2014 IL App (2d) 130321-U
No. 2-13-0321
Order filed September 12, 2014

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE CITY OF WOODSTOCK, Plaintiff-Appellee, v. THOMAS A. BEZIK, Defendant-Appellant.	)))))))))	Appeal from the Circuit Court of McHenry County. No. 11-DT-269 Honorable Charles P. Weech, Judge, Presiding.

JUSTICE BURKE delivered the judgment of the court.
Justices Hudson and Spence concurred in the judgment.

ORDER

¶ 1 *Held:* The trial court did not abuse its discretion in denying defendant a mistrial for the State's failure to introduce evidence as promised in its opening statement: the failure was not deliberate, the jury was instructed to disregard any statement not based on the evidence, and the evidence was not closely balanced.

¶ 2 The City of Woodstock (City) charged defendant, Thomas A. Bezik, with (1) driving with a breath-alcohol concentration (BAC) of 0.08 or more (625 ILCS 5/11-501(a)(1) (West 2010)); and (2) driving under the influence of alcohol (DUI) (625 ILCS 5/11-501(a)(2) (West 2010)). At defendant's jury trial, the trial court directed a verdict for him on the first charge but

denied his motion for a mistrial on the remaining charge. The jury convicted defendant of DUI, and he was sentenced to a year of conditional discharge.

¶ 3 On appeal, defendant contends that the trial court abused its discretion in denying his motion for a mistrial. The motion was based on the City's assertion, in its opening statement, that it would introduce into evidence the result of defendant's breath-alcohol test. The City never introduced this evidence at trial. We affirm.

¶ 4 In its opening statement, the City summarized the evidence that it expected to present on both charges, beginning with the testimony of the arresting police officer, Robby Branum. On the BAC-related charge, the prosecutor stated, "We anticipate the evidence will show that a little bit over an hour and a half after *** Branum's contact with the defendant ***, the defendant took [a] Breathalyzer test and that Breathalyzer resulted in a [0].18."

¶ 5 The City first called Branum, who testified on direct examination as follows. On March 21, 2011, he was on patrol, in uniform and driving a marked squad car. At about 10:57 p.m., he was dispatched to the Mobil station at 2025 South Eastwood Drive in Woodstock. He pulled up in front of the station, which was illuminated by overhead lighting. About 20 to 30 feet away, defendant was walking out of the store toward a blue Cadillac. Defendant appeared to be having difficulty maintaining his balance; he was "staggering" and "stumbling." Branum exited his car, approached the Cadillac, and said, "[H]ey, stop, I need to talk to you for a minute." Defendant entered the Cadillac and put it in drive. He was alone in the car. Branum tried to knock on the driver-side window and open the door, but defendant began to pull away. Branum yelled at defendant to stop; defendant did. Branum approached the Cadillac; defendant began to drive away; Branum told him to put the car in park and exit; and defendant complied.

¶ 6 Branum testified that, as defendant exited his car, he had to "guide himself" out. After he was outside, he leaned on the car to maintain his balance. His eyes were red, glassy, and bloodshot, and he emitted a "strong odor of alcoholic beverage." Branum asked him to produce his driver's license and proof of insurance. Defendant consented, but, as he tried to remove his license from his wallet, he "pulled everything out and dropped it *** on the ground in front of him." Defendant bent down to retrieve the items, but he lost his balance and had to lean against the vehicle. As he straightened up, he lost his balance again, and Branum had to support him by the shoulders. Branum told defendant that he thought he was intoxicated. He asked defendant where he had come from; defendant said that he was coming from his son's house. His speech was slurred; "his S's were kind of sloppy," which was characteristic of intoxicated speakers. He could understand Branum's directions, but Branum sometimes had to "ask him twice."

