

**State of Wisconsin
Court of Appeals
District 2
Appeal No. 2009AP003167 - CR**

State of Wisconsin,

Plaintiff-Respondent,

v.

Kevin Moore,

Defendant-Appellant.

Appeal from a judgment of conviction for first degree intentional
homicide entered in the Fond du Lac County Circuit Court, the
Honorable Richard Nuss, presiding

Defendant-Appellant's Brief

Law Offices of Jeffrey W. Jensen
735 W. Wisconsin Ave., Twelfth Floor
Milwaukee, WI 53233
(414) 671-9484

Attorneys for Defendant-Appellant
By: Jeffrey W. Jensen
State Bar No. 01012529

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Statement on Oral Argument and Publication

One issue presented by this appeal may be an issue of first impression; that is, whether in a "Denny" (third party culpability) analysis, a strong showing on connection to the crime, may offset a weaker showing on the motive prong. Thus, both oral argument and publication are recommended.

Statement of the Issues

I. Whether the trial court abused its discretion in admitting other acts evidence, as proof of motive, that Moore frequented a "gentleman's club", that he spent large sums of money at the club, and that he had a relationship with one of the dancers at the club.

Answered by the trial court: No.

II. Whether the trial court abused its discretion in admitting hearsay testimony that while at dinner with a professional colleague, who stated that if anything ever happened to her (the colleague), the police should look at her husband (the colleague's husband), the deceased, Dawn Moore, agreed that if anything ever happened to her (Dawn Moore), they should also look at her husband (the appellant, Kevin Moore).

Answered by the trial court: No.

III. Whether the trial court abused its discretion in excluding from evidence the fact that a third party, Dennis Valstad, who was admittedly near the scene of the murder at about the the

time it occurred, refused to be interviewed by Moore's investigator and, consequently, the court precluded Moore from arguing that Valstad may have been the perpetrator.

Answered by the trial court: No.

IV. Whether the evidence was sufficient, as a matter of law, to support the jury's verdict finding the appellant guilty of first degree intentional homicide.

Answered by the trial court: Yes.

Summary of the Arguments

I. The trial court abused its discretion in admitting evidence of Moore's activities at *The Mansion on Main*. There was evidence that, in the months before Dawn Moore's death, Kevin Moore frequented a "gentleman's club" called *The Mansion on Main*. While there, Moore engaged in various forms of mild debauchery, including drinking cocktails, fraternizing with the dancers, receiving "lap dances", and he recklessly spent money. The State argued that this evidence established that Moore had a motive to kill his wife. Over Moore's objection, the trial court admitted the evidence.

The trial court abused its discretion in admitting the evidence because, firstly, the trial court failed to conduct the so-called *Sullivan* analysis; and, additionally, there are no facts in the record to support the trial court's ruling had the *Sullivan* analysis been done. Although the evidence was offered for a permissible purpose under Sec. 904.04, Stats., to prove motive, the evidence was not relevant-- that is, the evidence did not establish that Moore had a motive to kill his wife. Rather, the evidence merely established that Kevin Moore was a cad.

Moore's activities at *The Mansion* might have given Dawn Moore a reason to want to kill her husband; but it certainly does not suggest that Kevin Moore had a motive to kill his wife. Additionally, the unfair prejudice of admitting the evidence is monumental. The evidence painted a picture of Kevin Moore as a spendthrift, and a person of low moral character with a proclivity toward mild debauchery. Thus, the evidence unfairly invited the jury to find Moore guilty-- not because the evidence proved him guilty-- but because he was just the sort of scoundrel who might kill his wife.

II. The trial court abused its discretion in admitting the hearsay statements of Dawn Moore to the effect that, if anything ever happened to her, the police should look at Kevin Moore. Over Moore's hearsay objection, the trial court permitted Melanie McManus, who was Dawn Moore's manager at work, to testify about a conversation that McManus had with Dawn Moore in Louisville, Kentucky, at a professional dinner. At this dinner, McManus mentioned that her husband had threatened her, that a divorce was pending, and that she had an order of protection against her husband. McManus concluded by expressing her hope that if anything ever happened to her, the police would look at her husband. Dawn Moore responded by saying, "I can relate to that." Dawn pointed out that if anything ever happened to her she hoped that they would look at Kevin Moore.

The trial court abused its discretion in admitting this evidence because, for one thing, the trial court used the wrong analysis. Moore did not object on confrontation grounds, he objected on hearsay grounds. Nonetheless, the trial court spent time

analyzing whether Dawn Moore's statements were testimonial or not (which is only done in a confrontation analysis). The court barely discussed whether the statements properly fell under the "residual" exception to the hearsay rule.

As will be set forth in more detail below, Dawn Moore's statements plainly do not have circumstantial guarantees of trustworthiness. Her statement was not spontaneous; rather, it was made in response to, and was intended to affirm the emotions of, Melanie McManus. Moreover, Dawn Moore's statement was made to a group of remote acquaintances, hundreds of miles from her home, under circumstances where no one was in a position to evaluate the truthfulness of the statement.

Thus, the statement should not have been admitted.

III. The trial court abused its discretion in excluding evidence that Dennis Valstad refused to be interviewed by Moore's investigator, and in precluding Moore from arguing that Valstad could be the killer. Moore filed a motion for a preliminary ruling on the admissibility of evidence that Dennis Valstad, who was near the scene of the crime at about the time it occurred, refused to be interviewed by Moore's investigator. Additionally, Moore sought to argue that the murder could have been committed by Valstad. The trial court ruled that Moore's proffer did not meet the legitimate tendency standard, and ordered that no evidence be presented that Valstad refused to be interviewed, and Moore was precluded from arguing that Valstad may have been the murderer. Valstad did testify at trial, though, that he walked past the Moore's home at about the

time that Dawn Moore was killed, and he did not see anything unusual.

