STATE OF WISCONSIN CIRCUIT COURT BRANCH 1 MANITOWOC COUNTY

STATE OF WISCONSIN,

Plaintiff,

v. Case No. 05-CF-381

STEVEN A. AVERY,

Defendant.

MANITOWOC COUNTY
STATE OF WISCONSIN
FILED
NOV 16 2009
CLERK OF CIRCUIT COURT

STATE'S REPLY TO DEFENDANT'S POSTCONVICTION MOTION

I. THE SUBSTITUTE JUROR ISSUE.

Summary of Argument

1. Steven Avery received a fair trial. His guilt was determined by a fair and impartial jury. The jury consisted of twelve peers who deliberated and reached a unanimous verdict of guilt on the charges of homicide and felon in possession of a firearm.

2. There was no error in the process by which this occurred. Juror Mahler was removed at his request and for cause. A substitute juror, N.S., took his place. This eventuality was contemplated by the parties. N.S. had been sequestered in anticipation of this very occurrence. The jury was instructed to begin anew, and the court took appropriate steps to ensure this would occur.[1] There was no objection to the process. The defendant chose this course of action. There has been no argument or evidence to suggest that the verdict reached in this case was anything but fair and impartial.

[1] *See* Exhibit #1, p. 2. The state inadvertently referred to Exhibit #1 as Exhibit #2 in its initial response.

3. No error, structural or otherwise, occurred regarding the use of an alternate juror. If statutory or constitutional error occurred, it is subject to the harmless error analysis, because defendant received a fair and impartial jury of twelve who determined his guilt; the error was harmless beyond a reasonable doubt.

A. The removal of Juror Richard Mahler was appropriate and based on cause notwithstanding the manner in which the court proceeded.

4. This court need not decide whether it violated certain procedures regarding the defendant's right to be present with his counsel during the court's inquiry of Mr. Mahler at 9:00 p.m. on March 15, 2007. The court need not decide this issue because of the procedures it employed when it made a record the following morning. The court need not decide this issue because his counsel willingly agreed to the manner in which the court conducted itself in determining whether cause existed for the removal of Mr. Mahler. Lastly, this court need not decide whether there was a procedural error because the defendant received a fair and impartial jury.

5. There was cause for the removal of Juror Richard Mahler. Specifically, the court observed that Mahler was distraught and depressed (Ex. #1). The court noted Mahler spoke quietly and slowly. Mahler confirmed his stepdaughter was involved in a traffic accident earlier in the evening and that his wife was very upset about the accident and the amount of time that Mahler had been away from the family because of the trial (Ex. #1). Mahler indicated that he and his wife were experiencing marital problems before the trial and that the trial was putting an extra strain on their relationship. The court concluded things had "apparently boiled over" as a result of the accident and his not being there to provide support. The court believed, as a result of the statements and demeanor of Mr. Mahler, that his marriage was at stake. Consequently, the

court excused Mahler. Not only was this just cause, it was the humane response—one which was called for by the circumstances.

6. Defendant's counsel willingly participated and assented to the procedure employed by the court. While the defense is technically correct in saying that the defendant did not "waive" his right to be present and to follow a different procedure, he clearly forfeited his right to object and complain about the procedure employed. *See, e.g., United States v. Olano,* 507 U.S. 725, 733 (1993). Again, this presupposes error. If in fact there was error, it should be reviewed solely in the context of an ineffective assistance of counsel claim.