¶ 7 Branum testified that he next asked defendant to perform several field sobriety tests (FSTs). Before starting the FSTs, Branum activated the video camera in his squad car. The area of the FSTs, in front of Branum's squad car, was paved and level, with no debris or cracks in the pavement. The station's lights illuminated the area. One FST that Branum administered was the walk-and-turn test. Branum explained the test to defendant and demonstrated it. Defendant did not ask any questions and told Branum that he had no medical problems that would prevent him from taking the test. In performing the test, defendant deviated from the instructions in that he did not touch his heel to his toe; raised his hand to maintain his balance; deviated from the imaginary line along which he was told to walk; took an improper number of steps; and made an improper turn. Branum had been trained to look for two "decision points" to indicate possible intoxication; here, he noted eight decision points.

¶ 8 Branum testified that he next had defendant perform the "finger-to-thumb" test, which was not a standard FST. Based on defendant's performance, Branum concluded that his fine motor skills were "impaired." Branum next explained and demonstrated the one-legged-stand test and had defendant perform it. Defendant swayed, repeatedly lifted his hands to keep his balance, and repeatedly put his foot down early. Branum had been trained to look for two decision points as a sign of intoxication; defendant scored four. In Branum's opinion, defendant failed the one-legged-stand test. Finally, Branum administered the horizontal gaze nystagmus (HGN) test. Defendant initially failed to follow Branum's instruction to follow a pen with his eyes without moving his head. He retook the test properly, but he failed.

¶ 9 Branum testified that he concluded that defendant was under the influence of alcohol. He based his opinion on the results of the FSTs; his observations of defendant; defendant's inability to maintain his balance; defendant's impaired fine motor skills; and the strong odor of an alcoholic beverage on defendant's breath. Branum arrested defendant, handcuffed him, and placed him into the squad car. Defendant started crying (for how long Branum did not recall). Branum drove to the police station and took defendant to the booking area. Branum noticed a strong odor of alcohol emanating from defendant. Branum also saw a wet spot in the crotch of defendant's pants; the spot was "maybe 12 inches round."

¶ 10 At the station, Branum contacted Frederick Spitzer, a detective, to administer a breath-alcohol test to defendant. Spitzer appeared about half an hour after Branum and defendant had arrived at the station.

¶ 11 Branum testified that his squad car's camera recorded all but the very beginning of his encounter with defendant. The recording (without any sound) was played for the jury.

¶ 12 Branum testified on cross-examination as follows. Before March 21, 2011, he had never met or seen defendant. Upon arriving at the Mobil station, he watched defendant walk about 25 feet directly to the Cadillac. In that time, defendant never tripped or fell. The first time that Branum shouted at defendant to stop, they were about 20 to 25 feet apart, and other people were present. When Branum approached the Cadillac and told defendant to put it in park, the car's windows were rolled up. Defendant eventually did put the car in park; Branum could not recall whether defendant had had any difficulty maneuvering the car. When Branum told defendant to exit and go to the rear of the car, he complied. Defendant did produce his driver's license and proof of insurance and did not hand Branum any irrelevant documents (such as a credit card).

¶ 13 Branum testified that an odor of alcohol coming from a person does not enable an officer to tell what he has been drinking, how much he has drunk, or when he started. A person emitting an odor of alcohol might not be intoxicated. Also, his eyes might be bloodshot and glassy for reasons other than intoxication; Branum did not ask defendant why his eyes looked that way. Although defendant's speech was slurred, Branum could understand him. Based on defendant's answers to Branum's questions, Branum believed that he understood the questions "[f]or the most part." Branum never asked defendant whether he had been drinking; he wanted to wait until defendant had received *Miranda* warnings and Branum could prepare an "influence report."

¶ 14 Branum conceded that, when he demonstrated the walk-and-turn test, he raised his arms more than six inches from his sides. During the walk-and-turn test, defendant never had either foot on the line, and he stepped from side to side instead of trying to touch his toe to his heel. During the first "pass" of the HGN test, defendant moved his head, but, during at least six more passes, he kept his head still. Upon being arrested, he was cooperative and had no trouble entering the squad car. At the station, he followed Branum's directions and appeared to

understand most of what Branum told him. Defendant's only unusual display of emotion was crying in the squad car. Branum testified on redirect that defendant never said that he had any allergies or back problems.

