STATE OF WISCONSIN CIRCUIT COURT MANITOWOC COUNTY

STATE OF WISCONSIN,
Plaintiff,
vs. Case No. 05 CF 381

STEVEN A. AVERY,
Defendant.

DECISION AND ORDER ON DEFENDANT'S MOTION FOR POSTCONVICTION RELIEF

The defendant, Steven A. Avery, was convicted following a jury trial on charges of party to the crime of first degree intentional homicide and felon in possession of a firearm on March 18, 2007. On June 29, 2009 the defendant filed a motion for postconviction relief seeking a new trial on grounds that (1) the court improperly excused a juror during the course of the jury's deliberations, and (2) the court improperly excluded evidence of third party liability. The defendant's argument includes a claim of ineffective assistance of counsel. An evidentiary hearing on the defendant's postconviction motion was held on September 28, 2009. Following that hearing the court received written briefs from both parties.

FINDINGS OF FACT

From evidence introduced at the postconviction motion hearing and the court record in this case, the court makes the following factual findings:

The trial in this matter commenced on February 12, 2007. By prior agreement of the parties, the case was tried at the Calumet County courthouse using

Manitowoc County jurors. The case was submitted to the jury at 12:54 p.m. on March 15, 2007. The jury was ordered to be sequestered at a Chilton hotel during deliberations. When the jury began its deliberations, the court sequestered a 13th alternate juror without objection from the parties. Richard Mahler was one of the 12 jurors who initially began deliberating the case. Deliberations continued on March 15, 2007 until late in the afternoon.

In the evening following the jurors' dinner on March 15, 2007, Mr. Mahler made a request to a sheriff's deputy, who relayed the request to Calumet County Sheriff Gerald Pagel, asking that he be excused from the jury. Sheriff Pagel telephoned the trial judge at his home in Manitowoc to inform him of the request. The court memorialized its conversation with Sheriff Pagel in a sealed file memo which the court prepared on March 16, 2007[1] and which was introduced as Exhibit 1 at the postconviction motion hearing. That summary reads as follows:

> On Thursday, March 15, 2007 sometime around 9:00 p.m. the court received a telephone call from Sheriff Pagel indicating one of the jurors had presented a request to a deputy that he be excused from further jury service because of an unforeseen family emergency. Specifically, Rich Mahler was distraught and felt he could no longer serve as a juror. He reported his stepdaughter was involved in a traffic accident earlier in the evening which resulted in the totaling of her vehicle. I received no information about any injuries. His wife was very upset about the accident and of the amount of time Mr. Mahler had been away from the family because of the trial. He reiterated that his family and especially his wife were very embarrassed by news reports at the time of original voir dire that he was living off the proceeds of her trust fund. There was also a suggestion that the juror and his wife had been having some form of marital difficulties before the trial and the juror felt it was vital for his marriage that he be excused.

Upon receiving the telephone call from Sheriff Pagel, the court contacted Special Prosecutor Kenneth Kratz and defense counsel Dean Strang and Jerome Buting by

[1] The court's computer shows the document was last saved at 2:40 p.m. on March 16, 2007.

conference call. As acknowledged in the testimony of Attorney Strang and Attorney Buting, counsel reached agreement that the court should personally speak with Mr. Mahler and if the information presented by Sheriff Pagel was verified, the juror should be excused. What next transpired is reflected in the following paragraph from the court's March 16, 2007 sealed file memo:

> Following the conference call, I called Sheriff Pagel back. He was at the hotel, I believe originally in the parking lot. I told him I'd like to speak to Mr. Mahler. My recollection is that the sheriff called me back shortly thereafter and apparently handed the phone to Mr. Mahler. I could immediately sense that Mr. Mahler was distraught. He sounded depressed. He spoke quietly and slowly. He confirmed the information I'd been told. He indicated he and his wife had had some marital problems before the trial and the trial was putting an extra strain on the relationship. He again mentioned, as he had during individual voir dire of the jurors on Monday, that his wife was upset about the trust fund reports involving a musician juror on the news. Things apparently boiled over when his stepdaughter was involved in a vehicle accident this evening and he was not there to provide support. My reading, without pressing him with questions too specific, was that he felt the future of his marriage was at stake if he was not excused. At that point I told him I'd heard all I needed to know. I thanked him for his service. I indicated that I would not specify the nature of his request to be excused on the record. He thanked me for that. Sheriff Pagel indicated he would have Mr. Mahler transported to his vehicle at Reisterer and Schnell.

At the time of the telephone conference call, the trial judge was at his home in Manitowoc while the defendant was being held in the Calumet County jail in Chilton, some 28 miles away. Attorney Kratz was presumably at his residence, and Attorneys Strang and Buting were at a restaurant in Appleton, which is about 26 miles from Chilton.

Before the jury began its second day of deliberations on March 16, 2007 the court met with counsel in chambers to discuss how to proceed. Prior to that chambers conference, both the court and defense counsel concluded that the procedure would be governed by the Wisconsin Supreme Court decision in *State v.*

Lehman, 108 Wis. 2d 291 (1982). Postconviction Motion hearing transcript at page 96 (Tr. 96). Attorneys for both parties agreed that under *Lehman* the discharge of a juror during deliberations left the parties with three options. They could either stipulate to proceed with fewer than 12 jurors, stipulate to the substitution of an alternate juror, or have the court declare a mistrial. Immediately following the chambers conference, both defense counsel met with Mr. Avery for close to 20 minutes and recommended to him that he elect to replace the excused juror with the alternate juror. Tr. 99. Both parties agreed to this option and Mr. Avery specifically agreed to it following an on-the-record colloquy with the court. Following the parties' stipulation, the alternate juror was selected to replace Mr. Mahler and the jury was instructed to begin its deliberations anew. The jury deliberated on Friday, March 16 from 10:20 a.m. to 6:29 p.m., on Saturday, March 17 from 8:55 a.m. to 5:00 p.m. and on Sunday, March 18 from 11:00 a.m. until reaching verdicts at 4:35 p.m. The jury found the defendant guilty of party to the crime of first degree intentional homicide and felon in possession of a firearm. The jury also found the defendant not guilty of party to the crime of mutilating a corpse.

At the postconviction motion hearing on September 28, 2009 Richard Mahler presented a somewhat different version of the facts which occurred on March 15, 2007, some two and a half years earlier. He testified that he and his wife were not having any marital problems before the trial began and his wife was generally supportive of his jury service. Tr. 10, 13. He testified that following completion of the first day of jury deliberations and dinner on March 15, he saw other jurors

calling home from the hotel and decided to call his wife to check in. Tr. 20-21. He indicated that during the telephone conversation his wife told him that her daughter (his step-daughter) had been involved in a car accident. He testified his wife did not tell him that he needed to come home, but that she was upset about something. Tr. 22-23. After the phone conversation with his wife, he went back to his room. Sometime later he talked to the state patrolman stationed outside his door and asked to talk to the bailiff. He told the bailiff, "There was a family emergency I had to deal with at home." Tr. 25. The bailiff passed his request on to Sheriff Pagel, who then came to speak to Mahler. Mahler testified he told Pagel only "that there was some kind of an accident at home, family emergency" and that he just "felt I needed to go home." He did not recall saying anything to the sheriff about his step-daughter's car being totaled. Tr. 26.

Sheriff Pagel then arranged for Mr. Mahler to speak to the court. Mahler testified he told the court only that there was some unspecified family emergency at home and that he needed to go home. He did state on a number of occasions that the only reason he wanted to go home was because of his concern about what was happening at home. Tr. 64, 57, 59. While he either denied or could not recall telling the court he needed to go home because his marriage was in trouble, he did acknowledge the court told him it would not publicly disclose on the record his requested reason for being excused from the jury. Tr. 63.

In addition to recharacterizing the nature of the family matters which prompted his request to be excused from the jury, Mahler also testified that he was

disturbed by the comments of another juror on March 15. He testified that juror C.W. made the comment when deliberations began that Mr. Avery was "f***ing guilty." Tr. 18. Mahler felt stressed that, in his opinion, C.W. and a couple of other jurors apparently had made up their minds and were not willing to thoroughly evaluate the evidence. Tr. 35-36. He also testified to the contents of a dinner conversation he had with juror C.W. following the conclusion of the first day of deliberations. He testified that he was sitting next to juror C.W. at the table. He reported that the only conversation the two had all evening was when Mahler told C.W. he was frustrated with deliberations. According to Mahler, C.W. responded, "If you can't handle it, why don't you tell them and just leave." Tr. 16. Mahler recalled the statement as being made in a "sarcastic tone of voice." He testified he did not find the statement to be physically threatening, but did feel it was verbally threatening. Tr. 17.

Mahler's testimony was inconsistent as to whether his reported behavior on the part of juror C.W. played any role in his request to be excused from jury service. When prompted by questions from postconviction counsel, he at least intimated that his exchange with C.W. played some role in his request to be excused from the jury. Tr. 29: 4-8; Tr. 68: 20-24. However, his consistent testimony, both on direct and cross examination, was that he wanted to be excused because of problems at home. *See, e.g.* Tr. 23: 23-25; Tr. 25: 2-3; Tr. 28: 2-4; Tr. 48: 14-21; Tr. 50: 22-25; Tr. 51: 1-17. He acknowledged that he did not report to either Sheriff Pagel or the court any information about juror C.W. Tr. 63. He testified that his unpleasant exchange

with juror C.W. did not seriously jeopardize his ability to serve as a juror and it was still his intention when he went to his room that evening to fulfill what he viewed to be his duty as a juror. Tr. 42: 3-5 and 18-22. He consistently emphasized a number of times in his testimony that his reason for wanting to be excused was his concern about "what was happening at home." Tr. 64, 65-66, 53-54, 50-51.

To the extent Mr. Mahler's testimony at the postconviction motion hearing differs from the court's March 16, 2007 file memo and the testimony of Attorneys Strang and Buting at the postconviction hearing, the court finds such testimony not credible. It is entirely possible that Mahler and juror C.W. may have had a difference of opinion concerning their approach to the jury deliberation process. That is not unusual among deliberating jurors. However, Mahler's own ambiguous testimony, the fact he never reported anything about juror C.W. to either the jury bailiff, Sheriff Pagel or the court, and the timing of his request to be excused from the jury all support the conclusion that whatever exchanges he may have had with juror C.W., his real reason for wanting to be excused from the jury had to do with what he perceived to be problems at home. Even by his own testimony at the postconviction motion hearing, Mr. Mahler's intention when he went to his room after dinner on March 15, 2007 was to put aside his "unpleasant exchange" with juror C.W. and continue his jury service. What triggered his request to be excused was not anything having to do with juror C.W., but his telephone call to his wife later that evening.

The court finds likewise incredible Mr. Mahler's denial that his concerns about his marriage were the primary reason for his request to be excused from jury service. Mahler testified at the postconviction motion hearing that he either did not say anything to Sheriff Pagel or the court about having marital difficulties or did not recall doing so. However, the file memo demonstrates that Sheriff Pagel initially relayed Mr. Mahler's reported concern over his marriage to the court and the court discussed it with the attorneys before the court even spoke to Mr. Mahler. The fact that Mr. Mahler gave marital difficulties as one of his reasons for requesting that he be excused is further evidenced by the court's indication that it would not specify on the record the nature of Mr. Mahler's request to be excused. This courtesy from the court would not have been required had Mahler simply requested that he be excused to comfort his wife following a car accident involving his step-daughter.

Additional support for the conclusion that marital concerns led to Mr. Mahler's request can be found in his account of his telephone conversation with his wife. He testified that his wife told him that his stepdaughter had been involved in a car accident. Tr. 22, 45. He also said he later learned there had not actually been an accident, but his stepdaughter was simply having car troubles. Tr. 29. Significantly, he never testified that there had been any type of misunderstanding between him and his wife about her initial report that his stepdaughter had been involved in an accident. If Mr. Mahler's account at the postconviction motion hearing is to be believed, the most logical inference is that his wife lied to him about the accident to get him home because she was upset about his absence during the trial. That is

precisely the explanation Mahler passed on to the court when he requested to be excused.

DECISION

JUROR SUBSTITUTION ISSUE

The defendant raises a number of related but distinct arguments in support of his claim that the court erroneously granted Mr. Mahler's request to be excused from the jury. The court will address the arguments individually.

I. AVERY'S RIGHTS WERE VIOLATED WHEN THE COURT DISCHARGED A DELIBERATING JUROR WITHOUT FOLLOWING THE MANDATED PROCEDURES AND WITHOUT A RECORD ESTABLISHING CAUSE FOR HIS REMOVAL.

A. Avery's right to be present with counsel during the court's questioning of Juror Mahler.

The defendant first argues that by questioning Juror Mahler without the defendant or his counsel present, the court failed to comply both with the defendant's rights under *State v. Lehman*, 108 Wis. 2d 291 (1982) and constitutions of the United States and the State of Wisconsin.

Lehman appears to be the only reported Wisconsin court decision addressing the procedure a trial judge is to follow when considering whether cause exists to discharge a juror during deliberations in a criminal trial. The court in *Lehman* concluded that a circuit court must have the discretion to discharge a juror for cause

during jury deliberations. The decision provides the following procedural guidance to trial courts:

> When a juror seeks to be excused, or a party seeks to have a juror discharged, whether before or after jury deliberations have begun, it is the circuit court's duty, prior to the exercise of its discretion to excuse the juror, to make careful inquiry into the substance of the request and to exert reasonable efforts to avoid discharging the juror. Such inquiry *generally*[2] should be made out of the presence of the jurors and in the presence of all counsel and the defendant. The juror potentially subject to the discharge should not be present during counsel's arguments on the discharge. *The circuit court's efforts depend on the circumstances of the case.* The court must approach the issue with extreme caution to avoid a mistrial by either needlessly discharging the juror or by prejudicing in some manner the juror potentially subject to discharge or the remaining jurors.
>
> The term discretion contemplates a process of reasoning. The process depends on facts that are of record or that are reasonably derived by inference from the record. Discretion must in fact be exercised by the circuit court, and the circuit court must set forth on the record the basis for its exercise of discretion. Adherence to this practice facilitates the decision-making process of the circuit court in the first instance and aids appellate review. (citations omitted) (emphasis added). *Lehman, supra,* at 300-301.

The defendant argues that the court in this case failed to comply with the requirements of *Lehman* because its inquiry of Juror Mahler was not conducted in the physical presence of counsel and the defendant. In addition, the defendant argues the court did not make a contemporaneous record of its *voir dire* of Juror Mahler prior to granting his request to be excused.

Had the court received Juror Mahler's request while the jurors were deliberating at the Calumet County courthouse with defense counsel and the defendant present or physically available, the court would have little trouble accepting defendant's argument that the requirements of *Lehman* were not met. However, defendant's argument fails to take into account the language in *Lehman*

[2] The defendant's Reply Brief quoted this paragraph from *Lehman*, but omitted the word "generally" without noting the omission.

which provides that the court's inquiry "generally" should be made in the presence of counsel and the defendant. The defendant's contention that "[t]he court removed a deliberating juror without complying with *Lehman*" also fails to address the language in *Lehman* that "the circuit court's efforts depend on the circumstances of the case." Apparently, the defendant regards this language as surplusage. The court does not.

In this particular case, the court did not receive a report that a juror was seeking to be excused during the day while at the courthouse, but at nine o'clock in the evening when the judge was at his home in Manitowoc, some 27 miles away from the courthouse. The defendant's trial counsel were not present at the courthouse either, but were having dinner at a restaurant in Appleton, approximately 26 miles away from the courthouse in another direction.[3] Upon receiving notice of Juror Mahler's request, the trial court immediately called defense counsel and counsel for the State seeking suggestions about how to handle the situation. At the time of that conversation the court had been informed that Juror Mahler's stepdaughter had been involved in a serious car accident requiring his presence at home. That information, as noted by Attorney Strang in his testimony, suggested a sense of urgency. In addition, it was also reported to the court that Juror Mahler and his wife had been having marital difficulties and Mahler felt it was vital for the future of his marriage that he be excused from further jury service. This report

[3] These distances are the approximate differences between the cities according to Mapquest.

raised serious questions about his ability to remain dedicated to his duty as a juror during deliberations which would determine the fate of the defendant.

The defendant's argument focuses entirely on the general rule of *Lehman* without taking "the circumstances of the case" into account. The court in this case did take the circumstances of the case into account. The defendant was represented by two able and experienced criminal defense lawyers, neither one of whom felt it was necessary to consult with his client at the time and both of whom agreed that if the information reported to the court proved to be true, the juror's wish to be excused should be granted. Given the time the jury in this case took before reaching its decision, one would be hard pressed to second guess the decision defense counsel made at the time. The defendant was entitled to 12 dedicated jurors willing to spend days (which, as it turned out, were necessary) to weigh the evidence and make a decision based on the law and the facts introduced during the trial. Mahler's reported concern that the future of his marriage was at stake if he was not excused as a juror seriously compromised his willingness and ability to perform his sworn duty.

