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STATE OF WISCONSIN

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

DISTRICT II

Case No. 2023AP1556

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

STEVEN A. AVERY,

Defendant-Appellant.

APPEAL FROM AN ORDER DENYING A WIS. STAT. § 974.06 MOTION ENTERED IN THE MANITOWOC COUNTY CIRCUIT COURT, THE HONORABLE ANGELA W. SUTKIEWICZ, PRESIDING

BRIEF OF THE PLAINTIFF-RESPONDENT

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ISSUE PRESENTED[1]

Did the circuit court properly exercise its discretion to deny Defendant-Appellant Steven A. Avery's third Wis. Stat. § 974.06 motion without holding an evidentiary hearing because his claims of newly discovered evidence were insufficiently pled and refuted by the record?

The circuit court issued a thorough opinion fully explaining the numerous failures in Avery's motion to plead facts that would meet the legal elements of his newly discovered evidence claim and show that they weren't otherwise defeated by the existing record. It properly exercised its discretion in denying the motion without a hearing.

This Court should affirm.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Neither oral argument nor publication are appropriate. This case deals with application of well-settled law to the facts, which are adequately addressed on briefs.

INTRODUCTION

Avery has once again misunderstood the pleading standards and the scope of this Court's review. He simply attempts to convince this Court that his latest defense theory pinning the murder on Bobby Dassey has merit, and in his appellate brief attempts to cure the pleading failures in his

[1] Below, Avery alleged that the State violated *Brady v. Maryland*, 373 U.S. 83 (1963). (R. 1065:31–46.) On appeal, he mentions that he "raised *Brady* claims," but he makes no argument on them on appeal. (Avery's Br. 5, 9–11, 17.) He has thus abandoned them. *A.O. Smith Corp. v. Allstate Ins. Cos.*, 222 Wis. 2d 475, 493, 588 N.W.2d 285 (Ct. App. 1998). The State will not discuss them further.

Wis. Stat. § 974.06 motion identified by the circuit court. Accordingly, Avery says much about why he believes this defense is viable, but almost nothing about the sufficiency of his pleading below.

The only issue before this Court is whether Avery pled sufficient, nonconclusory facts within the four corners of his third section 974.06 motion to entitle him to a hearing. The circuit court correctly concluded he did not meet this burden. Avery's motion again contained nothing more than conjecture and unsupported speculation, and even assuming any of it were true, it did not establish what he claimed. He failed to show that he could meet the *Denny*[2] test as to Bobby Dassey, and he failed to even try to explain how there was a reasonable probability of a different result at trial if he offered it. As this Court explained previously, "key to any § 974.06 motion are sufficient, nonconclusory showings . . . why the claim has facial merit. These requirements are not optional and cannot be met by broad conclusions or by misstating evidence."[3] Broad conclusions and misstatements of the evidence are again all Avery provided, though. The circuit court appropriately exercised its discretion in denying Avery's motion without a hearing.

STATEMENT OF THE CASE

This Court has reviewed the underlying facts of this case multiple times, so the State will not relay them in detail here.[4] (R. 1056:2–4.) The State instead provides this overview of Avery's postconviction litigation.

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

[3] (R. 1056:47.)

[4] Wis. Stat. § (Rule) 809.19(3)(a)2.

The State charged Avery with first-degree intentional homicide for the 2005 premeditated murder of Teresa Halbach. (R. 1056:2–3.) The case proceeded to a five-week jury trial at which Avery's defense was that law enforcement was biased against him and planted the evidence to implicate him, which the "real killer" exploited to also plant evidence on the property. (R. 1056:3.) The jury found Avery guilty, and he was sentenced to life in prison. (R. 1056:3–4.)

Avery moved in 2009 for a new trial on the basis of structural trial error, erroneous exclusion of Avery's attempted *Denny* defense implicating several alternative perpetrators—including Bobby Dassey—and ineffective assistance of trial counsel. (R. 1056:4; 634; 636:10–12.) The circuit court held a hearing and denied the motion. (R. 651; 660.) Avery appealed, and this Court affirmed. (R. 696.)

In 2013, Avery, pro se, filed a Wis. Stat. § 974.06 motion again requesting a new trial. (R. 702.) The circuit court appointed counsel to investigate some of Avery's allegations. (R. 18.) After counsel informed the court that he could find nothing substantiating them, Avery's motion was denied, and Avery appealed. (R. 56; 68; 78.) That appeal was voluntarily dismissed after Avery filed a motion in the circuit court to conduct scientific testing on some of the physical evidence, and later filed a new Wis. Stat. § 974.06 motion in June of 2017 raising a host of new claims. (R. 151; 152; 161; 178; 218; 220; 224.) There, Avery stated that "only one person meets the requirements of *Denny* as a third party suspect," and that was Halbach's ex-boyfriend. (R. 178:122.)

The circuit court denied the motion, and after five further motions seeking to vacate that order and adding new claims to the original motion—including a retooled argument that he could establish a third-party perpetrator defense that Dassey was the plausible killer—were all rejected, Avery appealed. (R. 226; 227; 284; 614; 963:21–26; 1000; 1056:4.) This Court affirmed, finding the vast majority of Avery's

claims procedurally barred and those that were not barred insufficiently pled to warrant a hearing. (R. 1056:4–48.)

Roughly a year later, Avery filed yet another Wis. Stat. § 974.06 motion. (R. 1065.) This time, he claimed that a purported new witness, Thomas Sowinski, made allegations amounting to either newly discovered evidence or a *Brady* violation. (R. 1065.) Specifically, he claimed for the third time he could meet the *Denny* test as to Bobby Dassey, based on Sowinski's averments that he saw two individuals pushing a vehicle similar to the victim's car down Avery Road on November 5, 2005. (R. 1065:13–44.) After the State responded, Avery amended his motion multiple times, including filing an affidavit from another supposed witness, Thomas Buresh, claiming he observed Bobby Dassey with a car similar to the victim's on November 5, 2005. (R. 1094; 1100; 1101; 1109; 1120.)

The circuit court denied the motion. (R. 1132.) It found that Sowinski's information was discovered after conviction and that Avery was not negligent in seeking it, but that Avery failed to plead facts establishing its materiality. (R. 1132:7–8, 18.) To meet that burden, Avery had to show that Sowinski's information would allow him to meet the *Denny* test and what Avery alleged failed to meet any of the prongs, thus he necessarily could not show a reasonable probability of a different result at a new trial. (R. 1132:18–27.) It found Buresh's affidavit similarly lacking in facts that would link Bobby Dassey to the perpetration of the crime and also insufficiently accompanied by facts showing that Avery was not negligent in seeking or investigating it. (R. 1132:29–30.) Avery appeals.

ARGUMENT

I. Avery failed to plead sufficient facts in his motion that would meet the newly discovered evidence standard even if true.

A. Standard of Review

A circuit court may deny a postconviction motion without a hearing if the facts alleged "do not entitle the movant to relief [or] if one or more key factual allegations in the motion are conclusory." *State v. Allen*, 2004 WI 106, ¶ 12, 274 Wis. 2d 568, 682 N.W.2d 433. To sufficiently plead a postconviction motion, the defendant must present, within the four corners of the document, the "who, what, where, when, why, and how" that would entitle him to the relief he seeks. *Id.* ¶ 23. Mere speculation presented as fact is a conclusory allegation and insufficient. *See, e.g.*, *State v. Burton*, 2013 WI 61, ¶ 69, 349 Wis. 2d 1, 832 N.W.2d 611. When evaluating the sufficiency of a pleading, this Court reviews "only the allegations contained in the four corners of [the defendant's] postconviction motion, and not any additional allegations that are contained in [the defendant's] brief." *Allen*, 274 Wis. 2d 568, ¶ 27.

