

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA
FOURTH JUDICIAL DISTRICT AT FAIRBANKS

STATE OF ALASKA,

Plaintiff,

vs.

STEVEN HARRIS DOWNS,

Defendant.

Case No. 4FA-19-00504CR

**ORDER GRANTING IN PART DEFENDANT'S MOTION TO INTRODUCE
EVIDENCE OF ALTERNATIVE SUSPECTS
[Motion 9 & 22]**

Before the court is Steven Downs's Motion to Introduce Evidence of Alternative Suspects and Motion *In Limine* for a *Smithhart* determination of Admissibility of Evidence for Alternative Suspects. Mr. Downs argues that sixteen alternative suspects could have committed the crime and proffers evidence he wishes to present at trial. The State opposes, arguing that Mr. Downs's proffers do not meet the standards set out in *Smithhart v. State*¹ and *Marrone v. State*.² Having considered the arguments, the court HEREBY GRANTS IN PART Mr. Downs's motions. Consistent with this order, this court will allow Mr. Downs to present some alternative suspect evidence regarding Gregory Thornton, Nicholas Dazer, and Kenneth Moto. The court denies the motion with regard to the remaining thirteen alternative suspects.

¹ 988 P.2d 583 (Alaska 1999).

² 359 P.2d 696 (Alaska 1961).

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Discussion

The court will first address relevant case law that will be referenced throughout the order. The court will then discuss the proffered evidence for Gregory Thornton, Nicholas Dazer, and Kenneth Moto. The court will then address why proffered evidence for the remaining thirteen other suspects is insufficient, and then address what the defense can and cannot discuss in opening and closing arguments as it relates to alternative suspects.

Relevant Law

Defendants have a due process right to present a defense of their choice as long as it conforms with the rules of evidence.³ Defendants can always generally suggest that people other than the defendant committed the crime alleged.⁴ However, “when a defendant wishes to implicate a specific individual, evidence of the third party’s guilt is admissible only if the defense can produce evidence that tends to directly connect such other person with the actual commission of the crime.”⁵ The direct connection must be more than just evidence that an alternative suspect had motive or opportunity to commit the crime.⁶ However, opportunity can be considered along with other evidence that creates a direct connection between the suspect and the commission of a crime.⁷ For example, the *Smithart* court found that alternative suspect evidence should have been admitted when the defendant proffered evidence of opportunity, consciousness of guilt, and supporting forensic evidence.⁸ Additionally, courts may allow evidence of an alternative suspect when that

³ See *Cleveland v. State*, 91 P.3d 965, 974 (Alaska 2004); see also *Smithart*, 988 P.2d at 586.

⁴ *Smithart*, 988 P.2d at 586.

⁵ *Id.*

⁶ *Cleveland*, 91 P.3d at 972; *Smithart*, 988 P.2d at 587.

⁷ *Smithart*, 988 P.2d at 588.

⁸ *Id.* (reversing a trial court’s decision to block other suspect evidence because defendant’s offer of proof showed that the other suspect was at the crime scene, worked in a shop that contained paint chips found at the crime scene, and had lied to police about his whereabouts the day the crime took place).

alternative suspect had the opportunity to commit the crime and a modus operandi that matches the crime in question.⁹

Proffered evidence of another suspect's guilt does not need to prove the other suspect's guilt: "the defense has no responsibility to produce affirmative evidence of an alternative perpetrator's guilt through independent forensic testing or any other means."¹⁰ Instead, evidence only needs to be sufficient to warrant a reasonable inference that the other suspect is the perpetrator, and thus create a reasonable doubt regarding the defendant's guilt.¹¹

In *Smithart*, metal fragments and orange paint chips were found on and near a murder victim.¹² The trial court prevented the defendant from presenting evidence that another party, who was at the scene of the crime, had orange paint in his workshop.¹³ The Supreme Court reversed, finding that "orange paint is relevant because it tends to create a reasonable doubt as to Smithart's guilt."¹⁴

Lastly, while the *Smithart* court emphasized that a defendant has a right to mount a defense, "*Smithart* does not give defendants the right to introduce testimony or physical evidence that fails to qualify for admission under the rules of evidence."¹⁵ In *Cleveland*, the Court of Appeals rejected an argument that hearsay evidence not fitting under a recognized exception, is admissible under *Smithart* if the hearsay evidence is used to show another party may have committed the crime.¹⁶

⁹ *Garner v. State*, 711 P.2d 1191, at 1194 (Alaska App. 1986) (finding, in a child abuse case, that defendant had the right to present other suspect evidence in direct examination that his neighbor committed the child abuse, because his neighbor was alone with the victim the day of the crime (opportunity), and had been reported to have committed similar acts of child abuse against others in the past).

¹⁰ *Smithart*, 988 P.2d at 590.

¹¹ *Id.* at 588.

¹² *Id.* at 590.

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Cleveland*, 91 P.3d at 973. (upholding a trial court's decision to block double hearsay evidence even though that evidence was offered to show an alternative suspect may have actually committed the crime).