Lehman goes on to require that the court "set forth on the record the basis for its exercise of discretion." The court did set forth on the record the basis for its exercise of discretion in the form of the sealed memo which was introduced at the postconviction hearing as Exhibit No. 1. The memo was prepared within hours of the proceedings which took place during the preceding evening.[4] Defense counsel

[4] As noted in footnote 1, the court's computer shows the document was last saved at 2:40 p.m. on March 16, 2007.

briefed the defendant on what had transpired early the following morning. Both defense counsel and the defendant accepted the court's exercise of discretion without any objection on the record when court reconvened on March 16. The court concludes that its actions complied with the requirements of *Lehman* under the particular circumstances of this case.

Aside from the requirements of *Lehman*, the defendant further argues that the court violated the defendant's constitutional rights when it communicated with Juror Mahler outside the presence of the defendant and his attorneys. Once again, the court accepts the defendant's statement of the general proposition that a defendant has a constitutional right to be present and assisted by counsel when a court communicates with deliberating jurors or conducts individual *voir dire* of a juror. *State v. Burton*, 112 Wis. 2d 560, 565 (1983); *State v. Anderson*, 291 Wis. 2d 673, 697, 698, 708 (2006); *State v. Tulley*, 248 Wis. 2d 505, 514 (Ct. App. 2001); *State v. David J.K.*, 190 Wis. 2d 726, 736 (Ct. App. 1994). What the defense argument does not address is whether these general constitutional requirements are applicable to the particular facts of this case. None of the cited cases (*Burton*, *Anderson*, *Tulley*, or *David J. K.*) involve communication between the court and a member of the jury seeking to be excused from further service. The one reported Wisconsin Supreme Court decision with facts somewhat similar to those in this case is *State v. Lehman*, *supra*. The court in *Lehman* specifically noted that because it concluded the trial judge committed error under Wis. Stats. §972.02(1), the court did not reach the constitutional issues raised by the defendant. *Id*., at footnote 6.

There is no reported Wisconsin decision either cited by the parties or located by the court which addresses the constitutional issue raised by the defendant in the context of the facts of this case, that is, when a juror reports an emergency during late evening hours while court is not in session and the parties and counsel are not readily available, is any *ex parte* contact between the court and the juror prohibited? Federal court decisions have held that the constitutional requirement that a defendant be present during any communication between the court and a juror is not without exception. In *United States v. Gagnon*, 470 U.S. 522 (1985)[5] one of the jurors noticed that the defendant had been making handwritten sketches of the jurors during the trial. Upon defense counsel's suggestion, the trial judge met with the juror in chambers in the presence of the defendant's attorney, but not the defendant, to make sure the defendant's actions would not affect the impartiality of the juror. The United States Supreme Court upheld the trial court's action, ruling as follows:

> We think it clear that respondents' rights under the Fifth Amendment Due Process Clause were not violated by the *in camera* discussion with the juror. '[The] mere occurrence of an *ex parte* conversation between a trial judge and a juror does not constitute a deprivation of any constitutional right. The defense has no constitutional right to be present at every interaction between a judge and a juror, nor is there a constitutional right to have a court reporter transcribe every such communication.' *Rushen* v. *Spain*, 464 U.S. 114, 125-126 (1983) (STEVENS, J., concurring in judgment)."

470 U.S. at 526.

Gagnon was cited as authority by the court in *United States v. Carson*, 455 F.3d 336 (D.C. Cir, 2006), where the defendants challenged *ex parte* contacts

[5] *Gagnon* is quoted in footnote 13 to the Wisconsin Supreme Court decision in *State v. Anderson*, 291 Wis. 2d 673, 695 (2006) for the proposition that an accused has a constitutional right to be present during communications between the court and the jury under the Confrontation Clause of the Sixth Amendment as well as the Due Process Clause of the Fifth Amendment. Nevertheless, the United State Supreme Court ruled that the communication involved in *Gagnon* did not implicate the defendant's constitutional rights

between the court and a deputy marshal named Adams with a juror who was suffering symptoms of illness. The decision reads in relevant part as follows:

> Finally, the appellants assert that the judge's and Adams's *ex parte* contacts with the jurors violated the appellants' rights under the United States Constitution's Fifth Amendment Due Process Clause and Sixth Amendment's Confrontation Clause and under Federal Rule of Criminal Procedure 43. We reject this argument as well. . . . . "'[T]he mere occurrence of an *ex parte* conversation between a trial judge and a juror does not constitute a deprivation of any constitutional right. The defense has no constitutional right to be present at every interaction between a judge and a juror, nor is there a constitutional right to have a court reporter transcribe every such communication.'" *United States v. Gagnon*, 470 U.S. 522, 526, 105 S. Ct. 1482, 84 L. Ed. 2d 486 (1983) (quoting *Rushen v. Spain*, 464 U.S. 114, 125-26, 104 S. Ct. 453, 78 L. Ed. 2d 267 (1983) (Stevens, J., concurring in judgment)) (alteration in original). Counsel's presence is necessary only if required "to ensure fundamental fairness or a 'reasonably substantial . . . opportunity to defend against the charge.'" *Id*. at 527 (quoting *Snyder v. Massachusetts*, 291 U.S. 97, 105-06, 54 S. Ct. 330, 78 L. Ed. 674(1934)). Because the *ex parte* conversations were unrelated to the merits of the case and their substance was reported in open court in the presence of the defendants and their counsel, they did not constitute error.

455 F.3d at 354. In this case, the court's conversations with Juror Mahler "were unrelated to the merits of the case." The substance of the communications was not transcribed, but was contemporaneously reported in the court's file memorandum which was made a part of the record and disclosed to both parties.

The defendant cites no authority suggesting that the court's contact with juror Mahler under the facts of this case violates any state or federal constitutional right. Neither party cites the court to any reported Wisconsin decisions on similar facts. What case law the court has located from the United States Supreme Court and other jurisdictions holds that when a trial court communicates with a juror under facts similar to those in this case, the defendant has no constitutional right to be present, with or without counsel. The right of the defendant and his attorney to be present

when the court questions a juror seeking to be excused is defined by the holding in *Lehman*.

Even if the court's contact with Juror Mahler is found to have violated the defendant's right to be present, the contact is subject to "harmless error" analysis. *State v. Anderson*, 291 Wis. 2d 673, 699 (2006). The burden of persuasion is on the State to demonstrate that any error was harmless. *Id.* In this case, both of Avery's attorneys agreed that if the facts reported to the court by Sheriff Pagel were verified to the court by Juror Mahler, the juror should be excused. While Avery was not present to discuss the decision with his attorneys, as Attorney Buting explained, "he was agreeable with virtually all our recommendations throughout the trial." Tr. 245: 19-20. Juror Mahler did verify the reported facts behind his request to be excused and his request was granted. (To the extent Mahler provided inconsistent testimony at the postconviction motion hearing, the court found such testimony not credible.) There is nothing in the record to suggest anything would have happened differently had Avery been present with counsel when the court questioned Mahler. As Attorney Strang testified at the postconviction motion hearing, "I think the specific concern that I had was that if he remained on the jury, and whatever the events were at home were weighing heavily on him, that he might be inclined to rush through deliberations or not hold to a sincerely held belief about the weight of the evidence." Tr. 146: 5-11. Given that the jury deliberated for the bulk of three full days after Mahler was excused, Attorney Strang's concern about leaving Mahler on the jury was certainly justified. Attorney Buting testified that while he felt Mahler was "a

favorable juror for the defense," he also believed, with respect to the alternate who took Mahler's place, "that if—if we had to have her as a juror, that she would be an all right juror for the defense." Tr. 200; 4-5; Tr. 241: 12-15. While it is the State's burden to demonstrate that any error was harmless, Avery has not articulated how his presence with counsel during the questioning of Mahler would have changed anything and the court cannot perceive how he may have been prejudiced by his absence. As the court noted in *State v. Burton*, 112 Wis. 2d 560, 570: "A new trial places a heavy burden on the criminal justice system, and a new trial should not be ordered if it is unnecessary to ensure the defendant a fair trial." If the court did commit error by questioning Juror Mahler with defense counsel's explicit consent, but without Avery and his counsel present, such error was harmless. Avery received a fair trial. His case was decided by 12 jurors who heard all the evidence and rendered verdicts undistracted by any serious personal issues.

B. Avery's right to be present and assisted by counsel could not be waived by his attorneys.

This argument assumes the defendant has a right to be present and assisted by counsel which was violated by the court. As noted above, the defendant's general right to be present with counsel was not violated under the particular facts of this case. Therefore, the court declines to address the defendant's argument that his attorneys could not waive his right to be present. (Whether the defendant personally

waived his right to object to the procedure by not objecting to it the following morning is addressed below.)

C. The court removed Juror Mahler without a record establishing cause for his removal during deliberations.

The defendant asserts the court removed Juror Mahler without a record establishing cause for the decision. In the defense brief, this argument is limited to the failure of the court to conduct an on-the-record *voir dire* of Mahler. The defendant recognizes the court did prepare a file memo memorializing the basis for its decision which was made part of the court record.

The basis for the court's decision is found in the first paragraph on the second page of the memo, marked as postconviction hearing Exhibit 1. The grounds for excusing the juror were based on two representations made by Mahler to the court. First, Mahler reported to Sheriff Pagel that his wife had informed him her daughter (his stepdaughter) had totaled her vehicle in an accident earlier that evening. Mahler "confirmed the information" to the court. The court understood his report to be that the accident had resulted in serious property damage to the vehicle, but no reported serious injury to the stepdaughter.

Had the only information reported to the court been about the accident itself, the court agrees that the it could have explored measures short of excusing Juror Mahler to address his family emergency. However, as noted in the File Memo,

Mahler also reported "he and his wife had had some marital problems before the trial and the trial was putting an extra strain on the relationship." Exhibit 1. Mahler reiterated to the court that his wife was upset about publicized reports during the jury selection process that he was living off her trust fund. "Things apparently boiled over when his stepdaughter was involved in a vehicle accident this evening and he was not there to provide support." *Id.* Mahler spoke quietly and slowly to the court and sounded depressed and distraught. He conveyed to the court that "he felt the future of his marriage was at stake if he was not excused." It was the accident plus Mahler's distraught report that his marriage was in serious jeopardy if he was not excused that formed the recorded basis for the court's decision to excuse him. Defendant's trial counsel had already agreed that if Mahler truly felt he could not fulfill his duties as a juror because of his preoccupation with a failing marriage, he should be excused.

The court did conclude based on his words, the factual background he provided, and his verbal demeanor that grounds existed to grant his request to be excused. The defendant argues in his brief that "[a]lthough admittedly treading on personal matters, the court had an obligation to press Mahler with specific questions, both about the accident and the state of his marriage." Defendant's Postconviction Brief, p. 16. With respect to the accident, the information presented both to Sheriff Pagel and to the court was that the stepdaughter had been in a car accident which caused serious property damage, but no serious injury. Had the accident alone been the issue, the defendant's argument might have some merit. However, the details of

the accident, even if known with more specificity, would not have changed the more serious juror problem, which was Mahler's preoccupation with the future of his marriage. Admittedly, the court did not inquire whether infidelity, alcohol or drugs, or other causes may have contributed to Mahler's reported marital strife. The defendant suggests "further investigation of the situation, perhaps with a call to Mahler's wife, was needed." *Id.* The court does not believe it was required to instigate impromptu marriage counseling as part of its duties based on Juror Mahler's representations. The question is not so much fact-based as behavioral-based. That is, whatever the facts were behind Mahler's marital problems, his behavior suggested he was preoccupied by those problems and could not continue to serve as a juror. The court had no reason to believe Juror Mahler was lying. He was very distraught on the phone and there was a reported incident, a serious property damage accident involving his stepdaughter, which provided factual corroboration for his request. The court concluded that his concern over his marriage seriously jeopardized his ability to devote himself to his duties as a juror. If his request was denied, there was a very real danger that he would overtly or subconsciously engage in a rush to judgment in order to get home to save his marriage. That's the conclusion which was reached by both the court and Avery's two able and experienced trial attorneys. The court concludes the record which was made is adequate to support the decision to grant Juror Mahler's request to be excused.

Avery cites a number of federal cases in support of his argument. Most of these cases are cited support of general propositions with which the court agrees, but

do not involve facts similar to this case. The one case cited with facts most closely related to those in this case is *United States v. Doherty*, 867 F.2d 47 (1st Cir. 1989). The decision summarizes the facts involved as follows:

> About midnight on Saturday, May 2, 1987, after 54 days of trial and three days of jury deliberations, a United States Marshal telephoned the district judge at his home. The Marshal told the judge that one of the jurors was upset and threatened to walk out of the hotel where the jury was sequestered. The judge spoke to the juror on the phone. The juror told him that his former wife had died of cancer, leaving him with two small children. His children were upset at being left in the care of his second wife during his long absence. The juror had spoken to them that evening, and found his wife "hysterical" and his son crying. He felt, as a result of this conversation, that if he could not go home immediately to reconcile himself with his family, "there would be nothing for him when he went home." The judge then excused the juror.

867 F. 2d at 73. The Circuit Court of Appeals upheld the decision of the trial judge excusing the juror, ruling as follows:

> . . . Under the circumstances, it seems to us that the judge showed considerable common sense, and that the decision to excuse the juror was clearly within his discretion. *See United States v. Molinares Charris*, 822 F.2d 1213, 1223 (1st Cir. 1987) (appellate court should not second-guess trial judge, who is in best position to assess whether a juror is unable to fulfill his duties; excusing a nervous, upset juror who had taken a tranquilizer was not abuse of discretion).
>
> Appellants' strongest objection, however, is not to the decision itself. They say the judge should have found some temporary solution, held a hearing with all counsel present, and only then decided whether to excuse the juror. Indeed, the judge himself later said his decision to act unilaterally was an error, *see Doherty*, 675 F. Supp. at 741. In our view, however, the procedure that the district judge followed does not require a retrial, because it did not substantially prejudice the appellants. It did not in any way deprive them of a fair trial. Appellants point out that the reported case law indicates that district judges have always held hearings prior to deciding whether to excuse a juror. *See, e.g., Molinares Charris*, 822 F.2d at 1223 (judge met with counsel to discuss alternatives before excusing juror); *United States v. Guevara*, 823 F.2d 446, 447 (11th Cir. 1987) (judge had "extended discussions" with counsel on what to do when juror became ill). Yet, this case involved a sudden crisis, arising in the middle of the night when locating all counsel and convening the court would have been difficult. The trial judge was acting within the limits of his discretionary powers in excusing the juror.

867 F.2d at 74-75.

The court concludes *Doherty* supports its decision in this case. Avery attempts to contrast *Doherty*, citing it as an example that a juror may be excused only for a more serious situation involving the severe injury or death of a family member. The decision in *Doherty* does not suggest when the juror's former wife died. It may well have been long before the trial commenced. The decision does make clear that it did not involve the death of a "family member," since the juror was actually remarried at the time of the trial. The juror faced a situation much like Juror Mahler reported he was facing here. There was an emotional crisis taking place within the family and the juror worried "there would be nothing for him when he went home." The most significant factual difference between *Doherty* and this case is that the trial judge in *Doherty* excused the juror without first consulting with trial counsel. In this case, both of Avery's experienced trial attorneys were consulted and agreed that, on the facts presented, the juror should be excused.

In his Reply Brief, Avery emphasizes that the holding in *United States v. Araujo*, 62 F.3d 930 (7th Cir. 1995) supports his claim that insufficient cause existed to excuse Juror Mahler in this case. In *Araujo* the court excused a juror who reported to the court on the third day of deliberations that on his way to the courthouse he became "stranded on the side of the road" and was unable to leave his car. *Id.* at 932. Following a three day Martin Luther King holiday weekend, deliberations had already been postponed the preceding day (Tuesday) as a result of a different juror

who reported she was unable to attend "due to difficulties associated with the weather." *Id.* (The trial was in Chicago in January and the temperature had reach 20º below zero.) Both defendants in the case objected to the court's decision, which resulted in the case being decided by a jury of eleven. In his decision to excuse the juror, the trial judge expressed concern about jurors' memories fading and the possibility that the bad weather could result in additional delay. The court of appeals reversed the convictions in *Araujo*, finding that while judges are allowed to dismiss jurors for just cause, the court did not make an effort to determine how long the juror would be unable to participate in deliberations. *Id.* at 934. As the court viewed the record, "Mr. Lyles lived in Chicago and . . . it is possible that he might have reported later that same day." *Id.* at 936.

The facts in this case are far more analogous to those in *Doherty* than those in *Araujo*. The time needed to deal with a disabled car is much more predictable than the time needed to repair a troubled marriage. The juror in this case felt he needed to be excused; the juror in *Araujo* simply reported the reason for his temporary unavailability to the court. Significantly, defense counsel in this case approved of the decision to excuse the juror and the defendant did not object after consulting with his attorneys the following morning. In *Araujo*, the juror was excused over defense counsel's objection.

