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May 18, 2021

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You are hereby notified that the Court has entered the following opinion and order:

2020AP16-CR

State of Wisconsin v. Scott G. Starfield (L. C. No. 2016CF59)

Before Stark, P.J., Hruz and Seidl, JJ.

Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

Scott Starfield appeals a judgment, entered following a jury trial, convicting him of possession of both methamphetamine and tetrahydrocannabinols (THC). *See* WIS. STAT. §§ 961.41(3g)(g) and (e) (2015-16). He argues that the circuit court erred when it refused to admit *Denny*, or “third-party perpetrator,” evidence. *See State v. Denny*, 120 Wis. 2d 614, 623, 357 N.W.2d 12 (Ct. App. 1984). Based upon our review of the briefs and record, we conclude at

conference that this case is appropriate for summary disposition, and we affirm. *See* WIS. STAT. RULE 809.21 (2019-20).

The criminal complaint incorporated police reports prepared by officers Jesse Neely and Kristopher Stewart. Those reports alleged that on April 6, 2016, the officers went to 258 South Young Street in the city of Prescott on a report of “an unwanted subject at that address.” The Prescott police had recently searched that address pursuant to a warrant. The officers knew that the property’s renters, Todd Bellamy and Steven Hirman, were to have vacated the premises the previous day per the instructions of the property’s owner.

Neely’s report explained that upon arrival, he and Stewart encountered three individuals, including Starfield, who said they were present in the building because they were “helping Todd Bellamy move.” Bellamy was not present at the time.

Stewart began by interviewing Starfield and the other two individuals who were present. Stewart noted in his report that he asked Starfield to sit down, and he picked the particular location where Starfield sat “because it was free of any objects.” As Stewart was interviewing Starfield, Stewart “observed a Camel Snus tin now located on the ground approximately 6 inches behind Mr. Starfield’s left rear pocket.” Starfield denied that the tin belonged to him. When Stewart opened the tin, he found a substance he recognized as methamphetamine and then arrested Starfield.

Prior to his trial, Starfield brought a motion seeking to admit third-party perpetrator evidence. He argued that the snus tin containing methamphetamine belonged to Bellamy or Hirman and that it was present at the scene before he sat down. The State opposed Starfield’s motion.

Starfield made various allegations in support of his position, including that “during 2016, at least as late as the end of February, 258 South Young Street was being leased by Mr. Steven Hirman and Mr. Todd Bellamy.” Starfield further alleged that during the execution of a search warrant at that address on February 25, 2016, “law enforcement found quantities of substances believed to be THC and methamphetamine, as well as methamphetamine-related drug paraphernalia throughout the interior of the building.” In addition, Starfield referenced police observations of Hirman’s activity at the address on February 28, 2016, and Hirman’s statement that Bellamy sold drugs from the building. Starfield relayed that Bellamy was arrested at 258 South Young Street on the same day as Starfield’s arrest, and that Bellamy had been at the property “approximately 30 minutes prior to the arrival of law enforcement, and he returned to the scene when [officer] Neely was present.”

During an evidentiary hearing, Neely and Stewart testified regarding the circumstances surrounding Starfield’s arrest. Stewart explained that he began by instructing the three individuals to move to different areas of the building so that they could not communicate with each other. Regarding the area where Starfield was instructed to sit down, Stewart testified: “So it was a barren wall. I asked him to sit down on the floor.” Stewart said that when he returned to the area where Starfield was sitting, after talking to the other two individuals located at the scene, “that’s when I observed a snus can on the floor between his buttocks area and the wall where I’d instructed him to sit down.” According to Stewart, the tin “was almost underneath Mr. Starfield’s butt.” When asked whether he could have missed the snus tin earlier, Stewart responded: “That’s not possible. There was nothing there when I asked him to sit down.”

The circuit court denied the motion and detailed its findings, which relied heavily on Stewart’s testimony:

Here are the facts on that particular point that I think are extremely germane. Stewart is trying to figure out what is going on. He wants to know why they are there, what they are doing. They are not authorized to be there. He separates the three apart from each other so they can't talk. Good police work. Starts talking to Mr. Starfield and Starfield—he sits him down on the floor I believe.

At one point before he does that, in fact my notes suggest, the Defendant sat down. This is Stewart's testimony at the hearing. The snus can was on the floor next to him and it hadn't been there right before he sat down. That snus can had a gem bag in it. The Defendant immediately said, [“]hey, that's not mine.[”] I believe that Stewart arrested him and he said he was under arrest. Then [Starfield] said, [“]you can't prove it's mine,[”] immediately without any questions.

It was not there before he sat down, before Starfield sat down. After he did sit down, it was there. How else could it have gotten there had Starfield not taken it off his person and put it there?

The circuit court later reiterated: “I have not seen any evidence at all that [Hirman or Bellamy] would have been the ones to put that snus can on the floor there. Especially in light of S[t]ewart's testimony it wasn't there, and then he sits down and it is there.”

A jury subsequently found Starfield guilty of both charges. The circuit court withheld sentence on both counts and ordered Starfield to serve two concurrent terms of probation. Starfield now appeals.

The only issue before us is whether the circuit court erred when it denied Starfield's motion to admit third-party perpetrator evidence related to the charge against Starfield for possession of methamphetamine.¹ *See Denny*, 120 Wis. 2d at 623. Starfield also argues that when the court denied his motion, it deprived him of his ability to fully present a defense and, in

¹ Starfield does not challenge his conviction for possession of THC on appeal.

doing so, deprived him of his rights under the Sixth and Fourteenth Amendments to the United States Constitution and article I, section 7 of the Wisconsin Constitution. Additionally, Starfield argues that the court’s ruling “violated his more general common law rights found in broader caselaw standing for the proposition of a defendant being entitled to [a] fair trial and [to] present witnesses[.]”

