

No. 1-11-3374

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

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Cook County.
)	
v.)	No. 10 CR 17224
)	
RICARDO CRUZ,)	Honorable
)	Carol A. Kipperman,
Defendant-Appellant.)	Judge Presiding.

JUSTICE TAYLOR delivered the judgment of the court.
Justices McBride and Palmer concurred in the judgment.

ORDER

¶ 1 *Held:* Defendant's convictions for aggravated driving under the influence of alcohol and driving on a revoked license are affirmed where the trial court's denial of defendant's motion for a mistrial was not an abuse of discretion because the court cured any possible prejudice by striking the improper testimony and instructing the jury to disregard it.

¶ 2 Following a jury trial, defendant Ricardo Cruz was convicted of aggravated driving under the influence of alcohol and driving on a revoked license. The trial court sentenced defendant to concurrent terms of 10 years' imprisonment. On appeal, defendant contends the trial court erred when it denied his motion for a mistrial following a police sergeant's testimony that defendant

stated he had been "locked up before." Defendant argues that the State committed a discovery violation when it failed to disclose the evidence of defendant's statement before trial, the testimony prejudiced defendant, and the error was not cured when the trial court instructed the jury to disregard the testimony. We affirm.

¶ 3 At trial, River Grove police officer Tony Ikis testified that shortly after 10 p.m. on August 10, 2010, he was driving an unmarked police car when he observed a blue Toyota in front of him weave to the left over the yellow line twice. There was no issue with the vehicle's speed, but the Toyota drove halfway into the oncoming lane of traffic. Officer Ikis activated his lights and siren to pull over the Toyota. The Toyota slowed down and appeared as though it was going to stop in the middle of the road, then pulled over to the right of the roadway. Officer Ikis approached the driver's side of the Toyota and saw that defendant was in the car alone. The officer asked defendant to roll down his window, and defendant refused by shaking his head back and forth. Officer Ikis then opened defendant's car door, which was unlocked. The officer immediately smelled a "very strong" odor of alcohol and saw that defendant's eyes were bloodshot and watery.

¶ 4 Officer Ikis asked defendant for his driver's license, and defendant replied that it was revoked. The officer then asked defendant to exit his vehicle, and defendant stumbled out of his car. Officer Ikis continued to smell the strong odor of alcohol coming from defendant's breath and body, and defendant's speech was slurred and mumbled. Officer Ikis conducted a pat-down search of defendant and found his state identification card in his pocket. Defendant claimed he was coming from his home, but he was driving in the opposite direction of his address. Defendant had difficulty with his balance, periodically swaying back and forth. Defendant

refused to perform any field sobriety tests. Officer Ikis then arrested defendant for driving under the influence of alcohol (DUI). As they walked to the police car, defendant continued swaying.

¶ 5 In the police car, defendant repeatedly asked Officer Ikis what offense he was being charged with, and Officer Ikis repeatedly advised him of the charge. Officer Ikis continued to smell a very strong odor of alcohol in the police car, which was not there prior to defendant's presence in the car.

¶ 6 At the police station, defendant requested and was allowed to use the restroom. Thereafter, Officer Ikis placed defendant in the mug room, which is a small room with a desk and a bench where the handcuffed offenders sit. Defendant was seated on the bench and Officer Ikis attempted to read defendant his *Miranda* warnings and the "warning to motorist" about the consequences of taking or refusing the Breathalyzer and drug tests. At this point, defendant's demeanor changed and he became very belligerent and uncooperative. As the officer read the warnings, defendant repeatedly said "la, la, la, la, la, la," indicating he did not want to listen. The officer continued reading the warnings as required. Defendant still had a very strong odor of alcohol, had bloodshot and watery eyes, and was unruly and uncooperative. Defendant used a lot of profanity, repeatedly telling Officer Ikis "you're a bitch," and made strange remarks, such as "I know your name *** it is Big Foot." Defendant initially said he would take a breath test, but when it was time to take the test, refused to do so, using profanity.

¶ 7 Officer Ikis left defendant alone in the mug room, handcuffed to the bench. When the officer returned to the room a short time later, defendant had urinated in the garbage can and on the floor. Defendant denied doing it. Defendant refused to look at the camera to be photographed for his mug shot and refused to be fingerprinted, clenching his fists. Due to defendant's lack of cooperation, Officer Ikis could not finish booking defendant, and defendant's

processing was not completed until the following day. Officer Ikis' shift ended at midnight, at which time he turned the investigation over to one of his sergeants. In his 12 years of experience as a River Grove police officer, Officer Ikis had made 1,000 DUI arrests. Based on his experience and his observations of defendant, Officer Ikis opined that defendant was under the influence of alcohol and incapable of safely driving his vehicle.