D. The court's removal of a deliberating juror without cause is structural error.

Avery alleges not only that the court committed error by questioning Juror Mahler without the defendant and his counsel present before excusing him, but that the court committed "structural error" which requires that he be granted a new trial without any harmless error analysis. For purposes of evaluating this argument, the court will assume that it committed error in questioning and excusing Juror Mahler.

There is no dispute that some errors so fundamentally affect a defendant's constitutional rights that, by their nature, they cannot be considered harmless. The concept was described in *Neder v. United States*, 527 U.S. 1, 8 (1999) as follows:

> We have recognized that "most constitutional errors can be harmless." *Fulminante*, *supra*, at 306. "If the defendant had counsel and was tried by an impartial adjudicator, there is a strong presumption that any other constitutional errors that may have occurred are subject to harmless-error analysis." *Rose* v. *Clark*, 478 U.S. 570, 579, 92 L. Ed. 2d 460, 106 S. Ct. 3101 (1986). Indeed, we have found an error to be "structural," and thus subject to automatic reversal, only in a "very limited class of cases." *Johnson* v. *United States*, 520 U.S. 461, 468, 137 L. Ed. 2d 718, 117 S. Ct. 1544 (1997) (citing *Gideon* v. *Wainwright*, 372 U.S. 335, 9 L. Ed. 2d 799, 83 S. Ct. 792 (1963) (complete denial of counsel); *Tumey* v. *Ohio*, 273 U.S. 510, 71 L. Ed. 749, 47 S. Ct. 437 (1927) (biased trial judge); *Vasquez* v. *Hillery*, 474 U.S. 254, 88 L. Ed. 2d 598, 106 S. Ct. 617 (1986) (racial discrimination in selection of grand jury); *McKaskle* v. *Wiggins*, 465 U.S. 168, 79 L. Ed. 2d 122, 104 S. Ct. 944 (1984) (denial of self-representation at trial); *Waller* v. *Georgia*, 467 U.S. 39, 81 L. Ed. 2d 31, 104 S. Ct. 2210 (1984) (denial of public trial); *Sullivan* v. *Louisiana*, 508 U.S. 275, 124 L. Ed. 2d 182, 113 S. Ct. 2078 (1993) (defective reasonable-doubt instruction)).

Avery cites the court to a number of reported federal and Wisconsin decisions involving errors "affecting the makeup and size of the jury" which have been found to be structural errors that are not subject to a harmless error analysis. Defendant's Postconviction Brief, p. 17. Examples include: *United States v. Martinez-Salazar*, 528 U.S. 304 (2000) (The seating of a juror who should have been removed for

cause is structural error.); *State v. Hansford*, 219 Wis. 2d 226 (1998). (The denial of the defendant's constitutional right to a unanimous verdict by a jury of 12 persons requires reversal.); *State v. Cooley*, 105 Wis. 2d 642 (Ct. App. 1981). (Reversal is required where defendant's counsel rather than the defendant himself personally agreed to proceed with only 11 jurors). Avery goes on to cite a number of federal court decisions which have held that the removal of a deliberating juror without a record establishing cause was found to be structural error, not subject to harmless error analysis. The cases cited for this proposition are *United States v. Curbelo*, 343 F. 3d 273, 285 (4th Cir. 2003); *United States v. Araujo*, 62 F. 3d 930 (7th Cir. 1995); *United States v. Ginyard*, 444 F. 3d 648, 655 (D.C. Cir. 2006); *United States v. Patterson*, 26 F. 3d 1127 (D.C. Cir. 1994); and *United States v. Essex*, 734 F. 2d 832, 845-846 (D.C. Cir. 1984)[6]. It is true that in each of these cases the trial judge was found to have excused a juror during deliberations without adequate cause. However, it is also true that in each case the trial judge, over the objection of the defendant, permitted a jury of only 11 members to arrive at the verdict. The conclusion reached by the federal courts in each case was based not on the simple fact that a juror had been improperly excused, but more significantly, that as a result of the trial court's error the defendant was forced to have his case decided by a jury of 11 rather than a jury of 12. For example, in *Curbelo* the court reasoned as follows:

[6] Not all of these cases specifically addressed the appropriate standard for evaluating the claimed error. In some cases, the court simply ordered that the conviction be reversed because of the trial court's error. However, it is true that in none of the cases did the court reach its decision by conducting a harmless error analysis. That is, in each case the court appeared to treat the improper excusal of the juror which resulted in an 11 person jury deciding the case as structural error.

> Like other structural errors, the error here has repercussions that are 'necessarily unquantifiable and indeterminate.' This is particularly true given the rules of evidence and the restrictions that they quite legitimately place on any inquiry into jury deliberations. We simply cannot know what effect a 12th juror might have had on jury deliberations."

343 F. 3d at 281. Here, Avery's case was decided by a jury of 12 persons who heard all the evidence in the case and Avery does not question the qualifications of any of the 12 jurors who decided his case. His brief argues that the dismissal of Juror Mahler resulted in his losing his right to have his case decided "from an impartial jury of 12 persons to whom the case was submitted." Defendant's Postconviction Brief, p. 18. However, Avery cites no case law, either state or federal, holding that the substitution of an alternate juror during deliberations constitutes structural error.

The errors Avery does allege are that the court improperly spoke to Juror Mahler without him and his counsel present, and that the court improperly excused Juror Mahler. The Wisconsin Supreme Court has held on more than one occasion that communication of the court with the jury outside of the accused's presence is not structural error. "In *Burton* the court made clear that it will not reverse a conviction when a circuit court communicates with the jury outside the presence of an accused when the error was harmless." *State v. Anderson*, 291 Wis. 2d 673, 699 (2006). In *State v. Tulley*, 248 Wis. 2d 505 (Ct. App. 2001) the Court of Appeals applied harmless error analysis to the trial court's questioning of three prospective jurors before trial outside the presence of both the defendant and his attorney. Based on this *ex parte* questioning, the judge decided to excuse each of the jurors questioned. (The judge apparently decided to excuse the jurors without input from

the parties, but did later place his reasons for his decisions on the record following his questioning of the jurors.) The State conceded on appeal that the defendant has a constitutional right to be present during every critical stage of a criminal proceeding, including jury voir dire and that the court's *ex parte* voir dire constituted error. The court agreed with the State that deprivation of this right is reviewed on appeal for harmless error. *Id.* at 514.

While the defendant in *Tulley* did not specifically challenge the court's decision to excuse the jurors questioned outside of his presence, the court's explanation of its finding that the error committed by the trial court was harmless serves to illustrate why any error committed by the court in this case does not implicate basic constitutional rights subject to structural error analysis:

> Tulley was present during the entire voir dire of all prospective jurors who served on the panel that convicted him. He does not assert that the jurors who served were not fair and impartial. He does not claim that the outcome of the trial was affected by the court's in camera discussions with the three jurors. Because the three prospective jurors with whom the court spoke in camera did not serve on the jury, we conclude that the State has met its burden to show that there is no reasonable possibility that the court's error contributed to Tulley's conviction. Therefore, we conclude that the circuit court's in camera interview of three prospective jurors, though error, was harmless error.

Tulley, at 518.

Like the defendant in *Tulley*, Avery "was present during the entire voir dire of all prospective jurors who served on the panel that convicted him." He does not challenge the qualifications of any of the jurors who convicted him. Though the defendant in *Tulley* apparently did not specifically contend that the court committed structural error, the reasoning expressed in the case for why any error was harmless

also illustrates why no fundamental constitutional right requiring structural error analysis is implicated in this case. Mr. Avery's case was decided by a 12 person jury that was fair and impartial. He did not suffer the loss of any fundamental right by the court's decision, with the consent of his counsel, to excuse Juror Mahler.

E. In the alternative, removal of Mahler without a record establishing cause and without following the mandated procedure was prejudicial because, in fact, no cause existed to remove him.

Avery argues that the trial court committed error in excusing Juror Mahler because no cause existed to grant Mahler's request to be excused. Avery's argument is largely based on testimony Juror Mahler provided at the postconviction motion evidentiary hearing, testimony which the court has already concluded is not credible. The court will take this opportunity to further explain some of the reasons for its findings.

While Mahler reiterated a number of times during his testimony at the September 28, 2009 postconviction motion hearing his desire to be excused because of "what was happening at home," he also suggested for the first time that his recollection of an interchange with Juror C.W. played a role in his request. Tr. 29: 4-8 and Tr. 68: 20-24. For a number of reasons, the court does not find credible Mahler's testimony that Juror C.W. had anything to do with his request to be excused. First, Mahler acknowledged in his testimony at the postconviction hearing he said nothing to the judge or anyone else about the claim he now makes. Tr. 29: 4-8. Mahler gave no reason why, if juror C. W. did have anything to do with his

request, he was not more forthright with the court when he asked to be excused. While it is unfortunate that under the circumstances of this case Mahler was not questioned on the record in the presence of the defendant and counsel for both sides, the private conversation with the court surely would have made it even easier for him to be honest and forthright about any reasons for his request to be excused. The fact that he failed to report any contact with Juror C.W. as having any effect on his request until 2-1/2 years later is strong reason to question the veracity of his claim at the postconviction motion hearing.

There are other reasons to question the veracity of Juror Mahler's testimony at the postconviction hearing. He was somewhat ambiguous about the role he claimed Juror C.W. played in his request to be excused. He testified that at dinner following the first afternoon of deliberations he told Juror C.W. he was frustrated with deliberations and Juror C.W. responded to his comment with, "If you can't handle it, why don't you tell them and just leave." Tr. 16: 24-25. He said Juror C.W.'s tone was "sarcastic" when he made this statement, and Mahler interpreted the statement as being "verbally threatening," though he did not feel physically threatened by the comment. Tr. 17: 3-11. Mahler did not explain what he meant by feeling "verbally threatened." He did testify that his exchange with Juror C.W. did not seriously jeopardize his ability to continue as a juror and it was still his intention that evening, before his telephone conversation with his wife, to continue his jury service. Tr. 42: 3-5; 18-22. On cross examination Juror Mahler emphasized on a number of

occasions that the reason he wanted to be excused was because of what was going on at home. The following exchange with Attorney Fallon is a good example:

> Q. All right. And in your conversation with Judge Willis, you did not tell him about that?
>
> A. No, I was pretty much concerned about what was happening at home.
>
> Q. All right. And the real reason you wanted to go home was what was occurring at home, or what you didn't know, but certainly was concerning to you, at home?
>
> A. Yes, that was.
>
> Q. That was the reason you wanted to go?
>
> A. Yes, sir." Tr. 64: 7-17.

It's true that on redirect examination he testified that his interactions with Juror C.W. were a contributing factor to his request to be excused, but only upon prompting from postconviction defense counsel. Even then, he concluded that what he was really hoping to accomplish was "to go home and find out what was really going on:"

> Q. (By Attorney Hagopian) You have testified, that when you spoke with the judge, that you were feeling frustrated and you were upset. Part of that frustration was your family situation?
>
> A. Yes.
>
> Q. Was there some other thoughts in your mind at that time that were troubling you?
>
> A. It was a mixture of what was said during deliberations, at lunch, and then all of a sudden the family emergency hit.
>
> Q. And when you refer to the deliberations, what specifically are you referring to?
>
> A. To the comment that Carl and two other jurors had made.

Q. And are you also, then, referring to the comment that was made by Mr. Wardman at dinner?

A. Yes.

Q. So when you spoke to the judge, you did want off the jury; is that right?

ATTORNEY FALLON: Objection, leading.

Q. (By Attorney Hagopian) When you spoke to the judge, what were you hoping to accomplish?

A. To go home and find out what was really going on.

Tr. 68: 15-25; Tr. 69: 1-12.

The court's finding is that Juror C.W. may have made a comment or some comments which Juror Mahler found to be rude, but Mahler made no report to the court that his request to be excused was based on anything other than domestic issues at home and the reasons given by Juror Mahler to the court on March 15, 2007 were the reasons for his request.

The court also questions Juror Mahler's credibility because he recanted his March 15, 2007 representation that his troubled marriage required his presence at home. He denied a number of times in his testimony at the postconviction motion hearing that his marriage was in trouble or that he told Sheriff Pagel and the court that his request to be excused was based on marital problems at home, accentuated by a recent motor vehicle accident involving his stepdaughter. Tr. 28: 16-22; Tr. 56: 18-25; Tr. 60: 13-21. While the court cannot conclude with a level of certainty whether Juror Mahler was lying at the postconviction motion hearing or whether he just has an extremely poor memory, his denial that he reported any trouble in his marriage as the basis for his request to be excused is completely incredible. In his

telephone call to the court providing notice of Juror Mahler's request to be excused, Sheriff Pagel informed the court not only of the vehicle accident involving Juror Mahler's stepdaughter, but his report of marital problems. Had the court not received such information by Sheriff Pagel, there would have been no reason for the court to notify trial defense counsel of Juror Mahler's reported marital problems. Both Attorney Strang and Attorney Buting corroborated the trial court's file memo to this effect. Tr. 91: 13-25; Tr. 196: 9-17. Juror Pagel's report to the court of Mahler's marital troubles was corroborated by Mahler himself when the court spoke to him. The importance of marital problems as a reason for the court granting Mahler's request to be excused was evidenced by the court's representation to Mahler that the court would not specify the nature of his request to be excused on the record. It would not be embarrassing to a juror for the court to announce on the record that the juror was being excused because a family member had been involved in a motor vehicle accident, but it would be extremely embarrassing for a juror if the court to announced in open court, at a trial that was being streamed live over the Internet, that the juror had to be excused to attend to marital problems at home.

The court addresses Avery's argument based on its finding that the facts forming the basis for the decision to grant Mahler's request to be excused are those contained in the file memo as corroborated by the testimony of Attorney Strang and Attorney Buting. On that basis, Avery's citations to cases from other jurisdictions finding error where a juror was excused because of differences of opinion with other jurors concerning the merits of the case are of no relevance. Because the credible

evidence demonstrates the deliberative process had nothing to do with Juror Mahler's request to be excused, this particular argument of Avery has no merit.

II. SHERIFF PAGEL'S PRIVATE COMMUNICATION WITH A DELIBERATING JUROR CONSTITUTED ERROR AND REQUIRES REVERSAL OF AVERY'S CONVICTIONS.

Aside from other alleged errors, Avery argues that Sheriff Pagel's involvement in the events leading to Juror Mahler's removal constitute error requiring a reversal of his conviction. To address this argument, it is first necessary to precisely describe the involvement of Calumet County Sheriff Pagel in Juror Mahler's removal.

While the offenses in this case occurred in Manitowoc County, the Calumet County Sheriff's Department became involved in the investigation of the case almost immediately because Avery had a pending lawsuit against Manitowoc County and the Manitowoc County Sheriff's Department arising out of his wrongful conviction in another case some years earlier. At an early stage in this case Avery filed a "Motion to Exclude Manitowoc County Sheriff's Department from Testifying and Overseeing Jurors." In part, the motion sought to prevent members of the Manitowoc County Sheriff's Department from having any role in the oversight of jurors. The parties resolved the motion as part of their agreement to

hold the trial in Calumet County, but with a jury of Manitowoc County residents. Attorney Strang, one of Avery's trial attorneys, summarized the agreement as it related to jury oversight, at a hearing on August 22, 2006:

> . . . . with a trial conducted in the Calumet County Courthouse, the Calumet County Sheriff's Department, in the ordinary course, would take charge of jury assembly, jury management, the role of bailiff, custody of Mr. Avery, if in fact he's in custody at the time of trial.
>
> And we see it as mooting the request for relief as to a role with the Manitowoc County Sheriff's Department, in prospective or actual jurors, because under this proposal the Manitowoc County Sheriff's Department will have no role with, or contact with, actual or prospective jurors. Tr. 20: 5-17.

On the evening of March 15, 2007 Juror Mahler first made his request to speak to a bailiff to the state patrol officer stationed in the hallway outside of his hotel room. Tr. 52-53. The state trooper summoned a bailiff named Oscar, a retired deputy with the Calumet County Sheriff's Department. Tr. 53: 15-17. After Mahler told Oscar why he wanted to speak with him, Oscar told Juror Mahler that he would get the sheriff. Tr. 54: 14-16. The testimony at the postconviction motion hearing demonstrates that Pagel's only involvement was to ask Juror Mahler what was going on and to relay the information provided to him by Juror Mahler to the judge. Tr. 25: 22-25; Tr. 26: 1-25; Tr. 27: 1-21. There is no record of any statements Sheriff Pagel is alleged to have made to Juror Mahler. Sheriff Pagel was not a witness in the trial and was not called as a witness at the postconviction motion hearing.