¹⁶ *Id.*

In other words, evidence implicating a specific alternative suspect must both comply with the *Smithart* standard and all applicable rules of evidence.

Application of *Smithart* to Each Alternative Suspect

A. Gregory Thornton

Most of Mr. Downs's proffered evidence regarding Gregory Thornton is admissible under *Smithart* because it shows opportunity and establishes a direct connection between Thornton and the commission of the crime; therefore, creating reasonable doubt as to Mr. Downs's guilt. However, Mr. Downs cannot introduce evidence of Thornton's suicidal tendencies as it is not relevant and more prejudicial than probative under Alaska Rule of Evidence 403.¹⁷

Mr. Downs proffers the following evidence implicating Thornton as an alternative suspect. First, Mr. Downs proffers that Melanie Sagoonick identified Thornton from a photo lineup as a person she witnessed leave the women's bathroom in which S.S. was found dead in Bartlett Hall around 1:30 a.m. the day S.S. was found dead.¹⁸ Second, Mr. Downs alleges Thornton was living with a friend, Michael Leake, at Bartlett Hall prior to S.S.'s murder, and subsequently disappeared from UAF's campus shortly after S.S.'s body was discovered.¹⁹ Third, Mr. Downs proffered statements from Michael Leake and Kenneth Elzey who claim Thornton owned a .22 caliber pistol during the time this crime took place—significant because a .22 caliber round was found in S.S.'s head.²⁰ Lastly, Mr. Downs proffers evidence that Thornton was suicidal around the time of S.S.'s murder.²¹

¹⁷ Alaska R. of Evid. 403.

¹⁸ Defendant's Offer of Proof and Motion *In Limine* for a *Smithart* determination of Admissibility of Evidence for Alternative Suspects, at 5, *State of Alaska v. Downs*, 4FA-19-00504CR.

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.*

As established in *Smithart*, the defense must present more than just motive or opportunity to introduce evidence implicating a specific alternative suspect.²² Here, Mr. Downs proffers both opportunity evidence and evidence that directly connects Thornton to the commission of the murder.

Mr. Downs's opportunity evidence is that Thornton was living at Bartlett Hall at the time the crime was committed and had access to the second-floor women's bathroom. Additionally, Thornton was seen leaving the women's bathroom the morning of the murder.²³

While both of these pieces of evidence go to Thornton's opportunity to commit the crime, Mr. Downs also has proffered two pieces of evidence that establish a direct connection between Thornton and the commission of the murder. Melanie Sagoonick's alleged identification of Thornton directly connects Thornton to the crime scene around the time of the murder.²⁴ This is similar to *Smithart*, where the court found a direct connection between an alternate suspect and a murder because evidence shows the alternative suspect was at the location the victim disappeared from right before the murder.²⁵ Additionally, evidence that Thornton owed a .22 caliber firearm also directly connects Thornton to the crime because a .22 caliber bullet was found in the deceased.²⁶ Therefore, a jury could reasonably infer that Thornton could have committed the crime because he lived in the building where the crime took place, owned a firearm similar to the one used in the crime, and was allegedly seen leaving the crime scene around the time of the murder.

²² *Smithart*, 988 P.2d at 587.

²³ Defendant's Offer of Proof and Motion *In Limine* for a *Smithart* determination of Admissibility of Evidence for Alternative Suspects, at 5.

²⁴ *Id.*

²⁵ *See Smithart*, 988 P.2d at 588.

²⁶ *See generally Id.*

Lastly, the fact that Thornton left UAF's campus immediately after the body was found could be considered consciousness of guilt. Consciousness of guilt refers to a powerful and highly incriminating inference that a jury may draw from the statements or conduct of a defendant.²⁷ The inferences made from such statements or conduct tend to suggest the defendant knows he or she is guilty of the charged crime.²⁸ The *Smithhart* court inferred consciousness of guilt when a witness lied to police about his location on the day the crime was committed.²⁹ While Thornton did not explicitly lie to police, a jury could similarly make an inference of guilt by his disappearance from campus immediately after the murder.³⁰ Unlike other alternative suspects in this case, Thornton was not a UAF student who was leaving campus because he had completed finals. Further, more evidence connects Thornton to the crime than other alternative suspects.

However, proffered evidence regarding Thornton's alleged suicidal inclinations prior to S.S.'s murder is more prejudicial than probative and is, thus, excluded under Alaska Rule of Evidence 403. Mr. Downs's proffer does not clearly establish why he believes such evidence is relevant under a *Smithhart* analysis. This evidence does not establish a direct link between Thornton and the commission of the crime, nor does it illustrate consciousness of guilt or opportunity.³¹ Alaska Rule of Evidence 403 allows the court to exclude evidence if its probative value is outweighed by the danger of unfair prejudice.³² While the probative value of Thornton's alleged suicidal inclinations is unclear, the prejudicial effect is clear. Labeling someone as suicidal may create an impression that the person is mentally ill, but it does not establish that the person is more

²⁷ *Jensen v. State*, 667 P.2d 188, 190 (Alaska Ct. App. 1983).