A sufficiently pleaded motion, however, is not enough to require a hearing. "[A]n evidentiary hearing is not mandatory if the record as a whole conclusively demonstrates that [the] defendant is not entitled to relief, even if the motion alleges sufficient nonconclusory facts." *State v. Ruffin*, 2022 WI 34, ¶ 37, 401 Wis. 2d 619, 974 N.W.2d 432 (citation omitted).

"This court will uphold the circuit court's findings of fact unless they are clearly erroneous." *State v. Thiel*, 2003 WI 111, ¶ 21, 264 Wis. 2d 571, 665 N.W.2d 305. "'[W]hether a defendant's [postconviction motion] "on its face alleges facts which would entitle the defendant to relief" and whether the record conclusively demonstrates that the defendant is entitled to no relief' are questions of law that [an appellate

court] review[s] de novo." *State v. Sulla*, 2016 WI 46, ¶ 23, 369 Wis. 2d 225, 880 N.W.2d 659 (first alteration in original) (citation omitted).

B. The circuit court did not err in evaluating the materiality prong of the newly discovered evidence test through the lens of Avery's attempt to establish Bobby Dassey as a third-party perpetrator.

Avery begins with another argument based on an unsupported conclusion he posits as fact. (Avery's Br. 12–13.) He claims "[t]he circuit court improperly found the materiality of Mr. Avery's newly discovered evidence is exclusively contingent upon its satisfaction of the *Denny* test," but instead should have considered whether Sowinski's and Buresh's affidavits were independently material, arguing they rendered the forensic evidence introduced against Avery at trial unreliable because Bobby was a third-party perpetrator suspect. (Avery's Br. 12–13.) He then claims "[i]f a third-party suspect had possession of Ms. Halbach's vehicle, numerous areas of reasonable doubt arise." (Avery's Br. 14.) There are two problems with this argument.

First, it is circular. Avery assumes the conclusion he has to prove—that he meets the *Denny* test as to Bobby—to support his claim that "a third-party suspect had possession of Ms. Halbach's vehicle," in turn making Sowinski's information material. (Avery's Br. 12–14.) But that assumes he met the *Denny* test in the first place. Without first establishing Bobby as a potential third-party perpetrator, Sowinski's and Buresh's claiming they saw Bobby with a car similar to the victim's five days later is irrelevant and meaningless.

Sowinski's information cannot be material if untethered from a viable third-party perpetrator defense claiming Bobby killed the victim, because there is zero probability that a different result would be reached at trial based on arguments that Bobby could have planted the forensic evidence simply because Sowinski saw him pushing a car down the road. Unless he could argue that Bobby killed the victim, Avery would have to make a context-less allegation that Bobby planted all of the evidence against him with no explanation how or why Bobby would even know the victim was dead or where her car was located, let alone any viable explanation why Bobby would be sneaking around placing her items and remains on his uncle's property and mopping up Avery's blood and, nonsensically, his touch DNA, to frame him. And Avery still conveniently fails to account for the bullet with Ms. Halbach's DNA on it that was shot from the gun in Avery's possession and found in Avery's garage. This unbelievable proposition would not raise any doubt about Avery's guilt with any reasonable juror. So, the circuit court properly recognized that Sowinski's allegations are not materially independent from Avery's attempt to meet *Denny*. The only issue here is thus whether Avery provided sufficient facts in his motion to show he could establish Bobby as a possible third-party perpetrator.

Second, Avery's argument on this is based purely on conjecture, with none of the necessary facts supplied that would establish what Avery concludes. (Avery's Br. 13; R. 1065:38.) Again, Bobby was not "the State's primary eyewitness" no matter how many times Avery declares it. (Avery's Br. 13–14; R. 1065:38.) Bobby established only that Ms. Halbach arrived at the Avery Salvage Yard on October 31 and that he saw Ms. Halbach walking toward Avery's trailer before she disappeared. (R. 581:35–66, 89–99; 591:7–45.) The State called over 14 citizens, 16 law enforcement witnesses and 12 forensic scientists who explained the enormous

amount of evidence pointing directly to Avery as the killer, and they were all far more material than Bobby—over half of Bobby's direct testimony was just identifying photos of the property. (R. 581:33–99.) Avery fails to explain how attempting to impeach Bobby's testimony about seeing Ms. Halbach arrive on October 31 with Sowinski's purported evidence would have even been achievable, let alone would have turned the tide at trial. (Avery's Br. 13–14.)

Avery's affidavits establish only that Sowinski and Buresh believe they saw Bobby and some other person with a RAV-4 on November 5, 2005. As the circuit court correctly observed, Avery then speculates this means Bobby must have been in possession of Ms. Halbach's RAV-4 five days after the murder and therefore he must be the killer, and backfills with speculation about the record from that perspective. (R. 1132:25; Avery's Br. 13–14.) The circuit court properly rejected this unfounded speculation as insufficiently pled.

C. Avery's newly discovered evidence claim was multilayered, requiring application of both *Edmunds* and *Denny*.

"To set aside a judgment of conviction based on newly discovered evidence, the evidence must be sufficient to establish that the defendant's conviction resulted in a 'manifest injustice.'" *State v. Avery*, 2013 WI 13, ¶ 25, 345 Wis. 2d 407, 826 N.W.2d 60 (citation omitted). When seeking a new trial based on the allegation of newly discovered evidence, "a defendant must establish by clear and convincing evidence 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.'" *State v. Edmunds*, 2008 WI App 33, ¶ 13, 308 Wis. 2d 374, 746 N.W.2d 590 (citation omitted). "Once those four criteria have been established, the court looks to 'whether a reasonable

probability exists that a different result would be reached in a [new] trial.'" *Id.* (citation omitted).

Here, Avery claimed that Sowinski's and apparently Buresh's later information[5] would permit him to assert a third-party perpetrator defense claiming Bobby Dassey committed the murder. (R. 1065:13–44.) To establish that it is material, then, he must have provided sufficient facts to show that it would permit him to meet the legitimate tendency test articulated in *Denny* and clarified in *State v. Wilson*, 2015 WI 48, ¶ 3, 362 Wis. 2d 193, 864 N.W.2d 52. And to meet the fifth prong of the newly discovered evidence test, he had to provide sufficient facts in his motion to show a reasonable probability that a jury presented with his third-party perpetrator defense would have had a reasonable doubt about his guilt.[6] Avery's motion failed to provide sufficient facts that show he could establish either,[7] thus the circuit court properly exercised its discretion in denying it.

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[5] Avery makes no argument related to Buresh here and made none in the circuit court; he merely filed Buresh's belated affidavit in the circuit court May 26, 2023. (R. 1065; 1120; Avery's Br. 5–42.)

[6] Avery's claim that this Court is reviewing his constitutional right to present a defense as a matter of constitutional fact is wrong. (Avery's Br. 18.) This Court is reviewing only the sufficiency of Avery's pleading. *State v. Sholar*, 2018 WI 53, ¶ 51, 381 Wis. 2d 560, 912 N.W.2d 89.

[7] The circuit court did not find "that Mr. Avery satisfied all the elements required to admit his newly discovered evidence . . . but for the materiality requirement". (Avery's Br. 12.) It did not reach the fourth or fifth prongs of the test because it found that Avery could not meet the materiality requirement. (R. 1132:8–31.)

