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COURT OF APPEALS

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.

BRIEF OF DEFENDANT-APPELLANT STEVEN A. AVERY

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The circuit court answered: No.

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

The circuit court answered: No.

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

The circuit court answered: No.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Pursuant to Wis. Stat. § 809.22 (2022), Appellant requests oral argument to facilitate review of the complex legal issues raised herein. A publication is warranted because the case is of interest to the public.

INTRODUCTION

When dealing with stakes as high as a defendant's liberty, third-party perpetrator evidence walks a bit of a tightrope. *State v. Mull*, 2023 WI 26, ¶40, 406 Wis. 2d 491, 515, 987 N.W.2d 707. Without regard for Mr. Avery's liberty, even after he has brought forth strong new evidence connecting a third party to Ms. Halbach's murder, the circuit court has denied Mr. Avery the opportunity for an evidentiary hearing. Mr. Avery now appeals the circuit court's denial of his amended third postconviction motion because the circuit court's opinion is so legally and factually flawed that it does not even consider whether Mr. Avery has alleged sufficient facts to warrant an evidentiary hearing; instead, the circuit court erroneously interprets S*tate v. Denny,* 120 Wis.2d 614, 357 N.W.2d 12 (Ct. App. 1984) as requiring conclusive proof of motive to satisfy the materiality requirement of *State v. Edmunds,* 208 WI 33, 308 Wis, 2d 374, 746 N.W.2d 590 and as requiring the alleged third party suspect to have the "necessary skills" to manipulate evidence in a manner that would implicate the defendant to satisfy the opportunity prong of *Denny.*

The circuit court's decision, denying Mr. Avery an evidentiary hearing on his new evidence of Bobby Dassey's ("Bobby's") possession of Ms. Halbach's vehicle, is based on an irrational premise "that Bobby could have been in possession of the car that night . . . to help hide evidence to protect *the two individuals* directly linked by forensic evidence to this murder and convicted of the crime." (1132:27, emphasis

added).[1] First, the circuit court is hugely mistaken in presupposing that Brendan Dassey was ever linked forensically to the crime. He was not. Second, the circuit court erroneously relies upon evidence that was barred from being considered at Mr. Avery's trial, such as Brendan Dassey's "confession," to support its decision to deny Mr. Avery an evidentiary hearing (1132:24-25).[2]

The circuit court's speculation is that when Bobby moved Ms. Halbach's vehicle onto the Avery property, it was his intent to help his uncle by hiding evidence. This is contradicted by the fact that all of the forensic evidence used to convict Mr. Avery was in the vehicle and was discovered because the vehicle had been moved onto the Avery property. Mr. Avery's blood and DNA was in the vehicle, Ms. Halbach's electronic devices from her vehicle were subsequently found in Mr. Avery's burn barrel, and the RAV-4 key was later found in Mr. Avery's bedroom. None of this incriminating

[1] Citations to the record on appeal appear with the document number before the colon and the page number after the colon. A citation to "429:16," for instance, refers this Court to page 16 of document 429. Citations to different documents in the record are separated by semicolons. Where available, parallel citations to the Separate Appendix appear in separate parentheticals after the citations to the record. Mr. Avery shall cite to the concurrently filed Separate Appendix as "App. [page number(s)]."

[2] On June 6, 2007, in a letter attached to Mr. Avery's PSI report, Judge Patrick L. Willis evaluated the reliability of Brendan Dassey's "confession" as follows: "Brendan Dassey did not testify at the trial in this case. The jury was not required to assess the credibility of any statements attributed to him;" "Charges of first-degree sexual assault and kidnapping, which were added to the Information after the police interviewed Mr. Dassey, were dismissed by the State before trial;" "The account attributed to Mr. Dassey in the PSI is based on one of his interviews with police. He was interviewed by the police on other occasions during which he gave somewhat different accounts of what happened. He also at some pointed [sic] recanted his statements admitting involvement in the crimes;" "The physical and forensic evidence introduced at Mr. Avery's trial failed to provide corroborating support for a number of the allegations attributed to Mr. Dassey. As one significant example, there was no physical or scientific evidence demonstrating that Teresa Halbach was ever present in Mr. Avery's trailer;" and "An expert witness called on behalf of Mr. Dassey at his trial, one Dr. Gordon, and a Dr. White retained by Avery's counsel, both called into question much of the information provided by Brendan Dassey because of his intellectual limitations, his susceptibility to suggested answers, and the nature of the investigative techniques used." (486:1-2).

evidence was discovered until the vehicle was brought back to the Avery Salvage Yard by Bobby. In the circuit court's nonsensical conclusion, because these actions could be seen as an effort by Bobby to help Mr. Avery, he cannot be considered a valid third-party *Denny* suspect. The circuit court failed to explain why if Bobby was simply lending a helping hand to his homicidal uncle, he would then become the State's star witness against Mr. Avery.

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

This case began in early November 2005 with the disappearance of Teresa Halbach, a twenty-five-year-old professional photographer. Ms. Halbach was reported missing on November 3, 2005. On November 5, 2005, volunteer searchers found Ms. Halbach's Toyota RAV-4 on the forty-acre site of Avery's Auto Salvage, a salvage yard business where Mr. Avery and other family members lived and worked. Ms. Halbach had photographed vehicles at this site previously per Mr. Avery's request. According to State witness Bobby Dassey ("Bobby"), Ms. Halbach was last seen walking towards Mr. Avery's trailer on October 31, 2005.

After finding Ms. Halbach's RAV-4, law enforcement searched the Avery property and, over the course of the next four months, discovered and identified evidence including: burned bone fragments in and around a burn pit, with DNA matching Ms. Halbach's; Mr. Avery's and Ms. Halbach's blood in the RAV-4; the remnants of electronic devices and a camera, the same models as Ms. Halbach's, in a burn barrel; Ms. Halbach's RAV-4 key in Mr. Avery's bedroom, with Mr. Avery's DNA on it; Mr. Avery's DNA on the hood latch of the RAV-4 (deposited, the State later

claimed by Mr. Avery's "sweaty hands"); and a bullet in Mr. Avery's garage containing Ms. Halbach's DNA.

During Mr. Avery's trial, Bobby was the State's primary witness against Mr. Avery. The State used Bobby's testimony to establish that Ms. Halbach never left the Avery property alive. (589:103–04). In his opening statement, Prosecutor Kratz explicitly told the jury of the significance of Bobby's putative observations on the date of Ms. Halbach's disappearance:

> You are going to hear that Bobby was the last person, the last citizen that will have seen Teresa Halbach alive.

(589:104). During the trial, Bobby testified that he observed Ms. Halbach's SUV pulled up in his driveway at 2:30 p.m. on October 31, 2005. (581:36). Bobby testified that he then observed Ms. Halbach exit her vehicle and start taking pictures of his mom's maroon van right in front of his trailer. (581:37). Bobby testified that he then observed Ms. Halbach walking towards the door of Mr. Avery's trailer. (581:38). The following exchange occurred between Prosecutor Kratz and Bobby:

> Q: After seeing this woman walking toward your Uncle Steven's, did you ever see this woman again?
>
> A: No.

(581:39).

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

On October 11, 2019, Mr. Avery appealed the circuit court's denial of his second postconviction motion and all of its supplements. He filed motions to stay and remand concerning two additional claims. At this Court's direction, Mr. Avery raised his claims in his motions to the circuit court as supplemental postconviction motions. The circuit court denied his motions to supplement.

During the pendency of Mr. Avery's appeal, a new witness, Mr. Thomas Sowinski ("Mr. Sowinski"), contacted Mr. Avery's current postconviction counsel in December of 2020. Mr. Sowinski stated that he had witnessed Bobby and one other individual, a bearded man, pushing Ms. Halbach's RAV-4 onto the Avery Salvage Yard in the early morning hours of November 5, 2005. Mr. Sowinski claimed that he had reported this information to the Manitowoc Sheriff's Office.

