COURT OF APPEALS
DECISION
DATED AND FILED

October 18, 2017

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2016AP2170 **Cir. Ct. No. 2016CV155**

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

CITY OF WEST BEND,

PLAINTIFF-RESPONDENT,

V.

REBECCA L. SMITH,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Washington County: ANDREW T. GONRING, Judge. *Affirmed*.

¶1 REILLY, P.J.[1] Rebecca Smith appeals from her conviction for operating while intoxicated (OWI) and operating with a prohibited blood alcohol

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(c) (2015-16). All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

concentration (BAC). Smith argues that the circuit court erroneously admitted a "computer aided dispatch" (CAD) activity report into evidence and that the jury heard "improper testimony related to [Smith's] BAC and retrograde extrapolation." We affirm the judgment of the circuit court.

BACKGROUND

¶2 On February 1, 2015, at approximately 2:30 a.m., Smith struck the rear driver's side of D.R.'s vehicle at the intersection of Main Street and Washington Street in the City of West Bend.[2] D.R. exited his vehicle and yelled at Smith to pull over, but she drove away. D.R. wrote down her license plate number. Smith testified that she never struck D.R.'s car, but rather while she was driving home from a bar where she and her sister had been drinking, she observed D.R.'s car spin out due to snowy conditions. Smith claimed she had a "panic attack" and "just wanted to get home," so she left the scene. Smith drove home and called her sister, who invited her to come over. Smith went to her sister's home and immediately drank two shots of liquor.

¶3 Lieutenant Robert Lloyd and Officer Scott Dopke investigated the collision. Lloyd was on patrol at the time of the accident and had just gone through the intersection of Main and Washington when he looked in his mirrors and saw a vehicle facing the wrong direction in the snow. Lloyd executed a U-turn and returned to the accident scene where D.R. gave him the license plate number of the car that hit him. Dopke was sent to Smith's home, where he

[2] Smith pled no contest to a traffic charge of falsifying an accident report, originally charged as a hit and run, contrary to WIS. STAT. § 346.70(5) in Washington County case No. 2015CM386.

observed fresh tire tracks in the snow but no one home. Dopke called Smith on her cell phone, and she told him she was at her sister's home.

¶4 Upon arrival at Smith's sister's house, the officers observed damage to the front bumper of Smith's car.[3] Smith denied knowing where the intersection was and falsely claimed that she had not seen anyone spin out at the intersection. Smith also told the officers that she had come from her home, had not been at a bar, and had not been drinking that evening. Smith testified at trial that she told these lies because she was "scared" and "tired." Dopke noted Smith displayed several signs of intoxication, including an odor of alcohol, and he took Smith to the police station for additional investigation.

¶5 Smith failed her field sobriety tests and consented to a blood draw, which revealed a prohibited BAC (.142 g/110 mL). Smith was found guilty of OWI and operating with a prohibited BAC in municipal court and appealed for a jury trial in circuit court. The jury found Smith guilty of both OWI and prohibited BAC.[4] Smith appeals.

DISCUSSION

¶6 Smith's argument is two-fold: (1) the CAD report was erroneously admitted into evidence as it contained hearsay statements and (2) testimony pertaining to retrograde extrapolation should not have been admitted into evidence. Our standard of review on both issues is the same; a circuit court has

[3] The officers took photos of the damage, and the photos were admitted at trial. Smith testified that the damage was a result of an incident in 2010 or 2011.

[4] The circuit court entered judgment and sentenced Smith only on the OWI.

"broad discretion to admit or exclude evidence," and we may overturn the circuit court only if it erroneously exercised its discretion. ***State v. Giacomantonio***, 2016 WI App 62, ¶17, 371 Wis. 2d 452, 885 N.W.2d 394 (quoting ***State v. Kandutsch***, 2011 WI 78, ¶23, 336 Wis. 2d 478, 799 N.W.2d 865). If a circuit court "examined the relevant facts, applied a proper legal standard, and, using a demonstrated rational process, reached a reasonable conclusion," we will uphold its decision. ***Giacomantonio***, 371 Wis. 2d 452, ¶17 (citation omitted). Whether evidence falls within an exception to the hearsay rule is a question of law that we review independently on appeal. ***State v. Joyner***, 2002 WI App 250, ¶16, 258 Wis. 2d 249, 653 N.W.2d 290.