As will be set forth in more detail below, the trial court correctly analyzed this issue under the "legitimate tendency standard" under *State v. Denny*, 120 Wis.2d 614, 622 N.W.2d 12 (Ct. App. 1984); however, the present case presents an unusual wrinkle in the analysis. Typically, so-called "Denny evidence" involves a request by the defendant to present evidence that some other person had a motive to commit the crime. Under *Denny*, before the defendant is permitted to do so, he must also present evidence that this other person was in some way connected to the crime scene. The present case, though, presents the opposite circumstance. There is no question but that Valstad was near the scene of the murder at or about the time of the crime. What is somewhat lacking here is evidence of motive on the part of Valstad. Because motive is not an element of the crime, and because many times the culprit's motive is totally incomprehensible, a strong showing that the third-party was connected to the scene ought to outweigh any deficiency in the motive.

IV. The evidence was insufficient, as a matter of law, to support the jury's verdict finding Moore guilty of first degree intentional homicide. There was no direct evidence that Kevin Moore killed his wife. The case against Moore was entirely circumstantial. On appeal, circumstantial evidence will be found to be sufficient were the jury could have drawn reasonable inferences from the circumstantial evidence that the defendant was guilty-- even when there are competing reasonable inferences that the defendant is innocent. Here,

though, the inference that Kevin Moore killed his wife cannot reasonably be drawn from the mere the fact that he was in proximity to the scene at the time of the murder. The location of the murder, the backyard of the home, was not a place where only Kevin Moore had access. Thus, any person in the area also had access to Dawn Moore. The other acts evidence presented does not establish a motive for Kevin Moore to kill his wife. Thus, this evidence, even in combination with the evidence of Moore's proximity to the scene of the crime, does not permit a reasonable inference that Kevin Moore killed his wife.

Statement of the Case

I. Procedural Background

This is a prosecution of the defendant-appellant, Kevin Moore (hereinafter "Moore" or "Kevin Moore" to distinguish him from the deceased) for first degree intentional homicide arising out of the death of his wife, Dawn Moore on November 6, 2006.

Following a preliminary hearing, Moore was bound over trial and he entered a not guilty plea. The case was tried to a jury for fourteen days beginning on January 7, 2008. The jury returned a verdict finding Moore guilty as charged. The court sentenced Moore to life in prison.

Moore timely filed a notice of intent to pursue postconviction relief, and then he filed a notice of appeal. There were no postconviction motions.

A. The Denny Motion

Prior to the start of trial, Moore filed a motion for a preliminary ruling on the admissibility of evidence, to be presented by Moore, that there were at least three people in the vicinity of the murder who could have committed it. (R:39). The motion focused on a neighbor named Dennis Valstad who, the motion alleged, "was awake at 5:30 a.m. and was in the vicinity of the death scene at about 6:30 a.m." (R:39-2). The motion goes on to allege that, by agreement of the attorneys, the police reinterviewed Valstad, and Valstad denied any involvement in the homicide; however, when Moore's investigator attempted to interview him, Valstad declined. Moore sought to present the evidence that Valstad refused to be interviewed by Moore's investigator, and to argue that this evidence suggests that Valstad may have been involved in the murder.

The trial court denied the motion, saying:

In reviewing the various reports, it seems to the Court . . . that the individual in question had minimal-- minimal contact with the decedent, and Mr. Moore. And I don't want to get into too much specific about that, but suffice to say it was very limited. Beyond that, he really did not know much about these individuals, other than the fact that he lived in the general area.

Also, when the Court reviewed the reports, it certainly seemed to me that there was a consistency in the various report as to his-- as to the events that took place in his life at the date and time in question.

So while I recognize that, and Mr. Storm acknowledges that, certainly one could argue that there was in fact the opportunity that the other two prongs of motive and direct connection to the crime do not satisfy the Denny standard. I agree with that.

And certainly if during the course of trial something would develop that would compromise that, counsel certainly is welcome to certainly make an offer of proof and the Court can certainly revisit that. But that's not before the Court today. What is before the Court today is the motion.

(R:87-20)

B. The other acts evidence

The State moved for a preliminary ruling on the admissibility of evidence that Moore was in the habit of going to a "gentleman's club" called *The Mansion on Main*, where he would receive "lap dances" from one Julie Tyson, and Moore would spend as much as \$500 in tips at the club. (R:87-26 et seq.) The State argued that this was not "other acts" evidence, rather, it was evidence as to motive. (R:87-27)¹

The trial court ruled, on a preliminary basis, that the evidence was admissible. Significantly, the court did not evaluate the

¹. The prosecutor's comment make no sense. Evidence of motive is, by definition, other acts evidence. Sec. 904.04(2)(a) provides, "Except as provided in [par. \(b\)](#), evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that the person acted in conformity therewith. This subsection does not exclude the evidence when offered for other purposes, such as **proof of motive**, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

evidence using the "other acts" analysis, rather, the court simply stated:

So what we have here today is that we have a theory by the State that indicates that there is certainly some financial issues involving this couple. Does that mean that there was such hostile discord in this family that very possibly his own life-style behavior provided the nexus or motive for what in fact happened? I don't know. And I think what's important though, is that the jury not be denied the opportunity of giving the appropriate weight and credibility to those factual statements as they would come . . . At this point . . . I would certainly find that there is a sufficient basis at this time to permit the testimony of Julie Tyson for the reasons stated by the state.

(R:87-40, 41).

The case proceeded to jury trial beginning on January 7, 2008.

C. The Melanie McManus Testimony

At trial, the State called Melanie McManus for the purpose of testifying regarding a conversation she had had with Dawn Moore (the deceased) in August, 2006, (two and a half months before Dawn Moore was found dead). An offer of proof established that McManus had a conversation with Dawn Moore while at a professional lunch in Louisville, Kentucky; and, during that conversation, McManus said that if she (McManus) were ever found dead, the police should look to her (McManus')

husband. (R:90-672) Dawn Moore responded by saying, "I know what you're saying. I feel the same way." *Ibid*

Kevin Moore objected to the McManus testimony on hearsay grounds². (R:90-667) The State argued that the testimony was admissible under the residual hearsay exception, Sec. 908.03(24), Stats ("sufficient indicia of reliability"). The trial court agreed. The court did a lengthy analysis of whether the statement was testimonial or non-testimonial (even though there was no confrontation objection). Having concluded that the statements were non-testimonial, the court then found that the statements had sufficient guarantees of trustworthiness, and admitted the McManus testimony under the residual exception to the hearsay rule. (R:90-701)

II. Factual Background

The appellant, Kevin Moore, was the husband of the deceased, Dawn Moore. Until Dawn's death, on November 6, 2006, the couple resided together in Ripon, Wisconsin.

