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STATE OF WISCONSIN CIRCUIT COURT MANITOWOC COUNTY

STATE OF WISCONSIN,
Plaintiff,

v.

Case No.: 05-CF-381
Judge: Patrick L. Willis

STEVEN A. AVERY,

Defendant.

MEMORANDUM TO PRECLUDE
THIRD PARTY LIABILITY EVIDENCE

I. INTRODUCTION

Pursuant to court order, the defense provided the state with its "Statement on Third Party Responsibility" evidence. The state reviewed the filing and now moves to preclude the introduction of any third party liability evidence regarding the possibility or the probability that any of the individuals mentioned in their January 8, 2007, filing committed the crimes charged. Such evidence is inadmissible as it pertains to *known* third party liability evidence by virtue of the decision in *State v. Denny,* 120 Wis. 2d 614, 357 N.W.2d 12 (Ct. App. 1984). Similarly, evidence regarding third-party liability for *unknown* perpetrators must likewise be excluded pursuant to the decision in *State v. Scheidell,* 227 Wis. 2d 285, 595 N.W.2d 661 (1991). The state reserves argument regarding the intended use of (third party) "frame up" evidence by the defense since that offer of proof is forthcoming. The state reasserts its previous position that the theory of a

"police frame-up" posited by the defense necessarily implies police involvement in the crime and as such, the *Denny* test is applicable. The state requests oral argument on these issues. Oral argument is necessary to elaborate further on the confluence of the *Denny*, *Richardson* and *Scheidell* analyses with the facts of this case.

II. ARGUMENT

A. The applicability of *Denny*

In *State v. Denny,* 120 Wis. 2d 614, 357 N.W.2d 12 (Ct. App. 1984) the court held that in order for evidence to be admissible that a known third person could have committed the crime with which a defendant is charged, the proponent of the evidence must demonstrate that the known third person had a motive as well as the opportunity to commit the offense; and that there is some evidence to directly connect the third person to the crime charged which is not remote in time, place, or circumstances. *Denny*, at 624. This is commonly known as the "legitimate tendency" test. It has been accepted, although not without limits, in Wisconsin courts. *State v. Scheidell*, 227 Wis. 2d 285, 595 N.W.2d 661 (1999) and *State v. Richardson*, 210 Wis. 2d 694, 563 N.W.2d 899 (1997). The defendant has previously acknowledged the viability of this rule and that should he decide to introduce evidence of third party liability, he must comply with it. In the defendant's pleading entitled **"Defendant's Response to State's Motion to Prohibit Evidence of Third Party Liability (*Denny* Motion)"** filed with the court on or about June 26, 2006, the defendant acknowledges ". . . that the *Denny* rule must be satisfied should he decide to offer third party liability evidence, other than against Dassey, ..." *See* pp. 1-2. The defendant argues that *Denny* does not and should not apply to him

because his *frame up argument* is based on the concept of bias.[1] He argues on p. 2 "(t)hat same bias, and quite possibly the perpetrator's recognition of the bias and ensuing decision to exploit the bias, led either law enforcement officers or the perpetrator(s), or both, to plant evidence (including but not limited to Avery's blood in Teresa Halbach's Toyota) that casts suspicion on Steven Avery and further channeled law enforcement attention his way" (emphasis added).

It is noteworthy that the defense attempts to distinguish *Denny* in its applicability by arguing that *Denny* applies only to *known* third party liability possibilities. The defendant argues that *State v. Scheidell,* 227 Wis. 2d 285, 595 N.W.2d 661 (1999) is more closely on point because they do not really know who committed the crime other than Brendan Dassey and *Scheidell* deals with *unknown* third parties. Yet, the defense then lists almost everyone, from the state's discovery, that acknowledged being at the Avery Salvage Yard on October 31, 2005. Thus, there are a *known* and finite number of potential suspects. Therefore, if the defense wants to introduce evidence that one of these individuals, alone or in conjunction with Mr. Dassey, committed the offense, they must comply with *Denny.* The defense has failed to establish a *legitimate tendency* that any third person committed the crimes charged. As a result, none of this evidence is admissible.

With the possible exception of the defendant's brothers, one of whom is a convicted sex offender and the other who was charged but with a sex offense not

[1] The defense is only half-right in that *Richardson* does apply, but so does *Denny*. See State's Motion to Exclude Blood Vial Evidence.

convicted, the defendant offers no evidence that any of the individuals who visited the Avery Salvage Yard on October 31 had a motive to kill Teresa Halbach. In addition, few of them had the opportunity to kill Teresa Halbach and none of them is directly connected to the crimes charged.