1. To require a hearing on his *Denny* claim, Avery had to provide sufficient facts to establish the third party had motive, opportunity, and that evidence directly connects them to the perpetration of the crime.

"[T]o present evidence that a third party committed the crime for which the defendant is being tried, the defendant must show 'a legitimate tendency' that the third party committed the crime; in other words, that the third party had motive, opportunity, and a direct connection to the crime." *Wilson*, 362 Wis. 2d 193, ¶ 3 (citation omitted). A defendant's offer of proof on these three prongs is insufficient if it merely establishes a bare possibility that the third party could have been the perpetrator. *Id.* ¶ 83. Rather, "[i]t is the defendant's responsibility to show a *legitimate* tendency that the alleged third-party perpetrator committed the crime." *Id.* ¶ 59.

2. Avery failed to provide any facts that would establish that Bobby Dassey had a motive for the murder.

"'Motive' refers to a person's reason for doing something." *Wilson*, 362 Wis. 2d 193, ¶ 62 (citation omitted). Avery claimed that he pled sufficient facts to establish that Bobby Dassey had a motive to kill the victim because pornography and some gory images were found on the communal computer in the Dassey home.[8] (Avery's Br. 21.) He then claims that the circuit court erroneously required each piece of his proffered evidence to meet all three prongs. (Avery's Br. 21.) The record plainly shows that the circuit court did not do that—it examined the evidence he provided for each prong under the test for each prong (R. 1132:18–31)—

[8] Avery's claim that this Court "pointed out in its opinion previously" that *Denny* evidence "must be viewed in the aggregate" is false. (Avery's Br. 21 (citing R. 1056:41 n.26).)

and it reasonably concluded that Avery did not supply adequate facts to establish that Bobby plausibly had a motive to commit this crime.

Avery again claimed that the pornography found on the Dassey home computer established Bobby "could have" had a sexual motive to commit this murder. (Avery's Br. 21.) The circuit court found that he did not provide any facts to support that speculation. (R. 1132:18.) This is because he provided nothing that would establish: (1) Bobby conducted the searches for the pornography found on the Dassey communal computer or that he was even at home at the time the searches were conducted (R. 1132:18–19); (2) the searches were generic and broad and did not closely resemble anything about this crime (R. 1132:19–20); and (3) the two psychological opinions he submitted were based on the assumption that Bobby conducted the searches which was supported by no facts of record, and were produced without any forensic or psychological examination of Bobby himself (R. 1132:18–20). Those findings were all supported by the record and not clearly erroneous, meaning the circuit court's legal conclusion that Avery did not plead sufficient facts that could establish Bobby had a motive to commit this murder was sound as well.

The record shows that Avery once again failed to supply any facts supporting his contention that Bobby conducted these searches. (R. 1065:20–22.) As this Court noted previously, the mere fact that Bobby could have been at home when some of these searches took place fails to establish anything about who actually conducted them, and Avery cannot rely on his computer expert's or anyone else's speculation on what Bobby's schedule might have been on those days. (R. 1056:41 n.25.) But speculation based on the timestamps from a fraction of the searches and some generic statements about the home's occupants' usual schedules were once again all Avery provided, with no actual facts about

Bobby's whereabouts on the days and times the searches were conducted, nor anyone else's who may have had access to the home. (R. 1065:20–22.) As this Court already explained, the existence of the searches is not a fact that would establish Bobby was even in the house at those times, let alone that he was the person using the computer or accessing these images, and Avery's broad generalizations about what the other Dassey family members' typical schedules were does not suffice, either. (R. 1065:20–22; 1056:41 n.25.)

Avery's own submitted exhibit showed that there was no evidentiary support for his allegation that Bobby had a motive to commit this crime. (R. 1074:62–66.) The bulk of the searches for pornography or gory material that Avery relied on to allege motive had no relation to this crime and either occurred on a weekend when anyone could have accessed the computer, or occurred after 3:45 p.m. on a weekday when Blaine indisputably also had access to it. (R. 1065:20–21; 1074:62–66.) Nor did Avery account for the fact that Mishicot School District had spring break from March 24, 2005, to March 30, 2005, meaning Blaine and Brendan and anyone they invited over also could have been in the home on weekdays during that time, and from April 7, 2006, to April 18, 2006, meaning Blaine at least also had access during those weekdays.[9]

Of the 128 searches listed, only 28 of them occurred between 7:00 a.m. and 3:45 p.m. on a weekday. (R. 1065:20–21; 1074:62–66.) Moreover, of those 28 searches, only 3 of them occurred before Ms. Halbach's murder—two at 8:14 a.m. on Tuesday, September 13, 2005, and one at 7:54 a.m. on Thursday, September 15, 2005. (R. 1074:62–66.) Even accepting Avery's unsupported speculation that Bobby was

[9] Academic calendars for all Wisconsin school districts for the dates in question can be found at https://dpi.wi.gov/cst/school-directory/calendar (last visited April 12, 2024).

the only person who could have conducted searches during that timeframe, Avery failed to explain how Bobby Dassey's only possibly having searched for pornography a mere three times before Ms. Halbach's murder is sufficient to show he was a voracious violent pornography consumer on October 31, 2005, who was thus spontaneously motivated to abduct and kill a stranger on sight that day because of it. (R. 1065:17–24.)

Avery now claims this was an erroneous finding by the circuit court because several searches took place on September 18, 2005, which is uncontested. (Avery's Br. 40–41.) That lends no support to his contention that Bobby was the only person who could have conducted them, however, because September 18, 2005, was a Sunday—the entire family and any guests they had would have been available to perform them. Moreover, to support this contention, Avery points only to his inadmissible "police procedure" expert, Gregg McCrary's, belatedly-offered, unqualified opinion that Bobby made the September 18, 2005 searches and that they were evidence of sexual paraphilia. (Avery's Br. 40–41; R. 1104:125.) Avery offered not one shred of factual support for McCrary's statement nor anything showing McCrary has the relevant credentials to offer it; indeed, he still fails to point this Court to any evidence he submitted to support that statement. (Avery's Br. 40–41.)

Avery failed to support his allegations in his motion with sufficient factual particularity to establish anything related to Bobby Dassey, or even to a crime. There were no timestamps given for the searches Avery pointed to in Detective Velie's report and no explanation of how any of them are relevant to an individual's motive for this murder. (R. 1065:17–24; 1074:50.) Most of them are generic and mundane—the mere fact that someone searched for "[n]ews," "[b]ody," "[j]ournal" and "[c]ement" doesn't show anything similar or related to this crime. (R. 1074:50.) Avery failed to provide any facts that would connect even the actual

pornography searches to anything that occurred here—someone searching for "ghetto sluts" has no relevance to this crime whatsoever. (R. 1065:17–24; 228:105–06.) As this Court previously observed, despite Avery's insistence that this pornography is similar to what happened to Ms. Halbach in this case, "there is no support for this conclusion in the evidence on record." (R. 1056:41 n.25; 228:105–06.) There remains none.

