

BY THE COURT

Angela W. Sutkiewicz

Angela W. Sutkiewicz
Circuit Court Judge

Date August 22, 2023

STATE OF WISCONSIN : CIRCUIT COURT : SHEBOYGAN COUNTY

STATE OF WISCONSIN,

v.

Case No. 2005 CF 381

STEVEN A. AVERY,

Defendant.

MEMORANDUM DECISION AND ORDER

The defendant is back before the circuit court with a post-conviction motion pursuant to Wis. Stats. §974.06. Through his attorneys, Kathleen T. Zellner & Associates, PC, the defendant asserts that newly discovered witness statements will establish that there is a viable third party suspect for this offense. The defendant asserts that evidence regarding this third party suspect was never presented at the time of trial and the failure of the presentation of the alternative suspect undermines the confidence in the jury verdict. The defendant further asserts that the state violated the provisions of

Brady v. Maryland, 373 U.S. 83, 87, 83 S. Ct. 1194, 10 L.Ed. 2d 215 (1963). If the court rules that the third party suspect evidence does not meet the requirements to grant relief pursuant to his request for post-conviction relief, the defendant asks that, alternatively, that the court grant him a new trial in the interests of justice, pursuant to Wis. Stats. §805.15.

FACTS

The court will not recount the full record in this voluminous case. The facts have been set forth in numerous filings in prior court proceedings. This court will refer only to the facts alleged in the current motion before the court.

Prior to the commencement of his trial in 2006, the trial court entered an order requiring the defense to identify any individuals “other than Brendan Dassey” that it intended to suggest was a third party responsible for any of crimes charged against the defendant. Furthermore, the court stated that the admissibility of evidence regarding a potential third party suspect would be required to meet all the standards set forth in the ruling in *State v. Denny*, 120 Wis. 2d 614, 357 N.W.2d 12 (Ct. App. 1984).

The defendant provided notice that he would assert that there was a reasonable possibility that others committed the murder with which he was charged, including Scott Tadych, Andres Martinez, Robert Fabian, Charles and Earl Avery, and the Dassey Brothers. In addition, the defendant argued that the ruling in *Denny* did not apply to his trial and that, if it did, he should be permitted to present evidence regarding several alternative suspects.

The trial court found that the standard set forth in *Denny* did apply to the defendant's evidentiary offering and noted that in the absence of motive, it could be more difficult to offer evidence that would be relevant and material to a third person having committed the crime. The court concluded that nothing in the defendant's offer went beyond the level of speculation. The court stated that while the defendant identified many people with the opportunity to commit the murder, no clear motive for the crime was identified for any of the alternative suspects, failing to meet the *Denny* standards.

After the defendant was convicted of this murder, he filed a post-conviction motion pursuant to Wis. Stats. §974.06. The court concluded that while the defendant may have supplied evidence as to motive to frame the defendant, none of the evidence identified a motive for Bobby Dassey to murder Teresa Halbach. Without establishing any evidence of motive, the court concluded that Mr. Dassey was precluded from being named as a potential suspect under *Denny*. The Wisconsin Supreme Court allowed the decision to stand.

Several other post-conviction motions were filed, denied, and upheld by the Appellate Courts. The Court of Appeals ruled on the defendant's last post-conviction motion on July 28, 2021, upholding the circuit court's decision. The court found that the content of the defendant's motion was insufficient to entitle him to a hearing on his claims.

While that motion was pending before the Court of Appeals, the defendant requested that the court stay its decision and remand the matter back to the circuit court for evaluation of a new claim. The Court of Appeals noted that the defendant was asserting a *Brady* violation involving the affidavit of a new witness, Thomas Sowinski.

In his affidavit, Mr. Sowinski asserted that he saw Bobby Dassey in possession of the victim's vehicle several days after the murder. Mr. Sowinski stated that he called the Manitowoc Sheriff's Department later that day to report what he saw and was dismissed by the deputy.

In its decision of July 2021, the Court of Appeals stated that the defendant's newest claims regarding a *Brady* violation had little or no relation to the claims before the court in that appeal. The Court stated that this issue should be resolved in a separate post-conviction before the circuit court. The court further stated that:

As discussed below, we are not addressing Avery's most recent filing to this court (see our discussion of Motion #6), which seeks to directly connect Dassey to Halbach's murder. If Avery wishes to raise that claim, he will need to bring a new WIS. STAT. § 974.06 motion. That motion would need to survive both Escalona-Naranjo scrutiny and be found to have merit—in which case, the evidence presented might supply the missing "direct connection." In that event, the Velie CD evidence might become relevant to showing Dassey's motive, and might bear on whether Dassey is, or should have been, a viable Denny suspect. We express no opinion on the merit of any such § 974.06 motion, as all such issues would be for the circuit court to decide in the first instance.

(Referring to *State v. Escalona-Naranjo*, 185 Wis. 2d 168, 185-186, 517 N.W. 2d 157,164 (1994)).

As a result of this ruling, the defendant brought this post-conviction motion pursuant to Wis. Stats. §974.06. The defendant asserts that by failing to disclose the statement of Mr. Sowinski to the defendant, the state withheld exculpatory evidence from the defense in violation of the *Brady* rule. Furthermore, the defendant states that the evidence supplied by Mr. Sowinski creates a direct link between Bobby Dassey and the murder of the victim. As such, the defendant asserts that he was denied the opportunity

to present evidence of a viable third party suspect at his trial. By denying the defendant the opportunity to present that defense at his criminal trial, he argues that the issues in the case were not fully tried and that had the jury been presented with this testimony, the verdict in the case would likely have been different. The defendant is now asking the court to review the aforementioned claims and grant the defendant relief, or in the alternative, grant him a new trial in the interests of justice.

