STATE OF WISCONSIN	CIRCUIT COURT BRANCH VI	BROWN COUNTY
STATE OF WISCONSIN Plaintiff, vs. GEORGE STEVEN BURCH DOB: 02/14/1978 Defendant.	DA Case No.: 2016BR006033 Court Case No.: 2016CF001309 **PLAINTIFF'S RESPONSE BRIEF TO DEFENDANT'S MOTION TO ADMIT DENNY EVIDENCE**	AUTHENTICATED COPY FILED MAY 12 2017 CLERK OF COURTS BROWN COUNTY, WI *For Official Use*

The State of Wisconsin, by District Attorney David L. Lasee, hereby files its response to the defendant's motion seeking to introduce evidence that a third-party perpetrator, Douglass Detrie, murdered Nicole VanderHeyden. As the defendant correctly notes, he has a constitutional right to present a defense. That right, however, is necessarily restricted by well-established rules governing the admissibility of such evidence. Wisconsin courts have reconciled this tension with a test established in State v. Denny, 120 Wis. 2d 614, 617, 357 N.W.2d 12 (Ct. App. 1984). Thus, in order to introduce third-party perpetrator evidence, the defendant must satisfy each of the three prongs under Denny: that the third party perpetrator has (1) motive to commit the crime, (2) the opportunity to commit the crime, and (3) a direct connection between the third party actor and the perpetration of the crime. See State v. Wilson, 2015 WI 48, ¶¶ 56-59, 362 Wis. 2d 193, 864 N.W.2d 52.

The Defendant wishes to admit "evidence" that Doug Detrie committed the alleged crime, so that he can support the fantastic tale that he has created to explain his own involvement in Nicole's death. In a section cleverly titled "Facts," the defendant provides his version of the events during the early morning hours of May 21, 2016. (Defendant's Brief, 8–10.) In essence,

the defendant acknowledges that he was with VanderHeyden the night she was murdered but asserts that Douglass Detrie knocked the defendant unconscious. (Id. at 10). When the defendant awoke, the defendant claims he saw that VanderHeyden appeared dead at the hand of Detrie. (Id.) The defendant alleges Detrie forced him at gunpoint to assist Detrie in disposing of VanderHeyden's body before the defendant was eventually able to flee. (Id.) However, because the defendant fails to show that Douglas Detrie had motive, opportunity, or a direct connection to VanderHeyden's murder, the State respectfully requests that the Court deny the defendant's motion to admit evidence relating to Detrie's alleged involvement in the crime.

APPLICABLE LAW

The defendant correctly notes that whether evidence relating to Detrie's alleged involvement in VanderHeyden's death is admissible is squarely governed by State v. Denny, 120 Wis. 2d 614, 357 N.W.2d 12 (Ct. App. 1984). In Denny, the defendant was convicted of first-degree murder for stabbing the victim fifty-seven times. Id. at 617. Denny attempted to introduce evidence that he did not have a motive to murder the victim; and that several other individual would have had a motive to kill her. Id. at 621. The circuit court refused to admit any evidence of motive, as it related to any third-parties, because it was deemed irrelevant. Id. In reviewing the circuit court's ruling, the court of appeals adopted the "legitimate tendency" test established in Alexander v. United States, 138 U.S. 35, 356–57 (1891).

The Denny court thereby created a "bright line standard" requiring that before a defendant can admit evidence alleging that a third-party committed the crime for which he is charged, the defendant must show motive, opportunity, and a direct connection between that third-party and the crime alleged. Id. at 625. The Wisconsin Supreme Court has since affirmed that the Denny test is the proper analysis courts must use in analyzing whether to admit third

party perpetrator evidence. See, e.g., State v. Wilson, 2015 WI 48, ¶ 52, 362 Wis. 2d 193, 864 N.W.2d 52 ("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."). Third party perpetrator evidence is, however, difficult to establish. The defense cannot rely on "a bare possibility that a third party might be the culprit." Denny, 120 Wis. 2d at 622. The proffered evidence must do more than "simply afford[] a possible ground of suspicion against another person." State v. Avery, 2011 WI App 124, ¶ 42, 337 Wis. 2d 351, 804 N.W.2d 216 (citing Michael R.B. v. State, 175 Wis. 2d 713, 723–24, 499 N.W.2d 641 (1993)).

Logically, it would follow that evidence proposed to satisfy one individual Denny prong be itself admissible evidence in the first place. For instance, if a defendant in a homicide trial offered the testimony of A that he heard the victim owed the alleged third party actor a substantial amount of money, that evidence, while arguably satisfying the motive prong under Denny, would be inadmissible hearsay at trial. Similarly, as the Court in Wilson stated, evidence offered to show motive must itself still satisfy evidentiary rules which mandate that only relevant evidence is admissible. Wilson, 362 Wis. 2d 193, ¶ 63 (citing State v. Berby, 81 Wis. 2d 667, 686, 260 N.W.2d 798 (1977)); see also Holmes v. South Carolina, 547 U.S. 319, 326 (2006) ("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.").

