

**COURT OF APPEALS
DECISION
DATED AND FILED**

October 7, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

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 § 808.10 and RULE 809.62, STATS.

No. 99-0092-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

WILLIAM R. PETERSON,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for La Crosse County: DENNIS G. MONTABON, Judge. *Affirmed.*

Before Dykman, P.J., Eich and Roggensack, JJ.

¶1 PER CURIAM. William R. Peterson appeals from a judgment convicting him of one count of homicide by intoxicated use of a vehicle, four counts of causing injury by intoxicated operation of a motorboat, and one count of failing to render aid following a boating accident involving an injury of great

bodily harm, and also from an order denying his motion for a new trial. He claims the trial court erroneously exercised its discretion on remand when it again refused to admit a videotape reconstructing visibility conditions on the river on the night of the accident. We conclude the trial court properly exercised its discretion by weighing the evidentiary value of the videotape against its potential to mislead the jury. Accordingly, we affirm.

BACKGROUND

¶2 Peterson's boat struck a boat owned by the Sandviks on the Black River on the evening of August 16, 1996. One person was killed by the motor of Peterson's boat as it flew over the Sandvik boat, and another four people were injured in the accident. The State brought criminal charges against Peterson based on his intoxication at the time of the collision. Peterson's defense was that the accident would have occurred even if he had not been under the influence of alcohol, because the Sandvik boat did not have its lights on.

¶3 Prior to trial, Peterson sought to introduce a videotape which was filmed on the Black River about a month after the accident. The accident reconstruction expert who had filmed the tape testified at a pretrial hearing that the reconstruction was filmed a few days before a first-quarter moon, with approximately one-eighth cloud cover. There were no clouds and no moon the night of the accident. The expert filmed the tape from Peterson's boat, just behind Peterson as he operated the boat on five runs along the route taken on the night of the accident. The video camera used to make the reconstruction had the best available rating for picking up images. The boat used to represent the Sandvik boat was about six inches wider and twenty-six inches higher than the actual boat involved in the accident, although it was difficult to estimate the actual difference

in the boat's height above the water since there were nine people on the taller boat involved in the accident and only one person on the shorter boat used in the reconstruction.

¶4 Peterson's expert testified that the videotape was a very good reproduction of the conditions on the night of the reconstruction. A DNR conservation warden testifying for the State offered no opinion on the accuracy of the videotape's reproduction of the visibility conditions during the reconstruction, but stated he believed the actual boat involved in the accident would have been more visible than that used in the reconstruction because it was larger. The warden admitted that the boat used in the reconstruction was very difficult to see at night with its lights off, even knowing its approximate location.

¶5 The trial court excluded the videotape from trial, in part, because it did not believe it presented an accurate reproduction of nighttime visibility conditions on the river based on the judge's own experience with nighttime boating and the adjustment of the human eye to darkness. Peterson appealed the videotape admissibility ruling following his conviction, and we remanded to allow the trial court to exercise its discretion based solely on the facts of record.

¶6 On remand, the trial court again excluded the videotape and denied Peterson a new trial. This time, the trial court based its decision on blurred and haloed lights on the videotape that wouldn't appear in ordinary vision; on a glow or haze from the dash board that created distortions on the tape; on the location of the camera operator, which created a different perspective than the driver had; on the size of the target boat used in the demonstration; and on the video's low probative value and propensity to confuse the jury relative to the main issue in the case, whether the lights were on or off the Sandvik boat, and to replace it with the

issue of whether the Sandvik boat would have been visible without lights on at night.

STANDARD OF REVIEW

¶7 The trial court has discretion whether to admit a demonstrative videotape into evidence. *See State v. Peterson*, 222 Wis.2d 449, 453, 588 N.W.2d 84, 86 (Ct. App. 1998). A court exercises discretion when it considers the facts of record under the proper legal standard and reasons its way to a rational conclusion. *See Burkes v. Hales*, 165 Wis.2d 585, 590-91, 478 N.W.2d 37, 39 (Ct. App. 1991). Thus, we will not overturn a discretionary determination merely because we would have reached a different result. Rather, “[b]ecause the exercise of discretion is so essential to the trial court’s functioning, we generally look for reasons to sustain discretionary decisions.” *Id.* at 591, 478 N.W.2d at 39 (citation omitted).

DISCUSSION

¶8 We stated the proper legal standard for determining the admissibility of the videotape the last time this case was before us:

[B]efore a videotape of a demonstration may be admitted into evidence there must be a foundation for the videotape—that it is a fair and accurate representation of what was seen—and for the demonstration—that it was conducted under conditions reasonably similar to conditions existing at the actual event. Even if this foundation is established, the trial court may, in its discretion, exclude the videotaped demonstration upon a finding that the probative value of the videotape is outweighed by its prejudicial effect.

Peterson, 222 Wis.2d at 454, 588 N.W.2d at 86. We think it is clear from the trial court's discussion that it considered the admissibility of the videotape under this standard upon remand.

¶9 Peterson nonetheless maintains that the trial court erroneously exercised its discretion by again taking into account the judge's personal knowledge of nighttime river visibility, by unreasonably concluding that the conditions surrounding the reenactment were dissimilar from those the night of the accident, and by unreasonably concluding that the videotape's probative value was outweighed by its prejudicial effect. We disagree.

¶10 First, we note that the trial court began its analysis by acknowledging that this court had accepted the videotape operator's statement regarding the accuracy of the videotape's depiction of nighttime visibility on the river, and later stated that it was not disregarding that testimony. The trial court very carefully explained that its continuing reservations about the videotape's usefulness to the jury were based upon distortions which were apparent on the videotape itself. The videotape was, of course, part of the record, and there was nothing to prevent the trial court from taking its quality into account.

¶11 We further conclude that the trial court's consideration of the dissimilarities between the accident and reconstruction was proper. While it is true that we indicated in our prior opinion that the difference in boat size alone was insufficient to justify excluding the videotape, the trial court took additional factors, including the weather and the perspective of the video camera operator, into account on remand. While we may not agree with the weight the trial court accorded to these differences, we cannot say its decision was irrational.

¶12 Finally, even assuming that the trial court erred in its evaluation of the foundation for the videotape's admission, we see no error in its evaluation of the tape's low probative value relative to its potential prejudicial effect. The trial court correctly noted that the principal issue for trial was whether the Sandvik boat had been operating with or without its lights. If Peterson were able to convince the jury that the Sandvik boat's lights were not on, there would be little dispute that the boat would have been very difficult to see at night. Thus, showing the jury several runs of Peterson's boat toward a boat with no lights on could confuse the jury and cause them to focus on whether Peterson could have seen an unlighted boat, not to focus on whether the boat had its lights on at the time of the accident. Therefore, we are satisfied that it properly exercised its discretion when it excluded the tape in order to avoid misleading the jury.

By the Court.—Judgment and order affirmed.

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