Avery once again attempts to rest this theory on *Dressler v. McCaughtry*, 238 F.3d 908 (7th Cir. 2001), as if it held that any and all pornography consumption establishes a motive for murder regardless of circumstances. (Avery's Br. 25–26.) *Dressler* held no such thing and is not remotely on point (and as a federal habeas corpus case it is not law in Wisconsin). The State never argued nor did the court "adopt" that *Dressler* held "that the pornographic images must be a mirror image of the crime, or they have no relevance." (Avery's Br. 25.) It correctly determined that to be relevant the pornography must have some identifiable similarity to the crime, and the facts of the underlying Wisconsin case in *Dressler* are a vast departure from the facts here. (R. 1132:19–20.) There, the male victim was last seen approaching Dressler's house for political campaign activity; he was assaulted and murdered in an extremely specific and particularly brutal way that included binding, mutilation, and dismemberment; and police found myriad weapons and restraints, along with pictures, magazines, and videos depicting similarly murdered and mutilated victims and homosexual pornography in Dressler's home. *Dressler*, 238 F.3d at 909–11. These items were admitted as other acts evidence of Dressler's intent, motive, and plan to assault and kill the victim in that particular manner. *Id.* at 914.

But in that case: (1) there was no dispute that the materials were Dressler's, unlike in this case where numerous people could have been responsible for these searches and Avery has not provided any facts showing otherwise; and (2) the materials found in Dressler's home depicted specific and unusual things that very closely mirrored the brutal crime. *Dressler*, 238 F.3d at 914. Here, however, the searches Avery attempts to rely on vary widely from the obscene to the mundane with no relation to how Ms. Halbach's murder occurred—indeed, Avery failed to point to a single image or search for someone who was shot and the body burned nor anything that would suggest that these widely varying types of pornography had any similarity whatsoever to Ms. Halbach's murder, and he relied on such irrelevant and off-point searches as "MySpace," "[t]ires," "race car accidents," "ford tempo car accident," "diseased girls" and "big woman naked." (R. 1074:50, 62–66.)

Additionally, in *Dressler* there was no dispute that Dressler owned all of the materials *before* the murder occurred, and they were deemed relevant to show that he was both homosexual and had a fascination with mutilation and dismemberment and thus formed a motive, intent, and plan to act out his violent sexual fantasies in this particular manner by the time the victim arrived at Dressler's home. *Dressler*, 238 F.3d at 914. Here, the material on which Avery relied and actually provided some timestamps for had no similarity or relation to how Ms. Halbach's murder occurred, and the vast majority were not made until months *after* the murder. (R. 1074:62–66.) Avery fails to explain how a motive to fulfill a murderous porn-fueled sexual fantasy can be formed (or proven) by someone not seeking or viewing any of this non-similar material until months after the murder had already occurred.

To the extent that *Dressler* is relevant at all, it shows that Avery did not meet his pleading burden because a comparison to it shows these computer contents would not be admissible to prove motive if Bobby were the defendant. *See Wilson*, 362 Wis. 2d 193, ¶ 63. Other acts evidence is admissible if it meets the familiar three-part test from *State v. Sullivan*, 216 Wis. 2d 768, 772, 576 N.W.2d 30 (1998), requiring it to be offered for permissible purpose, relevant, and that its probative value is not outweighed by unfair prejudice. The latter two prongs are not met.

Motive is a permissible purpose for introducing other acts evidence. *Id.* But as explained, none of what Avery presented is relevant to show motive to commit this particular crime. *State v. Normington*, 2008 WI App 8, ¶¶ 22–26, 39–40, 306 Wis. 2d 727, 744 N.W.2d 867. This Court already determined that Avery's contention that these images are similar to the murder of Ms. Halbach was false. (R. 1056:41 n.25.) The pornography and videos of murder and mutilation deemed relevant in *Dressler* were indisputably Dressler's, they closely tracked what happened to the victim in that case, and were collected by the defendant long before the murder occurred. *See Dressler*, 238 F.3d at 910–14. Nothing about an unidentified person searching a communal computer for various types of pornography and pictures of race car accidents or drowning victims months after Ms. Halbach's murder occurred shows an interest in anything similar to this crime, nor makes it any more or less likely that Bobby Dassey (or anyone else, for that matter) had a motive to shoot and kill Ms. Halbach in October 2005. The computer contents are simply not relevant. These searches and images would be excluded as other acts evidence because, without some closer tie to the events of October 31, 2005, their prejudicial value would greatly outweigh whatever minimal relevance they might have and influence the jury to convict because they

believed whomever conducted the distasteful searches must be a bad person. *Sullivan*, 216 Wis. 2d at 783.

Avery's claim that the circuit court "ignored Mr. Avery's evidence of Dassey computer deletions, which infers consciousness of guilt," similarly rests on no foundation. (Avery's Br. 25.) Avery offered nothing showing how or who made any deletions or why they mattered; he again simply relied on his unfounded claims that this pornography closely resembled this crime, which this Court previously found "wholly stray[ed] from the facts" (R. 1056:41 n.25), and an unsupported contention that Bobby Dassey was responsible for deleting it (R. 1065:19–20). Avery's insistence that these "deletions" were made by Bobby and show "consciousness of guilt" is, as usual, no more than unsupported guesswork grounded in presuming the conclusion Avery provided no facts to prove. (R. 1065:19–20; Avery's Br. 25.)

That law enforcement were seeking evidence of motive (among other things) in their search warrant affidavit cannot carry the load Avery assigns it, either. (Avery's Br. 22–24.) Police seizing and analyzing the computer seeking evidence of motive does not mean that anything they found ipso facto *is* evidence of motive, as Avery appears to believe. (Avery's Br. 22–24.) Law enforcement investigating a murder search for anything that could conceivably be relevant to the case; vast portions of what the police collect is later determined to be of no importance. Avery's contention that law enforcement's reporting about this pornography means the pornography's mere existence establishes that Bobby had a motive to commit this crime is pure speculation, which Avery did not factually connect to Bobby or show has any similarity to this crime with any evidence at all. (Avery's Br. 23; R. 1065:18–20.)

It is not the State's burden on Avery's third collateral motion to "eliminate" Bobby as the individual who made the searches nor to definitively disprove any of the rest of Avery's specious conjecture. (Avery's Br. 24.) It is Avery's burden to provide facts in his motion showing that he could prove at a hearing that Bobby was responsible for these searches and that they would actually establish a motive for this murder. With no facts pled that could establish that: (1) Bobby conducted these searches and viewed this pornography; (2) that it was at all relevant, let alone similar to, what happened to the victim in this case; and (3) that they were conducted before the murder occurred; the circuit court was correct that Avery failed to approach the threshold of making a plausible, factually-supported motive argument.[10] (R. 1132:20.)

3. The circuit court properly found that Avery failed to plead facts showing that Bobby Dassey had the opportunity to commit this crime or stage this scene.

"The second prong of the 'legitimate tendency' test asks whether the alleged third-party perpetrator *could have* committed the crime in question." *Wilson*, 362 Wis. 2d 193, ¶ 65. Evaluation of this prong is guided by the defense's theory of the third party's involvement in the crime. *Id.* ¶ 68. Sometimes, opportunity can be established by simply showing

[10] As the State will explain, Avery utterly failed to prove opportunity as required by *Wilson*, and his purportedly "powerful direct connection evidence" amounts to no evidence at all. (Avery's Br. 27–28.) They thus do nothing to affect the evaluation of his alleged motive evidence. (Avery's Br. 28.) Additionally, Avery's throwaway supposition that Sowinski's allegations "offers evidence that the motive could have even been a robbery" was not presented to the circuit court and is therefore forfeited. (Avery's Br. 28; R. 1065:18–24.)

the third party was at the crime scene. *Id.* ¶ 65. When, as here, the theory of how the third party committed the crime requires that person to have carried out a series of complicated and difficult tasks, it is not enough to show the third party's mere presence at the scene and an unaccounted-for period of time. *Id.* ¶¶ 10, 65, 68, 81–85.