To summarize, evidence of a third party's involvement in a crime may be admissible 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, ¶ 24, 595 N.W.2d 661 (1999) (citing Denny, 120 Wis. 2d at 623–24). The defendant provides a litany of arguments and purported evidence which in his view would support admission of the evidence. (Defendant's Brief, 11–20.) Keeping this in mind, however, the "legitimate tendency" test is not a balancing test. Even though evidence as to one of the prongs may be independently compelling, courts have re-iterated that "the Denny test is a three-prong test; it never becomes a one-or two-prong test." State v. Wilson, 362 Wis. 2d 193, ¶ 64. The defendant therefore must establish the existence of *each* of the three Denny prongs. Id., ¶ 54. The State will thus address each of the defendant's arguments with respect to the three Denny prongs in turn.

Motive

With respect to the first prong of the "legitimate tendency" test, the court must decide whether the third-party actor had a motive to commit the crime. State v. Wilson, 362 Wis. 2d 193, ¶ 57. That is, whether the alleged third-party actor had "a plausible reason to commit the crime." Id. The court uses the same analysis in assessing whether a third-party actor has a motive to commit the crime as it would were it to consider evidence relating to a defendant's motive to commit the crime. Id., ¶ 63. The defendant is thus not required to prove a third-party actor had the motive to commit a crime, but must put make a showing that the evidence is relevant. Id. (citing State v. Berby, 81 Wis. 2d 667, 686, 260 N.W.2d 798 (1977)); see also Kelly v. State, 75 Wis. 2d 303, 318, 249 N.W.2d 800 (1977) ("Generally, evidence of motive should be admissible under the same standards of relevancy as other evidence."). Therefore, courts should consider first whether or not the proffered motive evidence is relevant, that is, whether the evidence has

"any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Wis. Stat. § 904.01 (2015-16); see also Kelly, 75 Wis. 2d at 318-19. Next, the court should determine whether the prejudicial effect of the evidence substantially outweighs its probative value. See Wis. Stat. § 904.03.

With respect to the motive prong, the defendant puts forth a variety of arguments to establish Detrie's alleged motive to murder VanderHeyden. To summarize, the defendant cites a variety of national statistics relating to demographic information of murderers and their victims, circumstances surrounding homicides, and the recidivism rates for domestic violence offenders. (Defendant's Brief, 11–12.) The State respectfully asserts that these statistics are irrelevant and otherwise inadmissible under § 904.03. Motive "explains the reasons for a person's actions." State v. Balistreri, 106 Wis. 2d 741, 756, 317 N.W.2d 493 (1982). The statistics cited by the defendant merely espouse generalities regarding homicides nation-wide and do little to elucidate what specific alleged motive Detrie would have had to commit this murder. The cases which discuss the motive prong under Denny analyze the specific and personal motive the alleged third party perpetrator would have had to commit the crime. See, e.g., Denny, 120 Wis. 2d at 625 (analyzing motive in the context of allegations that the victim got in trouble with a big-time drug dealer, that the victim angered another man by purchasing a gun from him and later selling it, and the victim having allegedly owed money to another man); State v. Vollbrecht, 2012 WI App 90, ¶ 27, 344 Wis. 2d 69, 820 N.W.2d 443 (stating that the motive of the crime was to sexually assault the victim and the proffered third-party motive evidence tended to show the alleged third party acted with sexual intent). The statistics cited by the defendant are for pure propensity purposes, and are irrelevant to the analysis of whether Detrie had a motive to kill VanderHeyden.

Apart from these abstract statistics, the defendant also cites specific instances which he claims support the notion that Detrie had the motive to murder VanderHeyden. First, the defendant puts forth a variety of witness statements, including statements from Detrie himself, that Detrie and VanderHeyden had an argument the night of May 20, 2016, before the murder. (Defendant's Brief, 11–13.) The State acknowledges that the evidence would show that Detrie and VanderHeyden argued during the night of May 20, hours before VanderHeyden's murder. But a mere argument does not provide a sufficient basis for the Court to find Detrie had motive to kill VanderHeyden. Both VanderHeyden and Detrie were drinking somewhat heavily the night of May 20 into May 21. Apart from citing a litany of hearsay statements regarding alleged past acts of abuse towards VanderHeyden, the defendant does little more than extrapolate a motive to kill VanderHeyden from what was merely an intoxicated dispute between VanderHeyden and Detrie.