Melanie McManus testified that in August, 2006 she went to a corporate dinner with Dawn Moore in Louisville, Kentucky. At this dinner, according to McManus, she mentioned to a group that if anything ever happened to her (meaning McManus), the police should look at McManus' husband. According to McManus, her husband was unemployed, there was a divorce pending, McManus had an order of protection against him, and he was threatening her. In response, Dawn Moore said that she felt the same way about her husband (the appellant, Kevin

2. Moore did not object on confrontation grounds; and, therefore, the issue is limited to whether the testimony was barred by the hearsay rule.

Moore), who was also unemployed. McManus testified that Dawn Moore was not joking when she said this. When McManus heard that Dawn Moore had been killed, she (McManus) called the police. (R:90-717-723)

Around this same period, Kevin Moore was a regular patron of a gentlemen's club in Ripon called *The Mansion on Main*. (R:91-1309) Moore would frequent the *Mansion* three or four times per week. *Ibid*. While there, Moore would spend three to four hundred dollars per night on drinks and tips for the girls. (R:91-1310, 1311) Julie Lemiesz, who was a dancer at the club, testified that Moore would "spend money like water".

On one occasion, Lemiesz went out with Moore, and he spent approximately one thousand dollars in one evening. (R:91-1326)

On November 6, 2006, Chase Bank sent a letter to Dawn Moore informing her that there was a tax liability in the amount of \$11,851.00, and that there was a freeze on her accounts, which meant that if any checks came in, the bank would not be able to pay the checks. The letter further informed Dawn Moore that she would not be able to use the funds in the account (R:91-1270)

At about 5:30 a.m. on November 13, 2006, several neighbors of the Moores were awoken by screams. (R:88-192, 203). Later, at about 7:30 a.m., the Ripon Fire Department received an emergency call of a woman down (R:88-210). The caller was a male, who stated that his wife was lying in the driveway, and he did not know whether she was breathing. (R:89-321) Michael Workman, a Ripon police officer, was first on the scene. Moore came out of the house to meet the officer. (R:89-325) Shortly after Workman arrived, Ripon Fire Department personnel also arrived at Moore's property. There they found Dawn Moore

apparently dead, lying near the driveway next to the garage. (R:88-211) There was a large cinder block near her shoulder, and a significant amount of blood in the area of her body. (R:88-214, 218) First responders also noticed blood on the cinder block. (R:89-260)

The medical examiner determined that the cause of death for Dawn Moore was blunt force trauma in numerous places on her head. (R:90-755) There were a number of lacerations on the scalp, and a piece of the scalp was missing. *Ibid.* The injuries were consistent with being hit on the head with a cinder block. *Id.* 767 The medical examiner also noticed bruising around her eyes. *Ibid.*

Kevin Moore told Officer Workman that "they" (meaning whoever killed Dawn Moore) were in the house because there were muddy footprints in the house. (R:89-330)

Officer Mark Preissner was the first officer inside the house. There, he talked to Moore for a few minutes. According to Preissner's assessment, Moore seemed calm. (R:89-443).

The police discovered blood drops and blood splatters in the house. DNA analysis determined that the blood was from Dawn Moore. (R:91-960) Additionally, blood stains were located on Kevin Moore's jeans. The blood on the jeans was determined to be from Dawn Moore. (R:91-967)

While at the scene (in the house), Officer Randy Butters interviewed Moore in greater detail. Moore said that he had awoken at about 2:00 a.m., and then he went downstairs to organize Halloween decorations. (R:90-553). At about 6:00 a.m., Moore went to the gas station and bought some chocolate milk. (R:90-555) When he returned, Moore parked the car in the garage, and then went back downstairs, where he worked

for a while longer. Eventually, he got hungry, and he went back upstairs. It was then that he noticed the muddy foot-prints in the house. (R:90-556) He looked around the house for his wife, but he did not find her. *Ibid.* Then he looked out the window to see whether Dawn's car was in the garage, and that was when he noticed her lying near the driveway. (R:90-557)

According to Officer Butters, Moore's clothing was clean and dry. (R:90-561). Additionally, Moore said that he had been wearing the same clothes since he had got up at 2:00 a.m. (R:90-562)

Dennis Valstad testified for the defense that at about 6:30 a.m. on the day Dawn Moore was killed, he walked home from his girlfriend's house, and he did not notice anything unusual at the Moore's house. (R:96-1923)

Moore testified in his own behalf. He admitted that he did go to the *Mansion on Main* frequently, but he denied that he spent the amount of money that was claimed by other witnesses.

He denied that he knew about the tax levy until after his wife's death. (R:98-2383) Moore also described his activities in the early morning hours of November 6th. He told the jury that he woke up very early and went into the basement to organize boxes. Later, he went to the gas station to buy chocolate milk and, when he returned, he went back downstairs. After a while he went back upstairs to charge his I-Pod and he noticed the muddy footprints. Moments later he discovered Dawn's body with the cinder block on top of her head and he called the police. (R:98-2473)

Argument

I. The trial court abused its discretion in admitting evidence that Moore frequented a gentleman's club, and spent a lot of money there.

Over Moore's objection, the State presented evidence that in the period prior to Dawn Moore's death, Kevin Moore frequented a gentleman's club called *The Mansion on Main*. There, Moore spent large sums of money, he received "lap dances", and he may have had a relationship with one of the dancers. The State made the curious argument that this was not Sec. 904.04, Stats., "other acts" evidence; rather, according to the prosecutor, the evidence went to *motive*.³ Apparently in response to the State's argument, the trial court failed to conduct the proper analysis (the so-called "Sullivan analysis"). Instead, the court simply found that the evidence was *relevant*. Had the trial court done proper analysis, it would have been apparent that the evidence is not admissible, principally because it is *not* relevant-- that is, it does not tend to establish that Kevin Moore had a reason or motive to kill his wife-- and, further, the unfair prejudice of admitting the evidence far exceeded any minimal probative value that the evidence may have had.