²⁸ *Id.*

²⁹ *See Smithhart*, 988 P.2d 588.

³⁰ *Id.*

³¹ *See Cleveland*, 91 P.3d at 973.

³² Alaska R. of Evid. 403.

likely to commit murder. Therefore, this court excludes evidence related to Thornton's alleged suicidal inclinations.

The court rejects the State's arguments that Mr. Downs's proffer of Thornton does not meet the *Smithart* standard. These arguments can be summed up into three main points: (1) there is no forensic evidence linking Thornton to the crime scene; (2) Sagoonick's identification of Thornton was too tentative; and (3) Thornton's temporary roommate, Michael Leake, said Thornton was not around a "day or two" before the murder.³³ Essentially, the state suggests that the proffered evidence of Thornton cannot be admissible unless the evidence is ironclad and proves Thornton actually committed the murder. The State misstates the *Smithart* burden of proof and the court will address the State's arguments against the proffered Thornton evidence in turn.³⁴

Under *Smithart* "there is no requirement that the proffered evidence must prove or even raise a strong probability that the third party committed the offense. Rather, the evidence need only tend to create a reasonable doubt that the defendant committed the offense."³⁵ In this case, the proffered evidence creates a reasonable doubt of Mr. Downs's guilt because a jury could infer Thornton's guilt from the proffered evidence.

Unlike the State's suggestion, neither *Smithart* nor the related line of cases require forensic evidence to implicate an alternative suspect. The direct link between an alternative suspect and the commission of the crime can include the means used to commit the crime. Examples include owning a weapon that matches the one used in the crime or evidence that places a party at the

³³ Plaintiff's Response to Offer of Proof and Motion *In Limine* for *Smithart* Hearing, , at 11-12, *State of Alaska v. Downs*, 4FA-19-00504CR.

³⁴ See *Smithart*, 988 P.2d at 588.

³⁵ *Id.*

crime scene.³⁶ Further, the *Garner* and *Freeman* courts have allowed alternative suspect evidence even when there was no forensic evidence connecting the suspect to the crime.³⁷

Similarly, the State's argument that Sagoonick's identification was tentative does not bar this court from allowing the evidence. The State admits that Sagoonick did identify Thornton from a photo lineup. The State is free to cross examine Sagoonick and argue the tentativeness of her identification during closing arguments. Likewise, the State argues that Thornton's roommate, Michael Leake, contradicts Sagoonick's testimony because Leake did not think Thornton was around campus a day or two before the murder.³⁸ Ultimately, it is the jury's province to deal with this factual discrepancy, and the State is free to call Leake as a witness to testify on this point.

B. Nicholas Dazer

Mr. Downs's proffered evidence regarding Nicholas Dazer is admissible under *Smithart* because Dazer is a prosecution witness and the proffered evidence establishes a direct link between Dazer and the crime. Evidence that Dazer was fired from his campus security job is irrelevant and too prejudicial and cannot be introduced.

In Alaska, defendants are given "broader latitude to admit other-suspect evidence against witnesses who testify against them at trial."³⁹ In *Smithart*, the court found that the trial court erred by preventing the defendant from presenting evidence that Deforest, a key state witness, could have actually committed the crime; "where the third person is a state's witness with a possible

³⁶ See Generally *Id.*

³⁷ *Garner v. State*, 711 P.2d 1191, at 1194 (Alaska App. 1986); *Freeman v. State*, 202 WL 460222, No. A-7658 (Alaska App. 2001) (*Unpublished*).

³⁸ Plaintiff's Response to Offer of Proof and Motion *In Limine* for *Smithart* Hearing, at 12.

³⁹ *Smithart*, 988 P.2d at 588.

motive to convict the defendant to save himself, the rule admitting otherwise competent evidence of a third person's guilt is especially applicable."⁴⁰

Here, the State has indicated that Dazer will be a witness at trial. Dazer was a roommate of Mr. Downs at the time of the murder and claims that Mr. Downs possessed a specific firearm at the time—a Harrington and Richardson .22 caliber revolver.⁴¹ Mr. Downs however believes Dazer could have committed the murder and proffers the following evidence: (1) if Mr. Downs had a .22 caliber revolver at the time, Dazer would have had access to it; (2) Dazer lived in Bartlett Hall; (3) Dazer worked a campus security shift in and around Bartlett Hall the night of the murder; (4) Dazer guarded the crime scene after S.S. was found dead; and (5) Dazer got fired from his campus security job for lying about owning a gun of his own on campus.⁴²

Since Dazer will be a witness testifying against Mr. Downs, the court must provide "broader latitude to admit other suspect evidence."⁴³ The proffered evidence illustrates that Dazer had both opportunity and access to the firearm allegedly used in the commission of the crime.

While the State believes Mr. Downs used his .22 caliber revolver to kill S.S., Dazer, as Mr. Downs's roommate, presumably also had access to this gun. Under the *Smithart* analysis, Dazer's access to the type of firearm used in the murder of S.S. creates a direct connection between him and the commission of a crime. This is similar to *Smithart*, where the court found a direct connection between an alternative suspect and a murder because, in part, the suspect possessed firearms similar to the firearm used against the victim.⁴⁴

⁴⁰ *Id.* at 588-89 (quoting *State v. Hawkins*, 260 N.W.d 150, 158 (Minn. 1977)).