ANALYSIS

For the affidavit of Mr. Sowinski to be admitted as evidence, establishing Bobby Dassey as a valid third party suspect in the murder of Ms. Halbach, the defendant must satisfy two separate tests. The test in *Denny, supra.*, requires the defendant show that the third party had a legitimate tendency to commit the crime at issue. To meet this burden, the defendant must show that the third party had a motive to commit the crime, the opportunity to commit the crime, and that there is some direct evidence linking that party to the crime that is not remote in time, place, or circumstances. *Id.*

The defendant also raises, and correctly identifies, that the test set forth in *State v. Edmunds*, 2008 WI App 33, ¶ 13, 308 Wis. 2d 374, 746 N.W.2d 590, also applies to the admissibility of the affidavit itself. The *Edmunds* court established a four-part test to determine if evidence is newly discovered and admissible for consideration by the court. First, the evidence must have been discovered after the defendant's conviction. Second, the defendant must establish that he was not negligent in seeking out the evidence in question. Third, the defendant must establish that the evidence is material to an issue in the case. Fourth and finally, the defendant must prove that the evidence offered is not merely cumulative to that already in the court record. *Id.* The defendant further notes that

only if these four requirements are met, is the circuit court required to determine whether a reasonable probability exists that a different result would be reached in a new trial.

State v. Love, 2005 WI 116, ¶ 44, 284 Wis. 2d 111, 700 N.W.2d 62.

In his affidavit, Mr. Sowinski states that in the early morning of November 5, 2005, he was delivering newspapers to the Avery Salvage Yard in the course of his employment. Prior to actually delivering the newspapers, Mr. Sowinski states that he encountered Bobby Dassey and an older, unidentified man pushing a dark, blue RAV-4 down Avery Road toward the junkyard. Mr. Sowinski stated that the car did not have its lights on. After delivering the newspapers to the Avery mailboxes, Mr. Sowinski states that he drove back towards the exit where Bobby, the older gentlemen, and the car still were. Mr. Sowinski states that Bobby then stepped in front of his vehicle in an attempt to stop him from leaving the property. He further states that his headlights were shining directly on Mr. Dassey at this point. Mr. Sowinski then states that he came within 5 feet of Bobby Dassey, who looked unhappy to see him on the road, and was forced to swerve into a ditch to avoid him. Fearing for his safety, Mr. Sowinski called out, "Paperboy. Gotta go," and drove toward the exit. After learning that Ms. Halbach's car was found on the property, Mr. Sowinski states that he realized the importance of what he had seen and immediately contacted the Manitowoc County Sheriff's Department to report the encounter. Mr. Sowinski then states, that after viewing the television show, "Making of A Murder," he contacted the Innocence Project in New York to report the incident again. Finally, in 2020, Mr. Sowinski contacted the defendant's current counsel and the current affidavit was drafted.

With respect to the first requirement of the *Edmunds* test, the defendant states that Mr. Sowinski did not come forward and contact the defendant's counsel until April 2021.¹ In his corrected affidavit, Mr. Sowinski states that he originally believed that he contacted the defendant's counsel in 2016. However, it was later discovered that Mr. Sowinski actually sent his communication to the Innocence Project in New York. Counsel states that this information was not relayed to the current defense team at that time. The defendant asserts that in spite of numerous discovery requests filed by his original trial counsel, the record of the call that Mr. Sowinski made to the Manitowoc Sheriff's Department was not turned over to them until after Mr. Sowinski came forward in 2021 and an additional, specific discovery request was made.² For the purposes of this test only, the court will conclude that the evidence in the Sowinski affidavit was discovered by the counsel after the defendant's conviction, satisfying the first requirement of the *Edmunds* test.

The defendant next addresses the second standard of the *Edmunds* test. The defense asserts that it was not negligent in seeking out the evidence set forth in Mr. Sowinski's affidavit. Prior to Mr. Sowinski contacting his attorneys in 2021, the defense states that it had no way of knowing that such an account of events existed. The log of the call that Mr. Sowinski made to the Manitowoc County Sheriff's Department was not turned over to trial counsel in spite of numerous discovery requests. Neither trial nor appellate counsel was on notice that any such contact occurred. The record of the call was only delivered to current defense counsel after Mr. Sowinski contacted the team

¹ There is mention in the defendant's filing that the first phone call came to the defense team in December 2020. Both dates clearly come after the date of Mr. Avery's conviction.

² The State's objections to this evidence goes to the defendant's argument asserting a *Brady* violation occurred earlier in the prosecution of this case. The State's argument will be addressed in that analysis.

directly and the team specifically requested records of any contacts between Mr. Sowinski and the Manitowoc County Sheriff's Department in order to verify the assertion made in the affidavit. Based on those facts, the defense has met the requirements and satisfied the second standard of the *Edmonds* test.