A. Standard of Appellate Review

In, *State v. Payano*, 2009 WI 86, P40-P41 (Wis. 2009), the Supreme Court very recently reiterated the standard of

3. which, of course, is one of the acceptable uses of other acts evidence under the statute.

appellate review for issues concerning the admission of other acts evidence. The Supreme Court wrote:

This case requires us to determine whether the circuit court erroneously exercised its discretion when it allowed the admission of other acts evidence against Payano. (internal citations omitted)

In these circumstances, we are to determine whether the circuit court "reviewed the relevant facts; applied a proper standard of law; and using a rational process, reached a reasonable conclusion." (internal citations omitted). If, for whatever reasons, the circuit court failed to delineate the factors that influenced its decision, then it erroneously exercised its discretion. (internal citations omitted). However, "[r]egardless of the extent of the trial court's reasoning, we will uphold a discretionary decision if there are facts in the record which would support the trial court's decision had it fully exercised its discretion."

B. The trial court failed to conduct the "Sullivan Analysis"; the proffered evidence is not relevant to motive; and the unfair prejudice outweighs any probative value

Sec. 904.04(2)(a), Stats., provides:

(a) Except as provided in par. (b), evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that the person acted in conformity

therewith. This subsection does not exclude the evidence when offered for other purposes, such as proof of *motive*, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

In, *State v. Sullivan*, 216 Wis. 2d 768, 772-773 (Wis. 1998), the Wisconsin Supreme Court set forth the "three step analysis" to determine whether other acts evidence is admissible under Sec. 904.04, Stats. The Supreme Court explained that, when faced with this issue, the courts must address the following:

(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? See Wis. Stat. § (Rule) 904.03.

Here, the issue is whether the trial court properly admitted the evidence to the effect that Moore frequented the *Mansion on Main*, spent large sums of money there, and he may have had a relationship with one of the dancers.

At the outset, it must be emphasized that the State's position on this matter probably misled the trial court. The prosecutor argued that the evidence was not "other acts evidence". Rather, according to the prosecutor, it was evidence of *motive*.

Of course, evidence of motive is, by definition, other acts evidence. In any event, the trial court did not conduct the proper *Sullivan* analysis. Thus, the trial court abused its discretion.

On appeal, then, the Court of Appeals must look to the record to determine whether there are facts present which would have supported the trial court's decision had the trial court's discretion been properly exercised. Here, there are no such facts.

As is implicit in the immediately preceding paragraphs, Moore must concede that the evidence was offered for a permissible purpose under Sec. 904.04, Stats.-- that is, the State argued that the evidence was offered to prove motive, which is specifically listed as a permissible purpose in the statute.

The next question, then, under the *Sullivan* analysis, is whether the evidence was relevant; that is, does the evidence

tend to establish the material proposition for which it is offered?

In this case, the evidence of Moore's activities at the *Mansion on Main* hardly makes it more or less likely that he had a motive to kill his wife.

As the Supreme Court has explained:

In the courtroom the terms relevancy and materiality are often used interchangeably, but materiality in its more precise meaning looks to the relation between the propositions for which the evidence is offered and the issues in the case. If the evidence is offered to prove a proposition which is not a matter in issue nor probative of a matter in issue, the evidence is properly said to be immaterial. . . . Relevancy in logic is the tendency of evidence to establish a proposition which it is offered to prove. Relevancy, as employed by judges and lawyers, is the tendency of the evidence to establish a material proposition."

State v. Becker, 51 Wis. 2d 659, 667 (Wis. 1971). In order for the other acts evidence in this case to be relevant, then, it must tend to establish the material proposition that Kevin Moore wanted his wife dead, and that he intentionally killed her.

In its analysis of this proposition, the trial judge himself commented, "So what we have here today is that we have a theory by the State that indicates that there is certainly some financial issues involving this couple. Does that mean that there was such hostile discord in this family that very possibly his own life-style behavior provided the nexus or motive for what in fact happened? *I don't know.*" (R:87-40)

The *Mansion* evidence certainly suggests that Dawn Moore may have had a *reason* to be upset and angry with Kevin Moore. It might even give her a motive to kill Kevin Moore. The evidence, however, does not logically work in the opposite direction. Why would the fact that Kevin Moore went to a gentleman's club, and spent money there, suggest that he wanted Dawn Moore dead? At most, the evidence suggested that Kevin Moore was indifferent toward his wife, that he did not care what she thought about his activities. Perhaps the situation would be different if, for example, there was evidence that Dawn Moore found out about Kevin's activities, was upset with him, and threatened to expose him, or to divorce him, or to retaliate against him in some other way. There simply is no such evidence in this record, though. The fact that Dawn Moore might have had a motive to kill Kevin Moore certainly does not mean that Kevin Moore, likewise, had a motive to kill his wife.

Just as important to the analysis, though, is the third prong: Whether the unfair prejudice of admitting the evidence outweighs any probative value that the evidence might have.

As explained above, the other acts evidence has little or no probative value on the issue of motive. Even the trial judge did not know whether this evidence had a tendency to establish that Kevin Moore had a reason to kill his wife. The evidence does create a motive for Dawn Moore to be angry with Kevin Moore, but the evidence certainly does not suggest a motive for Kevin Moore to kill his wife. Instead, the evidence merely demonstrates that Kevin Moore was a cad; in other words, it is evidence purely of Kevin Moore's *poor character*.

