COURT OF APPEALS
DECISION
DATED AND FILED

January 26, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 98-1556

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

COUNTY OF OUTAGAMIE,

PLAINTIFF-RESPONDENT,

v.

KENNETH C. LUEDKE,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Outagamie County: JAMES T. BAYORGEON, Judge. *Affirmed.*

HOOVER, J. Kenneth Luedke appeals a conviction for operating a motor vehicle while under the influence of an intoxicant, contrary to § 346.63(1)(a), STATS.[1] He contends that the trial court erred by admitting evidence at trial that he had refused a chemical test of his blood after having

[1] Luedke was also convicted of operating a motor vehicle after his driving privileges had been revoked. His brief does not address that conviction.

previously dismissed the refusal proceeding as untimely. This court does not resolve whether evidence of his refusal was improperly admitted because even if it was error, it was harmless. The judgment of conviction is therefore affirmed.

Luedke was arrested for OWI on October 16, 1995. The arresting sheriff's deputy, sergeant Robert Bekx, issued a Notice of Intent to Revoke Operating Privileges to Luedke for his refusal to submit to a chemical test for determining the presence and amount of alcohol in his blood.[2] A hearing on the refusal was set for December 30, 1996, at which time the trial court granted Luedke's motions to dismiss the refusal matter and the OWI charge due to several procedural irregularities. The dismissal was with leave to refile. After a lengthy delay, charges were reinstated, and a new Notice of Intent to Revoke was issued in October 1997. Luedke again successfully moved to dismiss the refusal matter as untimely and beyond the statute of limitations. The dismissal notwithstanding, the trial court permitted the County to introduce over objection evidence that Luedke had refused to submit to a blood test.

Luedke raises several bases he claims demonstrate that the trial court erred by receiving evidence of the refusal at trial. His principal argument is that the refusal dismissal order should be construed as entered with prejudice, thus operating as an adjudication on the merits. As such, the order effectively resolved the issues germane to a refusal hearing against the County, which therefore should not have been permitted to use evidence of the refusal. Luedke also contends that he was deprived of a meaningful opportunity to receive notice and to be heard

[2] Luedke also refused to perform field sobriety tests. His explanation was that he was not driving and therefore believed that he need not submit to the field tests.

regarding the County's intention use evidence of his refusal, thereby violating his right to procedural due process.

The County responds to Luedke's substantive arguments, but also contends that any error in admitting refusal evidence was harmless. This court first notes that Luedke did not file a timely reply to the County's harmless error argument.[3] Arguments advanced on appeal that are unrefuted are deemed admitted. *See* ***Charolais Breeding Ranches v. FPC Secs. Corp.***, 90 Wis.2d 97, 109, 279 N.W.2d 493, 499 (Ct. App. 1979). Addressing the merits of the harmless error argument, however, this court finds the County's position compelling. There is thus no reason to address Luedke's assignments of error. *See* ***Sweet v. Berge***, 113 Wis.2d 61, 67, 334 N.W.2d 559, 562 (Ct. App. 1983) (if resolution of one issue is dispositive, this court need not address other issues raised).

State v. Schirmang, 210 Wis.2d 324, 333, 565 N.W.2d 225, 229 (Ct. App. 1997), discusses the harmless error analysis in the context of alleged evidentiary errors:

> Generally, 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 which is sufficient to undermine confidence in the outcome of the proceeding. *State v. Patricia A.M.*, 176 Wis.2d 542, 556, 500 N.W.2d 289, 295 (1993). The burden of proof is on the beneficiary of the error to establish that the error was not prejudicial. *Dyess* at 547 n.11, 370 N.W.2d at 232 n.1.

[3] Luedke did not file his reply brief within 15 days of service of the respondent's brief. *See* § 809.19(4), STATS. This court cannot continue to function at its current capacity without requiring compliance with the appellate rules of procedure, the purpose of which is to facilitate review. ***Cascade Mtn. v. Capitol Indem. Corp.***, 212 Wis.2d 265, 270 n.3, 569 N.W.2d 45, 47 n.3 (Ct. App. 1997). Accordingly, Luedke's reply brief is struck as late under RULE 809.83(2), STATS.

For a constitutional error to be held harmless, the court must be able to conclude that the error was harmless beyond a reasonable doubt. A court should be sure that the error did not affect the result or had only a slight affect. ***State v. Harris***, 199 Wis.2d 227, 252-53, 544 N.W.2d 545, 555-56 (1996). The evidence of Luedke's guilt is so overwhelming, and the evidence of his refusal so inconsequential in light of the defense he pursued, that under either standard any error was harmless.

