV-4 on the forty-acre site of Avery's Auto Salvage. After finding her RAV-4, law enforcement searched the Avery property and, over the next four months, discovered evidence including: burned bone fragments in and around a burn pit, with DNA matching Ms. Halbach's; Mr. Avery's and Ms. Halbach's blood in the RAV-4; remnants of electronic devices and a camera, the same models as Ms. Halbach's, in a burn barrel; Ms. Halbach's RAV-4 key in Mr. Avery's bedroom, with Mr. Avery's DNA on it; Mr. Avery's DNA on the hood latch of the RAV-4 (deposited, the State later claimed by his "sweaty hands"); and a bullet in Mr. Avery's garage containing Ms. Halbach's DNA.

During the trial, Bobby was the State's primary eyewitness against Mr. Avery. According to Bobby, Ms. Halbach was last seen walking towards Mr. Avery's trailer on October 31, 2005. The State used Bobby's testimony to establish that Ms. Halbach never left the Avery property alive. (589:103–04). If Bobby had told the truth that he saw Ms. Halbach leave the property that day (1075:56), Mr. Avery would never have been charged with her murder pursuant to the State's theory which did not involve Mr. Avery leaving his property. According to the State, Mr. Avery discharged his firearm into Ms. Halbach's head in his garage and burned her body for hours in his burn pit after putting her vehicle by the crusher.

On March 18, 2007, Mr. Avery was convicted of first degree intentional homicide, contrary to Wis. Stat. § 940.0l(l)(a) and felon in possession of a firearm contrary to Wis. Stat. § 941.29(2)(a). The jury found Mr. Avery not guilty of mutilation of a corpse. (542)

On October 11, 2019, Mr. Avery appealed the circuit court's denial of his second postconviction motion and its supplements. During the pendency of the appeal, a new witness, Mr. Thomas Sowinski ("Mr. Sowinski"), contacted Mr. Avery's current postconviction counsel in December of 2020. On April 10, 2021, Mr. Sowinski provided an affidavit to Mr. Avery's current postconviction counsel, stating that he was a motor-route driver for Gannett Newspapers, Inc. and delivered papers to the Avery Salvage Yard in the early morning hours of November 5, 2005. Prior to delivering the newspapers, he turned onto the Avery property and witnessed two individuals, Bobby Dassey and an unidentified older male with a long beard, suspiciously pushing a dark

blue RAV-4 down Avery Road towards the junkyard. The RAV-4 did not have its lights on. Mr. Sowinski drove past and delivered newspapers to the Avery mailbox and then turned around and drove back towards the exit. When he reached the RAV-4 still there, Bobby attempted to step in front of his car to block him from leaving. Mr. Sowinski came within 5 feet of Bobby and swerved into a shallow ditch to escape Bobby and exit. After Mr. Sowinski learned that Ms. Halbach's car was found later in the day on November 5, 2005, he immediately contacted the Manitowoc Sheriff's Office. (1065:76-82). On April 12, 2021, Mr. Avery filed a motion for remand and stay of appeal to this Court containing Mr. Sowinski's original affidavit.

On July 28, 2021, this Court issued a per curiam opinion, upholding the circuit court's summary denial of Mr. Avery's claims raised in his § 974.06 motion and two supplemental motions. *State v. Avery*, 2022 WI App 7, 400 Wis. 2d 541, 970 N.W.2d 564 (1056). However, this Court instructed the following:

> As discussed below, we are not addressing Avery's most recent filing to *this* court (see our discussion of Motion #6), which seeks to directly connect Dassey to Halbach's murder. If Avery wishes to raise that claim, he will need to bring a new WIS. STAT. § 974.06 motion. That motion would need to survive both *Escalona-Naranjo* scrutiny and be found to have merit—in which case, the evidence presented might supply the missing "direct connection." In that event, the Velie CD evidence might become relevant to showing Dassey's motive, and might bear on whether Dassey is, or should have been, a viable ***Denny*** suspect.

(1056:41, emphasis added). Regarding certain claims such as the alleged *Brady* violation pertaining to the witness, Mr. Kevin Rahmlow, reporting to law enforcement his observation of Ms. Halbach's RAV-4 in the turnaround of STH 47 on November 3 and 4 of 2005, this Court made no determination as to whether it would be barred. (1056:33).

On August 16, 2022, Mr. Avery filed his third § 974.06 motion (1065, 1066-75, 1109-15 (amended motion)). His motion set forth the newly discovered evidence of Bobby seen in possession of Ms. Halbach's vehicle after her disappearance. (1065:76-82). Affidavits from two witnesses, Mr. Kevin Rahmlow and Mr. Thomas Buresh, corroborate Mr. Sowinski's observations. Mr. Rahmlow observed Ms. Halbach's RAV-4 parked at the turnaround at STH 147 and the East Twin River Bridge on November 3 and 4, 2005. (1075:58-68); he reported this to a Manitowoc Sheriff's deputy on November 4, 2005. (1075:59, ¶6). Sometime before 2 a.m. on November 5, Mr. Buresh observed Bobby driving the RAV-4 in the area of Highway 147 and County Road Q in Manitowoc County. (1120:3-5).

In his motion, Mr. Avery also raised *Brady* claims. He attached supporting documents showing Mr. Sowinski's phone call to the Manitowoc Sheriff's Office was suppressed by the State (1068:1-5, 1069:1-2). Mr. Sowinski's ex-girlfriend, whom he was dating on November 5, 2005, and Mr. Sowinski both identified Mr. Sowinski's voice on a recording of a phone call made to the Manitowoc Sheriff's Office on November 6, 2005 at 10:28 p.m. (1070:1-5; 1071:1-12). Pertaining to Mr. Avery's *Brady* claim concerning Mr. Rahmlow's observations, no law enforcement report was ever generated memorializing Mr. Rahmlow's conversation with the Manitowoc sheriff deputy.

The circuit court denied Mr. Avery's § 974.06 motion on August 22, 2023. (1132). Mr. Avery filed a timely notice of appeal on August 24, 2023. (1137). This appeal follows.

ARGUMENT

I. Whether the circuit court improperly imposed a burden on Mr. Avery to conclusively prove the *Denny* motive element in order to satisfy the materiality prongs of *State v. Edmunds*, 2008 WI App 33, 308 Wis. 2d 374, 746 N.W.2d 590 and *Brady v. Maryland*, 373 U.S. 83 (1963)?

This circuit court misapplied *State v. Edmunds*, 2008 WI App 33, 308 Wis. 2d 374, 746 N.W.2d 590 by requiring Mr. Avery to conclusively establish Bobby's motive to murder Ms. Halbach in his motion, *on its face*, in order to satisfy the materiality requirement of *Edmunds*.

A. Standard of Review

An appellate court reviews a circuit court's determination as to whether a defendant has established his or her right to a new trial based on newly discovered evidence for an erroneous exercise of discretion. This Court will find an erroneous exercise of discretion if the circuit court's factual findings are unsupported by the evidence or if the court applied an erroneous view of the law. *Edmunds*, 2008 WI App 33, ¶1, 308 Wis. 2d 374, 377. Here, the circuit court erred in both regards.