On April 10, 2021, Mr. Sowinski provided an affidavit to Mr. Avery's current postconviction counsel, stating that:

> Mr. Sowinski was a motor-route driver for Gannett Newspapers, Inc. and delivered papers to the Avery Salvage Yard in the early morning hours of November 5th of 2005. Prior to delivering the newspapers to the Avery Salvage Yard, he turned onto the Avery property and witnessed two individuals, a shirtless Bobby Dassey ("Bobby") and an unidentified older male suspiciously pushing a dark blue RAV-4 down Avery Road towards the junkyard. The RAV-4 did not have its lights on. Mr. Sowinski drove past the two men and delivered newspapers to the Avery mailbox, and then he turned around and drove back towards the exit. When he reached the RAV-4 still over there, Bobby attempted to step in front of his car to block him from leaving the property. Mr. Sowinski came within 5 feet of Bobby and his headlights were on Bobby during this entire time, then Sowinski swerved into a shallow ditch to escape Bobby and exit the property. Mr. Sowinski states in his affidavit that he called out "Paperboy, gotta go" because he was afraid for his safety. He further stated that Bobby looked him in the eye and did not appear happy to see Mr. Sowinski there. After Mr. Sowinski learned that Teresa Halbach's car was found later in the day on November 5, 2005, he realized the significance of what he had observed and immediately contacted the Manitowoc Sheriff's Office.

(1065:76-82). On April 12, 2021, Mr. Avery filed a motion for remand and stay of appeal to this Court containing Mr. Sowinski's original affidavit.

On July 28, 2021, this Court issued a per curiam opinion, upholding the circuit court's summary denial of Mr. Avery's claims raised in his § 974.06 postconviction motion and two supplemental motions, holding that "Avery's § 974.06 motions are insufficient on their face to entitle him to a hearing." *State v. Avery*, 2022 WI App 7, 400 Wis. 2d 541, 970 N.W.2d 564 (1056). However, this Court did not remand Mr. Avery's case for a circuit court ruling on the claim in his most recent filing concerning the new witness, Mr. Sowinski, and reserved Mr. Avery's ability to raise this issue in a successive § 974.06 motion. (1056:2, 33, 41). Specifically, this Court instructed the following:

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

(1056:41, emphasis added). Regarding certain claims Mr. Avery raised in his motion to reconsider the circuit court's October 3, 2017 order denying his second postconviction motion and its two supplements, this Court found:

> Neither we nor the circuit court have squarely considered whether these claims are procedurally barred under ***Escalona-Naranjo*** or whether Avery pled sufficient materials entitling him to a hearing. Such consideration would have to come on a separately filed Wis. Stat. § 974.06 motion, and we express no opinion as to whether such claims would be barred in the event such a motion is filed.

(1056:33). Therefore, this Court did not rule on certain issues contained in Mr. Avery's prior motion to reconsider and its two supplements.

On August 16, 2022, Mr. Avery filed his third motion for post-conviction relief pursuant to § 974.06. (1065, 1066-75). Mr. Avery filed an amended motion on December 6, 2022. (1109-15). Mr. Avery's § 974.06 motion set forth newly discovered evidence that third-party Bobby was seen in possession of the victim Ms. Halbach's vehicle after her disappearance. Mr. Sowinski contacted the Innocence Project about this matter in 2016. Although Mr. Sowinski originally believed it was Mr. Avery's trial defense attorneys that he contacted in 2016, after finding an email verification, he realized it was rather the Innocence Project he contacted, and thus, he amended his original affidavit which was submitted in Mr. Avery's motion to stay his appeal to this Court and Mr. Sowinski's amended affidavit was filed to the circuit court reflecting this mistake. (1065:76-82). Affidavits from two other new witnesses in Mr. Avery's case, Mr. Kevin Rahmlow and Mr. Thomas Buresh,[3] corroborate Mr. Sowinski's observations.

In Mr. Avery's § 974.06 motion, Mr. Avery also raised *Brady* claims relating to the information from the new witnesses. Mr. Avery attached affidavits and documents showing that after Mr. Sowinski contacted Mr. Avery's current postconviction counsel

[3] In Mr. Rahmlow's affidavits provided to the circuit court, Mr. Rahmlow described observing Ms. Halbach's RAV-4 parked at the turnaround at STH 147 and the East Twin River Bridge on November 3 and 4, 2005. Mr. Rahmlow stated that he reported his observation to a Manitowoc Sheriff's deputy he encountered on November 4, 2005 at the Cenex station on STH 147 in Mishicot. (1075:58-68). In Mr. Thomas Buresh's affidavit, he states that sometime before 2 a.m. on November 5, he was driving a tow truck in the area of Highway 147 and County Road Q in Manitowoc County and saw RAV-4 driving South on County Road Q, turning left off of County Road Q as it passed him. Although he did not recognize the passenger in the vehicle, he is 100% sure it was not Mr. Avery (1120:3-5).

and provided the newly discovered evidence, Mr. Avery's current postconviction counsel, through its investigator, submitted its second Public Records Request pursuant to the Freedom of Information Act ("FOIA") for audio recordings of incoming and outgoing phone calls and/or radio dispatches between November 3, 2005 and November 9, 2005 relating to the case. The FOIA-produced audio recordings did not contain the Sowinski call, nor did they contain any dates or times of the calls produced. (1068:1-5). In May of 2022, Mr. Avery's current postconviction counsel received the previously suppressed Sowinski call to the Manitowoc Sheriff's Office which contained a partial recording of the suppressed call to the Manitowoc Sheriff's Office on November 6. For the first time, current postconviction counsel received the exact dates and times of the Manitowoc County Sheriff's Office incoming calls. (1069:1-2). As part of its investigation, Mr. Avery's investigator then interviewed Mr. Sowinski's ex-girlfriend, whom he was dating at the time of the November 5, 2005 incident. Mr. Sowinski's ex-girlfriend, Devon Novak, corroborated Mr. Sowinski's account of what he had witnessed and what he had relayed to law enforcement. Further, Ms. Novak recognized and identified Mr. Sowinski's voice on the recording, played to her by the investigator, of a phone call made to the Manitowoc Sheriff's Office on November 6, 2005 at 10:28 p.m. (1070:1-5). Mr. Avery's investigator interviewed Mr. Sowinski again and played the same audio recording of the phone call that was made to the Manitowoc Sheriff's Office on November 6, 2005 at 10:28 p.m.. Mr. Sowinski identified his voice in the audio recording of the phone call from November 6, 2005. (1071:1-12). The recording of Mr. Sowinski's call was never disclosed by the State to

Mr. Avery's trial defense counsel prior to or during the trial. Pre-trial, trial defense counsel made two specific requests for all exculpatory evidence and/or information within the possession, knowledge, or control of the State which would tend to negate the guilt of the defendant, or which would tend to affect the weight or credibility of the evidence used against the defendant, including any inconsistent statements. (1072:1-14). Pertaining to the *Brady* claim stemming from the evidence from Mr. Rahmlow, Mr. Rahmlow described, in his affidavit, that he reported his observation to a Manitowoc Sheriff's deputy he encountered on November 4, 2005 at the Cenex station on STH 147 in Mishicot. (1075:59, ¶6). No law enforcement report was ever generated by this Manitowoc Sheriff's deputy memorializing the conversation between Mr. Rahmlow and this deputy about Mr. Rahmlow's observation of Ms. Halbach's vehicle.

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

ARGUMENT

I. Whether this Court must conduct a *de novo* review of the sufficiency of Mr. Avery's motion for postconviction relief on its face because of the circuit court's failure to conduct any such analysis as a matter of law?

