

**COURT OF APPEALS
DECISION
DATED AND FILED**

February 10, 2004

Cornelia G. Clark
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 01-0272-CR

Cir. Ct. No. 99CF4897

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT-PETITIONER,

v.

JOHN P. HUNT,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Milwaukee County: DENNIS P. MORONEY, Judge. *Reversed in part; affirmed in part.*

Before Fine, Schudson and Curley, JJ.

¶1 PER CURIAM. John P. Hunt appeals from a judgment, entered after a jury trial, convicting him of two counts of first-degree sexual assault of a child, one count of repeated sexual assault of the same child, one count of first-degree sexual assault causing pregnancy, one count of exposing a child to harmful

material, and one count of second-degree sexual assault by the use of force.¹ Hunt was sentenced to a cumulative term of 122 years of imprisonment on counts one, three, four, and five, and thirty years of probation on counts two and six. Hunt contends that: (1) his statutory and constitutional rights were violated when he was charged with and convicted of violations of WIS. STAT. § 948.02 (1999-2000)² and a violation of WIS. STAT. § 948.025 that allegedly occurred within the same time frame; (2) his constitutional rights were violated “when insufficient safeguards were taken to ensure the jury did not use the sexual assault against Tiffany alleged in count four as one of the three repeated acts of sexual assault against Tiffany alleged in count three”; (3) the trial court erred when it refused to accept his proffered *Wallerman* stipulation;³ (4) the trial court erred when it allowed the State to use prior inconsistent statements that contained an extra level of hearsay; (5) his “constitutional right to be present in the courtroom and confront the witnesses against him was violated when the court removed him from the courtroom, placed him in the recalcitrant witness box, and then conditioned his return not merely upon a pledge not to disrupt the courtroom, but also upon a personal apology to the court”; and (6) the trial court erred when it

¹ Tiffany J. was the victim of the first five counts, and Angelica J. was the victim of the sixth count.

² All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

³ *State v. Wallerman*, 203 Wis. 2d 158, 552 N.W.2d 128 (Ct. App. 1996), *overruled in part by State v. Veach*, 2002 WI 110, 255 Wis. 2d 390, 648 N.W.2d 447.

refused to allow him to argue that someone else may have been the father of Tiffany J.'s baby.⁴

¶2 Because Hunt's rights were violated when he was charged with and convicted of violations of both WIS. STAT. § 948.02 and WIS. STAT. § 948.025, regarding incidents that allegedly occurred within the same time frame, we reverse the conviction on the § 948.025 charge. However, Hunt waived any argument in regard to the allegedly confusing jury instruction and his right to be present in the courtroom by failing to object. Further, we conclude that the trial court did not err in refusing to accept his *Wallerman* stipulation or in admitting evidence that Hunt alleges to be inadmissible hearsay. Finally, we are satisfied that Hunt failed to make the necessary evidentiary showing to argue that someone else may have impregnated Tiffany J., and, as a result, the trial court's refusal to permit any argument was proper. Thus, we reverse in part and affirm in part.

I. BACKGROUND.

¶3 Before 1988, Hunt lived with his wife, Ruth, and their children. They belonged to a church that encouraged the male members to have more than one wife. Accordingly, in 1988, Angelica J. and her three daughters, Tiffany J., Lana, and April, moved in with Hunt and his family; Angelica assumed the role of Hunt's "common-law" wife. Hunt proceeded to have another child with Ruth and

⁴ Hunt has also alleged that the trial court erred in admitting "other acts" evidence. In *State v. Hunt*, No. 01-0272-CR, unpublished slip op. (WI App July 17, 2002), this court reversed the judgment of conviction, concluding that the trial court erred in admitting the "other acts" evidence, and remanded the matter for a new trial. On July 2, 2003, the supreme court reversed that decision and affirmed the trial court in *State v. Hunt*, 2003 WI 81, 263 Wis. 2d 1, 666 N.W.2d 771. Hunt filed a motion for reconsideration of the remaining issues on appeal, and the supreme court remanded the case for consideration of those issues. Accordingly, this appeal concerns only those issues previously undecided.

three children with Angelica. In 1998, Tiffany J. gave birth to a son, Isaiah, when she was fifteen years old. A DNA test subsequently established to a high degree of medical certainty that Hunt was the father of the baby.