¶ 15 The City called Spitzer. He testified as follows. At 11:20 p.m. on March 21, 2011, he was asked to operate a breath-alcohol machine to test defendant. He noticed a strong odor of alcohol coming from defendant. After the required 20-minute observation period, he asked defendant whether he wanted to take the test; defendant said that he did.

¶ 16 Spitzer testified that he had been trained to perform breath-alcohol tests and had been a licensed "breath analyst operator" since 1986. He was familiar with the "Intoxilyzer" machine that was in the Woodstock police station on March 21, 2011. Asked whether he knew whether the machine was regularly checked for accuracy, Spitzer testified that he knew that a person regularly "[came] from the State Police to—Department of Health and certifie[d] it as accurate." The machine was checked "[a]bout once a month." Asked whether he knew when before March 21, 2011, the machine had last been checked, Spitzer testified, "March 1, 2011." Asked whether he personally knew the result of the check, Spitzer said that he did not.

¶ 17 Spitzer identified a "printout of the test of the machine on March the 1st of 2011." The prosecutor asked Spitzer whether it had been made "at or near the time of the accuracy check on the machine on March 21, 2011." Defendant objected, based on lack of foundation.

¶ 18 The trial court held a sidebar. The sidebar was recorded electronically, but much of what was said is denoted "unintelligible." The parties argued over whether the printout, which the prosecutor described as "an accuracy check," was admissible. Defendant contended that Spitzer's testimony could not lay a foundation unless he had been present when the document

was purportedly generated. The judge agreed that the City had not yet laid the proper foundation, but he allowed the City to question Spitzer further in order to do so.

¶ 19 The prosecutor resumed examining Spitzer, who testified as follows. He was familiar with how the Intoxilyzer at the Woodstock police station generated the reports that it printed out. The machine's "internal hard drive and memory" stored records of past tests and also accuracy checks that had been performed at specific times. In his work operating the machine, Spitzer had seen (in the prosecutor's words) "those slips regarding the accuracy checks of the machine." The exhibit at issue appeared to be "a copy of an accuracy check like the others that [he had] seen in the past." When Spitzer provided individual Breathalyzer results, the machine produced "a printout of the test and the accuracy of the machine."

¶ 20 Spitzer testified that he had viewed the printout for defendant's test of March 21, 2011, which included the accuracy check. Asked whether the printout had been made at or near the time that the accuracy check was made, Spitzer testified, "As far as I know, yes." Defendant objected; the trial court sustained the objection. The prosecutor asked Spitzer whether he had any reason to believe that the test purportedly done on March 1, 2011, had not been done on that date; defendant objected, and the court sustained the objection. Spitzer testified that he believed that the machine had been tested within 62 days before March 21, 2011. The prosecutor then asked Spitzer, "[D]id you believe that the machine was accurate on March 21, 2011?" Defendant objected, and the court held another sidebar.

¶ 21 The trial judge noted that the machine had an "internal logbook," which appeared to "get[] around the objection." Defendant argued that Spitzer's "opinion" on whether the machine had been checked every 62 days did not establish a foundation for the record; the City had to lay a foundation via the testimony of someone who was familiar with how the self-checks were done

and how the reports were generated. The judge concluded that the "internal logbook" required a foundation, which Spitzer's testimony had yet to establish. He stated that the internal test result could be admitted as a business record but that the City would need to lay the proper foundation.

¶ 22 After a short recess, the trial resumed. The prosecutor stated, "I have no further questions for [Spitzer]." Defendant did not cross-examine Spitzer. The City rested.