B. Burden of Proof

On a motion for post-conviction relief pursuant to Wis. Stat. § 974.06, a defendant has the burden of proof. Wis. Stat. § 974.06(6). To obtain an evidentiary hearing on a motion for a new trial on the basis of newly discovered evidence, the defendant first "must show specific facts that are sufficient by clear and convincing proof" to demonstrate that: "(1) the evidence was discovered after conviction; (2) the defendant was not negligent in seeking the evidence; (3) the evidence is material to an issue in the case; and (4) the evidence is not merely cumulative." *Edmunds*, ¶13, 385.

C. Argument

The circuit court found that Mr. Avery satisfied all the elements required to admit his newly discovered evidence ("the Sowinski evidence") but for the materiality requirement of *Edmunds*. It erroneously imposed a new *Denny* requirement that Mr. Avery must establish that Bobby had a motive, by conclusive evidence, to commit the murder of Ms. Halbach to meet the *Edmunds* materiality requirement. Specifically, it stated:

> A review of the record and the defendant's argument reveal that he has failed to satisfy the third standard of the *Edmonds* (sic) test as well as the motive element of the *Denny* test. With respect to the *Edmonds* (sic) test, the defendant argued that the evidence offered was material to an issue in the case because it established that there was a viable third- party suspect that could have committed the murder of Ms. Halbach, and such evidence was never presented to the jury for consideration, undermining confidence in the verdict reached. In order to meet that burden, the defendant had to prove that the evidence also met the standard set forth in *Denny* to be admissible as proof of a third party suspect. The defendant failed to establish that Bobby had the requisite motive to commit the murder of Ms. Halbach.

(1132:18). According to the circuit court, Mr. Avery would have to satisfy two tests for it to admit "the affidavit of Sowinski" into evidence. (1132:5).

The circuit court improperly found the materiality of Mr. Avery's newly discovered evidence is exclusively contingent upon its satisfaction of the *Denny* test for admissibility. In determining that Mr. Avery's new evidence could only be material to the issue of a potential third-party suspect, it completely ignored its inherent materiality to other material issues in Mr. Avery's case.

In Mr. Avery's third motion for postconviction relief, he argued,

> The Sowinski evidence is material to several issues in Mr. Avery's case . . . it is material for establishing Mr. Avery's defense, that is, that a third party

> committed the crime against Ms. Halbach . . . Additionally, the Sowinski evidence is material to the evidence in the RAV-4 being planted by Bobby, including Mr. Avery's blood and DNA. The RAV-4 also contained the Halbach vehicle key and Ms. Halbach's electronic devices which were discovered in Mr. Avery's bedroom and burn barrel, respectively. Further, the Sowinski evidence is material to impeach Bobby's trial testimony that Ms. Halbach never left the Avery property, and that she was last seen walking towards Mr. Avery's trailer.

(1065:16, ¶24).

The new evidence that Bobby had possession of Ms. Halbach's vehicle is highly material for evaluating the reliability of the forensic evidence used against Mr. Avery, which all happened to be derived from Ms. Halbach's vehicle. Crucially, it is also material to the credibility of the State's key eyewitness against Mr. Avery, Bobby himself.

This Court pointed out in its July 28, 2021 Opinion: "The State's theory was that Avery shot Halbach in the head, in his garage, and threw her in the cargo area of the RAV 4. He then burned the electronics and camera, cremated Halbach in a burn pit, transferred the remains to a burn barrel, and hid the RAV 4 until he could crush it in the Avery car crusher." (1056:3). Mr. Avery's new evidence shows that the vehicle left the Avery property and was in the possession of a third party. Additionally, it debunks the State's theory against Mr. Avery that he kept the RAV-4 on the Avery property by the crusher so he could crush it immediately.

The evidence of Bobby's possession of Ms. Halbach's vehicle is material because it shows that Bobby had possession of the forensic evidence used to convict Mr. Avery. The vehicle was the crime scene by virtue of having all of the relevant forensic evidence in it, including Ms. Halbach's blood. The Sowinski evidence

establishes that Bobby, the State's primary eyewitness, had control of the crime scene for a period of time. Despite police searches preceding the discovery of Ms. Halbach's vehicle, her electronic devices and key were not found until after it was found. The only logical conclusion to explain this is that all the items remained in her vehicle and were then moved by whoever had possession of her vehicle.

If a third-party suspect had possession of Ms. Halbach's vehicle, numerous areas of reasonable doubt arise, such as that the forensic evidence in the vehicle is tainted by the third party having control of it *before* it was discovered by law enforcement on the Avery Property. This would have created reasonable doubt in the jurors' minds, particularly since the State's primary eyewitness was the one in possession of the vehicle. Mr. Avery's new evidence also presents an alternative theory for the source of the forensic evidence used against Mr. Avery. *See Edmunds*, ¶15, 386.

State v. Edmunds is the leading case on newly discovered evidence. In *Edmunds*, the defendant was convicted of the death of an infant she was caring for. The defendant filed a motion for a new trial over a decade after her trial and offered medical testimony showing a shift in mainstream medical opinion as to the cause of the types of injuries the infant suffered. The court found the evidence was material to an issue in the case because the main issue at trial was the cause of the infant's injuries, and the new medical testimony presented an alternate theory for the source of those injuries. *Edmunds*, ¶15, 386.

Here, applying *Edmunds*, Mr. Avery's new evidence is material to a key issue in Mr. Avery's case because Mr. Avery's new evidence, that Bobby had possession of Ms.

Halbach's vehicle after her disappearance, presents an alternative theory for the source of the evidence used to convict Mr. Avery.

The Sowinski evidence is additionally material because it completely calls into question the credibility of the State's key witness (Bobby's) testimony, which allowed the State to argue that Mr. Avery had exclusive control of Ms. Halbach and her vehicle, containing all of the forensic evidence, and that this evidence was not tainted by any third party. During its closing argument, the State emphasized the importance of Bobby's testimony, vouching for his credibility: "Again, an eyewitness without any bias. It is a [*sic*] individual that deserves to be given a lot of credit." (610:91).

With the new Sowinski evidence, as well as Mr. Rahmlow's affidavit, the State could not possibly have presented an unbiased Bobby to establish Ms. Halbach never left the property in her vehicle and that she was last seen walking towards Mr. Avery's trailer – its critical eyewitness link to obtaining Mr. Avery's conviction. Bobby was the only witness whose testimony the jury requested to "read or hear a transcript of" (1104:47). Clearly, by Bobby possessing the vehicle, there is a reasonable likelihood it would have affected the judgment of the jury in that Bobby would have emerged as a much more likely suspect in Ms. Halbach's murder than his recently released, wrongfully convicted uncle. Contrary to the State's representations to the jury, Bobby was biased and deserved no credit for his fabricated testimony.