¶4 On September 21, 1999, Ruth, Angelica, and the children went to the police and reported that Hunt had threatened them. According to the police reports, Ruth told the police that she was afraid to return to the house because Hunt had threatened their lives. The police accompanied Ruth, Angelica, and the children to their home and arrested Hunt. After the police interviewed the wives and children, the State filed a criminal complaint against Hunt alleging a sexual assault of Angelica, numerous sexual assaults of Tiffany, and Hunt's impregnation of Tiffany.

¶5 Ultimately, however, the victims and witnesses refused to cooperate with the prosecution, recanted the statements they made to the police, and denied the allegations in the complaint. Consequently, at the jury trial, the State had to rely upon "other acts" evidence and the prior inconsistent statements the family members made to the police. The jury convicted Hunt on all six counts, and he was sentenced to 122 years in prison and thirty years of probation.

II. ANALYSIS.

A. *Hunt was inappropriately convicted of a violation of both WIS. STAT. § 948.02 and WIS. STAT. § 948.025.*

¶6 Hunt contends that the charges under WIS. STAT. § 948.02 violate the prohibition of WIS. STAT. § 948.025(3), and thus, "the convictions resulting therefrom must be vacated and stricken from the record." The State concedes that, under § 948.025(3), the convictions on the first three counts cannot coexist. However, the State contends that "[t]he decision as to which of the valid counts to

preserve, like other decisions relating to the prosecutor’s charging function, lies within the prosecutor’s discretion.” We disagree.

¶7 WISCONSIN STAT. § 948.025 provides, in relevant part:

(1) Whoever commits 3 or more violations under s. 948.02(1) or (2)⁵ within a specified period of time involving the same child is guilty of a Class B felony.

....

(3) The state may not charge in the same action a defendant with a violation of this section and with a ... violation involving the same child under s. 948.02 ... unless the other violation occurred outside of the time period applicable under sub. (1).

(Footnote added.)

¶8 As the applicable time frame establishing the WIS. STAT. § 948.025 charge was December 1993 to September 1997, and the incidents supporting the WIS. STAT. § 948.02 charges were alleged to have occurred in October 1994, the prohibition of § 948.025(3) was clearly violated. As such, it is only necessary to determine how the error is to be corrected.

¶9 In *State v. Cooper*, 2003 WI App 227, ___ Wis. 2d ___, 672 N.W.2d 118, this court held that “a court may reverse a conviction on the repeated acts

⁵ WISCONSIN STAT. § 948.02 provides, in relevant part:

(1) FIRST DEGREE SEXUAL ASSAULT. Whoever has sexual contact or sexual intercourse with a person who has not attained the age of 13 years is guilty of a Class B felony.

(2) SECOND DEGREE SEXUAL ASSAULT. Whoever has sexual contact or sexual intercourse with a person who has not attained the age of 16 years is guilty of a Class BC felony.

charge under WIS. STAT. § 948.025(1) when the proscription against multiple charges in § 948.025(3) is violated.” *Id.*, ¶15. We were persuaded by a California court’s reasoning that “because the specific felony offenses carried a more substantial aggregate sentence and were ‘most commensurate with [the defendant’s] culpability,’ the proper remedy for violation of [the California statute similar § 948.025(3)] was to reverse the conviction for continuous acts.” *Cooper*, 2003 WI App 227, ¶12; *see also People v. Torres*, 126 Cal. Rptr. 2d 92 (Ct. App. 2002). Thus, as there was a violation of the proscription against multiple charges in § 948.025(3), we reverse the conviction on the § 948.025(1) charge.⁶

B. Hunt waived any argument in regard to the allegedly confusing jury instruction.

¶10 Hunt contends that his “constitutional rights were violated when insufficient safeguards were taken to ensure the jury did not use the sexual assault against Tiffany alleged in [the charge of first-degree sexual assault causing pregnancy] as one of the three repeated acts of sexual assault against Tiffany alleged in [the charge of repeated sexual assaults of the same child].” He essentially insists that the time frames specified for the two charges overlapped as a result of vague language in the charging document and jury instructions, and the confusing explanation of the prosecutor during closing argument, and thus “there was a real danger the jury would find [him] guilty of [the assault causing pregnancy charge] and then turn around and use that same act as a basis for also finding [him] guilty of [the repeated acts charge].” He seemingly alleges that this