In this situation, to meet the opportunity prong, the defendant has to offer evidence that the alleged third-party perpetrator had the skills, contacts, tools, time, and/or other means necessary to have committed the crime and staged the scene in the manner the defendant alleges—in other words, "evidence that the third party had the realistic ability to engineer such a scenario." *Id.* ¶¶ 10, 83, 85, 90; *see also State v. Krider*, 202 P.3d 722, 729 (Kan. Ct. App. 2009) (holding that a third-party's possible access to hair and blood samples from the victim was mere conjecture insufficient to establish opportunity to frame the defendant). The circuit court appropriately concluded that Avery's submissions did not meet this threshold. (R. 1132:21–25.)

Avery claims that "the opportunity element has already been decided" because pretrial in 2007, the circuit court found opportunity by virtue of Bobby's presence on the property. (Avery's Br. 33.) But that fails to acknowledge that Avery's "defense theory" has changed drastically from the time of trial. (R. 1065:25.) Then, his contention was that he was framed by law enforcement, who had plenty of time, knowledge, and access to the evidence to plausibly doctor the crime scene—to meet the opportunity prong then, he only had to show that the alleged third-party perpetrator had the opportunity to *kill the victim*, because his theory was that the police framed him. Now, he claims his nephew Bobby Dassey planted all of the evidence against him, and did so in a very short time period. (Avery's Br. 29–37.) That means to sufficiently plead his motion on opportunity, he had to provide more than just a showing that Bobby was physically present

and "had access to" the evidence. (R. 1065:25–26); *Krider*, 202 P.3d at 729. He had to provide facts showing that Bobby had the "realistic ability to engineer such a scenario," meaning a realistic ability to both commit the murder and then complete each step of this framing process, and to do so before November 5. *Wilson*, 362 Wis. 2d 193, ¶ 10. And Avery did not provide facts that would establish at least four key components necessary to sufficiently plead that Bobby had the opportunity to kill the victim and plant all the evidence against Avery: the "why," the "when," the "where," and the "how."

Assuming for the sake of argument that Avery had pled facts that would establish Bobby's motive to kill in the first place (and as explained, he did not), Avery did not offer anything that would suggest *why* Bobby would want to frame Avery, especially given the grave risks and extreme difficulty of doing so. (R. 1065:24–27); *see Krider*, 202 P.3d at 729. Anyone who murders someone typically wants to escape detection. But that does not explain *why Bobby would frame Avery for it*, especially when doing so would ensure that law enforcement would be taking an intense look at the entire property and everyone who lived on it. He offered no reason why Bobby would want to send him to prison. (R. 1065:24–27.) Nor has Avery explained why someone who wanted to frame him would go to such lengths to *hide* the evidence. Surely if Bobby or anyone else wanted to frame Avery, they wouldn't have gone out of their way to make all of the evidence difficult for law enforcement to detect, gather, and connect to Avery—it makes no sense to burn the victim's remains and personal property in an attempt to conceal them, or to drip Avery's blood around the RAV-4 but then remove the license plate from and attempt to hide the vehicle by covering it with debris far away from Avery's trailer. Avery provided no facts explaining why Bobby Dassey's framing him is plausible

when he has given no reason whatsoever explaining why Bobby would do this. (R. 1065:24–27.)

More importantly, Avery's argument fundamentally failed on the "when" and the "how" Bobby could have committed the murder or planted any of the evidence. He provided nothing that could plausibly establish that Bobby had the knowledge, skills, tools, or time to engineer this elaborate ruse. (R. 1065:24–27.) The mere fact that Bobby was on the Avery property at some time when Avery's hand was bleeding falls far short of facts necessary to establish that Bobby had the opportunity to successfully orchestrate this extremely complicated supposed frame-up. (R. 1065:26); *see Wilson*, 362 Wis. 2d 193, ¶ 85 (third party's presence at the scene of a shooting was insufficient to show that the third party had the contacts and resources necessary to have had the opportunity to orchestrate a "hit" on the victim). The complete absence of the necessary facts to support several crucial elements of how Bobby could have accomplished staging this scene demonstrate that Avery failed to plead sufficient facts to show that Bobby had any opportunity to kill the victim and frame Avery in this manner. *See id.* ¶ 69.

Avery offered no facts at all in his motion that would establish *how* Bobby Dassey—an 18-year-old high-school graduate with no criminal record whatsoever and who was working third shift at a furniture factory (R. 581:34–35):

(1) managed to steal, at some unidentified time prior to October 31, the rifle hanging above Avery's bed with which the victim was shot, and at some other unidentified time before November 5 managed to replace it, with Avery's never noticing (R. 594:92–93, 100–02, 108–12; 596:134–38; 597:163–65; 601:88–89, 100–03, 107–18; 1065:24–27);

(2) could have abducted and killed the victim and hidden both her body and her car in some unspecified area in the minutes between her arrival on the property and

Scott Tadych passing Bobby Dassey on the highway around 3:00 p.m. on October 31, 2005 (nor did Avery provide any facts to establish where the killing could have happened apart from a nondescript "in the [RAV-4]," or where Bobby could have hidden the RAV-4 and the victim's remains in this short period of time) (R. 581:36–45; 599:123–24; 1065:24–27);

(3) had the scientific sophistication and knowledge necessary for it to occur to Bobby to collect, transport, and plant Avery's blood from his sink and—as Avery completely overlooked in his motion—his non-blood touch DNA on the hood latch of victim's RAV-4 and her keys, or how Bobby acquired the skills and knowledge to do this successfully (R. 597:122–23, 125–26, 168–83, 185–96; 1065:24–27);

(4) had a convenient stash of unidentified instruments capable of collecting and transporting liquid blood and touch DNA on hand or what those might have been (R. 1065:24–27);

(5) planted the keys to the RAV-4 in Avery's trailer unnoticed and at some unspecified time between November 3 and November 5, yet also either managed to move the RAV-4 off of the 40-acre property without the keys or drive it away and return on foot from wherever he supposedly took it and then sneak into Avery's trailer again to hide the keys, at some other unidentified time, once again unnoticed[11] (R. 596:35–36; 1065:24–27);

(6) found, and then planted, a tiny, mangled bullet fragment that Bobby inexplicably knew had the victim's DNA on it underneath items in Avery's garage, or alternatively how he shot the victim in Avery's garage on October 31 and then

[11] This is also completely inconsistent with Avery's allegation that Buresh saw Bobby driving what Avery contends was the victim's RAV-4 in the morning hours of November 5, and Avery did not attempt to explain at any point when or how Bobby could have planted the key in his home if Buresh's information were true. (R. 1065.)

at another unidentified time scrubbed the scene with Avery remaining unaware—this despite Avery indisputably having been working on his Suzuki and other vehicles in and around the garage around this time (R. 581:48; 594:99–100; 596:134–39, 185–86; 597:163–68; 1065:24–27);

(7) burned the victim's body in some undisclosed location and then moved the remains to Avery's burn pit, again completely undetected, and did it so thoroughly as to include "at least a fragment or more of almost every bone below the neck" in the entire human skeleton, along with the rivets from her jeans (nor did Avery provide any facts showing where and when this occurred) (R. 596:160–64; 597:38–40; 600:166; 1065:24–27);

(8) convinced his younger brother Brendan to go along with this plan and fabricate a confession implicating not only Avery but also *himself*, or why Brendan would do so (R. 179:172–86; 1065:24–27).