When seeking to admit evidence that a third party may have committed the crime that Starfield was charged with committing, he was required to make a preliminary evidentiary showing to satisfy all three prongs of *Denny*’s “legitimate tendency” test. *See State v. Wilson*, 2015 WI 48, ¶56, 362 Wis. 2d 193, 864 N.W.2d 52. First, the “motive” prong asks: “[D]id the alleged third-party perpetrator have a plausible reason to commit the crime?” *Id.*, ¶57. Second, the “opportunity” prong asks: “[D]oes the evidence create a practical possibility that the third party committed the crime?” *Id.*, ¶58. Third, the “direct connection” prong asks: “[I]s there evidence that the alleged third-party perpetrator actually committed the crime, directly or indirectly? … Logically, direct connection evidence should firm up the defendant’s theory of the crime and take it beyond mere speculation.” *Id.*, ¶59. While strong evidence implicating the third party on one prong may lessen the need for evidence on the other two prongs, “[n]onetheless, the *Denny* test is a three-prong test; it never becomes a one- or two-prong test.” *Id.*, ¶64.

We “review[] a circuit court’s decision to admit or refuse to admit evidence for an erroneous exercise of discretion.” *See Wilson*, 362 Wis. 2d 193, ¶47. However, when the court’s “denial of admission of the proffered evidence implicates a defendant’s constitutional right to present a defense, … the decision not to admit the evidence is a question of constitutional fact that this court reviews de novo.” *See id.*

Even if we were to assume, without deciding, that the motive prong is satisfied, Starfield has not shown opportunity or a direct connection. Starfield offered only speculation that Bellamy or Hirman left the methamphetamine at the property at some unidentified time before his arrest. His argument hinged on Bellamy's and Hirman's connection to the property near the date when he was arrested and his contention that they were "known to have drugs there." Beyond these statements, Starfield does not adequately explain how the alleged facts fit within the *Denny* analysis.

Furthermore, it is clear from the circuit court's oral ruling that it found Stewart's testimony credible. This court will "uphold the [circuit] court's factual findings unless they are clearly erroneous," and while Starfield is dissatisfied with the court's legal conclusion, he does not argue that the court's findings were clearly erroneous. *See State v. Ionescu*, 2019 WI App 68, ¶8, 389 Wis. 2d 586, 937 N.W.2d 90.

Stewart testified that it was "not possible" that the tin was on the floor before Starfield sat down. After Starfield sat down, however, Stewart testified that the tin was "between his buttocks area and the wall where I'd instructed him to sit down." On these facts, there was no "practical possibility" that either Hirman or Bellamy committed the crime, nor was there a "direct connection" so as to take Starfield's theory beyond mere speculation. *See Wilson*, 362 Wis. 2d 193, ¶¶58-59.

"[E]vidence that simply affords a possible ground of suspicion against another person should not be admissible." *Denny*, 120 Wis. 2d at 623. Stated another way, "*Denny*'s 'legitimate tendency' test requires more than mere possibility." *Wilson*, 362 Wis. 2d 193, ¶83. Here, Starfield's theory that Bellamy or Hirman left the methamphetamine at the property at

some unidentified time prior to his arrest and that the tin “was thought to be pushed up against the wall in a shadow by where [he] was sitting” amounts to nothing more than mere possibility. Starfield’s offer of proof was deficient. *See State v. Vollbrecht*, 2012 WI App 90, ¶26, 344 Wis. 2d 69, 820 N.W.2d 443 (noting that “*Denny* requires that all three [i.e., motive, opportunity, and direct connection] be shown before evidence of a third-party perpetrator is admitted at trial”).

Because the circuit court did not err when it denied Starfield’s motion to admit evidence under *Denny*, we affirm. To the extent that Starfield claims he was denied his constitutional right to present a defense, this argument fails.² Starfield was able to present the defense that it must have been someone other than him who placed the tin at the property; the circuit court’s ruling only foreclosed him from specifically identifying Hirman and Bellamy.³

² Starfield offers little more than generalized, conclusory assertions in this regard, which are no substitute for an analysis germane to the issues and the facts of this case. *See Associates Fin. Servs. Co. v. Brown*, 2002 WI App 300, ¶14 n.3, 258 Wis. 2d 915, 656 N.W.2d 56 (declining to address undeveloped arguments). For the sake of completeness, however, we mention this issue briefly.

³ After the circuit court explained its rationale for denying Starfield’s motion, the following exchange occurred:

[DEFENSE COUNSEL]: So, Judge, directly pointing the finger at these two individuals is not permitted through the [c]ourt’s ruling. That doesn’t mean Mr. Starfield can’t argue this was there beforehand. I don’t know who put it there.

THE COURT: Right. That’s what I expect you to argue. He [is] saying it is not his. It has to be somebody else’s.

[DEFENSE COUNSEL]: I guess that’s what I’m kind of getting at. I’m understanding the [c]ourt to say, [counsel], don’t point the finger at these two specific individuals. It’s okay if I say, look, it was there beforehand.

THE COURT: That’s a defense I think that Stewart missed it. He didn’t see it. That’s the way I understood the defense. He says he did look. That’s your defense. I’m not going to prohibit you from presenting that.

Therefore,

IT IS ORDERED that the judgment is summarily affirmed. *See* WIS. STAT. RULE 809.21 (2019-20).

IT IS FURTHER ORDERED that this summary disposition order will not be published.

Sheila T. Reiff
Clerk of Court of Appeals