B. The court's removal of a deliberating juror was not structural error under the facts of this case.

7. Defendant relies upon *Neder v. United States,* 527 U.S. 1 (1999), for the proposition that the procedure employed in this case constituted structural error. Defendant's reliance upon *Neder* is misplaced. The court in *Neder* observed that structural error leading to automatic reversal is applicable in a "very limited class of cases." *Id.* at 8. The court provided an illustrative list of circumstances in which structural error was found; limiting it to cases where there was a "complete denial of counsel, biased trial judge, racial discrimination in selection of grand jury, denial of self-representation at trial, denial of a public trial, and defective reasonable doubt instruction." *Id.* at p. 8 (citations omitted). Compared to the cases in which structural error leading to automatic reversal was found, the procedures in this case pale in comparison. There clearly is no defect affecting the framework within which the trial proceeded. Any claimed error here, regarding the procedure employed, did not deprive the defendant of the "basic protections" without which "a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence . . . and no criminal punishment may be regarded as

fundamentally fair." *Id.* at 8-9. Also, "most constitutional errors can be harmless." *Arizona v. Fulminante,* 499 U.S. 279, 306-09 (1991).

8. Additionally, the defendant relies upon *Rose v. Clark,* 478 U.S. 570 (1986), in support of his claim that some errors defy application of the harmless error doctrine and are structural in nature, thereby requiring reversal. However, upon close inspection, the examples listed in *Clark,* 478 U.S. at 577-78, such as introduction of a coerced confession, the complete denial of the right to counsel, or the right to an impartial judge, are not concerns present in this case; nor are they comparable in any way to what occurred involving the substitution of an alternate juror.

> Accordingly, if the defendant had counsel and was tried by an impartial adjudicator, there is a strong presumption that any other errors that may have occurred are subject to harmless-error analysis. The thrust of the many constitutional rules governing the conduct of criminal trials is to ensure that those trials lead to fair and correct judgments. Where a reviewing court can find that the record developed at trial establishes guilt beyond a reasonable doubt, the interest in fairness has been satisfied and the judgment should be affirmed.

Id. at 579. Such is the case here. Defendant should not be awarded a new trial.

9. *United States v. Olano*, 507 U.S. 725, is also instructive because the former Fed. R. Crim. P 24(c) was quite similar to Wisconsin's current statute. It read, "[a]n alternate juror who does not replace a regular juror shall be discharged after the jury retires to consider its verdict." However, *Olano* is factually and doctrinally distinguishable. In *Olano*, the parties permitted the presence of the alternate jurors during juror deliberations. In that case, it was error. However, it is noteworthy that the court did not presume prejudice when the alternate jurors were allowed to sit in and listen to the deliberations of the original jurors in case they were needed to step in at some point in the future. The court concluded that error could not be presumed and error had not been proved. While it might have been plain error to allow the alternates to be

present during juror deliberations, the error was not structural, nor was it presumed or fatal. Again, in this case, if there was error, it is not presumed, it is not fatal, and it certainly is not structural.

C. Sheriff Pagel's communication with Juror Mahler was not error.

10. In assessing whether Pagel's communication with Mahler was error, it is important to keep in mind the following salient facts: 1) Mahler initiated the contact; 2) the discussion was all "one way" in that Mahler did all the talking; 3) according to Mahler, Pagel provided no extraneous information whatsoever regarding jury deliberations; in fact, Pagel said very little to Mahler; 4) Pagel's subsequent contact with Mahler was at the court's direction and as the court's agent.

11. Pagel's contact with Mahler under the circumstances described at the postconviction hearing on September 28, 2009, did not violate the policy behind Wis. Stat. § 756.08(2), regarding a duty to protect jurors from communications with outsiders. Defendant initially relies upon *Maddox v. United States,* 146 U.S. 140 (1892), and *Remmer v. United States,* 347 U.S. 227 (1954).

12. In *Maddox,* the claimed error involved certain comments made by the bailiff while the jurors were deliberating. The bailiff reportedly commented to the jury, "After you fellows get through with this case it will be tried again down there." The bailiff made a second comment also during deliberations referring to the defendant, Maddox, and said, "This is the third fellow he has killed." *Maddox,* 146 U.S. at 141. In this case there is no testimony, nor is there any evidence to suggest that the bailiff (Oscar), or Sheriff Pagel, provided any such information disparaging the character of the defendant or any information that was at all related to the deliberations. Interestingly enough, the defendant at p. 22 of his postconviction brief,

refers to private communications being "possibly prejudicial." *Mattox*, 146 U.S. at 150. Even in 1892, American jurisprudence did not readily presume prejudice when there were private communications with jurors during deliberations. The fact that the United States Supreme Court reaffirmed *Maddox* in *Remmer v. United States,* 347 U.S. 227 (1954), is of no benefit to the defendant. Defendant cites the following language in support of his argument that such private communications are "presumptively prejudicial."

