

**COURT OF APPEALS
DECISION
DATED AND FILED**

September 14, 2011

A. John Voelker
Acting Clerk of Court of Appeals

NOTICE

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Appeal No. 2010AP1973-CR

Cir. Ct. No. 2008CF1387

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

STUART J. GASPER,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Waukesha County: LEE S. DREYFUS, JR., and JAMES R. KIEFFER, Judges.
Affirmed.

Before Brown, C.J., Neubauer, P.J., and Reilly, J.

¶1 BROWN, C.J. Stuart J. Gasper appeals from a judgment of conviction entered after a jury trial for operating a motor vehicle while intoxicated (eighth offense) and hit-and-run. He also appeals from the denial of his

postconviction motion. Gasper takes issue with two evidentiary decisions to allow certain testimony. With regard to one of those issues, we reject his argument. Assuming without deciding that he is correct as to the other issue, the error was harmless. We affirm.

¶2 At Gasper's jury trial, a number of witnesses testified to the events that took place on December 9, 2008, involving a red SUV-type vehicle. The pertinent facts are as follows.

¶3 Omar Trusillo testified that he was driving home around 9:20 p.m. when his car was struck by a red Chevy Trailblazer. He stated that the driver did not exit the car at the scene. Trusillo followed the Trailblazer after it left the scene to take down the license plate number, which he then gave to the police.

¶4 David Hansen testified that a red SUV struck him while he was on foot in the crosswalk at the intersection of College and Grand Avenue in Waukesha. He stated that the driver did not get out of the car at the scene.

¶5 Tierney Konitzer testified that she observed a red SUV sliding down Grand Avenue, that she looked in the direction that the car had come from and saw a person lying in the crosswalk. She said she tried to get the license plate of the SUV, but it had driven away. She stated that she saw a taillight lying in the street.

¶6 Waukesha Police Officer Brandon Pierce testified that at approximately 8:44 p.m., he received a dispatch sending him to a reckless vehicle complaint at the intersection of Main and Clinton Streets in downtown Waukesha. Upon arrival, he saw no evidence of an accident. However, at approximately 8:50 p.m., he received another dispatch regarding a hit-and-run accident at 147 West Main Street. He went to the scene and met with Trusillo, who showed him his

damaged car and provided a description of a red Trailblazer and the license plate number he had written down. Pierce testified that after running the plate, it listed the owner as Stuart Gasper, 241 East Park Avenue, Apartment 4, Waukesha.

¶7 Pierce called for backup, and proceeded to the East Park Avenue address. He and Officer Fredrick arrived at approximately 9:30 p.m. Knowing that he was looking for a red SUV and not seeing one on the street, he pulled into the driveway of the residence and observed a red SUV parked in the open garage. The license plate on the car matched the plate he had run through the dispatch center. He then got out of his squad car and was able to observe damage to all sides of the vehicle, but could not yet see the front of the vehicle at that time. What he did observe was a broken window and a taillight missing, both on the driver's side of the SUV. He then continued his inspection of the vehicle, placed his hand on the hood of the SUV and noticed that the engine was warm. He deduced from this that the vehicle had to have been driven in the past ten to twenty minutes.

¶8 Pierce stated that he heard radio traffic from another officer at the scene of one of the accidents that officers had found a taillight assembly at the scene. Pierce said that after describing the item, it was determined that it seemed to be the same item that belonged on the SUV.

¶9 Pierce then knocked on the door of Apartment 4 and Gasper answered and said that Pierce could come inside. Pierce could smell the odor of intoxicants and noted that Gasper was using the walls as balance, was lethargic in his speech and had watery, bloodshot eyes. Gasper admitted he had been drinking. Gasper admitted that the Trailblazer was his, and he stated that he had not given permission to anyone else to drive it.

¶10 Pierce informed Gasper that he was there to investigate accidents involving his vehicle in the recent hours. In response, Gasper said that “they’d hit me.” Pierce said he then asked Gasper to clarify what he meant by that, and Gasper then stated, “[W]ell, they weren’t my fault.”

¶11 Pierce conducted field sobriety tests. Gasper’s failing performance led Pierce to conclude that Gasper was not able to operate a motor vehicle safely. Pierce then placed Gasper under arrest for operating a vehicle while intoxicated.

¶12 Police later found out that, just before the events described above, Gaspar had hit a car being driven by Nancy McGuire. Over objection, McGuire was allowed to testify. Gasper’s first argument relates to McGuire’s testimony. He argues that this was illegal other acts evidence. We disagree. McGuire testified that on December 9, 2008, she was driving west on Main Street in Waukesha. She crossed over Clinton Street, and

noticed a red SUV that was starting to back out. So I sounded my horn, and he kept coming and struck my car, the left-front fender. And stopped for a minute and then my car was pushed a little further. And then I turned around to see what was going on, and the vehicle took off.

¶13 At the postconviction motion hearing, the trial court aptly concluded that “review of the pertinent testimony [shows] that this was not other acts evidence, rather this is evidence given to give the context of the scene and to complete the entire story that developed this night in question.” We agree. McGuire’s testimony was not other acts evidence because it was part of the panorama of evidence needed to completely describe the events that occurred. *See State v. Hereford*, 195 Wis. 2d 1054, 1069, 537 N.W.2d 62 (Ct. App. 1995) (“Testimony of other acts for the purpose of providing the background or context of a case is not prohibited by [WIS. STAT.] § 904.04(2).”). The event that

happened to McGuire was part and parcel of the events that evening. Just because the police did not know about the hit-and-run to McGuire does not mean that her testimony was “another” crime. It is as plain as day that what happened to McGuire was simply part of the same reckless driving sequence. We need not discuss this argument further.

¶14 Second, Gasper argues that the trial court erred when it allowed the arresting officer to testify to his conclusion that the warmth of Gasper’s SUV hood meant that the vehicle had been driven within ten to twenty minutes prior. Gasper contends that “[a]t best ... the officer could have testified that the hood felt ‘warm’ to him. Such testimony would have been rationally based upon his perceptions.” “However,” he argues, “testimony as to how recently the vehicle had been driven involves calculating the precise rate of heat transfer and is ... a matter for expert testimony.”

¶15 An erroneous exercise of discretion in admitting or excluding evidence does not necessarily lead to a new trial. *Martindale v. Ripp*, 2001 WI 113, ¶30, 246 Wis. 2d 67, 629 N.W.2d 698. The appellate court must conduct a harmless error analysis to determine whether the error affected the substantial rights of the party. *Id.* If the error did not affect the substantial rights of the party, the error is considered harmless. *Id.*

¶16 For an error to affect the substantial rights of a party, there must be a reasonable possibility that the error contributed to the outcome of the action or proceeding at issue. *Id.*, ¶32. A reasonable possibility of a different outcome is a possibility sufficient to undermine confidence in the outcome. *Id.* Our confidence in the outcome is not undermined where the erroneously admitted or excluded

evidence was peripheral or the outcome was strongly supported by evidence untainted by error. *See id.*

¶17 Here, we assume, without deciding, that Gasper is correct that the trial court erroneously admitted the portion of the officer's testimony relating his opinion as to how recently Gasper's SUV had been driven. However, any error was harmless because the record reveals that there is more than enough other substantial evidence for a jury to have reached the verdict it did, *see id.*, and there is no reasonable possibility that the error contributed to the conviction. *See State v. Dyess*, 124 Wis. 2d 525, 543, 370 N.W.2d 222 (1985).

By the Court.—Judgment and order affirmed.

Not recommended for publication in the official reports.

