STATE OF WISCONSIN CIRCUIT COURT BRANCH 1 MANITOWOC COUNTY

STATE OF WISCONSIN,

Plaintiff,

v.

STEVEN A. AVERY,

Defendant.

Case No. 05-CF-381

STATE'S RESPONSE TO DEFENDANT'S POSTCONVICTION MOTION

I. THE SUBSTITUTE JUROR ISSUE

A. Procedural History.

1. The state is largely in agreement with the facts set forth in defendants postconviction motion. At the postconviction hearing ("the hearing"), it was established what both parties knew previously: that at the end of a high-profile, six-week trial for first-degree intentional homicide, an unforeseen and unfamiliar situation developed concerning a juror, Richard Mahler (hereinafter "Mahler"). Defense counsel, both experienced trial attorneys whose practice is almost exclusively criminal defense, were immediately consulted (along with the prosecution) when the court became aware of the evolving situation with Mahler. The best evidence of what occurred that day is found in the court's memorandum, Exhibit #2, dated March 16, 2007. To the extent this memorandum conflicts with testimony elicited from witnesses at the hearing itself, this court is in the best position to resolve any conflicts as the memorandum is the most contemporaneous, detailed, and neutral account of what happened.

B. Facts established at the hearing.

2. At the hearing, Mahler testified to the source of his angst and the reason he sought to be relieved of jury duty on March 15, 2007. Mahler testified that he took issue with one other juror's comment to the effect that if he (Mahler) "can't handle it, [he] should just tell [the court] and leave" (Tr. 16:24-25). This momentary and isolated comment, allegedly made by one other juror at dinner following the first few hours of deliberations, was apparently sufficient to inspire stress in Mahler when combined with what Mahler originally reported as marital strife. Mahler also testified that earlier reports of his financial dependence upon his wife's trust fund had caused marital strife (Tr. 10:3-9). This strife was supposedly exacerbated by a phone conversation between Mahler and his wife later that evening during which Mahler originally claimed his wife told him that his stepdaughter had been in an accident, a fact that he later claimed was false at the hearing (*see* Ex. #2, Tr. 29:9-16).

3. On direct examination, Mahler expressed anxiety over the uncertainty related to his family after this phone conversation with his wife (Tr. 23:23-25, 24:1-3). He testified that he could not tell how upset his wife of thirteen years was, but intimated that he knew something was wrong (Tr. 23:5-9). Coupled with the perceived slight regarding his wife's financial support, Mahler testified that he sought out the bailiff in an effort to speak with the court (Tr. 24:15-25, 25). The bailiff allegedly contacted Sheriff Pagel to advise Pagel of the situation (Tr. 25:7-9). Sheriff Pagel contacted the court and the court eventually connected with the parties to inform them of the developing situation (Tr. 26:9-25, 81:18-25, 82:1-3). Attorney Strang and Buting claimed no recollection of Sheriff Pagel's involvement at the hearing itself; Exhibit #2 notwithstanding (Tr. 92:12-17, 204:16-20). When pressed, Mahler could not identify by name the bailiff with whom he had much more contact until it was offered by the state (Tr. 53:2-21).

4. Attorney Strang testified at the hearing that he felt the situation "both urgent and serious" (Tr. 83:24-25, 84:1-9). Attorney Buting testified to a similar belief (Tr. 195:17-24). Both attorneys, with a combined fifty plus years of criminal defense experience, testified they had not previously experienced a situation like this before; it was unique (Tr. 146:19-25, 147:1-6, 200:25, 201:1-22). In an effort to deal with the situation, the court undertook a reasonable and appropriate response. After obtaining consent from both parties, the court spoke with Mahler directly in an attempt to clarify his concerns.

5. The court's memorandum (Ex. #2) details that interaction. The court noted "[T]here was . . . suggestion that the juror and his wife had been having some form of marital difficulties before the trial and the juror felt it was *vital* for his marriage that he be excused" (emphasis supplied, Ex. #2, p. 1). The court was "mindful of its duty to exert reasonable efforts to avoid the discharge of a juror once deliberations have begun . . ." by speaking with Juror Mahler by cell phone (*id.*). After Mahler reiterated his predicament to the court as it had been relayed earlier, the court excused him from further service. Importantly, the court noted at the time: "[M]y reading, without pressing him with questions too specific, was that he felt the future of his marriage was at stake if he was not excused" (*id.*, p. 2). The court also noted, and Mahler confirmed at the hearing, that Mahler was thankful for the court's discreetness in handling what Mahler thought was a significant, personal, and embarrassing chain of events (*id.*, Tr. 63:3-12).

6. Satisfied that it had investigated the circumstances surrounding Mahler's request to be let off the jury, the court informed the parties of the outcome later that evening by telephone (*id.*). That evening, the parties independently discovered *State v. Lehman*, 108 Wis. 2d 291, 321 N.W.2d 212 (1982) (Tr. 88:20-25, 89:1-14). Believing *Lehman* to be controlling, the parties met the following morning in chambers to discuss the options set out in *Lehman*.

(Tr. 96:6-23). Before deciding, defense counsel met with the defendant to discuss his options (Tr. 99:5-25, 100:17-25, 101:1-2).

7. Defense counsel both testified they were "playing for the win, not for the fumbles," meaning they both wanted the best outcome for the defendant—a not guilty verdict (Tr. 104:1-12, 232:15-25, 233:1-9). In part because defense counsel steadfastly maintained the defendant's innocence, and because they recognized the state would likely continue the prosecution in the event of a mistrial, defense counsel both represented to the defendant that substitution of an alternate juror was the best option (Tr. 101:6-10, 211:23-25, 212:1-12). Defense counsel also spoke of the economics of their decision, realizing that if a mistrial were declared, the defendant would face the difficulty of obtaining new counsel without funds to do so, a likely delay, and a corresponding longer time in confinement (Tr. 159:16-25, 160:1-7, 212:13-20). Defense counsel both testified it would be antithetical to their approach to proceed with eleven jurors, noting the decreased chance of a mistrial or acquittal (Tr. 102:3-15, 213:23-25, 214:1-10).

8. Ultimately, the defendant chose to proceed with an alternate juror (Tr. 100:22-25, 101:1-2, 243:18-23) and Alternate Juror N.S. was impaneled after the court determined she had not been subjected to any outside influence. The entire panel was then instructed to begin their deliberations anew (Tr. 166:3-11). Further, the court had the bailiff shred the outlines which the jury had used in its brief period of deliberations the day before and return photos, which the jury had taped to the flipchart during deliberations, to the album. The court's memorandum notes this was done "to assure the jury did indeed begin their deliberations anew" (Ex. #2, p. 2).

9. Other than the issues involving Mahler and the court's *Denny* ruling, both Attorney Strang and Attorney Buting testified they believed the "evidence went in as well as it

could have" (Tr. 152:5-16, 236:20-25, 237:1-8). Both trial counsel, with a lifetime of criminal defense trial experience between them, believed they had carefully litigated the case such that a good opportunity for acquittal existed. This belief is an important in evaluating the reasonableness of trial counsels decisions, especially in the context of an ineffective assistance of counsel claim.

C. Analysis of Case Law and Argument.

10. The defendant cites much case law from state and federal courts in support of his postconviction motion. At first glance it appears persuasive. But under closer scrutiny, the application of that case law to this case is, by and large, problematic for six reasons.

11. First, the state did not ask the court to remove Juror Mahler. Second, the court was not informed by Mahler of the circumstances he testified to which lead to his discomfort. Third, there was no evidence that Mahler was a "holdout" then (or now for that matter) nor is there any evidence indicating he was a problem for the state after only four hours of deliberation. Fourth, if Mahler's testimony is credible that he was unaware of the true nature of the problems at home, it would have been impossible for this court to have probed for more information. It also means he lied to the court on March 15, 2007. Fifth, the defendant's choice to proceed with twelve jurors constituted a choice that directly benefited him. A choice he now claims he should not have been provided. He was able to continue the case with two very experienced attorneys who believed they created a solid opportunity for acquittal. He got a jury of twelve who deliberated to reach a unanimous verdict beyond a reasonable doubt. Lastly, the revision of Wis. Stat. § 972.10(7), while indirectly in response to the supreme court's decision in *Lehman*, does not necessarily foreclose the substitution of an alternate juror where circumstances such as these warrant it.

D. There was no structural, constitutional or procedural error.

12. The defendant asserts he was denied his right to be present and assisted by counsel when the court communicated with Mahler by phone, the evening before he was dismissed. He cites several cases for this proposition.[1] *State v. Anderson*, 2006 WI 77, 291 Wis. 2d 673, 717 N.W.2d 74, involved a jury request to have the defendant and victim's in-court testimony read back to them. *Id.* ¶ 13. Without consulting the state, the defendant, or defense counsel, the trial court sent a note back to the jury indicating that it would be too "cumbersome" to do so, and a brief back and forth of similar notes followed. *Id.* ¶ 15. After the jury reached its verdict, the judge advised counsel of what transpired, but failed to produce or record the notes. *Id.* ¶¶ 16-18. The supreme court determined this constituted an abuse of discretion and a prejudicial error, vacated the conviction, and ordered a new trial. *Id.* ¶ 127. In this case counsel were apprised immediately and participated in the decision making process.

13. Defendant further alleges that the absence of counsel during the court's first communication with Mahler constituted a waiver of the right to counsel. Defendant again cites *Anderson* for this proposition. Following *State v. Klessig*, 211 Wis. 2d 194, 564 N.W.2d 716 (1997), the supreme court concluded the defendant in *Anderson* could not have waived his right to counsel without a colloquy on the record which indicated that the defendant had made a knowing, voluntary, and intelligent choice to do so. *Anderson,* 291 Wis. 2d 673, ¶ 73.

14. In the case at bar, it cannot realistically be said that defendant waived counsel in the same sense as in *Anderson*, or proceeded in any real sense without representation at critical points. The discharge of Mahler was not explicitly prohibited by *Lehman* or Wisconsin statute.

[1] The balance of cases cited by defendant are inapplicable because they involve circumstances where a judge initiated contact with the jury on his own accord (*Burton),* there was no record of the conversation or decision (*Koller*), and two instances involving *in camera voir dires* in jury selection for sexual assault of a child (*Tulley, David K.*). Notably, while errors were found in all four instances, the reviewing appellate courts held that the errors were harmless in all four instances.

As noted above defense counsel were involved from the beginning. *Anderson's* reflects an accumulation of error not present in this case. Defense counsel met with the defendant the following morning and reviewed options, including that of a mistrial, before deciding how to proceed. The defendant was consulted and made the final decision in the morning. No evidence was presented demonstrating how, or if, the defendant was prejudiced from not speaking to his attorneys the previous evening. The defendant still had it within his power to request a mistrial the following morning. He alone controlled his own destiny on this issue. Although testimony was elicited through counsel that defendant was "disappointed" by this chain of events (Tr. 247:12-20), nothing further was presented beyond that simple fact. The testimony did not establish any preference or need for retaining Mahler (Tr. 252:24-45, 253, 254:1-14). Given what has been learned, none could have.

E. The record established cause to discharge the juror.

15. Defendant maintains the record contains inadequate information to justify removing Mahler. He cites *Peek v. Kemp*, 784 F.2d 1479 (11th Cir. 1986), in support. In *Peek*, the trial court replaced a regular juror with an alternate juror without personally questioning the regular juror to ascertain whether he was too ill to continue deliberations and without instructing the jury to begin its deliberations anew with the substitute juror. *Id.* at 1481. The jury retired to consider its verdict at 10:27 p.m. after a one-day first-degree murder trial. *Id.* Subsequently, it was discovered the original juror was the only holdout for a not guilty verdict. *Id.* After the alternate juror was inserted into deliberations, without further instruction, the jury returned a guilty verdict. *Id.* Shortly thereafter, the jury sentenced the defendant to death. *Id.* The 11th Circuit Court of Appeals held there was no error in excusing the original juror, noting that the state habeas proceedings provided a sufficient record to determine that the original juror was

unable to continue, and in any event found no prejudice had come to the defendant as a result. *Id.* at 1485. In the present case, the substitute juror N.S. was voir dired and instructed separately. Then the newly constructed panel was reinstructed as a whole to begin anew. *Peek* does not apply to this case.

16. The court in *Peek* relied upon an earlier case, *Green v. Zant*, 715 F.2d 551 (11th Cir. 1983), also cited in defendant's motion. In *Green*, the jury found the defendant guilty of murder and kidnapping, and was in the penalty phase of the trial when a juror collapsed outside the courtroom and said "I can't do it." *Id.* at 554. Afterwards, the trial court conducted a colloquy with the jury foreperson, who was of the opinion that the original juror was "physically and emotionally unable to continue. . . ." *Id.* The original juror was replaced without being personally questioned, and in later state habeas proceedings, the original juror filed an affidavit indicating that she "*had every intention of continuing as a juror. I don't remember ever making any statements to anyone asking to be taken off the jury.*" *Id.* at 555 (emphasis in original).

17. It is in this context the *Green* court stated "it would be prejudicial and constitutionally deficient for a trial judge to excuse a juror during deliberations 'for want of any factual support, or for a legally irrelevant reason.'" *Id.* (Postconviction Motion, p. 8). Concluding the record was insufficient to make a determination about the propriety of this substitution, but suggesting the possibility that the original juror had been removed because of her refusal to impose the death penalty, the court of appeals remanded the matter to district court for an evidentiary hearing. *Id.* at 557-59. On remand, the 11th Circuit Court of Appeals concluded the district court did not abuse its discretion in dismissing the juror because it was unaware of her opposition to imposing the death penalty. *Green v. Zant* (Green II), 738 F.2d 1529, 1533 (11th Cir. 1984). The court of appeals also relied upon testimony of the other jurors

in the evidentiary hearing who testified the original juror expressed her desire to be removed immediately after she had fainted outside the courtroom and concluded that the juror herself indicated she did not wish to continue to serve. *Id.* Again in the case at bar, a record was made and good reasons were given for the removal of Mahler.