In the circuit court's opinion dismissing Mr. Avery's third motion for post-conviction relief, the circuit court failed to consider Mr. Avery's request for an evidentiary hearing.

The circuit court "must determine first whether the motion on its face alleges sufficient material facts that, if true, would entitle the defendant to relief." *State v. Ruffin*, 2022 WI 34, ¶35, 401 Wis. 2d 619, 635, 974 N.W.2d 432, 439, citing *State v. Allen*, 2004 WI 106, ¶9, 274 Wis. 2d 568, 576, 682 N.W.2d 433, 437. As with any other civil pleading, in assessing the legal sufficiency of the motion, the court must assume the facts alleged therein to be true. *Gritzner v. Michael R.*, 2000 WI 68, ¶ 17, 235 Wis.2d 781, 611 N.W.2d 906. Only after an evidentiary hearing is the court charged with determining the issues and making findings of fact and conclusions of law. Wis. Stat. § 974.06(3)(d).

The circuit court improperly attempted to weigh Mr. Avery's facts with speculative theories unsupported by the record rather than accepting his facts as true and determining whether they were sufficiently pled to warrant an evidentiary hearing. Despite the fact that the circuit court opened its opinion claiming, "the defendant is back before the circuit court" (1132:1), the circuit court failed to conduct any analysis of whether Mr. Avery pled sufficient facts to warrant an evidentiary hearing on his newly discovered evidence. Rather, in its opinion, the circuit court weighed Mr. Avery's evidence as if it had already been presented during an evidentiary hearing.

An evidentiary hearing is nothing more than an intermediate step toward the objective of being granted a new trial. It is not an end in itself. The evidentiary hearing is a forum to prove allegations in a motion for post-conviction relief. *See State v. Balliette*, 2011 WI 79, ¶69, 336 Wis. 2d 358, 386, 805 N.W.2d 334. Mr. Avery's motion for post-conviction relief states what he is set to prove if he were granted an evidentiary hearing.

An evidentiary hearing would provide Mr. Avery with the opportunity to prove his pleaded claims that he is entitled to a new trial. *Balliette*, ¶61, 383. If Mr. Avery's motion contained all the proof necessary to show that he was entitled to a new trial, he would not need an evidentiary hearing. *Id.*

In Mr. Avery's prior appeal to this Court after the circuit court denied his second motion for post-conviction relief, this Court properly was guided by the law for determining whether an evidentiary hearing is warranted. This Court correctly stated the law: "Where, as here, a defendant appeals the circuit court's denial of a WIS. STAT. § 974.06 motion without an evidentiary hearing, then the question before us is narrow: whether remand for a hearing is warranted because the circuit court erred in denying the motion on its face" citing *Balliette*, 336 Wis. 2d 358, ¶38. (1056:5). This Court correctly noted the two potential standards for determining whether the circuit court erred in failing to grant an evidentiary hearing: The first being, "The circuit court must hold a hearing where the motion is sufficient on its face, unless the record as a whole otherwise conclusively demonstrates that the defendant is not entitled to relief." *Balliette*, 336 Wis. 2d 358, ¶¶18, 50; *State v. Howell*, 2007 WI 75, ¶¶ 75-77 & n.51, 301 Wis. 2d 350, 734 N.W.2d 48. This is a question of law reviewed *de novo*. *State v. Romero-Georgana*, 2014 WI 83, ¶30, 360 Wis. 2d 522, 540, 849 N.W.2d 668, 677. Additionally, this Court noted, "If the motion does not raise sufficient facts, or presents only conclusory allegations, or if the record conclusively demonstrates that the defendant is not entitled to relief," then "the circuit court has the discretion to grant or deny a hearing," citing *Balliette*, 336 Wis. 2d 358, ¶18 (quoting *John Allen*, 274 Wis. 2d 568, ¶9).

In such a case this Court reviews for an erroneous exercise of discretion. *Romero-Georgana*, 360 Wis. 2d 522, ¶30. (1156:7)

Here, the circuit court never conducted any analysis on whether Mr. Avery pled sufficient facts to warrant an evidentiary hearing, nor made the requisite finding pursuant to *State v. Jackson*, 2023 WI 3, 405 Wis. 2d 458, 983 N.W.2d 608 that "the record conclusively demonstrates that the defendant is not entitled to relief." This Court should reverse the circuit court's ruling denying Mr. Avery's motion because it failed to make the requisite findings established by case law.

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

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

A. Standard of Review

An appellate court reviews a circuit court's determination as to whether a defendant has established his or her right to a new trial based on newly discovered evidence for an erroneous exercise of discretion. A court properly exercises its discretion if it relies on the relevant facts in the record and applies the proper legal standard to reach a reasonable decision. Thus, this Court will find an erroneous exercise of discretion if the circuit court's factual findings are unsupported by the evidence or

if the court applied an erroneous view of the law. *State v. Edmunds*, 2008 WI App 33, ¶1, 308 Wis. 2d 374, 377, 746 N.W.2d 590 (emphasis added).

B. Burden of Proof

On a motion for post-conviction relief pursuant to Wis. Stat. § 974.06, a defendant has the burden of proof. Wis. Stat. § 974.06(6). The defendant must show his entitlement to relief by clear and convincing evidence. *State v. Rohl*, 104 Wis. 2d 77, 80, 310 N.W.2d 631, 633 (Ct. App. 1981).

To obtain an evidentiary hearing on a motion for a new trial on the basis of newly discovered evidence, the defendant first "must show specific facts that are sufficient by clear and convincing proof" to demonstrate that: "(1) the evidence was discovered after conviction; (2) the defendant was not negligent in seeking the evidence; (3) the evidence is material to an issue in the case; and (4) the evidence is not merely cumulative." *Edmunds*, ¶13, 385, 595.

C. Argument

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

> A review of the record and the defendant's argument reveal that he has failed to satisfy the third standard of the *Edmonds* (sic) test as well as the motive element of the *Denny* test. With respect to the *Edmonds* (sic) test, the defendant argued that the evidence offered was material to an issue in the case because it

> established that there was a viable third- party suspect that could have committed the murder of Ms. Halbach, and such evidence was never presented to the jury for consideration, undermining confidence in the verdict reached. In order to meet that burden, the defendant had to prove that the evidence also met the standard set forth in *Denny* to be admissible as proof of a third party suspect. The defendant failed to establish that Bobby had the requisite motive to commit the murder of Ms. Halbach.

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

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

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

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

(1065:16, ¶24).

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

also material to the reliability of the State's key witness against Mr. Avery, Bobby himself.

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

The evidence of Bobby's possession of Ms. Halbach's vehicle is material because it shows that Bobby had possession of the forensic evidence used to convict Mr. Avery. The vehicle was the crime scene by virtue of having all of the relevant forensic evidence in it, including Ms. Halbach's blood. The Sowinski evidence establishes that Bobby, the State's star witness, had control of the crime scene for a period of time. Despite police searches preceding the discovery of Ms. Halbach's vehicle, Ms. Halbach's electronic devices and key were not found until after Ms. Halbach's vehicle was found. The only logical conclusion to explain this is that all the items remained in Ms. Halbach's vehicle, and were then moved by whoever had possession of her vehicle.

If a third-party suspect had possession of Ms. Halbach's vehicle, numerous areas of reasonable doubt arise, such as that the forensic evidence in the vehicle is

tainted by the third party having control of it *before* it was discovered by law enforcement on the Avery Property. This would have created reasonable doubt in the jurors' minds, particularly since the State's star witness was the one in possession of the vehicle. Thus, Mr. Avery's new evidence also presents an alternative theory for the source of the forensic evidence used against Mr. Avery. *See Edmunds*, ¶15, 386.

