

STATE OF WISCONSIN,  
Plaintiff,

vs.

STEVEN A. AVERY,  
Defendant.

MANITOWOC COUNTY  
STATE OF WISCONSIN  
**FILED**

Case No. 05 CF 381

JAN 30 2007

CLERK OF CIRCUIT COURT

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**DECISION AND ORDER ON ADMISSIBILITY OF THIRD PARTY  
LIABILITY EVIDENCE**

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The court previously issued its “Order Regarding State’s Motion Prohibiting Evidence of Third Party Liability (“Denny” Motion)” on July 10, 2006. That order provided in part as follows:

“Should the defendant, as part of his defense, intend to suggest that a third party other than Brendan Dassey is responsible for any of the crimes charged, the defendant must notify the Court and the State at least thirty (30) days prior to the start of the trial of such intention. In that event, the defendant will be subject to the standards relating to the presentation of any such evidence established in State v. Denny, 120 Wis. 2d 614 (Ct. App. 1984).”

Pursuant to the court’s July 10, 2006 order, the defendant filed “Defendant’s Statement on Third-Party Responsibility” on January 8, 2007. The State filed its “Memorandum to Preclude Third Party Liability Evidence” on January 12, 2007. The court heard oral argument on the third party liability issue at a hearing on January 19, 2007.

While the parties dispute its applicability to the defendant's offer of proof, the leading Wisconsin case on the issue third party liability evidence is *State v. Denny*, 120 Wis. 2d 614 (Ct. App. 1984).<sup>1</sup> The defendant in that case, Kent Denny, was charged with first-degree murder. At trial, he claimed that he had no motive to murder the victim, but that a number of other individuals did. The trial court refused to allow the defendant to present such evidence because it was not accompanied by any evidence that the other individuals had an opportunity to commit the crime or a direct connection to it. The Court of Appeals upheld the trial court's refusal to admit the evidence. In its decision, the court adopted what is known as the "legitimate tendency" test. Under that test, a defendant seeking to introduce evidence asserting the motive of a third party or parties to have committed the crime must produce evidence that such party or parties had the opportunity to commit the crime and that there is some evidence which is not

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<sup>1</sup> The defendant has alternately claimed that the Wisconsin Supreme court has or has not adopted the *Denny* legitimate tendency test. In the defendant's June 26, 2006 Defendant's Response to State's Motion to Prohibit Evidence of Third Party Liability (*Denny* Motion), defense counsel recognized that "*Denny* has been adopted by the Wisconsin Supreme Court and Avery acknowledges its application in this case should he seek to introduce evidence of third party liability for Teresa Halbach's death. *See, State v. Knapp*, 265 Wis. 2d 278, 351-52, 666 N.W. 2d 881 (2003), *vacated on other grounds*, 542 U.S. 952 (2004), *reaffirmed on remand*, 2005 WI 127, 285 Wis. 2d 86, 700 N.W. 2d 899." at p. 3. By January 8, 2007, however, the defendant had come to the conclusion that "the Wisconsin Supreme Court has never adopted *Denny*." Defendant's Statement on Third-Party Responsibility at p. 3. The court believes the defendant had it right the first time. The Wisconsin Supreme Court ruled in *Knapp* as follows:

"The general rule, adopted by this court, concerning the issue is that evidence tending to prove motive and opportunity to commit a crime regarding a party other than the defendant can be excluded when there is no direct connection between the third party and the alleged crime." (Citing *Denny*) 265 Wis. 2d at 351.

remote in time, place or circumstances to directly connect any third party to the crime.

The defendant in this case initially acknowledged “that the *Denny* rule must be satisfied should he decide to offer third-party liability evidence, other than against Dassey.” Defendant’s Response to State’s Motion to Prohibit Evidence of Third-Party Liability (*Denny* motion) dated June 26, 2006 at p. 1. The defendant now claims, however, that *Denny* is not applicable to this case and that the defendant should be permitted to introduce evidence of potential third party liability on the part of a number of individuals evaluated solely on the basis of its admissibility under §§904.01, 904.02, and 904.03.

The defendant argues that *Denny* does not apply because while the defendant in *Denny* argued that third persons had a motive to commit the crime, “Avery does not propose to suggest that anyone had a motive to kill Teresa Halbach.” Defendant’s Statement on Third-Party Responsibility, p. 3. The defendant further argues that since the prosecution is not required to prove motive as an element of any of the crimes with which he is charged, he should not be required to prove motive as a prerequisite to submitting evidence of third party liability.