As Avery points out in his brief, the jurors in this case were sequestered during their deliberations. Wis. Stat. §972.12 provides that the officer appointed by the court is to "keep the jurors together and to prevent communication between the

jurors and others." §756.08(2) provides in relevant part: "While the jurors are under the supervision of the officer, he or she may not permit them to communicate with any person regarding their deliberations or the verdict that they have agreed upon, except as authorized by the court." Sheriff Pagel was not the person appointed by the court to oversee the jurors during their deliberations. One of his deputies, identified as Oscar in the postconviction motion testimony, was so appointed. A reasonable reading of the testimony is that when Juror Mahler presented his request to be excused to Oscar, Oscar was not sure what to do and contacted his superior, Sheriff Pagel, who followed up on Juror Mahler's request. While the court does not believe the communications between Sheriff Pagel and Juror Mahler regarded the jury's "deliberations or the verdict," the court will assume for purposes of its analysis that Juror Mahler's request should have been relayed to the court directly by the bailiff and Sheriff Pagel should not have intervened.

The law requires the court to determine whether any communication between Juror Mahler and Sheriff Pagel prejudiced the jury's decision in this case. As Avery points out in his brief, there is some confusion concerning the applicable burden to be applied concerning the showing of prejudice. The United States Supreme Court in *Remmer v. United States*, 347 U.S. 227, 229 (1954) ruled as follows:

> In a criminal case, any private communication, contact, or tampering, directly or indirectly, with a juror during a trial about the matter pending before the jury is, for obvious reasons, deemed presumptively prejudicial, if not made in pursuance of known rules of the court and the instructions and directions of the court made during the trial, with full knowledge of the parties. The presumption is not conclusive, but the burden rests heavily upon the Government to establish, after notice to and hearing of the defendant, that such contact with the juror was harmless to the defendant.

This language was specifically cited with approval in *State v. Dix*, 86 Wis. 2d 474, 491 (1979). However, *Dix* also points out that "in *Shelton v. State*, 50 Wis. 2d 43, 51, 183 N.W. 2d 87 (1971), the court expressly adopted a rule which requires a showing of probable prejudice." *Id.* Thus, it is somewhat unclear whether the communication between Sheriff Pagel and Juror Mahler creates a presumption of prejudice which the State must rebut, or whether Avery is required to make a showing of probable prejudice. For purposes of this case, the court does not find it necessary to determine which standard applies, because under either standard the record demonstrates no possibility of prejudice based on any communications between Juror Mahler and Sheriff Pagel.

The court first notes that whatever happened between Sheriff Pagel and Juror Mahler, Juror Mahler did not participate in the deliberations which led to Avery's guilty verdicts and none of the jurors who did participate in the verdicts had any knowledge of Sheriff Pagel's communication with Juror Mahler. It is undisputed that any communication between Sheriff Pagel and Juror Mahler had no effect on the verdicts which the jury rendered in this case.

Avery recognizes in his argument that Sheriff Pagel's contact with Juror Mahler had no effect on the verdicts themselves, but argues that "the communications between Mahler and Sheriff Pagel were prejudicial to Avery because they led to a change in the makeup of the jury." Defendant's Postconviction Brief, p. 24. Even accepting the proposition that a defendant can be prejudiced by an

unauthorized communication with a juror who did not participate in the verdicts, there is still no prejudice in this case. There is no evidence in the record of any communication Sheriff Pagel had with Juror Mahler other than receiving information concerning his request to be excused and passing it on to the trial court. In his testimony, Juror Mahler does not describe or even refer to any statement made by Sheriff Pagel to him. This is in sharp contrast to some of the statements made by law enforcement personnel in cases where prejudice was found to exist. *See, e.g. Mattox v. United States*, 146 U.S. 140, 141 (1892) (The bailiff told the jurors "this is the third fellow he has killed."). In this case, the record demonstrates that the communication between Juror Mahler and Sheriff Pagel was almost exclusively one way. Juror Mahler provided information and Sheriff Pagel received it before relaying it to the court. There is no possibility of prejudice to the defendant. The defendant has not alleged that Pagel distorted any information which was relayed to the judge. And, even had such an allegation been make, it would have been dispelled by the court's own follow up conversation with Juror Mahler. As noted in the court's file memo, when the court questioned Juror Mahler, "he confirmed the information I've been told" by Sheriff Pagel.

Avery argues that "even if Sheriff Pagel did not explicitly encourage Mahler's removal, his participation in the private communications is inseparable from the juror's ultimate removal." Defendant's Postconviction Brief at 24-25. What Avery fails to explain is how anything would have been or might have been different had the bailiff rather than Sheriff Pagel received Mahler's information and

passed it on to the trial court. There is simply no suggestion in the record that Sheriff Pagel acted as anything more than a conduit of information, a task which admittedly should have been performed by the bailiff.

III. AVERY'S CONVICTIONS CANNOT STAND BECAUSE THE COURT HAD NO AUTHORITY TO SUBSTITUTE AN ALTERNATE JUROR ONCE DELIBERATIONS HAD BEGUN.

Avery argues that even assuming cause existed for the removal of Juror Mahler, "his convictions still cannot stand because the option selected after the juror was removed – substitution of the alternate – is not permitted by the governing statute." Defendant's Postconviction Brief, p. 26. Thus, for purposes of the court's analysis of this argument, it is assumed that Juror Mahler was properly excused from the jury.

Analysis of Avery's argument requires a consideration of *State v. Lehman*, 108 Wis. 2d 291 (1982), the former Wis. Stats. §972.05 and current Wis. Stats. §972.10(7). In *Lehman*, the court concluded that Wis. Stat. §972.05 (1979-80) did not provide authorization for a trial court, without stipulation of the parties, to substitute an alternate juror for an excused juror. The statute, which has since been repealed, read as follows:

> 972.05 *Alternate jurors.* If the court is of the opinion that the trial of the action is likely to be protracted, it may, immediately after the jury is impaneled and sworn, call one or 2 alternate jurors. They shall be drawn in the same manner and have the same qualifications as regular jurors and shall be subject to like examination and challenge. Each party shall be allowed one peremptory challenge to each alternate juror. The alternate juror shall take the oath or affirmation and shall be seated next to the regular jurors and shall attend the trial at all times. If the regular jurors are kept in custody, the alternate shall also be so kept. *If before the final submission of the*

> *cause a regular juror dies or is discharged, the court shall order an alternate juror to take his place in the jury box*. If there are 2 alternate jurors, the court shall select one by lot. Upon entering the jury box, the alternate juror becomes a regular juror. (Emphasis supplied)

The Wisconsin Supreme Court, after describing "the significant difference of opinion in the legal community as to the wisdom and constitutionality of permitting substitution of an alternate after the jury has begun deliberations" concluded that it would "decline to infer from a silent statute that the legislature approves substitution during deliberations." *Id*. at 305-306. The court then went on to express its holding as follows:

> We hold that in the absence of express authorization by statute or rule for substitution of an alternate juror for a regular juror after jury deliberations have begun or in the absence of consent by the defendant to such substitution, hereafter it is reversible error for a circuit court to substitute an alternate juror for a regular juror after jury deliberations have begun.

Id. at 313.

In 1984 the Wisconsin legislature adopted 1983 Wisconsin Act 226. The introduction to the act recites that it relates "to impaneling additional jurors in civil and criminal trials." The common theme running through the statutes which were amended or created by Act 226 was to change the practice of designating alternate jurors at the time of jury selection and provide that the alternate jurors would only be identified and removed at final submission of the case. In a number of the notes to the statutes affected, the drafters recited that the "changes are intended to promote an attentive attitude and collegial relationship among all jurors." Of particular relevance to this case, 1983 Wisconsin Act 226 created §972.10(7) which remains

substantially unchanged to this date[7]. The new statute and the note following it read as follows:

> 972.10(7) If additional jurors have been impaneled under s. 972.04 (1) and the number remains more than required at final submission of the cause, the court shall determine by lot which jurors shall not participate in deliberations and discharge them.
>
> NOTE: Subsection (7) requires the court to reduce the size of the jury panel to the proper number immediately prior to final submission of the cause. Unneeded jurors must be determined by lot and these may not participate in deliberations. *State v. Lehman*, 108 Wis. 2d 291 (1982).

Avery points out that §805.08(2) was amended in 1996 to permit a circuit court in civil cases to hold additional jurors until the verdict is rendered or discharge them at any time. Because there is no comparable statute permitting the court to retain alternate jurors in criminal cases, Avery argues that §972.10(7) should be read to not only require the discharge of alternate jurors once the jury in a criminal case begins deliberating, but to prohibit the substitution of any alternate juror, should one of the original 12 subsequently be excused for cause. In the words of Avery's brief, "The court had no authority to substitute an alternate during deliberations, as the alternate should have been discharged once deliberations began." Defendant's Postconviction Brief, p. 27.

In order to assess the impact of §972.10(7) on the facts in this case, it is first necessary to have a precise understanding of the holding in *Lehman*. *Lehman* did not hold that any statute authorized the substitution of a juror during deliberations. Quite the opposite, the Wisconsin Supreme Court concluded that §972.05 did not

[7] With the exception of the change of the word "impaneled" to "selected," §972.10(7) remains unchanged.

authorize a trial court to substitute an alternate juror in the place of an excused regular juror after deliberations had begun and it was "reversible error" for a court to make such a substitution. The court did, however, sanction the substitution of an alternate juror after deliberations have commenced with the consent of the parties:

> Until there is express authorization permitting a circuit court to substitute an alternate juror during jury deliberations, the circuit court has only three options available to it if a regular juror is discharged after jury deliberations have begun: first, to obtain a stipulation by the parties to proceed with fewer than twelve jurors; second, to obtain a stipulation by the parties to substitute a juror; and third, to declare a mistrial.

108 Wis. 2d at 313.

§972.10 clearly does not authorize the substitution of a juror after deliberations have begun. The precise question that must be answered, however, is: Does current §972.10(7) *prohibit* the substitution of an alternate juror, even with the consent of the parties, under the process described in *Lehman*? To answer this question, the court must interpret the statute. When interpreting a statute, the trial court is required to follow rules well settled by our Supreme Court. Those rules were recently summarized as follows:

> ¶ 21. Statutory interpretation begins "with the language of the statute." *State ex rel. Kalal v. Circuit Court for Dane County*, 2004 WI 58, ¶ 45, 271 Wis.2d 633, 681 N.W.2d 110. Statutory language "is given its common, ordinary, and accepted meaning." Id. If the statute's meaning is plain, there is no ambiguity, and the statute is applied according to its terms. Id., ¶ 46. However, if a statute "is capable of being understood by reasonably well-informed persons in two or more senses," the statute is ambiguous, and we may consult extrinsic sources, such as legislative history. Id., ¶ 47-48.

County of Dane v. LIRC, 315 Wis. 2d 293, 310 (2009). The court agrees with the defendant that the plain language of §972.10(7) requires additional jurors to be discharged when the case is submitted to the jury. The unobjected to decision of the

court in this case to sequester one additional juror in addition to the 12 jurors who were deliberating was error. The court does not agree, however, that the plain language of §972.10(7) prohibits the parties from consenting to the substitution of one of the additional jurors in the event a regular juror is excused. The fact that a juror has been discharged does not necessarily mean the juror cannot be called back as a substitute at some point in the future. The court in *Lehman* recognized this distinction when it phrased the issue in the case as follows:

> The ultimate question is not whether the alternate juror is to be discharged upon final submission but whether sec. 972.05 allows a circuit judge, during jury deliberations, to order an alternate juror, *whether or not previously discharged*, to take the place of a regular juror who is discharged after jury deliberations have begun. (emphasis in original).

108 Wis. 2d at 305.

As part of its analysis, the Wisconsin Supreme Court in *Lehman* reviewed federal cases decided under Rule 24(c) as it read at the time. The rule contained language essentially identical to the language in current §972.10(7). The rule provided in part, "An alternate juror who does not replace a regular juror shall be discharged after the jury retires to consider its verdict." The federal courts which reviewed substitution of alternate jurors under Rule 24(c) came to different conclusions. *Lehman* points out that the 9th Circuit Federal Court of Appeals held that Rule 24(c) mandated discharge of the alternate juror and prohibited substitution after final submission to the jury in *United States v. Lamb*, 529 F. 2d 1153 (9th Cir. 1975). Other federal courts came to a different conclusion, including our own 7th

Circuit Court of Appeals, which ruled as follows in *United States v. Josefik*, 753 F. 2d 585, 587, 588 (7th Cir. 1985):

> Rule 24(c) provides that "alternate jurors in the order in which they are called shall replace jurors who, *prior to the time the jury retires to consider its verdict*, become or are found to be unable or disqualified to perform their duties" (emphasis added) and that "an alternate juror who does not replace a regular juror shall be discharged after the jury retires to consider its verdict." There is no provision for recalling an alternate after he is discharged and we think policy as well as the language we have quoted from the rule (especially the part we have italicized) forbid the practice.
>
> . . . .
>
> Although *United States v. Lamb*, 529 F.2d 1153, 1156-57 (9th Cir. 1975) (en banc), states in dictum that a violation of Rule 24(c) cannot be waived, we cannot understand why not. No other circuit has followed the dictum. *See, e.g., United States v. Barker, supra*, 735 F.2d at 1283; *United States v. Davis*, 608 F.2d 698, 699 (6th Cir. 1979) (per curiam). Even panels of the Ninth Circuit have repeatedly rejected it. See *United States v. Lopez*, 581 F.2d 1338, 1342 (9th Cir. 1978); *United States v. Foster, supra*, 711 F.2d at 886; *United States v. Crisco*, 725 F.2d 1228, 1233 (9th Cir. 1984); *United States v. Rubio*, 727 F.2d 786, 799 n.7 (9th Cir. 1984) (per curiam). If the defendant would prefer to take his chances with the jury in its reconstituted form rather than undergo the expense and uncertainty of a new trial, why should he not be allowed to?

Josefik essentially adopted the *Lehman* approach in applying a Rule reading essentially identical to §972.10(7). That is, substitution during deliberations is prohibited by the Rule, but can be allowed with the defendant's consent. While federal case law interpreting former Rule 24(c) is not determinative, the cases decided under it demonstrate that §972.10(7) is at least ambiguous on the issue of whether or not an additional juror, whether discharged or not, may subsequently be substituted for an excused regular juror.

The State in its original brief and the defendant in his reply brief both cite legislative history in support of their respective positions. The court agrees with the State that the primary purpose for 1983 Wisconsin Act 226 was to repeal the practice

of designating jurors as alternates at the time of their initial selection and provide that additional jurors would only be identified as alternates at the time the case was submitted to the jury for deliberations. There is no specific language, either in the statutes affected or in the notes to the act, suggesting any change in the rules governing substitution of jurors was intended. Avery argues in his reply brief that the language in §972.10(7) providing that unneeded jurors "may not participate in deliberations" was a "response to *Lehman*." Defendant's reply brief, p. 13. In support of this argument, Avery points to the note to §972.10(7). That note reads as follows:

> Subsection (7) requires the court to reduce the size of the jury panel to the proper number immediately prior to final submission of the cause. Unneeded jurors must be determined by lot and these may not participate in deliberations. *State v. Lehman*, 108 Wis. 2d 291 (1982).

The court reads the note to mean that the drafters viewed the newly created statute as being consistent with the decision in *Lehman*. One would expect that if the drafters had felt otherwise, the note would have included language indicating that the statute was intended to reverse, undo or modify some holding in the *Lehman* case. The court does not read the note as implying that the legislation was intended to modify or overrule any portion of the *Lehman* decision.

Avery additionally argues that the legislative intent to prohibit the substitution of jurors during deliberations is evidenced by the legislature's failure to adopt a proposed amendment to what became Act 226, which would have legislatively authorized a trial court to order an alternate juror to take the place of a

regular juror in the event a regular juror dies or is discharged after final submission of the case. Defendant's Reply Brief, p. 14. Avery is correct that such an amendment was proposed but was not made a part of the final legislation. The amendment was proposed by Representative Thomas Crawford, who detailed his concerns in a memorandum to the Legislative Reference Bureau dated November 3, 1982. A copy of that memorandum and the proposed amendment, both of which are part of the Legislative Reference Bureau file, are attached to this decision. In his memorandum, Representative Crawford details his opinion that the three choices offered to the parties in *Lehman* "are unduly harsh." It is clear in his memorandum that he hoped the legislation would include a provision allowing the trial court to substitute an alternate juror when a regular juror is discharged, whether or not there was a stipulation by the parties to do so. The purpose of his proposed amendment was to go beyond the authority given to the trial judge in *Lehman* to substitute a juror with the consent of the parties, and give the trial judge the discretion to substitute a juror with or without that consent. The legislature's failure to adopt his amendment served merely to leave the parties in a criminal action in the same position they were in under *Lehman*. There was no statutory authority authorizing the trial judge to substitute a juror, but there is nothing in the statutory language itself or the note to §972.10(7) which suggests the parties cannot follow the procedure outlined in *Lehman* and stipulate to the substitution of a 12th juror.

