

STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT III

FILED

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CLERK OF COURT OF APPEALS
OF WISCONSIN

No.

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

RAYMAND VANNIEUWENHOVEN,

Defendant-Appellant.

**PETITION FOR LEAVE TO PURSUE
PERMISSIVE APPEAL
AND SUPPORTING MEMORANDUM**

Permissive Appeal from Non-final Order
Marinette County Circuit Court
Hon. James Morrison, presiding
Case. No. 19 CF 49

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Petition and Memorandum

Mr. Raymand Vannieuwenhoven, by counsel, now seeks leave to appeal a non-final order from the Circuit Court. The order relates to the denial of the defendant's motion to introduce evidence at trial that another party committed the murder of the two victims in the case. The Defendant files this petition and supporting memorandum pursuant to Wis. Stat. §§808.03(2), 809.50(1).

Statement of Issues

Regarding the motion to introduce other evidence at trial, specifically that another individual may have committed the crime, the Defendant believes that the court erred by denying the Defendant's motion.

1. Did the circuit court err by excluding third-party-perpetrator evidence under *State v. Denny*, 120 Wis. 2d 614, 357 N.W.2d 12 (Ct. App. 1984)?

The circuit court denied the motion, finding that the defendant had not offered a plausible direct connection between the third-party-perpetrator and the crime scene or victims.

Statement of Facts

On the morning of Friday, July 9, 1976, David J. Schuldes (hereinafter "Schuldes") and his fiancée, Ellen A. Matheys (hereinafter, "Matheys") departed their residence in Green Bay, Wisconsin and traveled to Goodman Park and McClintock Park in Marinette County, Wisconsin, for a weekend of camping; they traveled in Schuldes' maroon and white 1975 AMC Gremlin. *Complaint for Search Warrant* App. 29 Goodman Fields claimed to observe a male and

female driving a maroon and white Gremlin through Goodman Park at approximately 11:30 a.m. *Id.* Mr. Fields further repoted that at approximately 2:30 p.m., he observed a male and female sitting at a campsite in McClintock Park with the same Gremlin. *Id.*

Thereafter, a statement was obtained from Kim Huempfner and Robert Swanson. *Id.* They indicated that between 2:00 p.m. and 2:40 p.m. they were driving through McClintock Park when heard one gunshot. Huempfner and Swanson reported that a few minutes later they observed a white male walking through the woods, carrying a rifle. Huempfner and Swanson describe the male as approximately 5'11" to 6'1", 150 to 160 lbs., having dark hair, a thin mustache, thin face, and a slender build, he was wearing a white button-down shirt. *Id.* The individual was walking in the general vicinity of a vehicle which was backed into a logging road. Huempfner and Swanson describe the vehicle as an older model, ark colored, boxy type automobile, possibly a 1968 or 1969 Plymouth vehicle, with Michigan license plates. *Id.* at App. 31.

Stanley Apansiewicz, the park caretaker, reported at approximately 2:35 p.m. he found the body of Schuldes near the women's restroom. Marinette County Sheriff's Department reports indicate Schuldes suffered a single gunshot wound to the neck. *Id.* at App 29. Deputy Jerry Jerue (hereinafter "Jerue") was the first Sheriff's Department member to arrive at the scene at 4:06 p.m. Jerue reports that he secured the scene, and subsequently found a bullet fragment in the fence outside the women's restroom. The bullet fragment is believed to be either a 30 caliber or 30-06 caliber, and it is believed to be the bullet that struck Schuldes *Id.* at App 30.

The following day, at approximately 12:00 p.m., Lt. Donald Hawley located Matheys' body in a wooded area, approximately 600 feet south of the women's restroom. Matheys' body was partially disrobed. She had two gunshot wounds, one in her stomach, and one in her chest. An autopsy of Matheys was conducted by Dr. Robert W. Huntington, III of the University of Wisconsin Hospital in Madison, Wisconsin. Dr. Huntington indicates in his report Matheys had been sexually assaulted, and semen was present in her vaginal area. *Id.* at App 31.

The investigation into the potential homicides was ongoing for over 40 years. A critical piece of evidence was semen found inside the shorts of the victim. Law enforcement received a recent lead from Parabon Nanolabs, a company that specializes in genetic profiling and mapping, who suggested the DNA recovered from the scene may be linked to the Vannieuwenhoven family in Northeast Wisconsin. On March 6, 2019, law enforcement was able to obtain a sample of Mr. Vannieuwenhoven's DNA. The DNA proved to be a match from the semen sample recovered from the victim's shorts. On March 21, 2019, Mr. Vannieuwenhoven was charged with two counts of 1st-Degree Murder under Wis. Stat. § 940.01(1) and one count of First Degree Sexual Assault under Wis. Stat. § 940.225(1)(b).