The defendant is correct that since he is not seeking to prove motive on the part of any other third party, this case is not squarely on all fours with *Denny*. *Denny* was not required to specifically address the issue of whether proof of

motive is a prerequisite to offering third party liability evidence because the defendant offered to show motive as part of his offer of proof. This court cannot conclude, however, that the distinction on the issue of motive means that *Denny* is not controlling in this case. *Denny* required a defendant offering third party liability evidence to show proof of motive, opportunity and a direct connection to the crime. It does not follow that if a defendant is unable to show motive, he is somehow freed from the requirements of the legitimate tendency test. In fact, the most logical reading of *Denny* is that all three facets of the legitimate tendency test must be met for third party liability evidence to be admissible. *Denny* specifically held “our decision establishes a bright line standard requiring that three factors be present, i.e., motive, opportunity and direct connection.” *Denny* at 625. The evidence offered by the defendant in *Denny* was ruled inadmissible because it demonstrated motive, but not opportunity or direct connection. There is nothing in the decision to suggest that a defendant who demonstrates opportunity and direct connection is somehow excused from demonstrating motive.

The defendant asserts that *Denny* should not control because no one had a motive to commit the charged crimes. The defense does not provide support for this novel proposition. The court does not view the Amended Complaint as alleging a motiveless series of crimes. Although the court has gleaned from representations made by counsel in the course of these proceedings that evidence

obtained by the State subsequent to the filing of the Amended Complaint may affect the precise version of what it intends to prove happened, the court does not accept the unsupported statement that no one had a motive to commit the crimes.

The defendant argues that a Wisconsin Supreme Court decision, *State v. Scheidell*, 227 Wis. 2d 285 (S. Ct. 1999) is more analogous to this case than *Denny* and should guide the court's analysis. The defendant in *Scheidell* was charged with attempted sexual assault for having allegedly broken into the residence of a woman in his apartment building through an open window in the early morning hours. The victim testified that her assailant straddled her body while she was in bed in her bedroom, struck her in the face a number of times and tried to pull off her underpants. She testified she identified the defendant, who was wearing a ski mask with holes for his eyes and mouth, as Scheidell and asked him by name what he was doing a number of times. Each time she addressed him by name the assailant hesitated briefly, then struck her again. Eventually, she was able to reach a pistol from her dresser and succeeded in getting the assailant to leave. The assailant never said a word during the entire attack. At trial, the defendant sought to admit evidence of a somewhat similar attack against a different victim committed approximately five weeks later while the defendant was being held in jail. The Supreme Court ruled that the *Denny* legitimate tendency test should not apply the facts in *Scheidell* because where the identity of the third party is

unknown, “it would be virtually impossible for the defendant to satisfy the motive or opportunity prongs of the legitimate tendency test of *Denny*.” *Id.* at 296. The court concluded that *Denny* did not apply to other acts evidence committed by an unknown third party. Rather, the court reasoned that when a defendant offers other acts evidence committed by an unknown third party, the court should apply the *Sullivan* other acts evidence test, and balance the probative value of the evidence, considering the similarities between the other act and the crime charged, against the considerations found in §904.03. *Id.* at 310.

The court finds the defendant’s argument that *Scheidell* is closer to the facts in this case than *Denny* to be unpersuasive. As pointed out by the State, this case does not involve any unknown third parties. The defendant does not offer any evidence to suggest that some unknown third party committed the crimes charged. The defendant has identified a number of persons by name who he claims were on or near the Avery property on October 31, 2005 and would have had an opportunity to commit the crime. Another distinction is that Avery is not seeking to offer any other acts evidence. Rather, he wishes to offer direct evidence that one or more identified third persons may have actually committed the crime. This is exactly what the defendant in *Denny* attempted to do. Also significant is the fact that while the defendant is *Scheidell* did not know the name of the third party, he did have evidence that the third party had motive, based on his alleged commission

of a similar crime. While the facts in *Denny* may not be precisely on point with those of this case, they are far more applicable to this case than the facts in *Scheidell*.

The court concludes that the defendant's offer of third party liability evidence must be measured by the legitimate tendency test established in *Denny*. The defendant knows the identity of third parties who may have had an opportunity to commit the crimes. They are identified in his pleading. Unlike the defendant in *Scheidell*, he is not precluded from determining whether any of them may have had a motive to do harm to Teresa Halbach. He simply acknowledges that he has no evidence to offer that other persons with opportunity had the motive to commit the crimes. Thus, if the *Denny* legitimate tendency test applies as it was originally established in *Denny*, and the court concludes that it does, none of the offered evidence is admissible because the defendant does not contend any of the other persons present at the Avery property on October 31, 2005 had a motive to murder Teresa Halbach or commit the other crimes alleged to have been committed against her.