18. The defendant further asserts that the trial court did not "satisfy its affirmative duty to make sufficient inquiry into the circumstances to determine whether the juror, in fact, was unable to continue to serve." (Postconviction Motion, p. 9) In support, he cites *United States v. Araujo*, 62 F.3d 930 (7th Cir. 1995). In *Araujo*, the defendant was charged with distributing cocaine. *Id.* at 931. After a five-day trial, the jury began deliberations, but was unable to reach agreement before the beginning of a three-day weekend. *Id.* at 932. The following week, two different jurors were involved in two different incidents involving car trouble and bad weather. *Id.* This delayed deliberations two days further, and the trial court, finding a five-day layoff in deliberations to be too much, decided to remove the second missing juror (the first having returned) and proceed with eleven jurors under Fed. R. Crim. P. 23(b)(3).[2] Defense counsel objected, but was overruled. *Id.* at 932. Later that day, the jury found Araujo guilty. *Id.* The 7th Circuit found the district court abused its discretion notwithstanding the broad discretion afforded to the court by Fed. R. Crim. P. 23(b).

> Recognizing the considerable latitude that Rule 23 bestows on a district court, we nonetheless conclude that the court abused its discretion in dismissing the juror here. The few facts that are known to us simply do not reveal how long Mr. Lyles would be unable to participate in the deliberations; thus, the record lacks the requisite support for the district court's determination that he should be dismissed for just cause.

Id. at 934.

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[2] Fed. R. Crim. P. 23(b) states: After the jury has retired to deliberate, the court may permit a jury of 11 persons to return a verdict, even without a stipulation by the parties, if the court finds good cause to excuse a juror.

19. Furthermore, the *Araujo* court held, "When the record is unclear as to the juror's inability to serve, and when the facts that are known leave open the possibility that the juror might have been able to resume her service after a reasonably brief delay, just cause for dismissal most likely is lacking." *Id.* at 935. Consequently, the 7th Circuit reversed Araujo's conviction and remanded for a new trial. *Id.* at 937.

20. *Araujo* is distinguishable for several reasons. First, defense counsel in *Araujo* objected to the suggestion that the trial court dismiss the problem juror and instead proceed with eleven. *Id.* at 932. Here, there was no objection by defense counsel; in fact, there was actual agreement regarding Mahler's removal. No one was aware of the now alleged circumstances surrounding that removal, so the parties sensibly allowed the court to speak with Juror Mahler to seek clarification without delving too deeply into admittedly personal matters. This further distinguishes the case at bar from *Araujo* because this court probed Mahler's proffered explanation and put that explanation on the record. Additionally, the end result in *Araujo* was arrived at by a jury of less than twelve, a concern which is not implicated here; but was expressly a factor in the *Araujo* decision. *Id.* at 937. Next, the juror car trouble in *Arajuo*, on account of cold weather, is a circumstance easily remedied and of considerably less import than Mahler's marital strife. Mahler expressed to the court that "his marriage might be at stake"(Ex. #2, p.2).

F. The discharge was not structural error in this case.

21. Defendant asserts he was denied an impartial jury because Mahler's discharge was error that is not subject to harmless error analysis. In support, he cites *Gray v. Mississippi*, 481 U.S. 648 (1987). *Gray* involved a capital murder case, where the prosecution used all of its preemptory challenges during *voir dire* but the trial court excused an additional juror who

indicated she was morally opposed to the death penalty. *Id.* at 655. The Supreme Court concluded that harmless error analysis was inappropriate under the circumstances.

> We reaffirm that ruling today in a case that brings into focus one of the real-world factors that render inappropriate the application of the harmless-error analysis to such erroneous exclusions for cause . . . the record in the instant case...it suggests . . . that the State exercised its peremptory challenges to remove all venire members who expressed any degree of hesitation against the death penalty. Because courts do not generally review the prosecution's reasons for exercising peremptory challenges, and because it appears that prosecutors often use peremptory challenges in this manner, a court cannot say with confidence that an erroneous exclusion for cause of a scrupled, yet eligible, venire member is an isolated incident in that particular case. Therefore, we cannot say that courts may treat such an error as an isolated incident having no prejudicial effect. . . harmless-error analysis cannot apply.

Id. at 667-68.

22. Although defendant may technically be correct in stating that "[D]enial of the right to an impartial jury is structural error that is not subject to harmless error analysis," the holding is limited by circumstances in *Davis*, 199 Wis. 2d 513, 545 N.W.2d 244 (Ct. App. 1996), which are notably not present here because no effort was made by the state or the court to remove a juror for moral reasons, nor was the state aware of Mahler's preliminary view of the case at the time Mahler asked to be let go.

23. Defendant also relies upon *State v. Tody*, 2009 WI 31, 316 Wis. 2d 689, 764 N.W.2d 737. However, the Wisconsin Supreme Court was clear to limit its holding. Harmless error analysis was inappropriate in cases where "a juror was biased and was erroneously impaneled." *Id.* ¶ 44. Because the court in this case had no knowledge of Mahler's original leanings or that he was misleading the court,[3] and because defense counsel agreed to the substitution and were satisfied with Juror N.S., *Tody* offers no support.

[3] Assuming solely for the sake of argument that Mahler was truthful on September 28, 2009, and March 15, 2007.

24. Next, defendant cites *United States v. Curbelo*, 343 F.3d 273 (4th Cir. 2003). In *Curbelo*, the defendant was on trial for drug trafficking when, at the beginning of the third day of a five-day trial, a juror called in sick. *Id.* at 275. The district court decided that the juror would not be available for the balance of trial (she reportedly had irritable bowel syndrome), and decided to proceed with eleven jurors, despite the defense's objection. *Id.* Curbelo was ultimately convicted of five counts of drug trafficking. *Id.* at 277.

25. The court held the district court abused its discretion in dismissing the twelfth juror without an adequate indication as to when she might be able to serve again. *Id.* at 278. The court went on to address whether such an error was subject to harmless error analysis. It concluded removal of the juror constituted structural error, which

> affect the very "framework within which the trial proceeds, rather than simply . . . the trial process itself." Examples of such errors include a total deprivation of the right to counsel, lack of an impartial trial judge, an unlawful exclusion of grand jurors of defendant's race, the right to self-representation at trial, the right to a public trial, an erroneous reasonable-doubt instruction to the jury, and the seating of a juror who should have been removed for cause. It is because such errors "infect the entire trial process" that they require reversal without regard to the evidence in a particular case. The error here-depriving a defendant of the verdict of twelve jurors, without his consent or any finding of good cause-is such an error.

Id. at 281 (internal citations omitted). Accordingly, the *Curbelo* court held "whether violative of the Constitution or not, the error here is structural, and such errors 'invalidate the conviction' without any showing of prejudice." *Curbelo,* 343 F.3d at 280 citing *Sullivan v. Louisiana*, 508 U.S. 275, 279 (1993). Therefore, "we must follow our sister circuits and conclude that the court's decision to excuse the twelfth juror prior to deliberations and absent the defendant's consent falls into the special category of errors that 'defy analysis by harmless-error standards' and require automatic reversal because they are 'necessarily unquantifiable and indeterminate.'" *Curbelo,* 343 F.3d at 285.

26. Here, defendant was not deprived of his right to have a jury of twelve consider his guilt or innocence as was the case in *Curbelo*, because a jury of twelve fully considered his case. Moreover, the trial court did not proceed with over objection from defense counsel; instead, the court bowed to the wishes of the defendant upon advice of counsel. Therefore, *Curbelo* is completely inapposite to this case.

G. No prejudice resulted from the procedure followed in this case.

27. Defendant offers two further cases in support of the argument that removal of a juror, where there is evidence the trial court is aware of the juror's "holdout" status, is improper under Fed. R. Crim. P. 23(b)(3). In *United States v. Symington*, 195 F.3d 1080 (9th Cir. 1999), the former governor of Arizona was alleged to have made false statements to banks to secure loans. *Id.* at 1082. During the eighth day of deliberations, the jury sent the district judge a note:

> "Your Honor, we respectfully request direction. One juror has stated their final opinion prior to review of all counts." The judge discussed the matter with counsel for both sides and then wrote back to the jurors reminding them of their duty to participate in deliberations with each other, but emphasizing also that each juror should make up his or her own mind on the charges. On [the following day], the jury sent the judge another, more detailed note. The note read, in pertinent part:
>
> > We have earnestly attempted to follow your last directive to continue with our deliberations. However, the majority of the jurors sincerely feel that the juror in question cannot properly participate in the discussion with us.

Id. at 1083. After discussing the matter with counsel for both sides, the judge (with counsel present) separately questioned each member of the jury to determine the nature of the problem. *Id.* Each of the jurors (other than the problem juror, Cotey) agreed that the note accurately described their concerns. *Id.* The jurors suggested the best solution would be for the judge to dismiss Cotey. *Id.* The judge decided to dismiss her because she was "either unwilling or

unable to deliberate with her colleagues." *Id.* The judge acknowledged that "no juror should yield a thoughtfully-held position simply to arrive at a verdict," but found "there has been nothing stated by any of the jurors that would indicate that that is the situation here." *Id.* Accordingly, the judge excused Cotey "for just cause for being either unwilling or unable to participate in the deliberative process in accordance with the instructions of the Court." *Id.* The following day, at Symington's request, the judge seated one of the alternate jurors in Cotey's place and instructed the jury to begin its deliberations anew. *Id.* The next day, Symington moved for a mistrial. *Id.*

28. The court of appeals concluded dismissing Cotey was error: "We hold that because it was reasonably possible that the impetus for Juror Cotey's dismissal came from her position on the merits of the case, it was error to dismiss her. Accordingly, we reverse Symington's conviction and vacate his sentence." *Id.* at 1088. In this case, no such discord in the jury room was presented to the court by Mahler. The proffered reason for Juror Mahler's removal had nothing to do with his view on the outcome of the case that he acknowledged was preliminary as he wanted to look at all the evidence (Tr. p. 18). The fact that Mahler *presently* claims discordance with another juror provides no help in assessing whether the court made the correct decision over two years ago when he was discharged. It comes too little and too late to be of any benefit.

29. The other case relied upon is *United States. v. Samet*, 207 F. Supp. 2d 269 (S.D. N.Y. 2002). It is also readily distinguishable. *Samet* involved a prosecution for participation in a ponzi scheme. *Id.* at 270. A juror called in and represented herself to be ill on the third day of deliberations after a seven-week trial. *Id.* at 270-71. The juror had left voicemail for the court in which she indicated she was "being verbally abused . . . [a]nd the way I feel right now, for me to

run out, I'm just going to vote the same as everyone else, just to be done with this. I can't sleep." *Id.* The court called the juror in, and conducted a *voir dire* on the record, with counsel and defendants present. *Id.* The juror indicated she felt at odds with one person, and that a cooling off period would not cure matters. *Id.* The district court sent everyone home for the weekend, indicating it needed some time to think. *Id.* The government moved to have her dismissed under Fed. R. Crim. P. 23(b), and proceed with eleven. *Id.* at 274-75. Both parties subsequently moved for a mistrial over the weekend. *Id.* at 276. The following Monday, the judge conducted a *voir dire* with the juror, asking her if she could follow his direction to deliberate. *Id.* She indicated she could not do so. *Id.* The district court thereafter, in ten-page decision, declared a mistrial. *Id.* at 282.

30. In this case, the state did not move to dismiss Mahler, it did not move to proceed with eleven, and did not force the defendant to choose the option of proceeding with the alternate juror. Moreover, there was no evidence presented then, or now for that matter, that Mahler was a hold out. This makes sense given that deliberations had just gotten underway that afternoon. The concerns represented in *Symington* and *Samet* are not implicated here.

H. The court had apparent authority to substitute an alternate juror once deliberations had begun under the facts of this case.

31. The defendant next argues that Wis. Stat. § 972.10(7) prohibits substitution of an alternate juror because it mandates discharge of any additional jurors prior to deliberation. Wis. Stat. § 972.10(7) ostensibly forecloses the possibilities outlined in *State v. Lehman*, 108 Wis. 2d at 313. The court and the parties were unaware of the statutory change brought about by *Lehman*. Nevertheless, the court and the parties believed *Lehman* to be controlling as to the options available to the defendant. The defendant chose an option he now claims was

unavailable to him. The option insured his right to a jury of twelve. A jury his attorneys believed could acquit him based on their assessment of how the case was tried.

32. More importantly, policy changes brought about by *Lehman* to Wis. Stat. § 972.10(7) did not involve a concern over the propriety of substituting alternate jurors in criminal cases. Rather, the intention behind the changes brought about by 1983 Wis. Act 226 involved the labeling or selecting of alternate jurors during jury selection. Alternates in criminal trials were explicitly declared at the start of trial. *See* Wis. Stat. § 972.05 (1979-80). This led to concerns regarding juror attentiveness and collegiality. In order to cure this problem, Wis. Stats. §§ 805.08(2) and 972.04(1) were amended by 1983 Wis. Act 226. These revisions occurred in order to keep the identity of the alternate juror, if any, unknown and undecided until the case was submitted for jury consideration. Thus, the concern of the legislature was two-fold. First, the legislature revised § 972.10(7) as an explicit response to *Lehman*, acknowledging that no procedure had previously been implemented. But secondly, and more importantly, the legislature noted the larger purpose behind this change: "These changes are intended to promote an attentive attitude and a collegial relationship among all jurors." *See* 1983 Wis. Act 226, § 5-6. There is no expressed intent to preclude substitution when the need exists; notwithstanding the discharge language in § 972.10(7).