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

Here, applying *Edmunds*, Mr. Avery's new evidence is material to a key issue in Mr. Avery's case because Mr. Avery's new evidence, that Bobby had possession of Ms. Halbach's vehicle after her murder, presents an alternative theory for the source of the evidence used to convict Mr. Avery.

The Sowinski evidence is additionally material because it completely calls into question the reliability of the State's key witness (Bobby's) testimony, which allowed the State to argue that Mr. Avery had exclusive control of Ms. Halbach and her vehicle, which contained all of the forensic evidence, and that this evidence was not tainted by any third party. During its closing argument, the State emphasized the importance of

Bobby's testimony and vouched for his credibility: "Again, an eyewitness without any bias. It is a [*sic*] individual that deserves to be given a lot of credit." (610:91). With the new Sowinski evidence, as well as Mr. Rahmlow's affidavit, the State could not possibly have presented Bobby to establish that Ms. Halbach never left the property in her vehicle and that she was last seen walking towards Mr. Avery's trailer – the State's critical witness link to obtaining Mr. Avery's conviction. Clearly, by Bobby possessing the Halbach vehicle, there is a reasonable likelihood it would have affected the judgment of the jury in that Bobby would have emerged as a much more likely suspect in the murder of Ms. Halbach than his recently released, wrongfully convicted uncle. Contrary to the State's representations to the jury, Bobby was biased and deserved no credit for his fabricated testimony.

The United States Supreme Court, in *Wearry v. Cain* 136 S. Ct. 1002, 194 L. Ed. 2d 78 (2016), held:

> *Brady* applies to evidence undermining witness credibility[]. Evidence qualifies as material when there is "any reasonable likelihood" it could have "affected the judgment of the jury." To prevail on his *Brady* claim, Wearry need not show that he "more likely than not" would have been acquitted had the new evidence been admitted.

Id. at 1006 (citations omitted).

Additionally, in regard to a motion for a new trial, a reasonable doubt as to a defendant's guilt has been found to exist when the reliability of a witness critical to the State's case is completely called into question by newly discovered evidence. *State v. Wilson*, 2022 WI App 55, 404 Wis. 2d 750, 982 N.W.2d 351. "A new trial is required if the false testimony could . . . in any reasonable likelihood, have affected the judgment

of the jury." *Giglio v. United States*, 405 U.S. 150, 154 (1972) (citations omitted); *see also State v. Plude*, 2008 WI 58, ¶47, 310 Wis. 2d 28, 55, 750 N.W.2d 42, 56 ("Wisconsin law has long held that impeaching evidence may be enough to warrant a new trial.").

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

Here, Mr. Avery presents a stronger case about the materiality of his newly discovered evidence because he does not just allege that it shows that Bobby misrepresented facts in his testimony; he alleges that the Sowinski evidence shows that Bobby committed perjury in his testimony that he left the property and did not see Ms. Halbach again. Furthermore, the newly discovered evidence taints all of the forensic evidence used against Mr. Avery which resulted in his conviction.

In this Court's previous opinion on July 28, 2021, this Court did not believe that the impeachment of Bobby was material because it found that there was significant forensic evidence linking Mr. Avery to the crime (1056:42, ¶ 68). However, the

Sowinski affidavit establishes Bobby's possession of the Halbach vehicle undermines confidence in the reliability of the forensic evidence used against Mr. Avery. This strengthens the materiality of the impeachment evidence against Bobby.

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

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

Rather than making the required finding that there was no reasonable probability that a jury, hearing Mr. Avery's new evidence, could have a reasonable doubt as to Mr. Avery's guilt, the circuit court engaged in weighing the evidence of the violent porn found on the Dassey computer and concluded that the evidence does not conclusively show that it was solely acquired by Bobby on the computer.

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

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

A. Standard of Review

This Court generally reviews a trial court's decision to admit or exclude evidence under an erroneous exercise of discretion standard. *State v. Wilson*, 2015 WI 48, ¶47, 362 Wis. 2d 193, 864 N.W.2d 52. However, when a defendant's constitutional right to present a defense is implicated by the exclusion of evidence, the decision not to admit the evidence presents a question of constitutional fact that this Court reviews *de novo*. *State v. Ramsey*, 2019 WI App 33, 388 Wis. 2d 143, 930 N.W.2d 273; *State v. Knapp*, 2003 WI 121, 265 Wis. 2d 278, 666 N.W.2d 881.

B. Burden of Proof

On a motion for post-conviction relief pursuant to sec. 974.06, Stats., the defendant has the burden of proof. Sec. 974.06(6), Stats. and must show his entitlement to relief by clear and convincing evidence. *Rohl v. State*, 90 Wis.2d 18, 28, 279 N.W.2d 722, 725 (Ct. App. 1979) (*Rohl* II).

C. Argument

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

In its opinion dismissing Mr. Avery's motion for post-conviction relief, the circuit court acknowledged that the standard for evaluating the admissibility of evidence of a potential third-party suspect is set forth in *Denny* (1132:2). However, rather than applying the *Denny* standard, the circuit court applied a stricter standard, which Wisconsin does not follow.

In *Denny*, the Wisconsin Court of Appeals rejected the standard set forth by the California Supreme Court in *People v. Green*, 609 P.2d 468 (1980). Specifically, the *Denny* court disagreed with "the *Green* court's conclusion that such evidence must be substantial," stating "We perceive this to be too strict a standard for the admissibility

of such evidence and conflicts with our supreme court's pronouncements on the fundamental standards of relevancy." *Denny*, at 623. The *Denny* court clarified,

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

Id. Rather than requiring any level of "substantial" certainty, *Denny* adopted the standard set forth in the earlier Supreme Court case, *Alexander v. United States*, 138 U.S. 353 (1891). There, the Supreme Court fashioned the "legitimate tendency" test, where the standard for evaluating the evidence is that it must show a "legitimate tendency" that the third party could have committed the crime. *Alexander,* at 356-57. In adopting the Supreme Court's test for materiality, the *Denny* court elaborated, "We believe that to show 'legitimate tendency,' a defendant should not be required to establish the guilt of third persons with that degree of certainty requisite to sustain a conviction in order for this type of evidence to be admitted. *Denny*, at 623. (emphasis added).

If the circuit court had correctly applied *Denny*, it would have found that Mr. Avery has provided sufficient evidence to satisfy the standard set forth by *Denny*. The *Denny* court differentiated between evidence which supports a "legitimate tendency" and "evidence that simply affords a possible ground of suspicion against another person," which is merely evidence "tending to show that hundreds of other persons had some motive or *animus* against the deceased" *Denny*, at 623. Unlike the inadmissible type of evidence that the *Denny* court described, Mr. Avery's evidence is very specific to Bobby and establishes a direct connection between Bobby and the crime. *See Denny*, at 624. Hundreds of other persons did not have possession of Ms. Halbach's vehicle

and also have photographs of young, mutilated females on the computer of which they are the primary user, ("The 'legitimate tendency' test asks whether the proffered evidence is so remote in time, place or circumstances that a direct connection cannot be made between the third person and the crime."). Again, *Denny* does not require a conclusive showing of Bobby's guilt, rather it establishes a standard for establishing a potential third-party suspect, which is a material issue in any murder case. *Denny* states that "as long as motive and opportunity have been shown and as long as there is also *some* evidence to directly connect a third person to the crime charged which is not remote in time, place or circumstances, the evidence should be admissible." *Id.* (emphasis added). Where Mr. Avery has proffered evidence that Bobby Dassey had possession of Ms. Halbach's vehicle after she went missing; had most likely been conducting computer searches relevant to Ms. Halbach's murder; and was on the Avery property before Ms. Halbach's disappearance and after her disappearance, no reasonable trier of fact, correctly applying the law, would find that Mr. Avery has not established some evidence directly connecting Bobby to the crime charged.

