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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.

REPLY BRIEF OF DEFENDANT-APPELLANT STEVEN A. AVERY

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INTRODUCTION

The State's response fills in gaps with findings and analysis the circuit court never made, thereby highlighting that the opinion is fundamentally flawed. For example, the circuit court never analyzed Mr. Avery's pleading under *State v. Allen*, 2004 WI 106, 274 Wis. 2d 568, 682 N.W.2d 433 to reach the conclusion that Mr. Avery insufficiently pled his claims. The State ignores this to repeatedly argue that the circuit court "properly found that Avery did not plead sufficient facts . . ." (St. Br. 7, 23, 32). The State is correct that 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." (St. Br. 7). However, the State is incorrect in claiming that the circuit court denied him an evidentiary hearing on this basis. It did not. Rather, it improperly relied upon evidence outside of Mr. Avery's record on appeal such as Brendan's "confession" (1132:24) and false assertions that there was forensic evidence linking Brendan to the crime. (1132:27).

Mr. Avery argued that the circuit court improperly merged the requirements of *State v. Edmunds*, 2008 WI App 33, 308 Wis. 2d 374, 746 N.W.2d 590 and *State v. Denny*, 120 Wis. 2d 614, 357

N.W.2d 12 (Ct. App. 1984) and made satisfying *Edmunds* contingent upon establishing the three elements of *Denny*. The circuit court focused, disproportionately, on the *Denny* motive element and ignored the independent materiality of the new impeachment evidence which results from Bobby Dassey ("Bobby") being in possession of Ms. Halbach's vehicle.

The State compounds these errors by attacking the credibility of the witness who attested that he saw Bobby in possession of Ms. Halbach's vehicle after she was reported missing. Without mentioning which authority requires Mr. Avery to address alleged facts outside his record (Brendan Dassey's alleged confession), the State argues that because Mr. Avery failed to address evidence from a completely different case, his pleading fails.

Lastly, the State accuses Mr. Avery of waiving his *Brady v. Maryland*, 373 U.S. 83 (1963) claims on appeal ignoring the fact that Mr. Avery specifically addressed them in the context of the circuit court finding that the alleged *Brady* evidence was immaterial. (Avery's Br. 2, 5, 10, 11, 17). The State has waived its argument on Mr. Avery's *Brady* claims.

ARGUMENT

I. Mr. Avery pled sufficient facts in his motion, to meet the newly discovered evidence standard.

A. Standard of Review

The State's recitation of the law governing this Court's review is correct.

B. The circuit court erred in its evaluation of the materiality prong of the newly discovered evidence test.

The State misconstrues Mr. Avery's arguments and the circuit court's opinion. The State contends that Mr. Avery argues that the circuit court "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.)" (St. Br. 11).

Mr. Avery never makes this argument. Mr. Avery's argument is, "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." (Avery's Br. 12). Mr. Avery lists other reasons to establish his *Denny* argument. Mr. Avery contends that

the Sowinski evidence is material because the RAV-4 is, undisputedly, material evidence in the Teresa Halbach murder case and now Bobby is connected to that material evidence.

The RAV-4 was the vehicle driven by Ms. Halbach on the day of her disappearance. The RAV-4 contained a blood spatter of Ms. Halbach's blood in the rear cargo area and 1-2 milliliters of Mr. Avery's blood in the front area of the vehicle. Prior to its discovery on November 5, 2005 the vehicle contained Ms. Halbach, her clothing, electronic devices, camera, keys, and license plate. All of these items were placed in locations that implicated Mr. Avery in her murder. Now there is a witness who places the RAV-4 in the hands of the State's primary eyewitness prior to its discovery by law enforcement.

The Sowinski evidence also impeaches the credibility of Bobby's trial testimony, where he established an alibi for himself while implicating Mr. Avery in the murder. Bobby testified he left the property while Ms. Halbach and her vehicle remained on the property with Mr. Avery. This crucial testimony allowed the State to claim it was Mr. Avery, not Bobby, who murdered Ms. Halbach and concealed her vehicle on the property. (610:91). This Court described Bobby's testimony as follows:

> Certainly, this testimony bolstered the State's theory that Halbach visited Avery on that day and did not leave the Avery property thereafter, but absent this testimony the State still possessed significant forensic (and other) evidence implicating Avery in a crime committed on his property.

(1056:42,¶68).

Now the Sowinski evidence undermines the cumulative effect of the other evidence presented against Mr. Avery. Bryan Dassey's previously submitted affidavit demonstrates that Bobby had no alibi and witnessed Ms. Halbach and her vehicle leave the property approximately the same time he left. (228:30-31). Mr. Avery was in his trailer alone, and according to the State, he never left the property that afternoon or evening, which rules him out as the perpetrator. The cumulative effect of the many false statements made by Bobby (1116:23-24) have to be re-considered in light of his possession of Ms. Halbach's vehicle.

