

**COURT OF APPEALS
DECISION
DATED AND FILED**

July 17, 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. 2006AP2350

Cir. Ct. No. 2002CF149

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JOSEPH L. SLATER,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Marathon County:
PATRICK M. BRADY, Judge. *Affirmed.*

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 PER CURIAM. Joseph Slater appeals an order denying his motion for postconviction relief in which he sought to vacate three armed robbery convictions. Although the postconviction motion raised several issues, Slater raises only one issue on appeal. He argues that the trial court improperly

exercised its discretion when it prohibited Slater from presenting evidence that Ric Thomas (a/k/a Q-Tip) committed the armed robberies along with Slater's brother Antwan. Because the trial court properly exercised its discretion and the error, if any, was harmless, we affirm the order.

¶2 According to the trial testimony of two bartenders and a patron, two large men wearing dark ski masks and sunglasses, armed with shotguns, robbed the Chatterbox Bar and a patron. They stole approximately \$1,000 and the patron's purse, which contained a grocery store card. Kay Damos, a friend of Slater's who lived near the bar, notified police of Slater's suspicious behavior and consented to a search of her garage where Slater parked a car. Damos knew that Slater stored guns in the garage and parked a car in the garage shortly after the robbery. In the search of the garage, the police found two dark ski masks, four shotguns, two pairs of sunglasses, the victim's purse and the grocery store card. After securing a search warrant for the car, the police also discovered approximately \$1,000 cash. Subsequent tests disclosed that Slater's DNA was on one of the masks, and his fingerprints were on one pair of sunglasses. The victims testified that the masks and sunglasses looked like those worn by the robbers. One of the bartenders also testified that he recognized Slater's distinctive voice during the robbery.

¶3 Slater argues that he should have been allowed to present evidence that his brother Antwan and Thomas committed the offense. Thomas was killed in a traffic accident before trial. Slater's proof of their involvement consists of Antwan's statement to Slater that he and Q-tip robbed the bar.

¶4 A defendant may present evidence that a third party committed the crime if he can show that the third party had the motive and opportunity, and some

evidence directly connecting the third party to the crime. *See State v. Denny*, 120 Wis. 2d 614, 622, 357 N.W.2d 12 (1984). A defendant is not required to prove the third party's guilt beyond a reasonable doubt. Conversely, evidence that simply affords a possible ground of suspicion against another person is not admissible. *State v. Knapp*, 2003 WI 121, ¶178, 265 Wis. 2d 278, 666 N.W.2d 881, *vacated on other grounds Wisconsin v. Knapp*, 542 U.S. 952 (2004). When the defendant cannot establish motive, opportunity and a direct connection, the evidence must be excluded as irrelevant. *Denny*, 120 Wis. 2d at 624. A defendant does not have a constitutional right to present irrelevant evidence. *Knapp*, 265 Wis. 2d 278, ¶176.

¶5 The trial court properly exercised its discretion when it refused to allow Slater to attempt to inculcate Thomas in the robbery. Slater offered no evidence that Thomas had a motive for committing the robbery such as drug addiction or unusual debts. Thomas's alleged motive, a desire to have money, does not distinguish Thomas from any other person. Slater offered no evidence of Thomas's place of residence at the time of the robbery or opportunity to commit the crime. Finally, the only evidence Slater offered to connect Thomas to the robberies was his own self-serving statement that Antwan told him Thomas was involved in the robbery.¹ Thomas was six feet or six feet one inch tall and weighed only 150 pounds. His physical description would not match the witnesses' testimony that two large men committed the robbery. Thomas's DNA was not preserved and Slater proffered no evidence connecting Thomas to any of the evidence discovered in Damos's garage.

¹ We need not review whether Slater's testimony would have been admissible over a hearsay objection and will not speculate whether Antwan would have testified because the proffered evidence does not meet the relevancy test set out in *State v. Denny*, 120 Wis. 2d 614, 622, 357 N.W.2d 12 (1984), regardless of whether it was hearsay.

¶6 In addition, any error in excluding the evidence of Thomas's participation in the robbery was harmless beyond a reasonable doubt. *See State v. Shomberg*, 2006 WI 9, ¶18, 288 Wis. 2d 1, 709 N.W.2d 370. Overwhelming evidence established that Slater committed the robbery regardless of which other individual served as his accomplice. Evidence that the bartender recognized his voice, his DNA on the mask, his fingerprint on the sunglasses and discovery of a victim's purse and grocery store card, as well as \$1,000 in his car, establish beyond a reasonable doubt that Slater committed the robberies.

By the Court.—Order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5 (2005-06).