Even if one accepts at face value Avery's theory that Bobby was scientifically sophisticated and equipped enough for it to occur to him to do all of this blood-evidence-gathering-and-planting, Avery provided nothing that would explain how Bobby could have done so in the roughly half an hour before the blood would have coagulated or dried while Avery was at Menards on November 3. (R. 1065:24–29.) And Avery did not plead even a single fact to establish how or when Bobby could have planted any of the rest of the mountain of forensic evidence against Avery, particularly the victim's remains, the non-blood DNA evidence, and the bullet, and also successfully eliminate from the scene any trace of his own involvement or physical presence. (R. 597:127–32, 175–76, 182–96; 1065:24–29.)

In sum, Avery provided no facts in his motion that would establish why Bobby would want to frame him or when, where, or how Bobby could have even possibly accomplished any of the necessary tasks to make this theory plausible. (R. 1065:24–27.) He supplied nothing other than a series of constantly-shifting affidavits about his and others' activities during the relevant time frame and then backfilled it with speculation—with zero factual support—about how a small fraction of the evidence against him (the blood and the car only) could have ended up where it was if someone else was the perpetrator, and pretended the rest of the evidence does not exist. (R. 1065:24–27; 179:22–30; 965:2–7; 1071; 1097; 1120:3–5.) That is flatly insufficient to provide facts that could show that Bobby had the opportunity to engineer this complicated scheme. *Wilson*, 362 Wis. 2d 193, ¶ 10.

Avery has attempted to cure this failure on appeal by offering up his previous statements about what his experts purportedly found regarding the physical evidence, which this Court already rejected as misleading and irrelevant speculation. (Avery's Br. 36–37; R. 1056:17–22, 25–28.) Avery did not provide these theories to the circuit court, so they couldn't form the basis for relief now even if they had some substance. (R. 1065:24–27); *Schonscheck v. Paccar, Inc.*, 2003 WI App 79, ¶ 11, 261 Wis. 2d 769, 661 N.W.2d 476. Regardless, inaccurate statements and speculation do not even show possibility. *Wilson*, 362 Wis. 2d 193, ¶¶ 10, 83. Avery further misses the point when he contends he was "less qualified to commit the murder than Bobby" because he had less education and never held a job. (Avery's Br. 36.) Obviously, no qualifications are required to commit murder. But if Avery wants to contend a specific person committed *this* murder and *then framed him for it*, he has to provide facts plausibly showing that the person was actually capable of doing so and also capable of staging all of the evidence. He did not come close.

Avery has abandoned all argument that he can meet *Wilson*'s requirements and instead tries to distinguish it because it was not a case about someone alleging being framed. (Avery's Br. 31.) That is irrelevant. The Wisconsin Supreme Court made crystal clear in *Wilson* that it is the defense's theory of the third party's involvement that dictates what must be shown to establish opportunity, and when that requires the third party to perform a series of complicated tasks, the defendant has to show that the third party realistically has the skills, tools, time, and abilities to do so. *Wilson*, 362 Wis. 2d 193, ¶¶ 10, 67–70, 75. This is because "*Denny*'s 'legitimate tendency' test requires more than mere possibility" that another person committed the crime. *Id.* ¶ 83.

Nor does *State v. Vollbrecht*, 2012 WI App 90, 344 Wis. 2d 69, 820 N.W.2d 443, assist Avery. (Avery's Br. 32.) There, the victim, Angela H., was murdered in a very specific manner, having been raped, chained to a tree, and shot. *Vollbrecht*, 344 Wis. 2d 69, ¶¶ 1, 10. The alleged third-party perpetrator, Kim Brown, had confessed to and was in prison for committing an identical murder of Linda N. six weeks after Angela's murder; the only difference was that Angela's murder occurred 30 miles away from Brown's home, whereas Linda was killed 7 miles away. *Id.* ¶¶ 10, 26. Much like in *Dressler*, Brown owned "a revolver and books involving rape, chains[,] and torture," and told multiple people he enjoyed binding and torturing women. *Id.* ¶ 11. The defense had been investigating Brown as a potential third-party suspect pretrial but was erroneously misinformed by law enforcement that Brown was at work when Angela's murder occurred, but he'd actually clocked out at 5:00 p.m. the day before. *Id.* ¶¶ 10, 26.

The circuit court granted Vollbrecht's motion for a new trial, finding that Brown had motive, a direct connection to the crime through his confession to the identical murder of Linda, an hour-and-a-half window of opportunity to murder

Angela, and that he was in the general area at the time. *Id.* ¶ 26. This Court held that in light of the very strong evidence of motive and direct connection—Brown's proclivity for rape and torture, his statements to others, the items found at his home, and the unusual and identical manner in which Brown admittedly murdered Linda—the fact that Brown lived within 30 miles of the crime scene and had an hour and thirty minute window of opportunity to commit the crime was sufficient under *Sullivan* to come in as other acts evidence proving Brown's identity as the perpetrator. *Id.* ¶¶ 27–33.

That is nothing at all like what Avery attempts here. His motive evidence totals three possible searches for pornography predating the murder that he cannot even actually connect to Bobby Dassey and that have no relation to the manner in which this homicide occurred. *Cf. Vollbrecht*, 344 Wis. 2d 69, ¶ 27. Avery provided only wildly implausible conjecture with no facts showing that Bobby had the knowledge, tools, time, or ability to commit the crime and stage the evidence—most of which he wholly ignored and did not account for—whereas in *Vollbrecht* there was no special scenario that had to be achieved; the perpetrator simply needed the time to kill the victim. *Id.* ¶ 26. And, as the State will explain below, Avery provided zero facts directly connecting Bobby Dassey to the actual killing (or even to the victim's vehicle), whereas in *Vollbrecht*, Brown was known to have performed the exact extreme and unusual acts performed on Angela against another woman, confessed to people that he liked to do so, was in the general area at the time, and the murders were near in time and place. *Id.* ¶¶ 32–33. *Vollbrecht* does not assist Avery in the least.

State v. Knapp, 2003 WI 121, ¶ 182, 265 Wis. 2d 278, 666 N.W.2d 881, *judgment vacated by Wisconsin v. Knapp*, 542 U.S. 952 (2004), is similarly inapposite. (Avery's Br. 26.) There, the victim was beaten to death with a baseball bat inside her home. *Id.* ¶ 9. The alleged third-party perpetrator

was the victim's husband, Brunner, who had a key to the victim's home in which she was found beaten to death, with whom she had been fighting, who was overheard saying he wished he had a bat, and who had been physically violent toward her shortly before. *Id.* ¶ 17. Hearsay statements from Brunner's girlfriend's roommate's friend that Brunner and his girlfriend stopped by the apartment late at night on the night of the murder and left shortly after with a paper bag contradicted what Brunner told police about his whereabouts that evening, for which he'd given them an alibi stating he was miles away. *Id.* ¶¶ 10, 168. Knapp's theory of Brunner's involvement required no skill or ability to accomplish, he had a key to the home and had threatened to beat his wife with a bat, his motive was plain, and therefore the evidence showing that Brunner's alibi was false and he was in close proximity to the crime scene that night met the *Denny* test. *Id.* ¶ 181–83.

Here, Bobby's mere presence on the Avery property and two vague affidavits contending he had a RAV-4 five days after the victim's murder do nothing to establish any fact showing he could have actually accomplished committing this murder and planting all of the evidence in this case. The circuit court correctly determined that Avery did not plead facts in his motion that could establish Bobby's opportunity to commit this crime and stage this scene.