The third standard of the *Edmunds* requires that the defendant establish that the new evidence offered is material to an issue in the defendant's case. The evidence submitted as being material to the defendant's motion goes to this theory that a third person committed the crime for which the defendant was convicted of. For evidence to be admitted to establish that a third party committed a crime rather than the accused, the evidence must meet the test set forth in *Denny, supra*. For evidence to meet the *Denny* test, the evidence offered must show that there is a "legitimate tendency" that a third party committed the crime alleged. More specifically, the evidence must establish that the third party had the motive, the opportunity, and a direct connection to the commission of the crime itself. *Id.* While the defendant does not have to prove the guilt of a third party at the level that would sustain a conviction, evidence that simply affords a possible ground of suspicion against the third party is not admissible. *State v. Wilson*, 2015 WI 48, ¶1, 362 Wis. 2d 193, 199, 864 N.W. 2d 52.

The defendant asserts that the evidence in the Sowinski affidavit establishes a direct link between Bobby Dassey and the murder of the victim. By linking Bobby Dassey directly to the vehicle driven by the victim, the defendant asserts additional evidence, previously discounted in this case, may then be reconsidered by the court, further supporting his third party suspect theory. The defendant argues that this previous excluded evidence includes a CD copy of the computer hard drive found in the Dassey

home. The defendant argues that this CD, which contains searches of terms and subjects, including images of violent pornography, would establish a sexual motive for Bobby Dassey to have committed the murder. The defendant argues that the Sowinski affidavit also establishes that Bobby Dassey had the opportunity not only to have committed the murder of Ms. Halbach, but also to plant evidence, including the defendant's blood and DNA, in the victim's RAV-4. Further, the defense argues that Mr. Dassey's possession of the RAV-4 also provided to him access to the key to the victim's car, found in the defendant's home, as well as the victim's electronics, found in the burn barrel along with the victim's remains. The defendant finally asserts that the information in the Sowinski affidavit could impeach the testimony that Bobby Dassey gave at trial, in which he stated that the victim never left the property and was last seen heading towards the defendant's trailer.

With respect to the motive element of the *Denny* test, the defendant argues that the state clearly considered that sexual assault was a motive for the murder, as evidenced by the seizure of the family computer in the Dassey home. The defendant asserts that evidence of Mr. Dassey's motive to commit murder was contained on the hard drive of that computer which was copied onto a CD, referred to as the "Velie CD". The defendant cites the decision of the Court of Appeals in which the court stated that the content of the Velie CD may become relevant to the defendant's motion if the defendant could prove a direct connection between Mr. Dassey and the murder committed.

The defendant then goes into a lengthy argument as to how the evidence found on the Dassey family computer establishes the motive for Mr. Dassey to have committed the murder of Ms. Halbach. The defendant asserts that searches for words and images found

on the Dassey computer show an obsession with violence and killing. The defendant further states that images deleted from the computer were pornographic in nature and depicted violent images of the torture and mutilation of young females. The defendant then refers to the affidavit of Brad Dassey, the half-brother of Bobby, who states that he had a conversation with Barbra Dassey, Bobby's mother, in which she stated that she hired someone to delete the files from the computer in question.

The defendant hired an expert to examine the Dassey family computer. His expert, Mr. Hunt, states that he discovered eight periods of time, close to the date of the murder, from which files were missing and presumably deleted. The defendant then states that Special Agent Thomas Fassbender examined the Velie CD and in his report, described media that he found on the disk: images of the victim and the defendant with a date of April 18, 2006; images of nudity of both sexes, including pornography depicting bondage and "possible torture and pain". He further stated that other images on the CD included those of pornography, including acts between humans and animals, images of young women, and injured and mutilated people.

The defendant then asserts that the record contains sufficient evidence to prove that Bobby Dassey was the only member of the household at home during certain days and hours when some of the searches were conducted. The defendant bases this conclusion on the self-reported routine schedules of all other members of the Dassey family that would have kept them out of the house at the time the searches were conducted. Based on those routine schedules, the defendant asserts that every other member of the family living in the Dassey house was excluded from conducting the incriminating searches and that only Bobby could have researched these violent and

pornographic images found on the family computer. The defendant asserts that he, too, must be eliminated as a person who conducted the searches because he had no access to the Dassey home and did not have the password to the computer. As further proof that he could not have conducted the computer searches, the defendant notes that most of the violent pornographic images discovered were accessed after he was taken into custody on November 9, 2005, and that Brendan Dassey, also convicted of crimes related to this murder, was in custody on March 1, 2006, when more of the most violent images were searched. The defendant further cites Bobby's testimony at his trial, in which he stated he was home alone and asleep from 6:30 a.m. to 2:30 p.m. on October 31, 2005. Because there were searches done on the Dassey family computer during those hours, the defendant asserts that the only conclusion that can be drawn is that Bobby conducted those searches.

The defendant also refers to documentation of an interview of Bobby, taken on November 17, 2017, in which he stated that the family computer was located on a desk in the living room of the Dassey home "at the time". Bobby further denied that the computer was ever located in his bedroom; however, crime scene photos taken on November 12, 2005, show the computer in that location. The defendant further cites an affidavit, taken on June 25, 2018, in which Bobby's brother Blaine stated that the family computer was located in Bobby's room and Bobby was the primary user.

Based on that evidence, the defendant asserts that the violent pornographic images researched by Bobby were conducted sufficiently close in time and were sufficiently similar in manner to the murder to establish a motive for Bobby to have committed a crime. The defendant relies on *Dressler v. McCaughtry*, 238 F.3d 908, 910, 913-14 (7th

Cir. 2001) for the proposition that other acts evidence admitted as evidence could be proof of a defendant's motive, intent, and plan to murder the victim. The defendant quotes the *Dressler* decision in support of his claim:

The fact that [the defendant] maintained a collection of videos and pictures depicting intentional violence is probative of the State's claim that he had an obsession with that subject. A person obsessed with violence is more likely to commit murder, and therefore the videos and photographs are relevant.