This brings us, then, to the question of unfair prejudice. The Wisconsin Supreme Court has long emphasized that an

accused has "the fundamental right to be tried only upon evidence which bears upon the specific offense charged," calling it "an ancient right firmly imbedded in our jurisprudence." *Mulkovich v. State*, 73 Wis. 2d 464, 471-472, 243 N.W.2d 198, 202 (1976). The court, in *Mulkovich*, explained:

From the time when advancing civilization began to recognize that the purpose and end of a criminal trial is as much to discharge the innocent accused as to punish the guilty, it has been held that evidence against him should be confined to the very offense charged, and that neither general bad character nor commission of other specific disconnected acts, whether criminal or merely meretricious, could be proved against him. This was predicated on the fundamental principle of justice that the bad man no more than the good ought to be convicted of a crime not committed by him."

Id., 73 Wis. 2d at 472, 243 N.W.2d at 202-203 (quoted source omitted). Thus, in *State v. Albright*, 98 Wis. 2d 663, 298 N.W.2d 196 (Ct. App. 1980), the Court of Appeals reversed a drunk-driving conviction because a testifying police officer volunteered that, after he had arrested the defendant, the officer removed from the defendant's car a chain and a knife. *Id.*, 98 Wis. 2d at 666, 675-676, 298 N.W.2d at 198-199, 203. The Court of Appeals explained:

The reference to confiscated weapons was improper. The testimony created unfair prejudice which substantially outweighed any probative value. Testimony by a state trooper that he confiscated a chain and knife from Albright's car clearly

inferred impropriety or illegality on the part of Albright. While a chain or knife does not necessarily constitute a weapon, removal by an officer infers that they were in this case. The resulting prejudice to Albright is that the jury might unjustifiably conclude on the basis of this confiscation that Albright was engaged in violent and unlawful activity and therefore it would convict him on the basis of these uncharged "crimes." We view this evidence as intending the inference we draw from it because we have been provided with no other plausible explanation for offering such obviously irrelevant evidence. We note that this information was not solicited by the prosecutor, but was volunteered by the highway patrolman.

The same is true here. The evidence of Moore's activities at *The Mansion* suggested that it was in Moore's character to engage in mild debauchery, and to be a spendthrift. In other words, Moore was something of a cad. This certainly does not mean, though, that Moore had a motive to kill his wife. The evidence, however, *did* invite the jury to find Moore guilty-- not because the evidence proved he was guilty-- but because Moore was a person of low moral character, just the sort of scoundrel who might kill his wife.

For these reasons, the trial court erred in admitting the other acts evidence.

II. The trial court abused its discretion in permitting Melanie McManus to testify to Dawn Moore's hearsay statement that if anything ever happened to her they should look at Kevin Moore.

Over Moore's hearsay objection⁴, the trial court permitted Melanie McManus to testify about a conversation she had with Dawn Moore in August, 2006, while at a professional dinner in Louisville, Kentucky. According to McManus, who was Dawn Moore's manager, she was at dinner with Dawn Moore and several others, and McManus mentioned to the group that her husband (McManus' husband) was unemployed, and he was threatening her. McManus said that there was a divorce pending, and she had an order of protection against her husband. McManus went on to say that if anything ever happened to her, the police should look at her husband. McManus testified that when she said this, Dawn Moore agreed with the sentiment. Moore mentioned that her husband (Kevin Moore) was unemployed, and that if anything ever happened to her (Dawn), they should look at Kevin.

Moore objected on hearsay grounds. The trial court then went into a detailed analysis of whether Dawn Moore's hearsay statements were testimonial or not (which is necessary only when there is a confrontation objection). This is entirely beside the point in a hearsay analysis. The court correctly concluded that the statements were not testimonial, though, and then admitted them under the "residual" exception to the hearsay rule. The court gave very little consideration to whether the statements had indicia of reliability. Rather, the judge said:

4. Moore did not object on the grounds that this was a Sixth Amendment confrontation violation, presumably because of the Supreme Court's holding in *State v. Jensen*, **2007 WI 26, P55 (Wis. 2007)**

Is there any reason why Ms. Moore would articulate the things she stated if they were in fact were not certainly presented in a manner that would be trustworthy? I certainly don't think so. I think it would be very trustworthy and should be perceived as such.

(R:90-700)

Sec. 908.03(24), Stats., provides an exception to the hearsay rule for, "A statement not specifically covered by any of the foregoing exceptions but having comparable circumstantial guarantees of trustworthiness."

Regarding this so-called "residual" hearsay exception, the Supreme Court in *State v. Anderson*, 2005 WI 54, P59 (Wis. 2005), explained:

In *Sorenson*, this court discussed the prerequisites to utilizing the residual hearsay exception: To apply the residual exception requires establishment of "circumstantial guarantees of trustworthiness" comparable to those existing for enumerated exceptions. Sec. 908.045(6), Stats. The guarantees of trustworthiness which are found in the enumerated hearsay exceptions [are as follows]:

a. Where the circumstances are such that a sincere and accurate statement would naturally be uttered, and no plan of falsification be formed;

b. Where, even though a desire to falsify might present itself, other considerations such as the danger of easy detection or the fear of punishment would probably counteract its force;

c. Where the statement was made under such conditions of

publicity that an error, if it had occurred, would probably have been detected and corrected."

In this case, Dawn Moore's alleged statements fall woefully short on all three prongs of the analysis.

Firstly, Dawn's statement was made under circumstances where she plainly had numerous reasons to exaggerate, or to even fabricate, the level of her "fear" of her husband, Kevin Moore. To begin with, Dawn's statement was not spontaneous. Rather, it was prompted by McManus making the claim that her husband had threatened her, that a divorce was pending, that she had an "order of protection" against him, and that if anything ever happened, McManus hoped that they would look at her husband first. Significantly, Dawn did not broach the topic. Rather, Dawn was merely empathizing with the emotions of a professional superior. In other words, this was affirmation talk. According to McManus, Dawn even used the phrase, "I can relate to that." (R:90-671). It is entirely natural in conversation for one to validate another's emotions by claiming to have had similar feelings- even if the empathy is somewhat insincere. This is especially true where that "other" is a professional superior. Thus, Dawn's alleged statement lacks the spontaneity that gives many other exceptions to the hearsay rule their indicia of reliability (for example, excited utterance, statement of then existing state-of-mind).