> In a criminal case, any private communication, contact, or tampering directly or indirectly, with a juror during a trial about the matter pending before the jury is, for obvious reasons, deemed presumptively prejudicial, if not made in pursuance of known rules of the court and the instructions and directions of the court made during the trial, with full knowledge of the parties. The presumption is not conclusive, but the burden rests heavily upon the Government to establish, after notice to and hearing of the defendant, that such contact with the juror was harmless to the defendant.

Id. at 229. Closer examination of the cited language reveals the following requirements before a contact is presumed prejudicial. First, there must be contact about the matter pending before the jury. Second, the contact must not be made in pursuance of known rules of the court and the instructions and directions of the court made during the trial, and it must occur without full knowledge of the parties. In this case, Mahler initiated the contact. Neither the bailiff nor Pagel provided any extraneous information relative to the matter pending before them for deliberations. And, most importantly, Pagel's contact with Mahler was at the behest of the court and with full knowledge (that the court would designate someone to orchestrate the communication) and agreement of the defendant's attorneys. Thus, the contact is not presumptively prejudicial. It is not prejudicial as a matter of law. It is no more than incidental contact unrelated to the deliberations solely for the purposes of dealing with a familial crisis that weighed heavily upon the mind of Richard Mahler.

13. Wisconsin courts have recognized the importance of preserving the jury's independence from outside influences during its deliberations. *See, e.g., State v. Yang,* 196 Wis. 2d 359, 538 N.W.2d 817 (Ct. App. 1995); *State v. Dix,* 86 Wis. 474, 273 N.W.2d 250 (1978); *Shelton v. State,* 50 Wis. 2d 43, 183 N.W.2d (1971). However, none of these cases offer support for defendant's position.

14. In *State v. Yang,* the court disapproved of allowing a law enforcement witness to act as a bailiff in charge of the jurors. In *Yang,* the witness/bailiff was asked a question by one of the jurors after deliberations ended for the day. A juror asked the officer, "[D]o you have a list, you know, of interpreters who you call?" The officer responded, "We try to call an interpreter, and if we can't, we do the best we can." The court concluded this was an extraneous prejudicial statement obtained by a jury member and warranted reversal. The question in *Yang* surrounded the reliability and efficacy of certain statements claimed to have been made by the victim of a sexual assault. There was much discussion during deliberations regarding the use of interpreters. "Extraneous information" was defined as "information which is neither of record nor the general knowledge that jurors are expected to possess." *Yang* at 366. The extraneous information was potentially prejudicial for purposes of determining competency under Wis. Stat. § 906.06(2) as it related to that case. In this case, there was no extraneous information provided by the bailiff or Sheriff Pagel to Mr. Mahler. There was no discussion regarding the status of deliberations or any preliminary votes as to guilty or not guilty. The discussion centered solely on Mahler's distress brought about by a phone call to his home. Any reliance on *Yang* is misplaced. Similarly, in *State v. Dix,* 86 Wis. 2d 474, the court noted that where communications are alleged to have occurred between private parties and jurors, the trial court should determine the impact on the juror and whether prejudice resulted. *Id.* at 491. The court also noted that the juror may

