

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

April 1, 1998

Marilyn L. Graves  
Clerk, Court of Appeals  
of Wisconsin

**NOTICE**

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

**No. 96-3575-CR**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT II**

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**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**v.**

**ANTHONY WALKER,**

**DEFENDANT-APPELLANT.**

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APPEAL from a judgment of the circuit court for Racine County:  
EMMANUEL VUVUNAS, Judge. *Affirmed.*

Before Snyder, P.J., Nettesheim and Anderson, JJ.

PER CURIAM. Anthony Walker appeals from a judgment convicting him of four counts of party to the crime of armed robbery while concealing identity contrary to § § 943.32(2), 939.05 and 939.641, STATS. On appeal, he challenges evidentiary rulings and the sufficiency of the evidence. We affirm the conviction.

Walker and Robert Willis were charged and tried together for the armed robbery of four men in a tavern managed by Rocco DeMark. DeMark was the only victim who could identify Walker as one of the robbers.

During pretrial proceedings, Walker moved the court to require DeMark to disclose his treatment records relating to substance abuse and/or addiction on the grounds that the records were relevant to DeMark's credibility. The court denied the motion because the relevancy of evidence of DeMark's drug use was questionable. Walker later filed motions in limine seeking the same records. The trial court delayed the trial and gave the defense an opportunity to present witnesses, including a drug expert, to determine whether evidence of DeMark's drug use was relevant.

At the conclusion of the relevancy hearing, the trial court excluded Walker's lay expert, Joseph Vigneri, a drug counselor, because the testimony he would offer would tend to confuse the jury and impermissibly comment on the credibility of another witness. The trial court also limited cross-examination of DeMark regarding drug use to February 26, 1994, the day of the robbery, and excluded evidence about DeMark's possible drug use on March 9, several days after the robbery.<sup>1</sup>

On appeal, Walker contends that the trial court failed to exercise its discretion when it limited evidence of DeMark's drug use to the time of the robbery and precluded other evidence of his alleged cocaine dependency. Evidentiary rulings are within the trial court's discretion. *See State v. Lindh*, 161

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<sup>1</sup> On March 9, 1994, DeMark's brother and sister-in-law, Sharon and Thomas Burman, informed police that they suspected DeMark had burglarized the tavern on March 8 in order to support a severe cocaine addiction.

Wis.2d 324, 348, 468 N.W.2d 168, 176 (1991). Whether evidence is relevant is also discretionary with the trial court. *See State v. Oberlander*, 149 Wis.2d 132, 140, 438 N.W.2d 580, 583 (1989). The question is whether the proffered evidence would shed any light on the subject of the inquiry. *See Rogers v. State*, 93 Wis.2d 682, 688, 287 N.W.2d 774, 776 (1980). The term “discretion” contemplates a process of reasoning which depends on facts that are of record or reasonably derived by inference from the record and a conclusion based on a logical rationale founded on proper legal standards. *See Christensen v. Economy Fire & Cas. Co.*, 77 Wis.2d 50, 55-56, 252 N.W.2d 81, 84 (1977).

We disagree with Walker’s contention that the trial court did not exercise its discretion in excluding evidence of DeMark’s drug use. It is clear from this record that the trial court did so. The court reviewed the evidence at the hearing, applied the appropriate legal standard and articulated a reasonable basis for limiting the drug use evidence.

Walker seems to argue that he had a blanket right to present evidence of DeMark’s drug use to challenge his credibility without having to establish the relevance of such evidence to issues at trial. We reject this assertion. An inquiry regarding drug or alcohol use is always grounded in considerations of relevancy and materiality. *See Chapin v. State*, 78 Wis.2d 346, 355, 254 N.W.2d 286, 291 (1977). Where evidence of intoxication, and by extension drug use, is not connected to the time of the incident, it does not bear on the witness’s credibility. *See id.* at 354, 254 N.W.2d at 290. Evidence of impairment “may be relevant as affecting the credibility of a witness when it shows that his mental disorganization in some way impaired his capacity to observe the event at the time of its occurrence, to communicate his observation accurately and truthfully at trial, or to maintain a clear recollection of it in the meantime.” *Id.* at 355-56, 254 N.W.2d at 291.

The court found that the drug counselor's proffered testimony focused on the effect of drugs for seventy-two hours after ingestion. However, DeMark denied using cocaine within seventy-two hours of the robbery and his sister did not testify that he used cocaine during that period. Therefore, nothing established that DeMark actually used cocaine within seventy-two hours of the robbery and the drug counselor's testimony would not have assisted the jury. Accordingly, the trial court limited trial questioning of DeMark to whether he used drugs on the day of the robbery. We conclude that the court properly exercised its discretion in excluding evidence of drug use outside of the time period immediately surrounding the robbery.

Although the trial court restricted evidence of DeMark's drug use, the record is nevertheless laced with such evidence and the jury was able to consider it. For example, DeMark admitted that he used cocaine and had purchased cocaine from the defendants. Other evidence placed DeMark at a drug house one week before the robbery and DeMark appeared to be under the influence of drugs at that time. In sum, notwithstanding the trial court's ruling in limine, the jury learned about DeMark's drug use other than in proximity to the robbery.

