

IN THE COURT OF APPEALS OF THE STATE OF IDAHO

Docket No. 37585

STATE OF IDAHO,)	2011 Unpublished Opinion No. 507
)	
Plaintiff-Respondent,)	Filed: June 6, 2011
)	
v.)	Stephen W. Kenyon, Clerk
)	
RONALD R. BURNS,)	THIS IS AN UNPUBLISHED
)	OPINION AND SHALL NOT
Defendant-Appellant.)	BE CITED AS AUTHORITY
)	

Appeal from the District Court of the Seventh Judicial District, State of Idaho, Jefferson County. Hon. Gregory W. Moeller, District Judge.

Judgment of conviction for felony driving under the influence, affirmed.

Stucki Law Office, P.A., Idaho Falls, for appellant. Marvin R. Stucki argued.

Hon. Lawrence G. Wasden, Attorney General; Mark W. Olson, Deputy Attorney General, Boise, for respondent. Mark W. Olson argued.

GRATTON, Chief Judge

Ronald R. Burns appeals from his judgment of conviction entered upon a jury verdict finding him guilty of felony driving under the influence (DUI), Idaho Code §§ 18-8004(1)(a) and 18-8005(7). We affirm.

I.

FACTS AND PROCEDURAL BACKGROUND

Following a traffic stop, Burns was arrested for driving under the influence. Based upon the arresting officer’s observations, including bloodshot eyes and the odor of an alcoholic beverage coming from Burns’ breath, the officer asked Burns to perform some field sobriety tests, which he failed or refused to complete. Once Burns was transported to the county jail, he was read the standard advisory form and asked whether he would submit to a breathalyzer test, and he declined. Because Burns had prior DUI convictions, he was charged with felony DUI. Following a jury trial, Burns was convicted of DUI. After the verdict, Burns pled guilty to Part 2

of the State's Information, admitting that he had prior DUI convictions. Thereafter, the district court imposed a unified sentence of seven years, with three years determinate. Burns appealed.

II.

DISCUSSION

A. Horizontal Gaze Nystagmus

Burns presents his first issue on appeal as follows: "Questions and comments by the prosecutor and responses elicited in regard to the horizontal gaze nystagmus test were misleading and a curative instruction from the Court was not sufficient to remove the prejudice to Burns." At trial, the prosecutor elicited direct testimony from Jefferson County Deputy Allen Fullmer regarding his observations of Burns, as well as Burns' conduct in the field sobriety tests. The first of the tests administered to Burns was the horizontal gaze nystagmus (HGN) test. Fullmer testified that "the more alcohol you drink affects the involuntary jerking of your eye, which is called nystagmus." Fullmer stated that the "more clues" obtained through the HGN test the greater the indication that the individual is under the influence of alcohol. Fullmer also stated, "We're looking at six clues, and four clues and more indicate 77 percent of the time that the subject has a BAC of .10 or above." Burns objected, and the district court sustained the objection on the basis of lack of foundation. The court instructed the jury to "disregard the statistical data" that had been presented. In an effort to lay further foundation, the prosecutor asked Fullmer to go through the six clues relative to the HGN test, which he did. The prosecutor then asked Fullmer what his findings were with respect to this case, and he testified that four of the clues indicated that Burns was under the influence. He further testified that he was unable to complete the last two clues of the HGN test due to lack of cooperation. The prosecutor then asked, "And so you believe you had at least four to six; is that correct?" to which Fullmer responded affirmatively. Burns did not object.

Burns maintains that the jury was "left with a sense that the Deputy was claiming that Burns' BAC was .10 or higher," and that the district court's brief instruction was "not sufficient to un-ring the bell." Burns also asserts that the prosecutor's question regarding Fullmer having identified "at least four to six" clues, and Fullmer's affirmative response, misstated the facts because Fullmer only identified four clues from the HGN test. To the extent that Burns is claiming evidentiary errors, no error occurred.

With respect to Burns' assertion that the prosecutor and Fullmer were misstating the facts, such a claim is clearly belied by the record as Fullmer testified that he identified four of the six clues from the HGN test, and that he was unable to complete the remaining two because Burns refused to continue. Based upon this evidence, the prosecutor asked whether Fullmer believed that he had "at least four to six" clues. No facts were misstated as Fullmer testified as to his belief that he had at least four to six clues through the HGN test indicating that Burns was under the influence of alcohol. Burns' own expert acknowledged that four out of six clues from the HGN test are indicative of being under the influence. As such, this statement does not amount to error as it is supported by the evidence.