only testify to the existence of such a communication and not to the influence it had upon him. In *Dix,* the claimed communication involved an incidental contact between the trial judge and a juror. The judge advised in a memorandum that he was unaware that the person to whom he was speaking was in fact one of the jurors until the end of the conversation. The trial court reported they did not discuss the case at all and limited their conversation to a mutual acquaintance. Under these circumstances, there was no prejudice. *Dix* is also noteworthy because it gives examples of circumstances in which a showing of prejudice is required and where none was shown. *See, e.g., State v. Stewart,* 56 Wis. 2d 278, 284, 201 N.W.2d 754 (1972), where a judge's response to a jury question that he did not know why a document placed in evidence had a name different from the defendant's on it was held to be nonprejudicial because it was an innocuous answer; and *Nyberg v. State,* 75 Wis. 2d 400, 249 N.W.2d 524 (1977), where prior to the opening statements the state's principal witness initiated a conversation with two of the jurors regarding social matters not related to the trial was found to be improper but not prejudicial.

15. Thus, since Pagel's communication with Mahler concerned nothing other than Mahler's reported personal crisis, did not involve the introduction of extraneous information into the deliberation process, and occurred as a result of both Mahler's initiative and the court's directive, no prejudice is presumed because no error occurred.

D. The court had authority to substitute an alternate juror once deliberations had begun because the statute does not specifically prohibit substitution; and defendant agreed to it.

16. The state relies on the arguments previously made with respect to the court's authority to substitute an alternate juror once deliberations have begun. In addition to those arguments, the state offers the following in support of that argument. The state takes issue with the proposition that the "newly" created Wis. Stat. § 972.10(7) explicitly prohibits substitution of

alternate jurors. While the statute says the court shall determine by lot which juror shall not participate in deliberations and discharge them; it does not explicitly say the court cannot use one of those jurors in a substitution scenario. In this regard, the statute is ambiguous. The recently decided case of *State v. Wisth,* 2009 WI App 53, 317 Wis. 2d 719, 766 N.W.2d 781, is instructive. *Wisth* was a case that involved interpreting the statutory provision governing the substitution of newly assigned judges. Wisth filed a request for substitution pursuant to Wis. Stat. § 971.20(5). The trial court denied his request on the grounds that § 971.20(5) allowed for substitution only prior to trial and not for purposes of sentencing after revocation. After reviewing § 971.20(5), the court characterized the dispute as to the meaning of the word or phrase "to the trial of an action." The state argued that "trial" meant a determination of guilt or innocence, whereas the defense argued that "trial of an action" was not so limited and that it applied to "all proceedings before a court from the filing of a complaint to the final disposition at the trial level." *Wisth,* 317 Wis. 719, ¶ 6. The *Wisth* court recognized that interpretation of a statute is a question of law and its interpretation begins with the language of the statute. *Id.* at ¶ 4. Of interest, the court said, "If the meaning of the statute is plain, we *ordinarily* stop the inquiry and apply that meaning." *Id.* (emphasis added). The court further observed relevant to a statute's plain meaning are the context in which the statute appears; the history of the statute revealed in both prior versions of the statute, and legislative amendments to the statute; and prior case law interpreting the statute. *Id.* Thus, the legislative history is important in discerning the intent and meaning behind that statute. The changes brought about by *State v. Lehman,* 108 Wis. 2d 291, 321 N.W.2d 212 (1982), were primarily designed to ensure juror collegiality and attentive attitude. *See* Legislature's note repealing § 972.05 relating to 1983 Wis. Act 226, § 5. The holding in *Wisth* is consistent with the Supreme Court's latest pronouncement on statutory

interpretation. *See State ex rel. Kalal v. Circuit Court for Dane County,* 2004 WI 58, ¶ 45-46, 271 Wis. 2d 633, 681 N.W.2d 110. Given the legislative history behind the act, the specific language chosen and the absence of a prohibition on use of alternate jurors as substitutes, the court was permitted to substitute an alternate juror when all parties, especially the defendant, agree to the procedure.

E. If error occurred, it is not plain error, and even if it were, it is subject to harmless error analysis; counsel were not ineffective and the interests of justice have been served.