In regard to a motion for a new trial, a reasonable doubt as to a defendant's guilt has been found to exist when the credibility of a witness critical to the State's case is completely called into question by newly discovered evidence. *State v. Wilson*, 2022

WI App 55, 404 Wis. 2d 750, 982 N.W.2d 351. "A new trial is required if the false testimony could . . . in any reasonable likelihood, have affected the judgment of the jury." *Giglio v. United States*, 405 U.S. 150, 154 (1972) (citations omitted); *see also State v. Plude*, 2008 WI 58, ¶47, 310 Wis. 2d 28, 55, 750 N.W.2d 42, 56 ("Wisconsin law has long held that impeaching evidence may be enough to warrant a new trial.").

In *State v. Plude*, the defendant presented newly discovered evidence that an expert witness lied about his credentials. *Id.*, ¶49, 56. The Supreme Court of Wisconsin found that because "[the expert witness's] testimony was a critical link in the State's case" (*Id.* ¶46, 55), "[his] quasi-medical expert testimony creates a reasonable probability that the jury hearing of [his] false testimony about his credentials would have had a reasonable doubt as to Plude's guilt." *Id.* ¶49, 56. Notably, in Justice Annette Ziegler's concurrence, she found the "new allegations" that the expert witness misrepresented his credentials created "a serious question" "as to whether the interests of justice were served." *Id.* ¶¶52-53, 57-58.

Mr. Avery presents a stronger case about the materiality of his newly discovered evidence because it shows Bobby committed perjury in his trial testimony, and it taints all of the forensic evidence used against Mr. Avery which resulted in his conviction.

In this Court's July 28, 2021 Opinion, this Court did not believe the impeachment of Bobby was material because it found significant forensic evidence linking Mr. Avery to the crime (1056:42, ¶68). However, the Sowinski affidavit establishes Bobby's possession of the Halbach vehicle which taints the forensic

evidence used against Mr. Avery. This strengthens the materiality of the impeachment evidence against Bobby.

In his motion, Mr. Avery satisfied *Edmunds*. Once the four criteria of newly discovered evidence have been established, the court looks to whether a reasonable probability exists that a different result would be reached in a trial. The reasonable probability factor need not be established by clear and convincing evidence, as it contains its own burden of proof. *Edmunds*, ¶1, 377. With regard to a motion for a new trial, the correct legal standard when applying the "reasonable probability of a different outcome" criteria is whether there is a reasonable probability that a jury, looking at both the old and the new evidence, would have a reasonable doubt as to a defendant's guilt. *Id.; see also Plude*, ¶33, 49, 52. ("A court reviewing newly-discovered evidence should consider whether a jury would find that the newly-discovered evidence had a sufficient impact on other evidence presented at trial that a jury would have a reasonable doubt as to the defendant's guilt.")

The circuit court, again, failed to analyze Mr. Avery's evidence under the proper test because of its improper requirement that Mr. Avery satisfy the *Denny* motive prong in order to show materiality of his evidence, even for purposes of *Brady*. It did not dispute that the prosecution suppressed the audio recording of Mr. Sowinski's call; rather, it disputed the materiality and favorability of the evidence to find that Mr. Avery failed to establish a *Brady* violation with respect to the Sowinski evidence.

Rather than making the required finding of no reasonable probability that a jury, hearing Mr. Avery's new evidence, could have a reasonable doubt as to Mr. Avery's

guilt, the circuit court improperly engaged in weighing the evidence of the violent porn found on the Dassey computer and concluded that it does not conclusively show that it was solely acquired by Bobby on the computer.

II. Whether the circuit court erred when it did not correctly apply *State v. Denny*, 120 Wis. 2d 614, 357 N.W.2d 12 (Ct. App. 1984) to Mr. Avery's potential third-party suspect evidence?

In his § 974.06 motion, Mr. Avery presented evidence, implicating his constitutional right to present a defense, that a potential third-party committed the murder of Ms. Halbach. However, the circuit court did not correctly apply *Denny* to the admissibility of his evidence. It erroneously imposed a substantial certainty requirement upon it and misapplied *Denny* in its evaluation of whether it satisfied the *Denny* elements of motive, opportunity, and direct connection.

A. Standard of Review

This Court generally reviews a trial court's decision to admit or exclude evidence under an erroneous exercise of discretion standard. *State v. Wilson*, 2015 WI 48, ¶47, 362 Wis. 2d 193, 864 N.W.2d 52. However, when a defendant's constitutional right to present a defense is implicated by the exclusion of evidence, the decision not to admit the evidence presents a question of constitutional fact that this Court reviews *de novo*. *State v. Ramsey*, 2019 WI App 33, 388 Wis. 2d 143, 930 N.W.2d 273.

B. Burden of Proof

On a motion for post-conviction relief pursuant to sec. 974.06, Stats., the defendant must show his entitlement to relief by clear and convincing evidence. *Rohl v. State*, 90 Wis.2d 18, 28, 279 N.W.2d 722, 725 (Ct. App. 1979) (*Rohl* II).

C. Argument

Denny governs the admissibility of potential third-party perpetrator evidence in Wisconsin. *Denny* requires a showing that "there must be a 'legitimate tendency' that the third person could have committed the crime." *State v. Denny*, 120 Wis. 2d 614, 623, 357 N.W.2d 12, 17 (Ct. App. 1984). A 'legitimate tendency' is demonstrated where the defendant can establish (1) motive, (2) opportunity to commit the charged crime, and (3) provide "some evidence to directly connect a third person to the crime charged which is not remote in time, place or circumstances." *Id.* at 624.

In its opinion, the circuit court acknowledged the standard for evaluating admissibility of evidence of a potential third-party suspect is set forth in *Denny* (1132:2). However, rather than applying the *Denny* standard, it applied a stricter standard Wisconsin does not follow.

In *Denny*, the Court of Appeals rejected the standard set forth by the California Supreme Court in *People v. Green*, 609 P.2d 468 (1980). Specifically, the *Denny* court disagreed with "the *Green* court's conclusion that such evidence must be substantial," stating "We perceive this to be too strict a standard for the admissibility of such evidence and conflicts with our supreme court's pronouncements on the fundamental standards of relevancy." *Denny*, at 623. The *Denny* court clarified,

> [R]elevant evidence means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. This rule does not say that the evidence must tend to prove a fact in a *substantial* way.

Id. Rather than requiring any level of "substantial" certainty, *Denny* adopted the standard set forth in *Alexander v. United States*, 138 U.S. 353 (1891). There, the Supreme

Court fashioned the "legitimate tendency" test, where the standard for evaluating the evidence is that it must show a "legitimate tendency" that the third party could have committed the crime. *Alexander,* at 356-57. In adopting the Supreme Court's test for materiality, *Denny* elaborated, "We believe that to show 'legitimate tendency,' a defendant should not be required to establish the guilt of third persons with that degree of certainty requisite to sustain a conviction in order for this type of evidence to be admitted. *Denny*, at 623. (emphasis added).

The *Denny* court differentiated between evidence which supports a "legitimate tendency" and "evidence that simply affords a possible ground of suspicion against another person," which is merely evidence "tending to show that hundreds of other persons had some motive or *animus* against the deceased" *Id.*, at 623. Unlike the inadmissible type of evidence *Denny* describes, Mr. Avery's evidence is very specific to Bobby and establishes a direct connection between Bobby and the crime. Hundreds of other persons did not have possession of Ms. Halbach's vehicle and have photographs of young, mutilated females on the computer of which they were the primary user (965:164-67, 1104:115-16).