The State mistakenly contends that Mr. Avery failed 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" (St. Br. 12). Mr. Avery has specifically addressed this allegation. (1116:28). Further, the State claims that Mr. Sowinski's affidavit only establishes that he "believe[s]" he saw Bobby. (St. Br. 13). However, Mr. Sowinski was certain that he saw Bobby. (1071:5,

¶4). The State also contends that Mr. Avery made no argument regarding Mr. Buresh's affidavit. Mr. Avery did, arguing that Mr. Buresh corroborates the Sowinski evidence. (Avery's brief 10).

C. The materiality of Mr. Avery's *Edmunds* claim is not contingent upon satisfying the *Denny* test because the evidence is independently material.

The State correctly states the standard for seeking a new trial based on the allegation of newly discovered evidence (St. Br. 13). The State adopts the circuit court's erroneous view that Mr. Avery's newly discovered evidence can only be material if it satisfies *Denny* first. Nevertheless, Mr. Avery has satisfied both tests.

1. Mr. Avery provided sufficient facts to meet the *Denny* requirements.

Mr. Avery agrees with the State on the law governing *Denny* but not the State's interpretation of it.

2. Mr. Avery pled sufficient facts to establish that Bobby Dassey had a motive for the murder.

The State spent 3 pages addressing *Dressler v. McCaughtry*, 238 F.3d 908 (7th Cir. 2001). Mr. Avery specifically relied upon *Dressler* for the court's finding that "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. (Avery's Brief 25-26). The violent photographs on the Dassey computer illustrate the same probative trait.

Lastly, to clarify Mr. Avery's statement that this Court "pointed out in its opinion previously" that *Denny* evidence "must be viewed in the aggregate," which the State claims is false (St. Br. 15, note 8), this Court described viewing the evidence in the aggregate (1056:41), exactly the standard articulated in *State v. Wilson*, 2015 WI 48, ¶53, 362 Wis. 2d 193, 218.

3. The circuit court improperly found that Mr. Avery's evidence does not satisfy the *Denny* opportunity element.

The State has improperly relied upon *State v. Krider*, 202 P.3d 722, 729 (Kan. Ct. App. 2009) to argue that Mr. Avery had to show that Bobby had the contacts, tools, time, and/or other means necessary to have committed the crime and failed to do so. (St. Br. 25).

The State claims that *Wilson*, 362 Wis. 2d 193, ¶¶ 10, 67–70, 75 supports the imposition of this burden on Mr. Avery. It does not. The *Wilson* paragraphs the State cites conclude that more evidence is required in the specific instance where vague allegations have

been made about a third party hiring an unidentified hitman. In this case, Bobby has been specifically identified as having possession of material evidence in the murder case.

The State, copied from its original response to Mr. Avery's third motion for post-conviction relief (1094:18-21) a list of activities it claims Bobby would have been required to perform to commit the murder and plant evidence to frame his uncle. (St. Br. 26-28). Mr. Avery rebutted all of these points in his circuit court reply brief. (1116:27-32).

4. The circuit court improperly weighed Mr. Avery's direct-connection evidence.

The RAV-4 is a material piece of evidence in the crime. *See, e.g., State ex rel. Koster v. McElwain*, 340 S.W. 3d 221, 249 (Mo. App. 2011). Since the only similar Wisconsin case on this point is the case of *State v. Williams*, No. 2008AP1831, 2009 WL 1186878 (Wis. Ct. App. May 5, 2009) (unpublished),[1] this Court can look to the Missouri case for guidance. There, the State presented other

[1] Using a common-sense approach, the court found that the defendant's possession of the victim's car established probable cause to believe the defendants "probably had committed a crime involving the murder victim's stolen car."

explanations for the discovery of material evidence, just as the State is doing here. The Court rejected that approach stating:

> The State argues that Ted Helmig's initial possession of some of the canceled checks and their later discovery with the purse only shows an attempt to cover up Dale Helmig's crime. That may be true. However, the fact that there may be other explanations for the discovery of the canceled checks with the purse besides an inference that Ted Helmig threw the purse and the canceled checks in the river sometime following his murder of Norma Helmig does not relieve us of the obligation to acknowledge that Ted Helmig has now been connected to the purse—material evidence in Norma Helmig's murder case.

McElwain, at 250-51. The Missouri court found that Ted Helmig's mere possession of the canceled checks was sufficient to connect him to "***a key piece of evidence in the crime--the purse where the cancelled checks were found.***" *Id*. at 249. Here, the circuit court admitted that Mr. Avery has established Bobby's possession of the RAV-4 but created other explanations other than acknowledging that Bobby had possession of the RAV-4 sometime following his murder of Ms. Halbach (1132:25). Bobby is now connected to material evidence in the Teresa Halbach murder case.

