No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

GENERAL GRANT WILSON

Petitioner,

v.

STATE OF WISCONSIN,

Respondent.

On Petition for Writ of Certiorari
to the Wisconsin Court of Appeals

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

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COURT OF APPEALS
DECISION
DATED AND FILED

January 12, 2021

Sheila T. Reiff
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2018AP183-CR **Cir. Ct. No. 1993CF931541**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT I

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

GENERAL GRANT WILSON,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County: M. JOSEPH DONALD, Judge. *Affirmed*.

Before Brash, P.J., Blanchard and White, JJ.

¶1 WHITE, J. General Grant Wilson appeals an order from the circuit court[1] denying his motion for a new trial on the basis of ineffective assistance of counsel during his trial in 1993 in which the jury found him guilty of first-degree intentional homicide and attempted first-degree intentional homicide, both with the use of a dangerous weapon enhancer. The circuit court determined that although Wilson's trial counsel was deficient, Wilson was not prejudiced by those deficiencies. We affirm on the same basis.

¶2 This matter has been discussed in detail in prior decisions; therefore, we will limit our summary of the facts to those relevant to this appeal. *See* ***State v. Wilson***, 2015 WI 48, ¶11-46, 362 Wis. 2d 193, 864 N.W.2d 52. Evania Maric was fatally shot as she sat in her car early in the morning on April 21, 1993. Willie Friend had been with Maric in the car, but a witness saw him run away while shots were being fired. Friend identified Wilson as the shooter to the police and testified to the same at trial. Wilson was charged with first-degree intentional homicide while possessing a dangerous weapon for Maric's death and attempted first-degree intentional homicide while possessing a dangerous weapon for the shots fired at Friend.

¶3 Trial counsel attempted to pursue a theory of third-party perpetrator defense—that the motive and opportunity existed for Friend, in conjunction with his brother, Larnell Friend, to have arranged for and carried out Maric's murder.[2] As

[1] Wilson's 1993 trial was conducted by the Honorable Victor Manion; we refer to him as the trial court. Wilson's 2010 postconviction motion was heard and decided by the Honorable Jeffrey A. Conen; we refer to him as the postconviction court. Wilson's postconviction motion that serves as the basis for this appeal was heard and decided by the Honorable M. Joseph Donald; we refer to him as the circuit court.

[2] We refer to Willie Friend as Friend and Larnell Friend, Willie Friend's brother, as Larnell.

part of this theory, trial counsel wanted to question Friend about the relationships among Maric, his brother, and himself, and to inquire about Maric's alleged attempts to terminate a prostitute/pimp relationship with either of them. However, the trial court rejected questioning along these lines because trial counsel had not sufficiently shown that this theory of defense was not mere speculation.

¶4 After both sides had rested, trial counsel investigated additional information to bolster proof of the third-party perpetrator defense. The trial court allowed the defense to reopen Wilson's defense for additional witnesses. The defense called Mary Larson, who testified that she had been friends with Maric since junior high. She had met both Wilson and Friend through Maric.

¶5 Over the State's objection, trial counsel made an offer of proof during the testimony of Mary Larson outside the jury's presence. Larson testified that approximately two weeks before the shooting, Larson, Friend, Maric, and another woman were in Larson's kitchen, and Friend said that he had to keep Maric in check, and that if he was not able to keep her in check, he would kill her. Larson also testified that Maric agreed that was true. Trial counsel argued that this evidence was relevant to show that Friend was involved in Maric's death because he had made previous threats and he was present at the scene. He argued this was direct evidence supporting the defense theory of a third-party perpetrator.

¶6 The trial court sustained the State's objection to admitting Larson's testimony on the ground that this third-party perpetrator theory would merely invite the jury to speculate. Further, the trial court expressed the view that Larson's testimony about Friend's statements would be inadmissible hearsay.

¶7 The trial court also denied trial counsel's request to recall Friend for additional questioning. The jury ultimately returned guilty verdicts against Wilson on both counts.

¶8 After sentencing, the trial court denied Wilson's postconviction motion for a new trial. In 2010, Wilson filed a petition for a writ of habeas corpus, alleging that his appointed appellate counsel had performed ineffectively. We granted Wilson's petition and reinstated his postconviction and appellate rights under WIS. STAT. RULE 809.30 (2009-10).[3] The postconviction court denied Wilson's motion for postconviction relief.

¶9 Wilson appealed and we reversed the judgment of conviction and the order denying postconviction relief and remanded for further proceedings. *See* ***State v. Wilson***, No. 2011AP1803-CR, unpublished slip op. (WI App Oct. 22, 2013). However, our supreme court reversed our decision and denied Wilson a new trial. *See* ***Wilson***, 362 Wis. 2d 193, ¶90. Although originally remitted to the circuit court, the State moved our supreme court to have the court of appeals address the other issues raised in Wilson's original appeal.

¶10 Subsequently, we remanded the case to the circuit court for a ***Machner***[4] hearing on Wilson's claims of ineffective assistance of trial counsel. The circuit court conducted three days of evidentiary hearings in May, June, and July 2017. The defense called two of Maric's friends who testified at the original trial, Mary Larson and Barbara (Lange) Streeter. Each testified that Maric worked as a prostitute and that Friend had threatened to kill Maric and physically abused her.

[3] All references to the Wisconsin Statutes are to the 2017-18 version unless otherwise noted.

[4] *See* ***State v. Machner***, 92 Wis. 2d 797, 804, 285 N.W.2d 905 (Ct. App. 1979).

Streeter added that Maric seemed to want to stop working as a prostitute. The State elicited testimony clarifying that neither witness had personal knowledge of any physical abuse.

¶11 The defense called Willie Wilson, the defendant's brother, who testified that he lived with Wilson from about 1988 to 1992.[5] Willie testified that Maric visited Wilson at their shared residence frequently and sometimes other men picked her up there. Although Willie testified that he had heard that Larnell was Maric's pimp, he further explained that he did not have personal knowledge that Maric was a prostitute or that Larnell was her pimp. The defense also called Scott Hungerford, a private investigator who acted on behalf of Wilson during this appeal. Hungerford testified that he performed background checks including collecting criminal records for members of the Friend family and the victim; he testified that this information would have been available in 1993 if an investigator pursued it.

¶12 Wilson's trial counsel, Peter Kovac, testified in part as follows. Attorney Kovac's requests to delay the trial were denied; therefore, the parties went to trial just sixty-five days after the murder. He believed that Friend was the State's most important witness. Attorney Kovac testified about his initial hearsay objections to three instances when Friend purported to recount Maric's statements to Friend on the night of the murder: (1) identifying Wilson's car to Friend, (2) saying that Wilson was stalking her, and (3) saying that Wilson tried to run her off the road and threatened to kill her. The trial court admitted the first two statements over defense objection. Trial counsel withdrew his objection to the third. Attorney

[5] We refer to Willie Wilson, General Grant Wilson's brother, as Willie.

Kovac testified that he was wrong to withdraw his objection, but he thought that the judge might revisit it and withdrawing the objection might have an advantage.

¶13 The defense questioned trial counsel about his failure to make a stronger offer of proof on the third-party perpetrator defense by bringing in character evidence from Maric's family that she worked as a prostitute or that Maric's friends heard Friend threaten Maric. Attorney Kovac testified that he failed in his attempts to admit testimony that could allow him to damage Friend's credibility.

¶14 The circuit court issued a written decision denying Wilson's motion for a new trial, concluding that trial counsel's performance was deficient in various respects, but that his deficient performance was not prejudicial. This appeal follows. Additional facts will be supplied in the opinion.

STANDARD OF REVIEW

¶15 The right to counsel is constitutionally guaranteed to criminal defendants in the United States Constitution and the Wisconsin Constitution. U.S. CONST. amends. VI, XIV; WIS. CONST. art. I, § 7. The right to counsel includes the right to effective counsel. ***Strickland v. Washington***, 466 U.S. 668, 686 (1984). In ***Strickland***, the United States Supreme Court set forth a two-part test to determine whether trial counsel's assistance was ineffective to the extent that it violated the defendant's constitutional rights. ***Id.*** at 687. In one prong of the analysis, we examine whether the defendant has shown that that counsel's performance was deficient. ***Id.***

¶16 The other prong of the inquiry, the one we consider dispositive here, is whether the defendant was prejudiced by counsel's performance. ***Strickland***, 466

U.S. at 687. "Even if deficient performance is found, judgment will not be reversed unless the defendant proves that the deficiency prejudiced his defense." ***State v. Johnson***, 153 Wis. 2d 121, 127, 449 N.W.2d 845 (1990). "The defendant must show that 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***, 466 U.S. at 694. Our inquiry into prejudice focuses on the reliability of the adversarial process and fundamental fairness of the trial. *See* ***State v. Pitsch***, 124 Wis. 2d 628, 642, 369 N.W.2d 711 (1985).

¶17 Whether there was a violation of a defendant's constitutional right to the effective assistance of counsel is a mixed question of law and fact. *See* ***State v. Trawitzki***, 2001 WI 77, ¶19, 244 Wis. 2d 523, 628 N.W.2d 801. We will uphold the circuit court's findings of fact unless they are clearly erroneous. *See* WIS. STAT. § 805.17(2); ***Pitsch***, 124 Wis. 2d at 634. The inquiry into whether a defendant received ineffective assistance of counsel, meaning counsel's performance was both deficient and prejudicial, is a question of law that we review independently without deference to the circuit court. *See* ***State v. Hunt***, 2014 WI 102, ¶22, 360 Wis. 2d 576, 851 N.W.2d 434.

DISCUSSION

¶18 Wilson asserts that his trial counsel provided ineffective assistance in three primary ways—failure to investigate and present the third-party perpetrator defense, failure to impeach Friend's credibility, and failure to object to hearsay—and that the cumulative effect of counsel's deficient performance was prejudicial to the outcome of the case. We assume without deciding that trial counsel's performance was deficient and conclude that Wilson fails to show prejudice.

¶19 Wilson's current arguments about how he could prove that Friend was involved in the killing do not differ dramatically from the third-party perpetrator defense arguments trial counsel made at trial. There remains no solid evidence to prove that Friend was involved in arranging or hiring one or more persons to shoot Maric. We are left with speculation as to what might be different at a new trial. Although Wilson suggests many avenues to impeach Friend's credibility, he does not present facts that would undermine our confidence in the jury verdict.

¶20 Our supreme court concluded that the trial court did not err in excluding Wilson's third-party perpetrator defense because Wilson failed to make an adequate offer of proof that "Friend had the opportunity to kill Maric, directly or indirectly[.]" ***Wilson***, 362 Wis. 2d 193, ¶¶10, 86. The court held that Wilson failed to show that Friend's opportunity to commit the crime was a "legitimate tendency" and not mere speculation, which excluded his third-party perpetrator defense under ***Denny***.[6] ***Wilson***, 362 Wis. 2d 193, ¶83. The court detailed the holes in the evidence proffered by Wilson's trial counsel in support of Wilson's third party perpetrator defense, namely "no evidence that Friend had the contacts, influence, and finances to quickly hire or engage a shooter or shooters to gun down a woman on a public

[6] As we explained in ***Denny***,

> [T]o show "legitimate tendency," a defendant should not be required to establish the guilt of third persons with that degree of certainty requisite to sustain a conviction in order for this type of evidence to be admitted. On the other hand, evidence that simply affords a possible ground of suspicion against another person should not be admissible.

State v. Denny, 120 Wis. 2d 614, 623, 357 N.W.2d 12 (Ct. App. 1984). In ***Denny***, we set forth a three-prong test that requires a defendant to show by the totality of the evidence that a third-party perpetrator had the motive, opportunity, and direct connection to the crime before the third-party defense may be presented to the jury. ***Id.*** at 624. "Although proffered evidence should be understood in the context of other evidence, the three prongs of the 'legitimate tendency' test are distinct from one another." ***State v. Wilson***, 2015 WI 48, ¶89, 362 Wis. 2d 193, 864 N.W.2d 52. "[T]he ***Denny*** test is a three-prong test; it never becomes a one-or two-prong test." ***Id.***, ¶64.

street"; no evidence that Friend or associates "had access to a gold Lincoln Continental similar to Wilson's"; no evidence of "telephone records from Friend or Friend's brother's house that could have set up the time and place of the hit on short notice"; no evidence that Friend or his family owned or had access to ".44 and .25 caliber weapons"; and no evidence of whom Friend might have hired as the shooter. ***Id.***, ¶85.

¶21 Our supreme court stated, "a convicted defendant may not simply present a laundry list of mistakes by counsel and expect to be awarded a new trial." ***State v. Thiel***, 2003 WI 111, ¶61, 264 Wis. 2d 571, 665 N.W.2d 305. Assuming, as Wilson argues, that trial counsel failed to adequately investigate Maric's life, the circumstances of the crime, the operations of Larnell's after-hours club, illegal activities at the club, and why the police did not search the club for the missing murder weapon, Wilson still fails to show that he could present evidence at a new trial that Friend had the contacts, influence, and finances to contract for Maric's murder. We agree with the State that Wilson has still failed to provide evidence of opportunity by Friend—or any other third party—at the level of clarity dictated by the reasoning in ***Wilson***.

¶22 Wilson argues that a jury at a new trial could reasonably infer that, because Larnell allegedly operated an after-hours club and was involved in prostitution, this meant that Friend or Larnell had the requisite contacts to arrange Maric's murder. Without any additional evidence, we reject an assumption that the nature of an after-hours club and alleged involvement in prostitution raises a reasonable inference of the opportunity to arrange a murder on a city street at the level of clarity dictated by the reasoning in ***Wilson***.

¶23 Wilson argues that, at a new trial with effective assistance, Maric's alleged work as a prostitute and Friend's threats against her would be central to the defense, and the jury would not have a rosy view of the relationship between Friend and Maric or the impression the shooting resulted from a lover's triangle among Friend, Maric, and Wilson. For this argument, Wilson relies in part on reasoning from ***Simpson v. State***, 83 Wis. 2d 494, 511, 266 N.W.2d 270 (1978). However, we consider ***Simpson*** distinguishable here, because it focused on the admissibility of relevant evidence, as defined in WIS. STAT. ch. 904, not hearsay, as defined in ch. 908. *See* ***id.***; ***State v. Kutz***, 2003 WI App 205, ¶58 n.32, 267 Wis. 2d 531, 671 N.W.2d 660. The State also points out that Wilson is the accused, not Friend, and no case law supports applying ***Simpson*** to a third-party perpetrator defense.

¶24 Wilson contends that Friend's alleged intent to kill Maric would satisfy the motive aspect of the ***Denny*** test. The problem with this line of reasoning is that it does not fill in the missing evidence in Wilson's third-party perpetrator defense case required under the analysis we must apply under the reasoning in ***Wilson***. We are still left with speculation about Friend's opportunity to arrange Maric's murder, even if this provides an alternate motive. We cannot assume or infer that because Maric was allegedly involved in prostitution and Friend was allegedly threatening and abusive to her that he had the ability to arrange her murder on a city street. That connection is still only speculative. We conclude Wilson has not shown that trial counsel could have satisfied the opportunity prong of the ***Denny*** test with better investigation or presentation under the ***Wilson*** standards.

¶25 Wilson fails to explain what trial counsel missed in his investigation of Friend and on what basis he could have impeached Friend's testimony. Wilson is correct that there are inconsistencies in the record about what occurred during the

hours before the shooting but none of them make Friend's testimony incredible or, if disproven, that a reasonable jury could only discount his account entirely.

¶26 Further, critically, none of those inconsistencies undermine the testimony of Carol Kidd-Edwards, who testified that she witnessed the shooting. At trial, she testified:

> I was sitting on the side of the bed putting on my last shoe. There rang out very, very loud gunshots, loud enough that [it] frightened me to the floor, because it's an old house.
>
> The windows are vibrating. The room is vibrating, and I'm not sure where the sound is coming from, so I took cover on the floor.
>
> What I believe, or can remember were consecutive fir[ing] of about maybe five shots that came one right behind the other.
>
> [Prosecutor:] Can you tell me whether or not at any point in time you did look out the window to see what was going on in the street outside?
>
> [Kidd-Edwards:] Immediately when the rhythm of the shots stopped, I instantly got to the window of my bedroom to look to see what was going on.
>
> ….
>
> From the point that I … got up off the floor and went to the window, as I observed [Friend] running from the car across the street, I also saw a man coming from my blind side, which is the passenger side of the car that I couldn't see. I saw a man coming from around out of my blind spot into view in front of the car, and then approach the car across the street where the car was still running.
>
> [Prosecutor:] What was that man doing then?
>
> [Kidd-Edwards:] As he was walking across the street, approaching the car, he was loading, top loading a gun.
>
> ….

> He went up to the driver's side of [Maric's] car across the street, and he stood there and he fired five or seven rounds into the car.

This highly probative, consistent testimony of a neutral observer had a powerful tendency to exclude Friend as the shooter and lent credence to Friend's innocence because her account matched the substance of Friend's testimony about the shooting.

¶27 Kidd-Edwards lived on the same street where Larnell operated the after-hours club and where Maric was killed. She testified that she watched the shots fired from her bedroom window and she recognized Friend running away without "any objects in his hand." She heard Friend pound on her front door, yell to call 911, and wait at the scene for the police. Kidd-Edward's testimony, as credited by the jury, clears Friend from direct involvement in the shooting. Therefore, we are again faced with the missing opportunity evidence. It strains credibility to imagine that Friend organized a conspiracy to murder Maric that placed him in danger from the shooting, but he still ran for help and yelled for someone to call 911, and he remained on the scene for help to arrive. There are minor inconsistencies between the accounts of Friend and Kidd-Edwards—primarily as to whether the shooter exited the driver's side or passenger side of the gold Lincoln—but those minor inconsistencies do not implicate Friend and do not undermine the credibility of either Friend or Kidd-Edwards. None of the inconsistencies cited by Wilson tend to show that Friend had an opportunity to commit or arrange Maric's shooting by an unknown third party.

¶28 Wilson suggests that it would be significant at a new trial if trial counsel were to object to Friend's hearsay statement that Maric told him at the after-hours club that night that Wilson tried to run her off the road and threatened to kill

her if he saw her with Friend again. The problem with this argument is that Maric's statement is plainly admissible under the excited utterance exception. *See* WIS. STAT. § 908.03(2). The excited utterance exception is predicated on the "sufficient trustworthiness" the rules of evidence accord to statements mean under "spontaneity and stress[.]" ***State v. Huntington***, 216 Wis. 2d 671, 681-82, 575 N.W.2d 268 (1998) (citation omitted). Out-of-court statements about a startling event or condition when made under the stress of excitement caused by the event or condition are admissible as an exception to the hearsay rule. ***Id.*** (citation omitted). The State argues compellingly that Friend's account of Maric's statement complies with these requirements and that the exception would likely be applied at a new trial.

¶29 Wilson argues that the cumulative effect of trial counsel's deficiencies prejudiced his defense, but this does not add anything to arguments we have already rejected. The ultimate question is whether there was a substantial likelihood of a different outcome but for trial counsel's presumed deficient performance. Reviewing the record and seeing little to no proof on the issue of Friend's opportunity at the level of clarity dictated by the reasoning in ***Wilson***, we cannot conclude there is a reasonable possibility of a different outcome if trial counsel's performance had been sufficient. When we apply the ***Wilson*** standards, we remain confident in the fairness of the trial process and outcome. Wilson's theory that Friend conspired to murder Maric remains speculative under these standards. He has failed to show what evidence trial counsel did not find and present at trial that would have made a difference. Therefore, Wilson has failed to show that trial counsel deprived him of a true defense and accordingly we conclude that, even assuming deficient performance, Wilson was not denied the effective assistance of trial counsel.

¶30 For the foregoing reasons, we affirm the trial court.

By the Court.—Order affirmed.

Not recommended for publication in the official reports.

No. 2018AP183-CR(D)

¶31 BRASH, P.J. (*dissenting*). I disagree with the Majority's conclusion that Wilson did not receive ineffective assistance of counsel. The Majority affirms the circuit court's determination that even with the numerous significant deficiencies made by trial counsel during Wilson's trial—which were identified and acknowledged at the ***Machner*** hearings—Wilson did not suffer prejudice as a result of those deficiencies.

¶32 On the contrary, I believe that the cumulative effect of those deficiencies was prejudicial to Wilson's defense and, had they not been committed, there is a reasonable probability that the outcome of Wilson's trial would have been different. Because of this lack of confidence in the outcome, I would remand this matter for a new trial. Therefore, I respectfully dissent.

Procedural History

¶33 As alluded to in the Majority opinion, this case has a complicated procedural history which, in and of itself, is indicative of the cumulative prejudice that occurred here. To begin, the seven-day jury trial in 1993 commenced just sixty-eight days after the crimes occurred, despite repeated requests by Wilson's trial counsel, Attorney Kovac, to delay the trial to allow him more time to prepare.

¶34 At the trial, the State argued that this was a crime of passion: Wilson killed Maric and tried to kill Friend because they were romantically involved and Wilson was jealous. In contrast, Attorney Kovac's theory of defense was that Wilson did not commit the crimes; rather, Friend, who was the only person linking Wilson to the crimes, and/or his brother Larnell, were the culprits. However,

Attorney Kovac did not file a pretrial motion requesting permission from the trial court to admit third-party perpetrator evidence under ***State v. Denny***, 120 Wis. 2d 614, 357 N.W.2d 12 (Ct. App. 1984). ***Denny*** provides that a defendant may introduce third-party perpetrator evidence only if the defendant establishes that the third party had a motive to commit the crime, an opportunity to do so, and a direct connection to the crime. *See* ***id.*** at 624. Because Attorney Kovac did not present an adequate offer of proof before or during the trial regarding the third-party perpetrator evidence, the trial court did not allow the evidence to be presented to the jury. The jury was initially unable to reach a verdict. After being told to continue to try to reach a verdict, the jury convicted Wilson of the crimes.

¶35 Seventeen years after Wilson's conviction, his right to a direct appeal was reinstated.[1] This appeal is the third time this case has been before us and is a continuation of Wilson's direct appeal from the 1993 conviction under WIS. STAT. RULE 809.30. As noted in the Majority opinion, the first time the case was before us, we reversed and remanded for a new trial. *See* ***State v. Wilson***, No. 2011AP1803-CR, unpublished op. and order (WI App Oct. 22, 2013). We concluded that Wilson was denied a meaningful opportunity to present a complete defense during his trial because the trial court did not allow him to introduce third-party perpetrator evidence pertaining to Friend and/or Larnell. *See* ***Crane v. Kentucky***, 476 U.S. 683, 690 (1986); ***Denny***, 120 Wis. 2d at 614.

¶36 Again as stated by the Majority, the Wisconsin Supreme Court reversed our decision. It ruled that the trial court properly excluded the third-party

[1] Wilson's right to a direct appeal was reinstated on September 14, 2010, on the grounds that Attorney Kovac provided him with ineffective assistance of appellate counsel. *See* ***State ex rel. Wilson v. Humphreys***, No. 2010AP1074-W, unpublished op. and order (WI App Sept. 14, 2010). The Office of Lawyer Regulation publicly reprimanded Attorney Kovac in 2008 for violating multiple rules of professional conduct while representing Wilson.

perpetrator evidence under ***Denny*** because Wilson had not shown that Friend or his brother had an opportunity to commit the crime. *See* ***Wilson***, 362 Wis. 2d 193, ¶86. The Wisconsin Supreme Court's decision reaffirmed the ***Denny*** test for the admission of third-party perpetrator evidence. *See* ***Wilson***, 362 Wis. 2d 193, ¶52.