Denny states, "as long as motive and opportunity have been shown and as long as there is also *some* evidence to directly connect a third person to the crime charged which is not remote in time, place or circumstances, the evidence should be admissible." *Id.* (emphasis added). Where Mr. Avery has proffered evidence that Bobby had possession of Ms. Halbach's vehicle after she went missing, had most likely been conducting computer searches relevant to her murder, and was on the Avery property

before and after her disappearance; no reasonable trier of fact, correctly applying the law, would find that Mr. Avery has not established *some* evidence directly connecting Bobby to the crime charged.

1. The circuit court erroneously evaluated the motive, opportunity, and direct connection elements of *Denny*.

As this Court pointed out in its opinion previously, evidence in support of *Denny* must be viewed in the aggregate. (1056:41, note 26). Rather than viewing Mr. Avery's evidence in the aggregate, the circuit court required Mr. Avery to present conclusive proof to satisfy each prong individually. However, "[e]ach piece of a defendant's proffered evidence need not individually satisfy all three prongs of the Denny test." *Wilson*, 2015 WI 48, ¶53, 362 Wis. 2d 193, 218. Further, the Wisconsin Supreme Court has determined that the "strength and proof" of one prong may "affect the evaluation of the other prongs." *Id.*, ¶64. The circuit court completely ignored these well-established principles of law in evaluating the motive, opportunity, and direct connection elements of *Denny*.

2. Motive Element of *Denny*

In Mr. Avery's § 974.06 motion, he alleged the motive attributed to Bobby for Ms. Halbach's murder could have been sexual and provided evidence supporting this, namely suppressed evidence from a computer that was in Bobby's bedroom; according to his brother Blaine, Bobby was the primary user of this computer. (1075:9). Bobby lied to police about its location claiming it was in the living room, but crime scene footage showed it was in his bedroom. (1104:112).

The computer was examined and revealed searches relevant to Ms. Halbach's murder, occurring during times in which the State has been unable to rule Bobby out as having conducted them. The State argued that other members of the Dassey household could have conducted them, a supposition that may or may not be true, but no other member of the Dassey household was spotted by an eyewitness with Ms. Halbach's vehicle shortly after her disappearance. Bobby's possession of the vehicle, with all of the forensic evidence used to convict his uncle, combined with the violent pornographic searches on the computer in his bedroom of which he is the primary user, elevate him to the level of a *Denny* third party suspect.

The circuit court spent twelve pages of its thirty-one-page opinion improperly weighing Mr. Avery's motive evidence, contrary to the law on motive. (1132:9-20). The issue is whether the pornographic searches on the Dassey computer are *relevant* to motive *regardless of the weight.*

In its opinion, the circuit court noted, "The state further disputes the defendant's conclusions that law enforcement considered pornography or sexual assault as a motive for the murder in this matter." (1132:13). However, this point is completely refuted by the record. On March 10, 2006, the State filed an amended information against Mr. Avery, adding the charge of sexual assault among others. (266:1-2). Mr. Avery's trailer and his computer were searched extensively for pornography, and none was found. Detective Velie was asked to generate a report of Mr. Avery's computer. Based on his report, no apparent searches of pornographic and/or sexual images were made and no websites with apparent sexual and/or

pornographic images were accessed. (1104:56-57). In further search for evidence to support a sexual assault motive, the Dassey computer was seized by law enforcement on April 21, 2006. (1104:48-49). In the Affidavit for Search Warrant for Dassey computer, Special Agent Tom Fassbender attested:

> Your affiant believes that said computer may contain images, records and messages which may be relevant to the investigation into the homicide of Teresa Halbach. Your affidavit further believes that information contained on said computer, *may include evidence of the crimes of homicide, mutilating a corpse, and sexual assault.*

(281:33-34, ¶8, emphasis added). The circuit court incorrectly relied upon the State's misrepresentations that the investigation was not focused on a sexual motive.

Law enforcement made great efforts to extract all the pornography from the Dassey computer and even went so far as having Detective Velie conduct specific word searches *related to the murder* in an effort to connect the searches to the murder. Detective Velie searched words that he believed were directly related to Ms. Halbach's murder, generating 2,632 search results, including: "Body" (2083); "Stab" (32); "Throat" (2); "Bullet" (10); "DNA" (3); "Fire" (51); "Gas" (50); "Rav" (74); "Gun" (75); "Handcuff" (2); "Bondage" (3); "Blood" (1); "Tire" (2); "Journal" (106). (1104:50). In the context of Ms. Halbach's murder, all these terms are relevant. Two bullets from a gun pierced her skull. There was a fire ignited by gas and tires which burned her body. She bled in her vehicle, so she may have been stabbed. Her DNA was found on a bullet, and she did keep a journal. Mr. Avery's blood was in the Rav-4. Velie's CD contains the State's "recovered" pornography images relevant to her murder. On the CD, Detective Velie

refined 14,099 images on 7 DVDs and recovered 1,625 violent pornography images *that had been deleted*. (1104:50).

Mr. Avery has been unable to get an affidavit from Bobby admitting he conducted the searches, or someone from the Dassey household stating they saw Bobby performing them, which the circuit court seems to require. Bobby did not volunteer for a forensic or psychological examination by Mr. Avery's experts as the circuit court also suggests is required. (1132:20). However, Brendan Dassey was arrested on March 1, 2006 and can be eliminated from a majority of the searches (614:33-37). Brian Dassey was interviewed and stated that he did live in the Dassey trailer and did not know anything about the computer (1104:55). Blaine Dassey, who was living there, denied ever doing a single pornography search on the computer (965:164-68). Bobby was the only Dassey household member who admitted that he "may" have watched porn on the computer. (1104:110). Importantly, Bobby cannot be eliminated by the State from *any* of the pornographic searches, especially the ones conducted prior to and very close in time to Ms. Halbach's murder, and he is the only family member who had unexplained scratches on his back on November 9, 2005, which have been identified by Mr. Avery's forensic pathologist expert as caused by human fingernails (965:152-62; 1075:20), and the only family member seen by witnesses with Ms. Halbach's vehicle after her disappearance.

The circuit court erroneously concluded the searches done after Ms. Halbach's murder have no weight (1132:20). Conduct of a suspected person, after the crime, is a legitimate subject for consideration as bearing upon the probability of his guilt. Motive

can manifest itself after the crime when the perpetrator is reliving and fantasizing about the crime. It is highly significant that the searches for deceased, mutilated young women began *after* not before the murder and mutilation of Ms. Halbach. The searches after the murder coincide with the fact that a young woman was murdered and mutilated. The searches before the murder coincide with thousands of images of young women engaging in sexual activity, many unwillingly, and corroborate a sexual assault motive. *See State v. Silva*, 2003 WI App 191, 266 Wis. 2d 906, 670 N.W.2d 385.