In fact, many of the statements the defendant cites in this section detail why *VanderHeyden* was upset or angry with *Detrie*, not vice versa. The only statement which would bear on Detrie's mental state is the comment made by Detrie's friend Gregg Mathu that Detrie was "mad" that VanderHeden walked away from the Sardine Can bar that night. Again, the mere fact that Detrie may have been upset that VanderHeyden walked away from the bar late at night is not relevant to Detrie's alleged motive for killing her. Detrie and VanderHeyden resided together, they had a very young child in common, and in fact, just that night, had gone out together to spend time with friends. It is a tremendous leap to suggest that because they had an argument that evening, Detrie was motivated to *kill* his girlfriend and the mother of his child.

The defendant also cites Detective Sergeant Roman Aronstein's comments to Detrie's friend, Gregg Mathu, wherein Aronstein indicated to Mathu that he believed Detrie was the

perpetrator. (Defendant's Brief, 12.) The defendant cites Sergeant Aronstein's statements as if they were Sergeant Aronstein's sincere opinion of the case and not an investigative technique meant to elicit information from Mathu. Moreover, Sergeant Aronstein's comments are wholly irrelevant to show any motive for Detrie to murder VanderHeyden. Even if they were sincere beliefs (and the State would argue there is no evidence to support such a suggestion) Sergeant Aronstein's comments are inadmissible as it widely acknowledged that witnesses cannot testify as to their personal beliefs regarding the guilt or innocence of the accused. See, e.g., 3 Wharton's Criminal Evidence § 126:16 (15th ed.) ("Although lay witnesses are sometimes permitted to give an opinion on an ultimate issue in a case, they may not give an opinion on whether they believe the defendant is guilty or innocent, because that is the ultimate question of fact the factfinder must determine.").

Lastly, the defendant cites Green Bay Police Department case #12-203623, in which Detrie as alleged to have committed acts of domestic abuse towards Rebecca Mott, a prior girlfriend. (Defendant's Brief, 14.) The State will note that although the defendant's brief offers this "evidence" as if Detrie had been tried and convicted in relation to this incident, Detrie wasn't even charged for that incident involving Mott. Indeed, when officers responded to the incident, they were greeted by Detrie who expressed that he was glad the officers arrived because he was about to call the police. Detrie told the responding officers that the incident was started by Mott. The State acknowledges that Mott made these allegations against Detrie in the past, however, the allegation are not relevant and admissible when they are properly weighed as other acts evidence pursuant to § 904.04(2).

While other acts evidence need not rely on criminal convictions, see, e.g., State v. Gray, 225 Wis. 2d, ¶ 52, 590 N.W.2d 918 (1999), other acts evidence of uncharged conduct is relevant

only "if a reasonable jury could find by a preponderance of the evidence that the defendant committed the other act." State v. Bustamante, 201 Wis. 2d 562, 570, 549 N.W.2d 746 (Ct. App. 1996) (citation omitted). The defendant still must establish the admissibility of the evidence under well-established rules outlined in State v. Sullivan, 216 Wis. 2d 768, 576 N.W.2d 30 (1998). See, e.g., Vollbrecht, 344 Wis. 2d 69, ¶ 29 (stating that when a defendant seeks to admit evidence of other acts committed by a third party, the court should apply the Sullivan framework). Under Sullivan, the court must determine: (1) whether the other acts evidence is offered for an acceptable purpose under § 904.04(2); (2) whether the evidence is relevant under § 904.01; and (3) whether the evidence's probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues or misleading the jury, or by consideration of undue delay, waste of time, or needless presentation of cumulative evidence, pursuant to § 904.03. Sullivan, 216 Wis. 2d at 772. The defendant does not provide any analysis as to why the evidence would be admissible as other acts evidence, but nevertheless the State will attempt to analyze the proffered evidence under Sullivan.

The defendant is nominally offering the evidence relating to the Rebecca Mott incident to show motive and opportunity. (Defendant's Brief at 14–15, 17.) However, the defendant himself repudiates this argument by arguing that this evidence would show "[Detrie's] propensity to strangle and beat women." (Defendant's Brief, 19.) Courts have long held that propensity evidence is inadmissible at trial. See, e.g., State v. Marinez, 2011 WI 12, ¶ 19, 331 Wis. 2d 568, 797 N.W.2d 399 ("Other-acts evidence is properly admissible...if it is offered for a permissible purpose, other than the prohibited propensity purpose.") (emphasis added); Whitty v. State, 34 Wis. 2d 278, 291, 149 N.W.2d 557 (1967) ("...[T]he 'character rule' is universally established that evidence of prior crimes is not admitted in evidence for the purpose of proving general

character, criminal propensity or general disposition on the issue of guilt or innocence."). The evidence is thus expressly not being offered for a permissible purpose under § 904.04.