¶37 The Wisconsin Supreme Court remitted the case to the trial court on August 4, 2015. Several months later, the State moved the Wisconsin Supreme Court to vacate its remittitur and remand to this court to allow us to address the other issues raised in Wilson's brief, which we did not reach in the first appeal. The Wisconsin Supreme Court vacated its remittitur on November 4, 2015, and remanded to this court to address the remaining issues pending in this appeal.

¶38 On November 15, 2016, we reversed the order denying postconviction relief and remanded the matter, concluding that Wilson was entitled to a ***Machner*** hearing on his claim of ineffective assistance of trial counsel. *See* ***State v. Wilson***, No. 2011AP1803-CR, unpublished op. and order (WI App Nov. 15, 2016). The circuit court held three evidentiary hearings and concluded that Attorney Kovac had performed deficiently. However, the circuit court also concluded that Attorney Kovac's deficient performance did not prejudice Wilson's defense. It is that decision that underlies this appeal.

Machner *Hearings*

¶39 The Wisconsin Supreme Court's decision and this court's prior decisions set forth the facts of this case as developed prior to the ***Machner*** hearings. *See* ***Wilson***, 362 Wis. 2d 193, ¶¶4-39; ***Wilson***, No. 2011AP1803-CR (WI App Oct. 22, 2013; ***Wilson***, No. 2011AP1803-CR (WI App Nov. 15, 2016). Those hearings took place in May, June, and July 2017, twenty-four years after Wilson's

conviction. There were six witnesses and more than three hundred pages of testimony. The circuit court made the following findings of fact:

> 1. Attorney Peter Kovac represented Wilson in the trial for the shooting death of Maric.
>
> 2. Attorney Kovac's theory of defense was that Friend either shot Maric or that there was a plot involving Friend and/or his brother to have her killed.
>
> 3. Attorney Kovac did not file a motion before trial for the admission of third-party perpetrator evidence under ***Denny***.
>
> 4. Attorney Kovac did not investigate sufficient facts to support the admission of third-party perpetrator evidence under ***Denny***.
>
> 5. The trial court denied Attorney Kovac's request to allow the third-party perpetrator evidence after hearing a verbal offer of proof based on a possible motive concerning Friend and/or Larnell and an offer of proof (made after the close of the defense's case) based on what two close friends of Maric, Mary Larson and Barbara Streeter, heard and observed about Friend.
>
>   The circuit court added a footnote to this factual finding that stated that Mary Larson and Barbara Streeter testified that four or five weeks before Maric's death, when Friend came to Larson's house with Maric, they were all in the kitchen and Friend had a gun sticking out of his pants. He announced that Maric was going to do what he said or he would "pop" her and would not think twice about it. After this incident a couple weeks later, Larson said that she saw signs of abuse on Maric's back and Maric told her that it was done by Friend. Barbara Streeter testified that Friend said, after Maric stated that she was "done" with prostitution, "well, you ain't stopping. I'm gonna keep all my bitches in check."
>
> 6. Mary Larson testified that three weeks before Maric's death, she saw welts on Maric's back (presumably the abuse referenced in the circuit court's footnote discussed above), which Maric told her had come from physical abuse perpetrated by Friend.
>
> 7. Barbara Streeter testified that she remembered Mary Larson telling her that Friend beat Maric with a hanger.

8. Mary Larson testified at trial but was not permitted to testify about Friend as set forth above.[2]

9. Attorney Kovac did not question the State's ballistics expert about distinctions between a .44 caliber Sturm Ruger (murder weapon) and a .44 caliber Smith & Wesson (which Wilson stated he once owned).

10. Attorney Kovac never told the jury that Wilson's .44 caliber revolver was not the same make as the .44 caliber revolver that was determined to have killed Maric.

11. The State sought permission to allow Friend to testify that Maric told him several hours before the murder that Wilson had just driven her off the road and threatened to kill her by pointing a gun at her if she did not stop seeing Friend. The trial court ruled the statement inadmissible. The statement was admitted after Attorney Kovac withdrew his objection. He explained that he did so because he believed the trial court would reconsider.

12. Attorney Kovac did not use lab or medical evidence during his cross-examination of Friend.

¶40 In addition, the State notes in its brief that the following facts were demonstrated: (1) Maric worked as a prostitute for Friend and/or Larnell; (2) Maric wanted to stop working as a prostitute; (3) Friend physically and emotionally abused and threatened Maric before her death; (4) Friend and Larnell had criminal records; (5) Maric was murdered outside of Larnell's after-hours club; (6) such clubs can be hotbeds of criminal activity.[3]

[2] At trial, the only testimony that Larson was permitted to give was that she knew both Wilson and Friend through Maric, and Maric was not afraid of Wilson. Larson was not allowed to testify about Friend or her observations about the relationship between Maric and Friend.

[3] These facts were testified to by multiple people and were undisputed.

DISCUSSION

¶41 As we know, the ***Strickland*** test requires a defendant to prove both that counsel's performance was deficient, and that this deficient performance was prejudicial. *See* ***id.***, 466 U.S. at 687. After making the above factual findings based on the evidence from the ***Machner*** hearings, the circuit court found that Attorney Kovac's performance was "deficient in various respects[.]" However, the court found that Wilson had not been prejudiced by those deficiencies.

¶42 I disagree. Although individual errors at trial may not necessarily require reversal, their cumulative effect can prejudice a defendant by undermining a court's confidence in the outcome of the trial. *See* ***Thiel***, 264 Wis. 2d 571, ¶59. This is because "'the right to the effective assistance of counsel is recognized not for its own sake, but because of the effect it has on the ability of the accused to receive a fair trial.'" ***Id.***, ¶62 (quoting ***United State v. Cronic***, 466 U.S. 648, 658 (1984)). "This inquiry directs analysis on the issue of prejudice to *the effect* of deficient performance on the overall reliability of the trial" which is a "substantively different focus from an overall assessment of an attorney's performance." ***Thiel***, 264 Wis. 2d 571, ¶62.

Third-Party Perpetrator Evidence

¶43 I begin the inquiry into cumulative prejudice with Attorney Kovac's failure to properly investigate the third-party perpetrator evidence. Counsel has a duty to undertake "reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." ***Strickland***, 466 U.S. at 691. Attorney Kovac did not adequately investigate and prepare his third-party perpetrator defense before trial. He explained at the ***Machner*** hearing that he did not more thoroughly investigate before trial or file a formal motion before trial

because he thought the third-party perpetrator evidence was clearly admissible under ***Denny***. However, according to ***Strickland***, Attorney Kovac's failure to investigate and more adequately prepare his theory of defense constituted deficient performance. *See* ***id.***, 466 U.S. at 691.

¶44 To determine the impact of this deficient performance on Wilson's defense, we look at what Attorney Kovac's unsuccessful offer of proof showed vis-à-vis the legal standard for admission of third-party perpetrator evidence and compare it to what his offer of proof would have shown if Attorney Kovac had adequately investigated and prepared.

¶45 As previously noted, for admission of third-party perpetrator evidence, a defendant must establish that there was a "legitimate tendency" that the third party "*could have* committed the crime," by demonstrating that the third party had a motive to commit the crime, an opportunity to do so, and a direct connection to the crime.[4] *See* ***Denny***, 120 Wis. 2d at 623-24 (emphasis added). The ***Denny*** criteria balance the tension that exists between a defendant's fundamental constitutional right to present witnesses on his or her behalf and the imperative that evidence must be relevant to the issues being tried. ***Id.*** at 622-23.

¶46 The Wisconsin Supreme Court concluded that Attorney Kovac's unsuccessful offer of proof regarding the third-party perpetrator evidence at trial was properly excluded under ***Denny*** because Wilson had not shown that Friend

[4] As noted by the Majority, the legitimate tendency test does not require the defendant to "establish the guilt of third persons with that degree of certainty requisite to sustain a conviction" in order for third-party perpetrator evidence to be deemed admissible. *See* ***Denny***, 120 Wis. 2d at 623.

and/or his brother had *the opportunity* to kill Maric.[5] The opportunity prong asks whether "the evidence create[d] a practical possibility that the third party committed the crime[.]" ***Wilson***, 362 Wis. 2d 193, ¶58. The court explained that for a defendant to meet the opportunity prong of the ***Denny*** test, the defendant must show that "the third party had the realistic ability to engineer such a scenario," or, as applied here, "had the contacts, influence, and finances" to arrange for a shooter or shooters to kill Maric. *See* ***Wilson***, 362 Wis. 2d 193, ¶¶85, 90.

¶47 The Wisconsin Supreme Court noted that Attorney Kovac's unsuccessful offer of proof during trial was as follows: (1) Mary Larson said that she knew Maric, Wilson, and Friend; (2) Larson said when Friend and Maric were at her house in the kitchen in the weeks before Maric's murder, Friend told Larson that "he had to keep [Maric] in check," and further, that "if she wouldn't be in check, he'd kill her, and she knew it"; (3) Larson said that Maric responded to Friend's comment by saying "yes, he would"; and (4) Larson said that she saw Friend slap Maric in a motel room. ***Wilson***, 362 Wis. 2d 193, ¶37.

¶48 The trial court rejected Larson's testimony, in part because it believed it was hearsay. However, Friend's statements to Larson were not hearsay; rather, they were prior inconsistent statements by a witness who could have been questioned about them during his testimony. *See* WIS. STAT. § 908.01(4)(a)(1).

¶49 The trial court also rejected Larson's testimony as being too speculative. However, the ***Machner*** hearing testimony and exhibits demonstrated significant additional facts: (1) Maric worked as a prostitute; (2) Friend and/or Larnell were her pimps; (3) Maric wanted to stop working as a prostitute; (4) Friend

[5] The Wisconsin Supreme Court noted that the State conceded that Attorney Kovac met the motive and direct connection prongs of the ***Denny*** test. *See* ***Wilson***, 362 Wis. 2d 193, ¶73.

beat Maric and threatened to kill her if she stopped working as a prostitute in the weeks before she was killed; (5) Larnell's after-hours club, in front of which Maric was killed, was known for prostitution; (6) the after-hours club used a metal detector to screen patrons, suggesting that persons carrying weapons frequented the establishment; (7) Friend, Larnell, and Marshall Friend—a brother of Friend and Larnell—were all were at the after-hours club when Maric was killed; and (8) Friend, Larnell, and Marshall had extensive criminal records and were known to police.

¶50 These facts go well beyond the unsuccessful offer of proof Attorney Kovac made at trial. However, the circuit court still deemed the evidence to be too speculative. I disagree. The nature of the relationship between Friend and Maric is a significant fact in this case. Friend testified at trial that he had known Maric for about twelve years and had been in an intimate relationship with her since the summer prior to her death.[6] On the contrary, the evidence from the ***Machner*** hearing demonstrated that Friend and/or Larnell were Maric's pimps—a much different type of relationship, and one that would not have supported the State's theory of the case. Indeed, by definition, the relationship between a pimp and

[6] Wilson also testified regarding his relationship with Maric. Wilson stated that he met Maric in 1988 and had maintained a relationship with her until the time of her death. He said that they had a good relationship, they were both dating others, and they were open about this with each other. Attorney Kovac introduced nine taped phone messages the State had seized from Wilson's telephone answering machine that Maric left Wilson in the ten days before her murder, the last of which was only two days before she died. In the messages Maric seems at ease, makes casual conversation, and states that she loves Wilson "madly" and misses him because he had been away on vacation. Wilson testified that he had never been to the after-hours club, but that Maric had pointed it out to him when they drove by it one time, and told him that if "something ever happened to [me] that … would be the place."

prostitute is one of power: the pimp obtaining and keeping power over the prostitute.[7]

¶51 Although the State previously conceded that the direct connection and motivation prongs of ***Denny*** were met, *see* ***Wilson***, 362 Wis. 2d 193, ¶73, I point out that this evidence clearly provides a direct connection between Friend and Maric outside of the fact that he was with her when she was killed. Additionally, when taken together with the ***Machner*** evidence that Maric wanted to stop being a prostitute, a strong motive for killing Maric is established.

¶52 Furthermore, "[s]ome evidence provides the foundation for other evidence"; that is, "'[f]acts give meaning to other facts,' and certain pieces of evidence become significant only in the aggregate, upon the proffer of other evidence." ***Wilson***, 362 Wis. 2d 193, ¶53 (citation omitted). The additional evidence from the ***Machner*** hearings gives meaning to the facts in the failed offer of proof that are sufficient to establish a "legitimate tendency" that Friend had the opportunity to arrange Maric's killing. *See* ***Wilson***, 362 Wis. 2d 193, ¶56.

¶53 To expound on this point, I note that our supreme court in ***Wilson*** focused on the improbability of Friend being able to "quickly hire or engage a shooter" and "set up the time and place of the hit on short notice." *See* ***id.***, ¶85. However, it is unclear why this was necessarily a last-minute plan. The threatening exchange witnessed by Larson occurred weeks before Maric was killed, giving Friend and/or Larnell plenty of time to form a plan. This plan could have been as simple as arranging for Larnell or an associate to shoot Maric the next time she

[7] *Pimp*, MERRIAM-WEBSTER DICTIONARY, https://www.merriam-webster.com/dictionary/pimp (last visited Dec. 9, 2020).

visited the after-hours club, which was owned by Larnell, and was known for criminal activity that attracted armed individuals.[8]

¶54 Thus, when all of the facts that came to light during the ***Machner*** hearing are viewed "in the aggregate," they demonstrate a legitimate tendency that Friend and/or Larnell "had the contacts, influence, and finances" to arrange for a shooter or shooters to kill Maric. *See* ***Wilson***, 362 Wis. 2d 193, ¶¶53, 85. Furthermore, we only have Friend's word regarding the events that led up to the shooting; with the introduction of the facts regarding the true nature of his relationship with Maric, his credibility likely would have been called into question.

¶55 Moreover, our supreme court in ***Wilson*** noted that in a ***Denny*** analysis, the "strength and proof of a third party's motive to commit the crime" may be "so strong that it will affect the evaluation of the other prongs." ***Wilson***, 362 Wis. 2d 193, ¶64. I believe that to be the case here; in fact, both the motive and direct connection prongs are sufficiently strong to bolster Wilson's theory of the involvement of either Friend and/or Larnell to beyond "mere speculation." ***Id.***, ¶59. Indeed, to succeed with a ***Denny*** motion, a defendant "need not establish the guilt of the third party to the level that would be necessarily to sustain a conviction." ***Wilson***, 362 Wis. 2d 193, ¶51.

[8] In contrast to this possible scenario, I note Wilson's testimony at trial regarding his actions on the night of the shooting. He said that he had met Rosanne Potrikus at a bar where she worked that night, helped her close the bar, and then drove around with her and went to get food. Wilson testified to the details of their activities, which were corroborated by Potrikus's testimony. Wilson testified that he then took Potrikus back to her car—which they had left at the bar where she worked—drove behind her to the freeway, and that he proceeded home, arriving between 3:30 a.m. and 4:00 a.m. He testified that he woke at 5:15 a.m. for work and called Potrikus at around 5:30 a.m. because she had made an unsolicited request that he call her to wake her up for work. Wilson testified that he then went to work at 7:00 a.m. at Krause Milling, where he had worked for sixteen years, was the senior miller for the production department, and a union steward. Phone records introduced at trial established that Wilson called Potrikus from his home at 5:33 a.m.

¶56 Another factor to consider in a ***Denny*** analysis is that "[o]verwhelming evidence against the defendant may not serve as the basis for excluding evidence of a third party's opportunity" to commit the crime. ***Wilson***, 362 Wis. 2d 193, ¶69. "[B]y evaluating the strength of only one party's evidence, no logical conclusion can be reached regarding the strength of contrary evidence offered by the other side to rebut or cast doubt." *See* ***Wilson***, 362 Wis. 2d 193, ¶69 (quoting ***Holmes v. South Carolina***, 547 U.S. 319, 331 (2006)).

¶57 This legal framework under which the additional evidence adduced at the ***Machner*** hearing is analyzed is key. We must focus on the probative value of the evidence *to the defense*; that is, we look at whether the evidence would have helped cast reasonable doubt on the State's case. *See* ***Wilson***, 362 Wis. 2d 193, ¶69. Clearly, the third-party perpetrator evidence would have helped to cast doubt on the State's narrative that this was a crime of passion committed by a spurned lover.

¶58 Furthermore, in addition to failing to *investigate* and *prepare* a third-party perpetrator defense, Attorney Kovac performed deficiently by failing to move the court for permission to introduce ***Denny*** evidence *before* trial so that he could have framed Wilson's defense differently if the evidence was not allowed. A review of the trial transcripts shows that Attorney Kovac had no coherent defense strategy to present to the jury. Instead, he was left repeatedly referring to evidence he was not allowed to present.

¶59 In assessing prejudice, we focus on "*the effect* of deficient performance on the overall reliability of the trial." *See* ***Thiel***, 264 Wis. 2d 571, ¶62. Attorney Kovac's failure to present a coherent defense harmed Wilson. Furthermore, had Attorney Kovac timely submitted a thoroughly investigated ***Denny*** motion prior to trial that was still rejected, he would have known that the

third-party defense involving Friend and/or his brother was unavailable to him, and could have pursued another defense strategy. Therefore, under either scenario, Wilson's defense was prejudiced by Attorney Kovac's deficiencies relating to the third-party perpetrator evidence.

Other Deficiencies

¶60 Another prejudicial deficiency committed by Attorney Kovac involves his withdrawal of his successful objection to a hearsay statement. Before Friend testified, the State sought permission to admit several hearsay statements through him. One of the statements was that Maric allegedly told Friend that Wilson had tried to run her off the road several hours before the murder, then pointed a gun at her and told her that if he saw her with Friend again, he was going to kill her. After the circuit court ruled *in favor of the defense excluding the statement*, Kovac withdrew his successful objection.

¶61 The State went on to repeatedly use the statement against Wilson. On direct examination, Friend testified that Maric came to the after-hours club to tell him that Wilson had tried to run her off the road and threatened to kill her if he saw her with Friend. Attorney Kovac compounded the problem with a lengthy cross-examination about the statement, giving it more attention before the jury. The State then emphasized the statement during its closing argument, pointing to it as evidence of Wilson's intent:

> How do we know it was intentional homicide? I submit to you … the statement that he is attributed to have made to Evania Maric when he ran her off the road. If I see you with that nigger again, I'm going to kill you both.

¶62 Attorney Kovac's decision to withdraw a successful objection to damaging testimony against his client constituted deficient performance. Moreover,

this emotionally charged evidence damaged Wilson's defense because it was the only evidence that Wilson ever threatened Maric and it bolstered the State's theory that Wilson killed Maric and attempted to kill Friend in a crime of passion.

¶63 The Majority asserts that Wilson suffered no prejudice as a result of Attorney Kovac's error because the trial court had erroneously sustained his objection, and that the excited utterance did indeed apply to render the statement admissible, citing the compelling argument of the State regarding this issue. Majority op., ¶28. The Majority also cites to ***Huntington*** and the three requirements established therein for admitting an excited utterance in support of this conclusion. *See* ***id.***, 216 Wis. 2d at 681-82.

¶64 The admission of out-of-court statements pursuant to an exception to the hearsay rule is a discretionary decision left to the trial court. ***Id.*** at 680. We do not overturn such a decision if we can "discern a reasonable basis" for that decision, "[b]ecause the [trial] court is better able to weigh the reliability of circumstances surrounding out-of-court statements[.]" ***Id.*** at 680-81.

¶65 The ***Huntington*** court explained that the basis for the excited utterance exception, set forth in WIS. STAT. § 908.03(2), is "'spontaneity and stress' which, like the bases for all exceptions to the hearsay rule, 'endow such statements with sufficient trustworthiness to overcome the reasons for exclusion of hearsay.'" ***Huntington***, 216 Wis. 2d at 681-82 (citation omitted). In making its ruling sustaining Attorney Kovac's objection on this statement, the trial court did not believe that the statement met the requirements of an excited utterance because of the time that had elapsed between when the incident allegedly occurred and when Maric purportedly told Friend about it. The trial court found that this time lapse

demonstrated that Maric had "thought about it and had time to reflect on it." This is a reasonable basis for the trial court's ruling. *See* ***id.*** at 680-81.

¶66 In any event, the trial court's decision regarding this evidence is not the issue under consideration here. Rather, it is the effect that Attorney Kovac's error in withdrawing his objection had on Wilson's defense, and I conclude that this error added to the cumulative prejudice that harmed Wilson's defense.

¶67 Continuing with Attorney Kovac's deficiencies, he did not draw for the jury the distinction between the murder weapon and the gun Wilson told the police he previously owned. The State's ballistics expert, Monty Lutz, testified that Maric was killed with .44 caliber bullets from a Sturm Ruger revolver, not a Smith & Wesson revolver, which was the make of gun that Wilson said he previously owned. The prosecutor repeatedly argued that Wilson used to own, but no longer had in his possession, a .44 caliber gun. Attorney Kovac failed to ask Lutz about the differences between a .44 caliber Sturm Ruger and a .44 caliber Smith & Wesson.

¶68 More importantly, Attorney Kovac never *told the jury* that the .44 caliber revolver Wilson admitted previously owning and bartering away *was not the same make* as the .44 caliber revolver that killed Maric. Attorney Kovac's failure to draw for the jury the distinction between the murder weapon and the gun Wilson said he previously owned constituted deficient performance. Moreover, it harmed Wilson's defense because the jury was left to wonder whether Wilson killed Maric with his Smith & Wesson, which was not the murder weapon according to the ballistics experts.

¶69 Another deficiency to note is Attorney Kovac's failure to call a witness relating to the vehicle driven by the shooter or shooters—the gold-toned

Lincoln Continental. At the ***Machner*** hearing, Wilson introduced a police report of an interview with Clyde Edwards conducted immediately after Maric's murder. Edwards is the husband of Kidd-Edwards, and lived at the same residence across from the after-hours club.

¶70 The police report states that Edwards told the police on the day of the murder that he had noticed the vehicle described by his wife, the gold-toned Lincoln Continental, in the area *before* Maric was killed. This is important because Friend testified that Wilson had never been to the after-hours club before the murder and the State argued that the fact that a gold-toned Lincoln Continental was present at the scene of the crime was strong evidence of Wilson's guilt. In fact, Attorney Kovac attempted to show at trial through other means that there *were* other gold-toned Lincoln Continentals in the area to cast doubt on the proposition that the shooter or shooters were in *Wilson's* car.

¶71 The Wisconsin Supreme Court noted that Attorney Kovac had not shown in his unsuccessful offer of proof that the third-party perpetrator evidence was admissible under ***Denny*** because, among other things, he had not shown that Friend, Larnell, or their alleged unnamed associates had access to a gold Lincoln Continental similar to Wilson's car. *See* ***Wilson***, 362 Wis. 2d 193, ¶85. After the ***Machner*** hearing, the circuit court made no explicit findings of fact on this issue—the hearings were quite broad in scope—but it is a matter of record that Attorney Kovac did not call Edwards to testify at trial. The testimony of Edwards would have helped in filling that hole in the evidence.

¶72 Instead, Attorney Kovac focused on Kidd-Edwards' testimony regarding a gold Lincoln Continental that she saw at the shooting scene. Prior to trial, Kidd-Edwards had indicated to an investigator hired by Attorney Kovac that

the license plate had three letters and three numbers. However, in her trial testimony, Kidd-Edwards was adamant that she did not remember whether she had seen the license plate.[9] Her testimony stands in stark contrast to Friend's statement to police immediately after the shooting, when he identified Wilson as the shooter, as well as providing a description of the gold Lincoln at the scene which included the license plate: a vanity plate that spelled "B-BALL." That license plate was then traced back to Wilson.

