2013 IL App (1st) 113765-U

FIFTH DIVISION
January 25, 2013

No. 1-11-3765

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

VILLAGE OF ORLAND PARK,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	Nos. YT 257 211
	)	YT 257 212
	)	
STEPHEN THORNE,	)	Honorable
	)	Kerry M. Kennedy,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE HOWSE delivered the judgment of the court.
Presiding Justice McBride and Justice Palmer concurred in the judgment.

O R D E R

¶ 1 *Held*: The court did not abuse its discretion in admitting into evidence a copy of a page from a breathalyzer machine log; defendant did not challenge the authenticity of the copy, and his assertion that its admission was unfair is wholly conclusory. Moreover, any error was harmless because there was sufficient evidence, independent of the breathalyzer results, that defendant was driving under the influence of alcohol.

¶ 2 Following a bench trial, defendant Stephen Thorne was found guilty of driving under the influence of alcohol (DUI) and sentenced to two years of conditional discharge with 30 days in jail and $1,405 in fines and fees. On appeal, defendant contends that the court erred in admitting

into evidence a photocopy of a page from a breathalyzer machine log rather than the log itself, as foundation for admitting the machine's breath analysis results for defendant, thus depriving him of the opportunity to cross-examine regarding certification of that machine.

¶ 3 At trial, Brandon Magalski testified that, at about 2 a.m. on June 23, 2011, he saw a car "that slammed into a construction equipment, a steam roller." He did not see the collision occur. The entire front end of the car was "torn up," and Magalski went to the car to see if anyone was injured. He saw defendant in the driver's seat, slouched over the steering wheel and repeatedly but unsuccessfully trying to start the engine. All of the car's doors were shut, and there was nobody else in the car. Defendant said that he was fine, did not want Magalski to call the police, and "left his lunch at home." Magalski phoned "911" anyway. He had not noticed anything unusual in defendant's speech beyond his reference to lunch.

¶ 4 Police officer Prestia testified that he responded to Magalski's report of a crash. Upon arriving at the scene, defendant was standing near the damaged car and the keys were in the ignition. The road paving machine was parked on the side of the road and was "marked with a cone." Defendant told Officer Prestia that he was driving when he reached for his lunch, lost control of the car, and struck the paving machine. Officer Prestia smelled a strong odor of alcohol on defendant's breath and noted that his speech was slightly slurred but understandable. Defendant had no difficulty standing or walking and was polite and cooperative.

¶ 5 Officer Gomez testified that she came to the scene after Officer Prestia. Defendant also told Officer Gomez that he had been driving when he reached for his lunch, looked away from the road, and struck the construction equipment. Officer Gomez learned that defendant was the registered owner of the damaged car. She smelled a strong odor of alcohol on defendant's breath and noted that his eyes were glassy and bloodshot and his face was red. Defendant admitted to having "a few beers earlier in the evening" but also said that he had not had a drink in the two

hours before leaving for work. Defendant agreed to take field sobriety tests, which included balance and walking-related tests; he swayed as he attempted to walk an imaginary line, and he could not stand on one foot. Officer Gomez also gave defendant a portable breath test, which showed a blood alcohol concentration (BAC) of 0.165. Officer Gomez arrested defendant and took him to the police station.

¶ 6 At the station, Officer Gomez observed defendant for 20 minutes, during which he did not eat, drink, vomit, or belch. Officer Gomez then used a particular breathalyzer machine (the Machine) that she was trained and licensed to operate. Officer Gomez testified that the Machine was regularly tested to ensure its accuracy. The State sought to introduce a copy of the Machine's readout of defendant's breath test, which indicated that the Machine was certified accurate on June 1, 2011. Officer Gomez testified that the copy of the readout was substantially in the same condition as on the night in question. Defendant objected "only *** as to the best evidence rule as a copy" but was overruled. The State introduced a copy of another readout from the Machine showing a certification on July 1, 2011, and again Officer Gomez testified that the copy was an accurate copy of the readout from the night in question. The State also sought to introduce a copy of a page from the Machine's log book (the Log), which Officer Gomez testified was "substantially in the same condition" as on the night in question. Defendant again objected "just to the best evidence rule" and was again overruled. Officer Gomez marked on the Log excerpt the entry she made for defendant's breath test. The result of that test, when Officer Gomez saw defendant blow into the Machine, was a BAC of 0.156. Defendant objected that "the best evidence is not intended to be a copy of" the Machine's test-result printout, and was again overruled. Officer Gomez gave her opinion from her police experience that defendant drove a car under the influence of alcohol on the night in question.

