COURT OF APPEALS
DECISION
DATED AND FILED

October 18, 2001

Cornelia G. Clark
Clerk of Court of Appeals

No. 01-0974

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

VILLAGE OF PLOVER,

PLAINTIFF-RESPONDENT,

V.

SCOTT K. PITTMAN,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Portage County: THOMAS T. FLUGAUR, Judge. *Affirmed.*

¶1 ROGGENSACK, J.[1] Scott Pittman appeals a jury verdict finding him guilty of operating a motor vehicle while intoxicated, in violation of WIS. STAT. § 346.63(1)(a). Pittman contends that the trial court erred by excluding

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(c) (1999-2000). Additionally, all further references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

testimony related to his reasons for refusing to submit to a chemical test for alcohol. We conclude that even if we were to assume that the challenged testimony were admissible, the circuit court's decision to exclude it is harmless error. Accordingly, we affirm the judgment of conviction and the circuit court's denial of Pittman's motion for a new trial.

BACKGROUND

¶2 Scott Pittman is a physician and a resident of Illinois. He was arrested for operating a motor vehicle while intoxicated (OMVWI) in the Village of Plover, Wisconsin. The arrest occurred after Village Police Officer Steven Moe observed Pittman's northbound vehicle straddling the centerline between two northbound lanes and weaving back and forth in the two northbound lanes.

¶3 Moe stopped the vehicle and questioned Pittman, who stated that he was just tired from a day spent golfing and gambling. Moe noted that some of Pittman's speech was slow and slightly slurred, that his eyelids were slow to blink and that his head was moving in a manner that made it appear it was too heavy for his neck. He also detected the odor of intoxicants coming from inside the vehicle. Moe asked Pittman whether he had been drinking. Initially Pittman denied drinking, but later he said that he had been.

¶4 Moe then conducted field sobriety tests. Pittman swayed from side to side during the HGN eye test, and his eyes reacted with the jerking movement that is indicative of alcohol intoxication. When Moe conducted the walk and turn test, Pittman failed the test because he was unable to walk a straight line for the nine steps he was instructed to take, took eleven steps, rather than nine and was unable to repeatedly place the heel of one foot at the toe of the other for the

duration of the test. Moe then conducted the one leg stand test, which Pittman was also unable to pass, even though he made four attempts.

¶5 Based on Pittman's performance on the field sobriety tests and Moe's other observations, Moe arrested him. With Pittman's permission, Moe moved Pittman's vehicle to a parking lot at the side of the road. When he did so he found two empty twelve ounce bottles of beer underneath the seat of the truck. At the Portage County Sheriff's Department, Moe read Pittman the Informing the Accused form, which explains Wisconsin's informed consent law and the consequences of refusing to submit to a chemical test for alcohol after an arrest. After Moe read the form, Pittman refused to submit to a breath test. In addition, Pittman did not ask to pursue any alternative tests, which is an option explained in the Informing the Accused form.

¶6 At trial, Moe testified about his observations and that Pittman refused to submit to testing after he had read him the Informing the Accused form. Pittman, himself, testified that he had no trouble understanding the information Moe read to him from the form. Pittman also gave an explanation for his refusal to have his breath tested. He testified that, as a physician, he is skeptical about the accuracy of breath, blood and urine tests, and that this skepticism is one of the reasons he refused to take the requested breath test. He also testified that, being a resident of Illinois, he was not familiar with Wisconsin law and that it was his belief that there was no penalty for refusing a test in Illinois.

¶7 Pittman was prepared to further explain his refusal by testifying that he has a number of friends who are attorneys and policemen in Illinois and that it was his understanding "from conversations with them that in Illinois, it's not advisable to submit to a test." This proposed testimony, however, was met with a

hearsay objection. The circuit court sustained the objection, and, as a result, Pittman was not permitted to repeat to the jury what Illinois attorneys and policemen had told him.

¶8 The jury returned a guilty verdict, and the circuit court entered a judgment of conviction and denied Pittman's motion for a new trial. Pittman contends on appeal that the circuit court erred in excluding the testimony as hearsay. He argues that what he was told by lawyers and police was not offered to establish the truth of the matter asserted, but instead was offered to establish the foundation for his belief (*i.e.*, his state of mind) at the time of his refusal that it was unwise to submit to a test in Illinois. According to Pittman, the excluded evidence was necessary to provide the jury with a complete picture of his reasons for refusing to take a chemical test and, without that evidence, the jury was likely to presume that his refusal arose out of consciousness of guilt.