Even were the Court to find that the evidence was offered for a permissible purpose, the evidence concerning the allegations in GBPD Case #12-203623 are irrelevant to this case. Relevance has two facets. The first is whether the evidence "relates to a fact or proposition that is of consequence to the determination of the action." Sullivan, 216 Wis. 2d at 785. Second, the evidence must be probative, that is, whether the evidence "has a tendency to make a consequential fact more or less probable than it would be without the evidence." Id. at 786. "The probative value of the evidence...depends on the other incident's nearness in time, place and circumstances to the alleged crime or to the fact or proposition sought to be proved." Id. (citing Whitty, 34 Wis. 2d at 294). In the context of other acts evidence of a third party, the proffered evidence "must do more than simply afford a possible ground of suspicion against another person; it must connect that person to the crime—either directly or inferentially." Vollbrecht, 344 Wis. 2d 69, ¶ 31. While there is no exact point at which other acts evidence is considered too remote, the allegations involving Detrie and Mott are too remote to be considered relevant to this case, especially in light of the dissimilarity in the two incidents. The incident involving Rebecca Mott occurred on March 20, 2012, over four years prior to VanderHeyden's murder. See State v. Hammer, 2000 WI 92, ¶ 33, 236 Wis. 2d 686, 613 N.W.2d 629 ("It is within a circuit court's discretion to determine whether other acts evidence is too remote.") (citation omitted). There were no reported incidents involving Detrie in the interim over those four years. This fact is important as court have stressed that the more incidents which occur increase the probative value of the evidence. See Sullivan, 216 Wis. 2d at 786–87. Furthermore, the incident are dissimilar in fact and circumstance. The incident between Detrie and Mott at best represented an disturbance

that involved mutual combatants that got out of hand. Mott herself has a history of involvement in domestic disturbances, and convictions for domestic violence. If there is to weigh all of the facts and circumstances of the incident between Detrie and Mott, it could not possibly come to the conclusion that a reasonable jury would find that the event occurred, nor that it is probative to the present case.

The minimal probative value of the evidence would be substantially outweighed by the evidence's prejudicial effect, confusion of the issues, and would mislead the jury. Allowing this evidence in would turn a trial in which the jury was to determine whether the defendant was guilty beyond a reasonable doubt of killing VanderHeyden into a trial within a trial of whether an incident from five years prior to the date of trial between two parties who are tangentially related to the present action. This evidence would needlessly waste the jury's time and would only serve to distract the jury from the evidence relevant to the defendant's guilt or innocence.

The defendant lastly cites numerous witness statements—from Danielle Tomarczyk, Heather Meyer, Randee Rufledt, Victoria Meyer, and Danielle Koss—regarding past allegations of abuse involving Detrie and VanderHeyden. Like the allegations of Rebecca Mott, these incidents again would constitute other acts evidence subject to a Sullivan analysis. Some of the statements, particularly from Victoria Meyer, Koss and Rufledt, are based solely on inadmissible hearsay. Koss, for instance, says she heard from Heather Meyer that Detrie may have been abusive. Koss specifically stated, "Nicole never confided in me or told me that Doug was abusive towards her." Likewise, Randee Rufledt based her statements on conversations with Heather Meyer. Randee also told officers, "Heather never disclosed to me anything about Doug being physically violent with Nicole. I have only met Doug a couple of times." The statements of Danielle Tomarczyk likewise are entirely irrelevant to the issue of Detrie's alleged motive.

Tomarczyk states that Detrie was controlling towards her, but stated that Doug "never became physically violent with [her]." Tomarczyk further stated she has never met VanderHeyden. Heather Meyer stated that she saw firsthand that Detrie was controlling and that she was aware that VanderHeyden and Detrie fought. Heather Meyer does not state any knowledge of Detrie ever becoming physical with VanderHeyden, which would diminish this evidence's relevance to whether Detrie had motive to kill VanderHeyden. Again, the purpose of the Denny test is to "avoid undue prejudice...from unsupported jury speculation as to the guilt of other suspects." Denny, 120 Wis. 2d at 622 (quoting People v. Green, 27 Cal. 3d 1, 164 Cal. Rptr. 1, 609 P. 2d 468, 480 (1980)).

The defendant cannot rely on a litany of irrelevant, inadmissible statements in lieu of tangible evidence which would support a finding that Detrie had motive to kill VanderHeyden. The entire purpose of these statements is to attempt to allow the jury to speculate as to Detrie's guilt based on his alleged and unsubstantiated prior propensity towards abuse. The State respectfully submits that the proffered motive evidence has no bearing as to the existence of any fact that is of consequence to this case.

Opportunity

With respect to the second prong of the Denny test, the court must decide whether the alleged third-party suspect could have committed the crime directly or indirectly. Wilson, 362 Wis. 2d 193, ¶ 58. This means that there must be evidence that would make a "practical possibility" that the third party committed the crime. Id. The inquiry is dependent on what the defense's theory of the third party's involvement. Id., ¶ 68. "'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." Id., ¶ 67. (citing 7 Wis. Prac., Wis. Evidence § 404.7 (3d ed.)). What is clear, however, is that the defendant "[i]n all but the rarest of cases...will need to show more than an unaccounted-for period of time to implicate a third party." Id. (citing Vollbrecht, 344 Wis. 2d 69). "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." Wilson, 362 Wis. 2d 193, ¶ 70 (citation omitted).