Id. at 914. Based on the *Dressler* ruling, the defendant asserts that the court should find that Bobby's obsession with violent pornographic images made him more likely to have committed murder, establishing his motive in this case.

In further support of his assertions, the defendant cites the report of his expert, Dr. Ann Burgess. Dr. Burgess states in her affidavit that there is a well-established causal connection between pornography consumption and violent behaviors. The defendant further refers to an affidavit submitted in a prior motion, submitted by former FBI agent Gregg McCrary, in which he offered his opinion that searches for violent, underage, and child pornography, combined with images and searches for dead bodies, "reflects a morbidity of sexual paraphilia." Agent Gregg further concluded that "Bobby was becoming obsessively deviant in his viewing of violent pornography" in the weeks before Ms. Halbach's murder."

The state disputes the conclusions drawn in the defendant's argument, asserting that the defendant is misrepresenting the facts of the case. The state argues that the defendant has fallen short of establishing that Bobby Dassey was, in fact, the person who conducted the computer searches in question or that the searches conducted were

probative or relevant to prove that anyone had a motive to commit murder in October of 2005.

The state argues that, once again, the defendant failed to establish that Bobby Dassey conducted any of the searches cited by the defendant. Referring back to a previous decision issued by the Court of Appeals, the state recounted the court's conclusion that the mere fact that Bobby could have been home alone when some of these searches were conducted was not conclusive evidence that he did in fact conduct the searches. The defendant, the court continued, cannot rely on the opinion of a computer expert or anyone else's speculation as to what Mr. Dassey's actual schedule was on any particular day in question, a fact which applies to other family members as well. The state notes that there are no citations to any facts of record establishing Mr. Dassey's whereabouts at the time the searches were conducted or any evidence that conclusively establishes that no other person had access to the home or computer at the time in question. Furthermore, the state notes that the defendant provided no citations of record to specific images that would directly relate to the crime committed or identify how any of the images were relevant to any specific individual having motive to commit murder. Referring again to the Court of Appeals decision, the state notes that the court previously concluded that the existence of the searches during a time that Mr. Dassey was usually at home is not a fact that would establish conclusively that he was actually in the home at those times, let alone that he was the person using the computer or accessing these images.

The state further disputes the defendant's conclusions that law enforcement considered pornography or sexual assault as a motive for the murder in this matter. The

state notes that during any criminal investigation, law enforcement collects all potential evidence that could possibly be relevant to the case. That evidence is then analyzed for determination as to whether it has any bearing on the crime committed. The mere fact that the investigator seized the computer does not prove any theory of the case. The state asserts that any relevance assigned by the defendant to the seized computer is unsupported speculation.

The state also argues that the images and terms found during the computer search and cited by the defendant as evidence of motive for murder are not similar to what actually occurred during the commission of the crime and are not relevant to proving motive for anyone, including Mr. Dassey. The state asserts that someone having conducted a search for terms like news, body, journal, and cement, which are very general and not specifically related to this crime, does not show that the searcher had a propensity to have committed this specific crime. The state notes that the defendant's own exhibits show that the majority of the searches for pornography and violent, graphic images have no direct similarity to the manner in which this crime was committed. The state further points out that most of the searches referred to by the defense occurred on a weekend when anyone in the house could have accessed the family computer, while other searches occurred after 3:45 p.m. on a weekday when Blaine would have had access to the computer as well. Additionally, the state points out that the defendant's timeline in which he asserts that Bobby was the only person who could have conducted the searches does not account for the time when Mishicot School District Spring Break took place. Between March 24, 2005 and March 30, 2005, Blaine, Brendan or anyone invited over by

the boys could have accessed the computer. Between April 7, 2006 and April 18, 2006, Blaine had access to the computer as well.

The state goes on to argue that, of the 128 searches listed and relied upon by the defendant as evidence of motive, only 28 of those occurred during the time that it is alleged that only Bobby Dassey could have accessed the computer. Furthermore, of those searches, only three of the searches occurred prior to Ms. Halbach's murder. Assuming, for the purposes of this motion, that those three searches were conducted by Bobby Dassey, the state argues that a mere three searches conducted prior to the murder of Ms. Halbach fail to demonstrate that Mr. Dassey was a voracious consumer of violent pornography prior to the murder, thus failing to establish that theory of motive offered by the defendant.

Addressing the defendant's citation of *Dressler v. McCaughtry*, 238 F.3d 908 (7th Cir. 2001), the state argues that the defendant's reliance on this ruling is misplaced for a number of reasons. First, the state argues that the ruling in *Dressler* was made in a habeas corpus proceeding and is not binding in Wisconsin criminal law. Second, the state argues that facts in the *Dressler* case present a vast departure from those in the case before the court. In *Dressler*, the male victim was murdered in an extremely specific manner that included binding, mutilation, and dismemberment. While investigating the crime, law enforcement searched the defendant's home and discovered many weapons and restraints, along with pictures, magazines, and videos depicting similarly murdered and mutilated victims as well as homosexual pornography. These items were offered at trial as other acts evidence in support of proving the defendant's intent, motive, and plan

to assault and kill the victim in the specific manner depicted in the images found in the defendant's possession.