¶73 Wilson contends that there were additional deficiencies by Attorney Kovac, including errors and omissions in his cross-examination of Friend relating to inconsistencies in Friend's version of events which would likely have cast doubt on the credibility of Friend's testimony. Indeed, Friend's credibility was paramount to the State's case: he was the person who identified Wilson as the shooter; he provided the connection of the car seen at the shooting to Wilson; and he was the one who provided the motive for Wilson to commit the shootings, based on the purported statement of Maric that Wilson had threatened to kill Maric and Friend if he saw them together. In contrast, Kidd-Edwards, the State's witness who both the circuit court and the Majority found compelling, could not identify the shooter or corroborate the license plate.[10]

[9] Specifically, Kidd-Edwards testified that any information she had given to police about the license plate at the time of the shooting would have been accurate, because her "memory was fresh" at that time. However, there was no information about the license plate in the police report with her statement.

[10] I note that Kidd-Edwards' testimony was that she saw Friend running away from the car, but she did not see him being shot at, as she had dropped to her bedroom floor during the first round of shots. Additionally, evidence was presented that Wilson was a sergeant in the Army Reserves, where he had served for eighteen years, and that he was an expert marksman. Yet, Friend was able to escape unscathed during the shooting.

Again, we have only Friend's word regarding what happened prior to, and at the time of, those first five shots.

¶74 Therefore, it stands to reason that the jury placed significant weight on the evidence provided by Friend, and further, that this weight may have been affected if it had been considered in conjunction with Friend's true relationship with Maric—a fact that did not come out until the ***Machner*** hearings.

¶75 In sum, I agree with Wilson that "the magnitude of Kovac's deficiencies was extraordinary." "Just as a single mistake in an attorney's otherwise commendable representation may be so serious as to impugn the integrity of a proceeding, the cumulative effect of several deficient acts or omissions may, in certain instances, also undermine a reviewing court's confidence in the outcome of a proceeding." ***Thiel***, 264 Wis. 2d 571, ¶60. Attorney Kovac's numerous errors and omissions, both large and small, prejudiced the defense to an extent that it rendered the reliability of this proceeding suspect. Stated more simply, Wilson did not receive a fair trial.

¶76 Thus, I am persuaded that, but for the numerous, unreasonable errors of Wilson's trial counsel, there is a reasonable probability that the result of the proceeding would have been different. *See* ***id.***, ¶81. Therefore, I would reverse and remand this matter for a new trial.

STATE OF WISCONSIN | CIRCUIT COURT Branch 2 | MILWAUKEE COUNTY

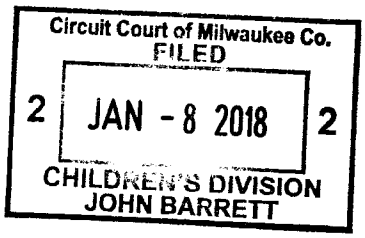
STATE OF WISCONSIN,

Plaintiff,

vs.

GENERAL GRANT WILSON,

Defendant.



Case No. 1993CF931541

FINDINGS OF FACT AND CONCLUSIONS OF LAW AND ORDER DENYING MOTION FOR NEW TRIAL

Pursuant to the Court of Appeals order dated November 15, 2016 remanding the case for an evidentiary hearing,[1] which was held before this court to determine whether the defendant received the ineffective assistance of counsel, the court makes the following findings of fact and conclusions of law with respect to each issue (or a combination of issues):

Findings of Fact (Eva and Willie Friend)

1. Attorney Peter Kovac represented the defendant at trial[2] for the shooting death of Eva Maric. It was his theory of defense that Willie Friend either shot her or that it

[1] The Court of Appeals previously remanded the case for an evidentiary hearing on the defendant's first claim, that the Hon. Victor Manian erred by preventing him from presenting a complete defense under ***State v. Denny***, 120 Wis. 2d 614 (1984). The Court of Appeals was reversed by the Wisconsin Supreme Court, which found that Judge Manian properly excluded evidence of defendant's assertion that Willie Friend committed the homicide. The case was then sent back to the Court of Appeals to address the second and third issues, to wit, whether the defendant received ineffective assistance of counsel and whether "the State improperly introduced prejudicial evidence of gun ownership and other acts." (*Court of Appeals decision dated 11/15/16, p. 3*). Because the Court of Appeals found that the supreme court decision essentially meant that trial counsel's failure " to adequately investigate and make an adequate offer of proof prior to or at trial *resulted in* the proper exclusion of third-party perpetrator evidence pointing to Willie Friend or Larnell Friend" (Id. at p. 5), it found that the defendant had set forth sufficient facts which, if true, showed that he was prejudiced. The evidentiary hearing commenced on May 12, 2017, and continued to June 16, 2017 and July 24, 2017.

[2] June 29-30, July 1-2, July 6-8, 1993.

was a conspiracy between Willie Friend and his brother Jabo (Larnell) Friend to set her up to be killed. (Tr. 6/16/17, pp. 118-119).

2. Attorney Kovac did not file a motion before trial or investigate sufficient facts to support the admission of ***Denny*** evidence.
3. Judge Manian denied Attorney Kovac's request to allow such evidence after hearing a verbal offer of proof based on a possible motive concerning the Friend brothers and an offer of proof based on what two close friends of Eva Maric[3] heard and observed about Willie Friend. Judge Manian's ruling rejecting the offers of proof was based on speculation and hearsay. (Tr. 6/30/93, p. 247-248; 7/6/93, p.m., p. 22).
4. Mary Larson testified that three weeks before Eva's death, she saw welts on Eva's back, which Eva told her had come from physical abuse perpetrated by Willie Friend. Barbara Streeter testified that she remembered "Mary telling me about Willie beating Eva with a hanger once." (Tr. 6/16/17 p. 25).
5. Mary Larson testified at trial but was not permitted to testify about Willie Friend as set forth above.

Conclusions of Law

1. The physical abuse attributed to Willie Friend regarding the welts on Eva Maric's back was hearsay and would not have been admissible evidence to support a third-party perpetrator defense that Willie Friend was connected to or associated with the shooting of Eva Maric.

[3] Mary Larson and Barbara Lange Streeter testified at the evidentiary hearing that four or five weeks before Eva's death when Willie Friend came to Mary Larson's house with Eva, they were all in the kitchen and Willie Friend had a gun sticking out of his pants. He announced that Eva was going to do what he said or he'd pop her and wouldn't think twice about it. (Tr. 5/12/17, p. 19). After this incident a couple weeks later, she said that she saw signs of abuse on Eva's back and that Eva told her that was done by Willie Friend. (Id. at 19-20). Barbara Streeter testified that Willie Friend said (after Eva said she was "done" with prostitution), "[W]ell, you ain't stopping. I'm gonna keep all my bitches in check." (Tr. 6/16/17 at pp. 11, 13, 29).

2. Testimony from Mary Larson or Barbara Streeter about Willie Friend stating he would keep Eva Maric in check or "pop" her was presented to Judge Manian at trial as an offer of third-party perpetrator proof under ***Denny***, as well as the physical abuse by Friend -- both rejected as speculative or predicated on hearsay. (Tr. 7/6/93, p. 22).
3. The above testimony, and any testimony as to the victim's status as a prostitute or the Friend brothers as her pimps, is insufficient to meet the ***Denny*** criteria because ***Denny***'s legitimate tendency test requires "more than mere possibility." ***State v. Wilson***, 11AP1803-CR, Supreme Court Decision dated 5/12/15 at ¶83. The defendant was not prejudiced by an offer of proof based on mere possibility and speculation.
4. Attorney Kovac's failure to ask Willie Friend whether he was Eva Maric's pimp or whether he physically abused Eva Maric to establish that Friend was associated with her murder was not prejudicial for the same reasons set forth in #3.

Findings of Fact (Lab/Medical Evidence)

1. Attorney Kovac did not use lab or medical evidence during his cross-examination of Willie Friend.

Conclusions of Law

1. There is no showing that evidence of whom Eva Maric had sex with prior to her death, or the inconclusive medical examiner testimony about her empty stomach (and whether she had consumed chicken as Friend stated), would have been reasonably probable to alter the outcome of the trial. Attorney Kovac's failure to delve into these matters did not prejudice the defendant's case.

Findings of Fact (Gun)

1. Attorney Kovac did not question the State's ballistics expert about distinctions between a .44 caliber Sturm Ruger (murder weapon) and a .44 caliber Smith &

Wesson (which defendant stated he once owned) and never told the jury that the defendant's .44 caliber revolver was not the same type as the .44 caliber revolver that was determined to have killed Eva Maric.

Conclusions of Law

1. The gun was never found, and it was only the defendant's word that his .44 caliber revolver was a Smith & Wesson. Given that he admitted on the stand that he had lied to police that he ever owned a .44 caliber revolver, there is not a reasonable probability the jury would have believed his assertion that his .44 caliber revolver was not the same brand as the murder weapon.

Findings of Fact (Hearsay)

1. Attorney Kovac initially objected to the admission of three hearsay statements. Willie Friend testified that Eva Maric told him hours before her death that she had just recognized the defendant's vehicle go by; that she was being stalked by the defendant in his car that night; and that the defendant had driven her off the road and threatened to kill her by pointing a gun at her if she didn't stop seeing Friend.
2. Judge Manian ruled that the first statement would be admissible as a present sense impression exception to the hearsay rule. The second statement was not elicited in the trial testimony. Judge Manian ruled the third statement inadmissible. (Tr. 6/29/93, pp. 242-243). The third statement was admitted after Attorney Kovac withdrew his objection, reasoning that he believed Judge Manian would reconsider his ruling after the State presented law allowing its admission to the court. (Id. at 250).

Conclusions of Law

1. The third hearsay statement would have been admitted as an excited utterance because it was made at the after-hours club right after it occurred and there was testimony that the victim was very upset after it happened. Willie Friend testified that he was at his brother's after-hours place when Eva Maric came in and said, "[Y]ou wouldn't believe this, but General tried to run me off the road. . . and she said the dude walked up to the car, supposed to have had a revolver and told her that if I see you and that nigger together again, I'm going to kill you." (Tr. 7/6/93 II, p. 32). Friend stated that Eva "was really upset . . . scared and shaken." (Id. at 55).
2. Attorney Kovac's performance was deficient in withdrawing the objection, but it did not prejudice the defendant's case because the statement would have been admissible as an excited utterance.

The court finds that Attorney Kovac's performance was deficient in various respects, but that his performance was not prejudicial.[4] The court's conclusions related to the lack of prejudice are based on the totality of the trial evidence examined in conjunction with the evidence presented at the evidentiary hearing. The court simply cannot find that the defendant has shown sufficient evidence to satisfy the opportunity prong of the legitimate tendency test under ***Denny***, and therefore, counsel was not ineffective. It agrees with the State that the reasons why the opportunity prong was not met during the trial "are still in existence after the post-conviction evidentiary hearings." (*State's brief filed on 10/24/17, p. 5*). In this respect, the court relies on the State's analysis related to the proffered testimony of Mary Larson and Barbara

[4] To the extent that the court did not specifically address a factual issue, it found that it was not significant enough to amount to ineffective assistance of counsel or reasonably probable to alter the outcome of the trial.

Streeter being insufficient to satisfy the opportunity prong under ***Denny***. (Id. at pp. 5-7). The court also agrees with the State that whether Willie Friend or Jabo Friend was Eva's pimp, or whether Willie Friend was a felon who used multiple aliases, or whether the after-hours club was connected with prostitution, guns and drugs are issues which are premised on nothing but speculation in the defendant's quest to satisfy the opportunity prong of ***Denny***. Similarly, counsel's failure to ask questions about the location of the bullet holes in Eva's body or where the first bullet entered her in order for purposes of undermining Willie Friend's testimony about the location of the shooter did not result in prejudice to the defendant for the same reasons set forth by the State in its brief. (Id. at 12-14).

The evidence presented by the State at trial supports all of the findings the court has made with regard to counsel. The question is whether there is a reasonable probability that confidence in the outcome is undermined or whether there would be a different result at trial based on the alleged failures attributed to Attorney Kovac. Putting aside Willie Friend as the State's star witness, the court finds the most striking witness was Carol Kidd-Edwards, a woman who lived on the street where Eva Maric was shot while sitting in her car. Kidd-Edwards testified that she was up early in the morning getting dressed when she heard "maybe five shots that came one right behind the other" that "rang out very, very loud." (Tr. 6/30/93, pp. 96-97). When the shots stopped, she looked out the window and saw a man running away from a car parked across the street taking refuge between two houses, whom she identified as Willie Friend. (Id. at 97-98). She said she saw a gold-toned Continental parked in front of the house (Id. at 101), and at the time she looked out the window [after the shots had stopped] and saw Willie running, she also saw a man coming around from what appeared to be the passenger side of the gold-toned Continental and approach the car across the street. (Id. at 103). She testified that as he approached the car, he was top loading a gun and pulling back the top of the gun, after which he

then went up to the driver's side of the car, stood, and fired five or seven rounds (not as loud) into the car. (Id. at 103-104). He pointed the gun directly into the driver's side of the car from a distance of about two feet. (Id. at 104-105). He then turned and went back in front of the gold-toned Lincoln and got into the car. (Id. at 106). She heard the door shut and the car pull off very fast. (Id.). She stated that Willie was banging on her front door hollering for her to call 911. (Id. at 108-109). The police arrived in five or ten minutes. (Id. at 110). Willie Friend stayed on the scene. Carol Kidd-Edwards' testimony fully supported Willie Friend's testimony as to what transpired. It stretches the limits of credibility that Friend was involved in a conspiracy given the close proximity of the shots being fired at him, his hollering for someone to call 911, and then going back to the scene to wait for police to arrive. Moreover, the defendant's own credibility was strongly compromised when he lied to police about owning a .44 caliber gun[5] *and* during the booking process. When the booking officer asked Officer Raspberry what the defendant was being charged for, the latter said a shooting. (Tr. 6/30/93, p. 208). When the booking officer asked if the victim had died, Officer Raspberry nodded his head, and the booking officer said, "Oh, so it's a homicide then." (Id.) At this point the defendant, who had not yet been informed of any facts of the case said, "She's dead? You guys didn't tell me she was dead." (Id.) He then started to cry. (Id.) During the defendant's testimony at trial, the jury heard that he knew the victim was a *she* before knowing the actual identity of the victim. (Tr. 7/2/93, pp. 74-77). All of these factors render what has been proffered towards a conspiracy theory totally improbable. In this regard, the defendant simply has not established that trial counsel's actions prejudiced him.

[5] The defendant testified at trial that he only told police about what guns he had and what he could produce. (Tr. 7/2/93, p. 56). However, the State established that there were other guns he no longer owned or had in his possession that he *had*, in fact, told police about – just not the .44. (Id. at 82-86, 94-100).

The supreme court found that the defendant's proffer was "entirely speculative and fell short of establishing a legitimate tendency that Friend arranged for hit men to kill Maric." (*Supreme Court decision dated at ¶122*). It found his proffered evidence "pure speculation about unidentified, hypothetical hit men." (Id. at ¶120). It indicated that in other jurisdictions, evidence of unknown third-party perpetrators was deemed too speculative to be admissible. (Id. at ¶110). In short, it concluded, "It would require a great deal of speculation to conclude that Friend hired assassins to kill the allegedly pregnant Maric based on testimony that he slapped and threatened her once or twice." (Id. at ¶116). "In sum, if Wilson's defense theory is viewed as an unknown third-party perpetrator theory because the alleged shooters are unknown, his proffered evidence is inadmissible under Denny, Scheidell, and many non-Wisconsin cases." (Id. at ¶117). As indicated above, nothing has really changed to any significant extent, and there is no showing that Willie Friend himself could have killed Eva Maric. The evidence adduced at three days of evidentiary hearings does not extend much beyond what was previously presented and is insufficient to demonstrate that a new trial is warranted on the basis that trial counsel was ineffective for failing to properly investigate and present an offer of proof to sufficiently support a ***Denny*** defense.

THEREFORE, IT IS HEREBY ORDERED that the defendant's motion for a new trial is **DENIED.**

M. Joseph Donald

Circuit Court Judge/Circuit Court Commissioner/Register in Probate

M. Joseph Donald

Title (Print or Type Name if not eSigned)

January 8, 2018

Date

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DISTRICT I

Amended as to panel November 21, 2016
November 15, 2016

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You are hereby notified that the Court has entered the following opinion and order:

2011AP1803-CR State of Wisconsin v. General Grant Wilson
(L.C. # 1993CF931541)

Before Curley, P.J., Kessler and Brennan, JJ.

General Grant Wilson was convicted of first-degree intentional homicide and attempted first-degree intentional homicide after a jury trial. On direct appeal, we reversed and remanded for a new trial. *See* ***State v. Wilson***, No. 2011AP1803-CR (WI App Oct. 24, 2014).[1] We

[1] Wilson's right to a direct appeal was reinstated on September 14, 2010, on the grounds that his lawyer, Peter Kovac, provided him with ineffective assistance of appellate counsel.

concluded that Wilson was denied a meaningful opportunity to present a complete defense during his trial because the circuit court did not allow him to introduce evidence that someone else killed the victim, Evania Maric. *See* ***Crane v. Kentucky***, 476 U.S. 683, 690 (1986), and ***State v. Denny***, 120 Wis. 2d 614, 357 N.W.2d 12 (1984).

The Wisconsin Supreme Court reversed our decision, ruling that the circuit court properly excluded the third-party perpetrator evidence under ***Denny***. *See* ***State v. Wilson***, 2015 WI 48, 362 Wis. 2d 193, 864 N.W.2d 52. The Wisconsin Supreme Court remitted the case to the circuit court on August 4, 2015. Several months later, Assistant Attorney General Marguerite M. Moeller moved the Wisconsin Supreme Court to vacate its remittitur and remand to this court to allow us to address the other issues raised in Wilson's brief, which we did not reach because we ordered a new trial. The Wisconsin Supreme Court vacated its remittitur on November 4, 2015, and remanded to this court to address the remaining issues pending in this appeal.

The Wisconsin Supreme Court's decision fully sets forth the facts and procedural history of this case. *See* ***id.*** To briefly recap, Maric was repeatedly shot with two different guns while seated in a parked car in front of an illegal "after hours" club owned by Larnell Friend around 5:10 a.m. on April 21, 1993. Willie Friend, Larnell's brother, was dating Maric and was with her in the car when she was shot, but fled without being injured. Willie Friend told the police that Wilson, who had also been dating Maric, opened fire on both of them, killing Maric. Willie Friend was the only person linking Wilson directly to the crime. Wilson adamantly denied killing Maric and said that he was at home asleep when the murder occurred. At trial, Wilson's

lawyer, Peter Kovac, attempted to present evidence implicating Willie Friend and/or his brother Larnell Friend, in Maric's murder. The circuit court did not allow the evidence.[2]

Wilson raised three arguments in his briefs to this court: (1) the circuit court erred by preventing him from presenting a complete defense despite his meeting the requirements of ***Denny***; (2) he received ineffective assistance of trial counsel; and (3) the conviction should be reversed because the State improperly introduced prejudicial evidence of gun ownership and other acts. The second and third issues remain pending.

To prove a claim of ineffective assistance of counsel, a defendant must show that his lawyer performed deficiently and that this deficient performance prejudiced him. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). "[T]he purpose of the effective assistance guarantee of the Sixth Amendment … is simply to ensure that criminal defendants receive a fair trial." ***Id.*** at 689. The test for deficient performance is whether counsel's representation fell below objective standards of reasonableness. ***State v. Carter***, 2010 WI 40, ¶22, 324 Wis. 2d 640, 782 N.W.2d 695. "[C]ounsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations [] unnecessary." ***Strickland***, 466 U.S. at 695. To show prejudice, "the defendant must show that 'there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" ***Carter***, 324 Wis. 2d 640, ¶37 (quoted source omitted).

A circuit court must hold an evidentiary hearing on a claim of ineffective assistance of counsel if a motion alleges facts which, if true, would entitle the defendant to relief. *See* ***State v.***

[2] For a recent in-depth discussion of third-party perpetrator evidence, *see* David S. Schwartz & Chelsey B. Metcalf, *Disfavored Treatment of Third-Party Guilt Evidence*, 2016 WIS. L. REV. 337.

Bentley, 201 Wis. 2d 303, 310, 548 N.W.2d 50 (1996). "Whether a motion alleges facts which, if true, would entitle a defendant to relief is a question of law that we review de novo." ***Id.***

Turning first to the performance prong of the ***Strickland*** test, Wilson alleges that Kovac provided him with constitutionally deficient performance by failing to adequately investigate his third-party perpetrator claim prior to trial and by failing to make an adequate offer of proof prior to or at trial that Willie Friend and/or Larnell Friend had the opportunity to kill Maric. Wilson also alleges that Kovac, who repeatedly requested that the trial be postponed because he was not prepared, also failed to clearly explain why the evidence was admissible. Kovac's alleged failure to adequately investigate and prepare an offer of proof before or at trial regarding the third-party perpetrator evidence, and his failure to clearly explain why the evidence was admissible, if true, meet the deficient performance prong of the ***Strickland*** test. ***Id.***, 466 U.S. at 695 (counsel has the duty to undertake reasonable investigation and provide representation that does not fall below objective standards of reasonableness).[3]

As for the prejudice prong of the ***Strickland*** test, Wilson alleges that there is a reasonable probability that the result of the proceeding would have been different if Kovac had properly investigated and made an adequate offer of proof regarding the third-party perpetrator evidence. The Wisconsin Supreme Court held that the circuit court properly excluded the third-party

[3] Kovac belatedly made an offer of proof near the close of the defense's case that two of Maric's friends, Mary Lee Larson and Barbara Lange, would testify that Willie Friend threatened to kill Maric several weeks before the murder in front of them and was physically violent to Maric in their presence. As it bears on Wilson's claim that Kovac did not adequately investigate or prepare for trial, we note that other information in the record bearing on Wilson's third-party perpetrator theory includes a police report in which Maric's sister, Deja Maric, said that Willie Friend beat Evania Maric with a coat hanger several weeks before the murder, causing extensive bruising to her upper torso, and Maric's mother, Clara Maric, told the police that Evania Maric had been working as a prostitute, that Larnell Friend was her pimp, that Evania wanted to get out of the business, that Larnell Friend had threatened to kill her for leaving, and that Clara Maric believed Evania Maric had "liberated" herself from Larnell Friend.

perpetrator evidence because Kovac failed to make an adequate offer of proof that Willie Friend or Larnell Friend had the opportunity to kill Maric. *See* ***Wilson***, 362 Wis. 2d 193, ¶¶10, 83, 86. Based on the Wisconsin Supreme Court's decision, Kovac's failure to adequately investigate and make an adequate offer of proof prior to or at trial *resulted in* the proper exclusion of third-party perpetrator evidence pointing to Willie Friend or Larnell Friend. Wilson has thus alleged sufficient facts that, if true, show that he was prejudiced. Wilson was therefore entitled to a hearing on his claim of ineffective assistance of counsel. *See* ***Bentley***, 201 Wis. 2d at 310 (a circuit court must hold an evidentiary hearing on a claim of ineffective assistance of counsel that alleges facts which, if true, would entitle a defendant to relief).

We remand to the circuit court for a hearing on Wilson's claim that he received ineffective assistance of counsel.[4] Due to the length of time that has passed since Wilson filed his postconviction motion on January 24, 2011, and the subsequent developments in this case, our order is not intended to limit the circuit court's discretion to consider whatever issues it deems appropriate.[5]

[4] The scope of Wilson's claim is not limited by the issues discussed in this opinion.