⁶ Hunt also contends that the three charges violate his constitutional right to be free from double jeopardy. As we have reversed the repeated acts conviction, there is no need to address the double jeopardy concern, as it is now moot.

would be a double jeopardy violation, as he contends that the assault causing pregnancy is a lesser-included offense of the repeated acts charge, and argues that the manner in which the acts supporting the first four counts “were charged and presented to the jury was fundamentally unfair and violative of due process.”

¶11 Hunt never objected to the jury instructions or the prosecution’s closing argument. He alleges that the charges were presented in a fundamentally unfair manner, but fails to point to anything in the record indicating that he objected to the overlapping nature of the charges or the instructions. While it is arguable that some confusion may have resulted from the wording of the instructions and the explanation by the prosecutor regarding the relevant time periods, Hunt has failed to point to any law to establish that these charges and instructions were fundamentally unfair as a result. Moreover, his double jeopardy argument ignores the proper analysis for determining whether two charges are indeed multiplicitous. Accordingly, we conclude that Hunt has waived any argument regarding the allegedly confusing “presentation” of the assault causing pregnancy and repeated acts charges and the jury instructions regarding the same. *See State v. Schumacher*, 144 Wis. 2d 388, 409, 424 N.W.2d 672 (1988) (“[T]he court of appeals ha[s] no power to reach ... unobjected-to instructions[.]”); *State v. Booth*, 147 Wis. 2d 208, 211, 432 N.W.2d 681 (Ct. App. 1988) (well-settled that failure to object to instruction constitutes waiver of alleged defects); WIS. STAT. § 805.13(3).

C. Hunt waived any argument in regard to his right to be present in the courtroom by failing to object to the conditions of return.

¶12 Hunt argues that the “trial court infringed upon [his] fundamental right to be fully present during his trial[.]” He insists that the “level of disruption ... does not appear to have been so egregious to warrant excluding him from the

courtroom in the first place[.]” and even if so, the trial court’s condition that he apologize before being allowed to return “has never been approved by the Supreme Court[.]” We decline to address this issue because Hunt never objected to the trial court’s conditions for his return to the courtroom. After the trial court decided to banish Hunt to the recalcitrant witness area for the remainder of the trial, Hunt’s counsel stated: “I would object. And I would ask that he be allowed to be brought back in the courtroom tomorrow morning.” The next morning, the following exchange occurred:

[DEFENSE COUNSEL]: Your honor, pursuant to our conversation this morning I informed Mr. Hunt that he would be permitted back into the courtroom. He informed me that he prefers to stay in the booth.

THE COURT: Is that correct?

[HUNT]: Yes.

THE COURT: All right. Well that is your choice. [The] Court was giving you the opportunity to purge yourself of that requirement and to be out here to assist and to be able to observe—well you can observe from in there, but to observe all that goes on in the courtroom and to be more readily available, but the Court also is telling you right now that this type of disruptive action will not be tolerated. You know, if you were willing to promise not to do that and to apologize for that action, I would give you another chance to be in the courtroom. But you have decided that you would rather stay in the booth. Is that a fair statement?

[HUNT]: Right.

The trial court gave Hunt several opportunities thereafter to promise not to act out and to apologize, but he chose not to do so. Curiously, he even chose to return to the box when he was excused as a witness near the end of the trial, even though the court welcomed him to stay.

¶13 As neither Hunt nor his attorney objected to the conditions, the trial court was never given an opportunity to address the issue. Furthermore, apart from the defense counsel's initial statement that "[he] would object [and] ask that [Hunt] be allowed to be brought back in the courtroom [the next] morning[.]" he never objected to the trial court's placement of Hunt in the recalcitrant witness box. He never argued during the trial that it was an erroneous exercise of the trial court's discretion to have Hunt in the box in the first place.