The state argues that the facts in the case at bar and those in *Dressler* are substantially different. In *Dressler*, the state notes that there was no dispute that physical evidence belonged to the defendant and was in his exclusive possession. In this matter, the state argues that the defendant has not provided any facts to prove that Bobby Dassey was the person in possession of the pornography alleged to be the motive for the murder or had exclusive access to the computer. In addition, the pornographic images discovered in the *Dressler* case very closely mirrored the evidence discovered at the crime scene itself. The state argues that the defendant neither submitted any images taken from the Dassey computer that show an individual who was shot and burned nor any pornographic images that depict acts with any similarity to the Halbach murder. Furthermore, the state argues that the search terms cited as evidence of motive for murder are general and do not specifically relate to the crime committed in this matter. Finally, the state notes that all of the violent images and pornography found in the *Dressler* case were in the exclusive possession of the perpetrator before the murder occurred. The media evidence in *Dressler*, the state argues, showed a prior disposition to commit the crime and a great similarity to the actual crime scene itself. Because the evidence was in the possession of the defendant prior to the crime having been committed, the state argues that it did in fact demonstrate a motive, plan, and intent to commit the crime as alleged. In the case at bar, the state points out that the vast majority of the computer evidence relied upon by the defendant to prove Bobby's motive to kill was obtained during searches conducted after Ms. Halbach was murdered. The state further states that the images and search results

from the Dassey computer did not directly mirror the manner in which the victim was killed. Unlike the defendant in *Dressler*, the state notes that evidence offered by the defendant as proof of motive cannot be proved to have been obtained by or have been in the sole possession of Bobby Dassey.

To the extent that the defendant's submission establishes anything, the state alleges that it demonstrates the defendant cannot meet the admissibility standards under *State v. Sullivan*, 216 Wis. 2d 768, 772, 576 N.W. 2d 30 (1998). The court in *Sullivan* ruled that for other acts evidence to be admissible, the evidence must be submitted for a permissible purpose, it must be relevant, and that its probative value must not be outweighed by unfair prejudice. *Id.*

While motive is a permissible purpose for which evidence can be used, the state contends that the defendant has not established that the evidence he offers is relevant to this matter. The state notes that the Court of Appeals has rejected the argument that the images on the Dassey computer depicted any situations that were similar to the crime scene in the Halbach murder. The state argues that there is nothing about the evidence found on the communal, family computer that is relevant as to proof of motive prior to the commission of the crime. The computer information was collected long after the murder. Nothing in the evidence submitted, the state asserts, makes it more or less likely that Bobby Dassey committed the murder as the defendant alleges.

The state also argues that because there is a lack of similarity to the crime committed and that the searches were done after the crime was committed, the prejudicial value of the evidence offered outweighs its probative value. Because there is no direct link to motive or any evidentiary similarity between the computer evidence and the crime

committed, the state argues that a jury could convict Bobby Dassey on legally inadmissible evidence. If such evidence were submitted to the jury, the state argues that a jury could conclude that the individual who searched for such images was inherently a bad person and convict on that basis alone, rather than on the applicable law.

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

The defendant rests his motive arguments on the premise that Bobby Dassey had an obsession with violent, sexual pornography involving young women and a fascination with gruesome homicides and deaths. However, the defendant's arguments are not supported by the evidence submitted. As the Court of Appeals has already concluded, the defendant did not establish that it was Bobby Dassey who conducted the searches in question. The Court of Appeals ruled that even if the defendant is correct as to what the usual schedules of the Dassey family members were, those general schedules are not proof establishing where any specific member of the family was on any given day. While the defendant argues that nothing short of a recording of Bobby Dassey conducting the

searches on the computer would satisfy the standard of proof demanded by the state, this assertion is not true. The defendant could have offered any piece of evidence that, during the time in question, Mr. Dassey entered some type of identifier unique to him, such as a specific username or password, to establish that he was, in fact, the person using the computer to conduct the searches cited. The defendant could have offered a witness who saw Mr. Dassey actually conducting any of the searches in question. Even more simply, the defendant could have offered evidence that the defendant was actually home at the time of the searches rather than speculation based on the typical schedules of the family to prove that Mr. Dassey conducted the searches. The Court of Appeals has already concluded that the mere fact that Mr. Dassey may have been home during the time that the searches were conducted was not conclusive proof that he was the person who actually conducted the searches that the defendant relies upon to prove motive for murder.

The defendant's reliance on *Dressler* is also misplaced. The facts in *Dressler* were substantially different from those in the current case. The defendant in *Dressler* was shown to have very specific images in his possession that closely mirrored the evidence found at the crime scene. The instruments involved in the murder were found in the defendant's exclusive possession. The totality of the evidence proved that the defendant was in possession of the incriminating evidence prior to the commission of the crime.

In this case, the images and terms searched by someone in the Dassey house on the family computer do not closely mirror either the method of murder or the disposal of the remains in this case. The searches offered by the defendant refer to generalized,

violent pornography and term searches. No search results offered by the defendant directly mirror the elements of the crime in this case. There is no evidence, only generalized assumptions, that Bobby Dassey was the individual who conducted the searches on the family computer. The computer was not in the exclusive possession of Bobby Dassey prior to or after the murder. Only a very small number of searches were conducted prior to the murder of Ms. Halbach. No physical evidence directly linking Brian Dassey to the homicide was found in the house.

The defendant offers the argument that Bobby Dassey had a predisposition to commit the crime based on an addiction to violent pornography. The defense offers two experts who discuss the role of pornography in the commission of this crime. Putting aside any questions as to the qualifications of the experts to opine on this matter, both of the conclusions reached by the experts depend on the assumption that Bobby Dassey was the individual researching the pornography on the computers, a fact not established in this matter. Furthermore, the experts reached their conclusions without doing any forensic or psychological examination of Bobby Dassey in person; their conclusions as to his mental state are based on evidence that is not admissible in this matter.