The circuit court also completely ignored Mr. Avery's evidence of Dassey computer deletions, which infers a consciousness of guilt. There were 8 periods of deletions on the computer, correlating with Ms. Halbach's visits to the property. (1104:52-53). The deletions cannot simply be dismissed as mere coincidences. It is highly significant in any investigation if there is an attempt to delete or destroy records. *See i.e., State v. Renier*, 2019 WI App 54, 388 Wis. 2d 621, 935 N.W.2d 551 (where the appellate court found, "[the defendant's] consciousness of guilt was also evidenced, as he told the victim to delete the text messages the two had exchanged."); *State v. Mercer*, 2010 WI App 47, ¶33, 324 Wis. 2d 506, 529, 782 N.W.2d 125, 137 (where the appellate court found "evidence from which [the jury] could infer that Mercer deleted the files where the forensic examiners would have found the child pornography stored in his hard drive" was significant evidence of the defendant's guilt.)

The circuit court misconstrued the holding in *Dressler v. McCaughtry,* 238 F.3d 908 (7th Cir. 2001) by adopting the State's argument that pornographic images must be a mirror image of the crime, or they have no relevance. The court in *Dressler* made

no such ruling and held, "the pictures depicting violence were offered to prove Dressler's fascination with death and mutilation, and this *trait* [of Dressler] is undeniably probative of a motive, intent, or plan to commit a vicious murder." *Id.* at 914. Likewise, here, most of the Dassey computer pornography consists of images depicting violence (even race car accidents) showing a fascination with death and mutilation (1116:45), and this *trait* of the Dassey pornographic consumer is "undeniably probative of a motive, intent, or plan to commit a vicious murder." Mr. Avery provided the circuit court with specific searches on the Dassey computer of terms such as "someone who was shot" and "gun to head." (964:18-82). There were 8 searches prior to Ms. Halbach's murder, on 9/17/05, for "skeleton" and "alive skeleton." (1104:63). After Ms. Halbach was reported missing, there were 6 searches for "girl guts;" 15 searches for "girl hurt;" and 2 searches for "seeing bones hot girls" (1104:85-87). These mirror the fate of someone hurt, shot in the head, mutilated and burned into skeletal remains which is the total amount of information known about Ms. Halbach's fate.

Contrary to the circuit court's view, the proper standard does not require Mr. Avery establish his motive evidence with absolute certainty. This level of certainty has never been required by any Wisconsin court to satisfy the motive element of *Denny* or any element of the *Denny* analysis, for that matter. *See State v. Knapp*, 2003 WI 121, 265 Wis. 2d 278, 666 N.W.2d 881 (where the Wisconsin Supreme Court has even deemed hearsay permissible evidence for satisfying all three prongs of the *Denny* test, including motive.) Under the motive prong, the court simply must question whether "the alleged third-party perpetrator [had] a plausible reason to commit the crime?" *Wilson*, 2015 WI

48, ¶57, 219, 64; s*ee also State v. Vollbrecht*, 2012 WI App 90, ¶27, 344 Wis. 2d 69, 820 N.W.2d 443 (evidence of a general motive is sufficient to prove this prong of the *Denny* test). Further, because motive is never an element of any crime, and the State never needs to prove motive, relevant evidence of motive is generally admissible *regardless of weight. Wilson*, ¶63, 221, 65; *see also State v. Berby,* 81 Wis.2d 677, 686, 260 N.W.2d 798 (1977).

Mr. Avery's third-party motive evidence is relevant regardless of the weight assigned to it by the circuit court. This is precisely the reason this Court found that if Mr. Avery's new direct connection evidence survives *Escalona-Naranjo* scrutiny and has merit, the motive evidence found in the Velie CD "might become *relevant* to showing [Bobby's] motive, and might bear on whether [Bobby] is, or should have been, a viable *Denny* suspect." (1056:41, note 26, emphasis added).

Mr. Avery offered his motive evidence in conjunction with evidence of Bobby's opportunity and direct connection to Ms. Halbach's murder and framing of Mr. Avery. Evidence of motive that would be admissible against a third party, were that third party, the defendant, is admissible when offered by a defendant in conjunction with evidence of that third party's opportunity and direct connection. *Wilson*, ¶63, 221, 65. In rehashing the weight of Mr. Avery's prior motive evidence contained on the Velie CD, which this Court already assessed was not sufficient in and of itself but could be relevant if Mr. Avery could also show Bobby's direct connection,[2] the circuit court

[2] This Court stated, "[T]he evidence presented might supply the missing 'direct connection.'" (1056:41, note 26).

evaluated the CD evidence in isolation contrary to this Court's prior directive. *See also Wilson*, ¶64 (The "strength and proof" of one of the prongs may "affect the evaluation of the other prongs."). Mr. Avery's powerful direct connection evidence certainly affects the evaluation of the other prongs because it provides evidence supporting all three prongs. For example, even if the motive for Ms. Halbach's murder was not sexual as law enforcement believed, the Sowinski evidence offers evidence that the motive could have even been a robbery.[3]

Wisconsin cases discussing the motive element of their *Denny* analysis show that the standard for fulfilling it is not overly burdensome, especially when there is strong evidence of a third party's direct connection to the crime. For example, *State v. Ramsey*, 2019 WI App 33, 388 Wis. 2d 143, 930 N.W.2d 273 is a case in which the defendant presented weak evidence of motive against a third party; however, the appellate court found strong evidence of a direct connection and thus, "plausible reasons" for the third party to commit the crime. *Id.* ¶ 28.

In *Ramsey*, the victim was found stabbed at a home. The 911 caller told police that the victim had been staying at her sister's home to hide from the defendant. The defendant was in a relationship with the victim for over 11 years and had a history of domestic violence. He admitted stabbing the victim twice to police officers. *Id.* ¶ 6. The victim's best friend told police that the day before the stabbing, the victim told the defendant that she was going to leave him. *Id.* ¶7.

[3] Accepting the Sowinski evidence as true, there is now proof that Ms. Halbach's vehicle and the items within the vehicle were stolen. Many things were missing from Ms. Halbach's RAV-4 that should have been present, such as Ms. Halbach's purse, wallet, and money she received that day. The motive for her murder may have been a theft by Bobby of her vehicle and the items within it.

After fingernail clippings from the victim revealed another man's DNA, the defendant brought forth a *Denny* motion, arguing that a potential third party perpetrator: (1) was a convicted criminal; (2) lived near the crime scene; and (3) his DNA at the scene is unexplained. The defendant alleged "possible" motives for the third party: irrational rage and antisocial behavior and/or sexual gratification and argued it was possible they had no rational motive. *Id.* ¶ 25. Thus, he presented evidence of a general motive not directed at the victim.

The circuit court found the defendant failed to establish third-party "motive," denying the motion. However, the appellate court reversed the circuit court, concluding: "[W]hen considered under the applicable law regarding motive, and with the opportunity evidence and the strong direct connection evidence, Ramsey has presented plausible reasons for [the third party] to commit the crime." *Id.*, ¶¶ 57, 64. It found, "under the totality of the circumstances, the evidence suggests a third-party perpetrator actually committed the crime" emphasizing, "'Suggests' is a rather broad term." *Id.* ¶ 34.