¶14 While Hunt makes much of the fact that the trial court allegedly never informed him of the "depth" of his constitutional right to be present at the trial, to waive that right, and to reclaim it, he fails to note that defense counsel had every opportunity to address that issue as well. Moreover, the trial court noted on several occasions that "[h]e can certainly have his 6th Amendment right to confrontation handled by virtue of the closed circuit factors in the witness room that is adjacent to the courtroom which is capable of seeing the courtroom," and that "he has all the full panoply of viewing and confrontational issues because he can see out and see everybody that's testifying and hear testimony and he has contact directly by his counsel by way of a two-way headset[.]"

¶15 Accordingly, Hunt has waived any argument in regard to his right to be present in the courtroom by virtue of his failure to object on the trial court level. See *State v. Boshcka*, 178 Wis. 2d 628, 642, 496 N.W.2d 627 (Ct. App. 1992) ("[U]nobjected-to errors are generally considered waived; and the rule applies to both evidentiary and constitutional errors.").

D. The trial court did not err in refusing to accept Hunt's Wallerman stipulation.

¶16 Hunt contends that the trial court erred when it refused to accept Hunt's stipulation that "any sexual contact between he [sic] and Tiffany would

have been for the purpose of sexual gratification” in order to “keep out the anticipated testimony of [two of Hunt’s daughters], who presumably would testify to sexual contact Hunt had with them when they were minors.” He insists that: (1) the court “employed the proclivity rational [sic] ... to justify its admission, noting that because Hunt had apparently had inappropriate sexual contact with [the girls], there was ‘an inference’ he had done the same thing with ‘the other person[;]’” and (2) “invoking ‘absence of mistake’ as a permissible purpose for the other acts evidence betrays an analysis utterly divorced from the facts of this case as one does not ‘accidentally’ or ‘mistakenly’ have sexual intercourse with a fifteen-year-old girl.” Hunt further argues:

[T]he idea that the other acts evidence would resolve credibility issues was merely a euphemism for the understanding that the inculpatory statements given by family members would triumph over the exculpatory statements once the jury understood Hunt was prone to commit such acts. From a practical standpoint, even if credibility was a permissible purpose for admission of the other acts, the jury was never told for what permissible purpose it could use the evidence.⁷

(Footnote added.)

¶17 Whether to accept a *Wallerman* stipulation is within the discretion of the trial court. See *State v. Veach*, 2002 WI 110, ¶119, 255 Wis. 2d 390, 648 N.W.2d 447.

In *Wallerman*, this court set out a procedure that, when utilized by the defendant, could foreclose the State from introducing “other acts” evidence. According to *Wallerman*, if the defendant concedes the element of the

⁷ Contrary to Hunt’s contention, the jury was informed that “it could not make any conclusions of Hunt’s character or propensity to commit the crime based on the other-acts evidence.” *Hunt*, 263 Wis. 2d 1, ¶22 (footnote omitted) (citing trial court’s jury instruction).

charged offense that the “other acts” evidence was directed at proving, the State might be foreclosed from introducing the “other acts” evidence. *See* WIS. STAT. § 904.04(2).

State v. Silva, 2003 WI App 191, ¶12, 266 Wis. 2d 906, 670 N.W.2d 385.

¶18 Here, the State sought to introduce evidence of other acts of sexual contact with two of Hunt’s other daughters. The trial court concluded that the evidence was relevant for purposes other than just establishing motive. It determined that the evidence was relevant in light of the credibility and recantation issues and the greater latitude rule. The court also pointed to plan and opportunity as a relevant purpose for the admission of the “other acts” evidence.

¶19 Although the trial court’s refusal to accept Hunt’s *Wallerman* stipulation might have been error at that time, a matter that we do not decide, any remand would be governed by the current standard established by *Veach*. In *Veach*, the supreme court determined that the State is not obligated to accept *Wallerman* stipulations: “While we do not hold that *Wallerman* stipulations are invalid per se, we do hold that, with the exception of stipulations to a defendant’s status, the state and the court are not obligated to accept stipulations to elements of a crime....” *Veach*, 255 Wis. 2d 390, ¶118. Moreover,

a *Wallerman* stipulation in a child sexual assault case is directly contrary to the greater latitude rule for the admission of other acts evidence in child sexual assault cases. The purpose of a *Wallerman* stipulation in this case—involving an allegation of child sexual assault—is to *preclude* the admission of other acts evidence. The purpose of the greater latitude rule in cases involving allegations of child sexual assault is to “*permit a more liberal admission of other crimes evidence.*”

Veach, 255 Wis. 2d 390, ¶122 (quoting *State v. Davidson*, 2000 WI 91, ¶44, 236 Wis. 2d 537, 613 N.W.2d 606 (emphasis added by *Veach*) (citations omitted)).