¶ 23 Defendant moved for a directed verdict on both charges. The City conceded the charge of driving with a BAC in excess of the legal limit. The trial court directed a verdict on that charge but held that the DUI charge would go to the jury. Defendant then moved for a mistrial on the remaining charge, based on the City's representation in its opening statement that the evidence would show that defendant had taken a Breathalyzer test and scored 0.18. He noted that the City never presented this evidence at trial. He contended that the statement would prejudice the jurors against him on the DUI charge, even if the judge were to instruct them that the opening statements were not evidence. The prosecutor responded that the standard instruction would cure any prejudice. Further, he contended, when he made the representation at issue, "[h]e did anticipate that [the City] would be able to lay a foundation for that breath result." Defendant responded that the jurors might tend to credit the representation even though they knew that the supporting evidence had been excluded for technical reasons.

¶ 24 The trial court denied defendant's motion for a mistrial. The judge explained that, when the prosecutor told the jury that he anticipated that the evidence would include defendant's BAC test result, he had "believed full well that he would be able to proceed on that count and he had evidence to prove that count." Further, the jurors would "clearly understand" and follow the instruction that the opening statements were not evidence.

¶ 25 Defendant presented no evidence. The jury, which had been instructed that the opening statements were not evidence and that any statement not based on the evidence should be disregarded, found defendant guilty of DUI. He filed a postjudgment motion contending in part that the trial court erred in denying his motion for a mistrial. The court denied the motion and sentenced defendant to a year of conditional discharge. He timely appealed.

¶ 26 On appeal, defendant contends solely that the trial court abused its discretion in denying his motion for a mistrial. He argues that the jury instruction did not cure the prejudice that he suffered from the City's unsupported assertion in its opening statement that he took a BAC test that resulted in a score far in excess of the legal limit. He reasons that, although the prosecutor did not make the statement in bad faith, as he believed that he would be able to introduce the BAC score as evidence, the trial court should have declared a mistrial, because the prosecutor's failure to lay the proper foundation for the evidence was the product of "incompetence" and thus was as "blameworthy" as any intentional misrepresentation.

¶ 27 A trial court should declare a mistrial only when an error of such magnitude has occurred that the defendant has been denied fundamental justice and continuing the proceedings would defeat the ends of justice. *People v. Nelson*, 235 Ill. 2d 386, 435 (2009). The trial court's denial of a mistrial will not be disturbed on review absent a clear abuse of discretion. *Id.* Here, we cannot say that the trial court abused its discretion in denying defendant's motion for a mistrial.

¶ 28 "[I]t is improper for counsel to make opening statements about testimony to be introduced at trial and then fail to produce that evidence." *People v. Kliner*, 185 Ill. 2d 81, 127 (1998). Nonetheless, reversal is not required merely because the prosecutor's opening statement refers to evidence that later turns out to be inadmissible. *Id.* The error warrants reversal only

when the comments are attributable to the prosecutor's deliberate misconduct and result in substantial prejudice to the defendant. *Id.*; *People v. Smith*, 141 Ill. 2d 40, 64 (1990).

¶ 29 Here, defendant concedes that, as the trial judge noted, when the prosecutor told the jury that the evidence would show that defendant took a BAC test that resulted in a reading of 0.18, he had every intention of introducing testimony to prove that fact. The City had, of course, brought two charges against defendant, the first of which required proof that he had had a BAC in excess of 0.08 (see 625 ILCS 5/11-501(a)(1) (West 2010)), and Spitzer's anticipated testimony was crucial to proving that charge. The prosecutor sought to introduce the testimony, but, after considerable argument and discussion, the trial court ruled that he had failed to lay the proper foundation for the printout generated by the "internal logbook." We see no deliberate misconduct by the prosecutor. His assertion in his opening statement was made in good faith and was defeated by his honest mistake about the foundation needed for the evidence—a mistake (if indeed it was one) that the judge apparently made at one point as well.

