COURT OF APPEALS
DECISION
DATED AND RELEASED

June 26, 1997

NOTICE

No. 96-1753-CR

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT IV

STATE OF WISCONSIN,

PLAINTIFF-APPELLANT,

v.

TYSON D. KIDD,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Grant County: JOHN R. WAGNER, Judge. *Affirmed.*

Before Eich, C.J., Roggensack and Deininger, JJ.

PER CURIAM. The State appeals from an order dismissing three counts of a criminal complaint against Tyson Kidd. The issue is whether the State presented sufficient evidence at the preliminary hearing to establish probable cause that Kidd committed the crimes charged in those counts. We conclude that the trial court properly found no probable cause, and we therefore affirm.

The State charged Kidd with three counts each of burglary, robbery and criminal damage to property in connection with break-ins at the Tenosi Mini-Mart in Tennyson, Wisconsin on March 20, 1994, at the Oky-Doky Gas Station in Dickeyville, Wisconsin on July 16, 1994, and the IOCO Speede Shoppe in Tennyson on September 14, 1994. The evidence against Kidd on the latter two break-ins included identification testimony and a detailed description of the crimes, from his alleged accomplice, which undisputedly established probable cause. However, the evidence against Kidd for the Tenosi Mini-Mart burglary was substantially weaker, consisting primarily of an inference from its similarity to the other two crimes, including a pried-open door, cut telephone lines and a safe removed from the store. The State also relied on the proximity in time and place. Additionally, the alleged accomplice testified that when he proposed burglarizing the Tenosi Mini-Mart in June 1994, Kidd knew it had already been burglarized. The trial court concluded that this evidence did not constitute probable cause as to the Tenosi break-in, resulting in this appeal.

The evidence at a preliminary hearing must establish that the defendant probably committed a felony. ***State v. Dunn***, 121 Wis.2d 389, 397-98, 359 N.W.2d 151, 155 (1984). That test is satisfied when the evidence presents a believable or plausible account of the defendant's commission of the felony. ***Id***. Here, the State failed to present a believable or plausible account of Kidds' involvement in the Tenosi Mini-Mart break-in. The evidence does not rise above speculation that he may have committed it, based on a limited number of not uncommon similarities to other crimes in which his participation is more certain. We also conclude that a crime occurring four months and six months, respectively, from the other charged crimes, does not create any particular inference based on proximity in time. As for Kidd's knowledge of the Tenosi break-in, any number

of inferences are available which could explain how he learned of it. The inference that he could know of it only because he committed it is no more compelling than many other explanations, all consistent with his innocence. On review of a probable cause determination, we review the evidence *de novo*. ***State v. Gerald L.C.***, 194 Wis.2d 548, 564, 535 N.W.2d 777, 782 (Ct. App. 1995). We affirm because we agree with the trial court on the insufficiency of the State's evidence.

By the Court.—Order affirmed.

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