33. Taken as a whole, 1983 Wis. Act 226 was directed at alleviating concerns over premature alternate juror designations. While ostensibly foreclosing keeping an alternate juror in service past the submission of the cause to the jury, the language of § 972.10(7) only makes sense when considering what Wis. Stat. § 972.05 (1979-80) used to say:

> [i]f the court is of the opinion that the trial of the action is likely to be protracted, it may, immediately after the jury is impaneled and sworn, call one or 2 (*sic*) alternate jurors. They shall be drawn in the same manner and have the same qualifications as regular jurors....The alternate jurors shall take the oath or

> affirmation and shall be seated next to the regular jurors and shall attend the trial at all times. If before the final submission of the cause a regular juror dies or is discharged, the court shall order an alternate juror to take his place in the jury box. If there are 2 (*sic*) alternate jurors, the court shall select one by lot. Upon entering the jury box, the alternate juror becomes a regular juror.

Id.

The legislature's note in repealing 972.05 indicates

> [t]his bill abolishes the concept of 'alternate' jurors and substitutes provisions allowing additional jurors to be impaneled to hear the evidence in protracted trials. The panel is then reduced to the appropriate size by lot immediately prior to the final submission of the case to the jury. These changes are intended to promote an attentive attitude and collegial relationship among all jurors.

1983 Wis. Act 226, § 5. Thus, whereas prior to 1983 alternate jurors were seated with but separate from the "regular" jurors, 1983 Wis. Act 226 eliminated that division by instead treating all jurors alike, and then, prior to retiring to deliberate, identifying which jurors were alternates and excusing them. A fair reading of this change is that it does not preclude substituting an alternate juror into deliberations in the event a regular juror is excused; it just changes the point at which the identity of the alternate jurors is known.

34. The legislature's Note accompanying the creation of § 972.10(7), read in this context, confirms the state's position

> Subsection (7) requires the court to reduce the size of the jury panel to the proper number immediately prior to the final submission of the cause. Unneeded jurors must be determined by lot and these may not participate in deliberations. *State v. Lehman*, 108 Wis. 2d 291 (1982).

1983 Wis. Act 226, § 6. When viewed from the perspective of the legislature, who had formerly and clearly delineated between alternate and regular jurors, going so far as to keep them physically separate from one another, this Note makes sense. Now that alternate jurors are functionally part of the jury during the trial, the legislature needed to make clear that the jury would need to be reduced to the customary twelve jurors before submission of the cause for

deliberation. This Note makes clear that, however many extra jurors might have been part of the jury during the trial, those extra jurors must not retire to the jury deliberation room with the rest of the jury as that would allow for juries of more than twelve,[4] which would then vary depending upon the amount of alternates who are sworn in any given case. The concern the defendant raises, substituting an alternate juror after deliberations have begun, is not implicated by this change.

35. The discussion of the legislative history above and the case law set forth below stand for the proposition that, at worst, there may have been a statutory violation or error, but such an error is not structural or constitutional as it played out in this case; especially when one considers that the selected option preserved defendant's right to a twelve-person jury.

36. At the federal level, the defendant offers *United States v. Neeley*, 189 F.3d 670 (7th Cir. 1999), in support of his argument. In *Neeley*, defendants were alleged to possess cocaine with intent to distribute. *Id.* at 673. After deliberations began on a Friday, the following Monday a juror left a voicemail with the court indicating she could not come in due to a custody hearing for her daughter's children that day. *Id.* at 677. The court informed the parties on the record, and summarized the voicemail. *Id.* The judge sought the parties' approval to call the juror, did so, and then came back on the record to summarize their conversation again. *Id.* Later that day, after the custody hearing, the judge spoke with the juror by phone once more. *Id.* The juror advised she had been awarded temporary custody of her daughter's three children. The judge decided to excuse her and proceed with eleven jurors. *Id.* Defense counsel did not object, but did not affirm the decision, either. *Id.* On appeal, the defendant argued the judge should have substituted an alternate instead of proceeding with eleven jurors. *Id.* at 681. The court of

[4] See *e. g. State v. Ledger,* 175 Wis. 2d 116, 499 N.W.2d 198 (Ct. App. 1993), where the parties agreed to thirteen jurors.

appeals held that the trial judge did not abuse his discretion in dismissing the juror, pursuant to Fed. R. Crim. P. 23(b), and that Fed. R. Crim. P. 24(c), which states "An alternate juror who does not replace a regular juror shall be discharged after the jury retires to consider its verdict," did not provide the judge with the authority to substitute an alternate into deliberations at defendant's request. *Id.* Notably, Fed. R. Crim. P. 24(c)(3)[5] now expressly permits this practice. Consequently, the procedure of substituting in alternate jurors can not be structural or constitutional error if it is part and parcel of federal practice.

37. At the state court level there is *Commonwealth v. Saunders*, 686 A.2d 25 (Pa. Super. Ct. 1996). It presents the most similar set of circumstances to the case at bar. In *Saunders*, the defendant was charged with second-degree murder. *Id.* at 27. After a three-day trial, twelve jurors retired to deliberate. *Id.* at 26. After the jury left, the trial judge asked two alternate jurors to remain in the courtroom, indicating:

> I am going to ask the alternates to stand by in case they have to fill in for someone on the jury. . . . You will be separated from the other members of the jury and from the public because you may have to enter the jury room and consider the case with the other jurors. So you are still on jury duty until we decide what we are going to do.

Id. After deliberating for the balance of the day (a Friday), the judge asked the all the jurors to come back the following Monday. *Id.* On Monday morning, a juror called in sick with the flu, and advised the court that she had been unable to secure a doctor's appointment until Wednesday. *Id.* Finding the chances of her returning that week slim, the trial judge dismissed the sick juror and substituted in the first alternate, all of which occurred over defense counsel's objection. *Id.* at 26-27. Two hours later, the jury returned a guilty verdict. *Id.* at 27.

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[5] "The court may retain alternate jurors after the jury retires to deliberate. The court must ensure that a retained alternate does not discuss the case with anyone until that alternate replaces a juror or is discharged. If an alternate replaces a juror after deliberations have begun, the court must instruct the jury to begin its deliberations anew."

38. Pennsylvania had a Rule of Criminal Procedure 1108,[6] similar to Wis. Stat. § 972.10(7), which reads in pertinent part:

> (a) The trial judge may direct that a reasonable even number of jurors in addition to the principal jurors be called and impaneled to sit as alternate jurors. Alternate jurors in the order in which they are called shall replace principal jurors who, prior to the time the jury retires to consider its verdict, become unable or disqualified to perform their duties. An alternate juror who does not replace a principal juror shall be discharged before the jury retires to consider its verdict.

Pa. R. Crim. P. 1108.

The Pennsylvania Superior Court[7] held:

> According to the plain and simple words of Rule 1108(a), the trial court erred in failing to discharge the alternate jurors before the jury retired to deliberate. There is no other conclusion. Further, the Rule only provides for the substitution of alternate jurors "prior to the time the jury retires to consider its verdict." Accordingly, there is no authorization in Pennsylvania for a trial court to replace a principal juror after deliberations have begun. Quite simply, the trial court overstepped its authority in the instant matter. Thus, the question becomes whether the trial court's errors are fatal.

Id. at 27. The court went on to analyze other states' practices, including Wisconsin's, noting that "there exists a 'significant division of opinion in the legal community as to the wisdom and constitutionality of allowing a substitution of an alternate juror after the jury has begun deliberations.'" *Id.*, citing *Lehman* at 291. The court concluded:

> If a post-submission substitution has been found to be erroneous, the bulk of courts next focus on the extent to which the error is prejudicial. . . . As such, we find that in cases where the trial court has substituted an alternate juror after deliberations have begun, there is a presumption of prejudice to the defendant. Further, this presumption may only be rebutted by evidence which establishes that sufficient protective measures were taken to insure the integrity of the jury function.

Id. at 28 (internal citations omitted). The Pennsylvania Superior Court found that the trial judge "failed to insure the integrity of the jury function." *Id* at 29. The court found fault with the lack

[6] The Pennsylvania Rules of Criminal Procedure have been renumbered: 1108 is now 645, but still employs the same language.

[7] In Pennsylvania, the Superior Courts function as the Court of Appeals in Wisconsin would.

of a colloquy with the newly composed jury to ensure that they could begin their deliberations anew and that the alternate juror had not been subjected to any outside interference, but was more concerned with the following instruction the trial judge had given:

> I would like you to advise the new juror who is taking the place of juror number eight as to what your deliberations were. Maybe you can go around the room without spending too much time and each juror can advise him as to his or her thoughts as to where you stand and what you consider. If you do that, the juror will then know everything that juror number eight knew. It means a little bit of extra effort on your part to bring him up-to-date. . . . I would like you to briefly tell new juror number eight when you get back to the jury room exactly what went on in your deliberations so far. . . .

Id. at 29-30. The court ultimately decided the state failed to overcome the presumption of prejudice. *Id.* at 30. Notably, however, the court ended with this statement:

> Finally, we note that in reaching our decision today, we do not speak to the constitutionality of post-submission substitution. Our decision only pertains to redressing a violation of Rule 1108(a) of our state's Rules of Criminal Procedure. Whether a violation of Rule 1108(a) also constitutes a violation of our state or federal constitutions is a question left for another day.

Id.

39. *Saunders* is important because it signals that substituting alternate jurors does not always rise to the level of structural or constitutional error. At worst, it may be statutory error. Further, the prophylactic measures missing in *Saunders* are present in this case. This court did not instruct jurors to advise Juror N.S. as to their earlier conversations, and in fact explicitly instructed the newly composed jury to begin their deliberations anew. In addition, the court made efforts to ensure that Juror N.S. was not subjected to any outside interference.

40. Defendant also contends he could not validly "waive" the right to a proper jury trial, even if his counsel did so (Postconviction Motion, p. 14). In support, he offers several Wisconsin cases, none of are definitively supportive. The first is *State v. Ledger*, 175 Wis. 2d 116, 499 N.W.2d 198 (Ct. App. 1993).

41. *Ledger*, permits a defendant to proceed with thirteen jurors when a defendant personally consents to it, but that holding does not mean, as defendant claims, that "a criminal defendant may not validly consent to a procedure that diminishes his constitutional right to a jury trial unless a statute expressly authorizes that procedure." In fact, the holding in *Ledger* supports the court's actions in this case. The court of appeals rejected Ledger's argument as follows:

> Ledger reasons that if a particular jury selection procedure is not recognized by the statutes, the practice is unconstitutional *per se*. We disagree. The constitution sets out a level of protection below which the law may not descend when seeking a criminal conviction. However, if the parties with the approval of the trial court choose to employ a procedure which accords a greater level of protection, we see no constitutional impediment. By having a thirteen-member jury pass upon the question of his guilt or innocence, Ledger was granted greater, rather than a lesser, constitutional protection.

Id. at 128. In this case, Avery was allowed to proceed with a twelve-person jury; and as each of his attorneys said, "twelve is better than eleven" Defendant was accorded equal if not greater protection under Wisconsin law, not less. He did not have to choose between a mistrial, on the one hand, or proceed with eleven jurors on the other. The logic and the statistics[8] cited in *Ledger* support this conclusion. Defense counsel testified that choosing eleven jurors would be a worse choice for the defendant because of a corresponding lesser chance of votes for acquittal. Therefore, the substitution of Juror N.S. constituted insurance that the defendant would have his guilt or innocence considered by a jury of twelve; and it provided him with a greater chance of securing acquittal. It is entirely unreasonable for the defendant to complain now about a process that he not only supported at the time, but from which he directly benefited.

42. Additionally, *State v. Hansford*, 219 Wis. 2d 226, 580 N.W.2d 171 (1998), and *State v. Lomagro*, 113 Wis. 2d 582, 335 N.W.2d 583 (1983), support the view that a jury of twelve and a unanimous verdict is guaranteed, but go no further than that. Beyond that, the

[8] "Statistical studies suggest that the risk of convicting an innocent person ... rises as the size of the jury diminishes." *Ledger*, 175 Wis. 2d at 128.

concern that a substitution into an already deliberating jury will unduly influence or corrupt the jury in some way is not supported in the cases defendant cites (*People v. Burnette*, 775 P.2d 583 (Colo. 1989), and *People v. Ryan*, 224 N.E.2d 710 (N.Y. 1966)) by a curative instruction to begin deliberations anew and a colloquy on the record in which the trial judge inquires about the juror's ability to start over. *See Burnette*, 775 P.2d at 590-891; *Saunders*, 686 A.2d at 29. That process was complied with in this case.