To further support his argument that jurors required to be discharged under §972.10(7) cannot later be substituted, Avery points out that in 1996 the Supreme

Court amended §805.08(2) to allow a trial court in civil cases to "hold additional jurors until the verdict is rendered." Avery argues that "if, as the state contends, the 'discharge' requirement created by post-*Lehman* does not bar substitution during deliberations, there would have been no need for the Supreme Court to amend the civil statute to permit such substitution." Defendant's Reply Brief, p. 15. Avery's argument fails to appreciate the distinction between §805.08(2), which contains no requirement that the parties stipulate to the substitution of an additional juror in a civil case, and the holding in *Lehman*, which prohibits a trial court from substituting an alternate juror, whether previously discharged or not, unless both parties stipulate to the substitution and the other safeguards provided for in *Lehman* are followed.

The court concludes that not only is the holding in *Lehman* permitting the substitution of an alternate juror by stipulation unaffected by §972.10(7), but there are good reasons for the continued vitality of the holding in *Lehman*. First and foremost, it gives the defendant an option to retain his right to a jury of 12 persons even where it becomes necessary to excuse one of the original jurors. The value of that option is evidenced by the testimony of Avery's trial counsel at the postconviction motion hearing. Both Attorney Strang and Attorney Buting testified they would not have recommended that Avery proceed to trial with a jury of only 11 members. Attorney Strang testified that in his opinion he thought it would have been "folly" to proceed with only 11 jurors. Tr. 153: 1-2. As Attorney Buting explained, "I'm sure we talked about all three options. And the one that was off the table from the beginning, was to proceed with just 11 jurors. That was never

something that I would have advised, or Mr. Strang, and I think we told Avery that." Tr. 211: 24-25; Tr. 212: 1-4. Avery's second option under the holding of *Lehman* was to request a mistrial. *Lehman* entitled him to a mistrial if he wished. In this case, however, both of his attorneys thought the case went in as well as it could have and recommended the substitution option. Tr. 152: 15-16; Tr. 158: 5-7; Tr. 236: 20-25; Tr. 237: 1-22. Mr. Avery had used the proceeds of his civil rights suit against Manitowoc County to pay attorney fees of $240,000.00 to his trial counsel. Tr. 231: 18-24. Both of his very well-respected trial attorneys were obligated to tell him that if there was a mistrial, he would be tried again and they would not be in a position to represent him. Tr. 157: 18-25; Tr. 158: 1-11; Tr. 235: 20-25; Tr. 236: 1-19. As the 7th Circuit Court of Appeals explained in *Josefik*, *supra*, "If the defendant would prefer to take his chances with the jury in its reconstituted form rather than undergo the expense and uncertainty of a new trial, why should he not be allowed to?"

Avery cites *Jennings v. State*, 134 Wis. 307 (1908) and *State v. Smith*, 184 Wis. 2d 664 (1924) for the proposition that "a criminal defendant may not validly consent to a procedure that diminishes his constitution right to a jury trial unless a statute expressly authorizes that procedure." To the extent that giving Avery the option to substitute the alternate juror constituted any diminishment of a constitutional right, that assertion simply flies in the face of the court's holding in *Lehman*. The court in *Lehman* specifically found there was no statutory authority authorizing the substitution of a juror during deliberations, but nevertheless allowed the practice if the defendant chose to exercise the option to use it. The language in

§972.10(7) providing that the court is to discharge additional jurors when the case is submitted to the jury is not sufficiently specific to deprive a criminal defendant of the options given to the defendant in *Lehman*.

IV. IF AVERY'S CLAIMS CHALLENGING JUROR MAHLER'S REMOVAL AND SUBSTITUTION OF THE ALTERNATE JUROR WERE WAIVED, WHICH HE DISPUTES, HE IS STILL ENTITLED TO RELIEF UNDER THE DOCTRINES OF PLAIN ERROR, IN THE INTEREST OF JUSTICE OR INEFFECTIVE ASSISTANCE OF COUNSEL.

In this section of Avery's brief in support of his motion, he anticipated that the state would argue the trial court's substitution of the alternate juror for Juror Mahler was waived by Avery's failure to object to the action during trial. The state did not disappoint. In Section K. of its initial response brief, the state argues that any objection to the substitution of the alternate juror was either waived or forfeited.

There are no reported Wisconsin decisions which specifically address the issue of waiver in the context of the facts in this case. In *Lehman*, *supra*, the trial court did excuse a juror without first questioning the juror in the presence of the defendant and his counsel. That case is of no assistance, however, because defense counsel objected to the substitution of the alternate juror at the trial.

To the extent Avery's argument that his failure to object at trial did not waive any *constitutional* claim, there is support for his position in *State v. Anderson*, 291 Wis. 2d 673 (2006). In *Anderson* the judge engaged in *ex parte* communications with the jury involving requests by the jury to view evidence during deliberations. The State conceded that these *ex parte* communications violated the defendant's

constitutional and statutory rights to be present during the trial. The Supreme Court concluded, "that although neither the defendant nor defense counsel objected to the circuit court's communicating with the jury in the defendant's absence, the alleged error is treated as a direct challenge to the appellate court, not as a claim of ineffective assistance of counsel." 291 Wis. 2d at 706. Thus, the court held that not only was the claim of error preserved despite the defendant's failure to object at trial, but the defendant had the right to challenge the claimed error directly and not as an ineffective assistance of counsel claim.

For reasons stated above, this court has concluded that its *ex parte* communications with Juror Mahler were not violative of the Wisconsin Supreme Court holding in *Lehman*, nor a violation of the defendant's constitutional rights. If the court is wrong, however, and Avery's rights were violated by the court's actions, the court concludes that Avery is entitled to directly challenge the propriety of the trial court's actions, even though no objection was made at trial. Though the court believes that Avery's failure to object to any aspect of the juror substitution process at his trial does not preclude him from challenging that process, the court will comment briefly on Avery's suggested alternative arguments, should any of his primary arguments deem to have been waived by failure to act at trial.

A. Plain error and interest of justice.

Avery argues that to the extent any of his arguments were deemed waived, a new trial should be granted on the grounds of plain error and in the interests of

justice. The Wisconsin Supreme Court has summarized the plain error doctrine as follows:

> Plain error is "'error so fundamental that a new trial or other relief must be granted even though the action was not objected to at the time.'" *State v. Sonnenberg*, 117 Wis. 2d 159, 177, 344 N.W.2d 95 (1984) (citation omitted). The error, however, must be "obvious and substantial." *Id.* Courts should use the plain error doctrine sparingly. *Id*. For example, "'where a basic constitutional right has not been extended to the accused,'" the plain error doctrine should be utilized. Id. (citing *Virgil v. State*, 84 Wis. 2d 166, 195, 267 N.W.2d 852 (1978) (Beilfuss, C.J., concurring); "Wisconsin courts have consistently used this constitutional error standard in determining whether to invoke the plain error rule." *State v. King*, 205 Wis. 2d 81, 91, 555 N.W.2d 189 (Ct. App. 1996) (citing to a number of Wisconsin cases applying the plain error doctrine).

State v. Jorgenson, 310 Wis. 2d 138 (2008). Avery cites one federal court decision, *United States v. Essex*, 734 F. 2d 832 (D.C. Cir. 1984), and one state court decision, *State v. Corsaro*, 526 A. 2d 1046 (N.J. 1987), as examples of cases which he asserts support his claim of plain error. The factual differences between this case and the facts involved in *Essex* and *Corsaro* serve only to demonstrate the inapplicability of the plain error doctrine to this case.

The defendant in *Essex* was convicted in federal court on a charge of possession of heroine with intent to distribute. Following the close of the case, the jury began deliberations and adjourned for the weekend. On Monday one of the 12 jurors failed to appear. Without finding any reason for excusing the 12th juror, and over the defendant's objection, the trial court permitted the remaining 11 jurors to continue deliberations and return a verdict. Noting that "there is nothing in this trial record, or in the contentions of the government, that indicates the juror in this case had anything happen to him that gave him any justifiable reason to absent himself,"

the Court of Appeals found that the defendant was denied his right to a unanimous verdict by a jury of 12 and reversed the conviction under the plain error doctrine. 784 F. 2d at 844. In its decision, the court did note that "the trial court has a great deal of discretion in deciding to excuse a juror for cause." *Id.* at 845. In *Essex*, the court found that the trial court made no effort to exercise that discretion. Here Avery's counsel was well aware of the reasons why Juror Mahler was excused and agreed with the court's action. Because of the availability of the alternate, Avery still received the benefit of verdicts reached by a full jury of 12 members.

Corsaro involved an even more egregious situation. A jury in a criminal case returned partial verdicts convicting three defendants on some gambling charges. The court then instructed the jurors to continue deliberations to determine whether the defendants were also guilty of conspiracy to promote gambling. When the jury reconvened to resume deliberations, one juror arrived over an hour late and appeared to be intoxicated. Although some of the defense attorneys expressed concern about substituting an alternate for the intoxicated juror, they eventually agreed to the substitution. The jury then returned guilty verdicts on all remaining charges. The appeals court reversed the convictions on grounds of plain error. The court explained its decision in part as follows:

> In this case, it is reasonable to assume that the fact-findings of the jury reflected in their partial verdicts are related to the convictions for maintenance of a gambling resort, promotion of gambling, and possession of gambling records, and that these factual circumstances also underlay the jury's deliberations with respect to conspiracy. The likelihood that the defendants' guilt on the earlier-decided counts would be accepted by the substituted juror or would not be truly amenable to reconsideration and reevaluation by the original jurors suggests that the new juror's contributions to the deliberations on the "open charges" would have been minimal at

> best. . . . While the facts underlying the partial verdict in this case did not necessarily constitute essential elements of the open charges, reliance on the convictions could have established the overt act requirement of conspiracy under *N.J.S.A.* 2C:5-2(d); the jury's conclusion, moreover, in the partial verdict that Corsaro possessed gambling records was a "strong, perhaps irresistible, gravitational pull" toward her conviction for "promoting gambling," *i.e.*, engaging "in conduct which materially aids any form of gambling activity."

526 A. 2d at 1054. The facts in *Corsaro* are significantly different from those in this case. In this case, the jury had deliberated for only a few hours before the alternate juror was substituted for Juror Mahler. The jury, after having been instructed to begin its deliberations anew, deliberated for the better part of three days before rendering its verdicts. Neither *Essex* nor *Corsaro* offer any support for Avery's claimed existence of plain error.

B. Ineffective assistance of counsel.

The standard a defendant must reach in order to demonstrate ineffective assistance of counsel is well established:

> This court operates under the principles adopted by the Supreme Court in *Strickland v. Washington*, 466 U.S. 668 (1984). To establish a claim of ineffective assistance of counsel under *Strickland*, the defendant must demonstrate that: (1) defense counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed to the defendant by the Sixth Amendment; and (2) this deficient performance prejudiced the defense so seriously as to deprive the defendant of a fair trial, a trial whose result is reliable. *Strickland*, 466 U.S. at 687.

State v. Schaefer, 308 Wis.2d 279, 323 (2008). The court concludes that in this case Avery has shown neither deficient performance nor prejudice from the performance of his counsel.

Much of Avery's argument attempting to show the performance of his trial counsel was defective is based on testimony Juror Mahler gave at the postconviction motion hearing which the court finds to be incredible. What his attorneys did agree

to do was permit the judge to verify information Juror Mahler had provided to the sheriff as relayed to the trial judge. The reported information would have raised legitimate concerns on the part of any competent defense attorney about the willingness of Juror Mahler to give Avery the time and attention to which his case was entitled. Attorney Strang expressed those concerns articulately at the postconviction motion hearing as follows: "I think the specific concern that I had was that if he remained on the jury, and whatever the events were at home were weighing heavily on him, that he might be inclined to rush through deliberations or not hold to a sincerely held belief about the weight of the evidence." Tr. 146: 5-11. Given the time of the evening when the problem with Juror Mahler was reported, the distance of all parties from the Calumet County courthouse, and the difficulty of attempting to convene court at what probably would have been some time around midnight, Attorneys Strang and Buting did not perform deficiently in trusting the judge to verify that cause existed to excuse Juror Mahler when they knew an untainted alternate juror was available.

The court also concludes that there is nothing in the record to suggest Avery was prejudiced by the substitution of the alternate juror. He sought and received jury verdicts rendered by 12 persons who not only heard the entire case, but rendered their verdicts without danger of personal distractions that could well have worked to his prejudice.

THIRD PARTY LIABILITY EVIDENCE ISSUE

V. THE COURT'S DENNY RULING DEPRIVED MR. AVERY OF A FAIR TRIAL.

In addition to challenging the replacement of Juror Mahler, Avery contends the court erred in preventing him from introducing evidence that other named third parties were responsible for the killing of Teresa Halbach. This is a challenge to the court's Decision and Order on Admissibility of Third Party Liability Evidence which was filed on January 30, 2007 in response to Defendant's Statement on Third Party Responsibility submitted by Avery's counsel on January 8, 2007. In its decision, the court precluded the defense from introducing evidence of the liability of other persons named in the defendant's Statement on the grounds the offered evidence did not meet the requirements of the legitimate tendency test established in *State v. Denny*, 120 Wis. 2d 614 (Ct. App. 1984). In *Denny*, the defendant sought to introduce evidence that other individuals had a motive to commit the crime with which he was charged. The court determined that as a prerequisite to the submission of third party liability evidence, the defendant was required to meet the "legitimate tendency" test. Specifically, the court ruled as follows:

> We are convinced that sec. 904.01, Stats., commands us to adopt a standard less severe than the California court; a better standard was developed in the early case of *Alexander v. United States*, 138 U.S. 353 (1891). In that case, the United States Supreme Court fashioned the "legitimate tendency" test. In other words, there must be a "legitimate tendency" that the third person could have committed the crime. *Id.* at 356-57. We believe that to show "legitimate tendency," a defendant should not be required to establish the guilt of third persons with that degree of certainty requisite to sustain a conviction in order for this type of evidence to be admitted. On the other hand, evidence that simply affords a possible ground of suspicion against another person should not be admissible. 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. 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. *Id.* at 356-57.
>
> Thus, as long as motive and opportunity have been shown and as long as there is also some evidence to directly connect a third person to the crime charged which is not remote in time, place or circumstances, the evidence should be admissible. By illustration, where it is shown that a third person not only had the motive and opportunity to commit the crime but also was placed in such proximity to the crime as to show he may have been the guilty party, the evidence would be admissible. *See Perry v. Watts*, 520 F. Supp 550, 557 (N.D. Cal. 1981), *aff'd sub nom. Perry v. Rushen*, 713 F.2d 1447 (9th Cir. 1983), or where a third person has committed or actively seeks to commit violent acts against the victim, or has threatened the victim in a manner not remote in time, place or circumstances, the evidence might likewise be admissible. *See Alexander* at 356-57. *See also Harrison v. State*, 83 S.W. 699, 702 (Tex. Crim. App. 1904).

120 Wis. 2d at 623-624.

Avery alleged in his motion that *Denny* did not apply in this case because neither he nor anyone else had a motive to kill Teresa Halbach. Specifically, Avery argued:

> Avery does not propose to suggest that anyone had a motive to kill Teresa Halbach. It is in part the very *lack* of motive, on the part of anyone, that makes this case so gripping and disturbing. The decision not to prove another's motive to kill Ms. Halbach in itself takes this case out of *Denny*.

Defendant's Statement on Third Party Liability at p. 3. The court ruled that the legitimate tendency test did apply in this case and Avery's inability to show motive on the part of any other named third party did not excuse him from the requirements of the test.

Before addressing the individual arguments made by Avery relating to the third party liability issue, the court makes three initial observations. First, Avery mischaracterizes the court's ruling when he asserts that "the court deprived Avery of a fair trial when it ruled that he could not elicit evidence *or argue* that anyone other than Brendan Dassey was responsible for Ms. Halbach's death." (emphasis added).

Defendant's Postconviction Brief, p. 39. While the court's ruling did preclude the introduction of evidence that certain named third parties may have murdered Teresa Halbach, the court's ruling did not preclude him from arguing in his closing that the evidence *which was admitted at trial* demonstrated that other third parties, named or unnamed, may have committed the crime. In fact, in his closing Attorney Buting did name other third parties who he suggested may have murdered Teresa Halbach. Specifically, Attorney Buting suggested that Bobby Dassey, Scott Tadych, Ryan Hilligus, Scott Bloedorn, Bradley Czech, and Tom Pearce all could have been the murderer. Tr. March 14, 2007, 206-211. The state objected to this line of argument:

> . . . so when the state tells you that Bobby Dassey is this credible witness, who's the last person to see Teresa Halbach alive, maybe he's right, if he's the killer. Or Scott Tadych, his only alibi. He tells him—
>
> ATTORNEY KRATZ: Judge, I'm sorry, I'm going to interpose an objection on third party liability. I would like to be heard.