¶20 Thus, as established by *Veach*, the trial court is not obligated to accept *Wallerman* stipulations. “This evidence is relevant to the motive element of the crime. As *Veach* discusses, and as made clear by *Davidson*, 236 Wis. 2d 537, ¶65, and *State v. Hammer*, 2000 WI 92, ¶25, 236 Wis. 2d 686, 613 N.W.2d 629, the State must prove every element of the crime, even those elements that are undisputed.” *Silva*, 266 Wis. 2d 906, ¶12.

¶21 As such, if the trial court reaches the right result, but for the wrong reason, it will be affirmed. *State v. Holt*, 128 Wis. 2d 110, 124, 382 N.W.2d 679 (Ct. App. 1985). “Underlying this principle is the notion that if a second, error-free trial would lead to the same result, the first decision should be affirmed. An appellate court may sustain a lower court’s holding on a theory or on reasoning not presented to the lower court.” *Id.* at 124-25. Thus, in light of *Veach*, we affirm the trial court’s refusal to accept Hunt’s *Wallerman* stipulation.

E. The trial court did not err in allowing the testimony that Hunt alleges to be inadmissible hearsay.

¶22 Hunt insists that many of the statements made by police officers at trial contained double hearsay, and, as such, he was prejudiced by their admission “because the hearsay statements of one family member related to another family member and then related to police were statements which were of a highly prejudicial nature.” He contends that “prior inconsistent statements were the overarching theme of this trial and whether it was setting them up or bringing them out, they permeated the testimony of virtually every witness who testified at trial.” Hunt then points to six different statements that he claims were improperly admitted. While he failed to object to some, the trial court properly admitted the rest.

¶23 It is well settled that:

[t]he admissibility of evidence is directed to the sound discretion of the trial court, and we will not reverse the trial court's decision to allow the admission of evidence if there is a reasonable basis for the decision and it was made in accordance with accepted legal standards and in accordance with the facts of record.

State v. Brewer, 195 Wis. 2d 295, 305, 536 N.W.2d 406 (Ct. App. 1995) (citation omitted). Accordingly, the decision of whether to admit evidence under a hearsay exception is within the trial court's discretion. See *State v. Moats*, 156 Wis. 2d 74, 96, 457 N.W.2d 299 (1990). Regarding the contemporaneous objection rule, this court has stated: “[U]nobjected-to errors are generally considered waived; and the rule applies to both evidentiary and constitutional errors. This holding is in line with the well-settled rule that [f]ailure to object to an error at trial generally precludes a defendant from raising the issue on appeal.” *State v. Davis*, 199 Wis. 2d 513, 517, 545 N.W.2d 244 (Ct. App. 1996) (citations omitted) (alterations in original). Moreover, “[u]nobjected-to hearsay is, of course, admissible for its truth.” *State v. Heredia*, 172 Wis. 2d 479, 482 n.1, 493 N.W.2d 404 (Ct. App. 1992).

¶24 The first statement was that of a police officer indicating that one of Hunt's children told the police officer that Tiffany told her that Hunt forced Tiffany to have sex with him. Hunt objected to the statement claiming that it contained an additional level of hearsay and that “the State's sole purpose of introducing the statement is to put it in for the truth of the matter that John Hunt forces Tiffany to have sex with him.” The trial court concluded that the statement was not hearsay, pursuant to WIS. STAT. § 908.01(4)(a), and thus admissible. Section 908.01(4) provides, in relevant part:

STATEMENTS WHICH ARE NOT HEARSAY. A statement is not hearsay if:

(a) *Prior statement by witness.* The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is:

1. Inconsistent with the declarant's testimony[.]

At the trial, the child testified before the police officer testified and denied ever making such a statement. The State argued that the statement was admissible as a prior inconsistent statement, and the trial court agreed. A decision permitting the testimony under § 908.01(4)(a) is one a reasonable judge could make.