Here, the circuit court's failure to consider the *Denny* prongs in the aggregate and its erroneous imposition of a substantial certainty burden on Mr. Avery's motive evidence results in a fatally flawed opinion on the law and the facts.

3. Opportunity Element of *Denny*

In regard to the *Denny* opportunity element, the circuit court found, "[E]ven if the defendant had met the burden with respect to the motive element of the Denny

test, he has not met the burden with respect to the element of opportunity . . . ." (1132:21).

Undisputedly, Bobby was on the Avery family property when Ms. Halbach was and before and after she was reported missing. Normally, even proximity to the murder is sufficient to show "opportunity." However, the circuit court improperly imposed a burden on Mr. Avery to prove Bobby had the skills, contacts, tools, time, and/or other means necessary to have committed the crime and staged the scene in order to satisfy the opportunity element of *Denny*. It cited *State v. Wilson*, 2015 WI 48, 362 Wis. 2d 193, 864 N.W.2d 52 for its requirement that Mr. Avery prove this. (1132:24). However, this principle came from a Kansas Court of Appeals case the State cited in its brief, *State v. Krider*, 41 Kan. App. 2d 368, 202 P.3d 722 (2009). (1094:15).

The Kansas case, *Krider*, is completely inapposite. In *Krider*, the defendant's proffered potential third party perpetrator evidence consisted of alleging a potential motive for the victim's son-in-law to kill her in that his wife would benefit from the inheritance and that he could have had the opportunity to get defendant's hair from headgear and blood from used bandages to later plant at the crime scene because he worked as a first-aid officer at the defendant's work. The court found the evidence did not effectively connect the third party to the crime, finding, "[it] is nothing more than mere speculation and conjecture and does not connect the third party to the crime, and therefore the district court did not err in excluding it." *Krider*, 376, 729.

Likewise, the facts of *Wilson* are completely distinguishable to Mr. Avery's case. In *Wilson*, multiple eyewitnesses identified the defendant as the shooter. The defense's

theory was that an unidentified hit man was hired by the man in the car with the victim and the hit man shot the victim. The *Wilson* Court found there was no evidence showing the man in the car had the opportunity to hire a hitman in the brief time he was in the car with the victim before she was shot. The defense failed to present any evidence of contacts, influences, or finances used to hire a hitman to corroborate its hypothetical theory that the potential perpetrator was some unidentified hit man. Thus, the Court found, "Wilson's proffer failed to demonstrate that these alleged assassins were anything but purely hypothetical people." *Wilson*, 2015 WI 48, ¶ 94.

Importantly, *Wilson* is not a case about planting evidence or framing but specifically stated that this type of theory only requires a showing of access to frame: "If the defense theory is that a third party framed the defendant, then the defense might show opportunity by demonstrating the third party's access to the items supposedly used in the frame-up." *Id.*, ¶68. The circuit court erroneously reasoned that pursuant to *Wilson*, Mr. Avery must prove Bobby had the "scientific knowledge to recognize the significance of each piece of forensic evidence supposedly planted by him, let alone establish that he had the skill to plant that evidence in a way that would stand up to scientific scrutiny by professional crime scene analysts." (1132:24). This is not the standard for showing a third party framed the defendant; evidence that the third party had access to the items used in the frame-up is sufficient pursuant to *Wilson*. The circuit court imposed upon Mr. Avery a standard for satisfying the opportunity element of *Denny* that has never before been applied in any Wisconsin case.

State v. Vollbrecht, 820 N.W.2d 443, 454 (Wis. App. 2012) is a case in which the evidence of connection and motive carried the strength of the opportunity evidence. The trial court granted a new trial, and the appellate court affirmed. Although the evidence only theoretically put the third party in the geographic area of the murder, the appellate court focused on the strength of the motive and direct connection evidence.

The facts of *Vollbrecht* are similar to those in Mr. Avery's case as both defendants were convicted based largely on circumstantial evidence. In *Vollbrecht*, the defendant was convicted of first-degree murder and sexual assault after a woman, shot in the back, was found in a wooded area, naked and hanging from a tree by tire chains. The defendant had been with her the day before she was reported missing. *Id.* ¶ 4. He told police that he was dropped off by her, but detectives spoke to several people who knew him and were in the area he claimed he was dropped off, and none saw him. Police interviewed a witness who identified him as being near the area where the victim's body was found the day she was reported missing. The defendant's hairdresser told police that he told her, 'I didn't do it and if I did, I don't remember doing it.' *Id.* ¶ 7. A witness who lived near where the victim was found testified that he woke up and heard shots around 2:50 a.m. and the sounds of a car dragging, which stopped and started up again 20 minutes later, which showed the victim was murdered before the time the defendant estimated he had parted ways with the victim. *Id.* ¶ 8.

Vollbrecht filed a § 974.06 motion based on newly discovered evidence of a third party convicted of a similar killing six weeks later, stemming from the discovery of reports that a search of the third party's residence uncovered a revolver and books

involving rape, chains and torture; statements to coworkers about tying girls up, abusing them, and getting rid of them; and statements to inmates that he liked to chain and burn women. *Id.* ¶ 11.

The State took issue with the opportunity prong of *Denny* being fulfilled, noting the third party lived 30 miles from where the victim was found and killed the other victim 30 miles away. *Id.* ¶ 26. It argued that opportunity evidence must be more than just the theoretical possibility of committing the crime. However, the appellate court rejected this and found, "The record reflects that the postconviction court's determination as to opportunity was made in light of the evidence presented as to motive and direct connection. We agree . . . that facts give meaning to other facts and that the significance of [the third party's] opportunity to commit the crime depends on his alleged motive and direct connection." *Id.* ¶ 26.

In Mr. Avery's case, the opportunity element has already been decided. According to the trial court, trial defense counsel established Bobby had the opportunity to commit Ms. Halbach's murder because of his presence on the property at the time Ms. Halbach was there. (660:1, 95-96).

The Sowinski evidence greatly strengthens Mr. Avery's evidence of Bobby's opportunity to commit Ms. Halbach's murder because it shows Bobby was in possession of her vehicle, where her murder likely occurred. He had access to Ms. Halbach's vehicle and all the evidence used to convict Mr. Avery of her murder. Correctly applying *Wilson*, Mr. Avery has not only shown Bobby's "opportunity" because of his proximity to the murder, but also because he had access to the items

used in the frame up. The defense theory of a third party's involvement will guide the relevance analysis of opportunity evidence in a *Denny* case. *Wilson*, ¶68, 222.