17. The removal of a juror and the substitution of an alternate under the circumstances of this particular case did not result in "plain error." It is difficult to imagine there was plain error "affecting substantial rights" in this case. Defendant received a jury of twelve, even though he now argues he should not have been given that choice; *i.e.,* he should have been given a choice of eleven jurors or a mistrial. Additionally, he received a fair, impartial and unanimous verdict that determined his guilt beyond a reasonable doubt. Defendant agreed to the removal and substitution before it was too late, he forfeited his right to object and complain. If he wishes to object and complain about the procedure now that he has lost, he must do it solely in the context of an ineffective assistance of counsel claim. This will be discussed below. All of the cases defendant cites regarding the removal of a juror during deliberations are not on point and not dispositive of the issue before this court.

18. The defendant was "well and truly tried." There is clear and substantial evidence of his guilt beyond a reasonable doubt. Defendant does not challenge the verdict, which was rendered by the jurors who deliberated, was anything but fair and impartial. Based on the record before this court, there is no error that is fundamental, obvious, and/or substantial. In fact there is no error at all.

19. The defendant also argues the court should use its discretionary reversal authority under Wis. Stat. § 805.15(1) because the real controversy was not fully and fairly tried. This argument is undeveloped by the defendant. It is undeveloped because the real controversy, defendant's guilt, was fully and fairly tried. Not only was it tried by able counsel for the defense, it was fairly and impartially determined by a jury of his peers. Defendant was not deprived of a unanimous verdict beyond a reasonable doubt. Twelve jurors deliberated his fate. He had the benefit of the statistics associated with a jury of more than eleven. *See, e.g., State v. Ledger,* 175 Wis. 2d 116, 128, 499 N.W.2d 198 (Ct. App. 1993). There is no reason for this court to grant defendant a new trial in the interests of justice.

F. Trial counsel were not ineffective.

20. Defendant claims counsel performed deficiently in three respects: 1) by authorizing the court to conduct a private voir dire of Juror Mahler without Avery being present; 2) by authorizing the court to discharge Mahler if the information so warranted; and 3) by entering into a stipulation and advising Avery to accept a stipulation regarding the substitution of an alternate juror. The state relies on the arguments previously made at pp. 26-28 of its initial response to defendant's postconviction motion. In addition, the state makes the following observations. First, if the court finds a lack of proof as to either prong of the *Strickland* analysis, the court need not address the remaining prong. *See, e.g., State v. Sanchez,* 201 Wis. 2d 219, 236, 548 N.W.2d 69 (1996). It is incumbent upon the defendant to plead and prove prejudice. *Id.* at 223. In order to show prejudice, the defendant must show there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Strickland v. Washington,* 466 U.S. 668, 694 (1984). Notably, trial counsels' decision with respect to proceeding with an alternate juror and recommending that procedure to the

defendant was every bit a strategy decision which benefitted the defendant, as it was a case of counsel not appreciating the now argued impact of a statutory revision in light of the *Lehman* case. Counsel reasoned that proceeding with twelve jurors is better than eleven, that a choice of eleven jurors versus a mistrial was not much of a choice at all given the fact that a mistrial would have resulted in a new trial, a substantial delay, the appointment of new counsel, and a retrial under circumstances such that the defense of planted evidence would have been fully exposed in the initial trial.[2] Counsels' reasons for recommending the approach were sound and well thought out. They were a matter of tactics and strategy. Counsel did not perform deficiently, but rather admirably. They secured a valued constitutional right; *i.e.,* the right to be to be judged by a jury of twelve. Regardless of whether defense counsel were aware of the statutory change, their decision brought a substantial and tangible benefit to the defendant. They should not be second guessed because the decision did not result in an acquittal. Lastly, as previously argued, their performance was not deficient under the unique circumstances of this particular case. It was 9:00 p.m., the court had retired to its residence in Manitowoc, trial counsel were in Appleton, the prosecutor was in Appleton, and the defendant was in the Calumet County Jail in Chilton, Wisconsin. Under the circumstances, the decisions of trial counsel were reasonable. Most importantly, the defendant himself had the last word. The defendant himself could have chosen mistrial and insisted on a new trial by requesting that his lawyers move for a mistrial. The defendant, upon advice of counsel, chose to proceed with a jury of twelve. There is nothing deficient about the performance. Especially when one considers the record the court made the following morning before proceeding with the substitution of the alternate juror.