The State improperly disputes the credibility of Mr. Avery's witnesses and his post-conviction lawyers. The State falsely accuses Mr. Avery's "recent attorney" of "put[ting] up a $100,000 bounty for purported witnesses," which it implies resulted in

Thomas Buresh's affidavit. (St. Br. 38). Mr. Avery's attorney did not put up a $100,000 bounty. Once again, the State alleges false facts outside of the record.

Unlike the State, the circuit court correctly acknowledged, "The Sowinski affidavit, taken as true for the purpose of this motion, directly links Bobby to possession of the victim's vehicle." (1132:26). However, it stated, "There are other reasons that Bobby could have been in possession of the car that night, including that Bobby was trying to help hide evidence to protect the two individuals directly linked by forensic evidence to this murder and convicted of the crime." (1132:27). This is an untrue statement because Brendan Dassey ("Brendan") was never linked to the crime by any forensic evidence and Bobby's testimony did not help Mr. Avery; rather, it ensured his conviction. Most importantly, the circuit court was not relieved of the obligation to acknowledge that Bobby has now been connected to material evidence in Ms. Halbach's murder.

The *Denny* test only requires an inference that Bobby is directly connected to the murder of Ms. Halbach, nothing more. By having possession of Ms. Halbach's vehicle after her disappearance, the inference can certainly be made. The Sowinski

evidence is being offered as evidence of the "missing" piece, the direct connection between Bobby and Ms. Halbach's murder. (1056:41). Contrary to the State's and circuit court's positions, Mr. Avery does not need to prove Bobby's guilt of the murder beyond a reasonable doubt. *See House v. Bell*, 547 U.S. 518 (2006).

D. There is a reasonable probability that presenting Mr. Avery's newly discovered evidence undermines confidence in the outcome of Mr. Avery's trial.

The State erroneously contends there is "no possibility that any jury hearing it would have a reasonable doubt about Avery's guilt." (St. Br. 37).

The State claims that even if Mr. Avery met the *Denny* and *Edmunds* standards, he has not explained his DNA on the hood latch of the RAV-4. (St. Br. 37). Mr. Avery has always contended the hood latch swabs were substituted by Inv. Weigert for the illegally seized groin swabs taken from Mr. Avery on November 9, 2005. (1116:29). The State incorrectly contends Mr. Avery fails to address its trial expert's testimony that there was "a fragment from 'virtually every' bone in the human body—being found in his burn pit." (St. Br. 37). Mr. Avery did address this issue. (Avery's Br. 41). The State incorrectly contends that Mr. Avery does

"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." (St. Br. 37). As stated *infra* page 7, Mr. Avery also addressed this.

The new evidence would have allowed the defense to impeach Bobby's trial testimony. Bobby would no longer be the "unbiased witness" described by Prosecutor Kratz. The forensic evidence would have been viewed as planted or at the very least tainted by being in the hands of a third party. With the new evidence, the defense could have argued Mr. Avery returned to his trailer; Ms. Halbach left the property in her vehicle and Bobby followed her, got her to pull over, and assaulted and murdered her at some point. He planted the RAV-4 on the Avery property and proceeded to remove and plant the electronic devices, the key, the bones, her clothing, her DNA on the bullet and Avery's blood.

The Sowinski evidence when viewed in the aggregate including all of the false statements made by Bobby to law enforcement and at trial would have provided a reasonable probability of a different outcome at trial. (1116:23-24).

E. Contrary to the State's position, the circuit court's inaccurate factual findings are material because they impose a higher burden on Mr. Avery.

The State defends the circuit court's erroneous reliance upon Brendan's "confession" (1132:24), even though it is not part of the Avery record. The State claims Brendan's "confession" "is a fact Avery must account for to show a legitimate tendency Bobby committed the crime no matter whether the State introduced it at the last trial, and Avery failed to provide any facts explaining why or how Bobby Dassey could be responsible for Brendan's confession." (St. Br. 40-41).

Brendan's confession directly contradicts the State's theory in Avery's trial and that is why the State did not introduce it. The lack of forensic evidence refuted Brendan's story of Ms. Halbach being bound, beaten, stabbed and cut in Avery's bedroom. Brendan's story had multiple versions of where Ms. Halbach was shot. The State, by making this final argument, is trying to avoid the simple undisputed fact that Bobby was in possession of material evidence in the case (the RAV-4) and that this fact directly connects him to Ms. Halbach's murder. Mr. Avery has met

the materiality requirements of *Denny, Edmunds* and *Brady*[2] with the new Sowinski evidence.

CONCLUSION

Mr. Avery respectfully requests that this Court grant him one of the following alternate 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.

Dated this 14th day of May, 2024.

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[2] The circuit court correctly found that Mr. Avery's evidence had met the first prong of *Brady*—that the prosecution suppressed the evidence (1132:27).

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 2,732 words.

Dated: May 14, 2024

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