43. The defendant asserts that the colloquy between himself and Judge Willis was inadequate to waive his right to a jury. In this case, however, defendant's guilt was determined by a jury of twelve. He erroneously relies on *State v. Anderson*, 2002 WI 7, 249 Wis. 2d 586, 638 N.W.2 301. In *Anderson*, the defendant waived his right to a jury trial on a disorderly conduct charge, instead choosing to proceed with a bench trial. *Id.* ¶ 7. He did so by completing a waiver form,[9] which the court accepted. *Id.* Later that afternoon, defendant was found guilty by the court. *Id.*

44. The Court of Appeals affirmed the trial court, and Anderson appealed to the Wisconsin Supreme Court. The court held, going forward, that in order to prove a valid jury waiver, the trial court must engage in a colloquy with the defendant before proceeding without a jury trial. *Id.* ¶ 24. Consequently, the case was remanded back to the circuit court for an evidentiary hearing to determine whether the waiver was knowing, intelligent, and voluntary with the burden of proving so on the state. *Id.* ¶¶ 25-6. But the holding of *Anderson* is specific: "we mandate the use of a personal colloquy in every case where a criminal defendant *seeks to waive his or her right to a jury trial*." *Id.* ¶ 23 (emphasis added). Avery did not waive his right

[9] "And now comes the above named defendant, and in his own proper person hereby expressly waives trial by a jury and consents to immediate trial before the court without a jury. I will be giving up my right to have my case decided by 12 people sitting as a jury; I understand that all 12 of those people would have to agree in order to reach a verdict." *State v. Anderson*, 249 Wis. 2d 586, ¶ 7.

to a jury in any real sense, and certainly did not do so in the same way as the defendant in *Anderson.*

45. In a similar vein *State v. Cooley*, 105 Wis. 2d 642, 315 N.W.2d 369 (Ct. App. 1981) involved an agreement by defense counsel to proceed with eleven jurors that was found deficient because the trial judge did not personally speak with the defendant before proceeding with eleven. *Id.* at 6459. Additionally, *State v. Resio*, 148 Wis. 2d 687, 436 N.W.2d 603 (1989), stands for the proposition that, before agreeing to proceed with a bench trial instead of a jury trial, the defendant must be informed of the unanimity requirement. *Id.* at 696-97. Notably, neither case is factually on point with this case. The defendant did not waive his right to a jury trial in lieu of a bench trial, the defendant in this case did not waive his right to a unanimous verdict and he did not waive his right to have his case decided by a jury of twelve. Indeed, Avery received the benefit of all three constitutional rights.

I. There is no "plain error;" a new trial is not warranted.

46. The defendant contends the removal of Mahler is plain error[10] and warrants a new trial under Wis. Stat. § 901.03(4) and § 805.15(1). He erroneously cites *United States v. Essex*, 734 F.2d 832 (D.C. Cir. 1984), for support. In *Essex*, the defendant was on trial for possession of heroin with intent to distribute. *Id.* at 834. At the start of the trial, the defense stipulated to proceeding with a jury of eleven if it became necessary to do so.[11] *Id.* During a five-day trial, the jury heard all the evidence, began deliberations, and then adjourned over the weekend. *Id.*

[10] *State v. Jorgenson*, 2008 WI 60, 310 Wis. 2d 138, 754 N.W.2d 77 makes clear that "[T]he error, however, must be 'obvious and substantial.' Courts should use the plain error doctrine sparingly." *Id.* at ¶ 21, 310 Wis. 2d 138, quoting *State v. Sonnenburg*, 117 Wis. 2d 159, 344 N.W.2d 95 (1984).

[11] The court had mistakenly seated a juror who should have been struck, and once discovered, the court rectified this problem by substituting in the only alternate juror. The court engaged in a thorough colloquy with defendant and defense counsel that, if something happened to a juror, a jury of eleven would have to decide the case. *United States v. Essex*, 734 F.2d 832, 835 (D.C. Cir. 1984).

One juror failed to appear on Monday morning and the court, without finding on the record that there was any reason for excusing him and over defense objection,[12] permitted the eleven remaining jurors to continue deliberations and to return a verdict. *Id.*

47. The court held that this conditional, verbal stipulation was insufficient.

> Rule 23(b) stipulations thus are contingent upon satisfying this condition precedent. The judge's statements that formed the basis of the stipulation provided that appellant would be "willing to proceed with 11" jurors "in the event we should have anything happen to them, they are unable to come" (Tr. 43). Thereafter, the judge repeated the condition that the waiver would operate "if something should happen" to one of the jurors. Id. . . . The waiver, by its terms, did not abrogate either the trial court's duty to investigate the non-appearance of a juror and make a finding as to the cause, or appellant's right, in the absence of determined good cause, to the unanimous verdict who heard the evidence, were instructed by the Court, and retired to deliberate on the verdict. Because no finding of just cause was made, the stipulation was not complied with, and therefore cannot excuse the violations. . . .

Id. at 839-40. The defendant relies on this language in *Essex*: "The obvious and substantial right of appellant that was denied is her right to a *unanimous* verdict by the *jury of 12* who heard her case and began their deliberations." *Id.* at 844 (emphasis in original, Postconviction Motion, p. 17). However, prior to that statement, the *Essex* court clarified the context.

> When the juror has been excused on a finding of just cause and the defendant has consented, the dangers are minimized and the procedure permitted by Rule 23(b) does not violate Rule 31(a).[13] But when, as here, there is no finding by the court that it is "necessary . . . for just cause" to excuse a juror during deliberations, a defendant is denied the right to a unanimous jury verdict that is protected by Rule 31(a).

Id. at 840.

48. Next, defendant argues that the *Essex* pronouncement that "no further prejudice need be shown than the fact that the district court removed the deliberating juror without cause,

[12] Note: this case occurred before Fed. R. Crim. P. Rule 23(b)(3) was adopted, which no longer requires a stipulation by defense counsel to proceed with eleven jurors after deliberations had begun.

[13] Fed. R. Crim. P 31(a) states: "The jury must return its verdict to a judge in open court. The verdict must be unanimous."

thereby denying the defendant her constitutional right to a unanimous verdict by the twelve jurors to whom the case was submitted" entitles him to relief. *Id.* at 845 (Postconviction Motion, p. 18.) But, again, the entire context of the *Essex* pronouncement bears noting: "[B]ut no further prejudice need be shown than that the *court did not comply with the stipulation and Rule 23(b)*, and that appellant was denied her right to have her case decided by the unanimous verdict of the 12 jurors who heard the case." *Id.* (emphasis supplied). In this case, the facts are quite different; twelve jurors decided the case, not eleven, and the court put on the record (albeit in a sealed memorandum) why Mahler was being excused. Thus, cause existed in this case, whereas none was demonstrated in *Essex*.

J. Trial counsel did not render deficient performance, nor was Avery prejudiced in any way as a result of their advice to proceed with the substitute juror.

49. The defendant alleges trial counsel were ineffective in three ways: by authorizing a private *voir dire* with Mahler (depriving him of his right to be present, his right to counsel), by authorizing discharge of Mahler for cause, and by stipulating to allow removal and substitution, which is not allowed by § 972.10(7). The defendant asserts throughout his brief that these errors are structural, and thus do not require any proof of prejudice. In this portion of his brief, defendant cites *Essex* and *Curbelo* for the proposition that structural errors constitute plain error. Specifically, he notes the "unquantifiable and indeterminate" impact substitution might have had. *Curbelo*, 343 F.3d at 281. The state relies on the arguments set forth *supra* at ¶¶ 24-25, 46-47 regarding these cases and will not repeat them here.

50. But in the context of an ineffective assistance of counsel claim, a "quantifiable" impact is precisely what is needed. A criminal defendant who claims his attorney was ineffective has a dual burden to prove both that his attorney's performance was deficient and that

the deficient performance prejudiced his defense. *State v. Allen*, 2004 WI 106, ¶ 26, 274 Wis. 2d 568, 682 N.W.2d 433; *State v. Thiel*, 2003 WI 111, ¶ 18, 264 Wis. 2d 571, 665 N.W.2d 305. A claim of ineffective assistance fails if the defendant fails to prove either one of these requirements. *State v. Williams*, 2006 WI App 212, ¶ 13, 296 Wis. 2d 834, 723 N.W.2d 719. After a full day evidentiary hearing, the record is void of facts denoting deficient performance, let alone prejudice. Thus, defendant's contention of ineffective assistance of counsel fails on both counts. And is it black letter law that prejudice will not be presumed in an ineffective assistance of counsel claim. *Strickland v. Washington*, 466 U.S. 668, 689 (1984). In fact, a strong presumption must be indulged that "counsel's conduct falls within a wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" *Id.* (internal citation omitted).

51. Notably, an attorney's performance is not deficient for failing to object on legal grounds that were unsettled at the time. *State v. Van Buren*, 2008 WI App 26, ¶¶ 18-19, 307 Wis. 2d 447, 746 N.W.2d 545. In the instant case, with the statutory change missed by five experienced criminal law practitioners plus the judge, coupled with no Wisconsin case law on point, the conclusion that the law on juror substitution is unsettled is quite apparent. In addition, § 972.10(7) does not necessarily preclude substitution (*see* ¶¶ 31-34 *supra*). Even if there is error it is difficult to imagine prejudice, let alone prove it. The defendant received all of his constitutional rights as it relates to the jury. There was a jury of twelve who deliberated on the issue of guilt or innocence. They were required to be and were unanimous in their decision and he was proven guilty beyond a reasonable doubt. The error, if any, was harmless at worst. The record in this case casts significant doubt on the claim of ineffective assistance of counsel. Trial

counsels' testimony revealed well thought out reasons for recommending to the defendant that substitution of a new juror was the best course of action. "Twelve is better than eleven" (Tr. pp. 102, 150); the case went in as well as could be expected (Tr. p. 158); defendant would not have the benefit of these two experienced trial counsel's representation if there was a mistrial (Tr. p. 157), the case wasn't going to get any better (Tr. p. 157); and counsel thought they had a good shot at acquittal (Tr. p. 159). Counsel should not and cannot be labeled deficient with reasons such as these and for failing to move for a mistrial on legal ground that was unsettled at the time. *Van Buren*, 307 Wis. 2d 447, ¶¶ 18-19.

52. Finally, nothing at the time suggested Mahler was a hold out, or may have been at odds with Juror C.W. If defense counsel (and everyone else for that matter) were unaware of any potential problems in the jury room, then there was no basis to argue that Mahler should have remained on the jury. Because deliberations following a six-week trial had just begun that day, the panel of jurors had not arrived at any permanent positions regarding the defendant's guilt or innocence. Therefore, this is not similar to cases like *Symington*, *Samet*, or *Gray* where the record revealed discordance inside the jury room. Here, all any of the parties were aware of was the alleged auto accident involving Juror Mahler's daughter and a great deal of marital strife to the extent Mahler reported his marriage was at stake (Ex. #2). No more can or should be gleaned from the record.

K. Waiver/Forfeiture/Judicial Estoppel/Invited Error.

53. The defendant complains now about a procedure to which he failed to object to when provided the opportunity. This court questioned the defendant on the morning of March 16, 2007, and it was at that time that the defendant could have lodged an objection on his own behalf. In other words, the defendant was in full control of his own destiny at that time.

Even though Mahler had been dismissed the prior evening, the defendant could have objected on the record at that time, regardless of the lack of personal participation the night before. The defendant chose not to do so.

54. In fact, the defendant benefited from his choice. It is important to note that the defendant now claims error because he was afforded a third option (to proceed with an alternate juror), while he claims only two were authorized by law. With the advice of counsel, defendant chose to proceed with this alternative, thereby assuring his constitutional right to a jury of twelve. By failing to object, and by embracing the very procedure to which he now objects, the defendant has forfeited his right to complain by virtue of the contemporaneous objection rule. *See, e.g., State v. Davis*, 199 Wis. 2d 513; *State v. Huebner*, 200 WI 59, 235 Wis. 2d 486, 611 N.W.2d 727.

55. In *Wainwright v. Sykes*, 433 U.S. 72 (1977), the U.S. Supreme Court discussed the application of the contemporaneous-objection rule to constitutional error. The Court reasoned:

> A contemporaneous objection enables the record to be made with respect to the constitutional claim when the recollections of witnesses are freshest. . . . It enables the judge who observed the demeanor of those witnesses to make factual determinations necessary for properly deciding the federal constitutional question.

Id. at 88.

56. There are strong policy reasons underlying the forfeiture/waiver rule. It is a poor use of judicial resources to address claims on appeal that could have been raised and resolved at trial. *State v. Erickson*, 227 Wis. 2d 758, 766, 596 N.W.2d 749 (1999). Similarly, those very same policy reasons are applicable in the postconviction context. *See* generally, *State v. Ndina*, 2009 WI 21, 315 Wis. 2d 653, 761 N.W.2d 612. The trial court has no opportunity to prevent or avoid the claimed error after the fact. It is simply too late. Thus, the contemporaneous-objection

rule contributes to the finality of litigation and encourages the parties to view the trial itself as a significant event that should be kept as error-free as possible. *See State v. Davis*, 199 Wis. 2d at 518. This is true because:

> The failure . . . to require compliance with the contemporaneous-objection rule tends to detract from the perception of the trial . . . as a decisive and portentous event . . . . Society's resources have been concentrated at that time and place to decide . . . the question of guilt or innocence of one of its citizens. Any procedural rule which encourages the result that those proceedings be as free of error as possible is thoroughly desirable. . . .

Id. at 518. Significantly, the rule "prevents attorneys from 'sandbagging errors,' or *failing to object to an error for strategic reasons and later claiming that the error is grounds for reversal.*" *State v. Huebner*, 235 Wis. 2d 486, ¶ 12, (emphasis supplied).

57. The normal procedure in criminal cases is to address a waived (or forfeited) claim of error within the ineffective assistance of counsel framework. *Erickson*, 227 Wis. 2d at 776-78. Ordinarily, a defendant who does not preserve a claim of error with a timely trial objection can obtain relief only by showing that the failure to object constituted ineffective assistance of counsel. *State v. Koller*, 2001 WI App 253, ¶ 44, 248 Wis. 2d 259, 635 N.W.2d 838. The claim of ineffective assistance of counsel is not supported by the record in this case.

58. In the case at bar, the defendant offers no reason for his failure to object or, for that matter, his choice to embrace the very procedure he now claims is error. It appears the defendant wishes to avoid responsibility for the strategic decisions made at the time of trial. This is a simply a case of buyer's remorse, and the court should not give aid or comfort to that remorse.