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

As this Court pointed out in its opinion previously, the evidence in support of *Denny* must be viewed in the aggregate. (1056:41, note 26). Rather than viewing Mr. Avery's evidence in the aggregate, the circuit court required Mr. Avery to present conclusive proof to satisfy each prong individually. However, "[e]ach piece of a defendant's proffered evidence need not individually satisfy all three prongs of the Denny test." *State v. Wilson*, 2015 WI 48, ¶53, 362 Wis. 2d 193, 218, 864 N.W.2d 52.

Further, the Wisconsin Supreme Court has determined that the "strength and proof" of one of the prongs may "affect the evaluation of the other prongs." *See State v. Wilson*, 2015 WI 48, ¶64, 362 Wis. 2d 193, 864 N.W.2d 52. The circuit court completely ignored these well-established principles of law in evaluating the motive, opportunity, and direct connection elements of *Denny*.

2. Motive Element of *Denny*

In Mr. Avery's motion for post-conviction relief, he alleged that the motive attributed to Bobby for Ms. Halbach's murder could have been sexual and provided evidence supporting this, namely the suppressed evidence from a computer that was in Bobby's bedroom; according to his brother Blaine's affidavit, Bobby was the primary user of this computer. (965:164-67, 1104:115-16). Bobby lied to police about the location of the computer claiming it was in the living room, but crime scene footage showed it was in his bedroom. (1104:112). The computer was examined and revealed searches highly relevant to the murder of Ms. Halbach, which occurred during times in which the State has been unable to rule Bobby out as having conducted them. The State argued that other members of the Dassey household could have conducted the searches, a supposition that may or may not be true, but no other member of the Dassey household was spotted by a witness with Ms. Halbach's vehicle shortly after her disappearance. Bobby's possession of the vehicle, with all of the forensic evidence used to convict his uncle, combined with the violent pornographic searches on the computer in his bedroom of which he is the primary user, elevate him to the level of a *Denny* third party suspect.

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

In its opinion, the circuit court noted, "The state further disputes the defendant's conclusions that law enforcement considered pornography or sexual assault as a motive for the murder in this matter." (1132:13). In dismissing Mr. Avery's motive evidence, the circuit court adopted this erroneous position from the State's response brief. However, this point is completely refuted by the record.

On March 10, 2006, the State filed an amended information against Mr. Avery, adding the charge of sexual assault among others. (266:1-2). This amended charge was the result of Brendan Dassey's "confession" on March 1, 2006. Mr. Avery's trailer and his computer were searched extensively for pornography, and none was found. Detective Velie was asked to generate a report of Mr. Avery's computer. Based on Detective's Velie's report, no apparent searches of pornographic and/or sexual images were made and no websites with apparent sexual and/or pornographic images were accessed. (1104:56-57). In further search for evidence to support a sexual assault motive, the Dassey computer was seized by law enforcement on April 21, 2006. (1104:48-49). In the Affidavit for Search Warrant for Dassey computer, Special Agent Tom Fassbender testified:

> Your affiant believes that said computer may contain images, records and messages which may be relevant to the investigation into the homicide of Teresa Halbach. Your affidavit further believes that information contained on said

> computer, *may include evidence of the crimes of homicide, mutilating a corpse, and sexual assault.*

(281:33-34, ¶8, emphasis added). Again, the circuit court misstated the evidence by relying upon the State's misrepresentations that the investigation was not focused on a sexual motive.

Law enforcement made great efforts to extract all the pornography from the Dassey computer and even went so far as to have Detective Velie conduct specific word searches *related to the murder* in an effort to connect the pornography to the murder. The specific search terms results were: "Body" (2083); "Stab" (32); "Throat" (2); "Bullet" (10); "DNA" (3); "Fire" (51); "Gas" (50); "Rav" (74); "Gun" (75); "Handcuff" (2); "Bondage" (3); "Blood" (1); and "Tire" (2). (1104:50). The "Velie CD" contains the State's "recovered" pornography images relevant to the Halbach murder. On the CD, Detective Velie refined 14,099 images on the 7 DVDs and recovered 1,625 violent pornography images *that had been deleted*. (1104:50). The CD contains thousands of images of violent pornography, criteria, word searches, registry, internet history, windows history, and all MSN messages, all of which reveals a propensity for sexual violence.

Without an evidentiary hearing, it cannot be conclusively established that Bobby was conducting these searches. Yet, Mr. Avery provided sufficient evidence concerning the schedules of the occupants of the Dassey residence to eliminate certain individuals who could have had access to the computer from many of the violent pornographic searches. (1111:70-76). Mr. Avery has been unable to get an affidavit from Bobby admitting he conducted the searches, nor someone from the Dassey household stating

they saw Bobby performing the searches, which the circuit court seems to be requiring. Moreover, Bobby did not volunteer for a forensic or psychological examination by Mr. Avery's experts as the circuit court suggests is required. (1132:20).

Based upon the findings of Mr. Gary Hunt (Mr. Avery's forensic computer expert), 667 sexual content searches were performed in total. Of those searches, 562 were performed on 10 weekdays between 6:00 a.m. to 3:30 p.m.: 8/16/2005 (4 searches); 9/13/2005 (12 searches); 2/23/2005 (48 searches); 3/29/2006 (37 searches); 3/30/2006 (23 searches); 4/3/2006 (93 searches); 4/5/2006 (96 searches); 4/6/2006 (14 searches); 4/13/2006 (39 searches); 4/19/2006 (196 searches). (1104:67). Therefore, 64 sexual content searches were performed prior to Ms. Halbach's murder between 6:00 a.m. to 3:45 p.m., when Bobby was allegedly home alone, if the family's reported schedules are taken to be true. Another 500 searches were performed in this same time frame after the murder when Bobby was supposedly home alone.

In its Response to Mr. Avery's motion for postconviction relief, the State conceded that Bobby is at least connected to three of the most violent searches prior to Ms. Halbach's murder and inadvertently conceded that Bobby is connected to twenty-five of the searches after Ms. Halbach's murder. Bobby cannot be eliminated by the State from *any* of the pornographic searches, especially the ones conducted prior to and very close in time to Ms. Halbach's murder, and he is the only family member who was seen with Ms. Halbach's vehicle after her disappearance.

The circuit court erroneously concluded that the searches done after Ms. Halbach's murder have no weight (1132:20). However, conduct of a suspected person,

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

The circuit court also completely ignored Mr. Avery's evidence of the Dassey computer deletions, which infers a consciousness of guilt. Significantly, many of the Dassey computer searches had been deleted, and only some of those were recovered, which leads to questions such as: who in the Dassey household deleted the searches? Why were these searches deleted before Mr. Avery's trial? To make the proper credibility findings on this issue, an evidentiary hearing must be held.

It is highly significant in any investigation if there is an attempt to delete or destroy records. *See i.e., State v. Renier*, 2019 WI App 54, 388 Wis. 2d 621, 935 N.W.2d 551 (In this sexual assault case, the appellate court found, "[the defendant's] consciousness of guilt was also evidenced, as he told the victim to delete the text messages the two had exchanged."); *see also State v. Mercer*, 2010 WI App 47, ¶33, 324 Wis. 2d 506, 529, 782 N.W.2d 125, 137 (where the appellate court found the fact that

"the jury heard evidence from which it could infer that Mercer deleted the files where the forensic examiners would have found the child pornography stored in his hard drive" was significant evidence of the defendant's guilt.)