¶ 7 On cross-examination, Officer Gomez testified that defendant did not seem to have difficulty standing when she arrived at the scene, nor did he have difficulty walking at the police station. His speech was slightly slurred but understandable; however, Officer Gomez's report did not reflect this. He was polite and cooperative. When he took the field sobriety tests, he successfully counted as she instructed him. Defendant did not seem injured at the scene, but a small cut on his head, initially hidden by his hat, was later noticed and treated.

¶ 8 Defendant's motion for a directed finding – to the effect that there was insufficient evidence he was driving the car – was denied.

¶ 9 Defendant testified that he was in the car that collided with the paving machine on the night in question but was not driving. The State did not cross-examine him.

¶ 10 The court found defendant guilty of DUI, improper lane usage, and operating an uninsured motor vehicle. At the hearing on defendant's unsuccessful post-trial motion (of which there is no copy of the written motion in the record), defense counsel referred only to the sufficiency of the evidence that defendant was driving, as "[w]e had stipulated [he] was under the influence." Defendant was sentenced for DUI as stated above, and this appeal followed.

¶ 11 On appeal, defendant contends that the court erred in admitting into evidence a photocopy of a page of the Log rather than the Log itself, thus depriving him of the opportunity to cross-examine regarding certification of the Machine.

¶ 12 Illinois Rule of Evidence 1003 (eff. Jan. 1, 2011) provides that a "duplicate is admissible to the same extent as an original unless (1) a genuine question is raised as to the authenticity of the original or (2) in the circumstances it would be unfair to admit the duplicate in lieu of the original." Illinois Rule of Evidence 1005 (eff. Jan. 1, 2011) provides that the "contents of an official record, or of a document authorized to be recorded or filed and actually recorded or filed, including data compilations in any form, if otherwise admissible, may be proved by copy,

certified as correct *** or testified to be correct by a witness who has compared it with the original." Illinois Rule of Evidence 106 (eff. Jan. 1, 2011) provides that "[w]hen a writing or recorded statement or part thereof is introduced by a party, an adverse party may require the introduction at that time of any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it." The admissibility of evidence at trial is a matter within the sound discretion of the trial court so that we will not overturn its decision absent a clear abuse of discretion. *People v. Graves*, 2012 IL App (4th) 110536, ¶ 16. The erroneous admission of evidence is harmless where the properly-admitted evidence establishes the defendant's guilt beyond a reasonable doubt so that a retrial without the error would not produce a different result. *Id*. at ¶ 32.

¶ 13 Here, while defendant objected to the introduction of the Log excerpt, he did not – and indeed does not now – claim that the Log excerpt was not authentic. Instead, he relies upon the other prong of Rule 1003, arguing (for the first time on appeal) that admission of the Log excerpt was unfair because it deprived him of his ability to cross-examine regarding certification of the Machine. However, he does not attempt to explain how his cross-examination was limited by introduction of the Log excerpt rather than the Log itself. Notably, defendant did not avail himself of Rule 106 at trial by demanding introduction of the entire Log, which he could do even after the Log excerpt was admitted over his "best evidence" objection. See *People v. Baltimore*, 381 Ill. App. 3d 115 (2008)(best evidence rule and completeness doctrine are independent bases for objection). We find that the Log excerpt was properly admitted into evidence.

¶ 14 Moreover, we find that any error in the admission of the Log excerpt was harmless in that a reasonable finder of fact could convict defendant of DUI without relying upon the testing results from the Machine. First and foremost, the evidence that defendant was operating the car that struck the road construction equipment in the roadway was strong. The car was registered to

defendant, a lay witness found defendant alone in the car, seated in the driver's seat and trying to start the engine, and defendant admitted to two police officers that he had been driving the car at the time of the crash. As to defendant being under the influence of alcohol, both officers smelled alcohol on his breath and noted his somewhat slurred speech while one noted his red face and his glassy and bloodshot eyes. Moreover, defendant admitted to one of the officers that he drank alcohol earlier that evening. Though there were some discrepancies in the officers' testimony, we do not believe they rise to the level of reasonable doubt.

¶ 15 Accordingly, the judgment of the circuit court is affirmed.

¶ 16 Affirmed.