The County's brief neatly marshals the trial evidence:

> Alphonse Tamayo, an off-duty City of Madison police officer, testified that the was traveling southbound on U.S. Highway 41 on October 16, 1995. He saw another vehicle make a U-turn from northbound Highway 41 to southbound Highway 41. As he traveled behind this vehicle, he observed it leave the lane of traffic and go to the shoulder repeatedly, kick up dirt and cross the lane divider causing Tamayo to fear his vehicle would be struck. This vehicle then traveled at 45 mph in the left lane obstructing that lane. The vehicle pulled off onto a side highway during which time Tamayo was in contact with police via his cell phone, giving them updates as to the driver's actions and location.
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> Tamayo testified that he saw the driver exit the vehicle and fall against the side of the vehicle. Further, the only person he saw exit the vehicle was the person arrested by the Sheriff's deputy at the scene. Tamayo opined that the person he saw get out of the vehicle was "one of the most intoxicated individuals I've ever observed."
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> Mark Ellis testified that he was making a midnight delivery to a paper company in Appleton traveling southbound on Highway 41 on October 16, 1995. He saw a vehicle swerve in front of him onto the shoulder throwing gravel and rocks in front of Ellis. Ellis observed this vehicle "driving erratically". Ellis described the driving as being "all over the road like you would expect somebody that was intoxicated driving to drive". Ellis called 911 and continued following this vehicle.
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> Ellis followed the vehicle until it pulled off the highway. A man got out of the driver's side of this vehicle,

> approached Ellis, and spoke to him. Ellis told him that he was all over the road, that he was going to hurt someone and that "the cops were on their way." The person acknowledged to Ellis, "yeah, you're right." Ellis saw no one else exit the vehicle and that the person who approached him was the person the officer took into custody.
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> According to Ellis, this person "looked like an intoxicated person" and "talked like an intoxicated person".
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> Sgt. Bekx testified that he was on duty on October 16, 1995 and was monitoring radio communications. He heard that two vehicles and a possible "drunk driving vehicle" had stopped on County Highway Double D and Highway 41. Sgt. Bekx located three vehicles nearby at County Highway U and Highway 41. Sgt. Bekx spoke to Tamayo who pointed out the driver of the suspect vehicle. Sgt. Bekx spoke to this person and observed that he had an odor of intoxicants coming from him, that he had bloodshot and glassy eyes and "had a hard time walking straight". Sgt. Bekx identified him as Kenneth C. Luedke. When asked for his opinion as to Luedke's sobriety, Sgt. Bekx replied "[h]e was plastered". In addition, Sgt. Bekx advised that Luedke never denied driving. …
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> The defendant himself was called to testify by the county as an adverse witness. The defendant confirmed he had been drinking that evening and that due to his medications, any amount of alcohol would have been too much. He further stated that "it was enough that I shouldn't have been driving and which I wasn't". When confronted by the county regarding the defendant's refusal to perform field sobriety testing, the defendant replied, "[a]s long as I wasn't driving the vehicle, I didn't feel I needed to submit to any of his tests, and I was adamant about that".

The County did not refer to the refusal in its opening statement. The subject first arose during Bekx's testimony. Luedke characterizes the trial testimony regarding his refusal to take the blood test as "lengthy." In fact, however, it amounts to a relatively brief exchange. Bekx testified that he twice asked Luedke if he would submit to an evidentiary blood test, and Luedtke was adamant in saying no. Bekx inquired regarding and Luedke denied any medical

reasons for refusing the test. The foregoing was established through six questions posed by the prosecutor.

A jury instruction related that evidence of Luedke's refusal had been received, and the jury could give it what weight it thought appropriate. During closing arguments, the prosecutor referred to the refusal once, briefly. Her main focus was on all of the other evidence showing that Luedke was the driver and was intoxicated. The prosecutor did not mention the refusal evidence in her rebuttal argument.

The evidence of Luedke's § 346.63(1)(a), STATS., violation was overwhelming. Several concerned citizens observed such dangerously erratic driving that each felt compelled to follow Luedke and report his driving to law enforcement. Both Ellis and Tomayo were independently able to place Luedke behind the wheel. Luedke was respectively described by a police officer and a deputy sheriff as one of the most intoxicated individuals he had ever seen and as "plastered." The witnesses' observations of Luedke's physical movements corroborated these opinions. On the other hand, the references to the refusal evidence were brief and few. Indeed, the refusal was compatible with Luedke's defense; he did not submit to the field or chemical tests because he was not driving and therefore was under no obligation to so submit. Weighing the effect of the claimed inadmissible evidence against the totality of the credible evidence supporting the verdict,[4] this court concludes that if it was error to admit evidence of Luedke's refusal, it was harmless beyond a reasonable doubt. This court is

[4] *See* ***State v. Britt***, 203 Wis.2d 25, 41, 553 N.W.2d 528, 534 (Ct. App. 1996).

confident that the reference to Luedke's refusal had at most only a slight affect on the outcome of the trial. Luedke's conviction is therefore affirmed.

By the Court.—Judgment affirmed.

This opinion will not be published. RULE 809.23(1)(b)4, STATS.