¶ 30 Defendant, nonetheless, maintains that the City's failure to lay the foundation was so "incompetent" as to be as "blameworthy" as deliberate misconduct. Defendant does not cite authority (other than one opinion to be discussed herein) that would allow a mistrial based on the allegedly incompetent but good-faith mistake. *Kliner* and *Smith*, two binding opinions of our supreme court, would appear to disallow reversal based on this lower standard. In any event, we believe that the lengthy arguments on whether the "internal logbook" was sufficient to lay the proper foundation, as a regular logbook would have been (see *People v. Jacobs*, 405 Ill. App. 3d 210, 215 (2010)), belie the premise that the prosecutor's mistake was obvious or the product of severe incompetence.[1] We cannot fault the trial court for concluding that, although the

[1] Apparently, a separate paper logbook was not kept.

prosecutor had not introduced the evidence that he had foreshadowed in his opening statement, the failure did not call for a mistrial on the remaining count of DUI.

¶ 31 Defendant relies on *People v. Bunning*, 298 Ill. App. 3d 725 (1998), to argue that a mistrial was required. In *Bunning*, the prosecutor in the defendant's trial for armed robbery told the jury, in his opening statement, that the State would introduce the inculpatory testimony of two men who, it turned out, the State never called. The appellate court held that the error was forfeited because the defendant's counsel had failed to raise it (*id.* at 727) but that it could be addressed under the rubric of ineffective assistance (*id.* at 727-28).

¶ 32 Although the *Bunning* court's reasoning is not entirely clear to us, it did reject the State's argument that the prosecutor's failure to call either witness resulted from his desire to avoid inviting error by calling them and then having them invoke their fifth amendment rights. *Id.* at 730-31. Thus, although *Bunning* does not explicitly cite supreme court precedent stating that only deliberate prosecutorial misconduct will warrant a reversal, it appears to have implicitly embraced it by rejecting the argument that the opening misstatement was the product of something other than intentional misconduct. We note that the application of *Bunning* is complicated further in that the error was not the only one that the court relied upon in holding that the defendant was entitled to a reversal: it also held that counsel had been ineffective for failing to object to the State's use of the defendant's postarrest silence. *Id.* at 731-32.

¶ 33 We cannot say that *Bunning* supports defendant's claim that the trial court abused its discretion in denying him a mistrial. *Bunning* appears to be consistent with the rule of *Kliner* and *Smith* that only deliberate prosecutorial misconduct will warrant reversal. Insofar as it deviates from this rule, it is distinguishable, in that the improper opening statement was not the sole support for the reversal; the court relied on the cumulative effect of the improper statement

and the State's improper use of the defendant's postarrest silence. Thus, we are not persuaded by defendant's reliance on *Bunning*.

¶ 34 Further, we agree with the City that other considerations distinguish this case from *Bunning* and, more fundamentally, support the trial court's exercise of its discretion in denying defendant a mistrial. The court instructed the jury that opening statements were not evidence and that any statement that was not based on the evidence should be disregarded. The judge believed, based on his experience, that the jury would heed this instruction and confine itself to the evidence in deciding the DUI charge. Although this instruction is not an automatic cure for any prejudice, it is a factor to consider in assessing the degree of prejudice to the defendant. See *Kliner*, 185 Ill. 2d at 128; *People v. Arroyo*, 339 Ill. App. 3d 137, 154 (2003).

¶ 35 Also, while we do not endorse the City's assertion that the evidence was "overwhelming," neither can we say that it was closely balanced. The arresting officer did not witness defendant driving erratically (except perhaps for his brief resistance to the order to stop the car); no BAC evidence was admitted; and defendant never told the officer how much or what beverages he had consumed. Nonetheless, the officer testified that defendant had difficulty maintaining his balance; that he emitted a strong odor of alcohol for a long period; that he exhibited several standard indicia of intoxication; and that he failed several FSTs and one nonstandard test, two of them by wide margins. Thus, we cannot say that the prosecutor's good-faith mistake in his opening statement about defendant's BAC test was so serious as to establish prejudice so severe that a mistrial was required.

¶ 36 For the foregoing reasons, the judgment of the circuit court of McHenry County is affirmed.

¶ 37 Affirmed.