**COURT OF APPEALS DECISION DATED AND RELEASED**

June 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. 95-1787-CR**

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

**STATE OF WISCONSIN,**

**Plaintiff-Respondent,**

**v.**

**MICHAEL A. SEITZ,**

**Defendant-Appellant.**

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

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

PER CURIAM. Michael A. Seitz appeals from a judgment of conviction of three counts of first-degree recklessly endangering safety with a weapon and two counts of discharging a firearm into a dwelling. The sole issue on appeal is the sufficiency of the evidence. We affirm the judgment of conviction.

Seitz frames the issue on appeal as whether the trial court erred in not granting his motion for a directed verdict or for judgment notwithstanding

the verdict. We reject Seitz's attempt to invoke civil standards by citation to motions under § 805.14(4), STATS. (directed verdict at close of all evidence) and § 805.14(5)(b) (motion for judgment notwithstanding verdict). Where a defendant moves for a directed verdict at the close of the prosecution's case and then goes on to present a defense, the motion for a directed verdict is waived. ***State v. Simplot***, 180 Wis.2d 383, 399-400, 509 N.W.2d 338, 344 (Ct. App. 1993). After proper refinement, the issue on appeal is whether, considering all of the evidence, the convictions are supported by sufficient evidence. See ***id.*** at 400, 509 N.W.2d at 344.

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. ***State v. Ray***, 166 Wis.2d 855, 861, 481 N.W.2d 288, 291 (Ct. App. 1992). The standard of review when the defendant challenges the sufficiency of the evidence to support a conviction is the same whether it is a direct or circumstantial evidence case. ***State v. Poellinger***, 153 Wis.2d 493, 501-02, 451 N.W.2d 752, 755 (1990).

In reviewing the sufficiency of circumstantial evidence, an appellate court need not concern itself in any way with evidence which might support other theories of the crime. ***Id.*** at 507-08, 451 N.W.2d at 758. "[W]hen faced with a record of historical facts which supports more than one inference, an appellate court must accept and follow the inference drawn by the trier of fact unless the evidence on which that inference is based is incredible as a matter of law." ***Id.*** at 506-07, 451 N.W.2d at 757. An appellate court need only decide whether the theory of guilt accepted by the trier of fact is supported by sufficient evidence. ***Id.*** at 508, 451 N.W.2d at 758.

The convictions arise from a drive-by shooting occurrence at approximately 9:43 p.m. on February 5, 1994, at the home of Todd Rognsvoog. Rognsvoog is the former husband of Seitz's wife and father of ten-year-old Nathan Rognsvoog, who then resided with Seitz and his wife. Seitz was charged as a party to the crime. Seitz offered an alibi defense.

The day before the shooting, Rognsvoog called the police to the Seitz residence because Seitz and his wife had left Nathan home alone with their eighteen-month-old child. Rognsvoog testified that when he went to pick Nathan up after the police were at the Seitz residence, Seitz was angry and told him he should not have called the police. The next day Rognsvoog observed Seitz make an obscene gesture towards him.

It was the State's theory that the animosity between Rognsvoog and Seitz provided a motive for Seitz's involvement in the drive-by shooting. There was also evidence suggesting that the drive-by shooting was not a random occurrence. Caledonia was not experiencing drive-by shootings when this occurred. Rognsvoog testified that he could think of no one with a motive to shoot at his house. "While motive does not by itself establish guilt or innocence, it is `an evidentiary circumstance which may be given as much weight as the fact finder deems it entitled to.'" ***State v. Bowden***, 93 Wis.2d 574, 587 n. 3, 288 N.W.2d 139, 145 (1980), *overruled on other grounds by* ***Poellinger***, 153 Wis.2d at 505, 451 N.W.2d at 756-57. Motive evidence is not any less probative. ***Id.*** at 587, 288 N.W.2d at 145. Here, there was evidence demonstrating that Seitz had a strong motive to act out against Rognsvoog.

There was more than just motive in this case. Approximately twenty-four hours after the shooting, investigators found at the Seitz residence a box of .22 caliber ammunition and five .44 caliber bullets in Seitz's jacket pocket. Three .22 caliber bullets and two .44 caliber bullets were recovered from the Rognsvoog residence. Although the State's expert was unable to positively identify whether the Rognsvoog bullets were the same as those found in Seitz's jacket, both sets of bullets were manufactured by the same company. Investigators did not recover the guns used in the shooting. However, numerous other weapons were found at Seitz's residence. The bullets and Seitz's apparent access to guns form links to the shooting.

Seitz's challenge to the sufficiency of the evidence centers on the absence of any direct evidence linking him to the scene of the crime. He refers to the absence of any evidence that he was wearing the jacket when the shots were fired or that his car was used in the shooting. He also finds the proof fatally flawed because it was obvious that there was more than one shooter and the State never produced evidence of an accomplice.

We need not concern ourselves with the evidence that is missing or Seitz's explanation for possessing the ammunition and guns found in his house. "If any possibility exists that the trier of fact could have drawn the appropriate inferences from the evidence adduced at trial to find the requisite guilt, an appellate court may not overturn a verdict even if it believes that the trier of fact should not have found guilt based on the evidence before it." ***Poellinger*** 153 Wis.2d at 507, 451 N.W.2d at 758. As Seitz concedes, the jury, as the arbiter of credibility, was free to reject his alibi and his theory that Rognsvoog was trying to obtain custody of Nathan by a "set up."

Seitz points to the trial court's comment that the "evidence presented was not compelling ... a reasonable jury considering the facts here could have acquitted the defendant very easily" as requiring a new trial under the holding in ***Kuhl v. State***, 167 Wis. 495, 167 N.W. 743 (1918). The trial court in ***Kuhl*** had remarked that it expected a verdict of acquittal and the supreme court stated, "Where the evidence on a trial produces the impression upon the trial court such as it did in this case, it becomes his duty under this law of the state to set such a verdict aside." ***Id.*** at 499, 167 N.W. at 744. Here, the trial court's comment was not the equivalent of that made by the trial court in ***Kuhl***. The trial court did not express a belief that an acquittal was expected. While we agree with the trial court that this is a close case, we conclude that the evidence was sufficient for the jury to find that Seitz participated in or facilitated the drive-by shooting.

*By the Court.*—Judgment affirmed.

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