Rather than accepting this, the circuit court found that Bobby needed some kind of expert scientific knowledge to plant evidence (1132:24). There is no scientific knowledge necessary to know that planting someone's blood in the vehicle of a woman that went missing is incriminating. Common sense suffices to make this deduction. The circuit court did not explain what special skills it took to shoot Ms. Halbach in the head that Bobby lacked. All that was required was to pull the trigger. Bobby was a skilled deer hunter with a .22 rifle, who had obviously pulled many triggers. For planting blood, the only skill required is using a wet sponge to remove Mr. Avery's blood from his sink and dripping 1-2 milliliters into the RAV-4 and applying it to the dashboard with a household item such as a Qtip. Mr. Avery told law enforcement, in a recorded interview, that his finger, which had been cut open prior to October 31, 2005, re-bled on November 3, 2005 and dripped blood in his bathroom sink and on the bathroom floor. (179: 26). Mr. Avery told law enforcement and his trial defense counsel that as he was leaving his property on November 3, 2005, and exiting onto Highway 147, he observed taillights of a vehicle close to his trailer. (179:22). He told trial defense counsel he noticed the blood had been removed from his sink when he entered the bathroom early in the morning on November 4, 2005. (179:26).

The bullet fragment found on Mr. Avery's property simply had to be rubbed in Ms. Halbach's blood or on her skin cells, both of which her murderer had access to, before her body was burned. This Court determined, "the State did not argue that this

specific bullet entered Halbach's skull or killed her . . ." (1056:26, ¶ 45), and there were no bone fragments on the bullet. It is undisputed that there were bullets all over Mr. Avery's property from Rollie Johnson shooting gopher holes with his .22 rifle, as well as Jodi Stachowski firing it. This was the gun that fired the bullet found on Mr. Avery's garage floor with Ms. Halbach's DNA on it. (179:2).

No skill was required to plant the electronic devices in Mr. Avery's burn barrel. The fact that there were burn barrels at the Dassey property (four, one of which contained human bones) shows the Dasseys, including Bobby, were proficient in burning material in their burn barrels. Part of the circuit court's certainty of Mr. Avery's guilt is based on another factual error: its belief that all of Ms. Halbach's remains were found in the Avery burn barrel. (1132:9). They were found in a Dassey burn barrel. (600:231-33). Dr. Eisenberg claimed that when she opened the container of bones from the Dassey burn barrel, she got a "waft of flammable liquid or fluid" but did not smell burned rubber from tires, which the State claimed was the accelerant Mr. Avery used. (601:6–7). This suggests Ms. Halbach's body was burned in a Dassey burn barrel and dumped in Mr. Avery's fire pit. Common sense suggests that Mr. Avery would not have been planting evidence to incriminate himself.

The circuit court erroneously stated that Mr. Avery argued that Bobby planted the key to the RAV-4 in Mr. Avery's trailer between November 3 and November 5. (1132:24). There was no such argument. Bobby would have had the key when he planted the vehicle on November 5 because it was locked when it was discovered, so whoever left it on the Avery property necessarily had the key and locked it. (590:224).

Bobby had access to Mr. Avery's unlocked trailer from early Saturday morning, November 5, until shortly before noon when the vehicle was located and the Avery property was secured by law enforcement. Mr. Avery and his mother left for their Crivitz cottage early Saturday morning. (179:28, ¶30).

Per the circuit court criteria, Mr. Avery was even less qualified to commit the murder than Bobby. He was less educated than Bobby, never having graduated from high school. He was less skilled because he never held a job because of his wrongful conviction, whereas Bobby was employed as a third shift worker at a furniture factory. During all the years Mr. Avery was incarcerated for his first wrongful conviction, Bobby had been honing his skills in stalking, hunting, killing, burning and dismembering game.

Further, the circuit court erroneously presupposed the forensic evidence against Mr. Avery stood up to scientific scrutiny in Mr. Avery's trial. Mr. Avery's defense team never presented the required experts to attack it. Mr. Avery, in his second post-conviction motion, presented voluminous evidence from numerous experts that the forensic evidence used to convict Mr. Avery was vulnerable to being discredited had the defense presented experts, such as DNA, trace, blood spatter, fire, forensic pathologists and ballistics experts. (178-182). This Court determined, "Certainly, these conclusions tend to support Avery's general theory that he was framed and their presentation may have been useful at trial" but concluded that Mr. Avery's experts' evidence failed to show "how its introduction at trial could reasonably have led to a different outcome." (1056:18, ¶27).

Mr. Avery previously presented an affidavit stating that he noticed his toothbrush was missing in the law enforcement photos taken from the bathroom in his trailer. (179:2). In regard to the hood latch swab, Mr. Avery is not abandoning his theory that the illegally collected groin swabs taken from him on November 9 after his arrest on a gun charge were substituted for the hood latch swabs when they were delivered to the Wisconsin Crime laboratory by Investigator Weigert who signed Deputy Hawkins name instead of his own. However, for purposes of demonstrating Bobby had the skill to plant DNA on both the hood latch and Ms. Halbach's key, Mr. Avery asserts that Mr. Avery's toothbrush could have been rubbed on both. Bobby had access to Mr. Avery's trailer where his toothbrush resided before disappearing. (179:23, 28, ¶¶ 8, 30). Any teenager watching an episode of Forensic Files could learn how to plant DNA. Certainly, the DNA searches on the Dassey computer bolster the assertion that DNA information was readily available.

4. Direct Connection Element of *Denny*

No bright lines can be drawn as to what constitutes a third party's direct connection to a crime. Rather, circuit courts must assess the proffered evidence ***in conjunction*** with all other evidence to determine whether, under the totality of the circumstances, the evidence ***suggests*** that a third-party perpetrator actually committed the crime. *Wilson*, 2015 WI 48, ¶71 (emphasis added).

In its opinion, the circuit court argued, "The Sowinski affidavit, taken as true for the purpose of this motion, directly links Bobby to possession of the victim's vehicle. However, possession of the vehicle does not directly link Bobby to the

homicide itself." (1132:26). Then, it highlighted, "Mr. Sowinski's affidavit does not mention seeing Bobby with the key to the victim's car" (1132:26), ignoring the fact that when her vehicle was found by law enforcement and volunteer searchers, it was locked. (590:224). Clearly, Bobby had the key to the vehicle.

In *State v. Williams*, 2009 WI App 95, 320 Wis. 2d 484, 769 N.W.2d 878,[4] the appellate court found a direct connection between the perpetrator of the murder and the fact that he had possession of the victim's vehicle several days later, explaining:

> [f]rom all of these circumstances, ***under a common sense, non-technical approach***, a reasonable police officer would draw the reasonable inference that both Williams and [Armstead] had been in possession of Brown's stolen car. There was probable cause to believe that both Williams and [Armstead] probably had committed a crime involving the murder victim's stolen car.

Id. (emphasis added). Applying this common-sense, non-technical approach, the Sowinski evidence provides the direct connection (that is, Bobby being witnessed in possession of Ms. Halbach's vehicle) to Bobby having committed the murder of Ms. Halbach and planting the evidence to frame Mr. Avery.

Rather than recognizing the significance of the evidence of Bobby having possession of, and thus access to Ms. Halbach's vehicle, the circuit court required Mr. Sowinski to witness Bobby in possession of the electronics. However, a reasonable inference can easily be made that because they had not yet been found by law enforcement when Bobby was seen with Ms. Halbach's vehicle, they were still inside the vehicle and he planted them in Mr. Avery's burn barrel.

