ORIGINAL

FILED UNDER SEAL

STATE OF WISCONSIN CIRCUIT COURT MANITOWOC COUNTY

STATE OF WISCONSIN,

Plaintiff,

v.

Case No. 05-CF-381

STEVEN A. AVERY,

Defendant.

REPLY TO DEFENDANT'S STATEMENT ON PLANTED BLOOD

INTRODUCTION

On January 3, 2007, the state moved to Exclude Blood Vial Evidence found in the Manitowoc Clerk of Court's Office. On January 8, 2007, the defendant filed its Statement on Third-Party Responsibility. Shortly thereafter, the state filed its Memorandum to Preclude Third-Party Liability Evidence. The defendant responded to the state's Motion to Exclude Blood Vial on January 12, 2007. The state now replies to the defendant's response on blood vial evidence.

The third-party liability evidence and the blood vial evidence must be addressed in conjunction with each other. As noted in its Memorandum to Preclude Third-Party Liability Evidence, the state asserts that the defendant's *frame-up* defense and its *planting* defense go hand-in-hand. Consequently, the state renews its request for oral argument and an evidentiary hearing to further flush-out the requisite facts linking the two theories and undermining the proffer. Since the Motion to Preclude Third Party Liability

Evidence and the defendant's pleading to introduce the blood vial evidence are filed under seal, it is advisable for the court to hold this evidentiary hearing (if needed) and oral argument *in camera*.

FACTS

The state expects an evidentiary hearing would reveal the following facts.

(1) Pam and Nikole Sturm found Teresa Halbach's locked Toyota Rav 4 SUV (hereinafter SUV) at approximately 10:30 a.m. on Saturday, November 5, 2005.

(2) Deputy O'Connor of the Manitowoc Sheriff's Office (MTSO) arrived on scene at approximately 10:54 a.m.

(3) Sergeant Orth (MTSO) arrived on scene at approximately 10:59 a.m. At 11:01 a.m., Sergeant Orth walked to the SUV to meet the Sturms. Orth remained with the vehicle until 1 p.m.

(4) At 1 p.m., Lieutenant Herman (MTSO) relieved Sergeant Orth. At 1:05 p.m., Sergeant Orth returned to the vehicle.

(5) After being advised by Detective Remiker that Halbach's SUV was located on Avery's property, Lenk placed himself on duty at approximately noon. At approximately 2 p.m., Lieutenant Lenk arrived on the scene.

(6) A log book is created to account for the comings and goings of law enforcement officers and others.

(7) Deputy Cummings (MTSO) relieved Sergeant Orth at 2:45 p.m. Cummings remained with the vehicle until 3:04 p.m.

(8) At 3:04 p.m., Sergeant Tyson of the Calumet County Sheriff's Office (CASO) and Calumet County assumed responsibility for the SUV.

(9) Deputy Bass (CASO) relieved Sergeant Tyson at 3:12 p.m.

(10) Sergeant Colborn arrives on the scene at 5:12 p.m. or later.

(11) Investigator Steier (CASO) relieved Deputy Bass for a break at 7:27 p.m. Deputy Bass returned at 7:35 p.m. Deputy Bass maintained security of the vehicle until its removal at 8:42 p.m.

(12) The Field Response Unit of the Wisconsin Crime Lab based in Madison arrived on the scene at approximately 4 p.m. The crime lab agents in conjunction with Special Agent Tom Fassbender of the Division of Criminal Investigation (DCI) took control of the vehicle and prepared it for transport to the crime lab in Madison.

(13) Defendant is incorrect when he states in paragraph 1 on page 4 that "(h)is fingerprints, palm prints, and DNA otherwise are nowhere in or on her car." Defendant's DNA was recovered from the hood latch of the SUV.

(14) The DNA profile obtained from the key to the SUV was not blood, but from another biological source. No blood was observed by the analyst when she swabbed the key.

(15) Marlene Kraintz would testify that she was the phlebotomist who withdrew the sample of defendant's blood on January 2, 1996. She would testify that she was the one who put the whole in the vacutainer tube at issue.

(16) The defense does not put one member of the Manitowoc County Sheriff's Office in possession of the vial of defendant's blood at any point in time.

(17) Moreover, testimony would reveal that neither Lieutenant Lenk nor Sergeant Colborn or anyone else associated with the wrongful conviction lawsuit entered the SUV on Saturday, November 5, 2005.

(18) No member of the MTSO in 2005 was a defendant in the wrongful conviction lawsuit filed by defendant.

(19) Manitowoc County is and was not a self-insured entity; but rather had an insurance carrier.