[5] We do not address Wilson's argument that his conviction should be reversed because the State improperly introduced prejudicial evidence of gun ownership and other acts because we remand for a hearing on Wilson's claim of ineffective assistance of trial counsel. *See* ***Turner v. Taylor***, 2003 WI App 256, ¶1 n.1, 268 Wis. 2d 628, 673 N.W.2d 716 (if a decision on one point disposes of an appeal, we will not decide the other issues raised).

IT IS ORDERED that the circuit court's order denying the postconviction motion is reversed and this case is remanded to the circuit court for a hearing on Wilson's postconviction motion under WIS. STAT. RULE 809.30.

Diane M. Fremgen
Clerk of Court of Appeals

2015 WI 48

SUPREME COURT OF WISCONSIN

CASE NO.:	2011AP1803-CR
COMPLETE TITLE:	State of Wisconsin, Plaintiff-Respondent-Petitioner, v. General Grant Wilson, Defendant-Appellant.

REVIEW OF A DECISION OF THE COURT OF APPEALS
(No cite)
(Ct. App. 2013 – Unpublished)

OPINION FILED:	May 12, 2015
SUBMITTED ON BRIEFS:	
ORAL ARGUMENT:	September 4, 2014
SOURCE OF APPEAL:	
COURT:	Circuit
COUNTY:	Milwaukee
JUDGE:	Victor Manian
JUSTICES:	
CONCURRED:	ZIEGLER, J., ROGGENSACK, C.J., concur(Opinion Filed.)
DISSENTED:	ABRAHAMSON, BRADLEY, JJ., dissent (Opinion Filed.)
NOT PARTICIPATING:	

ATTORNEYS:

For the plaintiff-respondent-petitioner, the cause was argued by *Maguerite Moeller*, assistant attorney general, with whom on the briefs was *J.B. Van Hollen*, attorney general.

For the defendant-appellant, the cause was argued by *Anne Berleman Kearney*, with whom on the brief was *Joseph D. Kearney* and *Appellate Consulting Group*, Milwaukee.

An amicus curiae brief was filed by *Carrie Sperling*, *John A. Pray*, and the *Frank J. Remington Center*, on behalf of the University of Wisconsin Law School.

2015 WI 48

NOTICE

This opinion is subject to further editing and modification. The final version will appear in the bound volume of the official reports.

No. 2011AP1803-CR
(L.C. No. 1993CF931541)

STATE OF WISCONSIN : IN SUPREME COURT

State of Wisconsin,

Plaintiff-Respondent-Petitioner,

v.

General Grant Wilson,

Defendant-Appellant.

FILED

MAY 12, 2015

Diane M. Fremgen
Clerk of Supreme Court

REVIEW of a decision of the Court of Appeals. *Reversed.*

¶1 DAVID T. PROSSER, J. This is a review of an unpublished decision of the court of appeals, reversing a judgment of conviction for a Milwaukee County homicide as well as a subsequent order denying postconviction relief.

¶2 The case requires us to determine whether, in 1993, the Milwaukee County Circuit Court, Victor Manian, Judge, erred by excluding evidence proffered by the defendant, General Grant Wilson (Wilson), that a third party committed the homicide for which Wilson was being tried.

¶3 The law is well established that a defendant has due process rights under the United States and Wisconsin Constitutions to present a theory of defense to the jury. However, a defendant's ability to present specific evidence to support a defense at trial may be subject to conditions or limitations. When a defendant seeks to present evidence that a third party committed the crime for which the defendant is being tried, the defendant must show "a legitimate tendency" that the third party committed the crime; in other words, that the third party had motive, opportunity, and a direct connection to the crime. State v. Denny, 120 Wis. 2d 614, 357 N.W.2d 12 (Ct. App. 1984).

¶4 In this case, the State accused Wilson of killing Evania (Eva) Maric (Maric) in the early-morning hours of April 21, 1993. Before the shooting, Maric had been sitting in her car with Willie Friend (Friend), a man with whom she was romantically involved. They were parked outside an illegal after-hours club operated by Friend's brother.

¶5 According to Friend, General Grant Wilson pulled up in his gold Lincoln Continental, got out, approached Maric's car, and began firing a large-caliber handgun. Friend fled, narrowly avoiding bullets fired in his direction. An eyewitness, Carol Kidd-Edwards, saw Friend flee and saw a shooter fire an additional five to seven shots into the driver's side of Maric's car with a smaller-caliber handgun. Kidd-Edwards watched the shooter walk toward the passenger side of the gold Lincoln

before leaving her line of sight. She then heard a car door close and saw the car speed away.

¶6 At trial, Wilson blamed Friend for Maric's murder. Wilson theorized that Friend had lured Maric to her car and kept her talking until an unknown assassin or assassins could kill her and frame Wilson for the crime.

¶7 To support this theory, Wilson attempted to introduce the testimony of two witnesses: Mary Lee Larson and Barbara Lange. Both Larson and Lange indicated they would testify that Friend had slapped and threatened Maric about two weeks before her murder. The circuit court ruled that the testimony was inadmissible because the issue was not who killed Maric, but rather, whether Wilson killed Maric. After a seven-day trial, the jury found Wilson guilty of first-degree intentional homicide (Maric) and attempted first-degree intentional homicide (Friend). On October 4, 1993, the court sentenced Wilson to life imprisonment for the homicide plus 20 years of imprisonment for the attempted homicide.

¶8 In June of 1996, Wilson filed a postconviction motion seeking a new trial based on the court's decision to exclude Wilson's proffered testimony from Larson and Lange. The court denied the motion, and Wilson's attorney failed to file an appeal. In September of 2010, the court of appeals reinstated Wilson's direct appeal due to his counsel's error. In January of 2011, Wilson filed another motion with the circuit court seeking a new trial. The circuit court denied the motion, and Wilson appealed.

¶9 The court of appeals summarily reversed Wilson's conviction and the circuit court's order denying postconviction relief. The court determined that Friend had the opportunity to kill Maric and that the State failed to show that the circuit court's alleged error in not admitting Wilson's proffered evidence was harmless. State v. Wilson, No. 2011AP1803-CR, unpublished order (Wis. Ct. App. Oct. 22, 2013). The court reasoned that Friend's involvement could have been direct (i.e., Friend could have been the shooter himself) or indirect (i.e., Friend could have engaged a gunman or gunmen to kill Maric); and given the conflicting evidence, the State could not meet its burden of showing that there was no reasonable possibility that the circuit court's error contributed to the guilty verdict. The State appealed, and we granted review.

¶10 We reaffirm the Denny test as the appropriate test for circuit courts to use to determine the admissibility of third-party perpetrator evidence. However, we conclude that, for a defendant to show that a third party had the "opportunity" to commit a crime by employing a gunman or gunmen to kill the victim, the defendant must provide some evidence that the third party had the realistic ability to engineer such a scenario. Here, Wilson has failed to show that Friend had the opportunity to kill Maric, directly or indirectly; consequently, it was not error for the circuit court to exclude Wilson's proffered evidence. Accordingly, we reverse.

I. FACTUAL BACKGROUND AND PROCEDURAL HISTORY

¶11 Maric was shot to death in the 3200 block of North 9th Street in Milwaukee at about 5:00 a.m. on April 21, 1993. Two weapons were used in the shooting: a .44 caliber gun and a .25 caliber gun. Maric was shot seven times in total: once in the chest and once in the back with the .44, and five times in the left front and side of her torso with the .25. Willie Friend was present at the shooting and was the principal witness against Wilson.

¶12 When police conducted an investigation at the crime scene, they recovered several bullets and bullet fragments: one .44 caliber jacketed bullet was found in the grassy area between the curb and sidewalk, a .44 caliber lead bullet was found nearby in the ground, another .44 caliber lead bullet was found in the front yard of an adjacent house on North 9th Street; four .25 caliber brass casings were found in Maric's car, one in the front seat area and three in the back.

¶13 The police investigation quickly focused on Wilson based on Friend's statement, shortly after the shooting, that Wilson was the shooter. Later that morning, Lieutenant Michael LaPointe of the Milwaukee Police Department, along with two detectives and other officers, went to Wilson's place of employment. LaPointe informed Wilson that they were investigating a shooting, that he was a suspect, and that he was under arrest. Wilson gave the officers permission to search his two lockers at work as well as his car. The officers recovered pictures of the victim from one of the lockers and a .38 caliber revolver from the trunk of his car. Later, LaPointe and other

officers searched Wilson's house and recovered a .357 caliber revolver from Wilson's bed. LaPointe also recovered two boxes that formerly contained .25 caliber handguns. Additionally, LaPointe recovered two .25 caliber cartridges from Wilson's home.

¶14 Detective Michael Young interviewed Wilson on April 22. Detective Young asked Wilson if he owned any .25 caliber handguns, and Wilson answered that he owned three .25 caliber Raven[1] semiautomatic pistols: police had custody of one, his mother had the second, and his brother had the third. None of the five weapons cited above was one of the murder weapons.

¶15 Detective Young also asked Wilson if he owned a .44 magnum revolver; Wilson answered that he did not. When Detective Young subsequently asked Wilson if he had ever owned a .44 magnum revolver, Wilson replied that he had not.

¶16 After Wilson denied owning a .44, police questioned Terry Jean Bethly, a friend of Wilson. Bethly informed the police that on April 3, 1993, she and Wilson went to a shooting range and Wilson brought a .44 with him. Bethly stated that she bought ammunition for Wilson's .44 that day. Bethly also said

[1] Transcripts in the record describe this gun as a "Ravin," which is probably a misspelling by the court reporter. Raven Arms was a weapons manufacturer founded in 1970 that specialized in low-cost handguns. See Nicholas Freudenberg, Lethal but Legal: Corporations, Consumption, and Protecting Public Health 48 (2014). The Raven Arms MP25 was one of the guns most used in crimes in the 1990s. Peter Harry Brown and Daniel G. Abel, Outgunned: Up Against the NRA 157 (2010).

that she had seen Wilson with the .44 on another occasion. Police also questioned Wilson's brother, who confirmed Wilson's possession of a .44. After learning this, Detective Michael Dubis questioned Wilson again regarding his ownership of a .44, but Wilson continued to deny ever owning or possessing one.

¶17 On April 26, the State charged Wilson with First-Degree Intentional Homicide While Possessing a Dangerous Weapon and Attempted First-Degree Intentional Homicide While Possessing a Dangerous Weapon.[2] He was bound over for trial after a preliminary examination. The State filed an information with the same charges on May 5, to which Wilson pled not guilty. Trial was scheduled for June 28, 1993. After pretrial motions, jury selection, and opening statements, testimony began on June 30. Below are highlights of the trial testimony.

A. Willie Friend's Testimony

¶18 At trial, Willie Friend testified that he entered into an intimate relationship with Maric in 1992, after having known her for about 12 years. On April 20, 1993, Friend asked Maric to pick him up at the Milwaukee County Courthouse after a child support hearing.[3] The time was around 4:00 or 5:00 p.m. The two drove to Maric's home in South Milwaukee after picking up some medication for Maric's mother. Friend left after Maric lent him

[2] Contrary to Wis. Stat. §§ 940.01(1), 939.32, and 939.63(1)(a)2. All subsequent references to the Wisconsin Statutes are to the 1991-92 version unless otherwise indicated.

[3] Friend testified that he had four children, three of whom were under the age of 18.

her car and he returned about 11:00 p.m. They briefly drove around the area, then headed to the north side of Milwaukee, stopping at a tavern "on 3rd and Center between Center and Hadley, I believe." They remained at the tavern, for "a few drinks," for "an hour or two."

¶19 Upon leaving the tavern, they drove west on Center Street and observed a gold Lincoln parked near another tavern. Friend said that Maric remarked that "there go General's car." Friend said he noted that the gold Lincoln had a license plate with "G-Ball" on it. When the prosecutor showed Friend a picture of Wilson's car, Friend identified Wilson's car as the car he had seen that night.[4]

¶20 Friend and Maric kept driving on Center Street to 17th, where they turned right to stop "at this chicken place" to get something to eat. They then drove to Friend's mother's house located at 3859 North 9th Street. They parked in front of the house to eat their chicken.

¶21 Soon Wilson pulled up in the same gold Lincoln that Friend had seen earlier. It had "the inside dash lights on." Wilson was driving with an unknown person in the front seat. Friend said he saw Wilson and identified him, although he had never seen him before except in a "picture photo" that Maric had shown him. After eyeing Maric's car, Wilson drove away. Three

[4] Wilson's sister, Sandra Wilson, later testified that she located five other Lincolns in the community to discount the uniqueness of Wilson's car.

or four minutes later Wilson drove by again, which caused Maric to have, as Friend described it, a "hyper-reaction."

¶22 Friend testified that he and Maric remained at his mother's house for an hour or so before Maric left in her car to return home. It was around 2:00 a.m. He testified that while they were at his mother's house, Maric expressed concerns about Wilson, with whom she was trying to end a relationship.

¶23 Afterwards, Friend walked south to the house of his brother, Larnell "Jabo" Friend, located at 3288 North 9th Street. Friend admitted under pressure that Jabo's house could be characterized as an "after hours place." About the time that Friend reached the house, Maric arrived and told Friend that Wilson had tried to run her off the road. She explained that Wilson walked up to her car holding a revolver and told her that if he saw her with Friend again, he would kill them both.

¶24 Maric and Friend stayed at Jabo's house for a while. Then, about 4:30 a.m., Friend walked Maric to her car. Maric's car was parked on the corner of 9th and Concordia, facing north, on the same side of the street as Jabo's house. After some time sitting in the car, Friend saw Wilson's car approach from the north and pull up directly across from Maric's car. Friend testified that he knew the car was Wilson's and was the same car he had seen earlier that night because of the color and fresh paint job, and because the car was "clean." Friend got out of Maric's car as Wilson's car approached, believing that Wilson wanted to talk to him about the situation. Friend testified

that the only person he saw in the car was Wilson but that he could not say whether someone else was in the car.

¶25 Instead of talking, Wilson got out of the driver's side of the Lincoln and approached the driver's side of Maric's car with a "blue steel large revolver" in his left hand. Wilson started shooting, and Friend ducked down beside Maric's car, with the passenger door open between him and Wilson, then began running. A bullet went through the door, and bullets hit the concrete around Friend, causing dirt to fly up and hit him as he ran to a passageway between two houses.[5] Friend ran through the passageway and around a house, and heard about three or four gunshots in rapid succession from a smaller gun before hearing a car door slam and the fast acceleration of an engine.

¶26 When Friend returned to the street Wilson's car was gone. He found Maric lying across the seat sideways, facing the passenger side. After raising her up, Friend saw a large, bloody wound on Maric's chest. He then went to Jabo's house to tell him that Maric had been shot. A neighbor called for medical assistance, which arrived shortly thereafter.

¶27 Friend identified Wilson as the shooter at the crime scene. Later, at the police station, he identified Wilson in a photo lineup as the person who shot at him when he was next to

[5] Detective Dennis Kuchenreuther later corroborated the existence of bullets and scattered dirt in this area when he testified to the location of bullets in the ground, the presence of abrasions on the sidewalk, a gouge in the dirt, and scattered dirt on the sidewalk.

Maric's car. Friend also told the police that Wilson was stocky and was wearing gold-rimmed glasses.

B. Carol Kidd-Edwards' Testimony

¶28 On the morning of April 21, 1993, Carol Kidd-Edwards, who lived at 3291 North 9th Street, was awake in her bedroom, putting on her shoes to take her husband to work. At about 5:00 a.m. she heard about five very loud, consecutive gun shots. When the shots began, she dove to the floor. When they stopped, she ran to the window to see what was happening. She saw a man with a brown leather jacket, whom she later identified as Friend, running away from a car, which she later identified as Maric's car, parked on the corner across the street from her house. She then saw Friend "take[] refuge on the side between two houses, of a house directly across the street from [hers]." Kidd-Edwards testified that she did not see any objects in Friend's hand.

¶29 Kidd-Edwards' house was the third from the corner on the west side of 9th Street. She said she could see everything to the corner across the street but had an obstructed view of the street and sidewalk on her side of the street. She testified that she saw a "gold toned Continental, a mark version of the Continental" near the corner on her side of the street. When shown a picture of Wilson's car, Kidd-Edwards stated that his car appeared to be like the car she saw. In giving her description, she demonstrated considerable knowledge of Lincoln automobiles.

¶30 Kidd-Edwards testified that as Friend was running from Maric's car, she saw a man walking from the passenger side of the Lincoln, which was in a blind spot from her bedroom window. Kidd-Edwards described the man as "a brown toned color black man," "roughly six feet," with a "top fade" hairstyle. Kidd-Edwards stated that she did not remember whether the man was wearing glasses. She was unable to get a good view of the man's face.

¶31 As the man was walking towards Maric's car, Kidd-Edwards saw him "top load[] a gun" and pull back the top of the gun. The man approached the driver's side of Maric's car and fired five to seven shots into the car. They were not as loud as the previous shots, suggesting a smaller gun. Afterwards, the man walked back towards the Lincoln into her blind spot. Although she did not see the man get into the car, she heard the door shut and saw the car quickly pull off and drive south, past her house. Kidd-Edwards testified that she could not see whether the man got into the passenger side of Wilson's car, but she could see the driver's side and did not see anyone get into that side of the car.

¶32 Kidd-Edwards stated that she did not see anyone other than the man firing the shots and Friend. After the Continental drove away, Kidd-Edwards heard Friend pound on her door and called 911 after Friend yelled repeatedly, "call 911, call 911." Kidd-Edwards stated that upon seeing the victim up close, she

appeared to be pregnant. She later asked Friend whether the victim was pregnant, and he told her that she was.[6]

C. General Grant Wilson's Testimony

¶33 Wilson testified that he met Maric on June 18, 1988 and had maintained some sort of relationship with her until the time of her death. When asked whether he had ever been near Jabo's house on 9th Street, Wilson testified that Maric had driven by when he was in the car, pointed out the house to him, and said that if "something ever happened to her that . . . would be the place."

¶34 One of Wilson's defenses was that he was at home when the shootings occurred. Wilson relied on an alibi witness, Rosanne Potrikus, to support his story that he did not shoot Maric. Wilson testified that on the night of the murder, he went to see Potrikus at a bar where she worked. He called the bar Throttle Twisters.[7] After Potrikus closed the bar, she and Wilson went to another bar in his car. After learning that that bar was closed, Wilson and Potrikus drove to a Kentucky Fried Chicken on Capitol Drive. Afterwards, Wilson testified that the

[6] Dr. Jeffrey Jentzen, the forensic pathologist assigned to the case, performed a complete autopsy on Maric and testified that she was not pregnant.

[7] In 1993 the Twisters bar was located at 508 West Center Street, Milwaukee.

two drove around Capitol Drive and then around 8th and 9th Streets.[8]

¶35 After Wilson dropped Potrikus off at her car, they drove west on Center Street toward the freeway. Wilson exited the freeway on Silver Spring Drive and drove to his home on 74th and Carmen, arriving sometime between 3:30 a.m. and 4:00 a.m.[9] He parked his car in the front of his house. Wilson stated that his roommate, Pedro Smith, was not home at that time. Wilson went to sleep on the couch and woke up around 5:15 a.m., and eventually got ready for work, which started at 7:00 a.m.[10]

¶36 Finally, when Wilson was questioned about whether the .44 he brought to the shooting range with Terry Bethly was his, he admitted to owning a .44 at that time. He said it was a Smith and Wesson Magnum, not a Sturm Ruger (which apparently was the type of .44 used in the shooting). Wilson stated that he did not tell the truth to the police when they questioned him

[8] This testimony corroborated earlier testimony by Potrikus about her activities with Wilson that evening.

[9] Wilson's testimony about his movements coincides with Friend's testimony about where he and Maric saw Wilson's car that evening. Wilson, of course, did not admit that he drove by Jabo's house on North 9th Street at approximately 5:00 a.m.

[10] Detective Brian O'Keefe testified that Wilson told him he arrived at his home at 3:00 a.m. Pedro Smith testified that he woke up around 3:35 a.m. on April 21, 1993 to go to work but did not see or hear Wilson anywhere in the house, including on the couch, and still did not see Wilson when he left for work at about 3:55 a.m. Smith also testified that he did not see Wilson's car in front of the house when he left for work.

about ever owning a .44 because he did not have it in his possession at that time. Wilson testified that he brought the gun with him on his recent vacation to Florida, and on his way back to Wisconsin he stopped in Alabama and exchanged it for certain "illicit pleasures" from "drug dealers and pimps."[11]

D. Attempts to Introduce Third-Party Perpetrator Evidence

¶37 Mary Lee Larson testified that she knew Maric, Wilson, and Friend. When asked whether she noticed Maric act in any way that indicated she was afraid of Wilson, Larson stated, "No. Not recently." When Wilson's defense counsel, Peter Kovac, attempted to ask Larson whether Maric was afraid of Friend, the State objected and the court sustained the objection. The court allowed Attorney Kovac to make an offer of proof, during which Kovac asked Larson whether she heard Friend threaten Maric at any time during the two weeks leading up to her death. Larson responded, stating that one time, when Friend and Maric were at her house in her kitchen, Friend told Larson that "he had to keep Eva in check," and further, that "if she wouldn't be in check, he'd kill her, and she knew it." Then, Maric responded that "yes, he would." Additionally, when Attorney Kovac asked Larson whether she ever observed any physical contact between Maric and Friend, Larson stated that she saw Friend slap Maric at a motel room.

[11] Neither of the weapons used in the murder was ever located.

¶38 At the end of his offer of proof, Kovac stated that "Our theory is that it's Willie who did it." In response, the court stated, "The issue is really not who did it. The issue is whether the defendant did it." The court added, "The statement by this witness [Larson] about what happened sometime previous is, I believe, hearsay." The court reasoned that allowing Larson to testify would "cause the jury to speculate." Accordingly, the court sustained the State's objection to Larson's testimony. The court similarly excluded Barbara Lange's proffered testimony about Friend and Maric's relationship and the threat Friend made to Maric in Larson's kitchen.

¶39 In closing arguments, Kovac stated that "Willie Friend should be a suspect." Kovac continued:

> Now, I'll tell you, right from the beginning . . . Willie did not fire the shots. There were two people who came by in that car, at least two people. There was somebody in the driver's area seat. There was somebody in the passenger seat. Those two people shot and killed Eva. I don't know who those people are . . . . But I think when you look at what's going on here, it's reasonable to me that Willie was involved. Willie had her there at this location knowing that these guys were going to come by.

To support his theory, Kovac suggested that Friend thought Maric was pregnant with his child and that he wanted to avoid another child support case. Kovac also suggested that the shots fired at Friend were for show, to make it look as though he was in harm's way when he was not.

E. Jury Verdict and Postconviction Proceedings

¶40 On July 8, 1993, the jury found Wilson guilty of both counts. At the sentencing hearing on October 4, 1993, the court sentenced Wilson to life in prison with parole eligibility after thirty years for the first count, and to a maximum of twenty years, consecutive to his first sentence, for the second count.

¶41 On June 3, 1996——almost three years later——Wilson filed a postconviction motion requesting a new trial. Wilson alleged that the trial was fundamentally unfair and denied him his right to present a complete defense. He also claimed newly discovered evidence not available at the time of trial substantiated his theory of defense and undermined the theory of the prosecution. The court denied this motion without a hearing. The court concluded that the reasons set forth on the record sufficed for not allowing Wilson to introduce the proffered evidence to support his theory that Friend was involved in Maric's murder. The court further determined that Wilson did not provide any evidence to support his claim of new evidence.