59. The related doctrines of "invited error" and "judicial estoppel" preclude these arguments as well. Generally, where a party "invites error" (assuming error occurred and the state by no means accepts that it has) on a given issue, it will not be reviewed on appeal. *E.g.,*

Shawn B.N. 173 Wis. 2d 343, 372, 497 N.W. 2d 141 (Ct. App. 1992). The concept of invited error is closely related to the doctrine of judicial estoppel, which is based on the notion that "[i]t is contrary to fundamental principles of justice and orderly procedure to permit a party to assume a certain position in the course of litigation which may be advantageous, and then after the court maintains that position, argue on appeal that the action was error." *State v. Gove*, 148 Wis. 2d 936, 944, 437 N.W.2d 218 (1989).

II. THIRD PARTY LIABILITY

L. Procedural History.

60. On June 28, 2006, Avery filed **"Defendant's Response to State's Motion to Prohibit Evidence of Third Party Liability (*Denny* Motion)."** In this initial offering on the issue, the defendant "acknowledge[d] that the *Denny* Rule must be satisfied should he decide to offer third party liability evidence other than against Brendan Dassey. . . ." Defendant's Response 06/28/06, p. 1. In his initial argument, defendant also observed "*Denny* has been adopted by the Wisconsin Supreme Court and Avery acknowledges its application in the case should he seek to introduce evidence of third party liability for Teresa Halbach's death. *See State v. Knapp,* 265 Wis. 2d 278, 351-52, 666 N.W.2d 881 (2003), *vacated on other grounds,* 542 U.S.. 952 (2004), *reaff'd on remand,* 2005 WI 127, 285 Wis. 2d 86, 700 N.W.2d 899." Defendant's Response 06/28/06 pretrial brief, p. 3.

61. On July 10, 2006, the court issued its **Order Regarding State's Motion Prohibiting Evidence of Third-Party Liability ("Denny"Motion).** The court ordered as follows:

> Should the defendant, as part of his defense, intend to suggest that a third party other than Brendan Dassey is responsible for any of the crimes charged, the defendant must notify the Court and the State at least thirty (30) days prior to the

start of the trial of such intention. In that event, the defendant will be subject to the standards relating to the presentation of any such evidence established in *State v. Denny,* 120 Wis. 2d 614 (Ct. App. 1984).

62. On January 10, 2007 Avery filed the "Defendant's Statement on Third-Party Responsibility." In his statement, which the state treated as a motion to introduce such evidence, defendant stated that he did not kill Teresa Halbach and that there was "at least a reasonable possibility that one or more unknown others, present at or near the salvage yard on the afternoon of October 31, 2005, killed her" (Postconviction Motion, ¶ 55). In his January 10 offering, defendant identified several persons as "potential alternative perpetrators." He identified Scott Tadych; Andres Martinez; Robert Fabian; Charles Avery; Earl Avery; and each of the four Dassey brothers, among others which he now apparently abandons, such as James Kennedy; Dawn Hausschultz; three juveniles: K.F., K.H., and A.McK.; Roberto Brooks; Chris Graff; Christopher Avery; Keith Schaeffer; Lisa Novachek; and Lisa Buechner. The state filed a **"Memorandum to Preclude Third Party Liability Evidence"** on January 12, 2007. The court heard oral argument on the third party liability issue at a motion hearing on January 19, 2007. The court is invited to review that transcript and the arguments contained therein as they supplemented the written arguments provided by the parties at the time. For the sake of some brevity the state will not repeat those arguments here.

63. On January 30, 2007, the court issued its **"Decision and Order on Admissibility of Third Party Liability Evidence."**

64. The court determined that *State v. Denny,* 120 Wis. 2d 614, 357 N.W.2d 12 (Ct. App. 1984), is the controlling case in Wisconsin. Decision 01/30/07, p. 2. The court also noted that the defendant had changed his view of whether *Denny* applied and whether he had to comply with it. 01/30/07 Decision, p. 2 n1. Additionally, the court observed that the Wisconsin

Supreme Court in *State v. Knapp,* 265 Wis. 2d at 351-52, adopted and reaffirmed the *legitimate tendency test* first pronounced in the original *Denny* decision. *Id.*

65. In its decision, the court initially determined that *Denny* applied to the circumstances of the defendant's offer of proof. The court applied the analysis and determined that none of the proffered evidence regarding any of the potential suspects listed in his statement on third party liability fulfilled the *Denny* criteria.

66. Today, the defendant once again offers many of the same potential alternative perpetrators that he did in January of 2007; namely, Scott Tadych; Andres Martinez; Robert Fabian; Charles Avery; Earl Avery; and the four Dassey brothers, Bobby, Blaine, Bryan, and Brendan. The defendant offers no new or additional facts supporting the admission of third party liability evidence regarding these individuals. No new arguments are offered in his postconviction filing; and, most importantly, absolutely no evidence was elicited from Attorneys Strang or Buting during the September 28, 2009 hearing from which this court could reconsider and reverse its decision.

67. This court determined that the *legitimate tendency test* announced in the *Denny* decision required the defendant to establish evidence of motive, opportunity, and a direct connection to the crime before. The court nevertheless considered the argument that since defendant was not offering motive for any of the listed suspects, primarily because he had no idea what might motivate anyone of them individually or any combination of them collectively to engage in the homicide, he should not have to prove motive. The court thoughtfully considered the argument and conducted an analysis of the proffer from the perspective that if the defendant was not required to prove motive, would any of the proffered evidence be admissible if they need only establish an opportunity to commit the crime and a direct connection to it.

Even with a less stringent standard, the court determined none of the proffered testimony was admissible. Although the court determined that several of the potential suspects had a plausible opportunity to commit the crime (except for Martinez and Tadych) none were directly connected to the crime. This decision was also correct. While a number of the individuals may have been on the property on October 31, 2005, and thus had a connection to the property and perhaps an opportunity to commit the crime (this is quite debatable), none of them have a direct connection to it. The court appropriately noted the policy concerns expressed in *Denny*, "that absent some reasonable restriction a defendant could conceivably produce some evidence tending to show that hundreds of other persons had some motive or animus against the deceased-degenerating the proceedings into a trial of collateral issues" (*Denny* at 623-624) was equally applicable in the context of opportunity (Decision, p. 9).

68. As a result of the court's ruling, defendant claims irreparable harm that he was not able to fully put forth a defense. It is important to note what the court's ruling did not preclude the defendant from doing in his case.

a. The court's *Denny* ruling did not preclude the defendant from pointing the finger at his nephew, Brendan Dassey.

b. The ruling permitted the defense to argue and suggest that some unknown third person committed this murder. *See* Defendant's Proposed Jury Instruction No. 9 on the theory of defense. It was slightly modified to include language regarding reasonable doubt, but in fact was given to the jury. *See* p. 5 of the Jury Instructions for the Theory of Defense Instruction.

c. The ruling permitted the defendant to claim the police framed him. It permitted the defendant to argue the police framed him by planting his blood and the

Toyota key. The defense also impliedly, if not directly, argued that the body of Teresa Halbach was not consumed in a fire in his burn pit, but rather had been consumed elsewhere and transported to that location by unknown third parties.

d. By skillful cross-examination, defendant was permitted to infer that the police ostensibly obtained a sample of his blood from a vile which had been kept in the clerk of court's office. Thus implying a theft or burglary from that office to facilitate the planting of evidence. No other act analysis was demanded by the court. The defendant implied that Officers Lenk and Colborn were at the heart of a conspiracy to frame him for Halbach's murder. The defendant was also permitted to argue as part of this frame up theory that the police were so biased against him, that as a result, they poorly investigated Teresa Halbach's death thereby narrowing their focus to him and him alone.

M. *Denny* was applicable and properly applied.

69. Defendant argues *Denny* does not apply to his case and, further, that it was wrongly decided. Postconviction Motion, ¶ 60. First, defendant argues that *Denny* applies only to those situations where a defendant seeks to introduce evidence of other perpetrators' motives to commit the crime. Since he was not sure which one of the subjects in the proffered motion actually committed the crime, he was at a loss to attribute a motive and thus felt that he should be relieved from that burden. Defendant implies that since Kent Denny sought to introduce evidence of motive possessed by other suspects, *Denny* does not apply to him. Defendant misreads *Denny* and ignores the supreme court's adoption of it in *State v. Knapp,* 265 Wis. 2d 351-52. While it is true Kent Denny sought to offer evidence of motive and in theory Avery does not, such a distinction does not excuse him from compliance with the *Denny* decision. *Denny* adopted the *legitimate tendency test.* If one is to put forth evidence that a third person

could actually have been the one to have committed the crime in question, then one must establish a "legitimate tendency," making the proposition plausible, by showing proof of motive, opportunity, and a direct connection to the crime charged. The *Denny* court described the test as follows:

> 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.
>
> Thus, as long as motive and opportunity have been shown and 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.

Denny, 120 Wis. 2d at 623-24 (citations omitted). Clearly, the import is that if one wishes to offer evidence that someone else could have committed the crime charged, then they must establish a "legitimate tendency" that that person was, in fact, involved. The way to establish a "legitimate tendency" that somebody else might have committed the crime is through proof of all three components - motive, opportunity, and a direct connection to the crime. Defendant seeks to escape application of the *Denny* test because he cannot comply with it. He cannot comply because there is no evidence to support it. Even when the court considered his proffer without the need for proof of motive, he still failed to establish both an opportunity and a direct connection to the crime for any of the possible suspects. The defendant could not at that time, and does not today, establish any direct connection between the list of potential suspects and Teresa Halbach's murder. The Supreme Court sanctioned the *legitimate tendency test* and its analytical framework in *State v. Knapp*, 265 Wis. 2d at 351-52. *Denny* applies in this case because there is a finite universe of potential suspects identified by the defense. The parties undertook a painstaking analysis of the *Denny* criteria in its briefing and in its oral argument before the court on January 19, 2007. Defendant argues in ¶ 63 of his Postconviction Motion

there was at least some circumstantial evidence linking these individuals to the crime and who had an opportunity to kill Halbach. However, no circumstantial evidence of sufficient probative value was offered in January of 2007, none is offered in their postconviction motion, and more importantly, none was offered by Attorneys Strang and Buting during their testimony.

70. Defendant is correct that *Denny* has not always been applied in circumstances where a party wishes to offer third party liability evidence. Initially, he cites to *State v. Oberlander,* 149 Wis. 2d 132, 438 N.W.2d 580 (1989). However, *Oberlander* is not applicable to the case at hand because it concerned an attempt to introduce other act evidence attributed to a *known third party* suspect. In *Oberlander*, the defendant was charged with arson and four counts of endangering safety by conduct regardless of life. The defense sought to introduce evidence of numerous threats made by another to support its contention that a person named Neu was the arsonist. The evidence included threats that Neu made against Oberlander, including threats made the night of the fire. There was also evidence that Oberlander had ordered Neu out of the tavern before it burned, that Neu had threatened the lives of a number of people, including Oberlander. Further, Oberlander's defense wanted to present evidence that Neu was possibly responsible for a "similar" incident at a concession stand at a local race track less than a year before the fire. While defendant is correct in stating that the decision to exclude the evidence was made on a relevancy determination, the court more importantly noted that:

> We . . . need not decide whether the circuit court correctly determined that sec. 904.04(2), Stats., was inapplicable to this case. As noted above, evidence admitted under sec. 904.04(2), must be relevant before it can be accepted. Consequently, we do not review the court of appeals' hold that sec. 904.04(2) is applicable to witnesses other than the defendant.

Id. at 144 (citation omitted). Thus, *Oberlander* does not stand as strongly for the proposition defendant cites. However, it is important to emphasize the evidence was ruled inadmissible on

relevancy grounds alone; primarily it was too remote in terms of time, place, and circumstance to the charge of arson. In the case at bar, the evidence for all of these potential suspects is likewise remote in terms of time, place, and circumstance to the charged offense.

71. Next, defendant cites *State v. Richardson,* 210 Wis. 2d 694, 563 N.W.2d 899 (1997), for the proposition that the *Denny* framework need not apply in his case. Defendant is correct that the court applied the balancing test found in Wis. Stat. § 904.03. Defendant correctly summarizes what *Richardson* stands for. However, it does not pave the way for the use of a pure relevancy test under §§ 904.01 and 904.03. *Richardson* involved a case where the defendant wished to offer evidence that he did not engage in the charged sexual contact with a fourteen-year-old because he was "framed." Richardson's theory was that his estranged wife was framing him for sexual assault because he had filed for divorce and obtained a restraining order. Richardson claimed the origin of the sexual assault allegation came from his wife Cindee. The evidence offered in *Richardson* was not evidence that someone else may have committed the crime; it was evidence offered to explain away what he believed to be a phony allegation of sexual assault where the victim lied in an effort to frame him. *Richardson,* 210 Wis. 2d 694, ¶ 19. Because Richardson did not offer the evidence to show someone else committed the crime, the case is inapplicable.

72. Further, the defendant cites *State v. Scheidell,* 227 Wis. 2d 285, 595 N.W.2d 661 (1999). In *Scheidell,* the defendant sought to introduce other acts evidence attributed to an unknown third person in an effort to cast a reasonable doubt as to his guilt. Scheidell intended to present evidence of a similar crime committed by an unknown third party while he was in jail. Scheidell had been found guilty of attempted first-degree sexual assault while masked and of armed burglary while masked. The supreme court determined that a § 904.04(2) analysis, as set

forth in *State v. Sullivan,* 216 Wis. 2d 768, 756 N.W.2d 30 (1998), was the appropriate analytical framework. *Scheidell* does not apply to the facts of defendant's submission and offers no help. In this case, Avery submitted a finite list of known perpetrators. He submitted no other act evidence attributed to an *unknown third party.* Moreover, the other act evidence submitted was so purely evidence of character and so remote as to time, place, and circumstance that it was not evidence of a motive to kill Teresa Halbach.

