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SUPREME COURT

STATE OF WISCONSIN

IN SUPREME COURT

No. 2023AP1556

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

STEVEN A. AVERY,

Defendant-Appellant-Petitioner.

RESPONSE TO PETITION FOR REVIEW

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INTRODUCTION

Defendant-Appellant-Petitioner Steven A. Avery has now filed his third petition for review in this Court, this time contending that the circuit court and court of appeals erred in finding insufficiently pled his latest of many successive claims that he could establish a *Denny*[1] third-party perpetrator defense and attempt to pin the crime on his nephew, Bobby Dassey. In a per curiam opinion, the court of appeals upheld the circuit court's determination that he did not meet his pleading burden, as he provided no facts that could meet any of the three prongs of the "legitimate tendency" test for introducing such a defense, thus his purported newly discovered evidence was not material.

There is no novel, important, or conflicting law at issue and nothing worthy of this Court's review raised by this case. As with his previous petition, Avery has ignored the fact that the only issue raised by this case is whether he met the postconviction pleading standard. Instead, he has again attempted to revive claims he forfeited in either the circuit court or the court of appeals; he makes nonsensical, circular arguments that have no support in the law; and he bases his claims on increasingly absurd conjecture untethered from the facts. The only legal principle at issue here is whether Avery sufficiently pled his *Denny* claim in his motion to warrant a hearing. The case law on which this claim relies has been established for decades, and both the circuit court and the court of appeals properly applied it. The petition should be denied.

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

BACKGROUND

A jury convicted Avery in 2007 of the first-degree intentional homicide of Teresa Halbach. Avery raised on direct appeal a claim that he should have been permitted to raise a *Denny* defense alleging several potential third-party perpetrators, including Bobby Dassey. (Pet-App. 36–37.) The court of appeals rejected that argument, holding that Avery could not meet the three-pronged "legitimate tendency" test as to Bobby, and affirmed. (Pet-App. 37.) Avery has been attempting to fill the gaps in his third-party-perpetrator theory ever since. (Pet-App. 37–38.) This petition arises from the denial of his third (though really his fifth) collateral attack motion under Wis. Stat. § 974.06.

This time, Avery claimed that a new witness, Thomas Sowinski, "provides the missing direct connection between Bobby and Ms. Halbach's murder" because Sowinski claimed he saw Bobby Dassey and an unknown older man pushing a car similar to the victim's down Avery Road during the early morning hours on November 5, 2005, five days after the murder, while Sowinski was delivering newspapers to the property.[2] (Pet-App. 38–39.) Avery alleged that this provided a "direct connection" to the murder. He argued he could show Bobby had a sexual motive because some pornography was found on the communal Dassey home computer. And he argued he could show opportunity because Bobby was on the property and knew Avery's hand was bleeding on November 3, 2005, which he claimed would allow Bobby to plant Avery's blood in the victim's car and access her keys, electronics, and license plate. (Pet-App. 40.) Avery did not explain in his motion how planting his blood could have been

[2] Sowinski's story changed repeatedly, landing on this version of events only after somehow having his memory "refreshed" by Avery's current postconviction counsel. (Pet-App. 39 n.3; R. 1071.)

accomplished nor account for any of the rest of the evidence against him. (Pet-App. 40.)

Months after briefing was completed, Avery filed another affidavit in the circuit court from a Thomas Buresh, who claimed he saw Bobby Dassey driving a RAV-4 in the early morning hours of November 5, 2005. (Pet-App. 54–55; R. 1120.) He added a single paragraph to his motion, claiming that Buresh's affidavit corroborated Sowinski's, with no other argument related to Buresh. (Pet-App. 54.)

The circuit court denied the motion, finding that Avery's motion was insufficiently pled on all three prongs of *Denny* and thus failed to meet the materiality prong of the newly discovered evidence test. (Pet-App. 47–48, 51–55.) The court of appeals agreed, noting that nearly all of Avery's allegations were unsupported by, and often contradicted by, the evidence he submitted and the existing record. (Pet-App. 45–55.) Only three of the pornography searches that he contended showed motive occurred before the murder and during the timeframe he contended only Bobby could have searched for them, and he failed to provide any facts to connect even those to Bobby, meaning he failed to provide sufficient facts on motive. (Pet-App. 45–48.) Even assuming Sowinski's evidence was believed and that it was actually the victim's RAV-4 he saw, Avery failed to connect Bobby to any of the rest of the enormous amount of evidence pointing to Avery as the killer nor provide any facts showing that Bobby had the skills, tools, knowledge, time, or ability to stage the rest of the scene or how he could have done so, meaning he also failed to provide sufficient facts to show opportunity. (Pet-App. 49–52.) And, again assuming it was even the victim's RAV-4 (or a RAV-4 at all as opposed to a similar model) that Sowinski saw, Bobby pushing the victim's car down a road with another individual five days after the murder would not provide a direct connection between Bobby