With respect to Burns' contention that the jury was tainted with inadmissible evidence, he objected to that evidence, and the district court sustained his objection. The court further instructed the jury to "disregard the statistical data" that had been offered. We presume that the jury followed the district court's instructions. See *State v. Kilby*, 130 Idaho 747, 751, 947 P.2d 420, 424 (Ct. App. 1997); *State v. Hudson*, 129 Idaho 478, 481, 927 P.2d 451, 454 (Ct. App. 1996). Burns did not request any further instruction, nor did he move for a mistrial. The State suggests that in order to be granted a remedy, Burns must be arguing that the district court failed to sua sponte declare a mistrial. Burns does not present a cognizable claim that can be addressed on appeal as he was granted the relief that he requested by the district court. Had he wanted a more specific instruction to the jury, he could have and should have requested one. His failure to do so does not amount to error on the part of the district court. Burns has failed to demonstrate a basis to conclude that the district court erred in failing to sua sponte declare a mistrial.

B. Prosecutorial Misconduct

While our system of criminal justice is adversarial in nature, and the prosecutor is expected to be diligent and leave no stone unturned, he or she is nevertheless expected and required to be fair. *State v. Field*, 144 Idaho 559, 571, 165 P.3d 273, 285 (2007). However, in reviewing allegations of prosecutorial misconduct we must keep in mind the realities of trial. *Id.* A fair trial is not necessarily a perfect trial. *Id.* Where prosecutorial misconduct was not objected to at trial, Idaho appellate courts may order a reversal only when the defendant demonstrates that the violation in question qualifies as fundamental error. *State v. Perry*, 150 Idaho 209, 227, 245 P.3d 961, 979 (2010).

In order to raise a claim of fundamental error that may be considered for the first time on appeal:

[T]he defendant bears the burden of persuading the appellate court that the alleged error: (1) violates one or more of the defendant's unwaived constitutional rights; (2) plainly exists (without the need for any additional information not contained in the appellate record, including information as to whether the failure to object was a tactical decision); and (3) was not harmless. If the defendant persuades the appellate court that the complained of error satisfies this three-prong inquiry, then the appellate court shall vacate and remand.

Perry, 150 Idaho at 228, 245 P.3d at 980.

Burns presents his second issue on appeal as follows: "Questioning, comments and statements made in the prosecutor's opening and closing statements were inappropriate and constitute prosecutorial misconduct, which requires a reversal of Burns' conviction." Based upon Burns' identification of the challenged conduct, there are two issues before the Court: (1) whether the prosecutor's comments during closing argument regarding Burns' refusal to submit to the breathalyzer test constitute misconduct; and (2) whether the prosecutor's comments during closing argument regarding his belief about how much Burns drank constitute misconduct.¹ Each contention will be addressed in turn.

1. Comments on refusal to submit to BAC

During the prosecutor's closing argument, he stated that Burns could have taken an objective test to "exonerate" himself, but he refused. The prosecutor further asserted that it would have been in Burns' best interest to take the breathalyzer test at the jail, because his blood alcohol content would have been lower due to the passage of time. In rebuttal to Burns' closing argument, the prosecutor again commented upon Burns' refusal of the BAC test, and the fact that taking the test would have benefitted him. Burns did not object to any of these comments. Burns argues that the prosecutor's argument was a "misleading and false statement of fact and

¹ Burns also alleges that the prosecutor's questions and comments regarding the HGN test, addressed above, constitute misconduct. However, as pointed out by the State, Burns cites no authority for the proposition that a prosecutor can commit misconduct by misstating facts in a direct examination question to a witness. Moreover, as noted above, the prosecutor's question did not elicit a response that misstated the facts. Rather, the statement was supported by the evidence, and the prosecutor's question does not constitute misconduct. Because Burns has failed to demonstrate any prosecutorial misconduct, the *Perry* analysis does not apply.

the operation of law” because, based upon Burns’ expert’s testimony, “persons who have consumed alcoholic beverages may be absorbing the alcohol and their breath alcohol content could be rising until a point where the absorption is complete and dissipation begins.”

