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DISTRICT II

March 3, 2021

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

2019AP300-CR	State of Wisconsin v. Keller G. McQuay (L.C. #2015CF1353)
2019AP301-CR	State of Wisconsin v. Keller G. McQuay (L.C. #2015CF1617)
2019AP302-CR	State of Wisconsin v. Keller G. McQuay (L.C. #2016CF817)

Before Neubauer, C.J., Reilly, P.J., and Gundrum, J.

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

In these consolidated appeals, Keller McQuay appeals from judgments convicting him of first-degree reckless homicide, felon in possession of a firearm, possessing a short-barreled shotgun, battery by a prisoner, and resisting or obstructing an officer. Based upon our review of

the briefs and record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2017-18).¹ We conclude that McQuay’s guilty plea waived his challenge to the circuit court’s refusal to waive adult jurisdiction over him and the circuit court properly exercised its discretion when it barred evidence that a third party shot the victim. We affirm the circuit court.

McQuay was fourteen years old when he committed the first-degree reckless homicide charge that placed him within the jurisdiction of the adult criminal court. WIS. STAT. § 938.183(1)(am) (2015-16). The circuit court held a hearing on McQuay’s WIS. STAT. § 970.032(2) reverse waiver motion to transfer his case to juvenile court and denied the motion. Thereafter, McQuay entered guilty pleas. On appeal, he argues that the circuit court erred when it declined to transfer his case to juvenile court.

McQuay’s guilty pleas waived his right to challenge the circuit court’s refusal to waive adult jurisdiction. *See State v. Villegas*, 2018 WI App 9, ¶¶44-46, 380 Wis. 2d 246, 908 N.W.2d 198. We decline McQuay’s entreaty that we not apply waiver in this case.

Even if McQuay’s appellate challenge to the circuit court’s reverse waiver ruling were not waived, we would conclude that the circuit court properly exercised its discretion when it denied the reverse waiver request. *State v. Dominic E.W.*, 218 Wis. 2d 52, 56, 579 N.W.2d 282 (Ct. App. 1998) (whether to retain adult jurisdiction is discretionary with the circuit court). McQuay did not establish, by a preponderance of the evidence, the elements set out in WIS. STAT. § 970.032(2)(a)–(c). *See State v. Kleser*, 2010 WI 88, ¶7, 328 Wis. 2d 42, 786 N.W.2d 144. The

¹ All references to the Wisconsin Statutes are to the 2017-18 version unless otherwise noted.

record supports the circuit court's determinations that McQuay could receive adequate treatment in the criminal justice system, § 970.032(2)(a), transferring McQuay to juvenile court would unduly depreciate the seriousness of his homicide offense, § 970.032(2)(b), and retaining adult court jurisdiction and the possibility of a lengthy adult-court sentence would deter McQuay and other juveniles from committing the crime with which McQuay was charged, § 970.032(2)(c). The circuit court applied the proper legal standard to McQuay's reverse waiver motion. McQuay did not meet his burden to establish all three elements of the § 970.032 reverse waiver statute. *Kleser*, 328 Wis. 2d 42, ¶7.

McQuay moved the circuit court to admit evidence that a third party, his eleven-year-old sister, could have shot the victim.² After a hearing, the circuit court found that McQuay's proffered evidence did not satisfy the three-prong test set out in *State v. Denny*, 120 Wis. 2d 614, 357 N.W.2d 12 (Ct. App. 1984),³ because McQuay did not offer any evidence that his sister had a direct connection with respect to the shooting or that she had any motivation to be involved in this type of criminal activity.

A defendant does not have a constitutional right to present evidence that does not satisfy the *Denny* test. See *State v. Jackson*, 188 Wis. 2d 187, 196, 525 N.W.2d 739 (Ct. App. 1994).

² The criminal complaint alleged that a witness encountered McQuay in the street as he was leaving his home, he admitted to the witness that he had just shot the victim, the witness found the victim on the home's kitchen floor with gunshot wounds, McQuay admitted to the witness that he had the firearm in his possession and was leaving, McQuay's sister was in another room of the house when she heard the shot, McQuay and the bleeding victim both appeared before the sister after the shooting, and the firearm suspected in the offense was found in a backyard two doors away from McQuay's home.

³ The test under *State v. Denny*, 120 Wis. 2d 614, 357 N.W.2d 12 (Ct. App. 1984), "is the correct and constitutionally proper test for circuit courts to apply when determining the admissibility of third-party perpetrator evidence." *State v. Wilson*, 2015 WI 48, ¶52, 362 Wis. 2d 193, 864 N.W.2d 52.

We review whether the circuit court erroneously exercised its discretion when it denied McQuay's request to present third-party perpetrator evidence. *State v. Wilson*, 2015 WI 48, ¶47, 362 Wis. 2d 193, 864 N.W.2d 52.

Evidence offered to cast blame for a charged offense onto a person other than the defendant is not relevant unless the evidence has a "legitimate tendency" to show that the other person actually could be guilty. *Denny*, 120 Wis. 2d at 623-25. Under the legitimate tendency test, third-party perpetrator evidence may be admissible if the defendant can show that: (1) the third party had a motive or plausible reason to commit the charged offense; (2) the third party had the opportunity to commit the charged offense; and (3) there is some evidence that is not "remote in time, place or circumstances" that the third party "actually committed the crime, directly or indirectly." *State v. Griffin*, 2019 WI App 49, ¶¶7-8, 388 Wis. 2d 581, 933 N.W.2d 681. All three prongs of the test must be satisfied. *Wilson*, 362 Wis. 2d 193, ¶64.

McQuay argues on appeal that he satisfied the *Denny* test with evidence that his sister was in the home when the victim was shot, he heard the shot fired approximately fifteen to twenty seconds after he saw his sister holding the firearm, his sister was covered in blood, and she fled the residence when McQuay did. The circuit court found that McQuay did not present any evidence about his sister's motive to shoot the victim, i.e., the existence of a plausible reason for shooting the victim. McQuay's failure to offer motive evidence rendered his *Denny* showing insufficient. *Wilson*, 362 Wis. 2d 193, ¶64 (all three prongs must be met). We agree with the circuit court that McQuay did not establish a legitimate tendency that his sister shot the victim. For this reason, the circuit court did not misuse its discretion when it barred this evidence.

Upon the foregoing reasons,

IT IS ORDERED that the judgments of the circuit court are summarily affirmed pursuant to WIS. STAT. RULE 809.21.

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

Sheila T. Reiff
Clerk of Court of Appeals