

STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT III

FILED

JUN 21 2021

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, filed on June 4, 2021, 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. 50. Goodman Fields claimed to observe a male and

female driving a maroon and white Gremlin through Goodman Park at approximately 11:00 a.m. *Id.* Mr. Fields further reported that at approximately 2:15 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 Huempfer and Robert Swanson. *Id.* at App. 50-51. They indicated that between 2:00 p.m. and 2:40 p.m. they were driving through McClintock Park when they heard one gunshot. Huempfer and Swanson reported that a few minutes later they observed a white male walking through the woods, carrying a rifle. Huempfer 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.* at App. 51. The individual was walking in the general vicinity of a vehicle which was backed into a logging road. Huempfer and Swanson describe the vehicle as an older model, dark colored, boxy type automobile, possibly a 1968 or 1969 Plymouth vehicle, with Michigan license plates. *Id.*

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.* 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.*

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.*

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, Robert Lukesh, had committed the murder of David Schuldes and Ellen Matheys. *See Defendant's Denny motion* at App. 9. 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. Lukesh's past history of physical and sexual abuse, history of drug abuse, close relationship with the

Marinette County Sheriff's Department, and obsession with committing the "perfect crime" to show Mr. Lukesh's motive. *Id.* at App. 18-24. In regard to the opportunity prong, the defendant suggested that Mr. Lukesh's residence was only twenty-five miles from the crime scene, that Mr. Lukesh owned a variety of guns and was proficient in their use, that Mr. Lukesh may have been at McClintock Park immediately prior to the double homicide. *Id.* at 25-27. Based on interviews conducted throughout the investigation, Mr. Lukesh was found to possess a number of firearms, including a .30 caliber rifle, and was noted to be proficient with them. *Id.* at 25. Investigators later interviewed a couple who spoke with a many similar in appearance to Mr. Lukesh, and was noted as wearing some kind of uniform. When Mr. Lukesh showed up to the crime scene on the night of the murder, he was noted as wearing a uniform. *Id.* at 27. For the direct connection prong, the defendant pointed to several important factors: Mr. Lukesh reportedly had a general obsession with homicides, had made several oddly specific comments regarding details of the murder, predicted that the female victim was deceased before her body was discovered, that a composite drawing of a suspect matched Mr. Lukesh's appearance, and that Mr. Lukesh attempted to establish an alibi for the date that the murder occurred. *Id.* 28-36.

In a written order filed on June 4, 2021, the circuit court judge denied the defendant's motion to introduce evidence of Mr. Lukesh. *Order Denying Defendant's Denny Motion* at App. 1.

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. Lukesh. Mr. Lukesh's unusual statements, tendency to commit violent acts, and time spent at 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. Lukesh's motives are best judged when taking into account his statements made to law enforcement and his own violent and bizarre behavior.

To satisfy the opportunity prong, Mr. Vannieuwenhoven must show that Mr. Lukesh "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. Lukesh 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. Lukesh's likeness, are all evidence that is directly relevant to Mr. Vannieuwenhoven's guilt. The evidence regarding Mr. Lukesh 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. Lukesh, and is supplemented extensively by reports from law enforcement in this case.

Further, whether or not the evidence regarding Mr. Lukesh 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.

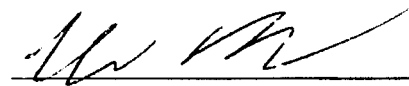
Evidence of Mr. Lukesh's behavior, connection to the crime scene, and other witness testimony tend to prove that Mr. Vannieuwenhoven is not guilty, and as such the court should reverse the decision of the circuit court.

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 17th day of June, 2021.

Respectfully Submitted

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

Richard Zoellner

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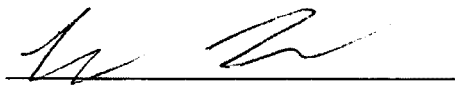
(920) 430-3090

Attorney for Defendant-Appellant

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 2093 words. *See* Wis. Stat. §§ 809.19(8)(c)(2), 809.50(4).

Dated this 17th day of June, 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 17th day of June, 2021

Signed:

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

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June 17, 2021

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**Re: Petition for Leave to Pursue Permissive Appeal and Supporting Memorandum
State of Wisconsin v. Raymand Vannieuwenhoven
Marinette County Case No.: 19 CF 49**

Dear Clerk of Supreme Court and Court of Appeals,

I represent Mr. Vannieuwenhoven in his petition for leave to pursue permissive appeal of the above referenced matter. Enclosed, please find the original and one (one) copy of the Petition for Leave to Pursue Permissive Appeal and Supporting Memorandum. I have also enclosed a check for payment of the Court's filing fee in the amount of \$195.00

If you have any questions, please contact my office. Thank you for your time and attention to this matter.

Sincerely,



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RSZ
Enc.

cc: Wisconsin Attorney General's Office
Marinette County Clerk of Courts
Marinette County District Attorney – DeShea Morrow
Defendant – Raymand Vannieuwenhoven

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