Perhaps equally significant to the first prong of the analysis, though, is the fact that there are two levels of "fact" to Dawn's assertion, each of which requires indicia of reliability. There is the literal understanding of the statement; that is, that Dawn Moore was afraid of her husband (the first level). Then, of

course, there is the inference that must be drawn from the statement; that Dawn's fear *is rationally based upon Kevin Moore's behavior* (the second level). If Dawn's fear is not rationally based on Kevin Moore's behavior, then it makes it no more or less likely that Kevin Moore killed Dawn Moore (i.e. the fear itself is not relevant, only the behavior of Kevin that caused the fear is relevant). Thus, the literal understanding of Dawn's statement is far less important than the factual inference from the statement. Perhaps Dawn Moore *was* afraid of her husband, but this fear is relevant to this case only if it were rationally based upon threatening behavior on the part of Kevin Moore (as opposed to being based upon Dawn's imagination or her speculation).

In her statement, McManus provided the details necessary for the listener to evaluate the validity of McManus' fear of her husband: the husband had threatened her, there was a divorce pending, and McManus had obtained an order of protection. In the case of Dawn Moore's affirmation of McManus' emotion, though, there are no similar details. Dawn Moore did not claim that Kevin Moore ever threatened her, there was no divorce pending, and there were no domestic abuse restraining orders.

For these reasons, Dawn Moore's statement was made under circumstances where she very likely exaggerated, or even wholly fabricated, her fear of Kevin Moore.

This, of course, brings us to the second prong, where the question is whether the statement was made under circumstances where there was a danger of easy detection, or the fear of punishment. There was, quite literally, almost no chance that Dawn Moore's statement could be detected as a lie; much less that she would be punished if the statement were

discovered to be untrue. Dawn was in Louisville, Kentucky, hundreds of miles from her home in Ripon, Wisconsin. She was talking to professional colleagues who apparently did not know Kevin Moore, and who would likely never have the opportunity to meet him.

We, as human beings, sometimes tell fictions about ourselves to remote acquaintances that we would never tell to a good friend. Why? Because a good friend has the background information to evaluate the truthfulness of the claim. A good friend may be able to discuss the claim with our friends or with our family. If a good friend discovers that he or she was lied to, one may lose that friend.

A remote acquaintance, on the other hand, has no choice but to accept a claim at face value. There is little chance that the claim will be exposed as fiction and, even if it is, nothing will come of it. Thus, Dawn Moore's hearsay statement fails miserably on the second prong, as well.

Finally, was the statement made under public circumstances where it was likely to be corrected if inaccurate? Hardly. No one at this professional dinner where the statement was made was in a position to contradict Dawn Moore's claim that she was afraid of her husband. No one even knew Kevin Moore.

For these reasons, the trial court abused its discretion in admitting the testimony of McManus concerning Dawn Moore's hearsay statement.

III. The trial court abused its discretion in excluding evidence that Dennis Valstad had refused to be interviewed by Moore's investigator, and in preventing Moore from arguing that Valstad could have been the murder.

Moore filed a motion for a preliminary ruling on the admissibility of evidence that Dennis Valstad, who was near the scene of the crime at about the time it occurred, refused to be interviewed by Moore's investigator. Additionally, Moore sought to argue that the murder could have been committed by Valstad. The trial court ruled that Moore's proffer did not meet the legitimate tendency standard, and ordered that no evidence be presented that Valstad refused to be interviewed, nor that any argument be made that Valstad may have been the murderer. Valstad did testify at trial, though, that he walked past the Moore's home at about the time that Dawn Moore was killed, and he did not see anything unusual.

As will be set forth in more detail below, the trial court correctly analyzed this issue under the "legitimate tendency standard" under *State v. Denny*, 120 Wis.2d 614, 622 357 N.W.2d 12 (Ct. App. 1984); however, this issue presents an unusual wrinkle in the analysis. Typically, so-called "Denny evidence" involves a request by the defendant to present evidence that some other person had a motive to commit the crime. Under *Denny*, before the defendant is permitted to do so, he must also present evidence that this other person was in some way connected to the crime scene. The present case, though, presents the opposite circumstance. There is no question but that Valstad was near the scene of the murder at or about the time of the crime. What is somewhat lacking here is evidence of motive

on the part of Valstad. Because motive is not an element of the crime, and because many times the culprit's motive is totally incomprehensible, a strong showing that the third-party was connected to the scene ought to outweigh any deficiency in the motive.

Although an accused's right to present evidence "in his defense is a fundamental constitutional right, that evidence must be relevant to the issues being tried." *Denny*, 120 Wis.2d 614 at 622, Moore's theory of defense was that someone other than Kevin Moore murdered Dawn Moore. One legitimate suspect was Dennis Valstad.

When confronted with a third party defense, Wisconsin courts utilize the "legitimate tendency" test to balance the defendant's right to a meaningful opportunity to present a defense with the state's interest in excluding unreliable or irrelevant evidence at trial. The Wisconsin version of the "legitimate tendency" test was announced in *Denny*, 120 Wis.2d at 624, 357 N.W.2d at 17: "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, [evidence demonstrating a legitimate tendency that the third person could have committed the crime] should be admissible."

A. Valstad's connection to the crime was not remote in time or in place.

The Valstad evidence easily meets the prong of the *Denny* test that requires there to be a connection to the crime that is not remote in time, location, or in circumstances. Here, it was undisputed that Valstad was near the Moore home at about

the time Dawn Moore was killed. This was by Valstad's own admission during his trial testimony.

B. There was evidence that Valstad had a motive

The somewhat more difficult question in this analysis, and the question that ultimately prompted the trial court to exclude the evidence, is whether there was evidence that Valstad had a motive to kill Dawn Moore.

Admittedly, Moore was unable to present evidence as to any specific motive that Valstad may have had to kill Dawn Moore. However, given the strong evidence of Valstad's *connection* to the scene of the crime; and given the negative inference that should be drawn from Valstad's refusal to speak to Moore's investigator, the trial court should have permitted Moore to present the defense.