(20) With respect to paragraph 7 of defendant's statement on planted blood, the evidence would reveal that the vial of blood never left the Clerk of Court's Office. The only items transported for analysis were fingernail clippings and an unknown pubic hair. The vial of blood at issue was never transmitted for analysis. Deputy Shallue would testify that the biological specimens to be analyzed by the crime lab were already prepared and packaged for transport by Janet Bonin, Deputy Clerk of Circuit Court, upon his arrival at the Clerk of Court's Office. Deputy Shallue took this biological evidence to the crime lab. Detective Sergeant James Lenk did nothing other than prepare the transmittal paperwork. Deputy Shallue never had possession of Avery's blood and neither did Detective Sergeant Lenk.

(21) There is no evidence to suggest or support the theory that the Manitowoc County Clerk of Court's Office was burglarized and that part or all of the vial of blood was ever removed by a member of the general public or law enforcement.

LAW

The defendant misrepresents the holding of *Holmes v. South Carolina*, __ U.S. __, 126 S.Ct. 1727, 164 L.E.2d 503 (2006) and its impact on Wisconsin law. *Holmes* does not abrogate the holding of *State v. Richardson*, 210 Wis. 2d 694, 563 N.W.2d 899 (1997), nor does it undermine the rule established in *State v. Denny*, 120 Wis. 2d 614, 357 N.W.2d 12 (Ct. App. 1984). In fact, *Holmes* acknowledges the appropriateness of the *Denny* rule in a footnote on page 1733. *Holmes* likewise acknowledges that third-party liability and frame-up evidence rules are widely accepted and generally do not run afoul of a defendant's constitutional right to present a defense. *Holmes* at 1733. As a point of law, the Supreme Court noted in *Holmes* as follows:

> "Evidence tending to show the commission by another person of the crime charged may be introduced by accused when it is inconsistent with, and raises a reasonable doubt of, his own guilt; **but frequently matters offered in evidence for this purpose are so remote and lack such connection with the crime that they are excluded**"); 40 A Am.Jur.2d, Homicide §286, pp. 136-138 (1999) ("[T]he accused may introduce any legal evidence tending to prove that another person may have committed the crime with which the defendant is charged ... **[Such evidence] may be excluded where it does not sufficiently connect the other person to the crime, as, for example, where the evidence is speculative or remote, or does not tend to prove or disprove a material fact in issue at the defendant's trial**" (footnotes omitted)). (emphasis added)

It stands to reason that if the court approves of rules such as *Denny* which clearly demands more from a defendant with respect to an offer of proof than what is demanded in a *Richardson* offer of proof regarding frame-up evidence, then *Richardson* is completely unaffected by the holding in *Holmes*.

As the court is aware, the *Richardson* case involved a §904.03, Stats. analysis and was a unanimous decision by the Wisconsin Supreme Court. In *Richardson*, although the Supreme Court acknowledged a defendant's constitutional right to present a defense, and rejected the *Denny* analysis; it nonetheless found Richardson's frame-up evidence inadmissible. The court determined that the slight probative value of the evidence was substantially outweighed by considerations of confusion of issues, misleading the jury and undue delay. The court reasoned that the opportunity for a waste of time on collateral issues would sidetrack the jury from the task at hand. Consequently, the evidence was properly ruled inadmissible.

ARGUMENT

The existence of the purported vial of defendant's blood, while relevant to the case at hand, is immaterial. In other words, it does not make it more or less probable, in and of itself, that the defendant was framed. This is because there is nothing to connect its existence to the blood in the SUV other than conjecture and speculation. The defendant fails to demonstrate materiality because he cannot raise a reasonable inference that the vial of blood ever left the Clerk of Court's Office. He cannot put the vial of the blood in the hands of Lieutenant Lenk, Sergeant Colborn, or any other member of the Manitowoc County Sheriff's Office. The best the defendant can do is to simply say it's possible. This possibility exists solely because a bailiff has a key to the Clerk of Court's Office which, in theory, could have been given to any member of the Sheriff's Department.

The defendant likewise posits an equally implausible theory when he suggests that a member of the public came into the Clerk's Office, presumably sometime after his exoneration in September of 2003 and before November 5, 2005, and obtained a sample of defendant's blood from the vial or the vial itself. However, the defendant does not suggest that a member of the general public planted the blood in the SUV. He speculates only that a law enforcement officer planted the blood. In this theory, we are asked to accept out of thin air the remote possibility that a member of the general public was working in conjunction with the Manitowoc County Sheriff's Office to frame Steven Avery. Regardless of which one of these theories one chooses, they are both equally deficient in terms of the offer of proof.

The defendant fails to connect these theories with the facts of the case because he cannot suggest if or when the blood was removed from the Clerk of Court's Office. Apparently, we are left to speculate that this occurred sometime after the defendant was freed in September of 2003 and before the vehicle was found on November 5, 2005. We are expected to believe that the blood was preserved for over two years (possibly) until this exact moment in time presented itself. It assumes the conspirators knew Teresa Halbach was dead, and the defendant could be framed for the crime that they knew someone else committed.