At trial, the prosecutor called Deputy Derrick Belnap, the jailer on duty when Burns was brought to the jail. He testified that he read Burns the standard advisory form, completed a fifteen-minute observation period, and then asked Burns whether he would take a BAC test, which Burns declined. On cross-examination, Belnap acknowledged that the test was being offered over two and a half hours after the time Burns had been stopped. Burns then inquired about the reliability of the BAC test at the time that it was offered:

Q. Now, based upon your training, that wouldn’t be a very reliable test at that point; would it?

A. Well, I do know that subjects and anyone that has been drinking, I do know as time goes by their alcohol level does go down. I do know that.

Q. Okay. Well, if you had taken a breath test from Ron Burns at 12:38 a.m. it certainly would not have been a very good indicator of what his breath alcohol result was at the time he was stopped; would it?

A. No.

On re-direct, the prosecutor probed further into the issue regarding the effects of a person’s BAC due to the passage of time, and the following exchange occurred:

Q. With the passage of time wouldn’t it be beneficial for any Defendant to take the test, as the BAC would be going down?

[Counsel]: Objection. That’s speculation.

[Prosecutor]: He asked the question. He opened the door.

COURT: I think it’s fair cross examination -- fair redirect. Go ahead.

[Belnap]: Yes, that’s correct.

Q. So it would have been in the Defendant’s best interest to take the test since he had been transported from the west side and some time had passed his BAC would have actually been lower?

A. Yes.

Q. So he missed an opportunity to exonerate himself?

[Counsel]: Objection. I think that calls for a conclusion.

COURT: Sustained.

Q. In any event, it would have been in his best interest to take it because of the passage of time?

[Counsel]: Same objection, Your Honor.

COURT: Sustained. I think you made your point, [prosecutor].

Burns' expert, Robert La Pier, was also asked how the passage of time affects "any breath test result." He testified:

You can rise in BAC, you could be coming down the longer out you wait from the time of your last drink, based on my training and experience on the Intoxilyzer and chemist, et cetera, a person can reach their maximum BAC anywhere from 30 minutes to two hours, in that time frame. After that, after two hours, you can't really say with any degree of certainty if they're going up or they're coming down or any of those things.

Burns testified, on direct examination, that he refused to submit to the breathalyzer test because he "felt that it had been so long that it was useless." On cross-examination, the prosecutor asked whether "it would be logical to assume that the test would even be better for you after the passage of time," to which Burns objected. The district court overruled the objection, and Burns stated, "At the period of time, I just felt not."

It is evident from the trial transcript that the prosecutor's arguments were based upon the evidence presented at trial. The prosecutor's assertion that taking the test would have been beneficial to Burns had he actually been innocent was supported by evidence in the record. Deputy Belnap specifically confirmed that, with the passage of time, it would be "beneficial for any Defendant to take the test, as the BAC would be going down." While Burns' expert witness, La Pier, testified that a person's BAC may increase, he also testified that "you could be coming down the longer out you wait from the time of your last drink." La Pier testified that "a person can reach their maximum BAC anywhere from 30 minutes to two hours." The test was offered two and a half hours after the stop and Burns claimed to have consumed less than three beers. Even assuming that La Pier's testimony contradicted Deputy Belnap's testimony, the prosecutor was free to argue the evidence supporting his case, as well as any inferences that could be drawn from that evidence. Moreover, as noted by the State, the prosecutor's argument also addressed Burns' testimony that he felt the BAC test would be useless. In view of the evidence adduced at trial, we conclude that the prosecutor's comments regarding Burns' refusal to take the BAC test do not constitute misconduct.

2. Comments on amount of alcohol consumed

Burns also asserts that the prosecutor inserted his personal opinion that he did not believe Burns when he stated, "I would suggest other things and I don't believe anyone would not take the test if they only had two beers. I just don't believe it. So, he wasn't truthful and I guess he

can kind of explain that away.” The State acknowledges that the prosecutor should not have framed his statement in terms of a personal belief, but argues that Burns has failed to show that the prosecutor’s comment rises to the level of a constitutional violation.