¶ 8 River Grove police sergeant Steve Shimanski testified that shortly after midnight, Officer Ikis notified him that he was having difficulty processing defendant, and the sergeant returned to the police station. When he entered the back area of the station, Sergeant Shimanski smelled a strong odor of alcohol. The sergeant entered the cell where defendant was being held to find out why defendant was refusing to be processed. Defendant's eyes were watery and his speech was slurred. Defendant demanded a cigarette and Sergeant Shimanski replied that smoking was not allowed in the station. The following colloquy then occurred:

"[PROSECUTOR:] And did you then inquire with him about his request or his denying the request to be fingerprinted?

[SGT. SHIMANSKI:] I asked him why he was refusing. He says that he's been locked up before.

[DEFENSE COUNSEL]: Objection, Judge. Could we have a sidebar on this?"

¶ 9 At the sidebar, defense counsel argued that Sergeant Shimanski's testimony that defendant had been "locked up" previously "doesn't get anymore prejudicial than that." The prosecutor replied that the defense had not filed a motion *in limine* to bar use of defendant's statements, and that the State intended to present defendant's entire statement. As an offer of proof, the prosecutor revealed that defendant had asked the sergeant if he was familiar with his

background, then stated that he had previously battered police officers, the police would have to break off his fingers to fingerprint him, someone would be going to the hospital, he did nothing wrong, and he called the sergeant a crooked cop.

¶ 10 Defense counsel stated that he was never tendered the page containing those statements during discovery. The State explained that the statements were on the second page of the supplemental report and offered to tender the page to counsel at the sidebar. Defense counsel stated that if he had received the page, he would have filed a motion *in limine*. Counsel argued that the jury had heard that defendant had been in jail, and therefore, the court should declare a mistrial. The State responded that the motion should be denied. The court noted that defense counsel could have a recess to review the police report and then make a related motion. The State suggested that counsel could ask that the sergeant's testimony be stricken and that the jury be instructed to disregard it. Defense counsel replied that it is not easy for a jury to disregard what it has already heard, and he again requested a mistrial.

¶ 11 The court denied defendant's motion for a mistrial and stated that it would instruct the jury to disregard the statement. The court further stated that after instructing the jury, it would take a recess. Defense counsel stated that he wanted proof that the State gave him the full report.

¶ 12 Following the sidebar, the trial court instructed the jury "to disregard any response with regard to defendant's previous contact with the law." The court then took a recess.

¶ 13 During the recess, defense counsel showed the court the packet of discovery he received from the State, noting that he had not removed any staples, that he had not added anything to it, and that the page the State had referred to was not in that packet, and thus, never tendered to him. Counsel stated that if he had received the page, he would have filed a motion *in limine*, and then defendant's statement that he had been previously "locked up" would not have been admitted.

Counsel further stated that he was not claiming the State intentionally failed to tender the page. Nevertheless, he argued that the State's failure to tender the page was a discovery violation.

¶ 14 The State maintained that it tendered a full set of discovery to defense counsel. The State then pointed out that it was going to present defendant's driving abstract, which indicated his driver's license was revoked. The State argued that the abstract spoke for itself regarding defendant's prior contact with law enforcement, and that the jury could draw its own conclusions of why his license was revoked. The State decided that it would not seek to admit the additional statements defendant made to the sergeant, and therefore, it had no further questions for the sergeant. The State asserted that the only remedy was for the court to instruct the jury to disregard the statement, which it had already done.

¶ 15 Defense counsel reiterated that he was never tendered the page and that he would have filed a motion *in limine* if he had received it. Counsel argued that defendant had a lot at stake in this case because, if convicted, he would be sentenced as a Class X offender. Counsel further argued that instructing the jury to disregard the statement would not correct the error.

¶ 16 The trial court refused to declare a mistrial and stated that a discovery violation does not automatically lead to a mistrial. The court explained that under such circumstances, it usually takes a recess, tenders the missing documents, and gives the aggrieved party a chance to talk to the witness. The parties continued arguing with each other. The court then stated "[a]s I said for the fifth or sixth or seventh time, there is not going to be a mistrial in this case." Defense counsel made a motion for a discovery violation, requested sanctions against the State, and made a motion for a new trial. The court denied counsel's motions. Counsel then made an oral motion *in limine* to prevent the sergeant or any other officer from testifying about any other statements defendant may have made.

¶ 17 When the trial resumed, the prosecutor stated that he had no further questions for the sergeant, defense counsel declined cross-examination, and Sergeant Shimanski was excused. The State then presented defendant's certified driving abstract which indicated the revocation of defendant's license was in effect on the date he was arrested in this case. Thereafter, both parties rested. While instructing the jury, the trial court stated "[y]ou should disregard testimony and exhibits which the Court has refused or stricken." Following deliberations, the jury found defendant guilty of aggravated driving under the influence of alcohol and driving with a revoked or suspended driver's license. The trial court sentenced defendant to concurrent terms of 10 years' imprisonment as a Class X offender based upon his extensive criminal history, which included nine prior felony convictions and numerous other misdemeanors and traffic violations.