The defendant has not met the burden under *Denny* to establish that Bobby Dassey had motive to commit the crime alleged and, as such, failed to meet the burden to admit the evidence offered to prove the existence of a third-party suspect for the commission of this crime. Without such a finding, the defendant cannot meet the third element of the *Edmunds* test establishing that the evidence is material in his case. As previously noted, evidence that simply affords a possible ground of suspicion against a third party is not admissible. *Wilson, Id.*

Even if the defendant had met the burden with respect to the motive element of the *Denny* test, he has not met the burden with respect to the element of opportunity under the same test. The defendant asserts that the legal term of opportunity is broad and encompasses other acts evidence that may otherwise be inadmissible. *Wilson*, at ¶¶ 66-67. The defendant states that opportunity can include the individual's physical presence at the crime scene or proof that an individual had the requisite skill, capacity, or ability to carry out an act. The defendant also notes that it is incumbent on the proponent of the evidence to show the relevance of the evidence offered. 7 Wis. Prac., Wis. Evidence §404.7 (3rd ed.) (footnotes omitted).

The defendant notes that Mr. Dassey was present on the Avery family property on the day that Ms. Halbach's murder took place. The defendant then refers to the affidavit of Mr. Sowinski to further support his other arguments. The defendant argues that the affidavit of Mr. Sowinski establishes that because Bobby had possession of the RAV-4, he; therefore, had access to evidence that the defendant asserts was planted to frame him. Specifically, the defendant asserts that Bobby's possession of the RAV-4 gave him access to the key found in the defendant's home and the victim's personal electronics found in the burn barrel. The defendant further states that Mr. Dassey had access to his blood because, on November 3, 2005, the defendant reopened the cut on his finger and dripped a substantial amount of blood in his bathroom sink and on the bathroom floor. The defendant then states that he went to the Dassey residence to ask Bobby and his brothers if they would like to go to Menard's with him and his brother. According to the defendant, Bobby decided to stay behind. It was also at that time that the defendant states that Bobby saw the open cut on his hand. The defendant states that when he left for

Menard's, he left his trailer unlocked and upon leaving, saw the tail lights of a vehicle near his trailer.

The state agrees that in some instances, an individual can be implicated in a crime by their mere proximity to a crime scene. However, in the matter before the court, the state argues that the defendant is offering a much more complicated scenario as to Mr. Dassey's opportunity to commit the crime. Referring to the defendant's argument, in order to satisfy the *Denny* test, the state asserts that the defendant must offer evidence that Mr. Dassey had the skills, contacts, tools, time, and/or other means necessary to have committed the crime and staged the scene in the manner alleged. The defendant must provide "evidence that the third party had the realistic ability to engineer such a scenario." *Wilson, supra.* at ¶¶ 10, 85.

The state argues that the defendant failed to meet that burden in this matter. The state asserts that the defendant has offered no evidence to establish that Bobby had the opportunity to successfully orchestrate this extremely complicated scheme to frame his uncle. The state argues that the complete absence of any necessary facts to support the defendant's argument demonstrates that the defendant has insufficient evidence to show that Bobby had the opportunity to kill Ms. Halbach and frame the defendant in the manner the defense claims.

The state goes on to argue that the defendant has offered no evidence to establish that Bobby had the necessary skills available to manipulate the evidence in a manner that would implicate the defendant. The state notes at the time of the murder, Bobby Dassey was an 18-year-old high school graduate with no criminal record. Mr. Dassey was employed as a third-shift worker at a furniture factory. The state posits that there is no

evidence of record that establishes how an individual of Bobby's age and experience would have obtained the scientific knowledge or skill to collect, transport, and plant the defendant's blood from his bathroom.

The state notes that nothing in the record indicates how Mr. Dassey would have obtained the necessary materials to collect and transfer evidence in a manner successfully, as well as in a manner not detected after analysis by the crime lab. The state points out that the defendant, in his brief in chief, does not address how Bobby transferred touch DNA to the victim's car.³ Furthermore, the state notes that the defendant does not explain how Bobby could have kidnapped and killed Ms. Halbach, then hid her body and her car within minutes of being seen on the highway at approximately 3:00 p.m. Referring to the record, the state asserts that it contains no explanation or evidence to establish how an individual with Bobby's age, education and experience discovered a tiny, mangled bullet fragment that he knew had the victim's DNA on it and planted it in the garage, or alternatively, shot the victim there on the 31st and managed to thoroughly clean up the scene without the defendant noticing Bobby even though he was using the garage to work on vehicles during and after that time.

The state additionally argues that there is nothing in the record explaining or supporting the theory that Bobby moved the victim's body and burned it at some

³ In his response brief, the defendant asserts he previously explained that the touch DNA was transferred by law enforcement from an illegally obtained swab of his person. However, the defendant also speculates that Bobby could have taken his toothbrush from the bathroom and used the DNA from that to place the DNA on the victim's car. This is a new claim – the defendant has not previously mentioned a missing toothbrush in his previous motions or attributed such action to Bobby Dassey. It is not clear from the defendant's argument which scenario the defendant is now relying upon: that both Bobby Dassey and law enforcement independently attempted to frame the defendant or that he is abandoning his theory of law enforcement involvement in the planting of evidence and speculating on the theory that a toothbrush provided the touch DNA on the car.

undisclosed location, then moved the bone fragments from almost every bone in the human body back to the burn pit on the Avery property undetected. While the defendant asserts that Bobby planted the key to the victim's RAV-4 in his trailer between November 3 and November 5, the state notes that there is no explanation as to how Bobby could have moved the car from the property without the keys, driven away from the property, walked back to the property and replaced the keys in the defendant's trailer without anyone noticing.