73. Finally, the defense cites *State v. Falk,* 2000 WI App 161, 238 Wis. 2d 93, 617 N.W.2d 676, in an effort to dissuade the court from applying a *Denny* analysis to his proffer. First and foremost, *Falk* is an unpublished opinion and, as such, it cannot be cited for any persuasive force in this case because it is an opinion which was authored prior to July 1, 2009. Wis. Stat. § 809.23(3)(b). Second, even if it had some persuasive value, it merely answers the question that the *Oberlander* court did not decide; that is, whether a § 904.04(2) analysis as described in *State v. Sullivan,* 216 Wis. 2d 768, should be the analytical framework when a defendant offers other act evidence attributed to a *known third party.* At best, *Falk* answers this question. However, as noted, it is of no consequence or help to the court in this case because Avery is not offering other act evidence that is similar to the crime charge for any of the potential list of suspects.

N. The application of the *Denny* rule does not violate defendant's constitutional rights.

74. The state has broad latitude to establish rules excluding evidence in criminal trials. *Holmes v. South Carolina,* 547 U.S. 319, 324 (2006). While defendant is correct that this broad latitude has limits, it is also equally clear that a defendant's right to present evidence as part of a defense is limited as well. *State v. Pulizzano,* 155 Wis. 2d 133, 456 N.W.2d 325

(1990); *State v. St. George,* 2002 WI 50, 252 Wis. 2d 499, 643 N.W.2d 777; *United States v. Scheffer,* 523 U.S. 303 (1998); and Wisconsin Rules of Evidence §§ 904.03 and 906.11. The court's denial of the defendant's request to present third party liability evidence did not violate his sixth amendment right to present a defense. The following language 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).

Scheidell, 227 Wis. 2d 293-94, ¶19 (emphasis added). Evidence that is ruled irrelevant is inadmissible regardless of whether the court applies a *Denny* standard of admissibility, a *Scheidell* other act evidence standard, or a traditional relevance standard in accordance with § 904.01 and its concomitant balancing test in § 904.03. The court correctly ruled in its pretrial order of January 30, 2007, the legitimate tendency test involves an assessment of whether evidence is so remote in time, place, and circumstance as to be irrelevant. Absent the presentation of motive, opportunity, and a direct connection to the offense, such evidence is irrelevant and thus inadmissible. Such a determination is not violative of the defendant's sixth amendment right to present a defense. There is no evidence that Wisconsin's *Denny* rule infringes upon a weighty interest of the accused and is arbitrary or disproportionate to the

purpose it is designed to serve; and as such, it was properly used by the trial court to exclude the proffered evidence. *Holmes v. South Carolina,* 547 U.S. 319. *See also State v. Muckerheide,* 2007 WI 5, ¶ 40, 298 Wis. 2d 553, 725 N.W.2d 930, where the Wisconsin Supreme Court cited the following language, "[t]he accused does not have an unfettered right to offer testimony that is incompetent, privileged, or otherwise inadmissible under the standard rules of evidence," citing *Taylor v. Illinois,* 44 U.S. 400, 410 (1998). *Muckerheide,* at ¶40.

75. Next, defendant claims the court's *Denny* ruling forced him to limit his frame up claim to the police. The court's ruling, however, was simply based on the offer of proof made by the defense and reflected the fact that there was not one shred of evidence suggesting that any of the named people in the proffer had any hand in framing Steven Avery, let alone in the killing of Teresa Halbach. The court's ruling reflected this. In addition, Avery failed to offer any such evidence at the evidentiary hearing on September 28, 2009. Neither trial counsel offered testimony pointing to evidence which directly suggested that any of them planted some or all of the "frame up evidence." They pointed the finger at the police not because the court left them without a choice, but rather, because there was no other evidence anywhere to support a claim that any of those individuals planted any or all of the evidence against Steven Avery.

76. Defendant also argues that his right to cross-examine was impermissibly infringed. Postconviction Motion, ¶ 71. In this case, the defendant was permitted to cross-examine each and every witness the state called. The defendant cross-examined Bobby Dassey, Blaine Dassey, Robert Fabian, and Scott Tadych. In addition, nothing precluded him from calling as witnesses Charles or Earl Avery—other than the fact that they had no evidence to assist Avery in his frame up defense. As the right to present a defense is properly limited by state evidentiary rule, so is the right to cross-examine witnesses. Wis. Stat. § 906.11(2) and *State*

v. Scheidell, 227 Wis. 2d. 285, ¶19. Such an evidentiary rule likewise does not run afoul of the constitutional right to confront. *E.g., Rogers v. State,* 93 Wis. 2d 682, 287 N.W.2d 774 (1980), where the supreme court held that the trial court's limiting the defendant from cross-examining a complaining witness's failure to appear at prior scheduled trial dates did not violate his sixth amendment right to confrontation. In *Delaware v. Van Arsdall,* 475 U.S. 673 (1986), the court held:

> It does not follow, of course, that the Confrontation Clause of the Sixth Amendment prevents a trial judge from imposing any limits on defense counsel's inquiry into the potential bias of a prosecution witness. On the contrary, trial judges retain wide latitude insofar as the Confrontation Clause is concerned to impose reasonable limits on such cross-examination based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant. And as we observed earlier this Term, "the Confrontation Clause guarantees an *opportunity* for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish.

Id. at 679. *Accord, State v. McCall,* 202 Wis. 2d 29, 549 N.W.2d 418 (1996), and *Chambers v. Mississippi,* 410 U.S. 284, 295 (1973).

77. The defendant argues that this court's *Denny* ruling precluded him from exploring in cross-examination a motive for witnesses such as Tadych, Dassey, and Fabian to lie; *i.e.,* one of them was guilty of the crime. If that were the case, then the state simply asks, where is the evidence? No evidence was put forth showing a direct connection to the murder. Furthermore, no such evidence has been argued in their postconviction motion, nor was any such evidence offered by either trial counsel at the September 28, 2009, hearing. As for paragraphs 73 through 77, such arguments amount to nothing more than rank speculation. In addition, they are reflective of the defendant's inability to establish motive, opportunity, or direct connection to the crimes charged. Lastly and with respect to impinging on the opening statement and closing argument, the state simply observes that an opening statement is neither evidence nor argument;

and while it is true the state objected vigorously to Attorney Buting's closing argument, it was proper to do so. It was not evidence, and Buting clearly had stepped over the line of zealous advocacy and violated the court's pretrial order. More importantly, there was no evidence offered by Attorney Buting, or Attorney Strang for that matter, as to what they would have argued had the court granted the motion to admit third party liability evidence.

O. The state did not "open the door" to the admission of third party liability evidence as argued in paragraphs 82-87.

78. While it is true the state offered evidence concerning the elimination samples of DNA evidence taken from Barb Janda; Bobby, Brendan, and Bryan Dassey; Earl, Charles, Delores, and Allen Avery, such evidence was offered for three purposes. None of which opened the door to third party liability evidence.

79. Such evidence was offered primarily to refute claims of investigative bias. Defense had argued and were implying consistently in cross-examination of police witnesses that the investigators had "tunnel vision" and had very early on narrowed the investigative focus exclusively to Steven Avery, thus failing to give due consideration to other potential suspects. Such evidence was powerful refutation of such an argument.

80. The evidence was also offered for purposes of completeness as it related to the presentation of DNA evidence for jury consideration. At the time it was offered, the state did not know whether there would be a statistical attack to the DNA evidence presented by the defense. As the court is aware, the defense had listed Dr. Alan Friedman, Ph.D. and noted defense expert in the fields of forensic DNA, biology, and molecular genetics, in his **Amended Disclosure of Expert Witness** declaration dated January 31, 2007. The state had to be prepared for any and all challenges to this DNA evidence. Lastly, the evidence was also offered to show the high degree

of specificity associated with this DNA analysis given the looming battle over the blood vial evidence and given the fact that it could cleanly and clearly discriminate between members of the Avery family who just happened to be on the premises throughout the week of October 31. Thus, it is all too convenient for the defense to simply say because the state introduced this evidence, it necessarily opened the door to third party liability evidence.

81. It is important to note that no such objection was made at the time of trial, nor was there any request to reopen or revisit the issue as a result of this evidence. Consequently, the defense has waived their right to make this particular argument. *See, e.g., State v. Davis,* 199 Wis. 2d 513, 545 N.W.2d 244 (Ct. App. 1996); *State v. Huebner,* 2000 WI 59, 235 Wis. 2d 486, 611 N.W.2d 727; and *Wainwright v. Sykes,* 433 U.S. 72 (1977).

P. *Denny* was properly decided and properly applied in this case.

82. As the defense correctly points out, this court lacks authority to overrule *Denny*. Consequently, any decision on whether *Denny* should be overruled must be left in the hands of the Wisconsin Supreme Court.

83. "Fleetingly" or not, the Wisconsin Supreme Court in *State v. Knapp,* 265 Wis. 2d 278, ¶¶ 175-83, clearly and unequivocally approved of the *legitimate tendency test* announced in *Denny*. As a point of law, the court specifically held, "The circuit court applied the proper legal standard and appropriately exercised its discretion in admitting this evidence under *Denny*." *Id.* ¶ 183. Clearly, the court determined that *Denny* is a well-conceived state evidentiary rule and that it was properly followed in the *Knapp* case. No further argument is needed on this point.

Q. If the trial court erred in applying an alternative "legitimate tendency test," the error was beneficial to him.

84. The court correctly determined *Denny* to be applicable and correctly applied the *legitimate tendency test* in its January 30, 2007 decision and order on admissibility of third party liability evidence.

85. Although the court may have hedged its bet by postulating that if it had misconstrued the defendant's argument relative to the requirement of proof of motive, or the breadth of the *Denny* ruling, the defendant stood to benefit from an alternative analysis that eliminated the proof of motive requirement. The court evaluated the evidence as if the defense was only required to prove opportunity and a direct connection to the crime. Even with a lesser burden of production, the defendant could not meet the challenge. The proffer was deficient even if he had only been required to establish two of the three propositions required for the admission of third party liability evidence. Defendant cannot now be heard to complain that even under a lesser standard, his proffer fails. His proffer failed then, and it fails now.

86. The court applied the correct evidentiary test and did not err by refusing to apply a relevancy test set out under Wis. Stat. §§ 904.01 and 904.03. First, defendant argues that had the court applied a relevancy test to determine the admissibility of third party liability evidence, he would have been able to present compelling evidence that Scott Tadych, Bobby Dassey, and Charles and/or Earl Avery were somehow responsible for the death of Teresa Halbach. No such evidence was offered in January 2007, no such evidence was offered in their initial postconviction filing, and no such evidence was forthcoming at the September 28 hearing. The defense hinges its argument almost entirely on the case of *State v. Richardson,* 210 Wis. 2d at 707. However, as noted earlier, Richardson never claimed that his wife or someone else had committed the sexual assault. Richardson's defense was that the assault never happened, that it

was a false allegation. *Richardson* does not apply to the facts of Avery's case. As previously noted and argued, the *legitimate tendency test* is the controlling evidentiary standard to determine the admissibility of this evidence. While it is generally true that evidence that someone else may have killed Teresa Halbach is clearly relevant, there must in fact be some evidence that someone else committed the crime. No such evidence was presented in January of 2007, in the defendant's postconviction motion of 2009, or in the evidentiary hearing held on September 28, 2009. Lastly, even if the court applied a pure relevancy test under Wis. Stat. §§ 904.01 and 904.03, the evidence in the defense offer of January 2007, as well as that in its postconviction motion of 2009, fails to pass muster. The probative value of the evidence offered in defendant's postconviction motion at paragraphs 102-44 is substantially outweighed by prejudicial effect caused by confusion, waste of time, and remoteness. Consequently, the court correctly applied *Denny* and correctly ruled this evidence inadmissible.

R. Under a *Denny* analysis, defendant's offer of proof with respect to Scott Tadych, Charles Avery, Earl Avery, and Bobby Dassey fails.

Scott Tadych

87. Defendant argues that Scott Tadych had motive, opportunity, and a direct connection to the crime. However, upon closer scrutiny, defendant offers no new evidence of Tadych's motive to kill Halbach, an opportunity to do so, or a direct connection to the crime.

88. Initially, paragraphs 104-109 involve nothing more than the attempt to use other act evidence involving behavior, which although indicative of certain character traits possessed by Tadych, is too remote in time, place, or circumstance to be indicative of a motive to kill Halbach. Defendant confuses evidence of motive and evidence of character.

89. Although the legal definition of character has been elusive in the common law, Professor McCormick's definition is most commonly relied upon:

> Character is a generalized description of a person's disposition, or of the disposition in respect to a general trait, such as honesty, temperance, or peacefulness. . . . If we speak of a character for care, we think of the person's tendency to act prudently in all the varying situations of life—in business, at home, in handling automobiles, and in walking across the street.

1 Kenneth S. Brown, *McCormick on Evidence* § 195 (6th ed. 2006); *see also Hart v. State,* 75 Wis. 2d 371, 392 n.9, 249 N.W.2d 810 (1977). Similarly, Professor Blinka observes, "[e]xamples of recognized character traits include 'lawfulness,' 'peacefulness,' 'violence,' 'truthfulness,' and 'honesty.'" 7 Daniel D. Blinka, *Wisconsin Evidence* § 404.1 p.147 (3rd ed. 2008). Motive on the other hand is often defined as, "the cause or reason that moves the will and induces action; it helps explain why a person acted the way she or he did." 7 Daniel D. Blinka, *Wisconsin Evidence* § 404.7 p. 202 (3rd ed. 2008). *See also State v. Balistreri,* 106 Wis. 2d 741, 756, 317 N.W.2d 493 (1982); and *State v. Fishnick,* 127 Wis. 2d 247, 378 N.W.2d 272 (1985). The defendant offers nothing more than a series of disturbing behaviors involving Tadych and the women and his life. Most striking, however, is the absence of any association whatsoever with Teresa Halbach.

