

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

December 19, 1996

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.

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 96-2083-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

JAMES P. MAJURY,

Defendant-Appellant.

APPEAL from a judgment of the circuit court for Dane County: Michael Nowakowski, Judge. *Affirmed.*

ROGGENSACK, J. James P. Majury appeals his misdemeanor conviction for criminal trespass to a dwelling. Majury claims that the trial court erred by admitting several irrelevant exhibits and the opinion testimony of a prosecution witness, and by finding that the offense occurred on the date alleged. However, Majury waived any objections he may have had regarding the admissibility of evidence by not raising them at the trial court level, and the

court's finding as to the date of the offense was not clearly erroneous. Accordingly, the judgment of the trial court is affirmed.¹

BACKGROUND

Majury was charged with criminal trespass to a dwelling for breaking into a woman's apartment under circumstances tending to create a breach of the peace. The complaint alleged that the incident occurred on October 14, 1994. The victim testified that she thought the incident occurred on a Saturday, because she had been watching cartoons that morning, but that it could have been on Sunday. The State introduced photographs of the French doors through which the victim claimed Majury had entered. The photographs showed the types of locks on the doors, but indicated no damage. A neighbor, Eric Reinicke, testified that the victim had come to his apartment to call the police, looking frightened and angry, and that he had then observed a very drunk Majury come downstairs. After hearing the evidence, the trial court found Majury guilty. On appeal, Majury challenges the admission of the apartment photographs as irrelevant and the testimony of Eric Reinicke as opinion testimony. He also claims that the evidence does not support a finding that the incident occurred on the date alleged in the complaint.

DISCUSSION

Scope of Review.

Evidentiary matters such as the admissibility of exhibits or testimony are within the trial court's discretion. *Ritt v. Dental Care Associates, S.C.*, 199 Wis.2d 48, 72, 543 N.W.2d 852, 861 (Ct. App. 1995). Discretionary acts will be upheld so long as the trial court (1) examined the relevant facts, (2) applied a proper standard of law, and (3) used a rational process to reach a conclusion which a reasonable judge could reach. *Id.* In addition, a trial court's findings of fact will be upheld unless they are clearly erroneous. Section

¹ This appeal is decided by one judge pursuant to § 752.31(2)(f), STATS.

805.17(2), STATS.; *County of Langlade v. Kaster*, 202 Wis.2d 449, 454, 550 N.W.2d 722, 724 (Ct. App. 1996).

Evidentiary Questions.

A trial judge does not exercise his evidentiary discretion until called upon to make a ruling on admissibility. *See* § 901.03(1), STATS. Therefore, a trial court does not err by admitting otherwise inadmissible evidence, when no objection is raised. *Wilder v. Classified Risk Ins. Co.*, 47 Wis.2d 286, 290, 177 N.W.2d 109, 113 (1970).

Majury stated on the record that he had no objection to the admission of several photographs of the victim's door. Therefore, we need not analyze whether the trial court properly exercised its discretion in receiving this evidence. No error occurred. Likewise, Majury failed to object to the testimony of Eric Reinicke during the trial. Because the trial court was never called upon to rule whether Reinicke's testimony was admissible under § 907.01, STATS., the issue has not been preserved for review by this court.

The trial court's determination that the offense occurred on the date alleged was a factual finding. The victim testified as to the week day on which she thought the break-in occurred. Majury offered no conflicting testimony, and no calendar was introduced to correlate the day of the week with the numerical date alleged in the complaint. The trial court's finding was not clearly erroneous.

CONCLUSION

By the Court – Judgment affirmed.

Not recommended for publication in the official reports. *See* RULE 809.23(1)(b)4., STATS.