4. The circuit court properly found that Avery did not plead sufficient facts—or any facts—directly connecting Bobby Dassey to the perpetration of the murder.

Direct connection is assessed by considering "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" and take the defendant's theory "beyond

mere speculation." *Wilson*, 362 Wis. 2d 193, ¶¶ 59, 71. "No bright lines can be drawn as to what constitutes a third party's direct connection to a crime," but it must be more than "a connection between the third party and the crime"; it requires "some direct connection between the third party and the *perpetration of* the crime." *Id.* ¶ 71. Avery claimed that he met the direct connection prong because Sowinski claimed to have seen Bobby Dassey pushing a RAV-4 on November 5, 2005. He's wrong.

Sowinski's averments that he purportedly saw Bobby and someone else pushing a RAV-4 on November 5—several days after Ms. Halbach's murder—do not provide a link between Bobby Dassey and *perpetration of the murder*, nor any factual link between Bobby Dassey and any of the forensic evidence. (R. 1071:5–6.) At the most generous, the affidavits Avery submitted could establish that Bobby was involved in moving the RAV-4 to the location where it was eventually found. That is nothing more than a possible "connection between the third party and the crime." *Wilson*, 362 Wis. 2d 193, ¶ 71. It provides no link at all between Bobby and the perpetration of the actual killing. And given that Sowinski and Buresh aver that they saw *two* people, it doesn't even connect Bobby to the crime because he wasn't in exclusive possession of whatever vehicle they saw. It also provides no connection between Bobby and any of the physical evidence—as the circuit court observed, Avery's contention that this purported sighting of Bobby pushing a vehicle means Bobby was in possession of the victim's car key and electronics is nothing more than "speculation by the defendant." (R. 1132:25–26.) Sowinski never says he saw Bobby with any keys or electronics or any other of the victim's effects. (R. 1071:5–6.) In fact, that Sowinski says these individuals were pushing the vehicle suggests that they were *not* in possession of the keys. Meanwhile, Buresh says he saw Bobby driving the car the same night (R. 1120)—meaning Avery's

purported evidence is contradictory, and he provided no facts showing how Bobby could have planted the victim's car keys in Avery's trailer in either scenario.

Sowinski's and Buresh's affidavits also do nothing to establish that Avery was not the killer—even if believed, all Sowinski's evidence would show is that perhaps Bobby was involved in trying to cover up Avery's crime. *See State v. Bembenek*, 140 Wis. 2d 248, 257, 409 N.W.2d 432 (Ct. App. 1987). That is far and away the most natural interpretation of the information imported by Sowinski and Buresh when considered in light of the existing evidence, even assuming both that their statements are accurate and that the car Bobby was seen with was the victim's. After all, Avery recruited Brendan to help him try to cover his tracks; the same could be true about Bobby. Direct connection requires a showing that "under the totality of the circumstances, the evidence suggests that a third-party perpetrator *actually committed* the crime." *Wilson*, 362 Wis. 2d 193, ¶ 71. Nothing Sowinski or Buresh aver connects Bobby to the actual killing in any way. (R. 1132:26–27.)

Buresh's claims are even more generic and speculative than Sowinski's. (R. 1120:3–4.) They do not provide a description of the vehicle he purportedly saw, just that he saw "a RAV4 driving South on County Road Q," again, five days after the murder. (R. 1120:3–4.) That establishes nothing suggesting whomever was in this car killed the victim—it doesn't even plausibly establish that the victim's RAV-4 is the car he saw. He gives a vague description of seeing news about the trial in 2006 or 2007 and says that's how he somehow recognized Bobby as the driver a year later, but Avery provided nothing showing that Bobby was ever on any news reports during that time. (R. 1065; 1120:3–4.) And yet, Buresh cannot describe the other passenger at all, beyond somehow being "100% sure it was not Steven Avery"—though he says

he knows none of the Avery or Dassey family members. (R. 1120:3–4.)

As the circuit court aptly observed, "[t]he defendant's conclusory assumptions drawn from the evidence offered in the affidavit[s] do not amount to evidence directly linking Bobby to the homicide itself." (R. 1132:27.) Particularly when coupled with Avery's utter lack of facts establishing Bobby's motive or opportunity and nothing tying him to even a single piece of the forensic evidence, Sowinski's and Buresh's averments amount to nothing. They do not even state facts that would establish that whomever they saw was actually in possession of the victim's car—it was not the only RAV-4 in existence. Avery's multiple layers of conjecture, piled on top of an allegation that Sowinski maybe saw Bobby and a second person pushing a car similar to the victim's at some point while Buresh contrarily claims he saw two people driving one, do nothing to establish any fact showing a legitimate tendency that Bobby actually murdered the victim. (Avery's Br. 37–40.)

State v. Williams, No. 2008AP1831, 2009 WL 1186878 (Wis. Ct. App. May 5, 2009) (unpublished), upon which Avery attempts to rely and has failed to provide in correct citation format identifying it as an unpublished opinion, predates July 1, 2009, and is not citable.[12] (Avery's Br. 38.) The State does not discuss it further.

* * * * *

In short, the "tendency" that Bobby committed this crime based on what Avery has presented here has not even entered the ballpark of "legitimate." *Wilson*, 362 Wis. 2d 193, ¶ 59. The State does not dispute "that facts give meaning to other facts," but that requires Avery to have provided some

[12] This is, at minimum, opposing counsel's 10th violation of the rules of this Court, and that does not include the numerous misrepresentations of the law and the facts.

actual facts on all three prongs of *Denny* to begin with. *Vollbrecht*, 344 Wis. 2d 69, ¶ 26. Avery's allegations are conjecture and speculation plugged in to unaccounted-for periods of Bobby's time. That is, and always has been, insufficient to meet *Denny*. *Wilson*, 362 Wis. 2d 193, ¶ 68, 84. The dearth of facts in Avery's motion necessary to establish Bobby's motive or opportunity to commit this crime and then carry out this elaborate planting scheme, along with nothing tying Bobby to perpetration of the actual killing or any of the forensic evidence, means Avery has failed to establish a *legitimate* tendency that Bobby was the killer. Avery thus failed to meet his pleading burden on his newly discovered evidence claim. No hearing is necessary.

D. Even if Avery could have met the three prongs of *Denny*, there is no reasonable probability that presenting Avery's new defense would change the result of the trial.

If the newly discovered evidence presented by a defendant would be inadmissible at a new trial, there is no way it could impact the jury's evaluation of the other evidence and the defendant fails to meet his burden. *Bembenek*, 140 Wis. 2d at 256–57. Avery's latest attempt at a *Denny* defense would not be admissible, meaning there is no probability of a different result at a new trial based on it.

"The *Denny* test is a three-prong test; it never becomes a one-or two-prong test." *Wilson*, 362 Wis. 2d 193, ¶ 64. If a defendant fails to make an adequate showing on any of the prongs, the third-party perpetrator evidence is inadmissible. Avery failed to meet his burden on all three prongs of the test. He failed to connect Bobby to the pornography or the pornography to the crime for motive, his opportunity evidence is flatly insufficient to establish that Bobby could have committed the crime or staged the crime scene, and his direct connection evidence doesn't establish a connection between Bobby and the actual killing. Accordingly, no jury would ever

be presented with what Avery has submitted here, and therefore there is no possibility that it could affect the outcome of a new trial. *Bembenek*, 140 Wis. 2d at 256–57.