and the perpetration of the murder nor any direct connection to the rest of the forensic evidence. (Pet-App. 52–54.)

The court of appeals thus concluded that "[b]ecause Avery's postconviction motion did not allege sufficient facts to satisfy the *Denny* requirements for third-party perpetrator evidence, the Sowinski evidence is not material and therefore does not satisfy the newly-discovered-evidence test." (Pet-App. 54.) It, like the circuit court, therefore declined to address whether the evidence was merely cumulative and whether there was a reasonable probability of a different result, because "Avery's motion [was] insufficiently pled" to necessitate reaching that analysis. (Pet-App. 54.) The court of appeals also found that Avery's motion was "insufficiently pled in regard to the Buresh affidavit. Avery referenced Buresh one time in the entirety of his postconviction motion." (Pet-App. 54–55.) "He did not offer any analysis or assertions within his motion as to how Buresh's affidavit met the four criteria of newly-discovered evidence or established a reasonable probability that a different result would be reached at trial." (Pet-App. 55.)

Avery petitions this Court for review.

ARGUMENT

This Court's function is to develop and clarify the law. *Blum v. 1st Auto & Cas. Ins. Co.*, 2010 WI 78, ¶ 49, 326 Wis. 2d 729, 786 N.W.2d 78. Nothing Avery raises in his petition is appropriate for this Court's review, because his petition again raises claims he abandoned below and otherwise deals only with well settled law on the postconviction pleading standard needing no clarification.

First, Avery attempts to resuscitate claims that he forfeited below and that are therefore not preserved in this Court. Avery claims that the court of appeals misapplied *Brady v. Maryland*, 373 U.S. 83, 87 (1963) and erroneously

denied his inappropriate request for a new trial in the interests of justice. (Pet. 7, 11–16.) It could not have been clearer that these claims were forfeited in the court of appeals. (Pet-App. 41.) Avery raised those claims in the circuit court but made not a single argument on either issue in his brief in the court of appeals. (Avery's Br. 3–45.) His argument there was that he met the materiality prong of the newly discovered evidence test under *State v. Edmunds*, 2008 WI App 33, 308 Wis. 2d 374, 746 N.W.2d 590, which, of course, uses the same standard as *Brady*. (Avery's Br. 11–18.) Avery did not preserve a *Brady* claim merely by citing it for the general materiality standard. There is no argument on the three prongs of a *Brady* claim anywhere in Avery's brief to the court of appeals. (Avery's Br. 11–45.) And he never once mentioned even the statute for an interests of justice claim, let alone made any argument that he was due relief under it. Arguments not raised in the appellant's brief to the court of appeals are forfeited in this Court. *Veritas Steel, LLC v. Lunda Construction Company*, 2020 WI 3, ¶¶ 38–43, 389 Wis. 2d 722, 937 N.W.2d 19. Avery forfeited these claims.

Avery's claim that Sowinski's account was material independently of the *Denny* test is also forfeited due to his failure to raise that argument in the circuit court. (Pet. 11–16.) There, he argued only that the Sowinski evidence met the materiality prong of the newly discovered evidence test because it satisfied the three prongs of *Denny*. (Pet-App.42–44.) The court of appeals thus held that Avery failed to sufficiently plead this argument in the circuit court to preserve it for appellate review. (Pet-App. 43–44.)

Second, and more importantly, the only legal issue raised by this case is whether Avery provided sufficient facts in his motion to require a hearing on his newly discovered evidence claim. (Pet-App. 44–55.) Whether he sufficiently showed that he could prove at a hearing that Sowinski's evidence was material necessarily revolved around whether

Avery pled sufficient facts to meet the three prongs of *Denny*, because otherwise his allegations against Bobby Dassey would be inadmissible, and inadmissible evidence is not material. *State v. Bembenek*, 140 Wis. 2d 248, 256–57, 409 N.W.2d 432 (Ct. App. 1987).