⁴¹ Defendant's Offer of Proof and Motion *In Limine* for a *Smithart* determination of Admissibility of Evidence for Alternative Suspects, at 11.

⁴² *Id.*

⁴³ *Smithart*, 988 P.2d at 588.

⁴⁴ *See Id.* at 587.

Further, Mr. Downs's proffered evidence shows Dazer also had the opportunity to commit the crime. Like Mr. Downs, Dazer lived in Bartlett Hall. Further, Dazer was working security the night of the murder. The State points out that Dazer was not assigned to Bartlett Hall the night of the murder. However, Katherine deSchweinitz Lee, who was a witness at the grand jury testified that Dazer stopped by the hall that night.⁴⁵ Further, even without Lee's testimony, since Dazer lived in Bartlett Hall, the jury could draw a reasonable inference that Dazer could have stopped by Bartlett Hall during his shift and therefore had an opportunity to commit the crime.

While Mr. Downs can introduce evidence of Dazer's connection to Mr. Downs, access to the alleged .22 caliber revolver, and access to Bartlett Hall, Mr. Downs cannot offer evidence that Dazer was fired from his campus security job for possessing a Smith & Wesson .40 caliber pistol on campus.⁴⁶ This evidence does not directly connect Dazer to the murder of S.S..⁴⁷ There is no evidence that a Smith & Wesson .40 caliber pistol was used in the crime. As stated above, the *Smithart* court found evidence of gun ownership created a direct connection to the crime only because the gun in question was the same type used in the crime.⁴⁸ Since a Smith & Wesson .40 caliber pistol was not used in the crime, evidence related to Dazer owning a Smith & Wesson .40 caliber pistol and being fired for possessing the gun on campus is irrelevant and does not directly connect Dazer to the crime. Even if evidence that Dazer lied about owning a gun becomes relevant and is otherwise admissible, it still may not be introduced until Alaska Rule of Evidence 608(c) has been complied with.⁴⁹

⁴⁵ Defendant's Offer of Proof and Motion *In Limine* for *Smithart* Hearing to Determine Admissibility of Evidence of Alternative Suspects, at 11.

⁴⁶ Plaintiff's Response to Offer of Proof and Motion *In Limine* for *Smithart* Hearing, at 16.

⁴⁷ See *Smithart*, 988 P.2d at 588.

⁴⁸ *Id.* at 587.

⁴⁹ See Alaska Rule of Evid. 608(c).

C. Kenneth Moto

Mr. Downs's proffers for Kenneth Moto regard his alleged confession to his sister, Karen Moto, and a witness's alleged identification of Kenneth leaving the crime scene. All other evidence proffered for Kenneth is insignificant and is either too speculative or is only relevant if Mr. Downs can admit the confession or identification. This court will address the proffered evidence below.

1. Kenneth's Alleged Confession

Mr. Downs proffered evidence that Kenneth Moto told his sister, Karen Moto, that he and another individual killed S.S.. In 2009, Karen Moto met with the Alaska State Troopers (AST) and told them about her brother's alleged confession.⁵⁰ Karen had two interviews with AST, both of which were recorded.⁵¹ However, since those interviews, Karen has died and therefore cannot testify to her brother's alleged confession. Alternatively, Mr. Downs wants to enter the recorded interviews of Karen into evidence. While the alleged confession does create a direct connection between Kenneth and the murder of S.S., Alaska's rules prohibiting hearsay evidence bar the admission of the recording of Karen's interviews with AST.⁵² However, Mr. Downs may attempt to illicit similar evidence by calling Kenneth Moto to the stand.

As established earlier in this order, "*Smithart* does not give defendants the right to introduce testimony or physical evidence that fails to qualify for admission under the rules of evidence."⁵³ Likewise, hearsay evidence that establishes a direct connection between an

⁵⁰ Plaintiff's Response to Offer of Proof and Motion *In Limine* for *Smithart* Hearing, at 8.

⁵¹ *Id.*

⁵² Compare with *Smithart*, 988 P.2d at 587; see also, *Cleveland*, 91 P.3d at 973.

⁵³ *Cleveland*, 91 P.3d at 973. (upholding a trial court's decision to block double hearsay evidence even though that evidence was offered to show an alternative suspect may have actually committed the crime).

alternative suspect and the commission of a crime can only be admitted if such hearsay evidence qualifies under a codified hearsay exception.⁵⁴

The recordings of Karen Moto's interviews with AST are double hearsay because they are recordings of Karen's statements regarding Kenneth's alleged statements to her. The recordings are not recordings of Kenneth's confession to the murder. Nonetheless, Mr. Downs argues the recordings of Karen Moto's interviews with AST are admissible under Alaska Rule of Evidence 803(23). The court disagrees.