The defense lists Scott Tadych; Andres F. Martinez; Robert M. Fabian, Jr.; James J. Kennedy; and two adolescents in the *customers and friends* category. In the *family members* category he lists Charles Avery; Earl Avery; Brian Dassey; Bobby Dassey; Brendan Dassey; and Blaine Dassey. However, in footnote 5 on p. 9, the defendant confesses, "by naming these persons, Avery does not assert that any of them killed Teresa Halbach, or that they did not." Defendant's brief p. 10.[2] The defendant says that he does not know who killed Teresa Halbach. That is too convenient. Interestingly, the defendant adds to his witness list in footnote 5 by naming the additional parties Lisa Buchner, Lisa Novachek, Keith Schaefer, Chris Graff, Christopher Avery, Trista Jimenez, K.S., K.H., and A. Mc.K., Roberto Brooks, Dawn Hauschultz, and Deanna Hauschultz as possible defense witnesses relative to this third party liability issue. Nowhere in his pleadings does the defendant establish the motive, the opportunity, and directly connect any of these individuals to the crimes charged other than Brendan Dassey.

In the *customers and friends* category, defendant names Scott Tadych as having potential third person liability. However, while one may argue Tadych had an

[2] A laundry list that includes practically all connected with the property provides no notice to the state whatsoever and disregards the court order.

opportunity to commit the crime, no motive was offered nor was there anything to directly connect Tadych to the crimes. Connection to the crime and not simply to the location of the crime is required. *Denny*, at 624.

The defendant fairs no better, worse in fact when he comes to Andres Martinez. The fact that Martinez attacked his girlfriend with a hatchet is totally irrelevant. Avery fails to establish a motive for the crime, the opportunity to commit it and the connection to the case against him. Martinez' rambling inconsistencies are hardly the raw material for a case of third person liability evidence. The defendant then offers up two school age girls, K. S. and A. McK. who, according to hearsay, Martinez was at a bonfire on October 30, the day before the crime occurred and thus on the property. Being on the property and knowing the defendant is a far cry from demonstrating a direct connection to the *crime charged.*

Similarly, the mention of Roberto Brooks and his girlfriend Dawn Hauschultz add nothing to the Martinez analysis nor are they at all connected to the crime charged. Lastly, defendant lists James Kennedy. Kennedy admits to being on the property around 3:00 PM on October 31 and thus had an "opportunity" to commit the crime. However, there is no motive for Kennedy and more importantly, no direct connection to the crime charged.

With respect to *family members*, the defendant names his brothers, Charles and Earl Avery as well as the four Dassey brothers. As with the *customer and friends* category, the defendant fails to present sufficient evidence of all three components; motive, opportunity and a direct connection to the crimes charged.

Arguably, Charles Avery had an opportunity to commit the crime charged since he worked on the 31st and arguably knew Halbach was coming to take some pictures. However, the fact that he was charged, but not convicted, of a sex offense is insufficient evidence of motive. If the court ruled inadmissible the defendant's statements to fellow inmates regarding plan, intent and motive to commit the crime charged, as well as the alleged assaults of his niece and girlfriend, finding them too attenuated, then surely the fact that Charles was charged with a sex offense, is insufficient evidence of motive. More importantly, the defense offers no direct evidence connecting Charles Avery to the crimes charged.

The same is true for Earl Avery, even though Earl Avery was convicted of a sex offense. The fact that Robert Fabian thinks Earl would know of the location of every car in the lot and that he (Earl) "seemed different" on the 31st is not evidence of anything. Neither is the fact that he drove a flatbed car hauler. The fact that it could have been used to move Theresa Halbach's vehicle is nothing more than rank speculation. It is the type of evidence that is routinely ruled inadmissible under a §904.03 analysis. Lastly, it is disingenuous at best to imply, suggest or otherwise offer up the theory that the .22 caliber rifle used by Earl Avery and Robert Fabian in their rabbit hunt could be the murder weapon. There is not one shred of forensic evidence to suggest that was the weapon other than its caliber. This is balanced against ballistic and DNA evidence which identifies another weapon, a weapon possessed by Steven Avery.

Finally, we come to the Dassey brothers and their mother Barb Janda.[3] Setting aside the obvious involvement of Brendan Dassey, the defendant again fails to connect Blaine, Bobby or Bryan Dassey to the crime charged. While it may be argued they had "opportunity" because they lived on the property and were home for short periods that afternoon and evening, nothing more is offered. No motive and no connection to the crime are offered. None of the persons mentioned meet the *Denny* requirements. This evidence of third person liability is inadmissible

