

**COURT OF APPEALS
DECISION
DATED AND FILED**

November 15, 2007

David R. Schanker
Clerk of Court of Appeals

NOTICE

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

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

Appeal No. 2006AP2038-CR

Cir. Ct. No. 2004CF1943

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

TOMMIE E. EVANS,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Dane County:
DAVID T. FLANAGAN, Judge. *Affirmed.*

Before Higginbotham, P.J., Lundsten and Bridge, JJ.

¶1 PER CURIAM. Tommie Evans appeals a judgment convicting him, following a jury trial, of two counts of burglary while armed with a dangerous weapon, one count of armed robbery with threat of force, and one count of

possession of a firearm by a felon, all as a repeat offender. Evans challenges the sufficiency of the evidence to support the verdicts. We affirm.

BACKGROUND

¶2 The charges were based on allegations that two men with their faces covered and brandishing handguns broke into the apartment of Claude Anderson, beat Anderson on the head, and took money he had recently won at a casino and some other items, including a bottle of Tums. Anderson testified that he was lying on his couch watching television around 10:30 p.m. when he heard the glass in his front door breaking and the two men came running in. Although the men had material of some sort over their heads, Anderson testified he thought that they were both black males in their twenties. He said both men were wearing jeans, but could not recall what type of shirts they had on.

¶3 The police noticed that the grass was depressed in a path leading from the victim's building to a fence and on to the street on the other side of the fence, which was DeVolis Parkway. The police recovered a Tums bottle and \$46 in the backyard approaching the fence along the path of depressed grass. They never recovered the other items taken, the guns used, or any physical evidence linking the defendants to the crime.

¶4 One of Anderson's neighbors, Willie Fleming, testified that he heard a dog barking and glass breaking at Anderson's apartment on the evening in question. Shortly thereafter, he looked out of a window, and saw two people running across the backyard and jumping over a fence. He thought one of them was wearing a white hooded sweatshirt with the hood covering the man's head, and the other one had a darker hooded sweatshirt.

¶5 Gary Bell testified that he saw a white SUV playing loud music pull up in front of his house sometime around 11:00 p.m. He saw one man get out of the car and move from the back seat to the front seat. He saw another man, who was a dark complected black male wearing a white t-shirt, first standing next to the vehicle and then walking eastbound. About twenty to twenty-five minutes later, Bell heard the vehicle return. He went outside and saw two black males, one of whom was wearing a white t-shirt, running toward the vehicle from the general direction of the victim's building. The man in the white t-shirt was leaning over as though he was carrying something and Bell heard a jingling coin-like noise. Bell also heard a dog barking nearby. The two running men got into the backseat and the car took off extremely fast while the doors were still shutting. Bell followed the car, got its license plate number and called 911.

¶6 Kionna Moore's parents owned the white SUV whose license plate number Bell obtained. Moore testified that she dropped off Evans and her boyfriend, the co-defendant Zallassio Sain, on Bell's street a little after 11:00 p.m. on the night in question. A third man moved up to the front seat at that time. Sain called the third man to have Moore come pick them back up in the same place about twenty to twenty-five minutes later. Moore claimed she did not know why Evans and Sain wanted to go to that area of town. She said Evans was wearing a white t-shirt and jeans, and Sain was wearing jeans and a white t-shirt over a blue t-shirt when she dropped them off. Sain was carrying the white t-shirt over his arm when he returned to the vehicle.

¶7 The witnesses all gave varying estimates of the two men's heights.

STANDARD OF REVIEW

¶8 When reviewing the sufficiency of the evidence to support a conviction, this court will sustain the verdict “unless the evidence, viewed most favorably to the state and the conviction, is so lacking 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.” *State v. Zimmerman*, 2003 WI App 196, ¶24, 266 Wis. 2d 1003, 669 N.W.2d 762 (quoting *State v. Poellinger*, 153 Wis. 2d 493, 507, 451 N.W.2d 752 (1990)); WIS. STAT. § 805.15(1) (2005-06).¹ Thus, we will sustain a verdict that is supported by any credible evidence, even if we might consider contradictory evidence to be more persuasive, leaving the credibility of the witness and drawing of inferences to the jury. See *Richards v. Mendivil*, 200 Wis. 2d 665, 670-72, 548 N.W.2d 85 (Ct. App. 1996).

DISCUSSION

¶9 Here, Evans does not dispute that the evidence was sufficient to show that the victim was robbed and burglarized by two men and that both the perpetrators had guns. He also does not dispute that he had a prior felony conviction. Evans challenges only the sufficiency of the evidence to establish that he was properly identified as one of the perpetrators. He contends that none of the witness identifications were “determinative,” given that each eyewitness gave a different description of the suspect, several of the witness descriptions varied over time, the victim’s memory had been impaired, the victim said both perpetrators

¹ All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

held their guns in their right hands while Evans was left handed, and there was no physical evidence linking Evans to the crime.

¶10 First of all, the discrepancies in the witnesses' physical descriptions of the suspects and the clothes they were wearing were of limited importance given the positive identifications made by Moore. That is, Moore confirmed Bell's account that two men got into a white car waiting on DeVolis Parkway on the night of the robbery and driven off, and identified those men as Evans and Sain. Moore was dating Sain and knew Evans. The only real question, then, is whether it was fair for the jury to infer that the two men who Bell witnessed running toward the car parked on DeVolis Parkway and quickly driving off—who had been identified as Evans and Sain—were the same two men who Anderson said had robbed him and who Fleming saw running away from the direction of the crime scene and jumping over a fence in the victim's backyard heading in the direction of DeVolis Parkway. We are satisfied that it was a reasonable inference from the evidence.

¶11 The grass was depressed in a pathway from near the victim's building to the fence and then toward the street where the car had been parked. Both neighbors placed their observations of two men running in the same timeframe as the robbery, after 11:00 p.m., when a neighbor's dog was barking. It looked to Bell as though one of the men who got into Moore's car was carrying something as he ran. Fleming said one of the two men jumping the fence had a white covering on his head which he believed was a hood, and Moore testified that one of the men had his t-shirt on his arm when he came back to the car—both of which would be consistent with Anderson's testimony that the men who robbed him had wrapped white material over their heads. Finally, Evans and Sain did not provide Moore with any explanation for why they wanted to be dropped off and

picked up in the neighborhood. All of these facts, taken together, were sufficient to support the jury's verdicts.

By the Court.—Judgment affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5.