90. In paragraph 110, defendant moves the focus from a motive to kill Teresa Halbach to a motive to frame Steven Avery. However, *Denny* does not countenance that a motive to frame an individual may be substituted for the motive to commit the crime itself. This is significant in this case because defendant offers no evidence and puts forth no argument to suggest that the "real murderer" was also the one who framed him; nor does Avery put forth any argument or evidence to suggest that the real murderer was not the one who framed him. Further, Avery offers no evidence or argument to support the fact that if someone other than the

murderer framed him that someone was somehow conspiring with the framer to implicate Avery. There is no evidence of a conspiracy. There is only an aura of preposterous speculation.

91. Next, defendant argues that Tadych had "an opportunity" to kill Teresa Halbach. Defendant's evidence is that since Janda and Tadych were dating at the time, later became engaged and are now married, he would have had ready access to the property on numerous occasions. This is nothing more than mere speculation. It evidences only one thing, that Tadych had a connection to the property by virtue of his then girlfriend and now spouse. The fact that Tadych was twice at the Janda home on October 31, 2005, is nothing more than happenstance. More importantly, Tadych was at the nursing home in Green Bay visiting his mother who had recently undergone back surgery. He also spent the evening in the company of Barb Janda. It would have been quite the magical feat for Tadych to have slipped into the Salvage yard in late afternoon and early evening of October 31, 2005 to murder Teresa Halbach and plant evidence to frame the defendant. One might ask just when was it he was to have "framed" Steven Avery with all of the forensic evidence used to convict Avery.

92. Further, defendant argues that Tadych had a "direct connection" to the crime. He theorizes that because Tadych and Bobby Dassey are alibis for each other relative to their hunting expeditions, one of them could have been the murderer. With the wildest speculation he says, "[o]f course, that they saw each other while driving does not mean that one of them could not have had a restrained Teresa Halbach in his car at the time." This is beyond speculation. This borders on the preposterous. It flies in the face of all the forensic evidence available to court and counsel. If Teresa Halbach was in either Tadych's or Dassey's vehicle, one is left only to imagine to how Halbach's blood got in her own vehicle along with that of Steven Avery's. How was it put there by either one of them; and when was it placed there?

93. Lastly, defendant argues that Tadych approached a co-worker and offered to sell a .22 caliber rifle. It is important to note that only one rifle was identified as having fired the .22 caliber bullet that pierced Teresa Halbach's skull, and that was the .22 caliber rifle found over the bed in Steven Avery's trailer.[14] Lastly, the fact that Tadych left work on the day that Avery was arrested and that he was "a nervous wreck" is evidence of nothing.

94. As evidence of just how remote the defense proffer is and of how sidetracked the trial would have been had the evidence been admitted, the state offers these facts from the investigative reports as it relates to the activities of Tadych on the day in question.

> On November 10, 2005, DCI Special Agent Antonio Martinez interviewed Scott A. Tadych, DOB: 07/14/1968. Tadych stated on October 31, 2005, he didn't go to work that day because his mother was in the hospital in Green Bay. Tadych stated he drove to Green Bay and checked on his mother at the hospital, left the hospital at approximately 2:15 p.m. and arrived home at approximately 3:15 p.m. Tadych stated when he arrived home, he got all of his hunting stuff together and loaded it into his vehicle, left his driveway and headed westbound on Highway 147. Tadych stated as he was driving westbound on Highway 147, he passed Bobby Dassey and they waved at each other. Tadych stated Bobby was going deer hunting behind his [Tadych's] house, and he knew that because Bobby had asked him about hunting behind his house. Tadych stated he arrived at his tree stand at approximately 3:30 p.m. and hunted until around 5 p.m. Tadych stated he then went to Barbara Janda's house to pick her up to take her to see his mother at Bay Care Aurora Medical Center in Green Bay because Barbara wanted to go see her. Tadych stated they stayed at the hospital for about an hour, drove back, and he brought Barbara home around 7:30 to 7:45 p.m., and he returned home at approximately 8 p.m. Tadych stated around 9 p.m., Barbara drove out to his house to visit and stayed there until 11 or 12 p.m.

See DCI report #05-1776/95.

> On November 14, 2005, CCSD Investigator Wendy Baldwin and DCI Special Agent Kim Skorlinski interviewed Barbara Janda. Barbara indicated she was picked up by her boyfriend, Scott Tadych, at about 5:15 p.m. on October 31, 2005, and went with him to the hospital to visit his mother. Barbara stated they returned home between 7:45 and 8 p.m. and, when she returned home at

[14] It is also important to note that there was a gentlemen's agreement between the state and the defense that in exchange for an early return of all other hunting weapons including other .22 caliber weapons seized from the Avery property no claim would be made that any gun other than the Marlin Glenfield .22 caliber rifle examined and testified to by Mr. Newhouse was the gun responsible for the death of Teresa Halbach.

> approximately 8 p.m., she saw a large fire in a pit behind Steven Avery's garage. She recalled there were two people standing by the fire but did not know who they were. Barbara stated she went into the house to tell whoever was in the house at the time she was going to be leaving for a short time. Barbara stated she left the residence, went to Tadych's house and returned home at approximately midnight.

See CCSD report, pp. 264-265.

Charles Avery

95. Defendant's argument for the admissibility of third party liability evidence as it relates to Charles Avery is not much different than that which he offers for Scott Tadych. It suffers the same failings. First, defendant argues the same sort of evidence of Charles Avery's violent and aggressive character as it relates to women in general as supposed evidence of a motive to kill Teresa Halbach. The primary deficiency in his argument is that there is no connection whatsoever between Charles Avery and Teresa Halbach. There was no relationship to put his violent character in correct context such as it could actually be construed as evidencing a motive to kill Teresa Halbach. There was no history of any relationship whatsoever, no attempt to date her, no evidence that he ever actually spoke to Halbach. Consequently, Charles Avery's persistent efforts at trying to establish a dating relationship with women such as Zina Lavora, Judith Knutson, or the woman associated with Daniel Lisowski are of no consequence in this case. At best, the behaviors set forth in paragraphs 117-121 are evidence of nothing more than Charles Avery's inability to relate to women generally and specifically his inability to establish healthy dating relationships. They have nothing to do with evidencing a motive to kill Teresa Halbach.

96. Next, defendant argues again that Charles Avery had a motive to frame his brother for Halbach's murder; namely, that of jealousy over money as it relates to the family

business and over Jody Stachowski. Again, *Denny* requires that the third person have a motive to commit the crime for which a defendant is charged and not a motive to frame someone for a crime committed by another. Secondly, defendant's argument fails as it relates to jealousy over money because Steven Avery had no interest in the family salvage yard business. Originally, the state argued that the defendant lacked standing to object to a search of Teresa Halbach's vehicle or the salvage yard because he had no interest in the land or the business. The state conceded only that defendant had standing to challenge the search of his trailer and his garage. The defense offered no evidence that he was an owner in the business.[15] In fact, only Charles and Earl Avery had an ownership interest in the business (*see* Calumet County Sheriff's Dept. investigative report # 168, among others). As for a motive to frame Steven Avery because of jealousy over Jody Stachowski, it is difficult to imagine how jealousy over Ms. Stachowski's affections would be a benefit to Charles Avery given the fact that she was incarcerated and on probation for an OWI-related offense at the time of Teresa Halbach's murder. More importantly, however, the fact that he may or may not have had an interest in Jody Stachowski is irrelevant in determining whether he had a motive to kill Teresa Halbach. Lastly, the fact that defendant was in line to receive a large sum of money as a result of his exoneration is of little help in the effort to establish a motive to kill Halbach or to frame his brother for that matter. Charles was not in line to receive any of that money. That it caused jealousy between them is both speculative and irrelevant as to whether Charles Avery had a motive to kill Teresa Halbach.

97. With respect to the question of whether Charles Avery had an opportunity to kill Teresa Halbach, all defendant can offer is that he was on the property daily and in theory would have been aware of the comings and goings of individuals to the family business. Further, he

[15] The court initially denied the motion to suppress on finding no *Franks v. Delaware* infirmity, and later on the merits. The court never ruled on the standing objection.

argues that Robert Fabian overheard a conversation between Charles Avery and Steven Avery in which Charles asked Steven if "the photographer" had come yet to the yard on October 31, 2005. However, he omits the rest of the response from Steven Avery in which Steven Avery is reported to have told Charles Avery and Robert Fabian, "No, she hadn't shown up yet." (Calumet County Sheriff's Dept. Report dated 11/10/05, p. 208). Next, he offers more speculation by suggesting that Charles Avery was first present when his brother, Steven Avery, cut his finger and that Charles "could have smeared" Steven's blood from a rag in Ms. Halbach's car; that Charles "could have planted the key" in Steven's room ostensibly for the reasons that "getting rid of Steven would only improve Charles' situation at the Avery salvage yard." This is the type of evidence the *legitimate tendency test* was designed to preclude. It flies in the face of all the forensic evidence that was reported and testified to during the course of the trial. First and foremost, there is no evidence that Charles Avery was around at the time Steven Avery cut himself on the finger. Secondly, one can only ask how Charles Avery would have saved the blood and arranged to have it so carefully placed in Teresa Halbach's vehicle. There is no explanation as to the who, what, where, when, why, or how the evidence was planted. It bears no further response as it is too far from the realms of possibility.

98. Lastly, defendant argues that Charles Avery has a connection to the crime, but upon close examination of his argument at paragraphs 127-30, he again argues that Charles Avery's connection to the crime is based solely on the fact that Charles Avery has a direct connection to the property, as opposed to the crime of Halbach's murder. The fact that his trailer was located closest to the business, closest to the entrance to the property, and closest to where her vehicle was found is of little consequence in determining whether he had a direct connection to her death. It is too remote to even be relevant. However, it is significant to point out that the

actual layout of the Avery salvage yard and the specific location of all the residences and buildings were adequately testified to by numerous witnesses at trial. So the location of his particular trailer is of no use to the court in determining whether he had a direct connection to the murder of Teresa Halbach. The fact that the police told Charles Avery several of the details of the crime and certain facts indicating the exact progress of the investigation is of no consequence whatsoever in determining whether Charles Avery had a motive, an opportunity, and a direct connection to the crime of murdering Teresa Halbach.

99. As evidence of just how remote the defense proffer is and of how sidetracked the trial would have been had the evidence been admitted, the state offers these facts from the investigative reports as it relates to the activities of Charles Avery on the day in question.

> On November 6, 2005, DCI Special Agent Debra Strauss, Sergeant Mike Sievert and Detective Todd Baldwin of the Marinette County Sheriff's Department interviewed Charles (a/k/a Chuck) E. Avery, DOB: 07/13/1954. Chuck stated on October 31, 2005, he went to work and opened up the salvage yard at approximately 8 a.m. Chuck stated his brother, Earl, came to work between 7 and 8 a.m. that morning, and Steve Avery was at work by 8 a.m. Chuck stated he worked at the salvage yard until 5 p.m. that afternoon. Chuck stated he and Earl are frequently in and out of the shop and also spend a considerable amount of time working in the pit area. Chuck stated he didn't know if Steven was at work all day. Chuck recalled that Steven may have left to meet with a girl to take some pictures on the afternoon of October 31, 2005. Chuck stated that on the night of October 31, 2005, he believed he was at home all night by himself.

See DCI report #05-1776/36.

> On November 11, 2005, DCI Special Agents Kim Skorlinski and Matthew Joy again interviewed Chuck Avery. Chuck recalled the last time he saw Steven on October 31, 2005, was when Steven left work around 11 a.m., and the last time he had contact with Steven was when he received a telephone call from Steven sometime after 5 p.m. that day.

See DCI report #05-1776/34.

Earl Avery

100. The case for introducing third party liability evidence as it relates to Earl Avery is fraught with the same failings as was the case for Charles Avery. Again, there is no evidence that Steven Avery had any interest in the salvage yard. Thus, this is neither evidence of a motive to frame Steven Avery, nor more importantly is it evidence of a motive to kill Teresa Halbach. Similarly, the fact that Earl Avery had been charged with incest involving his two daughters hardly equates to a motive to kill Teresa Halbach. Again, this *might* be evidence of a pertinent character trait (sexual deviancy) of Earl Avery which falls woefully short of indicating a motive to kill Teresa Halbach. It is interesting to note the court denied similar evidence offered by the state regarding defendant's sexual assault of his niece Marie as evidence that this was a sexually motivated homicide.

101. While it is true that Earl Avery and Robert Fabian were rabbit hunting on salvage yard property in the late afternoon hours of October 31, 2005, that fact alone is not evidence of an opportunity, and, more importantly, a direct connection to the murder of Halbach. As noted above, the only .22 caliber rifle used to shoot Teresa Halbach was the one identified from the rifle rack above the bed of Steven Avery. If Earl Avery and Robert Fabian had the "means" to kill Teresa Halbach simply because they were rabbit hunting on the property that day, then in theory anyone that was on the property that day conceivably had an opportunity to kill Teresa Halbach. This is what the defendant argued originally and is currently arguing. He argues this is enough to allow him to offer third party liability evidence that someone else, one of these now six identified suspects[16]killed Teresa Halbach. This is in essence the exact type of speculative evidence that *Denny* was designed to prevent. It is evidence that is so remote, so tangential, and

[16] In his Statement on Third Party Liability defendant originally identified eleven or more suspects as having possibly killed Teresa Halbach

so speculative that it was properly excluded from consideration by the jury. In addition, the defendant again argues that there is somehow relevance in the fact that a cadaver dog alerted on the golf cart driven around the premises by Earl Avery and Robert Fabian. This argument was made at the January 19 motion hearing by the defense. There is nothing new in this argument. It is no more relevant in October 2009 than it was in January 2007.