The offer of proof also fails because the defendant cannot present a plausible explanation as to how the blood was placed in the SUV on Saturday, November 5, 2005. The defendant implies that Lieutenant Lenk, Sergeant Colborn, or some other member of the Sheriff's Department planted the blood, but yet they don't establish that Colborn or

Lenk or another member of the Sheriff's Department, with a supposed bias as the result of the conviction lawsuit, entered the SUV before control of the vehicle was assumed by the Calumet County Sheriff's Department at 3 p.m. The defendant likewise cannot establish that the vehicle was opened at the salvage yard by anyone. Apparently, we are expected to assume that someone arrived at the scene unannounced, found the locked vehicle, gained entrance to it and planted the defendant's blood without being seen. Presumably, entrance was gained with the key that was later discovered in defendant's trailer by Lieutenant Lenk on Tuesday, November 8, 2005. If that is the inference the defendant will ask the jury to accept, then they must be accusing Lieutenant Lenk and/or other members of the Manitowoc County Sheriff's Department of killing Teresa Halbach. This conclusion is inescapable when one considers that the defense likewise implies in paragraph 19 there is a "more sinister" explanation to Lieutenant Lenk's presence in Avery's garage during the execution of the March search warrant that lead to the recovery of the bullet fragment containing Teresa Halbach's DNA. If this "more sinister" inference is put forth, then the defense must be saying that law enforcement was involved in the murder of Teresa Halbach. Otherwise, how else would they come into possession of the key and the bullet fragment containing her DNA.

The result of the defendant's offer of proof on the blood vial evidence, they have merged the *Denny* third-party liability theory with the *Richardson* frame-up theory. They must be required to demonstrate a motive, an opportunity and a direct connection to the crime if they wish to implicate, by inference, Lieutenant Lenk, Sergeant Colborn or any other member of the Manitowoc County Sheriff's Department.

On the other hand, if the court does not accept the proposition that *Denny* is applicable, the evidence is nonetheless admissible under a §904.03, Stats. analysis. The evidence is so speculative, so demanding of conjecture and so remote that its probative value is substantially outweighed by the danger of unfair prejudice, confusion of issues, confusion of the jury and undue delay.

§904.03, STATS. ANALYSIS

§904.03, Stats. provides:

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

a. Unfair Prejudice

The admissibility of the vial will lead to unfair prejudice. Since the court ruled the State may not test the vial of blood for the presence of EDTA preservative, without an evidentiary hearing, the state's ability to respond adequately to the planting allegation has been compromised. This is especially true in light of the media coverage given to the existence of the vial and widespread recent dissemination of the defense theory.

Additionally, unfair prejudice also stems from the court's receipt of this evidence because it denied the state's motion to admit defendant's statements to fellow inmates Luedtke, Werlein and Myers. Such statements are not other acts evidence but rather evidence of the defendant's intent, motive and plan to engage in the behavior charged. They are evidence of the commission of this crime not other crimes. See *State v. Bauer*, 2000 WI App. 206, 238 Wis. 2d 687, 617 N.W.2d 902. Such statements

are necessary to establish in rebuttal that the defendant had a bias, motive and intent to commit the crimes charged that existed long before the law enforcement officers' bias and motive to frame him was created by his exoneration and subsequent lawsuit.

b. Confusion and Delay

If the vial of blood and the planting theory is admissible, then this case will become more about how the vial of blood was smuggled out of the courthouse and how some of it ended up in Teresa Halbach's SUV on Saturday, November 5, 2005. In other words, the state will present an endless of parade of witnesses, including every member of the Clerk of Court's Office to establish the complete implausibility of the blood ever leaving the Clerk of Court's Office. The jury will be required to spend a great deal of time wondering and trying to answer unanswerable questions. For example, just how did that vial of blood get out of the courthouse, how did Lieutenant Lenk or Sergeant Colborn obtain possession of the vial of blood or some of its contents, and how was it planted in the vehicle if the vehicle was locked. Moreover, an hour-by-hour accounting of Lieutenant Lenk's whereabouts from October 31 through November 5 is demanded. Similarly, an accounting of Sergeant Colborn's whereabouts that week as well as the whereabouts of the former sheriff, who was the subject of the lawsuit, is required. Also, the jurors would hear testimony regarding which county employees, including members of the sheriff's department, had keys to the Clerk of Court's Office. The jurors would then likely hear evidence as to where those keys were stored and who had access to them. The potential for confusion abounds. Therefore, just as in *Richardson*, this evidence must and should be denied.

CONCLUSION

This blood vial offer of proof fails to meet the admissibility standards of *Denny* or *Richardson*. The denial of this evidence does not violate the defendant's constitutional right to present a defense, because the evidence is so marginally relevant, that its probative value is substantially outweighed by considerations of unfair prejudice, confusion of issues and the potential of the jurors being mislead.

Dated this 16th day of January, 2007.

Respectfully submitted,

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