"The defense theory of a third party's involvement will guide the relevance analysis of opportunity evidence in a Denny case." Wilson, 362 Wis. 2d 193, ¶ 68. The only evidence the defendant puts forth regarding Detrie's alleged opportunity to commit this crime is that Detrie was at his home at approximately 3:00 a.m., and his whereabouts thereafter were unknown. (Defendant's Brief, 17.) The defendant's residence is in the vicinity of the murder scene. The defendant speculates that Detrie was unlikely to have immediately fallen asleep due to ingesting amphetamine. (Id.) Additionally, the defendant argues that Detrie had the "physical and mental" capability to murder VanderHeyden as he had allegedly committed a similar crime against a previous girlfriend, an issue which the State has previously addressed in the preceding section. (Id.)

The defendant fails to show that Detrie had the opportunity to kill VanderHeyden. While it is true that the suspected site of the murder is in close proximity to Detrie's residence, the defendant fails to put forth any evidence that puts Detrie at the actual crime scene. Rather, the defendant speculates that the defendant did not fall asleep after returning home around 3:00 a.m. on May 21, 2016. The proffered evidence is more analogous to an unaccounted-for period of time, which is insufficient in most cases to meet the opportunity prong. Wilson, 362 Wis. 2d 193,

¶ 68. While courts have found that a party's unaccounted-for period of time was sufficient to show opportunity for a murder, that instance involved distinctive evidence tying the third party to a case for which he was already convicted. Vollbrecht, 344 Wis. 2d 69, ¶ 26. In Vollbrecht, for instance, which was a case involving the defendant seeking a new trial on the basis of newly-discovered evidence, the court of appeals affirmed the trial court's decision to permit the defendant to introduce evidence of a third-party perpetrator. In that case, however, the crime for which Vollbrecht was charged shared extremely distinct and similar characteristics to a separate crime which the alleged third party perpetrator, Kim Brown, was convicted of. See Id., ¶¶ 25-33. As to the opportunity prong, Vollbrecht merely relied on an hour and a half long unaccounted-for period of time where the third party may have been in the vicinity of the crime when it happened. Id., ¶ 26. The post-conviction court and the court of appeals concluded that this was sufficient in that case to establish Kim Brown's opportunity to commit the crime Vollbrecht was charged with. Id. However, the court of appeals expressly stated that the determination "was made in light of the evidence presented as to motive and direct connection" Id. The Supreme Court in Wilson distinguished Vollbrecht on that basis in excluding unaccounted-for period of time evidence from being a sufficient basis from which a court could find opportunity. Wilson, 362 Wis. 2d 193, ¶¶ 68, 86. Unlike in Vollbrecht, where the defendant was able to show motive and two extremely similar and distinctive crimes, one of which the third party perpetrator confessed and was convicted, the defendant in this case merely speculates that Detrie was involved in VanderHeyden's death.

The defendant mostly argues that Detrie had opportunity to commit the crime because he happens to reside very near the crime scene. But the defendant also in effect, through his version of events, argues that Detrie was also at the location where VanderHeyden's body was located.

The defendant points to no evidence that would put Detrie at the scene of where VanderHeyden's body was located. Moreover, if one were to believe the defendant's fantastic tale, Detrie would have been left alone, at 4:00a.m., with no transportation miles from his home. The defendant points to no evidence which would place Detrie in the vicinity of the location where VanderHeyden's body was located on May 21, 2016, nor any evidence as to how, and when he returned home from that location. If the court were to believe the defendant's version of events, there would be a significant period of time where Detrie left his residence, killed VanderHeyden, drove with Burch to the location where VanderHeyden's body was discovered, and then, presuming that the defendant was able to get away and leave Detrie without transportation, time to walk back to his residence. That is not to mention that it would mean that Detrie would have had to leave his nine-month-old son home alone for hours in the morning of May 21, 2016. Rather than provide any evidence which would show Detrie had an opportunity to commit the crime, the defendant relies on mere speculation based on Detrie's unaccounted-for period of time after 3:00 a.m. on May 21, 2016.

Direct Connection

With respect to the third prong of the "legitimate tendency" test, the court must decide whether the third-party perpetrator actually committed the crime either directly or indirectly. Wilson, 362 Wis. 2d 193, ¶ 59. This prong of the Denny test takes the defendant's theory of the case beyond mere speculation, and requires that the defendant show a "*legitimate* tendency that the alleged third-party perpetrator committed the crime." Id. (emphasis original). "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.