When evidence of third-party culpability is properly excluded, it is almost always because there is evidence that the third-party has a motive, but the defendant cannot connect the third-party to the scene of the crime. In fact, this was the problem in *Denny*. The court wrote, "The general rule is that evidence of motive of one other than the defendant to commit the crime can be excluded when there is no other proof directly connecting that person with the offense charged." *Denny*, 120 Wis. 2d at 622. The court continued, "[E]vidence that a third person had a motive to commit the crime with which the defendant is charged is inadmissible if it simply affords a possible ground of suspicion against such person; rather, it must be coupled with substantial evidence tending to directly connect that person with the actual commission of the offense. . . . The rule is designed to place reasonable limits on the trial of collateral issues." *Ibid*.

Here, the situation is quite the opposite. Valstad had an uncontroverted, and very close, connection to the scene of the crime. He plainly had the opportunity to kill Dawn Moore if he were so inclined. What we cannot tell, with any specificity, is whether Valstad had a *reason* to kill Dawn Moore. This, however, ought not prevent Moore from presenting the evidence.

Firstly, Valstad's connection to the crime was substantial. A substantial connection to the scene of the crime ought to outweigh any deficiency in the evidence of motive. This is because, as the jury is instructed, "While motive may be shown as a circumstance to aid in establishing the guilt of a defendant, the State is not required to prove motive on the part of a defendant in order to convict. Evidence of motive does not by itself establish guilt." Wis. JI-Criminal 175. The jury instruction recognizes that, many times, persons commit crimes for reasons that are inexplicable or incomprehensible. Lack of motive does not mean that the crime was not committed. Thus, when there is a strong connection between the third-party and the scene of the crime, this must outweigh any deficiency in the evidence of motive.

Secondly, there was in fact some circumstantial evidence that Valstad had a motive to kill Dawn Moore. The fact that Valstad refused to be interviewed by Moore's investigator permits a negative inference- that is, that Valstad had something to hide.

Valstad's refusal to be interviewed concerning his motive to kill Dawn Moore permits the finder of fact to infer that Valstad did, in fact, have some reason to want Dawn Moore dead.

Finally, the State's case against Kevin Moore was entirely circumstantial. The evidence of Valstad's motive to kill Dawn

Moore was at least as compelling as the evidence of Kevin Moore's motive. As was explained earlier, the evidence that the State presented to establish Kevin Moore's motive lacked all probative value. The evidence simply did not establish that Kevin Moore had a reason to kill his wife. Moore was prosecuted because he was nearby when the body was found. In a circumstantial case such as this, Moore's constitutional right to present a defense demanded that the jury know that someone else was nearby, too.

For these reasons, the trial court erred in excluding evidence that Dennis Valstad refused to answer questions for Moore's investigator; and in precluding Moore from arguing that Valstad could have been the murderer.

IV. The combination of errors was prejudicial

Errors excluding or admitting evidence are harmless if no reasonable possibility exists that the error contributed to the conviction. *State v. Dyess*, 124 Wis.2d 525, 543, 370 N.W.2d 222, 231-32 (1985). However, evidentiary errors need not be reviewed individually in a vacuum. A new trial should be granted when either: (1) the real controversy has not been fully tried; or (2) when it is probable that justice has for any reason miscarried. Sec. 752.35, Stats.; *State v. Wyss*, 124 Wis.2d 681, 734-36, 370 N.W.2d 745, 770-71 (1985).

Here, the trial court committed three major evidentiary errors: (1) the court improperly admitted evidence that Kevin Moore frequented a gentleman's club, spent large sums of money there, and fraternized with the dancers; (2) the court improperly admitted the hearsay declaration of Dawn Moore that if anything ever happened to her, the police should look at her husband,

Kevin Moore; and, (3) the trial court improperly excluded evidence that Dennis Valstad, who was admittedly near the scene of the murder at the time it occurred, refused to speak to Moore's investigator, and prohibited Moore from arguing to the jury that Valstad may have been the murderer.

Any one of these errors is reversible. The improper admission of character evidence is almost always reversible error. The appellate courts have recognized this since at least 1903. See, *Paulson v. State*, 118 Wis. 89, 97 (1903) "The character rule excluding prior-crimes evidence as it relates to the guilt issue rests on four bases: (1) The overstrong tendency to believe the defendant guilty of the charge merely because he is a person likely to do such acts; (2) the tendency to condemn not because he is believed guilty of the present charge but because he has escaped punishment from other offenses; (3) the injustice of attacking one who is not prepared to demonstrate the attacking evidence is fabricated; and (4) the confusion of issues which might result from bringing in evidence of other crimes." *Whitty v. State*, 34 Wis. 2d 278, 292 (Wis. 1967)

Thus, the admission of *The Mansion on Main* evidence, alone, is reversible error because it encouraged the jury to find Kevin Moore guilty not because the evidence proved him to be guilty, but because he was a person of bad character.

By the same token, Dawn Moore's hearsay declaration that the police should "look at" Kevin Moore is really just character evidence. The hearsay declaration is merely an expression of Dawn Moore's opinion that Kevin Moore is the sort of person who would murder his wife (i.e., it is character evidence).

Again, the improper admission of this evidence, alone, is sufficient to reverse Moore's conviction.

Finally, the trial court's order preventing Moore from presenting the defense that Dennis Valstad might have been the murderer implicates Moore's constitutional right to present a defense. This error alone prevented the real controversy from being tried. Even in isolation, it is reversible error.

When these three errors are considered together, though, it is unmistakable that this was not a fair trial. The real controversy was not tried and, had the errors not been committed, the jury would have very likely reached a different conclusion.

The direct evidence implicating Moore as the murderer was exceedingly thin. Kevin Moore was admittedly present in the home at the time Dawn Moore was killed. Dawn Moore's blood was found inside the home, and her blood was also found on Moore's clothing (which was to be expected since Moore was the one who found the body and called 9-1-1). According to the police, Moore's demeanor at the scene was unusually calm, and some of the details of his story were inconsistent. This is certainly enough circumstantial evidence to suspect that Kevin Moore might have had something to do with his wife's death.