Closing argument serves to sharpen and clarify the issues for resolution by the trier of fact in a criminal case. *State v. Phillips*, 144 Idaho 82, 86, 156 P.3d 583, 587 (Ct. App. 2007). Its purpose is to enlighten the jury and to help the jurors remember and interpret the evidence. *Id.*; *State v. Reynolds*, 120 Idaho 445, 450, 816 P.2d 1002, 1007 (Ct. App. 1991). Both sides have traditionally been afforded considerable latitude in closing argument to the jury and are entitled to discuss fully, from their respective standpoints, the evidence and the inferences to be drawn therefrom. *State v. Sheahan*, 139 Idaho 267, 280, 77 P.3d 956, 969 (2003); *Phillips*, 144 Idaho at 86, 156 P.3d at 587.

Closing argument should not include counsel’s personal opinions and beliefs about the credibility of a witness or the guilt or innocence of the accused. *Phillips*, 144 Idaho at 86, 156 P.3d at 587. *See also State v. Garcia*, 100 Idaho 108, 110-11, 594 P.2d 146, 148-49 (1979); *State v. Priest*, 128 Idaho 6, 14, 909 P.2d 624, 632 (Ct. App. 1995); *State v. Ames*, 109 Idaho 373, 376, 707 P.2d 484, 487 (Ct. App. 1985). A prosecuting attorney may express an opinion in argument as to the truth or falsity of testimony or the guilt of the defendant when such opinion is based upon the evidence, but the prosecutor should exercise caution to avoid interjecting his or her personal belief and should explicitly state that the opinion is based solely on inferences from evidence presented at trial. *Phillips*, 144 Idaho at 86 n.1, 156 P.3d at 587 n.1. The safer course is for a prosecutor to avoid the statement of opinion, as well as the disfavored phrases “I think” and “I believe” altogether. *Id.*

While a prosecutor’s comments during closing argument should not include personal opinions, such comments must also be examined in the context in which they were made. *See State v. Felder*, 150 Idaho 269, 272-73, 245 P.3d 1021, 1024-25 (Ct. App. 2010) (concluding that when the prosecutor’s statement was examined in context, it was clear that the prosecutor was not stating a personal belief that the victim was credible, but that the jury should find the victim credible based on the evidence presented at trial). The entirety of the prosecutor’s statement is as follows:

So the post-drinking admission, he changed his number again from three to two, he tried to explain that it was two and then he couldn’t remember and whatever. Whether you believe any of that, it’s up to you. *I would suggest other*

things and I don't believe anyone would not take the test if they only had two beers. I just don't believe it. So, he wasn't truthful and I guess he can kind of explain that away.

(Emphasis added.) While not particularly artful, the prosecutor's comment was a reference to specific evidence presented at trial regarding the amount of alcohol Burns had consumed, as well as Burns' credibility on that particular issue.

Deputy Fullmer testified that when he asked Burns whether he had been drinking, "he stated that he didn't drink." Burns ultimately acknowledged having consumed three beers. When Burns was transported to the jail, Detective Ricardo Frakes read Burns his rights, and Burns admitted to having purchased a six-pack of beer and consuming "around two beers" by the time he was stopped. Burns testified at trial that he "drank two beers and then started on the third." When asked on cross-examination why Burns had lied about consuming alcohol, he stated, "I just felt that the three beers that I had consumed, if I told him I hadn't been drinking I wouldn't have to deal with it."

Based upon the testimony at trial, and when placed in context, the prosecutor's comment about Burns' credibility regarding the amount of alcohol he had consumed does not amount to misconduct as the prosecutor "was merely analyzing the evidence bearing upon witnesses' credibility and stating the conclusions which he urged the jury to draw therefrom." *Priest*, 128 Idaho at 14, 909 P.2d at 632; *see also Felder*, 150 Idaho at 272-73, 245 P.3d at 1024-25. The prosecutor prefaced his comments by reminding the jury that "[w]hether you believe any of that, it's up to you." As such, Burns has failed to demonstrate that the prosecutor committed misconduct and, therefore, the *Perry* analysis does not apply.

III.

CONCLUSION

The district court did not err in its evidentiary ruling, instruction, or by failing to declare a mistrial sua sponte following Officer Fullmer's testimony regarding the HGN test. Burns has failed to demonstrate that the prosecutor's question and Officer Fullmer's response misstated the facts. Burns has failed to demonstrate that the prosecutor committed misconduct. Burns' judgment of conviction is, therefore, affirmed.

Judge GUTIERREZ and Judge MELANSON **CONCUR.**