The court acknowledges the remote possibility that an appeals court could choose to distinguish *Denny* and conclude that under some circumstances a defendant could meet the legitimate tendency test by producing evidence of such probative value as it relates to opportunity and direct connection to the crime that

proof of motive is not required. The court is not aware of any decision from any jurisdiction which so holds, but an argument could be made that despite *Denny's* "bright line standard" that "three factors be present," strong evidence of opportunity and direct connection to the crime might make up for the lack of motive evidence. After all, *Denny*, while adopting the legitimate tendency factors from *People v. Green*, 609 P.2d 468, 480 (Cal. 1980), declined to adopt *Green's* conclusion that the evidence submitted be "substantial," in recognition of Wisconsin's more liberal policy on the admission of relevant evidence. *Denny*, *supra*, at 622-623. Allowing for the possibility an appellate court might permit the defendant to meet the legitimate tendency test requirements by offering other evidence of sufficient opportunity and a direct connection to the crime in the absence of a demonstration of motive, the court will individually examine the persons identified by the defendant who could potentially be responsible for Teresa Halbach's homicide and the evidence the defendant proposes to offer with respect to each person, keeping in mind the admonition of *Denny* that "evidence that simply affords a possible ground of suspicion against another person should not be admissible." *Denny, supra*, at 623.

The opening sentence of the defendant's "Alternative *Denny* Proffer" suggests the weakness of his argument:

"If the court does conclude instead that *Denny* applies here, then Avery identifies each customer or family friend and each



member of his extended family present on the Avery salvage yard property at any time during the afternoon and early evening on October 31, 2005, as possible third-party perpetrators of one or more of the charged crimes.”

This offer appears to be an example of the dangers warned of by the court in

*Denny*:

“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, supra*, at 623-624.

In this case, the defendant has not identified a large group of people with motive, but rather a large group of people with opportunity. The danger of degenerating the proceedings into a trial of collateral issues remains the same.

1. Scott Tadych. The facts offered by the defendant in support of his argument that Scott Tadych may have potential liability are found at pages 10 and 11 of the Defendant’s Statement on Third-Party Responsibility. The offer of proof does not show a correlation between the time Scott Tadych was present on the property and the time Teresa Halbach was reported by others to have been on the property. Other parts of the defendant’s offer of proof place Teresa Halbach on the property at about 3:30 p.m. Her business of photographing Steven Avery’s vehicle would have been completed well before 5:15 p.m. had the crimes against her not taken place, yet the only proof offered is that Tadych didn’t get on the scene until 5:15 p.m. Any claim by Tadych that he saw a fire behind the defendant’s trailer

would appear to be more consistent with the State's theory of the crime than any liability on the part of Mr. Tadych. The defendant does not explain the relationship of the other facts recited to the crime. In the absence of motive, certainly something more would be required than what is alleged to take the information out of the category of speculation. Did Mr. Tadych know who Teresa Halbach was? Did Mr. Tadych know that she would be on the premises on that day? Is there any other evidence that would "directly connect" him to the crime? These questions are not addressed in the defendant's offer of proof.

2. Andres Martinez. The facts offered by the defendant in support of his argument that Andres Martinez may have potential liability are found at pages 11 through 14 of the Defendant's Statement on Third-Party Responsibility. The offer includes evidence that Mr. Martinez can be a violent man, as reflected in the reported November 5, 2005 attack on his girlfriend with a hatchet. There are also indications that he gave conflicting statements to the police department concerning his acquaintance with the defendant and what he knew or did not know about the crimes. Conspicuously missing from the offer is any indication that Mr. Martinez had any opportunity to do harm to Teresa Halbach, let alone a motive to do so. He denies being at the Avery salvage yard on October 31 and the court sees nothing in the offer of proof to indicate that any other person places him on the property on October 31. In addition, there is no indication that he knows who Teresa Halbach

was or that she would be present on the property on October 31. Again, the offer falls clearly within the range of speculation and far short of meeting the legitimate tendency test, either as specifically stated in *Denny* or as it might be otherwise conceivable applied.

3. James Kennedy. Mr. Kennedy was listed as a third party having potential liability in the defendant's statement, but at oral argument the court was informed by defense counsel that Kennedy himself would not be a suspect, but might be offered as a witness to provide testimony against others. Therefore, the court does not address an offer of proof against James Kennedy as the court understands an offer of proof is not being made.

4. Charles Avery. The evidence proffered against Charles Avery is found at pages 15 and 16. Charles Avery, one of the defendant's brothers, allegedly was present on the salvage yard property on October 31, 2005. While he did not know Teresa Halbach by name, he allegedly knew "the photographer" was expected to be visiting the property on October 31. The defendant indicates that James Kennedy arrived at the Avery Salvage Yard property around 3:00 p.m. and no one was in the office, which was unusual. After about five minutes, Charles Avery appeared from the back of the building. The court is left to speculate how this somehow "directly connects" Charles Avery to the crime. The defendant attempts to derive significance from the fact Charles Avery's trailer home was the

closest one to the location where Teresa Halbach's vehicle was found, but doesn't say what the distance was. It's the court's recollection from the Preliminary Examination that the trailer homes are not that far from each other and that none of them were very close to the site where the vehicle was found. In any event, the court cannot draw any significance from the facts offered. This is also true for the statement that Earl Avery told police that Charles Avery had spoken to a woman associated with Auto Trader magazine at a time not specified by the defendant. The facts listed arguably show that Mr. Avery would have had an opportunity to commit the crime, but there is no suggestion he had any motive to do so, nor is there any evidence to directly connect him to the crime.