102. Similarly, the fact that Earl Avery might have known that Ms. Halbach was coming to the property on October 31 is of little utility in the analysis of whether Earl Avery had a motive to kill Teresa Halbach, an opportunity to do so, and a direct connection with the crime. It is more likely that Earl Avery knew a photographer was coming, but as to Teresa Halbach's specific identity, there is no clear evidence of that fact. There is no evidence that Earl Avery had any association whatsoever with Teresa Halbach. In fact, there is little to no evidence that he ever spoke to Teresa Halbach, let alone had any contact with her. Lastly, the fact that Earl Avery hid from the police when they came to take his DNA sample, although curious and somewhat humorous, offers little to the *Denny* calculus.

103. As evidence of just how remote the defense proffer is and of how sidetracked the trial would have been had evidence of Earl Avery as a suspect been admitted, the state offers these facts from the investigative reports as it relates to the activities of Earl Avery on the day in question.

> On November 11, 2005, CCSD Investigator Gary Steier and DCI Special Agent Steven Lewis spoke with Earl K. Avery, DOB: 06/10/1970. Earl stated on Monday, October 31, 2005, at 4:30 p.m., he saw his brother-in-law Robert Fabian in the auto salvage yard. Earl stated he and Robert Fabian picked up a golf cart at his mother's house, and he and Robert went into the pit and placed two trees into the back of the golf cart. Earl indicated earlier that day between 11 a.m. and 12 noon, he used an end loader to remove the two trees from the location because he wanted to plant them at his residence. After finding no rabbits in the lower pit, Earl and Robert drove the cart down to Steven Avery's residence. Earl observed

> Steven Avery standing and staring at his snowmobile which was on trailer attached to his pick-up truck.

See CCSD report, p. 236.

> On November 30, 2005, CCSD Investigator Steier and Dedering again interviewed Earl Avery. Earl was asked how sure he was about rabbit hunting on October 31, 2005. Earl stated he was "pretty sure." Earl recalled the day of rabbit hunting, and stated Robert had arrived around 3:30 p.m. and Robert had left after dark, and it grew dark between 5 and 5:15 p.m. Earl stated he recalled both he and Robert left [the salvage yard property] at the same time. Earl also stated the day he went rabbit hunting, he believed he had went to pick up a pair of glasses in the city of Two Rivers. Earl stated he was positive the day he went rabbit hunting was the same day he picked up his glasses.

See CCSD report, pp. 310-311.

> On November 30, 2005, CCSD Investigators Steier and Dedering interviewed Julie Tisler, an employee of Dr. Daniels Eyecare. Julie stated Earl Avery had picked up a pair of eyeglasses on Monday, October 31, 2005, between 5 p.m. and 6 p.m.

See CCSD report, p. 308.

Bobby Dassey

104. Again, as he did nearly three years ago, defendant argues that he should have been able to point the finger at Bobby Dassey. However, there is no more evidence today than three years ago to suggest that Bobby Dassey was anything more than a witness to his uncle's heinous act. The defendant conveniently forgets that Bobby Dassey was at work Sunday night of October 30 and Monday, October 31. Dassey worked the late shift. It would have been virtually impossible for Dassey to have committed the crime, covered it up, and participated in the framing of his uncle given what the investigation revealed as to his whereabouts on Monday night, Tuesday, Wednesday, and Thursday of that week. The fact that he and Fabian had "mutually exclusive alibis" is again neither here nor there. It offers nothing to the *Denny*

analysis. It is not evidence of motive. It is not evidence of an opportunity to commit the crime, and it is certainly not evidence of any direct connection with the crime. Similarly, the fact that he took two showers, one when he got up in the morning and one after he finished hunting, is a fact of no consequence.

105. As evidence of just how remote the defense proffer is and of how sidetracked the trial would have been had evidence of Bobby Dassey as a suspect been admitted, the state offers these facts from the investigative reports as it relates to the activities of Bobby Dassey on the day in question.

> On November 5, 2005, CCSD Investigator John Dedering and Detective Dennis Jacobs of the Manitowoc County Sheriff's Department interviewed Bobby A. Dassey, DOB: 10/18/1986. Bobby states he works third shift at Hamilton Manufacturing and is normally home by 6:30 a.m. Bobby indicated on October 31, 2005, he woke up between 2 and 2:30 p.m. Bobby stated he looked out a window and observed a SUV, teal or blue in color, stop and a female exit the vehicle and photograph a maroon van which his mother was attempting to sell. Bobby stated he then observed the female walking toward the residence of Steven Avery. Bobby stated he left for deer hunting between 2:45 and 3 p.m. at which time the teal vehicle was still there.

See CCSD report, p. 90.

> Bobby stated as he was traveling on Highway 147 toward his hunting property, he observed an individual known to him as Scott Tadych. [See CCSD report, pg. 91]. Your affiant noted when DCI Special Agent Antonio Martinez interviewed Scott Tadych on November 10, 2005, Tadych confirmed he passed Bobby Dassey on Highway 147.

*See*DCI report #05-1776/95.

> Bobby stated he arrived home around dark or shortly thereafter and estimated the time to be approximately 4:45 p.m. When Bobby arrived home, the blue or teal SUV was gone.

See CCSD report, pp. 90-91.

> On February 27, 2006, CCSD Investigator Dedering and DCI Special Agent Michael Sasse again interviewed Bobby Dassey. Bobby recalled arriving home from work on October 31, 2005, at approximately 6:30 a.m. Bobby indicated he

> went to bed at that time, got up between 2 and 2:30 p.m., took a shower and went bow hunting. Bobby stated he arrived home from hunting around 5:30 p.m. and, when he arrived home, he went back to bed. Bobby stated he got up at approximately 9 p.m. and got ready for work. Bobby indicated when he was leaving for work at 9:30 p.m., he noticed Steven was having a bonfire. Bobby stated he worked from 10 p.m. until 6 a.m. the following day and then came back home.

See CCSD report, pp. 518-519.

106. The defendant continues to grasp at straws long since consumed by the fires of his own guilt. Defendant offers nothing new with respect to *Denny* evidence involving Bobby Dassey. The fact that he would have "been cross-examined differently," that he would have been cross-examined more like a murderer is again evidence of nothing.

107. Although defendant lists Bryan Dassey, Blaine Dassey, Robert Fabian and Andres Martinez on page 30 at ¶ 55; he undertakes no analysis in support of his argument the court erred. It appears those individuals are no longer suspects and he has abandoned his position. As a result the state offers no argument at this time.

CONCLUSION

108. The defendant now alleges this court's conduct in handling an eleventh hour emergency situation was error such that he was deprived his right to a fair trial to an impartial jury panel. The defendant, while entitled to a fair trial in which his guilt or innocence is fairly and fully litigated, got just that: a fair adjudication, decided by a jury of twelve, with able representation of counsel and above board prosecution from the state. Any alleged error (and none has been proven other than possible statutory error) does not undermine the fact that the defendant got all that is required under Wisconsin law: a unanimous guilty verdict, rendered by a jury of 12, wrought after a six-week trial and full consideration of the evidence by a panel of the defendant's peers.

109. What is relevant to these postconviction proceedings is what actually transpired during the defendant's trial at the time the decisions were made that he now claims constituted error. The defendant cannot change the record or the focus which must necessarily be on conduct of the court, defense counsel, and the state in 2007; and not on the revisionist history he now offers.

110. First and foremost, the court notified the parties as soon as it became aware of the evolving situation with Juror Mahler. This distinguishes the defendant's case from those cited in his brief, where the trial judge either initiated conversation with the jury on his own accord, attempted to deal with a problem without consulting the parties, or attempted to deal with the problem without making an adequate record. Showing reasonable consideration for Juror Mahler's private family life while balancing the defendant's trial rights is not an easy undertaking. Doing so at the end of a six-week trial, on the first night of deliberations, is even more difficult. But the court balanced these competing considerations and arrived at an outcome that was agreeable to all parties, including the defendant.

111. Second, no one (including Juror Mahler if one believes his testimony) was aware of the entire story surrounding his request to be let go. This guards against concern expressed in cases like *Symington*, *Samet*, and *Gray* where holdout status was readily apparent. To reiterate: this is not a case where the state or the court forced a juror off a deliberating jury, but rather one in which a juror begged off for reasons that remain somewhat unclear. Consequently, there is no force to the argument that the defendant was prejudiced by the actions of the state or court because neither of those two parties forced the end result upon the defendant. Indeed, it was the defendant himself who chose this outcome.

112. Third, an important consideration recognized throughout the defendant's brief is the impartiality and collegiality of the jury. Thus, reviewing courts have admonished trial courts for failing to reinstruct the jury, failing to adequately sequester the proposed alternate, and asking the jury to "bring the alternate up to speed." Notably, none of those concerns are present here. Juror N.S. was sequestered in the hotel with her colleagues, and the jury was explicitly instructed to begin deliberations anew. Further, the court wisely erased any previous efforts made by the jury during their brief time deliberating by ordering notes and drawings shredded and photos back to their original albums (Ex #2, p. 2)

113. Fourth, the procedure outlined in Wis. Stat. § 972.10(7) has not been fully developed in published case law. This is readily apparent from the simple fact that both defense counsel testified at the hearing that they had never encountered a similar situation. The change in the statute was not apparent to the three prosecutors who were equally experienced. The state was equally concerned about insuring an error free trial; especially when one considers the time and resources invested. To categorically condemn counsel, the court, or the state's conduct as deficient shows a failure to appreciate the fluid and dynamic nature of trial work. In addition, the spirit behind the revision of Wis. Stat. § 972.10(7) does not necessarily preclude the option of substitution. Instead, the revision was designed to resolve concerns regarding collegiality and inattentive alternate jurors. At bottom, it cannot be said the defendant was not ably represented by two competent, experienced, and effective lawyers who had his best interest in mind. Indeed, both Attorney Strang and Attorney Buting testified that they believed the evidence went in as well as it could have. This agreement serves as further support for the conclusion that the defendant got a fair trial, full consideration from an impartial panel, and an aggressive defense from two excellent lawyers.

114. Finally, the defendant has not proven plain error or met the high burden that a new trial in the interest of justice is warranted. Our supreme court made the plain error burden clear in *State v. Jorgenson*, 2008 WI 60, 310 Wis. 2d 138, 754 N.W.2d 77: "The error, however, must be 'obvious and substantial.' Courts should use the plain error doctrine sparingly." *Id.* at ¶ 21 (internal citation omitted). In order for an error to be "plain" within the meaning of the rule, it must be "so fundamental that a new trial or other relief must be granted." *Virgil v. State*, 84 Wis. 2d 166, 191, 267 N.W.2d 852 (1978). A "plain error" is one that is "both obvious and substantial" or "grave," *id.* at 191, and the rule is "reserved for cases where there is the likelihood that the [error] . . . has denied a defendant a basic constitutional right." *State v. Sonnenberg*, 117 Wis. 2d 159, 178, 344 N.W.2d 95 (1984).

115. Further, it cannot be said that the defendant was denied a "basic constitutional right." *Id.* The defendant was ably represented, and had his guilt or innocence decided by a jury of twelve. While the defendant believes the substitution of an alternate in place of a deliberating juror was error, it cannot be said that he was denied a "basic constitutional right" as a result. At least seven other states,[17] as well as the federal government, permit this practice in some form. *See* 88 A.L.R. 4th 711. The defendant also got a full day evidentiary hearing, after the completion of a six-week trial, to flush out whatever issues he believed were relevant to his defense. At this level, no more action need be taken on his behalf than that.

116. Beyond the plain error doctrine, a trial court may, in its discretion, set aside a jury verdict and order a new trial in the interest of justice if the real controversy was not "fully tried." *See* Wis. Stat. § 805.15(1); *State v. Harp*, 161 Wis. 2d 773, 779, 469 N.W.2d 210 (Ct. App. 1991). The real controversy is not fully tried either when important testimony bearing on an important issue in the case is erroneously withheld from the jury, or when improperly-admitted

[17] California, Delaware, Florida, Georgia, Illinois, Indiana, Massachusetts, Michigan, New Jersey, New York.

evidence clouds a crucial issue the jury must decide. *Morden v. Continental AG*, 2000 WI 51, ¶ 89, 235 Wis. 2d 325, 611 N.W.2d 659. Such is not the case here. This discretionary power is formidable and should be exercised sparingly and cautiously, and its use reserved for exceptional cases. *State v. Williams*, 2006 WI App 212, ¶ 36, 296 Wis. 2d 834, 723 N.W.2d 719; *Morden*, 235 Wis. 2d 325, ¶ 87.

117. The defendant's contentions here go less to the evidence considered and more to the composition of the panel sworn to consider it. But, a defendant is entitled to a fair trial, not a perfect one. *State v. Hanson*, 2000 WI App 10, ¶ 20, 232 Wis. 2d 291, 606 N.W.2d 278. The state submits that the defendant got that. Everyone involved recognized the significance of this trial, and thus every effort was made to secure a fair and full consideration of the defendant's guilt or innocence. The state is simply asking this court to validate a fair trial with unusual circumstances, the nature of which may be unavoidable in a trial of this magnitude.

118. Lastly, Avery's sixth amendment right to present a defense was not infringed by the preclusion of the proffered third party liability evidence. The court should adhere to its original ruling and deny the postconviction relief requested as to this issue as well.

Dated this 30th day of October, 2009.

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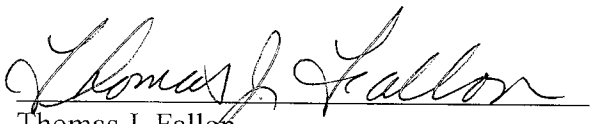

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