The *Wilson* test requires that the defendant must provide evidence that Bobby Dassey had the realistic ability to carry out the complicated plan that it alleges was used to frame the defendant. The defendant speculates on many points as to how Bobby could have carried out the plan to frame his uncle, but the *Wilson* test requires more. The defendant has failed to offer any evidence that Bobby had the scientific knowledge to recognize the significance of each piece of the forensic evidence supposedly planted by him, let alone establish that he had the skill to plant that evidence in a way that would stand up to scientific scrutiny by professional crime scene analysts. The defendant offers no evidence supporting his claim that Bobby had the requisite knowledge to create and execute an elaborate plan to commit a murder and frame his uncle.

The defendant further failed to offer any facts of record that establish a consistent plan to frame the defendant, or any theory including or excluding law enforcement involvement which implicates the defendant in this crime. The defendant's theory that Bobby framed him for this murder also fails to acknowledge a significant fact in relation to this crime – to which Brendan Dassey confessed and was convicted of participating in the murder of Ms. Halbach. Brendan specifically implicated the defendant in this crime

and his conviction has been affirmed by the appellate courts and remains of record. All of the allegations implicating Bobby in the murder and the framing of the defendant are pure speculation and not supported by any evidence submitted by the defendant. As such, the defendant failed to satisfy the tests in *Edmunds*, *Denny* and *Wilson*.

Finally, the defendant asserts that the Sowinski affidavit supplies a direct connection between Bobby and the murder of Ms. Halbach. The defendant asserts that because Bobby was in possession of the victim's RAV-4, it proves that he had access to the key to the defendant's car and her electronics that were found in the burn pit. These items are links that are central to proving Bobby Dassey's involvement in the murder of Ms. Halbach. The defendant argues that Bobby's possession of the car provides a direct evidentiary link between Bobby and the crime committed, making him a viable, third-party suspect.

Assuming, for the purposes of this motion, that everything averred to in the Sowinski affidavit is true, the defendant is incorrect in his assertion that the facts in the affidavit provide a direct link between Bobby and the Halbach murder. The defendant asserts that, ipso facto, if Bobby was in possession of the victim's car that night, he must also have been the individual who committed the murder. No evidence submitted by the defendant supports this conclusion. Even if Bobby was found in the possession of the victim's automobile on the night of November 5, 2005, there is only speculation and no evidence to prove that Bobby was in possession of the car or that he had exclusive control over the vehicle prior to that night.

The defendant further asserts that Bobby's possession of the car gave him access to the victim's car key and her personal electronics. Again, this is speculation by the

defendant. Mr. Sowinski's affidavit does not mention seeing Bobby with the key to the victim's car. In fact, the affidavit establishes that Bobby was pushing the victim's car without power on the night in question, placing doubt on whether he was in possession of the victim's car key. The affidavit does not mention that Mr. Sowinski saw Bobby with the defendant's personal electronics. There is no evidence that those items were in the car at the only time that it was linked to Bobby by Mr. Sowinski. Neither the key nor the electronics were linked by any witness or by any forensic evidence to Bobby. The victim's key and electronics could have been taken directly from the victim or taken from her car at any time prior to or after the murder by another individual long before the auto was in Bobby's possession. There is no evidence of record taken from the car that links Bobby directly to the actual homicide of Ms. Halbach.

The Sowinski affidavit, taken as true for the purpose of this motion, directly links Bobby to possession of the victim's vehicle. However, possession of the vehicle does not directly link Bobby to the homicide itself. Nothing in the affidavit establishes that Bobby was in possession of the evidence that the defendant asserts was used to frame the defendant. No forensic evidence was found in the car that directly linked Bobby to the murder. No evidence of record establishes that Bobby had exclusive possession of the victim's vehicle prior to the night that Mr. Sowinski saw him on the road or that Bobby had any control over the vehicle prior to that date. None of the physical evidence presented at trial or subsequently links Bobby Dassey to the actual commission of the homicide in this case.

While the defendant asserts that the only logical conclusion to be drawn from Bobby's possession of the vehicle that night is that Bobby was the individual who

actually murdered Ms. Halbach, this assumption is flawed. 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. The defendant's conclusory assumptions drawn from the evidence offered in the affidavit do not amount to evidence directly linking Bobby to the homicide itself. As such, the defendant failed to meet the final standard of the *Denny* test to establish Bobby as a valid third-party suspect in this crime.

The defendant also alleged that the state committed a *Brady* violation by failing to turn over the record of the phone call that Mr. Sowinski made to the Manitowoc County Sheriff's Department in 2005. The defendant accurately summed up the requirements for the finding of a *Brady* violation in paragraph 87 of his brief in chief,

To establish a *Brady* violation, a defendant must demonstrate that (1) the prosecution suppressed evidence, (2) the evidence was favorable to the defense, and (3) the defense was material to an issue at trial. *State v. Harris*, 2004 WI 64, ¶ 13, 272 Wis.2d 80, 680 N.W.2d 737 (citing *Giglio v. United States*, 405 U.S. 150, 154 (1972))

With respect to the second and third prongs of the *Brady* test, the court has addressed whether the evidence was favorable to the defendant for the purpose that it was offered and whether it was material to an issue at trial. It was concluded that the evidence did not meet either of those criteria. As such, the defendant failed to establish a *Brady* violation with respect to the Sowinski evidence.