Like the opportunity prong, the defendant must do more than simply show a connection between the third party and the crime or a third party's presence at a crime scene. See Wilson, 362 Wis. 2d 193, ¶ 72 ("Mere presence at the crime scene or acquaintance with the victim, however, is not normally enough to establish direct connection.") Rather, the court must look for "some direct connection between the third party and the *perpetration* of the crime." Id., ¶ 71. (emphasis original). Evidence which would go to direct connection may be intermixed with evidence under the opportunity prong. Id., ¶ 73. While certainly not an exhaustive list, Wilson provided two examples of evidence which may be sufficient to show a direct connection. A third party's self-incriminating statement, for instance, can establish a direct connection. Id., ¶ 72. So too can exclusive control of the murder weapon. Id.. In this case, the defendant puts forth no evidence that would come close to establishing a direct connection.

As with evidence showing a third-party's alleged opportunity to the commit the crime, evidence which would satisfy the direct connection prong is highly dependent on what the defendant's theory of the third party's culpability is. Id., ¶ 71. As "evidence" that Detrie directly perpetrated the homicide, the defendant argues that VanderHeyden was murdered in the close vicinity of Detrie's residence, that Detrie's residence smelled strongly of cleaning agents (several days after the crime), and a shoe print on VanderHeyden's back that was potentially consistent with a shoe from Detrie's residence. (Defendant's Brief, 18.) The defendant additionally asserts that because Detrie has a Concealed Carry Permit that it corroborates his claim that Detrie forced him at gunpoint to assist in moving VanderHeyden's body. (Defendant's Brief, 19.) The defendant also cites Sgt. Aronstein's comment to Greg Mathu that Detrie was involved in VanderHeyden's murder as if it were law enforcement's opinion of the case and not an interview technique utilized by Sgt. Aronstein to elicit information. (Id.)

The alleged evidence cited by the defendant to satisfy the third Denny prong merely attempts to draw a connection between Detrie and VanderHeyden's murder. The defendant, however, fails to put forth any evidence that would connect Detrie to the *perpetration* of the crime. See Wilson, 362 Wis. 2d 193, ¶ 71. With respect to the defendant's argument that Detrie was in the vicinity of the crime scene and his alleged problems with VanderHeyden, Wilson makes clear that these factors alone are insufficient. Id. ("Mere presence at the crime scene or acquaintance with the victim, however, is not normally enough to establish direct connection.") (citation omitted).

In further support of Detrie's alleged direct connection, the defendant cites markings on VanderHeyden's back which the defendant claims are consistent with the tread of a show that Detrie owns. This conclusion is based almost entirely on Sergeant Slinger's suggestion that the marks found on VanderHeyden's back were consistent with Detrie's Air Jordan shoes. To begin, Sergeant Slinger does not purport to be an expert in the field of comparing shoeprints. Even if Detrie's shoeprint and the markings on VanderHeyden's back were consistent, that fact alone is not relevant when considered with additional evidence in the case. First, a later analysis by a Wisconsin State Crime Laboratory footwear analyst indicated that impressions found on VanderHeyden were consistent with the outsole pattern design in some areas of Detrie's Nike Jordan basketball shoes, however "some areas of the questioned impression(s) also exhibit dissimilarities." The analyst later additionally tested a footprint located on VanderHeyden's tank top and compared that image to Detrie's shoe. The analyst determined that the "questioned impression(s) lacked sufficient detail for a meaningful conclusion." Moreover, DNA analysis of the bottom of these shoes revealed that there was limited amount of genetic information available and thus a comparison could not be made. Of course, Air Jordan shoes are quite common, and

even if the impression was consistently a complete match, that fact alone could not be sufficient to demonstrate a direct connection.

The defendant next cites evidence that Detrie stopped calling VanderHeyden at around 3:00 a.m. (Defendant's Brief, 18). The defendant again speculates consistent with his assertion of the facts that this was because Detrie saw VanderHeyden outside with Burch. (Defendant's Brief, 18–19.) Rather than entertain the defendant's rampant speculation as to why Detrie suddenly stopped calling VanderHeyden at 3 o'clock in the morning, the Court should consider how this evidence in any way supports the notion that Detrie actually committed the crime. See Wilson, 362 Wis. 2d 193, ¶ 71. Any reason why Detrie would have stopped calling VanderHeyden at 3 o'clock in the morning would be pure speculation. Perhaps he stopped calling her at 3:00 a.m. because, as Detrie stated to investigators, that is the time he fell asleep after being out all night drinking. The very purpose of the balancing test developed in Denny is to prevent this type of unsupported speculation as to the guilt of other suspects. Denny, 120 Wis. 2d at 622.

The defendant also argues that because Detrie has a Concealed Carry Permit, that would support the defendant's allegations. To the extent the State can follow this argument, the fact that Detrie has a concealed carry permit is wholly irrelevant to any fact of consequence in this case. In fact, the only allegation that a gun was in any way involved in the commission of this crime was first brought up by the defendant in his version of the events of May 21, in that the defendant alleges that he was held at gun point. There is no evidence that a gun was used in the perpetration of this crime; and likewise, there is no evidence that Doug Detrie ever owned a handgun. Put simply, Detrie's Concealed Carry Permit in no way has any bearing on Detrie's

alleged *perpetration* of the crime. VanderHeyden's death was the result of strangled and significant blunt force trauma; and there is no evidence that a gun was used in this offense.