Rule 803(23) allows hearsay evidence "not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness" to be admitted if the court determines the statement is offered: (1) as evidence of a material fact; (2) as more probative of the fact it is offered for than any other evidence that can be produced with reasonable effort; and (3) to serve the general purpose of rule 803 and the interest of justice.⁵⁵

Here, the recordings are evidence of a material fact regarding who killed S.S.. It is unclear if the recordings are more probative than other evidence that the defense could procure through reasonable efforts. While Karen Moto is dead and therefore unavailable as a witness, Kenneth Moto is still alive and is serving a sentence for an unrelated crime. Mr. Downs can call Kenneth to the stand and question him regarding his relationship with S.S., his activities the night of the murder, and whether he told Karen that he killed S.S.. This actual testimony from Kenneth may be more probative as to whether he killed S.S. than the double hearsay of his departed sister claiming that Kenneth confessed to the murder. The court acknowledges that it is doubtful that Kenneth would admit to killing S.S. at trial. Indeed, if Kenneth declined to testify, asserting his

⁵⁴ *Id.*

⁵⁵ Alaska R. of Evid. 803(23).

right not to incriminate himself, then the recordings would be more probative than any other evidence that Mr. Downs could produce. Thus, the real issue is whether Karen Moto's statements (i.e., the recordings) have circumstantial guarantees of trustworthiness. As the proponent of the double hearsay evidence, Mr. Downs bears this burden.⁵⁶

There are legitimate concerns regarding the credibility of Karen's statements. She stated that Kenneth and another unknown individual were stabbed during the altercation, and the crime occurred in the fall.⁵⁷ There is no evidence that Kenneth or any alleged accomplice were stabbed. No signs of blood from Kenneth or the alleged accomplice were found at the scene. Additionally, the murder occurred in April, not in the fall. Therefore, Karen's statements lack equivalent "circumstantial guarantees of trustworthiness" that would make her statements admissible under Alaska Rule of Evidence 803(23).⁵⁸

Whether or not Kenneth testifies at trial, Mr. Downs cannot introduce evidence of Kenneth's current conviction or his alleged history of violence against women. Introducing evidence of Kenneth's current conviction is more prejudicial than probative because the conviction is unrelated to the crime in question in this case.⁵⁹ It is the court's understanding that Kenneth is serving a sentence because he accidentally killed a man in a bar fight.⁶⁰ Additionally, while evidence of Kenneth's history of violence against women might be probative, Mr. Downs has proffered no verified source or evidence supporting the theory that Kenneth has such a history.⁶¹

⁵⁶ See *Id.*

⁵⁷ Karen Moto's Interview with Alaska State Troopers, *State of Alaska v. Downs*, 4FA-19-00504CR.

⁵⁸ Alaska R. of Evid. 803(23).

⁵⁹ Alaska R. of Evid. 403.

⁶⁰ Plaintiff's Response to Offer of Proof and Motion *In Limine* for *Smithart* Hearing, at 11.

⁶¹ Defendant's Offer of Proof and Motion *In Limine* for a *Smithart* determination of Admissibility of Evidence for Alternative Suspects.

It appears that Mr. Downs bases this claim on statements Karen made during her interviews with AST. As stated above, the statements of Karen are inadmissible.

2. Alleged Eye Witness Testimony

Additionally, Mr. Downs proffers that a witness identified Kenneth Moto leaving the second-floor women's bathroom of Bartlett Hall the morning of the murder. Mr. Downs does not state the witness's identity.⁶² The State, in their response, alleges that the witness, who they believe is Melanie Sagoonick, did not directly identify Kenneth leaving the bathroom, but instead identified an unknown man wearing a gray shirt, and that Kenneth Moto was wearing a similar gray shirt when he was interviewed by the police two days later.⁶³ If this is true then there appears to be no admissible evidence that Kenneth Moto was seen leaving the bathroom.

If Mr. Downs has a witness who can positively identify Kenneth Moto as the person they saw leaving the second-floor women's bathroom at Bartlett Hall the morning of the murder, then Mr. Downs can introduce this evidence at trial. Such evidence would create a direct link between Kenneth and the murder because it places Kenneth leaving the scene of the crime around the time the crime was believed to occur.⁶⁴

However, if Mr. Downs can only produce a witness who identified a man in a gray shirt, this would be too speculative. The fact that Kenneth, two days later, wore the same color shirt as an unknown suspect does not create a direct link between Kenneth and the commission of the crime. Owning a gray shirt is ubiquitous and is not a special characteristic that could narrow the list of suspects to only a few people. Therefore, any evidence related to Kenneth wearing a gray

⁶² *Id.* at 3.

⁶³ Plaintiff's Response to Offer of Proof and Motion *In Limine* for *Smithart* Hearing, at 8; Defendant's Offer of Proof and Motion *In Limine* for *Smithart* Hearing to Determine Admissibility of Evidence of Alternative Suspects, at 3.

⁶⁴ *See Smithart*, 988 P.2d at 588.

shirt is inadmissible unless Mr. Downs can produce a witness that can positively identify Kenneth leaving the bathroom on the second floor of Bartlett Hall, and at the time was dressed in a gray shirt.