Tr. March 14, 2007, 208: 21-25; 209: 1-3. The court heard argument on Attorney Kratz's objection outside the presence of the jury. Attorney Kratz asserted that the closing argument violated the court's order on the admissibility of third party liability evidence. Attorney Buting contested the objection and argued in part as follows:

> But maybe more importantly, the court's ruling was that we were not allowed to present any evidence, extrinsic evidence, of a third party. But I don't know that that included that we couldn't argue reasonable inferences from what the evidence presented. (sic)

Id., 216: 23-25; 217: 1-3. The court responded to Mr. Buting's argument with the following:

> THE COURT: All right. I'm taking a look at my order, after a 14 page decision, the order is that the defense is precluded from offering any direct evidence to a third party, other than Brendan Dassey participated in the commission of the crimes as charged in the Amended Information. I don't recall that I was asked to place a limit on closing argument. I think there is a differentiation between the two.
>
> I don't know how I would have ruled on it, frankly, had I had one, because I don't know that the *Denny* case specifically addresses the issue. I don't know that another case specifically addresses the issue.
>
> But my recollection is, and the wording of my order is, that it was directed to the introduction of evidence. I'm not sure that the Court can prevent the defense from arguing inferences on the evidence as it was presented. The State gets a chance to respond in rebuttal.

Id. 217: 16-25; 218: 1-10. In responding to Attorney Kratz's objection, Attorney Buting informed the court that:

> when you are doing closing arguments, of course, sometimes you say things differently than you intend. If I did, I certainly, I think, brought it back within the realm of investigative bias, which was the primary point we're trying to make and throughout this case.
>
> . . . Again, it wasn't even my intent to go outside the realm of investigative bias, failure to look at suspects. But if I did, I think in the overall context of the whole argument we have been making throughout this case, I think the jury is not going to be confused and it's going to be clear that that's the purpose for which it's being offered.

Id. Tr. 216: 17-22; Tr. 219: 19-25; Tr. 220: 1. In light of Mr. Buting's explanation that he identified other potential perpetrators only to demonstrate investigative bias, the court did not explicitly rule on the state's objection, but permitted Mr. Strang to clarify what the intent of the defense argument was in his closing the following morning. *Id.* Tr. 220-221. The state did not renew its objection following Attorney Strang's explanation. The result of the court's action was that the jury heard the defense argument suggesting other individuals may have been responsible for the murder of Teresa Halbach on the precise terms defense counsel indicated they

wished to present the argument. Moreover, the court's comments on the record outside the presence of the jury certainly notified Avery's counsel that if they wished to argue third party liability in their closing argument, the court's pretrial third party liability ruling did not prevent them from doing so. Except to the extent that the court's pretrial ruling limited the presentation of specific third party liability evidence by the defense, the court did not prohibit Avery from arguing that other individual third parties may have committed the crime, and his attorneys in fact did so.

As a second preliminary observation, the court notes that both parties have included factual assertions in their briefs which were not presented to the court at the time the third party liability motion was argued. For example, at pages 45 and 52 of the defendant's brief, Avery makes reference to some "bloody bandages" and "bloody rags" allegedly containing Avery's blood which might have been available for planting, presumably by one of the third parties Avery sought to name as an alternative killer.[8] The offer of proof contained in the Defendant's Statement on Third Party Liability dated January 8, 2007 and the transcript of the motion hearing on January 19, 2007 make no mention of such evidence. As another example, there was no mention of Bobby Dassey's pre-hunting shower referred to on page 47 of Defendant's Postconviction Brief in any of the documents or argument presented to the court when it heard the third party liability motion. The fact that defense trial

[8] Avery does not cite the court to any reference in the court record to "bloody bandages" or "bloody rags" containing his blood and the court does not recall any such evidence either proffered in any pretrial motion or introduced into evidence at the trial.

counsel made reference to such allegations at the postconviction hearing does not mean the court should now give them any consideration. Since the allegations were not presented at the time the motion was heard, the court did not have an opportunity to consider them in reaching its decision and does not consider them now. Likewise, the court will give no consideration to the excerpts from investigative police reports referred to at pages 49-50, 53, 55-56, and 57-58 in the State's Postconviction Brief which are not asserted to be part of the record. Any claim of error on the court's part will have to be based on the information which was presented to the court at the time it considered the defendant's offer of third party liability evidence.

As a third and final preliminary observation, and as the court discusses in more detail below, not all of the evidence which Avery claims was precluded by the trial court's order actually falls within the prohibition of the order. The court's order did no more than preclude the introduction of evidence by the defense purporting to show that other named individuals may have murdered Teresa Halbach. The court's order did not preclude Avery from introducing evidence to show that some unknown person other than himself may have been the murderer. After all, neither party disputed the fact that Teresa Halbach had been murdered. The essence of Avery's defense necessarily had to be that someone else committed the crime. The court's ruling only prohibited the introduction of "*Denny*-type evidence," that is, evidence that another indentified individual or individuals committed the murder.

In fact, the defense was permitted to and did introduce evidence that an unknown third party was the real killer. As one example, Avery introduced evidence that some of his blood was stored in vials at the Manitowoc County courthouse in support of his theory that that blood had been planted in Teresa Halbach's car in order to frame him. If there had been bloody rags available somewhere on his property that a third party may have had access to for the purpose of framing him, certainly nothing in the court's third party liability ruling would have prevented him from introducing such evidence at trial either.

Avery's counsel understood they were not prevented from introducing evidence that some unknown third party must have committed the murder. They called as a witness Dr. Fairgrieve, who testified as an expert that the bones of the victim may well have been moved to the site where they were discovered, presumably by the unknown third party murderer, rather than burned on that spot by Steven Avery. The court's order did not prohibit introduction of this unobjected to evidence, but only evidence aimed at demonstrating the liability of specific third parties where the standards of *Denny* were not met.

A. The court's Denny ruling violated Mr. Avery's rights to present a defense and to confront witnesses against him.

The portion of Avery's postconviction brief addressing this claim details how trial counsel's strategy would have been different had the court allowed the

introduction of direct evidence that other specific individuals may have murdered Teresa Halbach. That is, the argument is not addressed so much to the claimed error on the part of the court as it is to the effect of the court's decision on the defense. The court agrees that had it ruled in the defendant's favor on the third party liability issue, the defendant could have presented to the jury additional evidence and arguments in favor of his acquittal. The real issue, however, is whether the court erred in denying Avery that opportunity.

As Avery notes in his brief, "the constitution guarantees criminal defendants a meaningful opportunity to present a complete defense." *Holmes v. South Carolina*, 547 U.S. 319, 324 (2006). However, *Holmes* goes on to recognize that this right on the part of criminal defendants has limitations. "State and federal rulemakers have broad latitude under the Constitution to establish rules excluding evidence from criminal trials." (citations omitted) *Id.* at 324. *Holmes* cites the *Denny* case as an example of rules regulating the admission of third party liability evidence that "are widely accepted." *Id.* at 327.

It is no doubt true that had Avery been able to reach the evidentiary threshold to allow the introduction of specific third party evidence against another individual, his case may have been stronger. The court does not agree, however, that its ruling precluded Avery from introducing evidence and effectively presenting many of the arguments offered. For example, Avery asserts the following:

> Attorney Buting testified that he, too, would have tried to develop a theory of defense surrounding another possible suspect who would have been on the Avery Salvage Yard property that would have been more coherent than the narrative

> presented by the state. After all, while the state had forensic evidence which arguably tied Avery to Ms. Halbach's murder, the state's explanation of what must have happened that day leaves many questions unanswered. For example, the state did not have a logical explanation for why, if Steven Avery killed Ms. Halbach in his trailer or garage, he would have placed her body in the back of her car which was located right outside of his trailer, only to then move her body to a burn barrel the short distance right outside of his trailer, leaving the incriminating evidence in the car. The state did not have an explanation for how Ms. Halbach's bones were found in more than one location. On the other hand, attorney Buting testified that the more likely chain of events was that Ms. Halbach had finished photographing Barb Janda's van, and that as she was leaving the Avery Salvage Yard, one of these other suspects on the property flagged her down, suggested that she take a picture of another car or truck, and ultimately killed her. (PC Trans. at 227). Had this occurred, there would have been an explanation for why Ms. Halbach would have been placed in the back of her vehicle, and that is that she was murdered away from Avery's trailer, but that her body was moved to the burn barrel right outside of his trailer. This would have explained how it was that the propane truck driver would have seen a vehicle like Ms. Halbach's drive past him away from the Avery Salvage Yard.

Defendant's Postconviction Brief at 44-45. The court's third party liability evidence ruling did not prevent Avery from making arguments highlighting the shortcomings in the state's theory of the case, including the shortcomings referred to in this quoted language. Likewise, the court's ruling did not prohibit Avery from eliciting testimony that Ms. Halbach sometimes took photos of vehicles for sale that were not prearranged (so-called "hustle shots") nor from arguing to the jury that Teresa Halbach may have taken a "hustle shot" for some other unidentified person after the photo requested by Steven Avery of Barb Janda's vehicle. In fact, Attorney Buting made precisely this argument. *See,* Tr. March 14, 2007, 207: 2-25; 208: 1-25; 211: 6-22. The "hustle shot" argument was not directed at any specific alternative perpetrator and Avery does not argue in his brief that any particular alternative suspect could be directly tied to a "hustle shot."

Avery goes on to argue:

> Had the defense been permitted to argue an alternative perpetrator theory, the defense would not have been limited to claiming the police must have planted the evidence. Rather, the defense could have argued that another person on the Avery property had access to bloody rags belonging to Avery, and had used them to plant evidence in Ms. Halbach's car. Attorney Strang testified that the court's ruling 'took away the ability to suggest that persons other than law enforcement officers had access to bloody bandages, bloody towels, blood drips that came from Steven Avery.' (PC Trans. at 113). He testified that the anticipated testimony from the crime lab analyst that Avery's blood was in the car would be 'a big problem for the defense.' (*Id.* at 114). The defense needed to be able to explain how the blood got into the car, if it wasn't from Avery, and the *Denny* ruling left the defense with only the police as the source of that blood. (*Id.*) Had the court not barred the defense, they could have shown that Avery had indeed cut his finger earlier, that he was bleeding, and that others who were on the property regularly, such as his brothers, would have had access to his trailer and could have retrieved bloody items to plant evidence. (*Id.*).

Defendant's Postconviction Brief at 45. The court's ruling did not prohibit Avery from introducing evidence of other sources for the defendant's blood which could have been used by someone to frame him. This is precisely the type of evidence the defense did introduce with respect to Avery's blood sample at the Manitowoc County courthouse. While the court's ruling prohibited Avery from introducing evidence that a specific individual may have planted his blood because of his failure to meet the *Denny* threshold, Avery was not prevented from arguing that an unknown third person could have had access to his blood.

In summary, the fact that defense counsel wanted to present an alternative theory to the jury naming a specific individual or individuals who may have committed the murder cannot make up for the fact that no evidentiary basis was shown to justify the admission of such evidence. The defendant's failure to present a sufficient evidentiary basis for the admission of third party liability evidence is discussed in more detail below. For purposes of this portion of the defendant's

argument, it is sufficient to note that the desire of the defendant alone to present third party liability evidence is not sufficient to warrant its admissibility. Additionally, the court's ruling did not prohibit Avery's trial counsel from introducing evidence and presenting many of the arguments he now contends were precluded by the court's ruling.

B. The court erred in applying Denny to exclude evidence and arguments of alternative perpetrators because Avery, unlike Denny, would not have presented numerous alternative suspects, but rather, a limited number of possible perpetrators.

Avery argues that one aspect in which this case differs from *Denny* is that while Denny "sought to present a parade of witnesses with animus towards the victim, the defense here would have been more focused." Defendant's Postconviction Brief at p. 50. Avery correctly points out that the court in *Denny* found that one justification for the legitimate tendency test was that without it "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." *State v. Denny*, 120 Wis. 2d at 623-624.

At the outset, the court notes that the number of alternative suspects alone is not determinative of whether or not the court should admit third-party liability evidence. A limitation on the number of potential alternative suspects is one reason for adopting the legitimate tendency test, not a substitute for it. The court does

acknowledge, however, that a limitation on the number of alternative suspects may well be considered a factor in favor of admitting third-party liability evidence.

The court is not convinced that Avery proposed a more limited number of alternative suspects than did the defendant in *Denny*. Denny sought to introduce evidence from two witnesses who would have suggested that alternative perpetrators could have been (1) an unknown "big drug dealer," (2) Gary Peterson, to whom the victim owed the sum of $130.00, and (3) a gentleman named Bill Cudahy, who may have been upset with the victim for selling his shotgun. 120 Wis. 2d at 625. Avery's offer of third-party liability evidence in this case is found at Page 9 of the Defendant's Statement on Third-Party Responsibility. That offer reads as follows:

> 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. These include at least Andres F. Martinez, Robert M. Fabian, Jr., James J. Kennedy, Scott Tadych, Charles Avery, Earl Avery, Bryan Dassey, Bobby Dassey, Brendan Dassey, and Blaine Dassey.

Avery sought to introduce evidence that ten named individuals, along with an unspecified number of other unnamed individuals who would have been present on the Avery Salvage Yard property during the afternoon and evening of October 31, 2005, could have murdered Teresa Halbach. The court does not perceive this grouping of alternative potential perpetrators to be narrower than the group which the defendant sought to present in *Denny*. The fact Avery acknowledged that none of the ten named individuals nor any of the other unknown persons on the salvage yard property may have had a motive to murder Teresa Halbach only expands the

distinct likelihood that granting the defendant's request would have created a significant danger of "degenerating the proceedings into a trial of collateral issues."

In support of his argument, Avery cites the court to *State v. Falk*, 238 Wis. 2d 93 (Ct. App. 2000) and *State v. Richardson*, 210 Wis. 2d 694 (1997). As postconviction counsel should have immediately realized, *Falk* is an unreported decision which cannot be cited. The facts are so different from those in this case that it would not have had significant applicability, even had it been considered citable precedent. In *Richardson*, the defendant was charged with sexually assaulting a 14-year-old babysitter. The defendant sought to introduce evidence that his estranged wife, the babysitter and the babysitter's mother all conspired to frame him for a crime which did not take place. The defendant wanted to introduce evidence of other acts, including his wife's alleged statement to her divorce attorney two days before the alleged assault that he had had sex with a 14-year-old, in support of his defense. The Wisconsin Supreme Court ruled that *Denny* did not apply because "Richardson's proposed defense alleged that the victim was lying in an effort to frame him, not that someone else had committed the crime." 210 Wis. 2d at 705. The court determined that the admissibility of the evidence should have been evaluated under Wis. Stat. Ch. 904, and under that chapter the evidence was not admissible. *Richardson* is not determinative in this case because here there is no dispute that a crime did occur. It is true that the proffered evidence in *Richardson* consisted of "frame up evidence" and Avery also argues here that he was framed. However, Avery was permitted to introduce his proffered "frame up evidence" in

the form of his blood samples at the Manitowoc County courthouse which he claimed to have been planted in Teresa Halbach's vehicle. He did not offer any alleged frame up evidence tied to any particular third party who may have been liable for the crime. His offer of proof with respect to individuals in his Statement on Third-Party Responsibility related to opportunity evidence on the part of those individuals to have committed the crime, not to any effort on the part of any one of the individuals to frame him for the crime.

In his brief, Avery argues as follows:

> At trial, Avery argued the police framed him, for example by planting the car key in his trailer. Had he not been prohibited from doing so, Avery also would have claimed that others on the Avery property framed him. As Strang testified, others on the property had access to bloody rags that could have been used to plant blood in Ms. Halbach's car. (PC Trans. at 113-114). Others, such as Bobby Dassey, who pinned the blame on Avery with his testimony about Avery's supposed remark about disposing the body, could have framed Avery to inculpate himself. (*Id.* at 116).

As the court has already explained, nothing in its third-party liability decision prohibited Avery from introducing testimony concerning bloody rags that would have been available for a third party to use to plant evidence against him. What the court did prohibit was evidence that an individual third party committed the crime because Avery did not meet *Denny's* legitimate tendency test.

C. Denny does not apply because Avery had no more motive than the alternative perpetrators.

Avery further argues that the legitimate tendency test of *Denny* should not be applied to his offer of third-party liability evidence because, unlike Denny, Avery

does not argue any other third party had a motive to murder Teresa Halbach. Because of this fact, Avery argues that *Denny* is a "poor fit" to this case.