The defendant also resuscitates statements made by Detective Sergeant Roman Aronstein to Gregg Mathu regarding his personal belief of Detrie's guilt. The State addressed this point in the motive section, but the State reiterates that even if this statement reflected Sergeant Aronstein's personal belief, which it does not, the evidence would not be admissible at trial. Nor would it show any direct connection to VanderHeyden's murder.

Likewise, the defendant reprises his argument that the fact that the murder scene was in close proximity to Detrie's residence, that Detrie was by himself, and the allegations involving Detrie's conduct towards Rebecca Mott are relevant to a direct connection. (Defendant's Brief, 19). With respect to the first claim, Wilson makes clear that proximity to the crime scene is insufficient to establish a direct connection. Wilson, 362 Wis. 2d 193, ¶ 72. With respect to the claims concerning Rebecca Mott, the State would adopt its prior argument as it relates to direct connection. The defendant fails to meet the Sullivan analysis to establish other acts evidence in the direct connection prong. See Vollbrecht, , 344 Wis. 2d 69, ¶¶ 29-31. The proximity to the scene and the fact that Detrie was alone at the time of the murder do nothing to tie Detrie to commission of the actual crime. (Defendant's Brief, 17–18).

The defendant next argues that during the search warrant, officers noted that Detrie's residence smelled of cleaning agents. (Defendant's Brief, 18). Specifically, the defendant cites the report of Detective Sergeant Monica Janke of the Brown County Sheriff's Office from May 23, 2016. While executing a search warrant at approximately 9:40 p.m. on May 23, 2016, at Detrie's residence located at 2329 Berkley Road, Sergeant Janke reported that "[u]pon entering the garage, I immediately detected a strong odor of chemical, such as those of cleaning agents,

which remained strong on the first and second floor inside the residence." Sergeant Janke stated this odor "seemed inconsistent with the housekeeping condition of the home."

As an initial point, the mere odor of cleaning agents within Detrie's home does nothing to directly connect Detrie with the perpetration of the crime. Neither party argues that any portion of the crime scene occurred within Detrie's residence. The presence of cleaning agents is wholly irrelevant to the third prong under Denny. Moreover, Sergeant Janke detected an odor the night of May 23, 2016, nearly 72 hours after VanderHeyden's murder. Closer to the time frame of the homicide, on May 21, 2016, at around 5:15 p.m., Detective Sergeant Tracy Steffens responded to Detrie's residence to speak with him regarding his missing person complaint. Sergeant Steffens spent considerable time not only in Detrie's residence but also went into the garage to observe VanderHeyden's vehicle. Detective Steffens left the residence at around 8:00 p.m. on May 21. Noticeably absent from Detective Steffen's lengthy and detailed report of her nearly three hours in Detrie's residence is any mention of a strong odor of cleaning agents. Any modicum of relevance the evidence that Detrie's residence smelled of cleaning agents on May 23 is greatly diminished by the fact that neither Detective Steffens nor Narcotics Investigator Marc Shield of the Brown County Drug Task Force, who accompanied Sergeant Steffens during the interview, noted an odor of cleaning agents within hours of VanderHeyden's murder in the early morning hours of May 21.

The presumed relevance of the cleaning agent evidence is to show that Detrie was attempting to mask evidence relating to his involvement in VanderHeyden's death. Were this evidence to be relevant for this purpose, Sergeant Steffens and Investigator Shield would have certainly noted a "strong odor of cleaning agents," or in the alternative, they would have noticed the actual evidence of the crime if Detrie had not yet cleaned up. They did not notice either, and

the fact that Sergeant Janke did note an odor two days later is irrelevant for the purpose the defendant seeks to admit this evidence.

Furthermore, at the request of the Brown County Sheriff's Office, three Green Bay Police Department forensic specialist searched Detrie's residence after midnight on the morning of May 22, 2016. Not a single one of those analysts noted any odor of cleaning agent. Further, despite the fact that Nicole VanderHeyden suffered a brutal attack resulting in significant blood loss, those forensic analysts were not able to recover to any evidence of note tying Detrie to her murder.

The defendant appears to be grasping at straws to support his story that Doug Detrie was the perpetrator of Nicole VandenHeyden's murder. None of the facts alleged by the defendant actually connects Douglass Detrie to VanderHeyden's murder and therefore he fails to demonstrate a sufficient connection between Detrie and the perpetration of the crime. As such, the defendant has also failed to satisfy the third Denny prong.