¶9 The Village contends that the circuit court properly determined that the testimony was inadmissible hearsay. The Village also argues that, regardless of whether the testimony was properly excluded, if the circuit court erred, it was harmless error. Because we agree with the Village, that even assuming, *arguendo*, that the ruling was erroneous, it was harmless error, therefore we affirm.

DISCUSSION

Standard of Review.

¶10 The admissibility of evidence is within the circuit court's discretion. ***State v. Alexander***, 214 Wis. 2d 628, 640, 571 N.W.2d 662, 667 (1997). When we review a circuit court's exercise of discretion, we examine the record to determine if the court logically interpreted the facts, applied the proper legal

standard, and used a demonstrated rational process to reach a conclusion that a reasonable judge could reach. ***Ansani v. Cascade Mountain, Inc.***, 223 Wis. 2d 39, 45-46, 588 N.W.2d 321, 324 (Ct. App. 1998); ***State v. Evans***, 187 Wis. 2d 66, 77, 522 N.W.2d 554, 557 (Ct. App. 1994).

¶11 Any evidentiary error, however, is subject to a harmless error analysis. *See* ***McLemore v. State***, 87 Wis. 2d 739, 757, 275 N.W.2d 692, 701 (1979). In making a harmless error determination, we weigh the effect of the excluded evidence against the totality of the credible evidence supporting the verdict, *de novo*. ***State v. Doerr***, 229 Wis. 2d 616, 626, 599 N.W.2d 897, 902 (Ct. App. 1999).

Harmless Error.

¶12 Once the Village offered evidence of Pittman's refusal to take a breath test as consciousness of guilt, he had the right to explain his refusal to the jury and offer reasons that might counteract the negative inference argued by the Village. *See* ***State v. Bolstad***, 124 Wis. 2d 576, 370 N.W.2d 257 (1985); ***State v. Sayles***, 124 Wis. 2d 593, 370 N.W.2d 265 (1985). Although there was extensive testimony regarding his skepticism of the accuracy of blood, breath or urine tests and that that affected his decision to refuse to take the test requested, he was not permitted to tell the jury what policemen and attorneys had told him about the advisability of taking a chemical test.

¶13 For the purposes of our analysis, we will assume that the circuit court's decision to exclude the evidence was erroneous, and we will address the excluded evidence in a harmless error analysis. An error is harmless if there is no reasonable possibility that it contributed to the defendant's 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. ***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***, 124 Wis. 2d at 544 n.11, 370 N.W.2d at 232 n.11.

¶14 At trial there was extensive testimony about Moe's observations of Pittman, both while he was driving and during the field sobriety tests Pittman took and failed. For example, he reported that Pittman's vehicle straddled the centerline between two northbound lanes and also wove back and forth in them. He said that initially Pittman denied drinking, and that he noted some of Pittman's speech was slow and slightly slurred, that his eyelids were slow to blink and that his head was moving in a manner that made it appear it was too heavy for his neck. He also detected the odor of intoxicants. Moe said that while he conducted the HGN eye test, Pittman swayed from side to side and his eyes reacted with the jerking movement that is indicative of alcohol intoxication. During the walk and turn test, Pittman was unable to walk a straight line, take the requested number of steps, or repeatedly place the heel of one foot at the toe of the other foot. And in the one leg stand test, he could not stand on one foot for thirty seconds, even though he tried to do so four times.

¶15 Pittman stated that he intended to testify as follows:

> I have friends who are attorneys and friends who are policemen in Illinois, and I have occasion as I said being that I am in the Emergency Room and such like that to have conversations.
>
> It's my understanding from conversations with them that in Illinois, it's not advisable to submit to a test.

However, Pittman was driving in Wisconsin at the time of his arrest, not in Illinois. To the extent that the testimony might have been admitted solely to further explain Pittman's "state of mind" at the time of the refusal (*i.e.*, why he believed what he believed about submitting to tests), it would add almost nothing to what was already before the jury. Additionally, Pittman testified that he understood the Informing the Accused form which was read to him and which provides, "If you refuse to take any test that this agency requests, your operating privilege will be revoked and you will be subject to other penalties. The test results or the fact that you refused testing can be used against you in court." Therefore, upon a thorough review of the record, we conclude that there is no reasonable possibility that the jury would have acquitted Pittman if the excluded testimony had been admitted.

CONCLUSION

¶16 We conclude that even if we were to assume that the challenged testimony were admissible, the circuit court's decision to exclude it is harmless error. Accordingly, we affirm the judgment of conviction and the circuit court's denial of Pittman's motion for a new trial.

By the Court.—Judgment and order affirmed.

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