¶42 Wilson did not file an appeal of the circuit court's ruling on his postconviction motion. However, in a 2010 petition for a writ of habeas corpus, Wilson alleged that his counsel performed deficiently and abandoned Wilson by failing to pursue appellate review of the court's denial of Wilson's motion.[12] On September 14, 2010, the Court of Appeals granted

[12] The Office of Lawyer Regulation publicly reprimanded Attorney Kovac in 2008 for violating multiple rules of professional conduct while representing Wilson.

Wilson's petition and reinstated his postconviction and appellate rights, concluding that Attorney Kovac provided ineffective assistance of counsel to Wilson.

¶43 On January 24, 2011, Wilson filed another motion for postconviction relief, requesting a new trial. In this motion, Wilson alleged that his constitutional rights were violated through ineffective assistance of counsel and judicial error. Wilson argued that, under the standard adopted in Denny, "Willie . . . had the opportunity——in time and place——to have participated in Eva's killing" and that Willie had a motive to kill her. Wilson grounded one of his ineffective assistance of counsel claims on counsel's alleged failure to make a comprehensive offer of proof before trial and to show the court why available evidence satisfied the Denny standard so as to make Mary Lee Larson's and Barbara Lange's testimony regarding Friend's relationship with Maric admissible.

¶44 Once again, the court denied Wilson's motion for postconviction relief.[13] The court determined that Wilson's trial counsel was not ineffective for failing to proffer certain evidence that third parties might have committed the offense and for failing to explain why that evidence was admissible. The court concluded that it was not reasonably probable that the trial judge would have admitted the proffered evidence, as it would have been deemed either insufficient to satisfy Denny or inadmissible hearsay.

[13] Milwaukee County Circuit Judge Jeffrey Conen presided.

¶45 Wilson appealed, arguing that he was denied a meaningful opportunity to present a complete defense during his criminal trial because the court would not allow him to introduce third party perpetrator evidence. The court of appeals recognized the importance of Denny, stating,

> Evidence that a person other than the defendant committed the charged crime is relevant to the issues being tried, and thus admissible, "as long as motive and opportunity have been shown and as long as there is also some evidence to directly connect a third person to the crime charged which is not remote in time, place or circumstances."

State v. Wilson, No. 2011AP1803-CR, unpublished order, at 3 (Wis. Ct. App. Oct. 22, 2013) (quoting Denny, 120 Wis. 2d at 624).

¶46 The court of appeals then noted that the State conceded that Wilson's offer of proof was arguably sufficient to establish that Friend had a motive to kill Maric and that Friend's presence at the scene of the crime established that Friend had a direct connection to the crime. Id. at 6. However, the court rejected the State's position that Friend did not have the opportunity to commit this crime. Id. at 7. The court concluded that a "review of the evidence shows that Friend had the opportunity to commit this crime, either directly by firing the first weapon or in conjunction with others by luring Maric to the place where she was killed." Id. The court stated that "[u]nder Denny, Wilson should have been allowed to introduce evidence that Friend was involved in Maric's murder." Id. The court ultimately reversed Wilson's conviction and the

circuit court's order denying postconviction relief, and remanded the case for further proceedings. Id. at 11. The State sought review, and this court granted review on November 5, 2013.

II. STANDARD OF REVIEW

¶47 This court reviews a circuit court's decision to admit or refuse to admit evidence for an erroneous exercise of discretion. Weborg v. Jenny, 2012 WI 67, ¶41, 341 Wis. 2d 668, 816 N.W.2d 191. When the circuit court's denial of admission of the proffered evidence implicates a defendant's constitutional right to present a defense, however, the decision not to admit the evidence is a question of constitutional fact that this court reviews de novo. State v. Knapp, 2003 WI 121, ¶173, 265 Wis. 2d 278, 666 N.W.2d 881, vacated and remanded, 542 U.S. 952 (2004), reinstated in material part, 2005 WI 127, ¶2 n.3, 285 Wis. 2d 86, 700 N.W.2d 899.

III. DISCUSSION

¶48 Although a circuit court generally has the discretion to deny the admission of evidence, that discretion is subject to constitutional limitations; a circuit court may not refuse to admit evidence if doing so would deny the defendant's right to a fair trial. Crane v. Kentucky, 476 U.S. 683, 689-90 (1986). Nevertheless, evidence offered by a defendant in his own defense must be relevant. Milenkovic v. State, 86 Wis. 2d 272, 286-87, 272 N.W.2d 320 (Ct. App. 1978). It is this tension between the defendant's rights and the relevancy requirement that the court of appeals addressed in Denny.

¶49 Denny involved the conviction of Kent A. Denny for the murder of Christopher Mohr. Denny, 120 Wis. 2d at 617. Denny and his brother were accused of stabbing Mohr 57 times. Id. At trial, Denny attempted to introduce evidence that he had no motive to kill Mohr, but others did. Id. at 621. The circuit court refused to allow Denny to present the evidence, ruling it was irrelevant. Id. Denny appealed, claiming that the court's refusal to allow him to introduce the evidence was a violation of his constitutional right to present a defense. Id. at 621-22.

¶50 The court of appeals stated that it was a "general rule . . . that evidence of motive of one other than the defendant to commit the crime can be excluded when there is no other proof directly connecting that person with the offense charged." Id. at 622. The court looked to the California case of People v. Green, 609 P.2d 468 (Cal. 1980), to support its position. It agreed with the California Supreme Court that the purpose of limitations on the admission of evidence as to the possible motive of a third party is to "place reasonable limits on the trial of collateral issues . . . and to avoid undue prejudice to the People from unsupported jury speculation as to the guilt of other suspects . . . ." Denny, 120 Wis. 2d at 622 (quoting Green, 609 P.2d at 480) (alterations in original). The Denny court disagreed, however, with California's requirement that evidence connecting a third party to the crime be

"substantial," holding that standard to be unfair to defendants.[14] Id. at 623.

¶51 The court of appeals instead turned to Alexander v. United States, 138 U.S. 353, 356 (1891), and the "legitimate tendency" test created in that case. To support the introduction of third-party perpetrator evidence under Alexander, the court of appeals explained, "there must be a 'legitimate tendency' that the third person could have committed the crime." Denny, 120 Wis. 2d at 623 (citing Alexander, 138 U.S. at 356-57). The court noted that the defendant need not establish the guilt of the third party to the level that would be necessary to sustain a conviction. Id. However, "evidence that simply affords a possible ground of suspicion against another person should not be admissible." Id. The Denny court thus created a "bright line standard requiring that three factors be present, i.e., motive, opportunity, and direct connection" for a defendant to introduce third-party perpetrator evidence. Id. at 625.

¶52 We ratified the Denny test in Knapp, 265 Wis. 2d 278, ¶¶175-183, noting the constitutional underpinnings of the

[14] Two years after State v. Denny, 120 Wis. 2d 614, 357 N.W.2d 12 (Ct. App. 1984), the California Supreme Court backtracked on the substantiality requirement: "To be admissible, the third party evidence need not show 'substantial proof of a probability' that the third person committed the act; it need only be capable of raising a reasonable doubt of defendant's guilt." People v. Hall, 718 P.2d 99, 104 (Cal. 1986) (en banc).

standard in United States Supreme Court precedent. Id., ¶178 (citing Alexander, 138 U.S. 353). Indeed, since Knapp, the Supreme Court has gone on to cite the Denny case with approval. See Holmes v. South Carolina, 547 U.S. 319, 327-28 n.* (2006). We now reaffirm that the Denny test is the correct and constitutionally proper test for circuit courts to apply when determining the admissibility of third-party perpetrator evidence.

¶53 We pause to note that each piece of a defendant's proffered evidence need not individually satisfy all three prongs of the Denny test. Some evidence provides the foundation for other evidence. "[F]acts give meaning to other facts," and certain pieces of evidence become significant only in the aggregate, upon the proffer of other evidence. State v. Vollbrecht, 2012 WI App 90, ¶26, 344 Wis. 2d 69, 820 N.W.2d 443. "This is precisely why Denny requires that all three be shown before evidence of a third-party perpetrator is admitted at trial." Id.

¶54 Although the Denny case is sound in principle, it does not provide complete clarity as to the meaning and contours of two of its prongs. This ambiguity is understandable in light of the multitude of fact situations in which the Denny test may be employed. Denny is firm, however, that three factors be present, implying that "opportunity" and "direct connection" have distinct meaning. Thus, the fact that a person with a motive to commit the crime is present at the crime scene is not enough to satisfy both "opportunity" and "direct connection."

¶55 In theory, many people may qualify as having the opportunity to commit a crime by virtue of their presence at the crime scene or their presence (at the time of the crime) in the vicinity of the crime scene. But presence does not necessarily create either motive or direct connection; and presence does not necessarily move the defendant's theory beyond speculation, even when other evidence does not eliminate a third-party as having the opportunity to commit the crime.

¶56 Essentially, the Denny legitimate tendency test requires a court to answer three questions.

¶57 First, did the alleged third-party perpetrator have a plausible reason to commit the crime? This is the motive prong.

¶58 Second, could the alleged third-party perpetrator have committed the crime, directly or indirectly? In other words, does the evidence create a practical possibility that the third party committed the crime? This is the opportunity prong.

¶59 Third, is there evidence that the alleged third-party perpetrator actually committed the crime, directly or indirectly? This is the direct connection prong. Logically, direct connection evidence should firm up the defendant's theory of the crime and take it beyond mere speculation. It is the defendant's responsibility to show a legitimate tendency that the alleged third-party perpetrator committed the crime.

¶60 A person's presence at the crime scene may be analyzed under "opportunity" but the opportunity prong may be eliminated during this analysis because of additional information. A person's presence at the crime scene also may be analyzed under

the third prong, direct connection. What must be stressed is that "presence" alone will normally not satisfy both of these distinct prongs.

¶61 To provide additional guidance, we will discuss the three prongs one by one, keeping in mind that it is unconstitutional to refuse to allow a defendant to present a defense simply because the evidence against him is overwhelming.

A. Motive

¶62 Circuit courts often encounter the question of motive in homicide cases. A defendant's motive to commit a homicide is widely considered to be relevant. See D.E. Buckner, Necessity That Trial Court Charge Upon Motive in Homicide Case, 71 A.L.R.2d 1025 (1960). "'Motive' refers to a person's reason for doing something . . . . Evidence of motive does not by itself establish guilt." Wis JI——Criminal 175. Motive is not an element of any crime; rather, motive "may be shown as a circumstance to aid in establishing" a particular person's guilt. Id.

¶63 The admissibility of evidence of a third party's motive to commit the crime charged against the defendant is similar to what it would be if that third party were on trial himself. Because motive is not an element of any crime, the State never needs to prove motive; relevant evidence of motive is generally admissible regardless of weight. See State v. Berby, 81 Wis. 2d 677, 686, 260 N.W.2d 798 (1977). The same applies to evidence of a third party's motive——the defendant is not required to establish motive with substantial certainty.

Evidence of motive that would be admissible against a third party were that third party the defendant is therefore admissible when offered by a defendant in conjunction with evidence of that third party's opportunity and direct connection.

¶64 It may be that the strength and proof of a third party's motive to commit the crime is so strong that it will affect the evaluation of the other prongs. Nonetheless, the Denny test is a three-prong test; it never becomes a one- or two-prong test.

B. Opportunity

¶65 The second prong of the "legitimate tendency" test asks whether the alleged third-party perpetrator could have committed the crime in question. This often, but not always, amounts to a showing that the defendant was at the crime scene or known to be in the vicinity when the crime was committed.

¶66 As a legal concept, "opportunity" appears in the Wisconsin Statutes in the context of "other acts" evidence. See Wis. Stat. § 904.04(2):

> (2) OTHER CRIMES, WRONGS, OR ACTS. . . . [E]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that the person acted in conformity therewith. This subsection does not exclude the evidence when offered for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

(Emphasis added.)

¶67 The analysis of other acts evidence to demonstrate opportunity applies to third-party perpetrator evidence:

> The case law as well as § 904.04(2) permits the introduction of other act evidence to show a person's (whether a party or third person) "opportunity" to engage in certain conduct. "Opportunity" is a broad term . . . ; proof of opportunity may be relevant to place the person at the scene of the offense (time and proximity) or to prove whether one had the requisite skills, capacity, or ability to carry out an act. . . . It is incumbent on the proponent, however, to show the relevance of the "opportunity" evidence.

7 Wis. Prac., Wis. Evidence § 404.7 (3d ed.) (footnotes omitted).

¶68 The defense theory of a third party's involvement will guide the relevance analysis of opportunity evidence in a Denny case. If the third party is to be implicated personally as the shooter, then opportunity might be shown by the party's presence at the crime scene. See People v. Primo, 753 N.E.2d 164, 168–69 (N.Y. 2001) (evidence that the third party was at crime scene admissible in conjunction with ballistics linking third party to the weapon used). If the defense theory is that a third party framed the defendant, then the defense might show opportunity by demonstrating the third party's access to the items supposedly used in the frame-up. Cf. Krider v. Conover, 497 Fed. Appx. 818, 821 (10th Cir. 2012) (third party's access to defendant's blood and hair samples only speculative evidence of opportunity without connecting third party to crime). In all but the rarest of cases, however, a defendant will need to show more than an unaccounted-for period of time to implicate a third party. Cf.

Vollbrecht, 344 Wis. 2d 69 (a third party's unaccounted-for period of time enough to show opportunity in murder with extremely distinctive characteristics that also were present in a case in which the third party was convicted).

¶69 Overwhelming evidence against the defendant may not serve as the basis for excluding evidence of a third party's opportunity (or direct connection to the crime): "by evaluating the strength of only one party's evidence, no logical conclusion can be reached regarding the strength of contrary evidence offered by the other side to rebut or cast doubt." Holmes, 547 U.S. at 331. However, this holding does not govern situations in which overwhelming evidence demonstrates that the proposed third party could not have committed the crime. Courts are not evaluating the strength of only one party's evidence in such cases; they are in fact weighing the strength of the defendant's evidence (that a third party committed the crime) directly against the strength of the State's evidence (that the third party did not commit the crime).

¶70 Courts may permissibly find——as a matter of law——that no reasonable jury could determine that the third party perpetrated the crime in light of overwhelming evidence that he or she did not. Cf. People v. Pouncey, 471 N.W.2d 346, 350 (Mich. 1991) ("When, as a matter of law, no reasonable jury could find that the provocation was adequate [to form the basis of a defense to the charge], the judge may exclude evidence of the provocation."). In sum:

> While the Constitution . . . prohibits the exclusion of defense evidence under rules that serve no legitimate purpose or that are disproportionate to the ends that they are asserted to promote, well-established rules of evidence permit trial judges to exclude evidence if its probative value is outweighed by certain other factors such as unfair prejudice, confusion of the issues, or potential to mislead the jury.

Holmes, 547 U.S. at 326.

C. Direct Connection

¶71 "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." Denny, 120 Wis. 2d at 624 (citation omitted). No bright lines can be drawn as to what constitutes a third party's direct connection to a crime. Rather, circuit courts must assess the proffered evidence in conjunction with all other evidence to determine whether, under the totality of the circumstances, the evidence suggests that a third-party perpetrator actually committed the crime. See, e.g., Shields v. State, 166 S.W.3d 28 (Ark. 2004); State v. Oliver, 821 P.2d 250, 252 (Az. Ct. App. 1991) ("The defendant must show that the evidence has an inherent tendency to connect the other person with the actual commission of the crime.") (citation omitted); People v. Hall, 718 P.2d 99 (Cal. 1986). In sum, courts are not to look merely for a connection between the third party and the crime, they are to look for some direct connection between the third party and the perpetration of the crime.

¶72 As with opportunity, there are myriad possibilities how a defendant might demonstrate a third party's direct connection to the commission of a crime. For example, a third party's self-incriminating statement may be used to establish direct connection. See Erwin v. State, 729 S.W.2d 709, 714-17 (Tex. Crim. App. 1987). Exclusive control of the weapon used may also establish a direct connection. Primo, 753 N.E.2d at 168-69. Mere presence at the crime scene or acquaintance with the victim, however, is not normally enough to establish direction connection. See, e.g., State v. Eagles, 812 A.2d 124 (Conn. App. 2002).

D. Whether Wilson Satisfied the Denny Standard

¶73 The State conceded in its briefing to this court that Wilson satisfied the motive and direct connection prongs of the Denny test. We regret the State's concession of direct connection inasmuch as it has necessitated discussion of factors under the heading of opportunity that arguably belong under direct connection——and vice versa.

¶74 Friend's supposed motive was his belief that Maric was pregnant, that he was responsible for her pregnancy, and that he wanted to avoid future child support. The alleged direct connection was his relationship to Maric and his presence at the crime scene (in front of his brother's house) at the time of her death. Friend's presence at the crime scene might better have been analyzed under opportunity, raising the possibility that he could have committed the crime as a conspirator and leaving his tenuous connection to the perpetration of the crime to be

analyzed under direct connection. Because Friend's presence at the crime scene is not in dispute and because it has been consistently analyzed in this case as the direct connection, we assume without deciding that these two prongs have been satisfied.

¶75 This brings us to opportunity, which here must mean more than presence. If the opportunity prong has not been met, it was not error for the circuit court to refuse to admit the proffered evidence and we need go no further. See Denny, 120 Wis. 2d 614.

¶76 The State contends that "Wilson failed to show that Willie Friend had the opportunity to kill [Maric], either as the direct shooter or in conjunction with unknown persons he knew were planning to murder her."

¶77 The State argues first that Friend himself could not have been the shooter. It contends that the ballistics evidence on where the .44 bullets hit and were found, combined with the consistent testimonial evidence of Kidd-Edwards and Friend about the timing of the shots fired, shows it was "impossible" that Friend could have shot Maric with the .44, then have that gun shot at him by another, as he was running away. Both witnesses testified that the louder shots from the .44 were fired first and in rapid succession——"one right behind the other." Friend's hands were swabbed at the crime scene for gun shot residue, and the tests were negative. Shells were found in the area of Friend's observed flight.

¶78 Wilson counters that Friend could have been a "shooter" himself. He contends that ballistics evidence can be misinterpreted, that Friend and Maric were in the car for a long time before the shooting such that his position in the car at the time of the shooting was unknown, and that Kidd-Edwards did not see the first shots fired. Wilson therefore concludes that any question as to whether the State's evidence showed Friend not to be the shooter goes to the weight of Wilson's evidence, not the admissibility of it.

¶79 We note that Wilson's theory throughout the trial was that Friend's involvement was indirect——that Friend hired Maric's killer or killers as a result of his motive to kill Maric to avoid child support or some other concern. Wilson did not suggest that Friend pulled the trigger himself. "Willie did not fire the shots," his counsel told the jury. The proffered evidence that the circuit court refused to admit did not support a direct shooter theory, in part, because it was logically inconsistent with Wilson's favored theory that Friend hired someone else to be the shooter. We see no reason to belabor the point.

¶80 The State also argues that Wilson has failed to show "how Friend had the opportunity to arrange for two unnamed gunmen . . . to murder Eva [Maric]." The State relies on two points to support this argument. First, the "assailants" were driving the same type of car as Wilson. Second, the ballistics evidence and eyewitness testimony demonstrated that Friend was in real danger during the shooting; there was enough of a risk

of harm to Friend that it is implausible that he hired someone to make him look like a victim in that manner.

¶81 Wilson counters that nothing in the evidence excluded the possibility that Friend hired one or more hit men to kill Maric, make Friend look like a victim, and frame Wilson for the murder. In support of this theory, Wilson points to the substantial period of time——allegedly one to two hours——that Friend and Maric were in the car together prior to the shooting. Wilson claims this is evidence that Friend kept her there as a target for the shooters. Wilson also notes that Friend had time in his brother's house to arrange a hit on Maric. Here, Wilson relies on Vollbrecht, suggesting that Friend had a "limited but sufficient opportunity" under the Denny test to arrange for the murder.

¶82 Wilson argues that, for purposes of his defense, opportunity and direct connection are virtually the same thing; Friend's direct connection to the crime——his presence at the crime scene——also was his opportunity to commit the crime. As support, Wilson relies on Vollbrecht, where the court of appeals explained that "facts give meaning to other facts and . . . the significance of [the third party's] opportunity to commit the crime depends on his alleged motive and direct connection." Vollbrecht, 344 Wis. 2d 69, ¶26.

¶83 We are unpersuaded that Wilson has demonstrated a "legitimate tendency" that Friend committed the crime for which Wilson was convicted by hiring one or more persons to kill Maric. Denny's "legitimate tendency" test requires more than

mere possibility. Denny, 120 Wis. 2d at 623 ("evidence that simply affords a possible ground of suspicion against another person should not be admissible"). Wilson in 1993 and Wilson now have failed to proffer any evidence that would elevate the theory of Friend's involvement in an assassination conspiracy from a mere possibility to a legitimate tendency.

¶84 Friend and Wilson testified at trial. Their accounts are reported in some detail in this opinion. Wilson was able to challenge Friend's credibility as a witness based on Friend's eight prior criminal convictions, his inconsistent testimony about the nature of his brother's business, and an overheard statement before the preliminary hearing in which he said to his mother that he "had to get his story together." Wilson challenged the accuracy of Friend's testimony about the shooter being left-handed and wearing gold-rimmed glasses. Nevertheless, the jury must have believed Friend. Wilson did not have much success in poking serious holes in Friend's account of the series of events on the evening of April 20 and early morning of April 21. In fact, Wilson's testimony confirmed Friend's testimony at several points——Friend's observation of Wilson's car at Throttle Twisters and Friend's testimony that Wilson drove by Maric's vehicle twice as it was parked in front of 3859 North 9th Street about 2:00 a.m. on April 21. Friend changed his story about the length of time that he and Maric sat in Maric's car before the shooting, from several hours to the period from about 4:30 a.m. until the shooting, after Friend reluctantly admitted that he and Maric

spent most of that time in Jabo's house——the illegal after-hours club operated by his brother.

¶85 Against this background, Wilson has proffered no evidence demonstrating that Friend had the opportunity to arrange a hit on Maric during the relatively short time they were in Maric's car——no evidence that Friend had the contacts, influence, and finances to quickly hire or engage a shooter or shooters to gun down a woman on a public street. He has not shown that Friend or his alleged unnamed associates had access to a gold Lincoln Continental similar to Wilson's. He has not proffered any telephone records from Friend or Friend's brother's house that could have set up the time and place of the hit on short notice. He has not proffered any evidence of the ownership by Friend or his family of .44 and .25 caliber weapons. He has not identified any individuals as being the shooter or shooters possibly employed by Friend. In short, he has not offered any evidence whatsoever indicating that Friend had the means or access or ability to hire assassins to kill Maric at a particular place within a relatively short time frame.

¶86 Wilson's reliance on Vollbrecht is misplaced. Vollbrecht involved two separate murders that shared extremely distinctive characteristics, reducing the need for a showing of opportunity to more than the third party's unaccounted-for time. Wilson has failed to show any similarity to a previous crime committed by Friend, his brother, or any associate of Friend's, distinguishing this case from Vollbrecht. Wilson was not

excused from making an offer of proof as to opportunity beyond an unaccounted-for block of Friend's time. Because Wilson failed to make an adequate offer of proof as to Friend's opportunity, it was not error for the circuit court to refuse to admit Wilson's proffered evidence to avoid speculation that might confuse the jury.[15]

¶87 Because we determine there was no error in the circuit court's decision, we need not reach the question of whether any error was harmless.