The Court Can, and Should, Consider Evidence that Detrie Did Not Commit the Crime

In addition to considering each of the three prongs of the Denny test, courts tasked with determining the admissibility of third-party-perpetrator evidence, have made clear that the reviewing court can consider evidence which shows that third party could not have committed the crime. Wilson, 362 Wis. 2d 193, ¶ 69. In those cases, "[c]ourts 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)." Id. Thus, the Court may 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." Id., ¶ 72.

Perhaps the most important evidence supporting the position that Detrie could not have committed this offense, is that Detrie's DNA was almost entirely absent from swabs taken from VanderHeyden's body and clothing. Y-STR DNA consistent with Detrie and his and VanderHeyden's son were located only on VanderHeyden's bra, tank top, and underwear. This is hardly a surprise, given that VanderHeyden resided with Detrie and their son (and Detrie and his son share the same Y-STR profile). Most importantly, Detrie was excluded as the possible source of the male DNA located on swabs from VanderHeyden's arms, palms, chest, mons pubis, wrists, ankles, forearms, and, importantly considering that Vanderheyden was strangled, he was also excluded from the male DNA located on swabs from Vanderheyden's neck.

Similarly, investigators located a ligature the area where VanderHeyden was most likely killed. This ligature was found to have VandenHeyden's blood, but the crime lab also located male DNA on that ligature that is suspected of being the murder weapon. Once again, Doug Detrie was excluded as a possible source of that male DNA. While not proposing to offer an exhaustive list of ways a defendant could establish a direct connection, one of the two examples Wilson provided was exclusive control of the murder weapon. See Wilson, 362 Wis. 2d 193, ¶ 72 (citing People v. Primo, 96 N.Y.2d 351, 728 N.Y.S.2d 735, 753 N.E.2d 164, 168–69 (2001)). While VanderHeyden's DNA was recovered from the ligature, Detrie's was not. The defendant ignores clear scientific evidence which shows that Detrie was not involved in VanderHeyden's death.

Douglass Detrie reported VanderHeyden, his live-in girlfriend and the mother of his child, as a missing person, roughly half a day after he had last seen her. When he was questioned extensively by law enforcement officers, he was cooperative. He provided a detailed statement of his whereabouts and activities of the previous evening. Detrie allowed investigators to enter

his home and look around. He allowed investigators to forensically analyze his phone and computerized devices. Investigators extensively questioned his friends and the people he was with on the night that Nicole went missing. All of the information obtained, either in the form of statements from those who were with him, or as a result of forensic analysis, supported Detrie's adamant denial that he had any involvement in Nicole's death. Significantly, Doug Detrie had been wearing a FitBit device on the night of Nicole's death, and investigators were able to analyze Detrie's FitBit application from his mobile phone. That application confirmed the timeline of Detrie's activities, as provided to officers on May 21, 2016. Most importantly, the application did not show any movement during the time that Nicole was killed and her body was transported, rather, it showed that Detrie was asleep during that time, consistent with his statement to investigators.

Moreover, no officer observed any injuries to Detrie in the immediate aftermath of VanderHeyden's death, as would be expected given the significant blunt force trauma to VanderHeyden. Obvious injuries would be even more likely if we were to believe the defendant's story that Detrie managed to knock out the 6'7", 250 pound defendant, and was later shoved into a ravine by Burch. Specifically, on May 21, 2016, around 5:15 p.m., Detective Sergeant Tracy Steffens spoke with Detrie at his Berkley Road address. Sergeant Steffens reported that she "did not observe any cuts or abrasions on Doug's hands or arms or the legs" that she was able to see. Likewise, at 12:11 a.m. on May 22, 2016, Narcotics Investigator Jason Katers also noted in his report that he "did not notice any visible injuries to [Detrie's] body."

CONCLUSION

The defendant certainly has a constitutional right to present a defense. See, e.g., Milenkovic v. State, 86 Wis. 2d 272, 286, 272 N.W.2d 320 (Ct. App. 1978). That right, however,

is "not violated when the State precludes a defendant from presenting evidence which is irrelevant." Id. Ultimately, the evidence the defendant seeks to admit is little more than a bald assertion that Detrie was involved in VanderHeyden's murder, designed only to distract the jury from the defendant's conduct and to pass the blame on to someone else. Wisconsin courts have made clear that evidence of a third-party perpetrator must do more than raise a "mere possibility." Wilson, 362 Wis. 2d 193, ¶ 83; see also Denny, 120 Wis. 2d 614 at 623 ("[E]vidence that simply affords a possible ground of suspicion against another should not be admissible."). Denny warned against this evidence "degenerating the proceedings into a trial of collateral issues." Id. The defendant has failed to shows a "legitimate tendency" that Detrie was responsible for VanderHeyden's murder, apart from a wholly self-serving version of events. As a result, the State respectfully requests that the Court deny the defendant's motion to admit evidence relating to Douglas Detrie's alleged involvement in this crime.

Dated at Green Bay, Brown County, Wisconsin, this Friday, May 12, 2017.

Respectfully submitted,

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