Walker argues for the first time on appeal that evidence of DeMark's drug use would have been admissible to demonstrate that he had a motive to falsely identify the defendants. *See* § 940.04(2), STATS. The jury heard evidence that DeMark used drugs and purchased cocaine from the defendants. The jury was free to draw reasonable inferences from this evidence. It is obvious that the jury did not draw the inference preferred by Walker regarding DeMark's motive in accusing him of the robbery.

Walker also briefly contends that the exclusion of his expert witness denied him his right of confrontation. This argument was not made in the circuit court; therefore, it is waived. *See Vollmer v. Luety*, 156 Wis.2d 1, 10, 456 N.W.2d 797, 802 (1990). Notwithstanding this waiver, we note that a defendant does not have a constitutional right to present irrelevant evidence. *See State v. Robinson*, 146 Wis.2d 315, 332, 431 N.W.2d 165, 171 (1988). We have already upheld the trial court's relevancy determination regarding this evidence.

Walker next challenges the trial court's admission of testimony from the State's expert on footwear identification. Walker's codefendant, Willis, moved the court in limine to exclude evidence relating to a footprint impression taken from the top of the bar after the robbery. The State crime lab witness opined that Willis's boot could have made the impression taken from the tavern's bar. Willis argued that the evidence was too speculative and that even if relevant, its prejudicial effect outweighed its probative value. The trial court ruled that Willis's objection traveled to the weight of the evidence, not to its admissibility.

The State contends that Walker waived this issue on appeal because he did not join Willis in objecting to the footprint evidence. We conclude that waiver does not apply here. The purpose of the waiver rule is to preclude appellate review of issues which were not raised in the circuit court. *See Vollmer*, 156 Wis.2d at 10-11, 456 N.W.2d at 802. Here, we have an evidentiary ruling to review. Additionally, the State used this evidence against Walker, particularly when the State argued that the defendants admitted being together on the night of the robbery and could have committed the robbery together. We turn to the merits of the issue.

We conclude that the footprint evidence was relevant because it shed light on an issue at trial: identification of the robbers. See *Rogers*, 93 Wis.2d at 688, 287 N.W.2d at 776. DeMark testified that one of the robbers stood on the bar and left a footprint which was analyzed by the State crime lab. The crime lab witness testified that the boots worn by Willis the night of the robbery could have made the impression left on the bar.<sup>2</sup> The evidence could have assisted the jury in assessing whether Willis and Walker committed the robbery. The trial court properly exercised its discretion in admitting this evidence.

Walker challenges the sufficiency of the evidence that he was one of the robbers. Our review of the sufficiency of the evidence is to determine whether the evidence, viewed most favorably to the State and the conviction, is so insufficient in probative value and force that it can be said as a matter of law that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt. See *State v. Ray*, 166 Wis.2d 855, 861, 481 N.W.2d 288, 290-91 (Ct. App. 1992). An appellate court need only decide whether the theory of guilt accepted by the trier of fact is supported by sufficient evidence. See *State v. Poellinger*, 153 Wis.2d 493, 508, 451 N.W.2d 752, 758 (1990). We must accept the reasonable inferences drawn from the evidence by the jury. See *id.* at 507, 451 N.W.2d at 757. If more than one reasonable inference can be drawn from the evidence, the reviewing court must adopt the inference which supports the conviction. See *State v. Hamilton*, 120 Wis.2d 532, 541, 356 N.W.2d 169, 173-74 (1984).

Walker contends that only DeMark was able to identify the defendants and that his testimony was insufficient to establish beyond a reasonable doubt that

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<sup>2</sup> Willis and Walker were apprehended the night of the robbery.

Walker was one of the robbers. We disagree. DeMark testified that when one of the robbers, Walker, demanded access to the cash register, DeMark recognized his voice, his eyes and the shape of his face because he knew Walker from the neighborhood. DeMark also recognized Willis from the neighborhood. DeMark identified the robbers from photographs the day after the robbery and at trial. DeMark also admitted that he purchased cocaine from Willis and Walker. DeMark's level of familiarity with the defendants enhanced his ability to determine whether they were the robbers. DeMark's testimony, if believed by the jury, was sufficient to convict Walker.

Finally, in his reply brief, Walker moves the court for a new trial. We reject this request for two reasons. First, it is raised for the first time in the reply brief. See *State v. Grade*, 165 Wis.2d 143, 151 n.2, 477 N.W.2d 315, 318 (Ct. App. 1991). Second, because we have rejected Walker's individual claims for relief, a final catch-all plea for discretionary reversal based on the cumulative effect of non-errors cannot succeed. See *State v. Marhal*, 172 Wis.2d 491, 507, 493 N.W.2d 758, 766 (Ct. App. 1992).

*By the Court.*—Judgment affirmed.

This opinion will not be published. See RULE 809.23(1)(b)5, STATS.