IV. CONCLUSION

[15] At the court of appeals, Wilson also contended that the circuit court should have permitted him to introduce evidence implicating Larnell "Jabo" Friend in Maric's murder. The court of appeals did not reach this issue, basing its ruling instead on the proffered evidence about Willie Friend. State v. Wilson, No. 2011AP1803-CR, unpublished order, at 7 n.4 (Wis. Ct. App. Oct. 22, 2013). In cases where this court reverses the court of appeals and the court of appeals did not reach an issue, we will often remand the case for consideration of the issue not reached. See, e.g., State v. Sarfraz, 2014 WI 78, 356 Wis. 2d 460, 851 N.W.2d 235. However, "[o]nce [a] case is before us, it is within our discretion to review any substantial and compelling issue which the case presents." Univest Corp. v. General Split Corp., 148 Wis. 2d 29, 32, 435 N.W.2d 234 (1989).

Because the issue involving Jabo is so similar to the issue involving Willie (i.e., whether third-party perpetrator evidence should have been admitted), we see no need to remand to the court of appeals. At trial, Wilson's offer of proof regarding Jabo was that Maric "had been working as a prostitute, that her pimp was Jabo, [and] that she was trying to get out." Although this offer of proof suggested a possible motive, it described no opportunity or direct connection for Jabo to have perpetrated the crime. In short, Wilson's proffered evidence about Jabo offered little more than "a possible ground of suspicion"; accordingly, we hold that it was not error for the circuit court to exclude it. See Denny, 120 Wis. 2d at 623.

¶88 On trial for murder, General Grant Wilson developed a theory that someone else fired the shots that killed Evania Maric on April 21, 1993. The details of this theory fit within the contours of the known facts of the case in a way that could not be readily disproved. However, even though the law does not require Wilson to prove that someone else committed the crime for which he was on trial, it does require more than a theory "that simply affords a possible ground of suspicion . . . ." Denny, 120 Wis. 2d at 623.

¶89 The "legitimate tendency" test ensures that proffered evidence meets the necessary evidentiary threshold before it is admitted while, at the same time, guarding the constitutional rights of defendants. The test requires a showing of the third party's motive, opportunity, and direct connection to the crime. Although proffered evidence should be understood in the context of other evidence, the three prongs of the "legitimate tendency" test are distinct from one another. Only in rare cases will the context dictate that a showing on one or two prongs is strong enough to lower the threshold for the showing on the third prong. This is not one of those cases.

¶90 We reaffirm that the Denny test is the appropriate test for circuit courts to use to determine the admissibility of third-party perpetrator evidence. However, we conclude that, for a defendant to show that a third party had the "opportunity" to commit a crime by employing a gunman or gunmen to kill the victim, the defendant must provide some evidence that the third party had the realistic ability to engineer such a scenario.

Here, Wilson has failed to show that Friend had the opportunity to kill Maric, directly or indirectly; consequently, it was not error for the circuit court to exclude Wilson's proffered evidence. Accordingly, we reverse.

By the Court.—The decision of the court of appeals is reversed.

¶91 ANNETTE KINGSLAND ZIEGLER, J. (concurring). I join the majority opinion because it "reaffirm[s] the Denny test as the appropriate test for circuit courts to use to determine the admissibility of third-party perpetrator evidence." Majority op., ¶10. The majority opinion reaffirms that "the Denny test is a three-prong test; it never becomes a one- or two-prong test." Majority op., ¶64. I would not join the majority opinion if it were interpreted as doing anything other than reaffirming the longstanding application of the test from State v. Denny, 120 Wis. 2d 614, 357 N.W.2d 12 (Ct. App. 1984).

¶92 I write separately to clarify that the majority opinion is intended to reaffirm the Denny test and that certain passages in the majority opinion should not be misconstrued. In particular, the majority opinion should not be read as suggesting that a defendant may sometimes introduce Denny evidence without satisfying all three prongs of the Denny test. Further, it should not be read as suggesting that a third party's presence at a crime scene can alone satisfy multiple prongs of this test, or that a third party's unknown whereabouts during a crime can alone establish that the third party had an opportunity to commit the crime.

¶93 I also write separately to explain the Denny test's requirements, purposes, and constitutional basis. A criminal defendant is constitutionally endowed with the right to present a defense. The Denny test attempts to balance a meaningful opportunity to present a complete defense, namely that a third

party perpetrated the crime, with the requirement that such evidence meet established standards for admissibility. Simply stated, the Denny test requires that proffered evidence create a legitimate tendency that someone other than the defendant committed the crime charged. Evidence is deemed inadmissible under Denny if it merely raises possible grounds for suspicion. The Denny test, like the test for all admissible evidence, requires that in order for third-party perpetrator evidence to be admitted, it must have the requisite indicia of reliability, be relevant, and not be unfairly prejudicial. The Denny test requires a defendant to demonstrate that the third-party perpetrator had: (1) the motive to commit the crime; (2) the opportunity to commit the crime; and (3) a direct connection to the crime.

¶94 Finally, I write separately to explain that evidence of an unknown third-party perpetrator is generally deemed inadmissible when the defendant cannot meet the Denny test. Most typically, if such evidence is admissible, it is because the evidence is deemed admissible as other acts evidence. In the present case, General Grant Wilson did not proceed under the theory that his proffered evidence was other acts evidence. Instead, Wilson sought to introduce evidence that Willie Friend hired someone to shoot Evania Maric. Wilson's defense was that, although it was not Friend who shot Maric, Friend hired someone unknown to Wilson to shoot Maric. Wilson's proffer was that, in the past, Friend, who was romantically involved with Maric, had exhibited violent behavior toward her and that she was pregnant.

The defense theory was that Friend wanted Maric dead because he did not want to be responsible for the baby. Wilson sought to introduce witnesses who would testify that Friend slapped Maric at least once and threatened to kill her. Wilson wished to argue, based on this proffered evidence, that Friend hired someone to murder Maric. However, Wilson's proffer failed to demonstrate that these alleged assassins were anything but purely hypothetical people. While Friend's motive possibly could have been demonstrated, opportunity and direct connection were missing. Wilson's proffered evidence was speculative, at best, and the circuit court did not err in excluding it. Simply stated, the proffered third-party perpetrator evidence was not admissible because it did not meet the long-standing Denny test.

I. THE MAJORITY OPINION REAFFIRMS THE DENNY TEST

¶95 While a majority of the court intends that this case reiterate the Denny test, I write separately because the majority opinion may need some clarification. For example, it states that "[o]nly in rare cases will the context dictate that a showing on one or two prongs is strong enough to lower the threshold for the showing on the third prong." Majority op., ¶89. That statement should not be read as eliminating a defendant's need to prevail on all three prongs of the Denny test under any circumstances. To introduce evidence that a third party may have committed the crime charged, a defendant always must satisfy all three prongs of the Denny test: motive, opportunity, and direct connection to the commission of the crime. Denny, 120 Wis. 2d at 625; see also State v. Avery, 2011

WI App 124, ¶43, 337 Wis. 2d 351, 804 N.W.2d 216. The majority opinion correctly recognizes that "the Denny test is a three-prong test; it never becomes a one- or two-prong test." Majority op., ¶64. To be admissible, a defendant's evidence of a third-party perpetrator must establish a "legitimate tendency" that the third party committed the crime charged. Denny, 120 Wis. 2d at 623-24. A "mere possibility" that a third party committed the crime charged is insufficient. See id. at 623 (holding that "evidence that simply affords a possible ground of suspicion against another person should not be admissible"). Evidence of a mere possibility that a third party may have committed the crime charged is deemed inadmissible because it calls for speculation, creates a trial within a trial, and lacks the sufficient indicia of reliability or probative value so to qualify as admissible evidence.

¶96 The majority opinion also states: "What must be stressed is that 'presence' alone will normally not satisfy both of these distinct prongs [opportunity and direct connection]." Majority op., ¶60. That sentence should not be read as suggesting that a third party's presence at a crime scene will automatically satisfy any one prong of the Denny test, let alone more than one prong. The majority opinion correctly recognizes that "the fact that a person with a motive to commit the crime is present at the crime scene is not enough to satisfy both 'opportunity' and 'direct connection.'" Majority op., ¶54. The majority opinion also correctly notes that presence at a crime scene does "not normally . . . establish" a third party's direct

connection to the commission of the crime. Majority op., ¶72 (citing State v. Eagles, 812 A.2d 124 (Conn. App. Ct. 2002)). Similarly, a third party's presence at a crime scene does not necessarily establish that he or she had an opportunity or a motive to commit the crime. See Wiley v. State, 74 S.W.3d 399, 406 (Tex. Crim. App. 2002) (holding that an alleged third-party perpetrator had no opportunity to commit an arson because, although present at the crime scene, he lacked the mental competence to commit the crime). Accordingly, a third party's presence at a crime scene, by itself, will not automatically satisfy any one of the three prongs of the Denny test, and it will not satisfy all three prongs.

¶97 I also wish to clarify the majority opinion's statement that "[i]n all but the rarest of cases, . . . a defendant will need to show more than an unaccounted-for period of time to implicate a third party." Majority op., ¶68 (citing State v. Vollbrecht, 2012 WI App 90, 344 Wis. 2d 69, 820 N.W.2d 443). A third party's unaccounted-for period of time will never, in and of itself, satisfy the Denny test or even a single prong of this test. The majority opinion was interpreting Vollbrecht as holding that the defendant in that case satisfied the opportunity prong of the Denny test by showing that (1) a third party's whereabouts during a murder was unaccounted for; and (2) the third party was convicted of committing a very similar murder in the same area around the same time. See majority op., ¶¶68, 86. The majority opinion should have clarified its discussion of Vollbrecht and how

opportunity fit within the legal theories forwarded in that case. As explained earlier, the majority opinion correctly recognizes that the Denny test is always a three-prong test and that a third party's whereabouts will not satisfy multiple prongs of this test.

¶98 In sum, the majority opinion should not be read as changing the Denny test. A defendant always is required to prevail on all three prongs of the Denny test in order to introduce evidence of an alleged third-party perpetrator. The defendant's proffer must demonstrate a legitimate tendency that the third party committed the crime charged, not merely a speculative ground of suspicion in that regard. A third party's presence at a crime scene, by itself, will not necessarily satisfy any prong of the Denny test and will not satisfy multiple prongs. Similarly, a third party's unaccounted-for whereabouts during the commission of a crime will not alone satisfy any prong of the Denny test.

II. THE DENNY TEST

¶99 I turn now to the Denny test requirements, purposes, and constitutional basis. The court of appeals in Denny created "a bright line standard requiring that three factors be present, i.e., motive, opportunity and direct connection," before a defendant may introduce evidence that a third party committed the crime charged. Denny, 120 Wis. 2d at 625. Specifically,

> [t]hird-party defense evidence may be admissible under the legitimate tendency [e.g., Denny] test if the defendant can show that the third party had (1) the motive and (2) the opportunity to commit the charged crime, and (3) can provide some evidence to directly

> connect the third person to the crime charged which is not remote in time, place or circumstance.

State v. Scheidell, 227 Wis. 2d 285, 296, 595 N.W.2d 661 (1999) (citing Denny, 120 Wis. 2d at 623-24). The trial court remains the gatekeeper in determining what evidence is admissible and why.

¶100 Under the Denny test, "there must be a 'legitimate tendency' that the third person could have committed the crime." Denny, 120 Wis. 2d at 623 (quoting Alexander v. United States, 138 U.S. 353, 356-57 (1891)). Thus, "evidence that simply affords a possible ground of suspicion against another person should not be admissible. Otherwise, a defendant could conceivably produce 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, 120 Wis. 2d at 623-24.

¶101 States use a wide variety of terminology for their Denny-type tests, such as "directly links," "substantially connects," or "points directly." See 22 Charles Alan Wright & Kenneth W. Graham, Jr., Federal Practice and Procedure § 5180.2 (2d ed. 2012). However, despite that variation in language, many states ultimately require a defendant to establish motive, opportunity, and direct connection. See 41 C.J.S. Homicide § 328. A few jurisdictions eschew the language of a Denny-type test in favor of conventional evidentiary principles, such as relevancy and balancing probative value against prejudice. See David McCord, "But Perry Mason Made It Look So Easy!": The Admissibility of Evidence Offered by a Criminal Defendant to

Suggest That Someone Else Is Guilty, 63 Tenn. L. Rev. 917, 937-38 (1996); People v. Primo, 753 N.E.2d 164, 167-69 (N.Y. 2001).

¶102 The purpose of the Denny test is to allow a defendant to exercise his or her constitutional right to present a defense but also to ensure that third-party perpetrator evidence meets certain criteria for admissibility.[1] See Denny, 120 Wis. 2d at 622-23; Avery, 337 Wis. 2d 351, ¶50 (The Denny test is "a mechanism of balancing the accused's right to present a defense against the State's interest in excluding evidence that . . . is no more than marginally relevant, of extremely limited probative value, and likely to confuse the jury and waste the jury's time.") (internal quotation marks omitted); Primo, 753 N.E.2d at 168 (noting that a Denny-type test is "shorthand for weighing probative value against prejudice in the context of third-party culpability evidence"); John H. Blume et al., Every Juror Wants A Story: Narrative Relevance, Third Party Guilt and the Right to Present A Defense, 44 Am. Crim. L. Rev. 1069, 1080-85 (2007) (same); see also Ellen Yankiver Suni, Who Stole the Cookie from the Cookie Jar?: The Law and Ethics of Shifting Blame in

[1] The court of appeals in Denny seemed to view this test as a means of excluding evidence that is either irrelevant or, if relevant, unfairly prejudicial. See State v. Denny, 120 Wis. 2d 614, 622, 623-24, 357 N.W.2d 12 (Ct. App. 1984). See also Wis. Stat. § 904.02 (rendering irrelevant evidence inadmissible); Wis. Stat. § 904.03 ("Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.").

Criminal Cases, 68 Fordham L. Rev. 1643, 1680-81 (2000) (noting that, although some courts view a Denny-type test as a means of excluding irrelevant evidence, most courts view it as a balancing of probative value against prejudicial effect).

¶103 The United States Supreme Court placed its imprimatur on what Wisconsin calls the Denny test. See Holmes v. S. Carolina, 547 U.S. 319, 327 & n.* (2006). The Supreme Court concluded that "well-established rules of evidence permit trial judges to exclude evidence if its probative value is outweighed by certain other factors such as unfair prejudice, confusion of the issues, or potential to mislead the jury." Id. at 326 (citations omitted). By excluding unfairly prejudicial evidence, the Denny test prevents "unsupported jury speculation as to the guilt of other suspects . . . ." Denny, 120 Wis. 2d at 622 (quoting People v. Green, 609 P.2d 468, 480 (Cal. 1980)). Hence, evidence that raises only a speculative doubt will fail the Denny test. See People v. Hall, 718 P.2d 99, 104 (Cal. 1986). A defendant has no constitutional right to present speculative, unreliable evidence in an effort to create doubt. See Scheidell, 227 Wis. 2d at 303-04; Denny, 120 Wis. 2d at 622.

¶104 In Denny the defendant appealed his judgment of conviction for murder, arguing that the circuit court erred by excluding evidence that a third party committed the murder. Denny, 120 Wis. 2d at 617. The court of appeals held that the circuit court did not err in excluding that evidence. Id. at 625. Denny sought to introduce testimony that the victim "'may have gotten into trouble with . . . a big drug dealer.'" Id.

That testimony failed to show that the drug dealer had a motive or an opportunity to commit the crime or a direct connection to the crime. Id. Denny also sought to introduce testimony that the victim owed money to another man. Id. Assuming that the man had a motive to commit the murder, the court of appeals held that Denny failed to show the man's opportunity or direct connection. Id. Finally, Denny sought to introduce testimony that the victim angered another man by purchasing a shotgun from him and later selling it. Id. The court of appeals held that this testimony established motive but failed to establish opportunity or direct connection. Id.

¶105 Courts have subsequently upheld the exclusion of third-party perpetrator evidence under Denny. For example, in State v. Jackson, the defendant was convicted of robbing a liquor store at gunpoint. State v. Jackson, 188 Wis. 2d 187, 194, 525 N.W.2d 739 (Ct. App. 1994). At trial, a liquor store employee testified that "he was 'probably about 80 percent sure'" that Jackson was the perpetrator. Id. at 191. "At the conclusion of the employee's testimony and outside of the jury's presence, Jackson requested that because of the employee's uncertainty, the employee view a photo of another man that Jackson allegedly had learned was the gunman." Id. at 192. The employee viewed photographs of six people, one of whom was the alleged third-party perpetrator, who went by the alias "Rat." Id. The employee was certain that five of the people were not the perpetrator, but he said that "Rat" could have been the perpetrator. Id. at 192-93. Based on Denny, the circuit court

denied Jackson's request to recall the employee to testify that "Rat" could have been the perpetrator. Id. at 193. The court of appeals held that the circuit court did not err in excluding that evidence because it "provided nothing more than grounds for suspicion . . . ." Id. at 196. The court of appeals noted that the circuit court allowed Jackson to identify "Rat" as the perpetrator and to publish the photograph of "Rat" to the jury. Id. "Thus, the trial court did not impermissibly interfere with Jackson's constitutional right to present a defense." Id.

III. EVIDENCE OF AN UNKNOWN THIRD-PARTY PERPETRATOR IS GENERALLY DEEMED INADMISSIBLE

¶106 Evidence of an unknown third party, who is alleged to have committed the crime charged, is most often deemed too speculative to be admissible. In the present case, the proffered evidence, as it relates to unknown, alleged hit men, is inadmissible under Denny.[2] General Grant Wilson's defense theory may be viewed in one of two ways. It may be viewed as an unknown third-party perpetrator theory because the alleged actual shooter is unknown. On the other hand, the defense theory could be viewed as a known third-party perpetrator theory because Willie Friend allegedly hired the shooter. Either way, the circuit court was correct to exclude the evidence because it was speculative at best and did not meet the Denny criteria.

A. Unknown Third-Party Perpetrators

[2] Because this section discusses unknown third-party perpetrators, I do not discuss General Grant Wilson's proffered evidence as it relates to his theory that Willie Friend was the shooter.

¶107 In some, but not all, cases in which a defendant seeks to introduce evidence of an unknown third-party perpetrator, the defendant relies on other acts evidence. The present case does not involve any other acts evidence. "[O]ften times the defense must rely on other act evidence to raise a circumstantial inference that the third party carried out the crime." 7 Daniel D. Blinka, Wisconsin Practice Series: Wisconsin Evidence § 404.7, at 215 (3d ed. 2008). However, evidence of an unknown third-party perpetrator is often inadmissible even when it relies on other acts evidence.

¶108 In Scheidell we held that the Denny test does not apply to other acts evidence of a similar crime committed by an unknown third party who, according to the defendant, committed the crime charged. Scheidell, 227 Wis. 2d at 297. We reasoned that, "[i]n a situation where the perpetrator of the allegedly similar crime is unknown, it would be virtually impossible for the defendant to satisfy the motive or the opportunity prongs of the legitimate tendency test of Denny." Scheidell, 227 Wis. 2d at 296. Instead, evidence of a similar crime committed by an unknown third party is governed by the test for

determining the admissibility of other acts evidence.[3] Id. at 287-88.

¶109 The defendant in Scheidell appealed his judgment of conviction for armed burglary and attempted first-degree sexual assault. Id. at 287. He entered a woman's apartment during the night, while armed with a knife and wearing a mask, and attempted to sexually assault her. Id. at 288-90. At trial, he sought to introduce evidence that, five weeks after that burglary, an unknown assailant burglarized a woman's home at night and sexually assaulted her. Id. at 290-91. Scheidell was in jail during the second burglary, which occurred four blocks away from the previous burglary. Id. Scheidell wanted to argue that this unknown assailant committed the burglary for which he was charged. Id. We held that the circuit court "properly excluded" this other acts evidence because it was not relevant. Id. at 310. Specifically, due to several factual distinctions

[3] To determine whether other acts evidence is admissible, a court uses "a three-step analysis." State v. Jackson, 2014 WI 4, ¶55, 352 Wis. 2d 249, 841 N.W.2d 791. First, the evidence must be offered for an acceptable purpose under Wis. Stat. § 904.04(2), including "'motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.'" Id. (quoting State v. Sullivan, 216 Wis. 2d 768, 772, 576 N.W.2d 30 (1998)). Second, the evidence must be relevant, which means that it must tend to make a fact of consequence more or less probable than it would be without the evidence. Id. (quoting Sullivan, 216 Wis. 2d at 772). Third and finally, the probative value of the evidence must not be "'substantially outweighed by the danger of unfair prejudice, confusion of the issues or misleading the jury, or by considerations of undue delay, waste of time or needless presentation of cumulative evidence.'" Id. (quoting Sullivan, 216 Wis. 2d at 772-73).

between the two burglaries, this other acts evidence was not probative of Scheidell's identity as the assailant in the first burglary. Id. at 309-10. In subsequent cases, Wisconsin courts have rarely held that other acts evidence of an unknown third-party perpetrator is admissible.[4]

[4] In State v. Wright the court of appeals upheld the exclusion of other acts evidence of an unknown third-party perpetrator under Scheidell. State v. Wright, 2003 WI App 252, ¶45, 268 Wis. 2d 694, 673 N.W.2d 386. Wright was convicted of eight counts of armed robbery and one count of attempted armed robbery. Id., ¶1. On appeal, he argued that the circuit court erred by excluding testimony of a man who identified Wright at a lineup as the perpetrator of a different robbery, but who was unable to identify Wright at a preliminary hearing. Id., ¶3. Wright argued that this proffered testimony was admissible other acts evidence because it suggested that whoever committed that other robbery could have committed all of the robberies for which Wright was tried and convicted. Id. The court of appeals held that, under Scheidell, the circuit court did not err in excluding that evidence. Id., ¶45. The court of appeals held "that the mere inability of a victim to identify the defendant as the perpetrator of a similar uncharged crime perforce takes the jury into the realm of conjecture or speculation." Id. The court of appeals noted that the proffered evidence was even more speculative than the inadmissible evidence proffered in Scheidell. See id. In Scheidell the defendant proffered evidence of a similar crime that he could not have committed because he was incarcerated at the time. Id. By contrast, Wright's "proffered testimony does not demonstrate that Wright was incapable of committing the similar crime." Id. "At the most, [the] proffered testimony merely shows that [the witness] could not identify Wright as the robber; it does not demonstrate that Wright could not have committed the offense." Id.

(continued)

¶110 In other jurisdictions, evidence of an unknown third-party perpetrator is most often deemed too speculative to be admissible. See, e.g., Wheeler v. United States, 977 A.2d 973 (D.C. 2009); Gethers v. United States, 684 A.2d 1266 (D.C. 1996); Neal v. State, 436 S.E.2d 574 (Ga. Ct. App. 1993); People v. Armstrong, 704 P.2d 877 (Colo. App. 1985); State v. Eagles, 812 A.2d 124 (Conn. App. Ct. 2002). These cases involved traditional Denny evidence, not other acts evidence of a third-party perpetrator.

