

**COURT OF APPEALS
DECISION
DATED AND FILED**

June 23, 2009

David R. Schanker
Clerk of Court of Appeals

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 WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2008AP2066-CR

Cir. Ct. No. 2007CF48

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

EDWARD R. NEIBAUER, JR.,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Ashland County:
ROBERT E. EATON, Judge. *Affirmed.*

Before Hoover, P.J., Peterson and Brunner, JJ.

¶1 PER CURIAM. Edward Neibauer, Jr. appeals a judgment convicting him of fifth-offense drunk driving. After the court admitted into evidence Neibauer's inculpatory statement in effect admitting to driving his vehicle, the court prevented him from introducing other statements to police in

which he alleged Jon Larson drove the car off the road. Neibauer argues the subsequent statements were admissible under the “rule of completeness.” We conclude the trial court properly excluded the subsequent statements and if the court erred, the error was harmless because of overwhelming evidence that Neibauer drove the vehicle.

¶2 Deputy Jason Janacek observed the vehicle thirty feet off the road in a snow covered field. He asked the only occupant, Neibauer, what he was doing there. Neibauer responded he was “trying to get his vehicle turned around and back onto the road.” When Janacek asked Neibauer how he had gotten there, Neibauer responded that he went off the road. At least one-half hour later, in Janacek’s squad car, Neibauer advised Janacek that he had misunderstood what Neibauer said. Neibauer claimed he had driven the car in the field to try to get out and to operate the heater. Neibauer made two additional statements to Sgt. Bruce Joanis at the station later that day or the subsequent day. In those statements, Neibauer recanted his initial statement to Janacek and explained that his friend, Jon Larson, had actually been driving the car.

¶3 The trial court properly excluded Neibauer’s retractions and recantations because they are not admissible under the rule of completeness. The rule of completeness applies when a partial statement is admitted into evidence and hearing the remainder of the statement would be necessary to avoid giving the jury an unfair and misleading impression of what Neibauer said. *See State v. Eugenio*, 219 Wis. 2d 391, 411, 579 N.W.2d 642 (1998). The rule should not be viewed as an unbridled opportunity to open the door to other inadmissible evidence. *Id.* at 412. The court in *Eugenio* cautioned circuit courts to closely scrutinize the proffered statements and “to admit only those statements which are necessary to provide context and prevent distortion.” *Id.*

¶4 Neibauer's recantation and his claim that Larson drove the car off the road do not fall under the rule of completeness because they are not a part of the same statement. Statements made at a different time and a different place do not complete the thought, they must be admissible on their own basis. The State introduced Neibauer's entire initial conversation with Janacek. There was no danger of the jury taking the statement out of context. The subsequent statements are properly viewed as separate statements.

¶5 Even if the rule of completeness applied, any error in refusing to admit the statement was harmless because overwhelming evidence contradicted Neibauer's claim that Larson drove the vehicle off the road. Two other citizens observed the car off the road. Thomas Griffiths saw the car between 5:30 and 6:00 a.m. on the morning of February 14. His brother, Bruce, saw the car between 9:00 and 9:30 p.m. the night before. Bruce saw only one person in the car, consistent with what Janacek found the next morning.

¶6 Laura Scheder, a bartender, testified Neibauer and Larson entered the bar together on February 13 around 8:00 p.m. Neibauer left after 15 minutes. Larson was still there three hours later. She remembered that because Larson asked her for a ride home. This evidence established Neibauer's car was already in the ditch before Larson left the bar. Larson also testified and denied driving the vehicle. This overwhelming evidence that Neibauer drove the car off the road would have established his guilt beyond a reasonable doubt regardless of whether the jury heard his self-serving denials made after his initial incriminating statement.

By the Court.—Judgment affirmed.

This opinion will not be published. See WIS. STAT. RULE
809.23(1)(b)5. (2007-08).