Mr. Hunt identified 8 times when there were deletions on the Dassey computer. Those deletions are very important because they correlate with Ms. Halbach's visits to the property. Ms. Halbach visited the property on **August 22, 2005**, and there are deletions on the Dassey computer from **August 23 through August 26, 2005.** She visited the property on **August 29, 2005**, and there are deletions from **August 28, 2005 through September 11, 2005**. She visited the property on **September 19, 2005**, and there are deletions from **September 14, 2005 through September 15, 2005.** There are also deletions from **September 24, 2005 through October 24, 2005.** Most significantly, around the time of her murder on October 31, 2005, there were deletions from **October 26, 2005 to November 2, 2005**. Beginning **November 3, 2005**, there were further deletions made on the Dassey computer. (1104:52-53). These deletions at the above-described relevant times cannot simply be dismissed as mere coincidences.

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

depicting violence (even race car accidents) that show a fascination with death and mutilation (1116:45), and this *trait* of the Dassey pornographic consumer is "undeniably probative of a motive, intent, or plan to commit a vicious murder." Mr. Avery provided the circuit court with specific searches on the Dassey computer of terms such as "someone who was shot" and searches for a "gun to head." There were 8 searches prior to Ms. Halbach's murder, on 9/17/05, for "skeleton" and "alive skeleton." (1104:63) After the murder there were 6 searches for "girl guts" and 15 searches for "girl hurt" and 2 searches for "seeing bones hot girls" (1104:87). These searches mirror the fate of someone hurt, shot in the head, mutilated and burned into skeletal remains which is the total amount of information known about Ms. Halbach's fate. More importantly, these images reveal the *trait* of the Dassey pornographic consumer that is probative of motive, intent or plan to commit a vicious murder.

Contrary to the circuit court's view, the proper standard does not require Mr. Avery to establish his evidence of Bobby's motive with absolute certainty. In fact, this level of certainty has never been required by any court in Wisconsin to satisfy the motive element of *Denny* or any element of the *Denny* analysis, for that matter. *See State v. Knapp*, 2003 WI 121, 265 Wis. 2d 278, 666 N.W.2d 881 (where the Wisconsin Supreme Court has even deemed hearsay evidence as permissible evidence for satisfying all three prongs of the *Denny* test, including motive.)

Under the motive prong, the court simply must question whether "the alleged third-party perpetrator [had] a plausible reason to commit the crime?" *Wilson*, 2015 WI 48, ¶57, 219, 64; s*ee also State v. Vollbrecht*, 2012 WI App 90, ¶27, 344 Wis. 2d 69, 820

N.W.2d 443 (evidence of a general motive is sufficient to prove this prong of the *Denny* test). Further, because motive is never an element of any crime, and the State never needs to prove motive, relevant evidence of motive is generally admissible *regardless of weight*. *Wilson*, ¶63, 221, 65; *see also State v. Berby,* 81 Wis.2d 677, 686, 260 N.W.2d 798 (1977).

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

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

could also show Mr. Dassey's direct connection,[4] the circuit court evaluated the CD evidence in isolation contrary to this Court's prior directive in remanding the case. *See Wilson*, ¶64 (where the Wisconsin Supreme Court determined that the "strength and proof" of one of the prongs may "affect the evaluation of the other prongs."). Here, Mr. Avery's powerful direct connection evidence certainly affects the evaluation of the other prongs because it provides evidence supporting all three prongs of the *Denny* test. For example, even if the motive for Ms. Halbach's murder was not sexual as law enforcement believed, the Sowinski evidence offers evidence that the motive could have even been a robbery.[5]

The circuit court's finding that Mr. Avery has not established the "motive" element is at odds with Wisconsin case law. Wisconsin cases that discuss the motive element of their *Denny* analysis show that the standard for fulfilling the motive element of *Denny* is not overly burdensome, especially when there is strong evidence of a third-party perpetrator's direct connection to the crime.

For example, *State v. Ramsey*, 2019 WI App 33, 388 Wis. 2d 143, 930 N.W.2d 273 is a case in which very weak evidence of motive against a third party was presented by the defendant, however, the appellate court found there was strong evidence of a

[4] This Court stated, "[T]he evidence [Sowinski's evidence] presented might supply the ***missing*** 'direct connection.'" (1056:41, note 26, emphasis added).

[5] Many things were missing from Ms. Halbach's RAV-4 that should have been present in the vehicle, such as Ms. Halbach's purse, wallet, money, which she had been paid that day, driver's license, schedules, receipts, maps, Toyota master key, house key, and other items related to her activities with *AutoTrader* or her "hustle shots." There has never been proof previously that a third-party had possession of the vehicle, which contained these items. Importantly, Ms. Halbach's vehicle itself had been stolen.

direct connection and thus, it found "plausible reasons" for the third party to commit the crime. *Id.* ¶ 28.

In *Ramsey*, the victim was found stabbed at a home. The 911 caller told police that the victim had been staying at her sister's home to hide from the defendant. The defendant had been in a relationship with the victim for over 11 years and they had two children together. They had a history of domestic violence. Officers found the defendant, and the defendant admitted stabbing the victim twice. *Id.* ¶ 6. The victim's best friend told police that the day before the stabbing, the victim told the defendant that she was going to leave him. *Id.* ¶7. After fingernail clippings from the victim revealed another man's DNA, the defendant brought forth a *Denny* motion, arguing that a potential third party perpetrator: (1) was a convicted criminal; (2) lived near the crime scene; and (3) his DNA was present at the scene and is unexplained. The defendant alleged two "possible" motives for the third-party perpetrator: irrational rage and antisocial behavior and/or sexual gratification. *Id.* ¶ 25. The defendant argued that it was possible that the third party had no rational motive. *Id.* Thus, the defendant presented evidence of a general motive which was not directed at the particular victim.

In *Ramsey*, the circuit court found that the defendant had failed to establish the third party's "motive" and denied the motion. However, the appellate court reversed the circuit court's ruling, stating: "We conclude that when considered under the applicable law regarding motive, and with the opportunity evidence and the strong direct connection evidence, Ramsey has presented plausible reasons for [the third party] to commit the crime." *Id.*, ¶¶ 57, 64. The appellate court found that "under the

totality of the circumstances, the evidence suggests a third-party perpetrator actually committed the crime" emphasizing that 'Suggests' is a rather broad term." *Id.* ¶ 34.

Here, Mr. Avery has presented far more evidence than is even required to suggest that a third-party actually committed the crime. The circuit court's failure to consider the *Denny* prongs in the aggregate and its erroneous imposition of a burden of substantial certainty on Mr. Avery's motive evidence results in a fatally flawed opinion on the law and the facts.

3. Opportunity Element of *Denny*

In regard to the opportunity element of *Denny*, the circuit court stated in its opinion that "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." (1132:21). It is undisputed that Bobby was on the Avery family property when Ms. Halbach was there and before and after she was reported missing. Normally even proximity to the murder is sufficient to show "opportunity."

However, the circuit court improperly imposed a burden on Mr. Avery to prove that Bobby had the skills, contacts, tools, time, and/or other means necessary to have committed the crime and staged the scene in order to satisfy the opportunity element of *Denny*. The circuit court cited *State v. Wilson*, 2015 WI 48, 362 Wis. 2d 193, 864 N.W.2d 52 for its own finding that a Mr. Avery has to prove that the potential third party had the skills, contacts, tools, time, and/or other means necessary to have committed the crime and staged the scene in the manner alleged. (1132:24). However,

in reality, this principle came from the Kansas Court of Appeals case that the State cited in its response brief, *State v. Krider*, 41 Kan. App. 2d 368, 202 P.3d 722 (2009). (*See* R. 1094:15).

