

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**March 11, 2003**

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. 02-1157-CR  
STATE OF WISCONSIN**

Cir. Ct. No. 99CF5776

**IN COURT OF APPEALS  
DISTRICT I**

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**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**v.**

**DEMETRIUS A. GREEN,**

**DEFENDANT-APPELLANT.**

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APPEAL from a judgment of the circuit court for Milwaukee County: DANIEL L. KONKOL, Judge. *Affirmed.*

Before Wedemeyer, P.J., Fine and Curley, JJ.

¶1 PER CURIAM. Demetrius A. Green appeals his conviction for aggravated battery causing great bodily harm with the intent to cause great bodily harm, while using a dangerous weapon, as party to the crime, contrary to WIS.

STAT. §§ 940.19(5), 939.05 and 939.63 (1999-2000).<sup>1</sup> Green argues that the trial court erroneously exercised its discretion in refusing to allow him to introduce two pieces of evidence that suggested that a third party may have committed the crime. He submits that by failing to allow this evidence into the record, his constitutional right to present a defense was violated. Because the evidence was irrelevant, the constitutional right to present a defense was not violated and we affirm.

### I. BACKGROUND.

¶2 On November 6, 1999, Lamont Royster became engaged in an argument with David Braxton Lee at Lee's mother's house over the alleged disappearance of Lee's cocaine and money that Lee had given to Royster the night before for safekeeping.<sup>2</sup> Green, a friend of Lee, was also present in the house. The argument continued outside. While outside, Royster saw Green approach him and shoot him. Following the shooting, Lee also beat Royster with a chair. As a result, Royster was hospitalized, and he now suffers from permanent nerve damage as well as having lost part of his intestines.

¶3 At trial, Green's defense was that Royster misidentified him as the shooter and that others had a motive to harm Royster. In support of this defense, he brought a pretrial motion seeking to introduce into evidence the fact that several hours before the fight and shooting, Royster's cousin witnessed Royster

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<sup>1</sup> All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

<sup>2</sup> Royster claimed that Lee had given him the money and cocaine after Lee had called the police and turned himself in. Lee, however, reported to the police that Royster obtained the items through a "house invasion." The police apparently did not believe Lee, as Royster was arrested, but later released.

have a heated verbal argument with someone in the neighborhood called “Pat,” and that earlier in the day several unknown and threatening armed men had been to Lee’s mother’s house, resulting in several 911 calls. The motion was denied.

## II. ANALYSIS.

¶4 Green challenges the trial court’s decision to exclude his evidence allegedly showing that some unknown third parties may have shot Royster. He submits that he should not have been prohibited from either producing a witness who observed Royster engaged in an argument with a third party earlier in the day, or from introducing evidence that, earlier on the day of the shooting, several armed and menacing men had appeared at the home where the shooting occurred and so frightened the residents that several 911 calls were placed. Relying on the holding of *State v. Denny*, 120 Wis. 2d 614, 357 N.W.2d 12 (Ct. App. 1984), he argues that he met the “legitimate tendency” test, such that the trial court’s refusal to admit this evidence violated his constitutional rights to present witnesses in his own defense. We disagree.

¶5 We first address the trial court’s decision to exclude the evidence. The trial court’s determination to admit or exclude evidence is a discretionary decision that will not be upset on appeal absent an erroneous exercise of discretion. *State v. Jenkins*, 168 Wis. 2d 175, 186, 483 N.W.2d 262 (Ct. App. 1992). Green insists that he has met the requirements set forth in *Denny* for the admission of his evidence showing that someone else may have had a motive for shooting Royster.

¶6 In *Denny*, this court fashioned a test for the admission of evidence concerning the motive of another to harm the victim. In crafting this test, the court

rejected the substantial evidence test set forth in *People v. Green*, 609 P.2d 468 (Cal. 1980):

It is settled, however, that evidence 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 ... and to avoid undue prejudice to the People from unsupported jury speculation as to the guilt of other suspects....

*Denny*, 120 Wis. 2d at 622 (citing *Green*, 609 P.2d at 480). In its place, this court determined that evidence was admissible if it met the “legitimate tendency” test:

We believe that to show “legitimate tendency,” a defendant should not be required to establish the guilt of third persons with that degree of certainty requisite to sustain a conviction in order for this type of evidence to be admitted. ... The “legitimate tendency” test asks whether the proffered evidence is so remote in time, place or circumstances that a direct connection cannot be made between the third person and the crime.

....

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.

*Denny*, 120 Wis. 2d at 623-24 (citation omitted).

¶7 Here, Green’s offer of proof was deficient. One witness could only testify that Royster had a verbal argument earlier on the day of the shooting with “Pat,” a person in the neighborhood. There was no showing that “Pat” harbored any animus against Royster that would have compelled “Pat” to shoot Royster. Additionally, nothing in the proffered evidence connected “Pat” with the Lee’s

home or placed him on or near the premises at the time of the shooting. So too, Green's proposed evidence concerning the armed men who prompted the 911 calls also misses the mark. Although the armed men were at the scene of the shooting several hours before Royster was shot, no one claims to have seen them at the time of this incident and absolutely nothing connects the armed men with Royster. Indeed, what little is known about them suggests they were seeking Lee's mother's boyfriend, not Royster. Therefore, Green did not meet the "legitimate tendency" test and the trial court properly exercised its discretion in refusing to admit this irrelevant evidence.

¶8 Thus, because Green has not established that either "Pat" or the armed men had a motive or an opportunity, much less a direct connection to Royster or the crime, the trial court properly excluded this evidence and Green's constitutional rights to present a defense have not been infringed upon. Based upon the foregoing reasons, we affirm the judgment of the trial court.

*By the Court.*—Judgment affirmed.

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