[4] Mr. Avery realizes this case existed two months before it was found to not have precedential value. However, it is noteworthy for employing a common-sense approach that possession of a murder victim's stolen car means the thieves probably committed the murder.

In *State v. Knapp*, 2003 WI 121, 265 Wis. 2d 278, 666 N.W.2d 881 *vacated on other grounds*, 542 U.S. 952, 124 S. Ct. 2932, 159 L. Ed. 2d 835 (2004), the Wisconsin Supreme Court found hearsay evidence implicating a potential third party in a murder was properly admitted because it established the requisite "direct connection" pursuant to *Denny*. In *Knapp*, the defendant was the last person seen with the victim. *Id.*, ¶ 11. During trial, the defendant sought to introduce evidence of potential suspects including the victim's husband, Brunner, and the woman he was having an affair with, Mass. Specifically, the defense sought to introduce the testimony of a witness, Farell, who was close friends with a man, Borchardt, whom Mass had lived with at the time but had since passed. Through Farell, the defense sought to introduce statements Borchardt made about Mass's behavior and Brunner's truck at the Mass's residence after the murder. The Wisconsin Supreme Court found that the third part of the *Denny* analysis, the "connection," was at issue and found:

> The evidence at issue . . . connects the third parties, Brunner and Maas, to the crime in a number of ways: (1) It establishes that Brunner lied to investigators about his whereabouts at the time of the murder; (2) Maas was with Brunner at the time his wife was murdered, and Maas was observed a short time after Mrs. Brunner's death carrying a paper bag and getting into Brunner's waiting truck; and (3) most importantly, the evidence puts Brunner in Watertown in relative proximity to the location where the homicide occurred and near the time of the murder.

Id. ¶¶182-183. Based upon these three inferences from the hearsay evidence, the Court held, "the circuit court correctly determined that the evidence established Brunner's motive, opportunity and connection to the crime." *Id.*

If the same reasoning were applied to Mr. Avery's case, the circuit court would have found far stronger evidence of a direct connection to allow the defense to present

Bobby as a potential third party suspect pursuant to *Denny*. At bare minimum, the Sowinski evidence connects Bobby to Ms. Halbach's murder in all the same ways the hearsay evidence did to the third party in *Knapp*: (1) It establishes Bobby lied to investigators about his whereabouts during times relevant to Ms. Halbach's murder (noting, of course, the exact time of Ms. Halbach's murder is unknown); (2) Like Mass who was observed carrying a paper bag after the murder, which the Wisconsin Supreme Court found material, Bobby was seen with the victim's vehicle after Ms. Halbach's murder; and (3) the evidence certainly put Bobby in close proximity to where the homicide is alleged to have occurred, and that, combined with evidence showing that Bobby, according to his own testimony, was one of last people to see Ms. Halbach alive, would have satisfied *Denny* had the circuit court applied only the reasoning in *Knapp*.

III. Whether the circuit court erroneously exercised its discretion in denying Mr. Avery an evidentiary hearing because its factual findings are unsupported by the evidence?

This Court will find an erroneous exercise of discretion if the circuit court's factual findings are unsupported by the evidence. *Edmunds*, 2008 WI App 33, ¶1, 308 Wis. 2d 374, 377. The circuit court's egregious factual errors should result in a reversal of its decision.

In order to dismiss Mr. Avery's third-party motive evidence, the circuit court argued, "Only a small number of searches were conducted prior to the murder of Ms. Halbach. No physical evidence directly linking Brian Dassey to the homicide was found in the house." (1132:20). The circuit court is incorrect about there being a "small"

number of searches prior to the murder. For example, on September 18, 2005, there were 75 searches of violent, child, or underage pornography performed on the Dassey computer, obviously prior to Ms. Halbach's murder. (1104:125). Further, the circuit court's reference to Brian Dassey is perplexing and confusing. Brian was never linked to the murder in any way.

In order to dismiss Mr. Avery's direct link between Bobby and Ms. Halbach's murder, the circuit court erroneously found that Ms. Halbach was murdered on October 31st but there is no proof of when Ms. Halbach was murdered up until her remains were found on November 7th. (1132:25).

The circuit court erroneously believed that Ms. Halbach's bones were found in Mr. Avery's burn barrel (1132:9). No bones were found in Mr. Avery's burn barrel but some of Ms. Halbach's larger bones were found in the Dassey burn barrel (600:231-33). In order to dismiss Mr. Avery's claim that Bobby had the opportunity to frame him, the circuit court relied upon a belief that every bone from Ms. Halbach's body was found in Mr. Avery's burn pit, and therefore, Bobby could not have planted the bones in Avery's burn pit. (1132:23-24). Once again this is a false fact because it is undisputed that 40-60% of the bones comprising the "complete skeleton" of Ms. Halbach were never recovered (600:225-26). The jury was unconvinced that Ms. Halbach was burned by Mr. Avery in his burn pit because he was acquitted of the mutilation of Ms. Halbach's body (618:3).

Further, the circuit court relied upon Brendan Dassey's confession and its belief that Brendan was forensically linked to Ms. Halbach's murder to reject Mr. Avery's

theory that Bobby framed him. (1132:24, 27). Brendan's confession was not introduced into Mr. Avery's trial, and it is wholly improper for the circuit court to have factored the alleged confession into its analysis. Furthermore, Brendan was not forensically linked to the crime.

Even if the circuit court's numerous factual errors were correct and Brendan Dassey was "directly linked by forensic evidence to this murder" and his "confession" was admissible evidence against Mr. Avery, this still does not allow the circuit court to dismiss the powerful evidence of a third party's direct connection to the murder. Overwhelming evidence against the defendant may not serve as the basis for excluding evidence of a third party's opportunity or direct connection to the crime. *Wilson*, 2015 WI 48, ¶69. "By evaluating the strength of only one party's evidence, no logical conclusion can be reached regarding the strength of contrary evidence offered by the other side to rebut or cast doubt." *Holmes v. South Carolina*, 547 U.S. 319, 321 (2006). The circuit court has ignored the strength of Mr. Avery's evidence and reached an illogical conclusion which favors the State by misapplying the law and misinterpreting the facts.

CONCLUSION

For the reasons stated herein, Mr. Avery respectfully requests that this Court grant him one of the following alternative remedies: 1) reverse the Orders Denying Postconviction Relief and grant an evidentiary hearing; 2) reverse the judgments of conviction and the orders denying Postconviction Relief and remand for a new trial; 3) grant any other relief this Court deems appropriate.

Dates this 13th day of February, 2024.

Respectfully submitted,

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FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Sec. 809.19 (8) (b), (bm) and (c) for a brief. The length of this brief is 10,841 words.

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CERTIFICATE OF COMPLIANCE WITH RULE 809.19(8g)(B)

I further certify that filed with this brief is an appendix that complies with Sec. 809.19 (2) (a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinions of the circuit court; (3) a copy of any unpublished opinion cited under Sec. 809.23 (3) (a) or (b); and (4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using one or more initials or other appropriate pseudonym or designation instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Dated this 13th day of February, 2024.

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