Even if the principal from the Kansas case were to somehow apply to Wisconsin, the facts of *Krider* are completely inapposite to those in Mr. Avery's case. In *Krider*, the defendant's proffered evidence of a potential third-party perpetrator consisted of alleging a potential motive for the victim's son-in-law to kill her in that the son-in-law's wife would benefit from the inheritance and that the son-in-law could have had the opportunity to get defendant's hair from headgear and blood from used bandages to later plant at the crime scene while staying there overnight because he worked as a first-aid officer at the defendant's work. The court found that the evidence did not effectively connect the third party to the crime, stating, "This evidence is nothing more than mere speculation and conjecture and does not connect the third party to the crime, and therefore the district court did not err in excluding it." *Krider*, 376, 729.

Rather than considering that this principle came from a Kansas case, not a Wisconsin one, the circuit court imposed a burden on Mr. Avery to demonstrate that Bobby had the "scientific knowledge" to plant evidence.

The facts of *Wilson* are completely inapposite to Mr. Avery's case. In *Wilson*, multiple eye witnesses identified the defendant as a shooter. The defense attempted to argue that someone else was the shooter by proffering evidence of an alleged potential third party perpetrator. However, the potential third party perpetrator was completely

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

Importantly, *Wilson* is not a case about planting evidence or framing. *Wilson* specifically stated that this type of theory only requires a showing of access to frame, stating the following: "If the defense theory is that a third party framed the defendant, then the defense might show opportunity by demonstrating the third party's access to the items supposedly used in the frame-up." *Wilson*, ¶68. However, the circuit court erroneously reasoned that pursuant to *Wilson*, Mr. Avery must prove that Bobby had the "scientific knowledge to recognize the significance of each piece of forensic evidence supposedly planted by him, let alone establish that he had the skill to plant that evidence in a way that would stand up to scientific scrutiny by professional crime scene analysts." (1132:24). This is not the standard for showing a third party framed the defendant; evidence that the third party had access to the items used in the frame-up is sufficient pursuant to *Wilson*. Ultimately, the circuit court imposed upon Mr.

Avery a standard for satisfying the opportunity element of *Denny* that has never before been applied in any Wisconsin case.

State v. Vollbrecht, 820 N.W.2d 443, 454 (Wis. App. 2012) is a case in which the evidence of connection and motive carried the strength of the opportunity evidence. The trial court granted the defendant a new trial, and the appellate court affirmed. Although the evidence of the third-party's opportunity only theoretically put the third-party in the geographic area of the murder of the victim, the appellate court focused on the strength of the evidence of motive and direct connection rather than imposing any higher burden to show opportunity, as the circuit court in Mr. Avery's case did.

The facts of *Vollbrecht* are similar to those in Mr. Avery's case where in both cases, the defendants were convicted based in large part on completely circumstantial evidence. In *Vollbrecht*, the defendant was convicted of first-degree murder and first-degree sexual assault after a woman, who had been shot in the back, was found in a wooded area, naked and hanging from a tree by tire chains. The defendant had been with the victim the day before she was reported missing. *Id.* ¶ 4. He told police that he was dropped off by her, but detectives spoke to several people who knew the defendant and were in the area where he claimed the victim dropped him off, and none of them saw the defendant in the area. Police interviewed a witness who identified the defendant as the person the witness saw near the area where the victim's body was found on the day she was reported missing. Further, the defendant's hairdresser told police that the defendant talked to her about the murder investigation and told her that 'I didn't do it and if I did, I don't remember doing it.' *Id.* ¶ 7. A witness who lived near the area where

the victim was found testified that he woke up and heard shots around 2:50 a.m. and the sounds of a car dragging, which then stopped. He heard it start up again 20 minutes later. His testimony was used to establish that the victim was murdered before 3:30 a.m., the time which the defendant estimated he had parted ways with the victim. *Id.* ¶ 8.

Twenty years after his conviction, the defendant filed a Wis. Stat. § 974.06 (2010) motion for a new trial based on newly discovered evidence of a third-party perpetrator who had been convicted of a similar killing only six weeks later. The new evidence stemmed from the post-trial discovery of police reports including information that a search of the third-party's residence uncovered a revolver and books involving rape, chains and torture; notes about the third-party's statements to coworkers about tying girls up, abusing them, and getting rid of them; and statements to inmates that the third party liked to chain and burn women. *Id.* ¶ 11.

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

party's] opportunity to commit the crime depends on his alleged motive and direct connection." *Id.* ¶ 26.

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

Moreover, Mr. Avery's new evidence could not present a better case for showing a third party's access and accordingly, evidence of a frame up. The Sowinski evidence greatly strengthens Mr. Avery's evidence that Bobby had the opportunity to commit Ms. Halbach's murder because it shows that Bobby was in possession of Mr. Halbach's vehicle, where her murder likely occurred. He had access to Ms. Halbach's vehicle and all of the evidence used to convict Mr. Avery of her murder. "If the defense theory is that a third party framed the defendant, then the defense *might* show opportunity by demonstrating the third party's access to the items supposedly used in the frame-up." *State v. Wilson*, 2015 WI 48, ¶1, 362 Wis. 2d 193, 199, 864 N.W.2d 52 (emphasis added). Correctly applying *Wilson*, Mr. Avery has not only shown Mr. Dassey's "opportunity" because of his proximity to the murder, but also because he had access to the items used in the frame up. The defense theory of a third party's involvement will guide the relevance analysis of opportunity evidence in a *Denny* case. *State v. Wilson*, 2015 WI 48, ¶68, 362 Wis. 2d 193, 222, 864 N.W.2d 52. It is not the circuit court's theory that guides this analysis.

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

The bullet fragment found on Mr. Avery's property simply had to be rubbed in Ms. Halbach's blood or on her skin cells, both of which her murderer had access to before her body was burned. This Court determined "the State did not argue that this specific bullet entered Halbach's skull or killed her . . ." (1056:26, ¶ 45), and there were

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

No skill was required to plant the electronic devices in Mr. Avery's burn barrel. The fact that there were burn barrels at the Dassey property (four in total, one of which contained human bones) shows that the Dasseys, which includes Bobby, were proficient in burning material in the burn barrel. Part of the circuit court's interpretation of Mr. Avery's guilt is based on another factual error: its belief that all of Ms. Halbach's bones were found in the Avery burn barrel. (1132:23-24) They were not. They were found in the Dassey burn barrel. (600: 231-33). Dr. Eisenberg claimed that when she opened the container of bones from the Dassey burn barrel, she got a "waft of flammable liquid or fluid," but did not smell burned rubber from tires, which the State claimed was the accelerant Mr. Avery used. (601:6–7). This evidence suggests Ms. Halbach's body was burned in the Dassey burn barrel and dumped in Mr. Avery's fire pit. Common sense suggests that Mr. Avery would not have been planting evidence to incriminate himself.

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

property necessarily had the key and locked the vehicle. (590:224). Bobby had access to Mr. Avery's unlocked trailer from early Saturday morning, November 5, until shortly before noon when the vehicle was located and the Avery property was secured by law enforcement. Mr. Avery and his mother left for their Crivitz cottage around early Saturday morning. (179:28, ¶30).