¶111 In Wheeler the defendant appealed his judgment of conviction for murder, arguing that the trial court erred by excluding his evidence that someone else committed the crime. Wheeler, 977 A.2d at 976-77. The defendant sought to introduce

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In contrast, other acts evidence of an unknown third-party perpetrator was erroneously excluded in State v. Davis. In that case, the defendant was charged with five counts of burglary and one count of armed robbery. State v. Davis, 2006 WI App 23, ¶¶2-7, 289 Wis. 2d 398, 710 N.W.2d 514. One count of burglary was dismissed when the State discovered that Davis was incarcerated when that burglary occurred. Id., ¶8. The victim of that burglary had twice misidentified Davis as the burglar. Id., ¶¶3, 8-9. The circuit court denied Davis' motion to call that victim to testify that he had misidentified Davis as the burglar. Id., ¶9. Davis believed that this other acts evidence would establish that someone who looked like him committed that burglary and thus could have committed all of the burglaries for which he was on trial. Id., ¶10. The court of appeals held that this other acts evidence was erroneously excluded. Id., ¶30. The court of appeals reasoned that "[t]his is not a situation where someone accused of a crime makes a general claim that someone else must have done it." Id., ¶28. "Rather, here we have a burglary victim who twice misidentified Davis as the person he saw in his apartment." Id. "This fact provided Davis with the opportunity to attempt to prove that someone else, someone who looks a great deal like Davis, was burglarizing and robbing homes within the same general time frame." Id.

evidence that the murder victim had cocaine in his system at the time of death and, therefore, "had a 'dangerous lifestyle' and was at a 'high risk of violent death' from '[r]ival drug dealers, dissatisfied customers, or frustrated robbers.'" Id. at 990. The District of Columbia Court of Appeals held that the trial court properly excluded that evidence because it "fail[ed] to provide anything more than 'a hypothetical, unidentified person who may have had a motive' to commit the murder." Id. (quoting Gethers, 684 A.2d at 1271).

¶112 In Gethers two defendants appealed from their convictions for burglarizing an apartment together and shooting a man who lived in the apartment. Gethers, 684 A.2d at 1268. On appeal, they argued that the trial court erred by excluding evidence that someone besides them committed the burglary and shooting. Id. The proffered evidence was that the victim was a drug dealer and thus might have been shot by a disgruntled customer. Id. at 1270, 1272. The District of Columbia Court of Appeals held that the trial court did not err in excluding that evidence. Id. at 1272. The proffer of that evidence "made no showing" that a disgruntled customer, "if he or she actually existed, was connected in any way to the shooting." Id. Defense "counsel was merely trying to 'throw something out there for the jury to speculate about.'" Id.

¶113 In Neal the defendant appealed his judgment of conviction for aggravated child molestation, arguing that the trial court erred by excluding evidence that someone else committed the crime. Neal, 436 S.E.2d at 575. The evidence in

question was that "the mother of the victim was a cocaine addict and had casual relationships with numerous men in the family home. This testimony was offered in support of Neal's contention that one of these unidentified men . . . may have molested the victim." Id. The Georgia Court of Appeals held that the trial court did not err by excluding that evidence. Id. Evidence of a third-party perpetrator is inadmissible "where no specific individual is accused and the defendant merely speculates that a person or persons unknown may have had the opportunity to commit the crime." Id. at 576 (citation omitted). The defendant "has not presented anything other than his own speculation that unknown alleged drug users frequenting [the victim's] residence may have had the opportunity to molest the victim." Id. Because the defendant failed to show a direct connection between one of those unknown men and the crime, his proffered evidence was inadmissible. Id.

¶114 In Armstrong the defendant appealed his judgment of conviction for robbing a cafeteria with another African-American male. Armstrong, 704 P.2d at 878. The defendant argued that the trial court erred by excluding evidence that, 50 minutes prior to the robbery, a cafeteria employee saw "two unidentified black men" in the cafeteria parking lot. Id. at 879. The defendant wanted to argue during trial that those unidentified men committed the robbery. Id. The Colorado Court of Appeals held that the trial court did not err by excluding that evidence, because that evidence failed to establish a "direct connection" between the unidentified men and the robbery. Id.

¶115 In Eagles the defendant appealed a judgment of conviction for robbing and shooting a man. Eagles, 812 A.2d at 125-26. On appeal the defendant argued that the trial court erred in excluding his proffered evidence that someone else committed the robbery and shooting. Id. at 126. The proffered evidence was testimony from two witnesses who saw three unidentified men, none of whom was the defendant, running from the vicinity of the crime shortly after the gunshots. Id. at 127. The Connecticut Appellate Court held that the trial court did not err in excluding the evidence. Id. at 128. The appellate court reasoned that the defendant failed to present a "direct connection" between any of the three men and the crime. Id. Further, the defendant offered "no evidence of motive on the part of any of the three men to commit the crime." Id.

¶116 Consistent with the foregoing cases, General Grant Wilson's proffered evidence was inadmissible under Denny. See Scheidell, 227 Wis. 2d at 296. Further, Wilson did not attempt to introduce any other acts evidence, so his proffered evidence was inadmissible under Scheidell. Wilson attempted to introduce testimony that Willie Friend had slapped and threatened an allegedly pregnant Evania Maric, in order to argue that Friend hired assassins to kill Maric. This evidence was not other acts evidence and it fell far short of satisfying the Denny three-prong test. Wilson did not identify any possible assassins or introduce any evidence indicating that Friend arranged for Maric to be killed. In fact, Wilson "has not presented anything other than his own speculation that unknown alleged" hit men murdered

Maric. See Neal, 436 S.E.2d at 576. He "fail[ed] to provide anything more than 'a hypothetical, unidentified'" hit man or hit men. See Wheeler, 977 A.2d at 990 (quoting Gethers, 684 A.2d at 1271). Moreover, Wilson "made no showing" that the alleged hit men, if they "actually existed, [were] connected in any way to the shooting." See Gethers, 684 A.2d at 1272. It would require a great deal of speculation to conclude that Friend hired assassins to kill the allegedly pregnant Maric based on testimony that he slapped and threatened her once or twice. Thus, Wilson "was merely trying to 'throw something out there for the jury to speculate about.'" See Gethers, 684 A.2d at 1272. This kind of speculative evidence about unknown, alleged perpetrators is not admissible.

¶117 In sum, if Wilson's defense theory is viewed as an unknown third-party perpetrator theory because the alleged shooters are unknown, his proffered evidence is inadmissible under Denny, Scheidell, and many non-Wisconsin cases.

B. Evidence that a Known Third Party Allegedly Hired Unknown Persons to Commit the Crime Charged

¶118 Few third-party perpetrator cases involve an allegation that a known third party arranged for unknown persons to commit the crime at issue. One such case is Freeland v. United States, 631 A.2d 1186 (D.C. 1993). In that case Larry Freeland was charged with the murder of his wife. Freeland, 631 A.2d at 1187. The trial court excluded his proffered evidence that a man named William Hawthorne hired people to commit the murder. Id. Prior to the murder of Freeland's wife, Freeland and Hawthorne were fellow prison inmates. Id. at 1188.

Freeland witnessed Hawthorne stab another inmate to death. Id. Freeland testified against Hawthorne in his grand jury trial regarding the stabbing death. Id.

¶119 The District of Columbia Court of Appeals held that the proffered evidence should have been admitted as Denny-type evidence. Id. at 1190. Hawthorne had a motive to hire assassins to kill Freeland's wife in order to retaliate against Freeland for his grand jury testimony and to intimidate him into not testifying against Hawthorne at trial. See id. at 1189-90. Freeland's evidence demonstrated that Hawthorne had a "clear[] link" to the murder and a "present ability to carry out the threats through others." Id. at 1189-90. Specifically, Hawthorne's associates confronted Freeland on the street several times and "repeatedly made threats to [Freeland] and his family in order to intimidate [Freeland] and to retaliate for his grand jury testimony . . . ." Id. In addition, Freeland introduced evidence showing that Hawthorne was being prosecuted for threatening other witnesses. Id.

¶120 Freeland stands in stark contrast to the present case. In Freeland the defendant introduced a substantial amount of other acts evidence showing that the alleged third-party perpetrator, William Hawthorne, was capable of having his associates carry out the murder with which the defendant was charged. Hawthorne's associates confronted Freeland in person several times and "repeatedly" intimidated and threatened Freeland and his family because Freeland was an eyewitness in Hawthorne's murder trial. By contrast, Wilson has not

introduced any evidence indicating that Willie Friend or his associates had previously murdered anyone. In fact, Wilson introduced no evidence showing that Friend had ever used his associates to commit any crime on his behalf. In Freeland Hawthorne's associates were real people whom Freeland saw and spoke to several times. By contrast, Wilson did not even introduce evidence indicating that Friend had associates who were willing and able to murder Maric. Wilson's proffered evidence is pure speculation about unidentified, hypothetical hit men. In Freeland the defendant also introduced evidence showing that Hawthorne was being prosecuted for threatening other witnesses. By contrast, Wilson proffered no other acts evidence at all. "[O]ften times the defense must rely on other act evidence to raise a circumstantial inference that the third party carried out the crime." Blinka, supra, at 215.

¶121 In Freeland the defendant's "hit man" theory of defense could be reasonably inferred from his proffered evidence. Simply stated, a jury need not speculate in order to conclude that, because Hawthorne's associates "repeatedly" threatened Freeland's family, those associates might have killed Freeland's wife. In the present case, Wilson's "hit man" theory of defense had no foundation in his proffered evidence. A jury would necessarily have to speculate in order to conclude that, because Friend slapped and threatened Maric once or twice, he hired assassins to kill her. Unlike Freeland's proffered evidence, Wilson's proffered evidence had nothing whatsoever to do with possible hit men. Falling far short of the proffer made

in Freeland, Wilson's proffered evidence was pure speculation. This kind of evidence is inadmissible.

¶122 In sum, Wilson's proffer was entirely speculative and fell short of establishing a legitimate tendency that Friend arranged for hit men to kill Maric. The circuit court did not err in excluding that proffered evidence.

¶123 For the foregoing reasons, I respectfully concur.

¶124 I am authorized to state that Chief Justice PATIENCE DRAKE ROGGENSACK joins this concurrence.

¶125 SHIRLEY S. ABRAHAMSON, J. *(dissenting).* I agree with the court of appeals that the defendant's third-party perpetrator evidence should have been admitted as a matter of constitutional law.[1] Like the court of appeals, I would grant the defendant a new trial.

¶126 The instant case revolves around the circuit court's exclusion of evidence at the defendant's trial nearly 20 years ago.

¶127 The defendant sought to introduce evidence at trial to support his contention that a third party committed the crimes alleged in the State's complaint. Such evidence is sometimes referred to as "third-party perpetrator evidence." The circuit court excluded the defendant's third-party perpetrator evidence and the defendant was convicted.

¶128 By excluding the defendant's third-party perpetrator evidence, the circuit court denied the defendant his constitutional right to present a complete defense.[2] Thus, the

[1] State v. Wilson, No. 2011AP1803-CR, unpublished slip op., at 7 (Wis. Ct. App. Oct. 22, 2013).

[2] Majority op., ¶¶61, 70; Holmes v. South Carolina, 547 U.S. 319, 324 (2006) ("[T]he Constitution guarantees criminal defendants 'a meaningful opportunity to present a complete defense'" (quoted source omitted).).

(continued)

instant case presents a question of constitutional law this court decides independently but benefiting from the analyses of the circuit court and the court of appeals.[3]

¶129 I begin with a brief review of the relevant facts.

¶130 Evania Maric, the victim in the present case, was shot to death while seated in a parked car with Willie Friend, whom she was dating. Willie Friend fled and was not injured. Willie Friend thereafter reported to the police that the defendant was the shooter, which the defendant adamantly denied. The defendant was eventually charged with first-degree intentional homicide for killing the victim and attempted first-degree intentional homicide for shooting at Willie Friend.

¶131 At trial, the defendant's attorney attempted to persuade the jury that the defendant was innocent and that Willie Friend was not. To establish this defense, the

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See also State v. Anthony, 2015 WI 20, ¶¶119, 125, ___ Wis. 2d ___, ___ N.W.2d ___ (Abrahamson, C.J., dissenting) (linking the rights to testify and to present a complete defense by arguing that the circuit court unconstitutionally deprived the defendant of his right to testify to relevant testimony regarding self-defense and thereby prevented the defendant from presenting any defense at all); State v. Nelson, 2014 WI 70, ¶68, 355 Wis. 2d 722, 849 N.W.2d 317 (Abrahamson, C.J., dissenting) (explaining that the defendant's constitutional right to testify is embedded in the constitutional right to present a defense).

[3] The majority opinion acknowledges that the instant case presents a constitutional issue. Majority op. ¶¶47, 61. See also Anthony, 2015 WI 20, ¶43 (stating that "[w]hether an individual is denied a constitutional right is a question of constitutional fact that this court reviews independently as a question of law" (quoted source & internal quotation marks omitted)).

defendant's attorney sought to present testimony from two of the victim's friends, Mary Lee Larson and Barbara Lange, to implicate Willie Friend in the murder.

¶132 In an offer of proof, Larson stated that she had heard Willie Friend threaten to kill Maric and had observed Willie Friend slapping Maric. The defendant's attorney informed the circuit court that Lange would provide similar testimony. The testimony of Larson and Lange comprised the defendant's third-party perpetrator evidence. The circuit court ruled both witnesses' testimony inadmissible.

¶133 This was not an easy case for the jury. During deliberations, the jury informed the circuit court that it had reached an impasse. Later the next day, the jury found the defendant guilty of both charges.

¶134 The issue presented is whether the circuit court erred as a matter of law in excluding the defendant's third-party perpetrator evidence.

¶135 The circuit court cannot bar the defendant's third-party perpetrator evidence "simply because the evidence against the [defendant] is overwhelming."[4] Rather, third-party perpetrator evidence is admissible so long as the defendant shows "a 'legitimate tendency' that the third person could have committed the crime."[5]

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[4] Majority op., ¶¶61, 70.

[5] State v. Denny, 120 Wis. 2d 614, 623, 357 N.W.2d 12 (Ct. App. 1984).

¶136 State v. Denny, 120 Wis. 2d 614, 624, 357 N.W.2d 12 (Ct. App. 1984), established that a defendant fulfills the legitimate tendency test "as long as motive and opportunity have been shown and as long as there is also some evidence to directly connect [the] third person to the crime charged which is not remote in time, place or circumstances . . . ." In other words, the defendant in the instant case was required to fulfill the three-prong test set forth in Denny (1) by showing that Willie Friend had a motive to commit the crime; (2) by showing that Willie Friend had an opportunity to commit the crime; and (3) by presenting evidence of a direct connection between Willie Friend and the crime.[6]

¶137 The majority opinion struggles to clarify the Denny test and in doing so changes the test. Under any reasonable interpretation of Denny, the defendant in the instant case prevails.

¶138 The State concedes that the defendant has fulfilled the motive and direct connection prongs. The majority opinion assumes without deciding that the defendant has fulfilled the motive and direct connection prongs. Both the State and the majority opinion conclude that the defendant has not fulfilled the opportunity prong.

¶139 I review the three prongs of the Denny test in turn.

¶140 First, the defendant presented evidence that Willie Friend's "motive was his belief that Maric [the victim] was

[6] Majority op., ¶3.

pregnant, that [Willie Friend] was responsible for her pregnancy, and that he wanted to avoid future child support."[7] Because the defendant provided a "plausible reason" for Willie Friend to commit the crime, I conclude that the defendant has fulfilled the motive prong.[8]

¶141 Second, the defendant argued that Willie Friend's undisputed "presence at the crime scene" constituted evidence of a direct connection between Willie Friend and the crime. Based on the totality of the evidence presented (including evidence of Willie Friend's relationship with the victim, evidence that Willie Friend had previously hit and threatened to kill the victim, evidence that Willie Friend brought the victim to the location where she was murdered, and the undisputed fact that Willie Friend was present when the victim was shot), I conclude that the defendant has fulfilled the direct connection prong.

¶142 Third, the defendant argued that Willie Friend had the opportunity to hire the victim's killer(s) and set up the victim's murder.[9] In assessing this argument, the court of appeals explained that evidence presented at trial "places [Willie] Friend at the scene when the first round of shots was fired, and is consistent with [the defendant's] contention that

[7] Id., ¶74.

[8] See id., ¶57.

[9] Id., ¶81.

[Willie] Friend was involved in the murder by luring [the victim] to a place where she would be ambushed."[10]

¶143 The court of appeals concluded that Willie Friend "had the opportunity to commit this crime, either directly by firing the first weapon or in conjunction with others by luring [the victim] to the place where she was killed."[11]

¶144 I agree with the court of appeals. I conclude, along with the court of appeals, that the defendant has met all three prongs of the Denny test for the admissibility of third-party perpetrator evidence. The defendant was therefore entitled to introduce the testimony of Larson and Lange to implicate Willie Friend in the victim's murder.

¶145 In my opinion, the circuit court's exclusion of the defendant's third-party perpetrator evidence constituted an error of law that denied the defendant his constitutional right to present a complete defense.

¶146 The court of appeals applied harmless error review to this error of law and concluded that the error was not harmless.[12] Willie Friend was the State's primary witness. With the admission of the defendant's third-party perpetrator evidence, the jury may not have considered Willie Friend a credible witness. The jury may instead have believed the defendant. Accordingly, I agree with the court of appeals that

[10] Wilson, No. 2011AP1803-CR, unpublished slip op., at 7.

[11] Id.

[12] Id. at 10.

if harmless error review applies to the circuit court's exclusion of the defendant's third-party perpetrator evidence (and I do not think it does),[13] the error was not harmless.

¶147 For the reasons set forth, I dissent. I, like the court of appeals, would reverse the circuit court's judgment of conviction and order denying postconviction relief and would remand the cause for further proceedings.

¶148 I am authorized to state that Justice ANN WALSH BRADLEY joins this opinion.

[13] The court determined that harmless error review applies to the denial of a defendant's constitutional right to testify in Anthony, 2015 WI 20, ¶¶11, 96, 101, and Nelson, 355 Wis. 2d 722, ¶43. I dissented in both cases, concluding that harmless error review does not apply when a defendant is unconstitutionally deprived of the fundamental right to testify. See Anthony, 2015 WI 20, ¶140 (Abrahamson, C.J., dissenting); Nelson, 355 Wis. 2d 722, ¶79 (Abrahamson, C.J., dissenting). The constitutional right to testify is embedded in the constitutional right to present a defense. See Nelson, 355 Wis. 2d 722, ¶68 (Abrahamson, C.J., dissenting). Accordingly, I conclude that an unconstitutional deprivation of the defendant's right to present a defense is not amenable to harmless error review.

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October 22, 2013

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You are hereby notified that the Court has entered the following opinion and order:

2011AP1803-CR State of Wisconsin v. General Grant Wilson
(L.C. #1993CF931541)

Before Curley, P.J., Fine and Kessler, JJ.

General Grant Wilson appeals a judgment convicting him of first-degree homicide and attempted first-degree intentional homicide, both while possessing a dangerous weapon. He also

appeals an order denying his motion for postconviction relief.[1] Wilson argues that he was denied a meaningful opportunity to present a complete defense during his criminal trial because the circuit court would not allow him to introduce evidence that someone else killed Evania Maric, the victim. *See* ***Crane v. Kentucky***, 476 U.S. 683, 690 (1986). We summarily reverse the judgment of conviction and order denying postconviction relief, and remand for further proceedings.

Maric was repeatedly shot with two different guns while seated in a parked car in front of an illegal "after hours" club between 5:00 a.m. and 5:10 a.m. on April 21, 1993. Willie Friend, who was dating Maric, was with Maric in the car when she was shot, but fled without being injured. Friend told the police that Wilson, who had also been dating Maric, opened fire on both of them, killing Maric. Friend was the only person to link Wilson directly to the crime. Wilson adamantly denied killing Maric and said that he was at home asleep when the murder occurred.

The State charged Wilson with first-degree intentional homicide for killing Maric and attempted first-degree intentional homicide for shooting at Friend. At trial, Wilson's lawyer, Peter Kovac, repeatedly attempted to introduce evidence implicating Friend and/or his brother Larnell Friend, who operated the "after hours" club where Maric was killed, but the circuit court refused to allow the evidence. The jury reached an impasse the first day of deliberations but, on further deliberation, convicted Wilson of the crimes. Wilson moved for postconviction relief,

[1] Wilson was convicted of these crimes in 1993, but this is his direct appeal from his conviction. We reinstated his right to a direct appeal on September 14, 2010, after we ruled that he received ineffective assistance of appellate counsel.

arguing that he should be granted a new trial because the circuit court did not allow him to introduce the evidence pointing to a third-party perpetrator. The circuit court denied the motion.

"[T]he Constitution guarantees criminal defendants 'a meaningful opportunity to present a complete defense.'" *See* ***Crane***, 476 U.S. at 690 (citation omitted). This includes "the right to present witnesses in [one's] defense." ***State v. Denny***, 120 Wis. 2d 614, 622, 357 N.W.2d 12 (Ct. App. 1984). "[A]n essential component of procedural fairness is an opportunity to be heard." ***Crane***, 476 U.S. at 690. Evidence that a person other than the defendant committed the charged crime is relevant to the issues being tried, and thus admissible, "as long as motive and opportunity have been shown and as long as there is also some evidence to directly connect a third person to the crime charged which is not remote in time, place or circumstances." ***Denny***, 120 Wis. 2d at 624.

In an offer of proof, Wilson called Mary Lee Larson, Maric's friend, who testified that Friend was physically violent toward Maric in the weeks before the murder and had threatened to kill her:

> [WILSON'S LAWYER, PETER KOVAC]: Did you, within the two weeks before Eva's death, ever hear Willie Friend make any threats against Eva?
>
> [LARSON]: Yes.
>
> [KOVAC]: What did you hear? Who was there, where was it and what did you hear?
>
> [LARSON]: It was in my house in the kitchen. Willie and Eva were sitting there, and me and my girlfriend Barb.
>
> THE COURT: And what?
>
> [LARSON]: Were sitting at my kitchen table. Willie and Eva had come over. And Willie stated right to me and my girlfriend that he had to keep Eva in check. If--

THE COURT: He said what?

[LARSON]: Eva. He said he had to keep Eva in check.

THE COURT: Oh.

[LARSON]: If he didn't keep – if she wouldn't be in check, he'd kill her, and she knew it.

BY MR. KOVAC:

[KOVAC]: And did Eva respond to that?

[LARSON]: She said yes, he would.

[KOVAC]: Okay. Did you – During this time or about this time, did you ever observe any physical contact between Eva and Willie?

[LARSON]: Yes, I had.

[KOVAC]: What did you observe in that regard? Tell us.

[LARSON]: It was at a motel room. And he went and was slapping her right in front of us.

[KOVAC]: Okay.

[LARSON]: There was quite a few of us there.

[KOVAC]: All right. Thank you.

Kovac informed the circuit court that Barbara Lange, another of Maric's friends, was also prepared to testify that she saw Friend hitting Maric in the weeks before the murder and heard Friend threaten to kill Maric.[2] During the offer of proof, Officer Michael Dubis also testified that he had questioned Mary Larson and Barbara Lange in connection with the homicide, and

[2] Lange subsequently testified about other matters at trial, but the circuit court would not allow Kovac to ask her questions about Maric's relationship with either Willie or Larnell Friend.

they had both told him that they observed Friend slapping Maric shortly before the murder and they both thought Friend was involved in Maric's death, not Wilson.[3]

Expressing skepticism with the ***Denny*** decision, the circuit court refused to allow the evidence. The circuit court acknowledged that the testimony was relevant to Wilson's defense theory because it tended to show that Friend had a motive for killing Maric, but concluded that the evidence should not be allowed, reasoning:

> [THE COURT]: The issue is really not who did it. The issue is whether the defendant did it. That's the State's burden, to show that the defendant committed this offense. The statement by this witness about what happened sometime previous is, I believe, hearsay. And even though it might support what the defendant wants to put in a theory of defense, that Willie Friend had a motive and a reason for doing it and had on some occasions even threatened her, I understand that that's the defense position and that's the theory of defense. The issue is whether the defendant committed this offense or not.