The argument Avery makes in his postconviction motion echoes the argument his trial counsel made in the Defendant's Statement on Third-Party Responsibility. There, his counsel asserted "Avery does not propose to suggest that anyone had a motive to kill Teresa Halbach." Defendant's Statement on Third-Party Responsibility at p. 3. The fact of the matter is, however, both the state and Avery sought to present evidence at the trial related to motive. For its part, the state filed motions in June of 2006 seeking to introduce nine separate instances of other acts intended to demonstrate, among other things, that Steven Avery had a history of sexual misbehavior and violence, which included acts as heinous as the intentional burning of a live cat, demonstrating among other things that he had motive to commit the murder. The state was unable to present this evidence to the jury because the court found each piece of proffered evidence failed one or more elements of the *Sullivan* test. *See,* Decision and Order on State's Motion to Allow the Introduction of Nine Items of Other Acts Evidence filed September 25, 2006. Avery himself, while arguing that no one had a motive to kill Teresa Halbach, nevertheless contended in Defendant's Statement on Third-Party Responsibility that Scott Tadych was a "chronic liar and capable of the murder of Ms. Halbach," that Andres Martinez had attacked his girlfriend with a hatchet in November of 2005, and that Charles and Earl Avery each had "charging histories of sexually assaultive allegations." While neither the state nor the defense was able to offer any direct

evidence of motive for Steven Avery or anyone else to have wanted to murder Teresa Halbach, it is not fair to say that either party regarded her murder as a motiveless crime.

Avery argues that *Denny* does not apply in this case because he is unable to articulate a specific motive linking any particular third party to the crime. It does not necessarily follow that this lack of motive evidence makes *Denny* inapplicable. The real question is whether Denny's legitimate tendency test is a "poor fit" for Avery only because he is unable to meet its requirements, or whether Avery's inability to show motive on the part of any other third party renders the legitimate tendency test of *Denny* inapplicable to the facts in this case.

Besides *Richardson* and the unreported decision in *Falk*, Avery cites *State v. Oberlander*, 149 Wis. 2d 132 (1989) and *State v. Scheidell*, 227 Wis. 2d 285 (1999) in support of his argument that *Denny* should not control the admissibility of his offered third-party liability evidence. An examination of those decisions, however, does not suggest that the inability of a defendant to show motive somehow excuses a defendant from complying with the legitimate tendency test as a condition of being permitted to introduce third-party liability evidence.

In *Oberlander*, the defendant was alleged to have set fire to his own tavern for the purpose of collecting insurance proceeds. Oberlander contended at trial that Mark Neu was the arsonist. In support of his claim, the trial court allowed Oberlander to present the following evidence:

> This evidence included threats Neu made against Oberlander that he would "burn down" or "propane" the tavern, including threats made the night of the fire. There was also evidence that Oberlander had ordered Neu out of the Last Lap Tavern, that Neu had threatened the lives of a number of people, including Oberlander, that Neu told his own counsel at another unrelated court appearance that he "should burn down another tavern" and that the tavern he was referring to was the Last Lap Tavern. In addition, evidence that Neu had cut the electrical wires to the Last Lap Tavern about two months prior to the fire was also admitted.

149 Wis. 2d at 136. The issue on appeal was Oberlander's attempt to introduce other acts evidence demonstrating that "Neu was possibly responsible for a 'similar' incident at a concession stand at a local race track less than a year before the fire." *Id.* The Supreme Court sustained the circuit court's exclusion of the evidence on the basis of the circuit court's finding that the evidence was "too remote and had no connection with the arson charged in this case." *Id.* at 144.

The decision in *Oberlander* does not even mention the *Denny* case. What is significant is that the defendant had specific evidence to show that Neu had a motive to burn down his tavern and was permitted to present such *Denny*-type evidence. *Oberlander* was not a case in which there was any lack of motive on the part of the third party named by the defendant.

In *State vs. Scheidell*, 227 Wis. 2d 285 (1999), the defendant was charged with the sexual assault of a female who lived in his apartment building. The court summarized the facts of the case as follows:

> The facts are not in dispute. In August 1994, Jennifer D. began working at the Chancery Restaurant where she met Scheidell. When Jennifer and her two roommates were searching for a new apartment in May 1995, Scheidell remarked that two apartments in his building were unoccupied. Only one of the apartments was available, and Jennifer moved into the one-bedroom, studio apartment on the ground floor of the building.

> Scheidell was friendly with Jennifer, and stopped by to chat on occasion. Scheidell, who did work around the building, had obtained a key to Jennifer's apartment from the owner of the building. He had asked to keep the key to help paint her bathroom, and allowed a cable company employee into Jennifer's apartment while she was at work.
>
> At 4:45 a.m., on May 20, 1995, Jennifer awoke to the sound of the window blind falling onto her bathroom floor. She walked into the bathroom and noted that the casement window which she had left ajar for air was now open approximately one foot.
>
> Jennifer shut the window and attempted to go back to sleep. Approximately 30 minutes later, Jennifer awoke with a man straddling her waist. The assailant was wearing a black, knit ski mask with holes for the eyes and mouth, and a nylon jacket draped around his head.
>
> The assailant had pulled up her shirt, exposing her chest, he had his hand over her mouth, and she felt an object at her throat. When Jennifer struggled to break free, he began hitting her in the face with an open hand and tried to pull off her underpants. She was able to get one hand free and began hitting her assailant.
>
> Jennifer testified that she could see his eyes and believed she recognized the assailant as Scheidell. She said his name and asked him what he was doing. The assailant hesitated for a few seconds, pulled back, and then started hitting her again. Jennifer managed to push the assailant off her bed, but he shoved her back down to the bed at which point she noticed that he had a knife with a serrated edge. During the struggle, Jennifer called out "Danno," Scheidell's nickname, at least six times; each time the assailant hesitated and then resumed hitting her harder. She also managed to expose the left side of the man's face from the bottom of the eye to the top of the lip. Based on the assailant's distinctive body and walk, Jennifer was certain her attacker was Scheidell.

227 Wis. 2d at 288-290. At trial, Scheidell sought to present evidence of alternative liability on the part of another person. His offer of proof was as follows:

> According to the offer of proof, a police report, Kim C. was attacked in her second floor apartment approximately five weeks after the attack on Jennifer and approximately four blocks away. The offender, reportedly, a white male, age 35 to 40, with a thin build, entered through a previously damaged window, he was wearing some type of hood and possibly a white mask, and he used a butcher knife with a dull, rusty blade.

Id. at 291. The trial court applied the *Denny* legitimate tendency test and excluded the evidence because "while the crimes were strikingly similar, there was no showing of any direct connection between the crimes; therefore the evidence was

irrelevant and inadmissible." *Id.* at 292. The Supreme Court determined that under the facts of the case, the *Denny* "legitimate tendency" test was not applicable. The court reasoned:

> We are not persuaded that the legitimate tendency test of *Denny* can or should be molded to fit a situation where the defendant seeks to show that some unknown third party committed the charged crime based on evidence of another allegedly similar crime. In a situation where the perpetrator of the allegedly similar crime is unknown, it would be virtually impossible for the defendant to satisfy the motive or the opportunity prongs of the legitimate tendency test of *Denny*.

Id. at 296. The court concluded that where a defendant offers other acts evidence committed by an unknown party on the issue of identity, the court should determine admissibility based on the "*Whitty/Sullivan* framework." *Id.* at 305-306.

As in *Oberlander*, motive or lack of motive was not an issue in *Scheidell*. The court did decline to apply the *Denny* legitimate tendency test because "in a situation where the perpetrator of the allegedly similar crime is unknown, it would be virtually impossible for the defendant to satisfy the motive or the opportunity prongs of the legitimate tendency test of *Denny*." *Id.* at 298. In this case, impossibility is not an issue because the defendant has named a series of persons, the field of which has been narrowed at least for purposes of this postconviction motion, who he claims may have murdered Teresa Halbach. Under the circumstances it is not "virtually impossible for the defendant to satisfy the motive or opportunity prongs of the legitimate tendency test."

D. Denny does not apply because the state opened the door to third-party evidence.

As the court understands Avery's "open the door" argument, he is asking the court to find that, at least with respect to blood relatives of Steven Avery, the state opened the door to third-party liability evidence through the testimony of Sherry Culhane, its DNA expert. Culhane testified that she was able to exclude other members of the Avery family when she tested the DNA on the Toyota key and the blood stain obtained from Teresa Halbach's vehicle. In support of his argument, Avery cites the court to *State v. Dunlap*, 250 Wis. 2d 466 (2002). The court in *Dunlap* recognized that the conduct of one party at a trial may "open the door" to evidence from the other side which would otherwise be inadmissible. The court stated the test as follows:

> To determine whether the State opened the door, we apply the curative admissibility doctrine. Under the version of this doctrine that has been adopted in Wisconsin, when one party accidentally or purposefully takes advantage of a piece of evidence that is otherwise inadmissible, the court may, in its discretion, allow the opposing party to introduce otherwise inadmissible evidence if it is required by the concept of fundamental fairness to cure some unfair prejudice.

250 Wis. 2d at 485.

Avery's "open the door" argument fails for a number of reasons. First, his argument must be premised upon a contention that the DNA evidence elicited from Ms. Culhane pertaining to the DNA of other Avery family members "is otherwise inadmissible." Avery apparently contends that Ms. Culhane's testimony excluding other members of Steven Avery's family as sources of the blood found on Teresa Halbach's Toyota key and her vehicle was precluded by the court's Decision and Order of Third-Party Liability Evidence. Specifically, Avery argues as follows:

> In this case, given the trial court's ruling that Avery could not present evidence of alternative perpetrators, the state should not have presented evidence that excluded other potential suspects, particularly those whom the defense identified in its offer of proof.

Defendant's Postconviction Brief at p. 55. The defendant does not articulate how the court's decision prohibiting the admissibility of certain third-party liability evidence by Avery restricted the state in the presentation of its case. The court cannot discern any such restriction on its own. The fact that the court determined the defendant had not met the preliminary threshold to justify introduction of evidence shifting the blame to other members of Steven Avery's family did not operate to restrict the state in the presentation of evidence further excluding such third-party liability.

The state argues that the evidence presented by Ms. Culhane was admissible for a number of reasons. It addressed the defense contention that the state had unjustifiably narrowed the investigative focus on Steven Avery without investigating liability on the part of other potential suspects. The defense had identified as a potential witness a DNA expert who might challenge Ms. Culhane's finding that the incriminating blood stains belonged to Steven Avery and the state had the right to support her testimony with evidence of excluded persons. Finally, in order to demonstrate the reliability of DNA testing, the state wanted to demonstrate that the DNA attributed to Steven Avery could not be confused with DNA from other members of his family. These are all legitimate reasons justifying the admissibility of the evidence.

A second reason for rejecting Avery's "open the door" argument is that his attorneys did not object to the evidence presented by Ms. Culhane at the time it was offered, so that any objection to its admissibility was waived. In his response brief, Avery submits that any objection was not waived because "the third-party liability claim was extensively litigated and the court had issued its ruling. 'The law does not require counsel to … make a futile objection.'" (citation omitted). Defendant's Postconviction Reply Brief at p. 33. The court's third-party liability ruling merely prohibited the defendant from introducing evidence that other specific persons had committed the crimes. It did not address the introduction of any evidence from the state to support the charges against Steven Avery. Avery's argument that any objection to Ms. Culhane's evidence was not waived is without merit.

Avery has not met his burden under the curative admissibility doctrine to demonstrate that Sherry Culhane's testimony opened the door to any third party liability evidence that was not otherwise admissible.

E. Denny does not apply because the case was wrongly decided.

Avery acknowledges that this court does not have authority to consider whether or not *State v. Denny* was wrongly decided. Therefore, the court will not comment on this argument.

F. If Denny does apply, the court erred when it excluded evidence that Bobby Dassey, Scott Tadych, Charles and Earl Avery were potential perpetrators.

Avery further argues that if he is subject to the *Denny* legitimate tendency test, the court erred by failing to take a broader view of motive and finding that other individuals did, in fact, have a motive to murder Teresa Halbach. Avery expresses this argument as follows:

> The court's application of *Denny* was unreasonably strict. With respect to motive, the court unreasonably focused only on one type of motive, and that was who would have a motive to harm Teresa Halbach. The court failed to look at an equally important motive, which is the motive to frame Steven Avery for a crime he did not commit.

Defendant's postconviction motion at p. 46. If the court failed to adequately consider the separate motive of a third party to murder Teresa Halbach for the purpose of framing Steven Avery, it was because Avery never raised the argument himself at the time he sought to introduce third party liability evidence. On the contrary, Avery's argument before the court was that no one had a motive to kill Teresa Halbach. Defendant's Statement on Third-Party Responsibility at p. 3. As noted above, his statement did include an alternative argument that if *Denny* did apply, ten named individuals along with anyone else present on the Avery Salvage Yard property at the time met the requirements of the legitimate tendency test. Significantly, however, Avery did not argue to the court that the motive of any of these persons was premised on a desire to frame Steven Avery for the murder. The court cannot be expected to divine arguments which were not made to it. To the extent there is any argument that the court should find the motive requirement of the

legitimate tendency test was met by the desire of a third party to frame Steven Avery for the crime, that argument was waived.

Even if the court was required to consider Avery's proposed frame up motive theory at this time, the court would find it to be unpersuasive. As an example of a situation in which a third party's motive was to frame the defendant rather than commit the principal crime, Avery cites the court to *Beaty v. Kentucky*, 125 S.W. 3d 196 (Ky. 2003). In *Beaty*, the defendant was stopped for driving while under the influence of an intoxicant. His girlfriend, Maryann Hanks was a front seat passenger. The vehicle was owned by Pamela Kuhl, who was a friend of Hanks. During the course of the traffic stop, the arresting officer discovered that "the back seat and trunk of the vehicle contained a methamphetamine laboratory." *Id.* at 201. There was evidence that Kuhl frequently loaned her car to Hanks so that she could drive her daughter to school. Beaty sought to introduce evidence that Kuhl believed Hanks was having an affair with Kuhl's boyfriend, a man named Husky, and that Kuhl planted the methamphetamine-related products in the vehicle for the purpose of framing Hanks on a drug charge. Beaty's argument was that "though the trap was set for Hanks, it ensnared Appellant instead." *Id.* at 204.

As the court understands the defendant's argument in *Beaty,* he did not contend that Kuhl kept a methamphetamine lab in her vehicle because she was motivated to manufacture methamphetamine, but that "Kuhl contrived to loan Hanks the mobile methamphetamine laboratory in order to incriminate Hanks and eliminate her as a rival for Husky's affections." *Id.* at 204. To analogize *Beaty* to

this case, it would mean Avery is contending that a third person killed Teresa Halbach not based on any motive to kill her, but for the sole purpose of framing Steven Avery. That is, Teresa Halbach's death was nothing more than collateral damage from the killer's true motivation, which was to frame Steven Avery for the purpose of making sure he was reincarcerated. Given Avery's inability to articulate (1) any significant motive on the part of anyone to frame him, or (2) any corroborating evidence to support his frame up theory, it is difficult to see how his frame up argument could possibly meet the legitimate tendency test. The court in *Beaty* did find that the defendant met Kentucky's own version of a legitimate tendency test by his offer of proof. That is, the court found that Kuhl had a motive to frame Beaty's girlfriend because of her belief Hanks was sleeping with Kuhl's boyfriend and that she had an opportunity to place the drugs in her own vehicle. In *Beaty*, the defendant submitted writings from Kuhl in which she expressed her jealousy of Hanks for sleeping with her boyfriend. In the court's words:

> the avowal testimony and document support this theory by substantiating Kuhl's jealousy of Hanks and her worry that Hanks would "break up" Kuhl's relationship with Husky. The document also illustrated Kuhl's affection for scheming, evidenced by her admissions on the cardboard document that "We were trying to '*set him up*' and 'we planned it.'"

Id. at 209.

In this case, the only frame up motive Avery attributes to Scott Tadych is that if Tadych or one of the Dassey boys had killed Teresa Halbach, "Tadych would have had a motive to frame someone else for the crime, and Steven Avery would have been a convenient choice for a frame up." Defendant's Postconviction Motion at p.

49. With respect to Charles and Earl Avery, the defendant speculates that each of them may have worried that Steven would become a part of the family salvage business, cutting their share of the business from a half to a third. He also suggests that perhaps Charles was jealous over Steven's girlfriend, Jodi Stachowski, or the prospect of Steven receiving a large monetary settlement arising out of his prior wrongful conviction. The defendant suggests Charles may even have believed that he might receive some of the proceeds if Steven were sent back to prison. Bobby Dassey's alleged motive is based on Avery's assertion that "there is some evidence that Bobby did not like Steven Avery" and that "Steven would lie in order to 'stab ya in the back.'" *Id.* at p. 57. Avery offers no meaningful evidence by way of an offer of proof to support any of these speculative motives to frame him, nor does he attempt an explanation as to how such nebulous motives might be sufficient to induce any of the four alternative suspects to commit the murder of an innocent stranger for the purpose not of committing murder, but of framing Steven Avery. The probative value of the offered frame up evidence is so extremely minimal that its primary effect would be simply to confuse the jury. *Cf. State v. Richardson*, 210 Wis. 2d 694, 709 (1997).