¶ 18 On appeal, defendant contends the trial court erred when it denied his motion for a mistrial following Sergeant Shimanski's testimony that defendant stated he had been "locked up before." Defendant argues that, even if unintentional, the State committed a discovery violation when it failed to disclose defendant's statement before trial. Defendant acknowledges that a discovery violation does not entitle him to a new trial, and that the court has its option of remedies for addressing a discovery violation. He argues, however, that the sergeant's testimony severely prejudiced him by implying to the jury that defendant had been previously accused of a crime. Defendant further argues that the trial court's remedy of striking the testimony and instructing the jury to disregard that testimony was not sufficient to cure the prejudice.

¶ 19 The trial court has broad discretion to determine the propriety of granting a defendant's motion for a mistrial. *People v. Hall*, 194 Ill. 2d 305, 341 (2000). The trial court's denial of a defendant's motion for a mistrial will not be disturbed on review absent a clear abuse of that discretion. *People v. Nelson*, 235 Ill. 2d 386, 435 (2009). The trial court abuses its discretion

when its decision is arbitrary, fanciful or "unreasonable to the degree that no reasonable person would agree with it." *People v. Kladis*, 2011 IL 110920, ¶ 23.

¶ 20 A mistrial should be declared only where an error of such magnitude has occurred that the defendant was denied his right to a fair trial, and continuing the proceedings would defeat the ends of justice. *Nelson*, 235 Ill. 2d at 435; *Hall*, 194 Ill. 2d at 341. Where a timely objection to improper testimony is made during trial, the trial court can usually correct the error by sustaining the objection and instructing the jury to disregard the testimony. *Hall*, 194 Ill. 2d at 342. Where the trial court instructs the jury to disregard certain testimony, any possible prejudice to the defendant from that testimony can be sufficiently cured. *People v. Biggs*, 294 Ill. App. 3d 1046, 1051 (1998), citing *People v. Wiley*, 165 Ill. 2d 259, 291-94 (1995). Specifically, "the error of admitting evidence of other crimes for which defendant is not on trial can be cured when the improper testimony is promptly stricken and the trial court instructs the jury to disregard it." *Biggs*, 294 Ill. App. 3d at 1051, citing *People v. Speight*, 153 Ill. 2d 365, 372 (1992). We presume that the jury followed the trial court's instructions. *People v. Taylor*, 166 Ill. 2d 414, 438 (1995).

¶ 21 In this case, we find that the trial court did not abuse its discretion when it denied defendant's motion for a mistrial. The record shows that as soon as Sergeant Shimanski testified that defendant told him he had been "locked up before," defense counsel immediately objected, and the trial court granted his request for a sidebar, stopping the proceedings. At the sidebar, defense counsel was adamant that defendant had been severely prejudiced by the sergeant's testimony and moved for a mistrial. The trial court denied the motion and stated that it would instruct the jury to disregard the statement. Thereafter, the court expressly instructed the jury "to disregard any response with regard to defendant's previous contact with the law." The court then

took a recess. During the recess, counsel stated that he was not claiming the State intentionally failed to give him the missing page from the police report, but continued to vigorously argue for a mistrial. Counsel claimed that the jury instruction was not sufficient to correct the error.

¶ 22 After listening to counsel's argument, the trial court again denied his motion for a mistrial, noting that a discovery violation does not automatically lead to a mistrial. The court explained to counsel that under such circumstances, it usually takes a recess, tenders the missing documents, and gives the aggrieved party an opportunity to talk to the witness. Still, counsel continued arguing and again moved for a mistrial, which the trial court denied. When the trial resumed, no further questions were asked of the sergeant and he was excused. The trial proceeded with the State presenting defendant's driving abstract and both parties resting. The record shows that there was no further reference to defendant's statement. While instructing the jury, the trial court stated "[y]ou should disregard testimony and exhibits which the Court has refused or stricken," thereby again advising the jury to disregard the sergeant's testimony about defendant's statement.

¶ 23 In light of the trial court's instructions to the jury to disregard the testimony, and the lack of any further reference to that testimony, we find that any possible prejudice was cured and defendant was not denied his right to a fair trial. Moreover, we find that the trial court's decision denying defendant's motion for a mistrial was not arbitrary or unreasonable, but was made after listening to defense counsel's arguments during a sidebar and recess, and after considering its possible remedies and the circumstances in this case. Based on this record, we find no abuse of discretion by the trial court in denying defendant's motion for a mistrial.

¶ 24 Accordingly, we affirm the judgment of the circuit court of Cook County.

¶ 25 Affirmed.