D. Thaddeus Williams

Mr. Downs proffers five pieces of evidence to suggest Williams is an alternative suspect. The proffered evidence all relates to Williams's alleged affection for S.S.. Williams sent S.S.'s family a poem after her death, left S.S. a gift (a box a salmon) the night of the murder, allegedly had a "shrine" of pictures of S.S. in his dorm room, and was spotted at the crime scene approximately six months after S.S.'s murder.⁶⁵

This proffered evidence does not meet the *Smithart* standard since it does not establish a direct connection between Williams and the commission of the crime. Mr. Downs proffered no forensic evidence connecting Williams to the crime and there is no evidence that Williams possessed a potential murder weapon.⁶⁶ Further, there is no evidence that Williams was at the crime scene around the time of the murder.⁶⁷ Further, evidence that Williams went by S.S.'s room early in the evening on the day before her murder to drop off a gift would merely be considered opportunity evidence. As stated by the *Smithart* court, "opportunity alone is an insufficient basis on which to admit alternative-perpetrator evidence."⁶⁸

⁶⁵ Defendant's Offer of Proof and Motion *In Limine* for a *Smithart* determination of Admissibility of Evidence for Alternative Suspects, at 6-9.

⁶⁶ The court notes that Williams did tell AST that he owned a gun and the gun was located in Soldotna. It is unclear what type of gun this was. However, owning a gun is not enough to create a direct connection between a person and the commission of the crime. Further, the type of gun is unknown and the gun was not at UAF or Fairbanks.

⁶⁷ Plaintiff's Response to Offer of Proof and Motion *In Limine* for *Smithart* Hearing, at 14.

⁶⁸ *Id.* at 588 (citing favorably *Nelson v. U.S.*, 649 A.2d 301, 305 (D.C. App. 1994)).

Although motive evidence is not enough under a *Smithart* analysis, the remainder of the proffered evidence fails to establish Williams's motive for killing S.S..⁶⁹ Further, it is unclear why evidence of someone's affection for another illustrates motive for murder. Mr. Downs presents no additional evidence suggesting Williams has a history of hurting women or that Williams was hostile toward S.S. Therefore, all proffered evidence regarding Williams is denied and Mr. Downs is not permitted to introduce alternative suspect evidence regarding Williams.

E. Robert Rago and "Travis"

Next, Mr. Downs proffers evidence that four students in Nerland Hall saw Robert and an unknown man drive up outside the building at around 1:30am the night of S.S.'s death.⁷⁰ The students heard snippets of a conversation where the unidentified man was called "Travis." During Robert and "Travis's" conversation, the students heard statements like, "I can't believe you did that to her", and "you can't go home like that...let me clean you up."⁷¹

Mr. Downs has not identified the names of these student witnesses, nor indicated whether he could have them testify in court.⁷² Regardless, the evidence does not satisfy the *Smithart* standard and therefore is inadmissible.

The evidence proffered does not connect Robert or "Travis" to Bartlett Hall. Further, there is no indication of forensic evidence or weapons used by Robert and "Travis" or even that they harmed anyone. This witness testimony would be too speculative without more corroborating evidence. This is not even as strong as the insufficient proffer in *Brown*, where a murder defendant attempted to present alternative suspect evidence that an inmate committed the murder because the

⁶⁹ *Id.* at 587; *Cleveland*, 91 P.3d at 973.

⁷⁰ Defendant's Offer of Proof and Motion *In Limine* for a *Smithart* determination of Admissibility of Evidence for Alternative Suspects, at 9.

⁷¹ *Id.* at 10.

⁷² *Id.* at 9.

inmate bragged he put a “hit” out on a victim.⁷³ The court found this was too speculative and therefore inadmissible because there was no evidence the inmate actually planned or carried out the “hit.”⁷⁴ Similarly, witness statements regarding snippets of a conversation fail to directly tie Robert and “Travis” to the actual death of S.S.. Nothing in these purported statements even suggest Robert and “Travis” were referring to S.S. or to an act of violence. Therefore, this proffered evidence is deemed inadmissible and Mr. Downs cannot present alternative suspect evidence as it relates to Robert and “Travis.”

F. William “Billy” Wilson

Mr. Downs’s proffered evidence regarding Wilson is, at best, motive and opportunity evidence that is too speculative and therefore inadmissible under *Smithart*. Wilson was apparently seen showing off a knife around 3:00 a.m. the night of the murder.⁷⁵ A witness said Wilson was “weirded out” and sweating that night.⁷⁶ Wilson also admitted to police officers that he was drunk the night of the murder and went to the second floor of Bartlett Hall looking for a party.⁷⁷ Other evidence suggests he banged on someone’s dorm room looking for a blanket.⁷⁸ Lastly, at some point while he attended UAF Wilson owned a gun and apparently had a friend hide it for him.⁷⁹

Most of this evidence is very speculative and none of it connects Wilson to the commission of the murder. As previously stated in this order, simply owning a gun or weapon is not sufficient under *Smithart*.⁸⁰ Mr. Downs presents no evidence that would directly tie the knife or gun owned

⁷³ *Brown v. State*, 2001 WL 322199, Nos. A-7219, 4369, at 9 (Alaska App. 2001) (*Unpublished*).