With respect to the statement of Kevin Rahmlow cited in his brief, the defendant notes, in paragraph 118 of his brief in chief, that this statement was submitted to the court in its motion to reconsider the October 2017 ruling, denying his second postconviction

motion. The defendant asserts that this claim should not be procedurally barred under the ruling in *State v. Escalona-Naranjo*, 185 Wis. 2d 168, 185-186, 517 N.W.2d 157, 164 (1994) because the court did not specifically address the affidavit in its ruling on the motion.

While the court did not specifically address every document or exhibit attached to the motion of the defendant in its October 2017 ruling, the court considered each filing in full. However, to be clear, the court will specifically rule on the Rahmlow affidavit with respect to the defendant's current motion.

A *Brady* violation occurs when the prosecution withholds evidence that is favorable and material to an issue in the case. A *Brady* violation does not occur when the prosecution fails to turn over "the type of information that could form the basis for further investigation by the defense." *Harris, supra.* at ¶ 15.

With respect to the defendant's theory that Bobby Dassey is a credible third-party suspect, the Rahmlow affidavit falls into the category of that which could form the basis for further investigation by the defense. Putting aside any credibility issues on the part of the affiant, the affidavit, if taken as true for the purposes of this motion, establishes that the victim's RAV-4 was away from the Avery property between the time of the murder and the time that it was discovered on Avery property. As discussed previously, there is nothing in any of the exhibits offered by the defendant that establishes that Bobby Dassey had possession of the vehicle anytime before the night that Mr. Sowinski states that he saw Mr. Dassey with it. Nothing in the affidavit of Mr. Rahmlow directly links Bobby to the vehicle at the time that it was observed by him. Mr. Sowinski's affidavit only asserts that he saw Bobby pushing the car after Mr. Rahmlow saw it parked in a different

location. There is no exhibit offered that establishes that Bobby had the key to the victim's vehicle. While Mr. Rahmlow's information may have been an avenue for further investigation, the exhibits submitted do not directly connect Bobby Dassey to the homicide itself and fail to meet the standard under *Denny* to establish Bobby as a third-party suspect with respect to this crime. As such, the failure of law enforcement to turn over Mr. Rahmlow's statement is not a violation of his constitutional rights as defined in the ruling in *Brady*.

On May 26th, 2023, the defendant asked that the court consider another affidavit from Tom Buresh. In that affidavit, Mr. Buresh attests that on the night of November 4th or the early morning of November 5th, he was performing his duties as a tow truck driver when he observed Bobby Dassey driving a RAV-4 on County Road Q. Mr. Buresh states that the headlights from his truck illuminated the interior of the RAV-4 and he could clearly see Mr. Dassey and someone that was not the defendant in the vehicle. The affiant goes on to state that while he was incarcerated for bail jumping in 2006, he reported his story to a Brown County Sheriff's deputy, who discounted his report. Mr. Buresh then states that he did not discuss what he saw again until sometime in 2016 or 2017 when he mentioned it to his brother. The defendant reports that he received this affidavit on May 10, 2023, but, unlike the Sowinski affidavit, it does not provide any information on whether the statements made in the affidavit were verified or the investigation was completed.

Once again, assuming for the purposes of this motion, that the facts in the Buresh affidavit were true, the facts do not directly link Bobby Dassey with the murder of Ms. Halbach. The affidavit asserts that two people were in the car when it was seen driving

down the road. While Mr. Buresh states that he can conclusively identify Bobby Dassey in the car, he cannot identify the other individual in the car other than to eliminate that person being the defendant. Once again, the affidavit links Bobby Dassey to being in possession of the RAV-4 after the homicide took place. There is nothing in the affidavit that establishes that Bobby had possession or conclusive possession of the vehicle prior to that time. The affiant states that a second individual was in the car at the time that he saw it driving down the road. The affidavit does not establish that Bobby was the individual who was in possession of the key to the car or the car itself prior to that night. The affidavit only, taken as true, establishes that Bobby was in possession of the car on November 4th or 5th. However, even by the affidavit's statements, Bobby was not the only person in the car that night. Nothing in the statement links Bobby to the homicide itself. One would have to leap to the conclusion that if he were in possession of the RAV-4 that night, he must be the individual who committed the murder. As previously discussed, no direct evidence in this matter links Bobby directly to the murder.

Furthermore, in this affidavit, a new, unnamed individual could equally be implicated as the murderer in this case under the theory offered by the defendant. The unnamed individual had equal access to the car and the key on that night in question. That individual could have been the individual who, if the defense theory is correct, could have moved the car back and forth from the property, removed the personal electronics from the car, possessed the key, and then planted it in the defendant's home. As such, the affidavit offered also fails the test in *Denny* to be admissible to prove the existence of a third-party suspect for this crime.

In the alternative to his motions under *Denny*, the defendant asked that the court grant him a new trial in the interests of justice pursuant to Wis. Stats. §805.15. Given the above conclusions reached with respect to the evidence offered by the defendant, there are no legal grounds to grant such a request.

FOR THE REASONS SET FORTH ABOVE, THE MOTION OF THE
DEFENDANT IS **DENIED**.