The court of appeals appropriately looked to the substance pled within the four corners of Avery's motion and compared it to the facts on which he based it and the existing record. (Pet-App. 41–55); *State v. Allen*, 2004 WI 106, ¶¶ 12, 23, 274 Wis.2d 568, 682 N.W.2d 433. It correctly determined that neither the evidence Avery submitted nor the facts of record were sufficient to support Avery's legal conclusions on any of the three prongs of *Denny*, thus Avery failed to show Sowinski's evidence was material as required by the newly-discovered-evidence test. (Pet-App. 41–55.) This Court has already established that mere speculation that a third party committed the crime is insufficient, and that Avery's failure on any one of those prongs would mean his motion was insufficiently pled. *State v. Wilson*, 2015 WI 48, ¶¶ 59, 64, 362 Wis. 2d 193, 864 N.W.2d 52. There is nothing unclear about *Wilson* that needs this Court's attention, nor is there anything needing clarification about what is required for newly discovered evidence to be material.

As the State explained previously, these pleading standards and what constitutes sufficient, material, and nonconclusory facts to entitle the defendant to a hearing have been fully articulated for decades and in cases too numerous to count. *See, e.g.*, *Nelson v. State*, 54 Wis. 2d 489, 496, 195 N.W.2d 629 (1972); *State v. Bentley*, 201 Wis. 2d 303, 313–18, 548 N.W.2d 50 (1996); *Allen*, 274 Wis. 2d 568, ¶ 30; *State v. Balliette*, 2011 WI 79, ¶ 20, 336 Wis. 2d 358, 805 N.W.2d 334; *State v. Romero-Georgana*, 2014 WI 83, ¶¶ 33–37, 360 Wis. 2d 522, 849 N.W.2d 668. There is no need for this Court to rehash them.

The final reason this case is inappropriate for this Court's review is because it would not change the outcome here. The record plainly shows that there is no probability of a different result even if Avery presented his factually unsupported *Denny* defense.

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 explain how, when, or where Bobby Dassey could have abducted, killed, and hidden the victim or her car in the roughly 15 minutes between her arrival on the property and Scott Tadych passing Bobby on the highway; his failure to provide any plausible method how Bobby Dassey could have transferred Avery's blood from his sink to the RAV-4; his utter failure to account for his DNA on the hood latch of the RAV-4 or its keys, or any explanation how Bobby could have transferred his touch DNA to these items; his inability to explain how Ms. Halbach's remains, including a fragment from "virtually every" bone in the human body, could be transferred to his burn pit undetected or when that could have occurred; his inability to explain how or where Bobby hid the RAV-4 for five days or moved it to the location where it was eventually found or how or when he managed to get into his uncle's trailer undetected to plant the keys; and nothing to explain how Bobby could possibly be responsible for the bullet with Ms. Halbach's DNA on it being found in Avery's garage and matched to the gun above his bed. (R. 1065:18–29.) Nor did Avery provide any realistic explanation (or any explanation) why someone trying to frame him would have gone to such lengths to hide the evidence.

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. (*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.) And this second person he purportedly saw has never been identified, meaning Sowinski's information could not even actually point to Bobby as in exclusive possession of the car. 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. Additionally, Buresh's claim that he saw Bobby Dassey (whom he claims he does not know but somehow recalled that this is who he saw years later) driving a RAV-4 contradicts Sowinski's claim that he saw him pushing one the same morning. (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.

In short, Avery's petition concerns only the application of well settled law to the facts and rests on claims that would not succeed even if this Court were to grant review. There is no law development to be done here. Review would be a waste of this Court's scarce time and resources.

CONCLUSION

Avery's petition for review should be denied.

Dated this 13th day of February 2025.

Respectfully submitted,

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FORM AND LENGTH CERTIFICATION

I hereby certify that this petition or response conforms to the rules contained in Wis. Stat. §§ (Rules) 809.19(8)(b), (bm) and 809.62(4) for a petition or response produced with a proportional serif font. The length of this petition or response is 2,496 words.

Dated this 13th day of February 2025.

Electronically signed by:

Lisa E.F. Kumfer
LISA E.F. KUMFER

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 13th day of February 2025.

Electronically signed by:

Lisa E.F. Kumfer
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