On November 30, 2020, the Defendant filed a motion to introduce evidence at trial that a third party, Mervin J. Walker, had committed the murder of David Schuldes and Ellen Matheys. *See Defendant's Denny motion* at App. 7. In their motion, Defendant presented evidence, obtained primarily from prior law enforcement investigation, and argued that the evidence satisfied the three-prong *Denny* test, and should be admitted into evidence. The defendant pointed to Mr. Walker's past history of physical and sexual abuse, history of mental illness, and history of aggravated

violence to suggest motive. *Id* at 16. In regard to opportunity, the defendant suggested that from 1975 to 1977, Mr. Walker worked for the Marinette County Parks Department, and would be familiar with McClintock Park where the crime took place. Based on interviews conducted throughout the investigation, Mr. Walker may have been at McClintock Park at the time of the double homicide. Finally, Mr. Walker owned a vast collection of firearms, and was charged in Marinette Case 19CF102 for confronting an electronic company employee with a 30.30 rifle, the same caliber of rifle that was utilized in the murder of the victims. *Id.* at 21. For the direct connection prong, the defendant pointed to several important factors: Mr. Walker worked for the Marinette County Parks Department, he had no alibi for his whereabouts on July 9, 1976, he matched composite drawings, made incriminating and suspect statements to law enforcement, and items recovered from a February 2, 1998 search of Mr. Walker's residence, which turned up two items relating to the murders – a notebook with references to the "McClintock Park Murders" and a separate page with an entry on the "McClintock murders." *Id* at App. 18.

In a written order filed on March 22, 2021, the circuit court judge denied the defendant's motion to introduce evidence of Mr. Walker. *Order Denying Defendant's Denny Motion* at App. 1. On April 9, 2021, the Wisconsin Court of Appeals granted an extension to file this petition, on the basis that the Defendant had filed two "Denny" motions, and one was still pending at the Circuit Court level. At this time, the second "Denny" is still pending at the Circuit Court, and further investigation is being conducted regarding the second motion.

Statement of Grounds

A permissive appeal here will serve all three statutory purposes of interlocutory consideration for this Court.

1. Materially Advance Termination of Litigation or Clarify Further Proceedings

This appeal would clarify further proceedings. Mr. Vannieuwenhoven should be entitled to present evidence regarding Mr. Walker. Mr. Walker's unusual statements, tendency to commit violent acts, and ability to access the crime scene all supply sufficient evidence of motive, opportunity, and a direct connection to the crime. The issue here – whether Defendant's motion to introduce other evidence meets the standard put forth by *Denny*, will have an immense effect on the case's proceedings going forward. The crimes charged in this case are of the most serious nature, and it is imperative that trial counsel be able to present the strongest and most comprehensive defense they can. The clarification of this issue will help trial counsel with exactly such a task.

Further, not only would it provide clarity in the matter of presenting a robust defense for the defendant, but it would also guide the circuit court in instructing the jury at trial and in considering a motion to dismiss when the prosecution rests.

Although the court generally reviews a decision to admit or exclude evidence for an erroneous exercise of discretion, this court must review *de novo* whether the defendant's constitutional right to present a defense requires admission of the evidence. *State v. Wilson*, 2015 WI 48, ¶ 47, 362 Wis. 2d 193, 864 N.W.2d 52 (2015).

To satisfy the motive prong, Mr. Vannieuwenhoven is only required to offer a third party's "plausible reason to commit the crime. *Wilson*, 2015 WI 48, ¶ 57. The defendant is not required to prove a specific or personal motive, even general evidence of motive is enough. *State v. Vollbrecht*, 2012 WI App 90, ¶ 27, 344 Wis. 2d 69, 820 N.W.2d 443.

Mr. Walker's motives are best judged when taking into account his communication with law enforcement and his own violent and bizarre behavior.

To satisfy the opportunity prong, Mr. Vannieuwenhoven must show that Mr. Walker "could have" committed the crime. *Wilson*, 2015 WI 48, ¶ 65. Although no bright line rule was established to determine exactly what counts as a direct connection, *Wilson* held that evidence should suggest that the third party committed the crime. 2015 WI 48, ¶ 71. A direct connection is what would take the case "beyond mere speculation." *Id.*, ¶ 59.