5. Robert Fabian and Earl Avery. What would be an offer of proof against Robert Fabian and Earl Avery is summarized at pages 16 and 17. As near as the court can tell, the only evidence that might tie Robert Fabian to the crime is that he may have used a .22 caliber rifle while rabbit hunting that afternoon and a bullet from a .22 caliber rifle is alleged to have struck Teresa Halbach. There is no evidence relating to motive, opportunity or any other type of direct connection to the crime. The court is not sure that the defense actually intends to offer third-party evidence against Mr. Fabian, but if he does, his offer falls far short.

With respect to Earl Avery, there is no suggestion that he knew who Teresa Halbach was during her lifetime. The defendant asserts that Earl Avery returned to

the salvage yard driving a flatbed car hauler which could have been used to move Ms. Halbach's Toyota to the place where it was found. There is no evidence offered to suggest that Ms. Halbach's Toyota RAV 4 was not driven to the place where it was found. The defendant does not offer any evidence to suggest it was moved to the place where it was found by a flatbed car hauler. It is alleged that Earl Avery's whereabouts in the salvage yard are unknown until Fabian arrived to hunt rabbits with him late in the afternoon, but there is no suggestion why that would be unusual. The Avery salvage yard is a large parcel of property. The defendant attributes significance to the fact that a .22 caliber rifle would be appropriate for hunting rabbits and it was a .22 caliber rifle bullet that the State asserts was fired into Teresa Halbach's body. There is no suggestion, however, of any evidence to dispute the State's claim that ballistic evidence matches the bullet to a weapon possessed by Steven Avery. Viewing Earl Avery's possible use of a .22 caliber rifle in light of Holmes v. South Carolina, 126 S. Ct. 1727 (2006), the fact that the State will be introducing evidence that the .22 caliber bullet came from a weapon owned by Steven Avery does not alone prevent the defendant from introducing evidence to the contrary. However, for any weapons owned by other persons to be of any more than speculative significance, the court would expect at least evidence that they were tested and could not be ruled out as the weapon from

which the .22 caliber bullet found was fired. Otherwise, evidence concerning those weapons would bring only confusion and add nothing to the search for truth.

The defendant also makes reference to a golf cart belonging to his mother which Earl Avery drove at about 3:30 in the afternoon on October 31 and the fact that a cadaver dog later “alerted” on a golf cart. The defendant does not elaborate on the significance of the dog “alerting” on the golf cart, what role the defendant asserts the cart may have had in the commission of the crimes, or whether the golf cart used by Earl Avery is the one which was alerted on. The defendant indicates that Earl admitted driving past the location where Teresa Halbach’s Toyota was later discovered, but in the absence of any indication as to what time her vehicle was placed at the location where it was found, that fact does not appear to have any special significance.

6. Dassey Brothers. A summary of the offered evidence against Blaine, Bobby, and Bryan Dassey, all Bryan Dassey’s brothers, is found at pages 18 and 19 of the Defendant’s Statement on Third Party Responsibility. The summary suggests that Blaine, Bobby, and Bryan Dassey may all have been present on the Avery property at or about the time Teresa Halbach is alleged to have been killed. However, along with no allegation of any motive, the facts presented by the defendant do not suggest any direct connection that any of the Dassey brothers would have to the crime, other than the fact they happened to be on the Avery

property. In the absence of any allegation regarding motive, mere opportunity is insufficient to justify admission of the third party liability evidence.

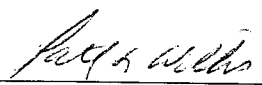
In summary, with the exception of Scott Tadych and Andres Martinez, the other persons identified by the defendant may have had an opportunity to commit some or all of the crimes charged in the sense that they were near the alleged crime scene at the time of the alleged crimes. The defense fails to offer any meaningful evidence, however, to suggest that any of the persons named were directly connected to the crimes in any way. In the absence of motive, it certainly may be more difficult for the defendant to offer evidence which is relevant and material connecting a third person to the crime. The court simply finds nothing in the offer made by the defendant that goes beyond the level of speculation.

**ORDER**

The defense is precluded from offering any direct evidence that a third party, other than Brendan Dassey, participated in the commission of the crimes charged in the Amended Information.

Dated this 30<sup>th</sup> day of January, 2007.

BY THE COURT:

  
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Patrick L. Willis,  
Circuit Court Judge