The court concludes that any argument asserting a third party was motivated to frame Steven Avery rather than murder Teresa Halbach was waived long ago. Further, to the extent the court is required to consider any offer of proof included in the defendant's postconviction motion as evidence of a motive to frame Steven Avery for the crime of homicide, as opposed to a motive to commit the homicide

itself, the offer is so lacking in probative value that it warrants no serious consideration. The court will evaluate Avery's argument that he met the legitimate tendency test by considering his offer of proof with respect to motive only as it involves a motive to murder Teresa Halbach.

Scott Tadych. As is the case with Charles Avery, Earl Avery and Bobby Dassey, Avery now offers the court a more detailed offer of proof than he presented at the time this issue was addressed before trial. The court questions whether after a six-week-long trial and the passage of nearly three years it is required to review its decision based on proffered facts that were not submitted when the issue was addressed. Nevertheless, the court will proceed to do so here.

Avery begins at paragraphs 104 through 109 of his Postconviction Motion by making allegations, presumably based on discovery materials, suggesting that Scott Tadych is a person with a short temper who has engaged in episodes of domestic violence in the past with persons who have a relationship to him. These persons include Constance Welnetz, presumably a prior girlfriend, and Patricia Tadych, his mother. There is no suggestion that Scott Tadych had any prior acquaintance with Teresa Halbach or any direct motive to do physical harm to her. Avery describes three instances of domestic violence involving Constance Welnetz from 1994, 1997 and 2002 respectively, and one petition for a temporary restraining order which she filed against Tadych in 2001. Tadych is also alleged to have been charged with a trespass for entering the home of his mother, Patricia Tadych, and arguing with her in 1998 when he became upset that she took some of his fishing equipment.

Since all of these proffered facts constitute "other acts" which do not directly relate to a motive to kill Teresa Halbach, before the court could consider whether they meet the motive requirement of the *Denny* legitimate tendency test, their admissibility would have to be determined under a *Sullivan* analysis. As a rule, evidence of prior bad acts is not admissible to prove the character of a person or to show that he acted in conformity therewith. §904.04(2). However, such evidence can be offered for some limited purposes, including proof of motive, if the requirements set by the Wisconsin Supreme Court in *State v. Sullivan*, 216 Wis.2d 768 (1998) are met. The required analysis was recently summarized in *State v. Kimberly B.,* 283 Wis. 2d 731, 752 (Ct. App. 2005) as follows:

> The analysis of other acts evidence culminated in our supreme court's delineation of a three-step analytical framework for attorneys and courts to follow in determining whether other acts evidence is admissible. *Sullivan*, 216 Wis. 2d at 772.
>
> (1) Is the other acts evidence offered for an acceptable purpose under WIS. STAT. § (RULE) 904.04(2), such as establishing motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident?
>
> (2) Is the other acts evidence relevant, considering the two facets of relevance set forth in WIS. STAT. § (RULE) 904.01? The first consideration in assessing relevance is whether the other acts evidence relates to a fact or proposition that is of consequence to the determination of the action. The second consideration in assessing relevance is whether the evidence has probative value, that is, whether the other acts evidence has a tendency to make the consequential fact or proposition more probable or less probable than it would be without the evidence.
>
> (3) Is the probative value of the other acts evidence substantially outweighed by the danger of unfair prejudice, confusion of the issues or misleading the jury, or by considerations of undue delay, waste of time or needless presentation of cumulative evidence?

Sullivan describes the manner in which the parties are to present the arguments and how the trial court is to apply the three-step test:

> ¶16. The proponent and the opponent of the other acts evidence must clearly articulate their reasoning for seeking admission or exclusion of the evidence and must apply the facts of the case to the analytical framework. The circuit court must similarly articulate its reasoning for admitting or excluding the evidence, applying the facts of the case to the analytical framework. This careful analysis is missing in the record in this case and has been missing in other cases reaching this court. Without careful statements by the proponent and the opponent of the evidence and by the circuit court regarding the rationale for admitting or excluding other acts evidence, the likelihood of error at trial is substantially increased and appellate review becomes more difficult. The proponent of the evidence, in this case the State, bears the burden of persuading the circuit court that the three-step inquiry is satisfied.

Sullivan, *supra*, at 774.

It is true that the standards of relevancy are relaxed somewhat when it is the defendant rather than the state seeking to introduce other acts evidence. *Scheidell, supra*, 227 Wis. 2d at 304. However, Avery does not articulate how the other acts evidence involving Scott Tadych would meet the requirements of the *Sullivan* test. Without the articulation required in *Sullivan* having been offered by the defendant, the court's analysis here is necessarily somewhat speculative. What can be said is that the obvious differences between the instances of domestic violence described by Avery involving close acquaintances of Scott Tadych are so different from the brutal murder of a stranger as to strongly suggest the other acts evidence would fail the test. First, while the prior acts may be marginally relevant as evidencing a motive to commit violence toward women, acts of domestic violence are (unfortunately) not uncommon and do not typically suggest a motive to commit acts of violence to a stranger.

Even if the other acts were found relevant under a lenient standard, the evidence would be of very minimal probative value, the weight of which would be

significantly outweighed by a confusion of the issues and unfair prejudice to the state. Instead of focusing on crime of homicide itself, the jury would be bogged down in evidence about the level of Scott Tadych's culpability in the alleged instances of domestic violence with Constance Welnetz, whether or not she had grounds for the injunction she sought, Scott Tadych's relationship with his mother, etc. In a case that already took six weeks to complete, these diversions into marginally relevant evidence would have taken a toll on the jury. Moreover, the defendant is not the only party that can suffer prejudice when evidence of low probative value is introduced:

> This includes prejudice to the state when evidence is offered by the defendant. The state has a significant interest in preserving orderly trials, in preventing undue diversion of the trial by injecting a collateral issue, and in avoiding unsupported jury speculation regarding the guilt of other suspects.

Scheidell, supra, at 303. All of these interests would have been implicated in this case had the court allowed the other acts evidence offered by the defendant against Scott Tadych in the absence of any direct evidence connecting him to the crime.

Avery's failure to articulate the basis for his request to admit other acts evidence involving Scott Tadych, the apparent minimal probative value of the proffered evidence, and its significant potential for confusing the jury and causing undue delay or prejudice to the state all strongly militate against allowing the evidence to support a claim of motive. Without evidence of motive, Avery cannot meet the requirements of the legitimate tendency test with respect to Scott Tadych.

Avery's attempt to show Tadych had an opportunity to commit the crime and a direct connection to the crime is also quite speculative. He questions the state's foundational evidence that Tadych was not on the Avery property at the time of the murder, but does not suggest how he might contradict that account with any evidence of his own. Even without questioning the credibility of the facts alleged by Avery (but questioning the admissibility of the other acts evidence), the offer falls short of what is necessary to meet the legitimate tendency test. Avery offers no evidence to show motive on the part of Scott Tadych to murder Teresa Halbach and offers no direct evidence of his own to suggest Tadych was on the Avery Salvage Yard property at the time of the murder.

Charles Avery. As he did with Scott Tadych, the defendant begins his offer of proof suggesting Charles Avery might have murdered Teresa Halbach with a series of other alleged bad acts. They include reports demonstrating that Charles was at least charged with episodes of domestic violence against his wife Donna and overaggressively attempted to date females who were customers of the Avery salvage business. As is the case with the reported prior domestic violence incidents alleged against Scott Tadych, these allegations do not relate to any direct motive to harm Teresa Halbach and could only be admitted as other acts evidence of motive. Avery fails to articulate how this proffered other acts evidence would satisfy the *Sullivan* test for admissibility and the court does not perceive how the *Sullivan* requirements could be met. The acts alleged, even if they were determined to be marginally relevant, have virtually no probative value, but definitely could confuse

the jury and unduly extend the trial. Avery does not articulate a contrary argument in his motion or his brief.

The court does acknowledge that Charles Avery probably had opportunity and a direct connection to the crime, as those terms are defined in *Denny*. However, without a showing of evidence supporting motive to commit the crime, the evidence offered against Charles Avery fails the legitimate tendency test.

Earl Avery. The only evidence offered by Steven Avery that Earl Avery may have had a motive to murder Teresa Halbach is the fact that he was charged with sexually assaulting his two daughters in 1995. Again, the defendant does not articulate how this evidence would have met the admissibility requirements of the *Sullivan* test and the court believes any attempt to do so would have fallen far short. The facts proffered by the defendant probably do show that Earl Avery would have had opportunity and a direct connection to the crime, satisfying those two prongs of the legitimate tendency test. Without any admissible evidence of motive, however, the defendant's attempt to meet the *Denny* requirements fails.

Bobby Dassey. The only evidence offered by the defendant to show motive on the part of Bobby Dassey consisted of evidence allegedly supporting a motive to frame Steven Avery. No evidence is offered to suggest Bobby Dassey had a motive to murder Teresa Halbach. Avery suggests that if Brendan Dassey, Bobby's brother, or Scott Tadych were involved in the crimes, Bobby would have had a motive to help them frame Steven Avery for the crimes, presumably based on his relationship with his brother and Scott Tadych. The defendant also offers that Bobby did not like

Steven Avery and stated that Steven "would lie in order to 'stab ya in the back.'" Defendant's postconviction motion at p. 57. The speculation that if Brendan Dassey or Scott Tadych had committed the crimes, Bobby Dassey would have had a motive to frame Steven Avery, unsupported by any evidence whatsoever, is too speculative to meet the motive requirement. Likewise, even if Bobby Dassey thought his Uncle Steven was a liar, that is not enough to constitute motive to commit murder. The connection is simply too tenuous. Avery's proffered evidence is not sufficient to show that Bobby Dassey had motive to murder Teresa Halbach.

The evidence offered against Bobby Dassey probably did meet the opportunity and direct connection to the crime requirements of the legitimate tendency test because of his presence on the property at the time Teresa Halbach was there. However, without any showing of motive, third party evidence against Bobby Dassey is precluded under *Denny*.

In conclusion, the court stands by its original determination that the defendant was not entitled to introduce *Denny* evidence against any third party because he acknowledged at the time that he could not demonstrate any party had a motive to kill Teresa Halbach. The additional arguments and offers of proof Avery now raises in his postconviction motion were waived by not being presented to the court in a timely manner. Even if those arguments and offers of proof have not been waived, they are still not sufficient to justify the admission of direct third-party liability evidence under *Denny* against Scott Tadych, Charles Avery, Earl Avery or Bobby Dassey.

G. If Denny does not apply, what rules determine the admissibility of Avery's proffered third-party evidence?

For reasons already stated the court concludes that, despite Avery's claimed inability to demonstrate a motive on the part of anyone else to murder Teresa Halbach, his offer of third-party liability evidence is subject to the legitimate tendency test established by the court in *Denny*. Like the defendant in *Denny*, Avery sought to introduce evidence that other identifiable individuals had an opportunity and direct connection to the crime making them viable suspects.

The court does acknowledge that this case is not on all fours with *Denny*. The defendant in *Denny* wanted to introduce evidence demonstrating that others had a motive to kill the victim. In this case, Avery's primary argument is that he is not in a position to demonstrate a specific motive for the crime, and should not be required to do so.

There are other Wisconsin decisions that have declined to apply *Denny* where the defendant sought to introduce third party liability evidence. The court views those cases as farther removed on their facts from this case than *Denny*. In *Richardson, supra*, for example, the court declined to apply *Denny* where the defendant contended that third parties intended to frame him for a sexual assault which the defendant contended was committed by no one. Here, it's undisputed that a homicide did occur. In *Scheidell, supra*, the court declined to apply *Denny* where the defendant offered evidence of an identical modus operandi on the part of an

unknown third person who committed a similar crime to the one charged against the defendant. The court's rationale for not applying *Denny* was that its requirements would place too great a burden on the defendant, who had no way of knowing the identity of the alleged third party perpetrator. That concern is not present here. The facts in this case are far closer to those in *Denny* than the facts in *Richardson* or *Scheidell*. Avery's acknowledged inability to provide a viable motive alone does not appear to be enough to relieve him from the requirements of *Denny*.

As the court acknowledged in its original Decision and Order on Admissibility of Third Party Liability Evidence, it is possible that an appeals court could conclude the *Denny* legitimate tendency test should not be applied in cases where the defendant does not assert any third party had motive to commit the crime. It is true that no reported Wisconsin decision has addressed the precise argument raised by Avery. The court wishes to make clear, however, that even had it concluded *Denny* did not apply, it would not have found the proffered third-party liability evidence admissible. The court does agree with Avery that if *Denny* is inapplicable, his offer of proof would likely be analyzed for admissibility under the relevancy standards of Wis. Stats. Ch. 904.[9] The court now reviews Avery's offer of third party liability evidence under those standards.

[9] The court agrees with Avery that if *Denny* does not control the admissibility of the offered third-party liability evidence in this case, it is not likely that the admissibility would be determined by some modification to the legitimate tendency test, as suggested by this court in dicta in its Decision and Order on Admissibility of Third-Party Liability Evidence. In those reported cases where *Denny* was found not to be applicable, the court simply applied the rules of evidence to determine the admissibility of the offered evidence. *See, e.g. Richardson* and *Scheidell, supra.*

The third-party liability evidence offered by Avery, both in his original Statement on Third-Party Responsibility and as supplemented by his postconviction motion, falls into two categories. First, Avery proffered a number of instances of other acts evidence against named third parties, which he acknowledges in his motion would have been offered to demonstrate motive. If not offered to show motive, Avery makes no argument that this evidence would be admissible under any other exception to the general character evidence prohibition in §904.04. A party seeking the admission of other acts evidence is required to articulate his reason for seeking the admission and to apply the appropriate analytical framework to the facts of the case. *State v. Sullivan*, 216 Wis. 2d 768, 774 (1998). As the court concluded in the preceding section of this decision, Avery has not provided sufficient articulation to justify the admission of his proffered third party other acts evidence.

The remaining proffered evidence consists largely of evidence relating to the activities of the alleged third party perpetrators on the day of the crime. To be admissible, this evidence must be relevant under §904.02 and sufficiently probative under §904.03. While Avery goes to great lengths to argue that his offer of third party liability evidence should not be subject to the legitimate tendency test, he does not articulate in his postconviction motion or brief how all of the third-party liability evidence he offers would have been admissible under these statutes.

As a general rule, all relevant evidence is admissible. Wis. Stat. §904.02. §904.01 defines "relevant evidence" as "evidence having a 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." Wisconsin has a broad definition of relevance. *Richardson, supra,* at 707. To the extent the offered third party liability evidence demonstrates opportunity to have committed the crime on the part of Scott Tadych, Charles Avery, Earl Avery and Bobby Dassey to have murdered Teresa Halbach, the evidence would be relevant.

§904.03 provides that "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by consideration of undue delay, waste of time, or needless presentation of cumulative evidence." In this case, without any direct or indirect evidence of motive to support it, the evidence offered by Avery involving the four named individuals has very little probative value. In the case of many crimes, the court imagines there are large numbers of innocent individuals in the geographic proximity of the scene of the crime who could have had an opportunity to commit it. Obviously, evidence of such opportunity alone would not be admissible under §904.03. Here, Avery offers no physical or other evidence connecting any of the individuals to the crime, other than their presence in the general vicinity. One can only imagine how much longer this six-week trial would have lasted had the court granted the defendant's request to introduce third-party liability evidence implicating the ten individuals named in the Defendant's Statement on Third-Party Responsibility, as well as "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."

Defendant's Statement on Third-Party Responsibility, p. 9. Even if the evidence was limited to the four individuals now identified in Avery's postconviction motion, the defendant would have asked the court to admit evidence about Scott Tadych's mood at work the day Steven Avery was arrested, his offer to sell a .22 rifle that is not otherwise tied to the evidence in this case, Charles Avery's alleged pining for Steven Avery's girlfriend, Jodi Stachowski, details about the ownership and business operations of the Avery Salvage Yard, Charles Avery's alleged hope that he might obtain proceeds from Steven Avery's lawsuit if Steven Avery went to prison again, Earl Avery's behavior when he was interviewed by the Calumet County Sheriff's Department, Bobby Dassey's shower habits, etc. To be sure, if there was some additional evidence, whether it be motive, physical evidence or some other probative evidence directly connecting any of the third parties to Teresa Halbach, some of these collateral facts might have measurable probative value. But here, Avery offers no such admissible evidence. Even if the *Denny* legitimate tendency test is determined to be inapplicable to Avery's offer of third party liability evidence, the lack of any meaningful evidence either suggesting a motive on the part of Scott Tadych, Charles Avery, Earl Avery or Bobby Dassey to harm Teresa Halbach, or physically connecting any of them to the crime renders all the other proffered evidence no more than marginally relevant, of extremely limited probative value, and likely to confuse the jury and waste the jury's time. In sum, the third party liability evidence offered by Steven Avery would not be admissible whether or not it was required to meet the *Denny* legitimate tendency test.

ORDER

For the foregoing reasons, the defendant's Motion for Postconviction Relief is denied.

Dated this 25th day of January, 2010.

BY THE COURT:

_____
Patrick L. Willis,
Circuit Court Judge