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

After misapplying *Wilson*, the circuit court erroneously presupposed that the forensic evidence against Mr. Avery stood up to scientific scrutiny in Mr. Avery's trial. Mr. Avery's defense team never presented the required experts to attack the scientific evidence. Mr. Avery, in his second post-conviction motion, presented voluminous evidence from numerous experts that the forensic evidence which was used to convict Mr. Avery was vulnerable to being discredited if the defense actually presented all of the experts that trial defense counsel failed to present, such as DNA, trace, blood spatter, fire, forensic pathologists and ballistics experts. (178-182). This Court determined, "Certainly, these conclusions tend to support Avery's general theory that he was framed and their presentation may have been useful at trial" but concluded that

Avery's experts had failed to show "how its introduction at trial could reasonably have led to a different outcome." (1056:18, ¶27). Now, this Court has the direct link between a third-party suspect and the forensic evidence. This Court can consider Mr. Avery's forensic expert opinions in light of the identification of a specific third party suspect in determining if this evidence could reasonably have led to a different outcome. For example, Mr. Avery's blood spatter expert described the blood pattern distribution in the vehicle as being inconsistent as coming from an active bleeder as the state claimed. (1056:18, ¶26). Knowing Bobby had access to Mr. Avery's sink with blood in it and how simple it would be to selectively drip the blood in the vehicle, this Court should reconsider the blood spatter expert's affidavit. Mr. Avery's DNA expert described that in the controlled experiments he conducted with Mr. Avery holding the key for 12 minutes, there was 10 times less DNA deposited on the exemplar key than what was present from Mr. Avery on the vehicle key found in Mr. Avery's bedroom. The expert suggested that if the DNA on this key was enhanced, some personal item of Mr. Avery's was used for this purpose, such as a toothbrush or cigarette butt. (1056:19, ¶31). Mr. Avery previously presented an affidavit that he noticed his toothbrush was missing in the law enforcement photos taken from the bathroom in his trailer. (179:2). In regard to the hood latch swab, Mr. Avery is not abandoning his theory that the illegally collected groin swabs taken from Mr. Avery were substituted for the hood latch swabs when they were delivered to the Wisconsin Crime laboratory. However, for

purposes of demonstrating that Bobby had the skill necessary to plant DNA on both the hood latch and Ms. Halbach's key, Mr. Avery asserts that Mr. Avery's toothbrush could have been rubbed on both. Bobby had access to the trailer where his toothbrush resided prior to disappearing. (179:23, 28, ¶¶ 8, 30)

4. Direct Connection Element of *Denny*

No bright lines can be drawn as to what constitutes a third party's direct connection to a crime. Rather, circuit courts must assess the proffered evidence ***in conjunction*** with all other evidence to determine whether, under the totality of the circumstances, the evidence ***suggests*** that a third-party perpetrator actually committed the crime. *State v. Wilson*, 2015 WI 48, ¶71, 362 Wis. 2d 193, 224, 864 N.W.2d 52 (emphasis added).

In its opinion, the circuit court argued, "The Sowinski affidavit, taken as true for the purpose of this motion, directly links Bobby to possession of the victim's vehicle. However, possession of the vehicle does not directly link Bobby to the homicide itself." (1132:26). Then, the circuit court highlighted the fact that "Mr. Sowinski's affidavit does not mention seeing Bobby with the key to the victim's car." (1132:26). It ignored the fact that when Ms. Halbach's vehicle was found by law enforcement and volunteer searchers, it was locked. (590:224). Clearly, Bobby had the key to the vehicle. Further, the circuit court ignored that all the forensic evidence used to convict Avery was discovered ***after*** Bobby was seen moving Ms. Halbach's vehicle onto the Avery property.

In *State v. Williams*, 2009 WI App 95, 320 Wis. 2d 484, 769 N.W.2d 878,[6] the appellate court found a direct connection between the perpetrator of the murder and the fact that he had possession of the victim's vehicle several days after her murder, specifically, the court explained:

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

State v. Williams, 2009 WI App 95, 320 Wis. 2d 484, 769 N.W.2d 878 (emphasis added). Applying this common-sense approach here, the Sowinski evidence provides the direct connection (that is, Bobby being witnessed in possession of Ms. Halbach's vehicle) to Bobby having committed the murder of Ms. Halbach and planting the evidence to frame Mr. Avery.

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

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

In *State v. Knapp*, 2003 WI 121, 265 Wis. 2d 278, 666 N.W.2d 881 *vacated on other grounds*, 542 U.S. 952, 124 S. Ct. 2932, 159 L. Ed. 2d 835 (2004), the Wisconsin Supreme Court found that in light of *Denny* and *Chambers*, hearsay evidence implicating a potential third-party in the victim's murder was properly admitted because it established the requisite "direct connection" pursuant to *Denny*.

In *Knapp*, the defendant was the last person seen with the victim as they went out together that night. *Id.*, ¶ 11. During trial, the defendant sought to introduce evidence of other potential suspects including the victim's husband, Brunner, and the woman he was having an affair with, Mass, on the night that the victim was murdered. Specifically, the defense sought to introduce hearsay evidence through the testimony of a witness, Farell, who was close friends with a man named Borchardt, whom Mass had lived with at the time but had since passed away. Through Farell, the defense sought to introduce statements made to him by Borchardt regarding his observations of Mass's behavior right after the homicide and his observation of Brunner's truck at the Mass's residence after the murder.

The Wisconsin Supreme Court found that the third part of the *Denny* analysis, the "connection," was at issue. However, ultimately, it found that the evidence supplied the missing "direct connection," using the following reasoning:

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

> circuit court correctly determined that the evidence established Brunner's motive, opportunity and connection to the crime. Further, we hold that the circuit court applied the proper legal standard and appropriately exercised its discretion in admitting this evidence under Denny.

State v. Knapp, 2003 WI 121, ¶¶182-183, 265 Wis. 2d 278, 352-53, 666 N.W.2d 881. The Court found that based upon these three inferences listed above, the hearsay evidence established Brunner's connection to the crime and also fulfilled the "motive" and "opportunity" prongs of *Denny*, which it did not even dispute.

If the same reasoning were applied to Mr. Avery's case, the circuit court would have found far stronger evidence of a direct connection to allow the defense to present Bobby as a potential third party suspect pursuant to *Denny*. At a bare minimum, the Sowinski evidence connects Bobby to Ms. Halbach's murder in all the same ways that the hearsay evidence did to the third party in the *Knapp* case: (1) It establishes that Bobby lied to investigators about his whereabouts during times relevant to determining Ms. Halbach's murder (noting, of course, that the exact time of Ms. Halbach's murder is not known); (2) Like Mass who was observed carrying a paper bag after the murder, which the Wisconsin Supreme Court found was material, Bobby was seen with the victim's vehicle after Ms. Halbach's murder; and (3) the evidence certainly put Bobby in close proximity to the location where the homicide is alleged to have occurred, and that, combined with evidence showing that Bobby, according to his own testimony, was one of last people to see Ms. Halbach alive would have satisfied *Denny* had the circuit court applied only the reasoning in *Knapp*.

The Supreme Court of Wisconsin offers an illustration to exemplify what type of evidence can show a "direct connection" to a degree of certainty required by the

legitimate tendency test to admit evidence regarding a "third party suspect." By illustration, where it is shown that a third person not only had the motive and opportunity to commit the crime but also was placed in such proximity to the crime as to show he may have been the guilty party, the evidence is admissible. *State v. Knapp*, 2003 WI 121, ¶1, 265 Wis. 2d 278, 288, 666 N.W.2d 881.

Even if the circuit court's numerous factual errors were correct and Brendan Dassey was "directly linked by forensic evidence to this murder" and his "confession" was admissible evidence against Mr. Avery, this still does not allow the circuit court to dismiss the powerful evidence of a third-party's direct connection to the murder. Overwhelming evidence against the defendant may not serve as the basis for excluding evidence of a third party's opportunity or direct connection to the crime. *State v. Wilson*, 2015 WI 48, ¶69, 362 Wis. 2d 193, 223, 864 N.W.2d 52. "By evaluating the strength of only one party's evidence, no logical conclusion can be reached regarding the strength of contrary evidence offered by the other side to rebut or cast doubt." *Holmes v. South Carolina*, 547 U.S. 319, 321 (2006).

CONCLUSION

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

Dates this 12th day of January, 2024.

Respectfully submitted,

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FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Sec. 809.19 (8) (b), (bm) and (c) for a brief. The length of this brief is 50 pages.

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

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

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

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

Dated this 12th day of January, 2024.

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