Without more, though, the evidence does not even begin to approach the beyond a reasonable doubt standard.

Apparently recognizing this deficiency in its case, the State desperately searched for *something more*. Unfortunately, this "something more" was inadmissible character evidence in the form of Kevin Moore's behavior at *The Mansion on Main* and Dawn Moore's hearsay declaration that she believed that Kevin Moore was capable of harming her. Then, as if to skew the "circumstances" of this entirely circumstantial case in favor of the State, the trial court did not permit the jury to fully explore the possibility that Dennis Valstad was the murder.

For these reasons, the errors were reversible errors.

V. The evidence was insufficient, as a matter of law, to support the jury's verdict finding Moore guilty of first degree intentional homicide.

When reviewing the sufficiency of the evidence to support a criminal conviction, the evidence is reviewed most favorably to the jury's verdict. *State v. Poellinger*, 153 Wis.2d 493, 501, 451 N.W.2d 752, 755 (1990). "An appellate court may not reverse a conviction unless the evidence, viewed most favorably to the state and the conviction, is so insufficient in probative value and force that it can be said as a matter of law that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt." *Id.*

Here, there was no direct evidence that Kevin Moore killed his wife. The case was entirely circumstantial. Whether the evidence is circumstantial or direct, though, the standard of review is the same. *Poellinger*, 153 Wis.2d at 503. A conviction may rest entirely on circumstantial evidence, even if that circumstantial evidence also supports an equally reasonable theory consistent with innocence. *Id.* at 501, 451 N.W.2d at 755. The jury may draw reasonable inferences from circumstantial evidence, as long as the evidence supports those inferences. *State ex rel. Kanieski v. Gagnon*, 54 Wis.2d 108, 117, 194 N.W.2d 808, 813 (1972).

The question, then, in reviewing the sufficiency of the evidence, is whether it was *reasonable* for the jury to draw the inference that Kevin Moore intentionally killed his wife. A

reasonable inference is an inference for which a reason may be given.

Plainly, whoever killed Dawn Moore *intended* to kill her. The grievous nature of her injuries is a testament to that.

Can any reason be given, though, for the inference that it was Kevin Moore who killed her? Is the mere fact that Kevin Moore was nearby when Dawn was killed a sufficient reason to believe that he killed her? Certainly not. Common human experience teaches that mere geographic proximity to the scene of a crime permits no inference that an individual committed the crime--except when the evidence is uncontroverted that the individual was the *only* person present.

The evidence here is hardly uncontroverted that Kevin Moore was the only other person present. Firstly, it appears that many of blows to Dawn Moore's head occurred *outside* of the house in an area that is accessible by any person in the area. Secondly, Kevin Moore testified to his belief that other persons had been present in the house; and, to be sure, the police also observed the muddy footprints in the house.

Thus, Kevin Moore's mere proximity to the murder does not permit a reasonable inference that he killed his wife.

Does the so-called "motive" evidence change anything? Does this evidence, when combined with the evidence of Kevin Moore's proximity to the murder, permit a reasonable inference that Kevin Moore was the killer? If the other acts evidence actually established a motive for Kevin Moore to kill his wife it might make a difference. Here, though, the *Mansion on Main* evidence established only that Kevin Moore was a cad. If anything, this established a motive for Dawn Moore to want to

harm Kevin Moore. In logic, though, the evidence does not work in the opposite direction.

Similarly, Dawn Moore's opinion that Kevin Moore might harm her, without any of the details about *why* she believed this to be the case, adds nothing. Without any details, it is impossible to evaluate the credibility of this opinion. Recall that, under the sufficiency of the evidence standard, there must be *credible* evidence in the record. On this record, it is simply impossible to know whether Dawn Moore's opinion was based something concrete, like violent behavior by Kevin Moore, combine with threats to do harm; or on something abstract, like paranoia on the part of Dawn Moore.

For these reasons, the evidence is insufficient, as a matter of law, to support the jury's verdict finding Kevin Moore guilty of first degree intentional homicide.

Conclusion

For the foregoing reasons, it is respectfully requested that the Court of Appeals first review the sufficiency of the evidence to support Moore's conviction for first degree intentional homicide. If the court finds that the evidence is not sufficient, the conviction must be reversed and the court must direct that a judgment of acquittal be entered. The Double Jeopardy clause would prevent a retrial.

If the court finds that the evidence is sufficient, then the court should reverse the conviction and remand the case for retrial with orders that the *Mansion on Main* evidence, and the evidence of Dawn Moore's hearsay declaration not be admitted.

Additionally, the court should order that, at the retrial, Moore

be permitted to present evidence that Dennis Valstad refused to speak to the defense investigator; and that Moore be permitted to argue that Valstad is a legitimate suspect in the murder of Dawn Moore.

Dated at Milwaukee, Wisconsin this ____ day of March, 2010.

Law Offices of Jeffrey W. Jensen
Attorneys for Appellant

By: _____

Jeffrey W. Jensen
State Bar No. 01012529

735 W. Wisconsin Ave.
Twelfth Floor
Milwaukee, WI 53223
(414) 671-9484

Certification as to Length and E-Filing

I hereby certify that this brief conforms to the rules contained in §809.19(8)(b) and (c) for a brief and appendix produced with a proportional serif font. The length of the brief is 9,479 words.

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Dated this _____ day of
_____, 2010:

Jeffrey W. Jensen

**State of Wisconsin
Court of Appeals
District 2
Appeal No. 2009AP003167 - CR**

State of Wisconsin,

Plaintiff-Respondent,

v.

Kevin Moore,

Defendant-Appellant.

Defendant-Appellant's Appendix

1. Record on Appeal
2. Excerpt of trial court's ruling on other acts evidence
3. Excerpt of trial court's ruling on hearsay declaration
4. Excerpt of trial court's ruling on Dennis Valstad evidence

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with s. 809.19 (2) (a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; and (3) portions of the record essential to an

understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

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

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

Dated at Milwaukee, Wisconsin, this _____ day of March, 2010

By: _____

Jeffrey W. Jensen
State Bar No. 01012529