CAD Report

¶7 The City utilized the CAD report during the testimony of Dopke and Lloyd, and Smith objected that the CAD report was hearsay. On appeal, Smith also argues that the CAD report was made in contemplation of future litigation. The circuit court denied the hearsay objection, concluding after questioning the officers that the CAD report fell under the business records exception. *See* WIS. STAT. § 908.03(6). We are at a loss to specifically examine Smith's argument as she does not specify what portion of the CAD report she objects to on appeal, but instead she focuses her argument on the entire report. A CAD report is akin to a police report, which may be a business record but may also contain multiple levels of hearsay that must fit within a hearsay exception in order for the report, or a specific portion of the report, to be introduced. *See* ***State v. Gilles***, 173 Wis. 2d 101, 113, 496 N.W.2d 133 (Ct. App. 1992). Smith's global objection is not helpful if Smith is objecting to a specific statement within the CAD report as being inadmissible hearsay.

¶8 Our review of the trial transcript indicates that the report was used exclusively to demonstrate the timing of events the morning of February 1, 2015, to explain, for example, when the incident was first reported, when the officers arrived at Smith's sister's residence, and when the officers reported leaving the sister's residence to go to the police station.

¶9 If Smith's objection is to the "time stamp" evidence contained in the CAD report being received, her objection fails as a time stamp generated by a computer system is not hearsay. Hearsay is a statement that comes from a "declarant," and a "declarant" must be a human being. *See* WIS. STAT. § 908.01(2), (3); ***Kandutsch***, 336 Wis. 2d 478, ¶55. Dopke testified that the time stamps in the CAD report are computer-generated entries that are an automatic function of the dispatching software. "A record created as a result of a computerized or mechanical process cannot lie. It cannot forget or misunderstand. Although data may be lost or garbled as a result of some malfunction, such a malfunction would go to the weight of the evidence, not its admissibility." ***Kandutsch***, 336 Wis. 2d 478, ¶61. The time stamp is evidence produced by a machine rather than a "declarant" under § 908.01(2), and as such the time stamp evidence is not hearsay.

¶10 As Smith makes no objection to any specific statement within the CAD report, we examine the report globally and conclude that the court did not err in its application of the business records exception to hearsay under WIS. STAT. § 908.03(6). Section 908.03(6) provides that the following is an exception to the hearsay rule:

> A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, all in the course of a regularly conducted activity, as shown by the

> testimony of the custodian or other qualified witness, or by certification that complies with [WIS. STAT. §] 909.02(12) or (13), or a statute permitting certification, unless the sources of information or other circumstances indicate lack of trustworthiness.

Like a police report, a CAD report is a report created "in the course of a regularly conducted activity" by "a person with knowledge." Sec. 908.03(6); *see also* ***Mitchell v. State***, 84 Wis. 2d 325, 330, 267 N.W.2d 349 (1978). Both Lloyd and Dopke authenticated the CAD report as being maintained by the West Bend Police Department pertaining to this case, Dopke testified that "the information contained [in the CAD report] is made and kept in the regular course of the West Bend Police Department business," and Lloyd and Dopke were the parties providing the information to the dispatcher who updated the CAD report, thereby establishing themselves as "qualified witness[es]." *See* ***Palisades Collection LLC v. Kalal***, 2010 WI App 38, ¶¶21-22, 324 Wis. 2d 180, 781 N.W.2d 503.