⁷⁴ *Id.*

⁷⁵ Defendant’s Offer of Proof and Motion *In Limine* for a *Smithart* determination of Admissibility of Evidence for Alternative Suspects, at 11.

⁷⁶ *Id.*

⁷⁷ *Id.* at 12.

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *Smithart*, 988 P.2d 588.

by Wilson to the injuries sustained by S.S.. Further, Wilson hiding his gun is not, by itself, evidence of consciousness of guilt. In 1993, UAF prohibited students from having guns on campus or in their dorm rooms. Therefore, Wilson asking a friend to hide his gun is only indicative of him violating UAF's rule. Without evidence connecting Wilson to the murder, hiding the gun is not indicative that he committed murder.

Similarly, Wilson leaving campus is also not inherently indicative of his guilt. The murder occurred on April 23, 1993, the weekend preceding the start of finals. Many students had plans to leave campus even before a horrific murder occurred on campus.⁸¹ Without more evidence that connects Wilson to the crime, the fact he left campus when the semester ended is not indicative of his guilt.

The rest of the evidence proffered is either irrelevant or purely goes to Wilson's opportunity or motive. Since the proffered evidence does not directly connect Wilson to the commission of the murder, the proffered evidence is not admissible.

G. Serge Suleimani

Mr. Downs's proffered evidence regarding Serge Suleimani also does not meet the *Smithart* evidentiary standard. Mr. Downs alleges that Serge was spotted near Bartlett Hall the night of the murder, has no alibi during the approximate time of the murder, and was accused of raping a girl on campus the same year S.S. was murdered.⁸²

This evidence is merely speculative and does not connect Serge to the commission of the crime. While Serge was near Bartlett Hall, as were scores or hundreds of other people, Mr. Downs has not proffered evidence that places Serge inside Bartlett Hall. Further, it is not clear how Mr.

⁸¹ See Plaintiff's Response to Offer of Proof and Motion *In Limine* for *Smithart* Hearing, at 18.

⁸² Defendant's Offer of Proof and Motion *In Limine* for a *Smithart* determination of Admissibility of Evidence for Alternative Suspects, at 12.

Downs is using the word “near.” Was Serge seen outside the door of Bartlett Hall or was he seen a block away? Serge’s precise location matters to establish a direct connection between him and the commission of the crime.⁸³ Even if evidence did place Serge on the second floor of Bartlett Hall, opportunity evidence is not enough to admit alternative suspect evidence.⁸⁴

Regardless, Mr. Downs argues that Serge’s past rape allegation is enough to make him an alternative suspect in this case. It appears that Mr. Downs is attempting to make a *Garner* argument.⁸⁵ The *Garner* court held that alternative suspect evidence can sometimes be admissible when the defendant proffers both opportunity and modus operandi evidence.⁸⁶ The *Garner* court allowed alternative suspect evidence for a child abuse case where only the defendant and alternative suspect had opportunity the day of the crime.⁸⁷ Additionally, in *Garner*, the alternative suspect had a confirmed history of abusing her own child.⁸⁸ Further, the alternative suspect’s past victim’s had similar injuries to the victim in *Garner*.⁸⁹

Mr. Downs has not proffered enough evidence to meet the *Garner* standard. While he suggests Serge has committed rape in the past, he provided no evidence that Serge was ever convicted or that the allegation of rape was credible. Further, he presented no evidence showing Serge could have committed the sexual assault on S.S. based on an alleged modus operandi. For these reasons, Mr. Downs’s proffered evidence does not meet the *Smithart*⁹⁰ or *Garner*⁹¹ standards and, therefore, is inadmissible.

⁸³ See *Smithart*, 988 P.2d at 588.

⁸⁴ *Id.*

⁸⁵ See *Garner*, 711 P.2d at 1194.

⁸⁶ See generally *Id.*

⁸⁷ *Id.* at 1193.

⁸⁸ *Id.*

⁸⁹ *Id.* at 1194.

⁹⁰ 988 P.2d 583.

⁹¹ 711 P.2d 1191.

H. Other Suspects and Persons of Interest

Lastly, Mr. Downs lists Matthew Cameron, Chad Baxter, Jesse Laraux, Aldo Bravo, Eric McKeon, Terrance Thompson, Anthony Evans, and Steve Delo as alternative suspects. Mr. Downs's proffered evidence for these individuals is very speculative and weak. Much of Mr. Downs's proffer on these people focus on their purported bad reputations or unrelated criminal histories.⁹² Mr. Downs also does not directly connect any of these people to Bartlett Hall, S.S., forensic evidence, or anything else related to the commission of S.S.'s murder.⁹³ Instead, Mr. Downs primarily proffers impermissible character evidence for these individuals.⁹⁴ Therefore, at trial, Mr. Downs cannot introduce any alternative suspect evidence for these eight individuals.