B. *State v. Scheidell*

In *Scheidell,* 227 Wis. 2d 285, 595 N.W.2d 661 (1999) the Wisconsin Supreme Court ruled the *Denny* test inapplicable in cases where a defendant proffers other acts evidence committed by an "unknown" party on the issue of identity, the court must balance the probity of the evidence considering the similarities between the other act and the crime alleged against the considerations of potential for prejudice, confusion, or waste of time utilizing the three-step analytical framework outlined in *State v. Sullivan,* 216 Wis. 2d 768, 576 N.W.2d 30 (1998). The court must determine: 1) whether the other acts evidence is offered for permissible purpose; 2) whether the evidence is relevant; and 3) whether the probative value of the evidence is substantially outweighed by prejudicial effect. Unfortunately, for the defendant, *Scheidell* is not similar to the case at hand and it does not apply. First, as already noted, the pool of potential perpetrators is known. Second, with the possible exception of Andres Martinez, the defendant fails to identify

[3] Curiously, the defendant makes no comment about Barb Janda being a possible perpetrator, nor does he include Dolores Avery in his potential list of third party suspects. Since he does not discuss them in his third person theory, we offer no comment at this time.

any crime or other act similar in nature to the crimes charged such that this analysis is viable. However, the defendant does not conduct a *Sullivan* analysis to demonstrate that Martinez' assault on his girlfriend or any of his subsequent statements are evidence of his involvement in Halbach's death. Since there are no "other acts", there is nothing to analyze under *Sullivan*. No balancing of probative value against prejudicial effect is necessary or possible in a *Sullivan* context.

On a final note, since the defendant fails to connect any of this evidence to the crimes charged, its probative value is clearly outweighed by its prejudicial effect. Under a §904.03 analysis the evidence is inadmissible. Admission of this evidence does not make the existence of any fact that is of consequence to the determination more or less probable. The admission of marginally relevant evidence like this only leads to unfair prejudice, confusion of issues; and it will mislead the jury. It's probative value is substantially outweighed by its prejudicial effect.

III. THE RIGHT TO PRESENT A DEFENSE

Denial of the defense request to present third person liability evidence will not violate the defendant's Sixth Amendment right to present a defense. The following quote from the *Scheidell* case is instructive.

> The constitutional right to present evidence is grounded in the confrontation and compulsory process clauses of Art. I, § 7 of the Wisconsin Constitution and the Sixth Amendment of the United States Constitution. *Chambers v. Mississippi*, 410 U.S. 284, 294, 93. S.Ct. 1038, 35 L.Ed.2d 297 (1973); *State v. Pulizzano*, 155 Wis. 2d 633, 645, 456 N.W.2d 325 (1990). An accused's right to cross-examine witnesses and to present witnesses in his or her own defense have long been recognized as fundamental and essential to

> a fair trial. *Chambers*, 410 U.S. at 302-03, 93. S.Ct. 1038; *Pulizzano*, 155 Wis. 2d at 645, 456 N.W.2d 325. The right to present evidence is not absolute, however. *Pulizzano*, 155 Wis. 2d at 646, 456 N.W.2d 325. Much like the state, an accused "must comply with established rules of procedure and evidence designed to assure both fairness and reliability in the ascertainment of guilt and innocence." *Chambers*, 410 U.S. at 302, 93 S.Ct. 1038. Simply put, an accused has no right, constitutional or otherwise, to present irrelevant evidence. *State v. Robinson*, 146 Wis. 2d 315, 332, 431 N.W.2d 165 (1988). *Emphasis added.*

Scheidell, at 293-94 ¶19. The evidence is irrelevant and thus inadmissible, regardless of whether the court applies a *Denny, Scheidell*, or §904.03 analysis or any combination of analyses. This is so because the evidence marshaled by the defense is not relevant at all and clearly immaterial to any proposition at issue in the case. It is immaterial because the defense fails to connect the proffered evidence in any meaningful way to the crimes charged.

CONCLUSION

Regardless of whether the court applies *Denny*, *Scheidell* or simply a §904.03 analysis; the defense fails to meet its burden of production. The motion[4] to introduce third party liability evidence must be denied.

Dated this _____ day of January, 2007.

Respectfully submitted,

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[4] The state is treating this "Statement" as a motion to permit the introduction of third person liability evidence.

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NOTICE OF MOTION AND MOTION
TO PRECLUDE THIRD PARTY LIABILITY EVIDENCE

PLEASE TAKE NOTICE that the State of Wisconsin, by Special Prosecutors Kenneth R. Kratz, Thomas J. Fallon and Norman A. Gahn will move the Court on January 19, 2007, or soon thereafter as counsel may be heard, for an order precluding third party liability evidence.

As basis for said motion, the State relies on §§ 904.01, 904.03, *State v. Scheidell*, 227 Wis. 2d 285, 595 N.W.2d 661 (1999), *State v. Denny*, 120 Wis. 2d 614, 357 N.W.2d 12 (Ct. App. 1984), and the attached memorandum.

(1)

Dated this 8th day of January, 2007.

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