¶25 The second statement was that of a police officer indicating that Tiffany's sister told the police officer that she heard through family members that Hunt was forcing himself onto Tiffany and having sex with her. The defense objected: "I consider it egregiously disingenuous for the State to say that its purpose is anything other than asserting the truth of the matter.... And I see no – there is no – there's no exception for this level of hearsay. Same as the last one." The trial court concluded that it was admissible for the same reason as the first statement—as a prior inconsistent statement. For the reasons previously stated, admission of this testimony was a proper exercise of discretion.

¶26 The third statement was that of a detective who testified that while she was interviewing Tiffany, another detective told Tiffany that Angelica said she was lying. Hunt never objected to this statement, and as such, he has waived any claim of error in regard to its admission. *Caccitolo v. State*, 69 Wis. 2d 102, 113, 230 N.W.2d 139 (1975) (failure to object to admission of testimony waives any contest).

¶27 The fourth statement was that of a detective who testified that Angelica said that Tiffany told her that Hunt “was messing with her.” While Hunt sought to exclude this testimony in his pretrial motion *in limine*, it does not appear that the trial court ever ruled on this particular request, and Hunt failed to renew his objection at trial.⁸ As he failed to object before, during, or after the detective’s testimony, he has consequently waived his right to challenge this testimony. *See id.*

¶28 The fifth statement was that of a detective who testified that Tiffany indicated that the last assault occurred on the second day of her menstrual cycle. Again, Hunt never objected to this statement. As such, he has waived any claim of error, whatever it may be, in regard to its admission. *See id.*

¶29 The last statements were those of a police officer who testified regarding statements that one of Hunt’s children made to the officer concerning what Hunt said to the child. Here, Hunt claims that the child was a cooperative witness who did not make prior inconsistent statements, and thus it was improper for the police officer to testify regarding what the child told her. But once again, Hunt never objected to this statement, and as such, he has waived any claim of error in regard to its admission. *See id.*

⁸ Although *State v. Kutz*, 2003 WI App 205, ¶¶27-29, ___ Wis. 2d ___, 671 N.W.2d 660, makes clear that definitive pretrial rulings preserve objections to evidence without renewal at trial, it also indicates that a lack thereof requires an objection at trial in order for the issue to be preserved for appeal, *see id.*, ¶30. Here, we can find no definitive ruling on this particular request.

¶30 Accordingly, we conclude that with respect to the objected-to evidence the trial court did not erroneously exercise its discretion in allowing any of the testimony that Hunt alleges to be inadmissible hearsay.

F. The trial court properly refused to allow Hunt to argue that someone else may have been the father of Tiffany J.'s baby.

¶31 Hunt asserts that the trial court's action in refusing to allow Hunt to argue that someone else may have been the father of Tiffany J.'s baby "w[as] particularly egregious in that it did not exclude evidence, but instead, argument." He argues that during the trial, but outside the presence of the jury, he "posited" that his eldest son was possibly the father of Tiffany J.'s baby. He insists that, through the cross-examination of several witnesses, he established that his son "had the opportunity to commit the sexual assault upon Tiffany which resulted in her becoming pregnant[,] and that "this opportunity was critical in a case [where] Tiffany was unable or unwilling to identify the true father of [the child]." He urges that the relevance of this opportunity was enhanced as a result of the "DNA expert[']s testimony] conceded[ing] that the probability that [he] was the father of [the child] would be significantly lower if the pool of potential suspects w[as] limited to Hunt and his sons." As a result, he concludes that "the evidence need only show a legitimate tendency that the third person could have committed the crime[,] and "evidence in the records placed [the son] 'in such proximity to the crime as to show he may have been the guilty party.'"

¶32 The State contends that: (1) "the record does not show that the circuit court actually ever denied Hunt the opportunity to make his 'other guy did it' argument[,] but instead deferred a ruling on the issue and advised Hunt of the standard he would have to satisfy to make the argument; (2) the evidence did not justify the defense under *State v. Denny*, 120 Wis. 2d 614, 357 N.W.2d 12 (Ct.