Mr. Vannieuwenhoven is not required to conclusively establish that Mr. Walker was the killer. He only needs evidence suggesting a reasonable doubt as to his own guilt. The suspicious comments to law enforcement, the violent behavior, his various ties to the scene of murder, and the fact that the police artist sketch was likened to Mr. Walker's likeness, are all evidence that is directly relevant to Mr. Vannieuwenhoven's guilt. The evidence regarding Mr. Walker tends to make it less likely that Mr. Vannieuwenhoven is guilty. Wis. Stat § 904.01.

If the evidence presented by Mr. Vannieuwenhoven is not sufficient within the standard put forth in *Denny* and clarified in *Wilson*, then the defendant's strategy at trial will be reassessed and further clarified.

2. Protect Defendant from Substantial or Irreparable Injury

Should Mr. Vannieuwenhoven be found guilty of the charges in this case, any sentence imposed on him will almost certainly be a life sentence. Mr. Vannieuwenhoven is elderly, and has several health issues. Should the Defendant's case proceed and Mr. Vannieuwenhoven is found guilty at a jury trial, any postconviction or appellate motions will take considerable time to resolve. Time that Mr. Vannieuwenhoven may not have.

Further, the allegations in this case are of the utmost severity. Of course, a defendant cannot throw everything against the wall and see what sticks, which is why the standard established by *Denny* exists. A defendant must make a sufficient showing of a "legitimate tendency" that an alleged third-party committed the crime. *State v. Ramsey* 2019 WI App 33, ¶ 21, 388 Wis. 2d 143, 930 N.W.2d 273 (Ct. App. 2019). A defendant is not "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." *Denny* 120 Wis. 2d at 623.

If the third party-perpetrator evidence is admitted, it would allow Mr. Vannieuwenhoven the ability to put that evidence in front of a jury and let the jury decide how it should be considered. If such evidence should be allowed in front of a jury, then not having that evidence able to be used at trial will cause Mr. Vannieuwenhoven substantial and irreparable injury.

3. Clarify an Issue of General Importance

The primary issue of general importance here is whether or not the circuit court erred in denying Mr.

Vannieuwenhoven's motion that third party

This case does not present the fears outlined in *Denny*, where a defendant is seeking to implicate every person with a conceivable motive to kill the victim. In fact, this is quite the opposite. Over the rather long investigatory period this case has gone through, hundreds of individuals were interviewed and investigated. Mr. Vannieuwenhoven is not attempting to implicate every single person who has ever been involved in the investigation of this case. The motion that Mr. Vannieuwenhoven brings is specific to this one individual, Mr. Walker, and is supplemented extensively by reports from law enforcement in this case.

Further, whether or not the evidence regarding Mr. Walker is admitted will go on to further clarify exactly what kind of evidence is admissible under the *Denny* standard. Mr. Vannieuwenhoven believes that the evidence put forth in his motion is sufficient.

Evidence of Mr. Walker's behavior, connection to the crime scene, and other witness testimony tend to prove that Mr. Vannieuwenhoven is not guilty, and as such the court should reverse the decision of the circuit court.

Conclusion

Mr. Vannieuwenhoven asks this Court to grant leave to pursue a permissive appeal, challenging the denial of the motion and asking that the Court order the motion to allow the additional evidence from the *Denny* motion. This appeal will clarify law in this case and generally, and foreclose a possible appeal after a jury trial.

Dated this 22th day of April, 2020.

Respectfully Submitted



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CERTIFICATION

I certify that this petition conforms with the rules contained in Wis. Stat. §§ 809.50(1) and is produced with proportion serif font. The length of this petition and supporting memorandum is 2119 words. *See* Wis. Stat. §§ 809.19(8)(c)(2), 809.50(4).

Dated this 22th day of April, 2021.



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CERTIFICATION AS TO APPENDIX

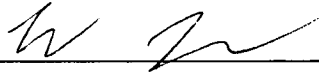
I hereby certify that filed with this petition and memorandum, either as a separate document or as a part of this brief, is an appendix that compiles with § 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings of opinion of the circuit court; (3) a copy of any unpublished opinion cited under § 809.23(3)(a) or (b); and (4) portions of the record essential to an understanding of the issues raised, including oral or written decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using one or more initials or other appropriate pseudonym or designation instead of full names of persons, specifically juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Dated this 22th day of April, 2021

Signed:

A handwritten signature in black ink, appearing to read 'Richard Zoellner', is written over a horizontal line.

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