The State concedes, as it must with this record, that the circuit court's reasons for refusing to admit the evidence were not a proper exercise of discretion, but contends that the circuit court's decision should nevertheless be upheld because it was ultimately correct, even if its reasoning was wrong. Turning to the ***Denny*** test for the admissibility of third-party

[3] The circumstances surrounding Officer Dubis's testimony during the offer of proof are unusual. Wilson's lawyer, Kovac, informed the circuit court that he did not learn until after trial began that Larson and Lange told the police that Friend had threatened Maric's life shortly before the murder because this information was not included in the police report summarizing the police interview with the two women. Kovac moved to dismiss on the grounds that the State failed to disclose exculpatory information. At that point, the prosecutor stated that the police officer who prepared the report, Officer Michael Dubis, was sitting next to her and "would testify that he's the person who interviewed this woman and that she never told him about any threats by Willie Friend against the victim." When the circuit court placed Dubis under oath, Dubis testified that both women told him about the incident several weeks before the murder during which Friend hit Maric in front of them and both told him they thought Friend was behind the murder, not Wilson, but Dubis also testified that he did not recall them telling him about a second incident, which is when the women said that Friend threatened to kill Maric.

perpetrator evidence, the State acknowledges that Wilson's offer of proof was arguably sufficient to establish that Friend had a motive. The State also acknowledges that Friend was present at the shooting scene, establishing that Friend had a direct connection to the crime based on his proximity. However, the State contends that Wilson did not establish that Friend had the opportunity to kill Maric. The State points to the testimony of Carol Kidd-Edwards, the only citizen eyewitness to the shooting, in support of this argument, and to the physical evidence, which the State contends corroborates Kidd-Edwards' testimony. Wilson takes the opposite view, arguing that Kidd-Edwards' testimony shows opportunity, and is consistent with his theory that Friend was involved with the murder.

Kidd-Edwards testified that she was dressing for work early in the morning when she heard about five loud gunshots. She threw herself on her bedroom floor because she did not know where the shots were being fired. When they stopped, she stood and looked out her window. She saw a man whom she later identified as Friend, whom she had never met but recognized from the neighborhood, running from a car parked across the street two houses north of her house. As Friend fled, she saw another man come from a "blind spot" in her view because of the angle at which she was looking at the street. The man came from the passenger's side around the front of a car stopped in the middle of the street next to the victim's parked car. The man walked toward the driver's side of the victim's car as he was loading a gun and shot repeatedly into the victim's car at close range. These shots were more rapid and not as loud as the first shots Kidd-Edwards heard, and Kidd-Edwards testified that she believed from the sound that the second gun was not the same as the first gun. Kidd-Edwards described the man as about six feet tall with a slight build, which she noticed because he wore a black leather waist-fitted jacket that tapered to the waist. She said that the man then walked in front of the car from which

he had come—he did not run—and went to the passenger's side, which was outside of her view. She then heard the car door shut and the car immediately drove away.

Contrary to the State's assertion, Kidd-Edwards' testimony does not establish that Friend did not have the opportunity to commit this crime. Her testimony places Friend at the scene when the first round of shots was fired, and is consistent with Wilson's contention that Friend was involved in the murder by luring Maric to a place where she would be ambushed. As for the physical evidence, it does not preclude Friend's involvement. There were bullet strikes in the concrete on either side of the sidewalk where Friend ran away. This evidence supports the State's contention that Wilson was shooting at Friend, but it also supports Wilson's contention that the intent was for Friend not to be harmed, but make it look as if he was in harm's way. Our review of the evidence shows that Friend had the opportunity to commit this crime, either directly by firing the first weapon or in conjunction with others by luring Maric to the place where she was killed. Under ***Denny***, Wilson should have been allowed to introduce evidence that Friend was involved in Maric's murder.[4]

The State contends that any error in excluding evidence that Friend was involved in Maric's murder is harmless. An error is not harmless in a criminal case if "there is a reasonable possibility that the error contributed to the conviction." ***State v. Dyess***, 124 Wis. 2d 525, 543,

[4] Wilson also attempted to introduce evidence implicating Larnell Friend in the murder. In an offer of proof, Kovac contended that Maric had been working as a prostitute, that Larnell Friend was her pimp, that she was trying to get out of the business, and that Larnell Friend wanted her to continue to work for him and threatened to kill her as a result. This information was based on statements given to the police by Maric's mother. We do not address whether the circuit court should have allowed evidence pertaining to Larnell Friend's possible involvement in the murder because we conclude that Wilson is entitled to a new trial based on the circuit court's exclusion of evidence as to Willie Friend. If a decision on one point disposes of an appeal, we will not decide the other issues raised. ***Turner v. Taylor***, 2003 WI App 256, ¶1 n.1, 268 Wis. 2d 628, 673 N.W.2d 716.

370 N.W.2d 222 (1985). "If it did, reversal and a new trial must result. The burden of proving no prejudice is on the beneficiary of the error, here the state. The state's burden, then, is to establish that there is no reasonable possibility that the error contributed to the conviction." ***Id.*** (citation omitted).

Friend and Wilson were both romantically involved with Maric. Friend was the only person to directly link Wilson to the crime. Friend testified that Wilson threatened Maric earlier on the night of the shooting, and that Maric had been afraid of Wilson for several months. In direct contradiction, Wilson testified he and Maric had a good relationship, they were open about dating others, and she was not afraid of him. He introduced nine taped phone messages that Maric left him shortly before her murder, the last of which was only two days before she died, in which Maric seems at ease, makes casual conversation, and states that she loves Wilson "madly" and misses him because he had been away on vacation. Wilson also testified that Maric told him that if "something ever happened to her, that there would be the place," referring to the illegal club owned by Larnell and Willie Friend, whom he had never met.

Friend identified Wilson from a photo lineup, but testified that the shooter was left-handed and wore gold wire-rim glasses. Wilson testified, and called others to testify, that he had never worn gold wire rim glasses. Wilson testified, and called colleagues from the Army Reserve to testify, that he is right-handed and shoots a gun right-handed. Friend admitted at trial that he had made a telephone call from the courthouse before the preliminary hearing in which he had stated to his mother that he "had to get his story together" about what happened the night of the murder.

Two of Maric's friends, Mary Lee Larson and Barbara Lange, were willing to testify at trial that Friend was physically violent with Maric and threatened to kill her in the weeks leading up to the murder, and both told the police that it was their opinion that Friend was behind the murder, not Wilson. In his statement to police, Friend stated that he and Maric had not been in his brother's club the night of the murder. At the preliminary hearing, Friend testified the same thing. At trial, however, Friend admitted that he lied in his statement to the police and in his testimony at the preliminary hearing, and that they had, in fact, been in the club in the hours before the murder.

The only citizen witness to the shooting, Carol Kidd-Edwards, testified that she saw Friend running from the car after the first five shots were fired, one of which was likely the bullet that killed Maric, according to the pathology report. Kidd-Edwards testified that the person who shot the second round of gunfire was slightly built, which Wilson argued was inconsistent with a description of him because he has a large build. She testified that the shooter walked to the passenger side of the car after the shooting, which was inconsistent with the State's argument that Wilson acted alone in committing this crime of passion, but arguably consistent with Wilson's argument that Friend and unnamed confederates killed Maric and framed him.

Kidd-Edwards testified that the car that drove away was a gold-toned Lincoln and that she looked carefully at the license plate in an attempt to remember it, but that she could not remember the numbers and letters. She also testified that the license plate was a regular license plate. Wilson drove a gold-toned Lincoln, but his license plate was a specialty plate that read "G-Ball." Friend testified that he knew that Wilson drove a gold-toned Lincoln before the murder. Wilson presented evidence that there were many different gold Lincoln Continental cars belonging to people in the area near where the murder occurred.

The physical evidence showed bullet strikes on the ground to either side of Friend as he fled. This is consistent with the State's theory that Wilson shot at Friend, but is also consistent with Wilson's argument that Maric's murder was a set up "hit" and attempt to frame him, with bullets landing everywhere, but none hitting Friend, despite the fact that Wilson is a skilled marksman.

As this brief partial summary of the evidence shows, the evidence introduced at trial was contradictory. Given the conflicting evidence, the State cannot meet its burden of showing that there is no reasonable possibility that the error contributed to the verdict. We therefore reject the State's argument that the error was harmless. Wilson is entitled to a new trial. He was denied his constitutional right to present a complete defense during his criminal trial because the circuit court did not allow him to introduce evidence that Friend was involved in the murder despite having shown that Friend had a motive, the opportunity and a direct connection to the crime. *See* ***Denny***, 120 Wis. 2d at 624.[5]

[5] In support of its harmless error argument, the State also points to "the fact that Wilson repeatedly lied to police about his ownership of a .44 caliber weapon, the type of gun used to kill Eva Maric" and his "belated admission at trial that he did in fact own a .44 Smith and Wesson Magnum" until shortly before the murder. We agree with Wilson that this argument "goes widely off the mark." The State's ballistics expert, Monty Lutz, testified that the .44 caliber bullets involved in the shooting were fired from a Stern Rouger revolver, not a Smith and Wesson revolver, the type owned by Wilson. The defense's ballistics expert, Richard Thompson, concurred with Lutz's assessment, explaining that different markings are left on bullets depending on the gun manufacturer and the markings left on the .44 caliber bullets used in the shooting were consistent with a Stern Rouger revolver, not a Smith and Wesson revolver.

IT IS ORDERED that the judgment of conviction and order denying postconviction relief are summarily reversed and this action is remanded for further proceedings. *See* WIS. STAT. RULE 809.21 (2011-12).

Diane M. Fremgen
Clerk of Court of Appeals

STATE OF WISCONSIN CIRCUIT COURT Branch 30 MILWAUKEE COUNTY

STATE OF WISCONSIN,

Plaintiff,

vs.

GENERAL GRANT WILSON,

Defendant.

Case No. 93CF931541

DECISION AND ORDER
DENYING MOTION FOR POSTCONVICTION RELIEF

On January 24, 2011, the defendant by his attorney filed a motion for postconviction relief after his appellate rights were reinstated by the Court of Appeals. He was convicted of one count of first degree intentional homicide while possessing a dangerous weapon and one count of attempt first degree intentional homicide while possession a dangerous weapon, for which Judge Manian sentenced him to life imprisonment with a parole eligibility date of October 4, 2023 on count one and to twenty years (consecutive) on count two. Based on the multiple claims the defendant has set forth in his motion, the court ordered a briefing schedule to which the parties have responded. For the following reasons, the motion is denied.

The defendant was charged with intentionally shooting his former girlfriend, Evania Maric, as she sat in a car with her new boyfriend, Willie Friend, whom it was alleged the defendant also attempted to shoot and kill. An independent witness, Carol Kidd-Edwards, testified that she saw Willie Friend running away from the shooter, whom she could not identify, and that the shooter walked towards a gold tone Lincoln, that she heard the door slam, and that she then saw it drive off. Willie Friend provided police with the personalized license plate of the

vehicle, either G-Ball or 8-Ball, and G-Ball was found to be listed to the defendant. When the defendant was placed under arrest, he asked what he was charged with, and he was told that he was charged with a shooting. The booking officer then indicated that it was a homicide, and the defendant asked, "She's dead?," although no one had told him anything about the homicide up to that point. (Tr. 6/30/93, pp. 208-209). During interrogation, he denied ever having owned a .44 caliber gun (one of the instruments of death), but during the trial, he admitted having owned one.

At trial, the defense wanted to show that either Willie Friend or his brother, Larnell Friend (Jabo), had killed the victim under State v. Denny, 120 Wis. 2d 614 (Ct. App. 1984), but Judge Manian indicated the evidence was too speculative and did not allow it. (Tr. 7/7/93, pp. 4-5). The defendant now contends that trial counsel was ineffective for failing to proffer certain evidence and explain why it was admissible, to wit, a police report containing an interview of the victim's mother and sister in which the mother told police that Jabo acted as the victim's pimp and that her deceased daughter wanted to stop prostituting herself, but Jabo had threatened to kill her if she attempted to do so. She further told police that her daughter's relationship with the defendant was one in which they constantly fought out of jealousy. The sister told police that Willie Friend, her sister's new boyfriend, had beaten the victim with a coat hanger; however, she also indicated that the defendant had also beaten her sister on occasion.

Carol Kidd-Edwards testified that Jabo was not at the scene at the time of the shooting and only arrived afterwards. (Tr. 6/30/93, p. 111). Both Jabo and Willie Friend were swabbed by police, and the results were negative. (Id., p. 10). Carol Kidd-Edwards testified that Willie Friend had nothing in his hands at the time the shooting occurred (Id. at 101), but the man who walked toward the gold tone Lincoln Continental did (Id. at 103)(she said she saw him

toploading a gun as he approached the car in which the victim was located and saw him shoot five or seven rounds into the driver's side of the car that Friend had gotten out of. Id. at 103-104.)

This court finds it is not reasonably probable that Judge Manian would have allowed the hearsay evidence from the police reports – things the victim's mother and sister claimed they overheard through eavesdropping, and therefore, the proffered evidence would have been deemed just plain insufficient or inadmissible hearsay. Moreover, this court also finds that the evidence that the defendant claims trial counsel should have presented does not sufficiently satisfy the Denny criteria. A new trial is not warranted on this basis.

The defendant also maintains that his constitutional rights were violated based on prosecutorial misconduct. The court has reviewed the various instances alleged in his motion and agrees with the State on each of these contentions. Accordingly, it adopts the State's reasons as to why a new trial is not warranted on these bases.

The defendant next contends that trial counsel was ineffective for allowing Willie Friend to testify that the victim told him the defendant had threatened her without objection. There is not a reasonable probability that Judge Manian would have excluded this testimony had counsel objected, and therefore, the court does not find its admission prejudicial.

Finally, the defendant submits that a new trial should be ordered in the interest of justice. The court disagrees. The evidence at trial as summarized by the State in its brief overwhelmingly points to the defendant's guilt. Given that the evidence that he believes should have been admitted under Denny would not have been permitted, there is no basis for a new trial on grounds that the full controversy has not been heard.

THEREFORE, IT IS HEREBY ORDERED that the defendant's motion for postconviction relief (new trial) is **DENIED.**

Dated this 12 day of ~~June~~ July, 2011, at Milwaukee, Wisconsin.

BY THE COURT:

Jeffrey A. Conen
Circuit Court Judge

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DISTRICT I

September 14, 2010

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You are hereby notified that the Court has entered the following opinion and order:

2010AP1074-W State of Wisconsin ex rel. General Grant Wilson v. Robert Humphreys, Warden, Racine Correctional Institution (L.C. #1993CF1541)

Before Curley, P.J., Kessler and Brennan, JJ.

General Grant Wilson, by Attorney Randall E. Paulson, petitions for a writ of *habeas corpus*, alleging that Wilson's appointed appellate counsel, Attorney Peter Kovac, performed ineffectively and abandoned Wilson. *See* ***State v. Knight***, 168 Wis. 2d 509, 484 N.W.2d 540 (1992). Wilson claims that he lost his constitutionally guaranteed right to a direct appeal as a result of Attorney Kovac's actions and inactions. *See* WIS. CONST. art. I, § 21(1).

The State, on behalf of the Warden, and Attorney Kovac, both filed responses. The State acknowledges in its response that Wilson offers "serious allegations" that Attorney Kovac abandoned Wilson and provided ineffective assistance. The State advises that it "has no independent basis by which to assess the accuracy" of the facts alleged by Wilson and, in its

provided ineffective assistance to Wilson as a matter of law, and in light of the State's concession, we grant Wilson's petition.

"'*Habeas corpus* is essentially an equitable doctrine, and a court of equity has authority to tailor a remedy for the particular facts.'" ***Knight***, 168 Wis. 2d at 520-21 (citation omitted). Wilson seeks reinstatement of his postconviction and appellate rights under WIS. STAT. RULE 809.30 (2007-08).[2] The State agrees that the remedy Wilson seeks is proper and appropriate. We agree as well. *See* ***Betts v. Litscher***, 241 F.3d 594, 597 (7th Cir. 2001). The court therefore reinstates Wilson's postconviction and appellate rights under RULE 809.30.

IT IS ORDERED that the petition is granted and that, as a remedy, Wilson's postconviction and appellate rights under WIS. STAT. RULE 809.30, are reinstated effective immediately.

IT IS FURTHER ORDERED that counsel for Wilson shall file a postconviction motion or notice of appeal no later than sixty days after the date of this order.

A. John Voelker
Acting Clerk of Court of Appeals

[2] All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

STATE OF WISCONSIN | CIRCUIT COURT Branch 13 | MILWAUKEE COUNTY

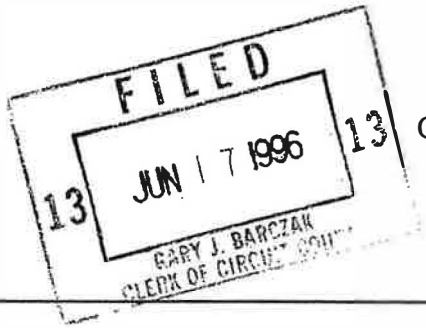
STATE OF WISCONSIN,

Plaintiff,

vs.

GENERAL GRANT WILSON,

Defendant.



Case No. F-931541

DECISION AND ORDER
DENYING MOTION FOR POSTCONVICTION RELIEF

On June 3, 1996, the defendant filed a motion for a new trial on two grounds. He contends that (1) the court erred by failing to allow him to present evidence in a jury trial that a different person killed one of the victims; and (2) newly discovered evidence exists proving there was more than one gunman acting on behalf of the other person who is alleged to have killed the victim. The motion, which is untimely,[1] will be addressed only to advance this case through the appellate process, which in another four months will be nearing the completion of its third year in postconviction status. The motion is denied without hearing for the following reasons.

[1] Defendant asserts in his motion that he received the last transcript on April 1, 1996; the motion was filed on June 3, 1996, more than 60 days after the receipt of the transcript. Sec. 809.30(2)(h), Wis. Stats. The court reporter who transcribed the final transcript, which was filed on December 7, 1995, advised the court that she did not receive payment for the transcript until January 18, 1996, but mailed it to appellate counsel upon payment, which was in January of 1996. Defendant has not sought an extension from the Court of Appeals within which to file a postconviction motion. This court assumes the motion would be granted, and not to generate any further delay in this case, the court has decided to review the motion. It merely sets forth this footnote in rebellion of the delay that has plagued this case for three years.

Defendant was convicted by a jury on July 8, 1993 of first degree intentional homicide and attempt first degree intentional homicide, both while using a dangerous weapon, after a four-day trial. During the trial, defendant attempted to introduce evidence to support his theory that a person other than he committed the shootings. (Tr. 6/30/93, pp. 7-13; Tr. 7/7/93, pp. 2-21, Zielski reporting; Tr. 7/7/93, pp. 3-5, Mitchell reporting) For the reasons set forth on the record denying defendant's request to introduce such evidence, the court likewise denies his postconviction motion for a new trial. This issue will not be revisited.

Defendant's assertion that newly discovered evidence exists is just that: an assertion. It is not supported by affidavit or other documentation. He merely indicates in conclusory terms that "there is a witness . . . [who] saw two different gunmen." (Defense motion, p. 7) He also submits that he has "been able to find numerous additional cars which generally match the description of the car used by the shooters." (Id.) These allegations are wholly insufficient to support a claim of newly discovered evidence so as to warrant a new trial, let alone a hearing. Nelson v. State, 54 Wis.2d 489, 498 (1972).

The court declines to modify the defendant's sentence on the basis that it is unduly harsh or that the court abused its discretion. A life sentence is mandated in first degree homicide cases; the 20-year sentence imposed in Count Two was warranted under the circumstances of this case. Defendant fails to set forth how the court abused its discretion in support of his second reason for modification. Nevertheless, there is nothing in the record to indicate there has been any abuse of discretion on the part of the court or any other reason to modify the sentence imposed.

THEREFORE, IT IS HEREBY ORDERED that the defendant's motion for a new trial is **DENIED.**

Dated this 17 day of June, 1996, at Milwaukee, Wisconsin.

BY THE COURT:

Victor Manian

Victor Manian
Circuit Court Judge

WISCONSIN | CIRCUIT BRANCH #13CR | MILWAUKEE COUNTY

State of Wisconsin, Plaintiff -vs- General Grant Wilson, Defendant 03-11-55 Defendant's Date of Birth	TYPE OF CONVICTION (Select One) X Sentence to Wisconsin State Prisons Sentence Withheld, Probation Ordered Sentence Imposed & Stayed, Probation Ordered COURT CASE NUMBER 93CF001541

The defendant entered plea(s) of: [ ] Guilty [X] Not Guilty [ ] No Contest

The [ ] Court [X] Jury found the defendant guilty of the following crime(s):

CRIME(S)	WIS STATUTE(S) VIOLATED	FELONY OR MISDEMEANOR (F OR M)	CLASS (A-E)	DATE(S) CRIME COMMITTED
#1) First Degree Intentional Homicide while possessing a dangerous Weapon	940.01(1) 939.63(1)(a)2	F	A	04-21-93
#2) Attempt First Degree Intentional Homicide while possessing a dangerous Weapon	940.01(1) 939.32 939.63(1)(a)2	F	A	04-21-93

IT IS ADJUDGED that the defendant is convicted on July 8, 1993 as found guilty, and:

[X] on October 4, 1993 is sentenced to prison for ct1: LIFE IMPRISONMENT, credit for 167 days, Parole eligibility date is 10-04-2023;Ct2: Twenty (20) years, consecutive to count 1, credit for 167 days.

[ ] on is sentenced to intensive sanctions for

[ ] on is sentenced to county jail/HOC for

[ ] on is placed on probation for

CONDITIONS OF SENTENCE/PROBATION

Obligations (Total amounts only)

Fine
(includes jail assessments; drug assessments; penalty assessments)

Court Costs To be determined (Both Counts)
(includes service fees; witness fees; restitution surcharge; domestic abuse fees; subpoena fees; automation fees)

Attorney fees
Restitution To be determined (Both Counts)

Other All applicable charges (Both Counts)
Mandatory victim/witness surcharge(s)
felony 2 counts $100.00
misdemeanor counts

Jail: To be incarcerated in the county jail/HOC for

Confinement Order For Intensive Sanctions sentence only - length of term:

Miscellaneous
Prison earnings to apply to all money owed at a rate of 25%.

IT IS ADJUDGED that -167- days sentence credit are due pursuant to s.973.155 Wis. Stats. and shall be credited if on probation and it is revoked.

IT IS ORDERED that the Sheriff shall deliver the defendant into the custody of the Department located in the City of Waupun, County of Dodge.

NAME OF JUDGE
Victor Manian

DISTRICT ATTORNEY
Carol Kraft

DEFENSE ATTORNEY
Peter Kovac

BY THE COURT:

Circuit Court Judge/Clerk/Deputy Clerk

October 4, 1993 cf
Date Signed

OFFICE OF THE CLERK

Supreme Court of Wisconsin

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August 11, 2021

To:

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You are hereby notified that the Court has entered the following order:

No. 2018AP183-CR State v. Wilson L.C. #1993CF931541

A petition for review pursuant to Wis. Stat. § 808.10 having been filed on behalf of defendant-appellant-petitioner, General Grant Wilson, and considered by this court;

IT IS ORDERED that the petition for review is denied, without costs.

Sheila T. Reiff
Clerk of Supreme Court