App. 1984); (3) there is no evidence in the record, apart from mere speculation, that the third party may have caused the pregnancy; and (4) Hunt did not produce any scientific evidence to contradict the State's paternity test or connect the third party to the pregnancy, nor question the third party himself. The State concludes that Hunt "sought to create 'a possible ground of suspicion against [the third party]' by arguing a highly speculative theory unsupported by any evidence in the record[, and t]o the extent that the circuit court deterred Hunt from actually doing so, the court acted properly." We agree.

¶33 *Denny* concerns, in part, the admission of evidence regarding a third party's motive to commit the crime for which the defendant is being tried. It requires that three factors be present in order for the argument to be relevant: (1) motive; (2) opportunity; and (3) a direct connection to the crime. *Denny*, 120 Wis. 2d at 625. "[T]here must be a 'legitimate tendency' that the third person could have committed the crime[,]" and "[t]he '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 623-24 (citation omitted).

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.

Id. at 624. "[E]vidence that simply affords a possible ground of suspicion against another person should not be admissible." *Id.* at 623.

¶34 Considering this standard, we cannot conclude that the trial court erroneously exercised its discretion in “denying” Hunt the opportunity to make the argument that someone else may have been the father of Tiffany’s baby. After the court and counsel discussed the potential implications of the rape shield law, the conception time period, and the third party defense rules, defense counsel stated:

Particularly what I intend to show is particularly question those—the witnesses in this case who are members of the Hunt family regarding the four persons, two of Mr. Hunt’s brothers and two of Mr. Hunt’s sons, who would have been of age sufficient to cause pregnancy. And all I intend to do is merely ask these people whether they were around during this—whether they were there, whether they had access to Tiffany during the contraceptive period, whether they were living at the house.

My understanding is one of Mr. Hunt’s sons was living at the house at the time, another one was living in Milwaukee, and that he has two brothers who live in Chicago who would frequently visit at this time and Tiffany would go there and visit, and the extent of what I intended to do is ask these people about those four persons and how often, what kind of access did they have, and obviously ask Tiffany of all the opportunity of family members.

After hearing argument from the State indicating that nothing in the record suggests that Tiffany ever claimed that any of those people could have been the father of her baby, and essentially insisting that if the defense wanted to point fingers, it needed to have some factual backing for doing so, instead of “just throwing out some speculation to try to open up a reasonable doubt when there is absolutely no support in the facts for it all[,]” the trial court eventually “with[e]d [its] ruling on the issue depending on what evidence does come in.”

¶35 The evidence indicates that Hunt may *arguably* have established that the third party lived in the house at the time of conception,⁹ and thus arguably met the opportunity requirement. Yet, there does not appear to be any other evidence of motive or a direct connection to the crime. The third party was never called as a witness, and none of the witnesses suggested that the third party might have been the father. Hunt claims that “evidence in the records placed [the third party] ‘in such proximity to the crime as to show he may have been the guilty party[,]’” but points only to the claim that the third party lived in the house at the time Tiffany

⁹ Hunt points to the following exchange in support of his claim that he established, through cross-examination, that the third party lived in the house at the time:

[Defense counsel:] And [the third party] was living there, too, at some point; correct?

[Angelica:] No.

[Defense counsel:] And he was living—he never lived at the house while you were living there?

[Angelica:] Not where I am staying at now; no.

[Defense counsel:] I mean before that on 37th Street did he ever live there?

[Angelica:] Yeah, for a while.

[Defense counsel:] And when was that?

[Angelica:] About—it was I think sometime in like '93, '94, something like that. I don't know exactly what time it was. I know he stayed there for a short time.

....

[Defense counsel:] Would he have been living there in 1997 at all?

[Angelica:] He probably was. I don't recall. He might have did. I don't recall the exact year.

was impregnated. Moreover, it does not appear that defense counsel ever revisited that “withheld ruling.” Thus, to the extent that the trial court may have refused to allow Hunt to argue that the third party may have been the father of Tiffany’s baby, it did so properly.

¶36 Accordingly, we reverse in part and affirm in part.

By the Court.—Judgment reversed in part; affirmed in part.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.