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[2] The state also observes that the same reasons for proceeding with twelve jurors as opposed to moving for a mistrial would have been present had the defendant been faced with a choice of mistrial or proceeding with eleven jurors. It is too easy for trial counsel to say now that they would have definitely moved for a mistrial then. Hindsight is always 20-20.

21. As to the question of prejudice, this is not a circumstance in which prejudice is presumed. Cases cited by the defendant are not on point. For example, in *State v. Smith,* 207 Wis. 2d 258, 278, 558 N.W.2d 379 (1997), prejudice was presumed where the attorney was deficient in failing to object to the prosecutor's breach of a plea agreement. In *State v. Behnke,* 155 Wis. 2d 796, 806-07, 456 N.W.2d 610 (1990), prejudice was presumed where counsel was absent from a reading of the verdict which led then to a failure to have the jury polled. Finally, defendant cites *State v. Johnson,* 133 Wis. 2d 207, 223-24, 395 N.W.2d 176 (1986), where prejudice was presumed because trial counsel failed to raise the issue of his client's competency to stand trial. The claimed "error" in this case does not rise to the level of error in *Smith, Behnke,* and *Johnson.* In those cases, there was a failure of counsel to secure or obtain a valued constitutional right. In this case, defendant had able-bodied and experienced counsel who made sure his right to be judged by a jury of twelve was secured. He was consulted as soon as circumstances permitted. He and he alone had the right to move for a mistrial the following morning. This was clearly a tactical decision made by defendant and his counsel. While there are instances where a court will presume prejudice, those instances, however, are rare. *State v. Erickson,* 227 Wis. 2d 758, ¶ 25, 596 N.W.2d 749 (1999). In one category of cases, prejudice has been presumed when the effective assistance of counsel has been eviscerated by forms unrelated to actual performance of the defendant's attorneys. For example, courts have presumed prejudice where a defendant was denied counsel altogether at critical stages. *Id.* at ¶ 25. Similarly, prejudice has been presumed when even a fully competent lawyer is not able to provide effective assistance of counsel in such cases as denial of a right to make a closing argument at conclusion of trial, denial of right to counsel on a nonfrivolous appeal, denial of a declaration of defendant's indigency are prime examples. *Id.* at ¶ 26. In addition, the *Erickson* court described circumstances where the actual assistance rendered by a particular attorney has

been deemed so outside the bounds necessary for effective trial counsel that a court presumes prejudice; *e.g.*, where an attorney has labored on behalf of the defendant while harboring a conflict of interest. *Id.* at ¶ 27. Of importance in the *Erickson* analysis is this language:

> There is little doubt that Erickson was judged by an impartial jury . . . . This fact alone distinguishes the present case from many of those in which prejudice was presumed. It is difficult to believe that defendants would make this same concession were they denied counsel at a hearing in which they enter a plea, or were they denied the opportunity to offer a summation, or were they required to stand trial even though they may well lack competency to do so . . . .

Id. at ¶ 29 (internal citations omitted). In *Erickson*, both sides equally lost out on the use of peremptory strikes. The court declined to presume prejudice because both sides labored under a similar disability. However, in defendant's case, the defendant and only the defendant had the choice to proceed with the alternate juror, proceed with eleven jurors, or demand a mistrial. The court would have proceeded with eleven or granted a mistrial had either been requested.