¶11 Citing ***Palmer v. Hoffman***, 318 U.S. 109, 113-14 (1943), Smith argues that "[r]ecords prepared in anticipation of litigation do not fall within the regularly conducted activity exception," claiming that the CAD report qualifies as just such a document. We disagree. Smith suggests in her brief-in-chief that "[t]he CAD report is no different than any other section of a police report," but this assertion belies her argument. Police reports are regularly accepted into evidence under the business records exception. *See* ***Mitchell***, 84 Wis. 2d at 330; ***Gilles***, 173 Wis. 2d at 113-14; *see also* ***Abdel v. United States***, 670 F.2d 73, 75 n.3 (7th Cir. 1982). A CAD report is not prepared for the purpose of litigation; the CAD system is utilized in all situations where officers are dispatched to a scene, regardless of any civil or criminal prosecution. To the extent any information contained in the CAD report is hearsay, Smith has pointed to no lack of

trustworthiness and we see no reason it would not fall under the business records exception.[5]

Retrograde Extrapolation Testimony

¶12 The City presented testimony from an expert on "retrograde extrapolation," which is an estimation of the BAC level at the time of driving based on a test result from some later time. Smith did not object to the expert's testimony and in fact utilized the expert to offer evidence that her BAC was below the legal limit at the time she drove. WISCONSIN STAT. § 901.03(1)(a) requires a party to make a "specific" and "timely objection" to the admission of evidence in order to preserve the issue for appeal. "Failure to object results in a [forfeiture] of any contest to that evidence." ***Caccitolo v. State***, 69 Wis. 2d 102, 113, 230 N.W.2d 139 (1975) (citation omitted). As Smith did not object at trial to the expert's testimony, her objection is forfeited.

¶13 Smith argues that admitting the retrograde extrapolation testimony was "plain error" under WIS. STAT. § 901.03(4) and that we should grant a new

[5] Even if the CAD report was improperly admitted into evidence, the error was harmless. *See* ***State v. Hunt***, 2014 WI 102, ¶21, 360 Wis. 2d 576, 851 N.W.2d 434 ("A circuit court's erroneous exercise of discretion in admitting evidence is subject to the harmless error rule."). An error is harmless when there is no reasonable possibility that the error contributed to the result of the case. ***State v. Dyess***, 124 Wis. 2d 525, 543, 370 N.W.2d 222 (1985). At trial, the CAD report was referenced to support the time estimates provided by Lloyd and Dopke on the stand. The testimony of Dopke and Lloyd did not contradict the CAD report information. Had the CAD report not been admitted into evidence, the time line of events at trial would have remained the same, albeit more imprecise; thus, the admission of the CAD report was harmless error.

trial in the interest of justice under WIS. STAT. § 752.35.[6] We disagree. The retrograde analysis testimony was properly admitted. We addressed the admissibility of retrograde extrapolation testimony in ***State v. Giese***, 2014 WI App 92, ¶¶24-25, 356 Wis. 2d 796, 854 N.W.2d 687, and affirmed its admissibility under ***Daubert***.[7] While Smith challenges the facts relied on by the expert, "[t]he accuracy of the facts upon which the expert relies and the ultimate determinations of credibility and accuracy are for the jury" as the concerns with retrograde extrapolation "go to the weight of the evidence, not to its admissibility." ***Giese***, 356 Wis. 2d 796, ¶¶23, 28. Smith was free to, and in fact did, challenge the expert's hypothetical assumptions by "propos[ing] competing scenarios" and conducting a vigorous cross examination.[8] ***Id.***, ¶28. There was no "plain error" in the admission of the retrograde extrapolation testimony.

By the Court.—Judgment affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)4.

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[6] Our supreme court has "consistently held that the discretionary reversal statute should be used only in *exceptional* cases." ***State v. McKellips***, 2016 WI 51, ¶52, 369 Wis. 2d 437, 881 N.W.2d 258. This case is not exceptional. The jury was asked to weigh the credibility of D.R., the police officers, and the toxicology expert against the credibility of Smith and her sister. Smith provided a plausible, if not attenuated, explanation for her BAC, but the jury failed to accept her version of events and returned unanimous guilty verdicts.

[7] ***Daubert v. Merrell Dow Pharm., Inc.***, 509 U.S. 579 (1993).

[8] We also fail to find a substantial probability of a different result on retrial as the jury was properly instructed that under WIS. STAT. § 885.235(1g)(c), a blood sample "taken within 3 hours after" driving is "prima facie evidence" of the defendant's BAC at the time of driving. Smith's blood draw, indicating that her BAC was above the legal limit, was conducted within that window. Even without the retrograde analysis, there is sufficient evidence to uphold the jury verdict.