

**COURT OF APPEALS
DECISION
DATED AND FILED**

May 21, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

NOTICE

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**Nos. 96-2375-CR
97-1724-CR**

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ENRIQUE PAZO-MORE,

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., Vergeront and Roggensack, JJ.

DYKMAN, P.J. Enrique Pazo-More appeals from a judgment convicting him of two counts of first-degree recklessly endangering safety by use of a dangerous weapon, contrary to §§ 941.30(1) and 939.63, STATS., and an order denying his motion for postconviction relief. Pazo-More challenges the validity of

several out-of-court and in-court identifications of him as the perpetrator of the offenses. We do not address Pazo-More's arguments because we conclude that the unchallenged evidence of guilt was so substantial that the admission of the out-of-court and in-court identifications, even if erroneous, was harmless beyond a reasonable doubt. Accordingly, we affirm the judgment of conviction.

An error is harmless if there is no reasonable possibility that it contributed to the conviction. *State v. Dyess*, 124 Wis.2d 525, 543, 370 N.W.2d 222, 231-32 (1985). A reasonable possibility is one that is sufficient to undermine confidence in the outcome of the proceeding. *See id.* at 544-45, 370 N.W.2d at 232-33. "Our task is to examine the erroneously admitted evidence and the remainder of the untainted evidence in context to determine whether the error was harmless." *State v. Harris*, 199 Wis.2d 227, 256, 544 N.W.2d 545, 557 (1996). We will assume, *arguendo*, that the identifications of Pazo-More as the perpetrator of the offenses were tainted. After reviewing the remainder of the evidence, we conclude that there is no reasonable possibility that the identifications contributed to the conviction.

The unchallenged evidence is as follows. On April 19, 1995, at approximately 8:00 p.m., an automobile stopped on Pearl Street in downtown La Crosse, and the driver got out and approached Theodore Swan, Keith Greene and Terrance Campos, who were walking down the street. The driver asked them what they had called him, and they replied that they did not call him anything. The driver then returned to his car, got a knife out of the glove compartment, and proceeded to slash Greene's nose, then stab Swan. The assailant returned to his car. As the vehicle was leaving, Swan broke a white plastic chair over the trunk of the car.

Several witnesses described the assailant as a black man, between 5'2" and 5'7", with short hair. Both Swan and a bystander identified the vehicle's license plate number. The bystander called 911 and told the dispatcher that the assailant's vehicle was a gray Honda or Nissan with the license plate number EM777.

Department of Transportation records showed that the vehicle was registered to Pazo-More. Officer Jerome Korger went to Pazo-More's house on Tenth Street at approximately 11 p.m., and Pazo-More was inside the residence. Officer Korger asked Pazo-More where his car was, and he said it was at the People's Food Co-op on Fifth Street. Korger then took Pazo-More to the police department for questioning. While en route to the police station or shortly thereafter, Korger told Officer Troy Nedegaard to have someone go the Co-op to see if Pazo-More's car was there.

Officer Nedegaard went to the Co-op and found a gray Nissan with the license plate number EM777 in the parking lot. Nedegaard found no evidence to suggest that the vehicle had been driven without a key. Nedegaard found blood on the driver's side door, on the roof next to the door frame, and on the left rear quarter panel. The vehicle also had a dent and white scuff marks on the trunk. A utility bill bearing Pazo-More's name was found in the back seat.

At the police station, Pazo-More told Officer Korger that he left home just prior to 8:00 p.m. that evening and drove to the Co-op to buy cigarettes. Pazo-More stated that when he was at the Co-op, he saw police cars driving toward the area of Fourth and Pearl Streets. The Co-op was closed, so Pazo-More walked to another store, then walked home. Pazo-More stated that he had the only keys to his vehicle and that he was the only person to drive his vehicle that night.

When Korger told Pazo-More that blood stains had been observed on his vehicle, Pazo-More became very agitated and angry and said that the police were setting him up.

A state crime lab analyst tested scrapings of white material from the rear window of Pazo-More's car and plastic from the chair that was smashed against the car. The analyst concluded that the scrapings from the window and the plastic from the chair were the same type of plastic and the same color.

Tests were also conducted on several blood samples removed from the exterior of Pazo-More's car, on blood removed from the plastic chair, and on blood taken from the victims, Theodore Swan and Keith Greene. The samples removed from the vehicle and chair were of the same blood type as Greene. Approximately ten percent of the Caucasian population and twenty percent of the Black population have this same blood type. The crime lab was also able to determine the subtype of one of the blood stains removed from the car.¹ This sample was of the same blood subtype as Greene. Only four percent of the Caucasian population and nine percent of the Black population have both the same blood type and subtype as Greene.

After Pazo-More was arrested, a color photograph was taken of him. This photograph shows that he had short hair and is dark skinned. At trial, Pazo-More stood back-to-back with a couple of witnesses to show his height. He was an inch or two shorter than a witness who was 5'6", and two or three inches shorter than a witness who was between 5'6" and 5'7".

¹ Tests on the other blood stains proved inconclusive.

The evidence of guilt is overwhelming. Pazo-More has approximately the same hair length, skin color and height as the assailant described by the witnesses. Two witnesses identified the license plate number of the assailant's vehicle, and that vehicle was registered to Pazo-More. There was no evidence to suggest that the vehicle had been driven without a key, and Pazo-More stated that he had the only keys to the vehicle and that only he drove the car that night. In fact, Pazo-More stated that he drove to the People's Food Co-op at approximately the same time that the crimes occurred. Blood stains found on Pazo-More's car were of the same type and subtype as the blood of one of the victims, and the color and chemical composition of white material scraped from the rear window of the car was the same as the color and chemical composition of the chair that was smashed over the back of the car. And Pazo-More's alibi—that at the time of the incident, he *drove* from home to the Co-op to buy cigarettes, then left his car at the Co-op and *walked* home—is implausible.

After hearing the unchallenged evidence, the only reasonable conclusion that the jury could reach was that Pazo-More was the perpetrator of the offenses. Accordingly, we conclude that any error was harmless and affirm the conviction.

By the Court.—Judgment and order affirmed.

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