22. Absent a presumption of prejudice, defendant must prove prejudice. *State v. Allen,* 2004 WI 106, ¶22, 274 Wis. 2d 568, 682 N.W.2d 433. Defendant must demonstrate but for his trial lawyers' error, there is a reasonable probability, a probability sufficient to undermine confidence in the outcome, that the results of his trial would have been different. *Strickland,* 466 U.S. at 693. Because of this, defendant must show that absent these claimed errors surrounding the substitute juror the original fact finder would have had a reasonable doubt with respect to his guilt. *Id.* at 695. Given this standard, prejudice has not been proven. As a matter of fact, one could not even speculate as to the existence of prejudice, let alone presume or prove it. Therefore, trial counsel were not deficient in their performance, and their performance did not prejudice the defendant.

II. THE *DENNY* ISSUE.

Summary of Argument

23. The state relies on the arguments and record previously made on this issue. The third party liability evidence proffered by the defendant was irrelevant regardless of the evidentiary standard employed to determine its admissibility. The state does, however, take this opportunity to make these final observations regarding this issue.

24. First, it is difficult to imagine how the outcome in this case would have been any different given the proffer of proof submitted by the defendant. The reference to the "courtroom mosaic" testified to by Attorney Strang and relied upon by the defendant at p. 42 of his brief offers little support for the argument that the court erred in denying the defense proffer. Neither attorney was able to demonstrate how the presentation of evidence would have been different if the court had ruled in their favor. The defendant's nonexpert witness list was due and filed on December 15, 2006. The court ruled on the admissibility of third party liability evidence six weeks later on January 30, 2007. Trial counsel must have been prepared to present a third party liability defense because they were required to list the witnesses to do so before the court's ruling. The defense witness list, the supplemental juror questionnaire submitted by the parties included a witness list, and defendant's offer of proof as it related to third party liability evidence, all provided opportunities to prepare for that presentation. Yet, the defense failed to establish in the postconviction process any cogent theory of defense supported by facts it claims should have been heard by the jury from which this court could conclude error occurred. It is inconceivable that the presentation of evidence would have been any different than that which was provided in their offer of proof in 2007 and here again in 2009. The evidence was irrelevant

and immaterial because it was too remote in time, place, and or circumstance; and would have led to a confusion of the issues. Wis. Stat. §§ 904.01 and 904.03.

25. Secondly, it is also noteworthy that the seeds for the frame up defense involving a police planting of evidence were skillfully sewn by the defendant himself in his well-known interviews with the media upon his arrest. There was no evidence at the hearing offered as to how the defense would deal with this impeaching rebuttal evidence had the defendant offered evidence that someone other than the police framed him.

26 Finally, the argument or theory that one of Avery's brothers or friends somehow planted his blood in Teresa Halbach's vehicle is inherently incredulous. The testimony revealed that the blood in the vehicle was deposited there by someone who was "actively bleeding" (testimony of Nicholas Stahlke, Crime Lab Analyst). Further, Stahlke testified that this active bleeding resulted in the depositing of at least two different types of blood spatter patterns—contact transfer and passive gravity. The presence of mind, skill needed, and opportunity to pull this off are beyond the ability of any of those mentioned in the proffer. Moreover, there is no evidence to explain away how the defendant's DNA, in the form of skin cells, was actually found on the hood latch to Teresa Halbach's vehicle and on the key that was "supposedly planted" by the police. Again, the possibility that someone else arranged for this, strains the imagination. Lastly, one is left to ponder this question: If defendant was being framed, then why did the framers make it so difficult for the investigators by burning and mutilated the body to the point that identification was almost impossible?

27. The state offers no additional argument beyond that which was already provided in 2007 and in its initial Response to Defendant's Postconviction Motion. The court should and

must deny defendant's request for a new trial, as the real controversy was tried and this evidence was properly ruled inadmissible.

CONCLUSION

Steven Avery received a fair trial. His guilt was determined by a fair and impartial jury. The jury consisted of twelve peers who deliberated and reached a unanimous verdict of guilt on the charges of homicide and felon in possession of a firearm. This court must deny his motion for a new trial.

Dated this 13th day of November, 2009.

Respectfully submitted,

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