Opening and Closing Statements

Mr. Downs can introduce evidence implicating Thornton, Dazer, and Moto consistent with this order. Mr. Downs can further use closing statements to expand on the evidence introduced and make arguments regarding the guilt of these alternative suspects. However, any reasonable inferences regarding the guilt of these suspects can only be introduced in Mr. Downs's opening statement if it is clear that the sufficient evidence will be introduced to support such an inference.⁹⁵ To date, it is not clear what admissible evidence Mr. Downs possesses. Thus, before mentioning these alternative suspects in his opening statement, Mr. Downs must proffer outside the presence of the jury what admissible evidence he will be presenting at trial—e.g., who his witnesses are and what they will say.

⁹² Defendant's Offer of Proof and Motion *In Limine* for a *Smithart* determination of Admissibility of Evidence for Alternative Suspects, at 13.

⁹³ *Id.*

⁹⁴ See Alaska Rule of Evid. 404.

⁹⁵ See *Smithart*, 988 P.2d at 589.

Under *Smithart*, nothing “limits an attorney from using opening and closing statements to draw reasonable inferences about a third-party’s involvement.”⁹⁶ However, evidence must be admitted before an attorney can argue reasonable inferences.⁹⁷ For example, the trial court in *Brown* found that defendant should have been allowed to argue, in closing statements, that two other people could have committed a murder.⁹⁸ While the court properly denied the proffered alternative suspect evidence, other admitted evidence demonstrated that both these people were seen with the victim at a bar prior to the victim’s disappearance and subsequent murder.⁹⁹ Therefore, the defense was entitled to make an inference in closing argument that these people could have committed the murder.¹⁰⁰

In this case, once Mr. Downs’s has presented admissible alternative suspect evidence to the jury, he can use closing arguments to make reasonable inferences regarding the potential guilt of Thornton, Dazer, and Moto. Additionally, while this court DENIES the proffered alternative suspect evidence for the other thirteen suspects, Mr. Downs can still make inferences regarding these people in closing arguments as long as the inference is reasonable based on the evidence admitted.¹⁰¹ However, to reiterate, Mr. Downs cannot introduce evidence of the other proffered alternative suspects that have not been deemed to have satisfied the *Smithart* standard.

Alternatively, reasonable inferences can be announced in opening statement if it is “clear that sufficient evidence would be introduced” that would “warrant a reasonable inference that [an

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ *Brown v. State*, 2001 WL 322199, Nos. A-7219, 4369, at 10 (Alaska App. 2001) (*Unpublished*) (finding that even though alternative suspect evidence under *Smithart* was properly not admitted, the defense was still entitled to make reasonable inferences that someone else committed the crime based on the evidence that was introduced).

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ *See Smithart*, 988 P.2d at 589.

alternative suspect] might be the perpetrator.”¹⁰² At present, it is unclear what admissible evidence Mr. Downs will have available for the approved alternative suspects.

Mr. Downs’s opening statement should not include evidence or inferences based on evidence that will not be admitted. For example, the recordings of Karen Moto’s statements implicating Kenneth Moto cannot be admitted. Therefore, Mr. Downs cannot refer to this alleged confession in his opening statement. However, if Mr. Downs finds a way to properly admit the alleged confession, for instance, through Kenneth Moto’s testimony at trial, then Mr. Downs can refer to the confession and make reasonable inferences in his closing statement.

Mr. Downs can make reasonable inferences during his opening statement on any proffered evidence that this court has deemed admissible, so long as it will actually be admitted. For example, this could include inferences from the testimony from Ms. Sagoonick, regarding her alleged identification of Thornton on a photo lineup. Mr. Downs is free to ask for a preemptive admissibility ruling on any evidence he has available and wishes to mention in his opening statement.

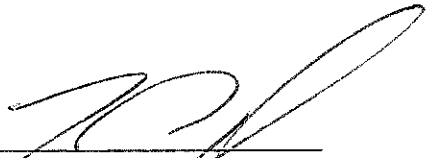
Conclusion

Consistent with this order, Mr. Downs can introduce alternative suspect evidence as it relates to Gregory Thornton, Nicholas Dazer, and Kenneth Moto if the evidence is admissible. However, Mr. Down’s cannot introduce the recordings of Karen Moto’s statements because he has failed to establish that those statements are admissible under Alaska’s Rules of Evidence. Evidence showing Kenneth Moto leaving the bathroom can also be introduced only if the eyewitness can produce a positive identification. Mr. Downs cannot admit any alternative suspect

¹⁰² *Id.* (quoting the court of appeals who found that the defendant was entitled to make inferences in his opening argument).

evidence implicating the remaining thirteen people that Mr. Downs has identified. Therefore, this court GRANTS IN PART Mr. Downs's Motion to Introduce Evidence of Alternative Suspects.

Dated at Fairbanks, Alaska this 13th day of December, 2021.



Thomas I. Temple
Superior Court Judge

I certify that on 12/14/21 copies of this
form were sent to: OSPA
CLERK: JP F. Spaulding
J. Howaniec
J. Archer