Even assuming that Avery's new witness testimony was sufficient to meet *Denny* and Avery had a new trial presenting this defense instead of the police bias defense, though, there is still no possibility that any jury hearing it would have a reasonable doubt about Avery's guilt. Accordingly, he could not meet the final requirement for asserting a newly discovered evidence claim. As explained above, there are far too many irreconcilable inconsistencies between Avery's allegations about Bobby Dassey and the actual evidence produced at trial. Particularly fatal would be Avery's complete failure to account for his DNA on the hood latch of the RAV-4 and Ms. Halbach's remains—again, including a fragment from "virtually every" bone in the human body—being found in his burn pit, and nothing to explain how Bobby could possibly be responsible for the bullet with Ms. Halbach's DNA on it being found in his garage and matched to the gun above his bed. (R. 1065:18–29.)

Moreover, the State would negate whatever little credibility Sowinski and Buresh had on the stand. It could easily impeach Sowinski with the glaring inconsistencies between his latest story and Sowinski's prior statements Avery submitted previously. The information Sowinski initially provided to counsel does not at all match what his affidavits now say about what or who he observed, when he observed them, who he spoke to at the Manitowoc County Sheriff's office, and what their response was. (*Compare* R. 1095; 1096; *and* 1097; *with* 1071.) And, in fact, Sowinski's original information to current defense counsel would have *eliminated* Bobby Dassey as a suspect, because Bobby was at work during the time frame Sowinski gave. (R. 581:34–35, 45; 1095.) Sowinski's account changed drastically after somehow having his memory "refreshed" by counsel and her

investigators—with no documentation that would show how this memory refreshment could have been achieved. (*Compare* R. 1095 *with* 1071:3.) And this second person he purportedly saw has never been identified, meaning Sowinski's information could not even actually point to Bobby as the perpetrator. Buresh's generic claims suffer similar failings, in particular his failure to explain why he did not bring this information to any of Avery's attorneys until nearly 20 years after the murder and after Avery's latest attorney put up a $100,000 bounty for purported witnesses. (R. 1120:3–5.)

Avery's new defense would essentially be just asking the jury to ignore the evidence introduced against him. When presented with the common-sense explanation that the evidence was located where it was because Avery shot and killed the victim after luring her to the property and unsuccessfully attempted to hide the evidence of his crime, versus Avery's attempt to paint the then-teenaged Bobby as a porn-obsessed, scientifically savvy, and extraordinarily stealthy criminal mastermind who inexplicably wanted to frame his uncle, no one would have a reasonable doubt about Avery's guilt.

"Courts may permissibly find—as a matter of law—that no reasonable jury could determine that the third party perpetrated the crime in light of overwhelming evidence that he or she did not." *Wilson*, 362 Wis. 2d 193, ¶ 70. Here, overwhelming evidence that Bobby did not commit this crime exists in the utter absence of any facts tying him to the actual killing or to even a single piece of the forensic evidence. Jurors are instructed to use their common sense when reaching a verdict, that the arguments of the attorneys are not evidence, and that a trial is a search for the truth. Wis. JI–Criminal 140 (2024); Wis. JI–Criminal 160 (2000). Any reasonable juror being asked to search for the truth in this murder trial would reject Avery's absurd new defense without fail.

E. Avery's claim that the circuit court's factual findings are unsupported by the evidence is false, and two mistakes the court made are immaterial.

Finally, Avery takes issue with several bits of minutiae that he contends the court got wrong about the record. (Avery's Br. 40–42.) He has misunderstood the record for most of them, and he fails to show that any of them matter.

Avery's complaint that the circuit court once referenced "Brian" Dassey instead of Bobby Dassey is trivial: that was plainly a typographical error by the court. (R. 1132:20.) Moreover, the circuit court was correct that only a very small number of the searches Avery claims only Bobby could have been responsible for took place before the murder occurred. As explained, the evidence Avery submitted showed only three searches taking place between 7:00 a.m. and 3:45 p.m. on a weekday before the murder occurred. (R. 1074:62–66.) He now claims that it was error on the part of the circuit court to so find, but he points only to McCrary's affidavit referencing the September 18, 2005 searches as support, and that affidavit offers no actual evidence about who conducted the searches nor showing that they're at all related to this crime. (Avery's Br. 40–41; R. 1104:124–25.) And again, September 18, 2005, was a Sunday. Anyone could have performed those searches.

Avery next claims there is no evidence that Ms. Halbach was murdered on October 31, 2005, and that the circuit court got that wrong. (Avery's Br. 41.) That is absurd. The vast wealth of evidence introduced at the five-week jury trial at which he was convicted of committing this murder plainly shows otherwise. (R. 696:2–7; 1056:2–4.)

Next, Avery complains that the circuit court erred in stating that some of the victim's bones were found in his burn barrel. (Avery's Br. 41.) True, but immaterial. Ms. Halbach's electronics were found in Avery's burn barrel. (R. 610:62–67.)

Her remains were found in multiple locations, but the primary site was Avery's burn pit, proved by the forensic anthropologist who found at least one fragment from nearly every bone in the human body within it, as the circuit court correctly observed. (R. 596:160–64; 597:38–40; 600:166; 1132:23–24.) The "40-60% of the bones comprising the 'complete skeleton'" to which Avery refers (Avery's Br. 41) was the expert's testimony that about half the total skeleton was destroyed in the fire; in other words, *parts* of each bone were destroyed, but parts of each remained (R. 600:225–26). And the jury was not "unconvinced that Ms. Halbach was burned by Mr. Avery in his burn pit because he was acquitted of mutilation of Ms. Halbach's body." (Avery's Br. 41.) A judgment of acquittal is not proof of innocence. *State v. Landrum*, 191 Wis. 2d 107, 120, 528 N.W.2d 36 (Ct. App. 1995). It is a judgment that the State didn't meet its burden of proving beyond a reasonable doubt each element of the crime. *Id.* Given that the common definition of "mutilate" is "to cut up or alter radically,"[13] it is not surprising that the jury acquitted on this count; the State could not provide evidence of what state Ms. Halbach's remains were in when Avery put her body in the fire because so little remained intact. That does not mean Avery did not burn Ms. Halbach's remains in his burn pit.

There was no error in relying in part on Brendan Dassey's confession to reject Avery's purported *Denny* defense. (Avery's Br. 41–42.) The fact that Brendan both confessed and implicated Avery is part of the record, and Brendan was convicted of this crime regardless of the fact that he wasn't "forensically linked" to it. (Avery's Br. 41–42; R. 179:172–86.) It is a fact Avery must account for to show a legitimate tendency Bobby committed the crime no matter

[13] *Mutilate*, Merriam-Webster Dictionary, Merriam-webster.com/dictionary/mutilate (last visited April 12, 2024).

whether the State introduced it at the last trial,[14] and Avery failed to provide any facts explaining why or how Bobby Dassey could be responsible for Brendan's confession.

Avery failed to show that the circuit court committed any factual errors about his failure to provide any actual evidence in his motion on the three prongs of *Denny*. (Avery's Br. 40–41.) And he fails to show how any of the purported errors of which he complains make any difference to its finding that he did not meet them. (Avery's Br. 40–41.) The circuit court properly denied Avery's insufficiently pled motion without a hearing.

CONCLUSION

This Court should affirm the circuit court.

Dated this 15th day of April 2024.

Respectfully submitted,

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[14] The State would, of course, not be limited to the same litigation strategy or evidence at a new trial that the State introduced at the last one.

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 10,937 words.

Dated this 15th day of April 2024.

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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 Appellate Court Electronic Filing System, which will accomplish electronic notice and service for all participants who are registered users.

Dated this 15th day of April 2024.

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