Note: Decisions of a three-justice panel are not to be considered as precedent before any tribunal.

ENTRY ORDER

SUPREME COURT DOCKET NO. 2007-222

MAY TERM, 2008

State of Vermont	}	APPEALED FROM:
	}	
	}	
v.	}	District Court of Vermont,
	}	Unit No. 2, Chittenden Circuit
	}	
Darrin Bourdeau	}	DOCKET NO. 3319-7-06 Cncr
		Trial Judge: Michael S. Kupersmith

In the above-entitled cause, the Clerk will enter:

Defendant appeals his jury conviction of driving under the influence (DUI), third or subsequent offense. See 23 V.S.A. § 1201(a)(2). He argues that the district court abused its discretion in denying his motion for a mistrial. We affirm.

The facts are undisputed. A police station receptionist noticed that defendant appeared to be intoxicated when he arrived at the station to speak to a detective. During questioning by a police officer, defendant admitted that he had driven to the station and that he had consumed alcohol earlier in the day. After failing dexterity tests, defendant submitted a breath sample that revealed a blood-alcohol concentration above the legal limit. Defendant's ensuing trial was bifurcated so that the jury would determine guilt or innocence on the most recently charged offense before considering the alleged prior offenses. At one point during the cross-examination of the police officer who processed defendant for DUI, defense counsel tried to get the officer to concede that he had not explained the nature of the dexterity tests before asking defendant if he was capable of doing them. The following exchange took place:

> Defense counsel: So to be clear, then, you haven't even informed [defendant] at the time you asked that question about disability. You haven't even informed him about what's involved with the heel to toe walking.
>
> Officer: Correct
>
> Defense Counsel: Okay. So would it be fair to say, then, that based on the information that you have or have not provided to him at that stage that he doesn't know what test you're talking about.

Officer: With his—

Defense Counsel: But in this particular instance. In other words, you haven't informed him about those (inaudible)—

Officer: In that particular—

Defense Counsel: Okay—

Officer: —instance I have not—

Defense Counsel: So—so—

Officer: He has enough experience, but—

Defense Counsel: Right. But the problem (inaudible)—

Officer: —in that instance, correct.

Defense Counsel: The problem is that—

At that point, defense counsel approached the bench and moved for a mistrial, arguing that the officer had suggested to the jury that defendant had experience with field sobriety tests, thereby defeating the whole purpose of bifurcation. The district court denied the motion, stating that the jury probably would not have understood what the challenged testimony suggested and that, in any case, it was defense counsel's line of questioning that elicited the response.

On appeal, defendant argues that the trial court abused its discretion by not granting a mistrial, given that defense counsel did not invite the challenged testimony and that the testimony plainly informed the jury that defendant had been accused of DUI in the past. We find no abuse of discretion. See State v. Messier, 2005 VT 98, ¶ 15, 178 Vt. 412 ("The disposition of a motion for a mistrial is discretionary, and, as such, a claim of error can be supported only where the trial court's discretion was either totally withheld, or exercised on clearly untenable or unreasonable grounds."). The officer's comment regarding defendant's prior experience was cryptic in nature and did not directly refer to any previous DUI arrests or convictions. Cf. State v. Bushey, 142 Vt. 507, 509-10 (1983) (reversing denial of mistrial based on state attorney's direct examination, which elicited testimony from arresting officer that defendant refused to take breath test "because of it being DWI three"); State v. Batchelor, 135 Vt. 366, 368-69 (1977) (reversing denial of mistrial based on state's attorney's elicitation of rebuttal testimony that defendant had two previous DUI arrests). Further, by suggesting that the officer had inappropriately failed to advise defendant of the nature of the dexterity tests before asking him if he was capable of doing them, defense counsel essentially elicited the officer's explanation of why it was unnecessary to describe the dexterity tests to defendant. Under these circumstances, the trial court acted well within its discretion in denying the motion for a mistrial.

Moreover, notwithstanding defendant's argument to the contrary, he has failed to demonstrate the prejudice necessary to prevail in challenging the trial court's denial of his motion for a mistrial. See State v. Gemler, 2004 Vt. 3, ¶ 16, 176 Vt. 257 ("In order to constitute reversible error, it must appear affirmatively that a denial of the motion [for a mistrial] has resulted in prejudice to the moving party, with the burden of proof being on the movant." (citation omitted)). Defendant's own admissions that he drank alcohol and later drove to the police station were supported by a police video surveillance tape and other evidence, which together provided strong evidence of guilt.

Affirmed.

BY THE COURT:

____
Paul L. Reiber, Chief Justice

____
John A. Dooley, Associate Justice

____
Brian L. Burgess, Associate Justice