STATE OF MINNESOTA
IN COURT OF APPEALS
A06-2007

State of Minnesota,
Respondent,

vs.

Glen Albin Brazier,
Appellant.

Filed January 8, 2008
Affirmed
Muehlberg, Judge[*]

Kittson County District Court
File No. T5-06-20

Lori Swanson, Attorney General, 1800 Bremer Tower, 445 Minnesota Street, St. Paul, MN 55101-2134; and

Roger C. Malm, Kittson County Attorney, Stephen M. Ringquist, Assistant County Attorney, P.O. Box 790, Hallock, MN 56728 (for respondent)

Peter J. Timmons, 700 Wells Fargo Plaza, 7900 Xerxes Avenue South, Minneapolis, MN 55431 (for appellant)

Considered and decided by Toussaint, Chief Judge; Crippen, Judge[**]; and Muehlberg, Judge.

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[*] Retired judge of the district court, serving as judge of the Minnesota Court of Appeals by appointment pursuant to Minn. Const. art. VI, § 10.

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U N P U B L I S H E D O P I N I O N

MUEHLBERG, Judge

Appellant challenges his conviction of misdemeanor DWI, arguing that (1) double jeopardy barred his retrial after a mistrial was declared due to the prosecutor's misconduct; (2) the prosecutor also committed misconduct in the second trial; and (3) the trial court should have awarded appellant some of his costs for the second trial. We affirm.

FACTS

Appellant Glen Brazier's car was stopped in the early morning hours of January 7, 2006, in the city of Karlstad. Appellant agreed to take a breath test and, after the Intoxilyzer result showed a .14 alcohol concentration, he was charged with one count of misdemeanor driving while impaired and one count of driving with an alcohol concentration of over .08 as measured within two hours of driving. The first trial ended in a mistrial declared after the prosecutor mentioned not only the field sobriety tests, but also the preliminary breath test (PBT).

Before the retrial began, the district court denied appellant's motion to dismiss the charges on double jeopardy grounds. The jury found appellant guilty of driving while impaired but not guilty of driving with an alcohol concentration of .08 or more as measured within two hours of driving. Appellant was sentenced, and this appeal followed.

D E C I S I O N

1. Double jeopardy

Appellant argues that his second trial violated the constitutional protection against double jeopardy because the prosecutor's intentional misconduct caused the declaration of the mistrial in the first trial. The application of double jeopardy principles is reviewed de novo. *State v. Leroy*, 604 N.W.2d 75, 77 (Minn. 1999).

Appellant requested a mistrial in the first trial after the prosecutor mentioned the initials "PBT" (for preliminary breath test) in his opening statement.

> [I]f a trial is terminated at the defendant's request, the double jeopardy clause does not bar a second trial unless the mistrial resulted from governmental misconduct *intended to provoke the mistrial request*.

State v. Fuller, 374 N.W.2d 722, 726 (Minn. 1985) (citing *Oregon v. Kennedy*, 456 U.S. 667, 672, 102 S. Ct. 2083, 2087 (1982)) (emphasis added).

PBT evidence is not admissible at trial. *See* Minn. Stat. § 169A.41, subd. 2 (2006) (prohibiting use of preliminary screening test of a driver's breath in a court action except in certain actions). It is highly unlikely that the prosecutor's vague reference indicated an intent to provoke a mistrial. The prosecutor in the first trial did not elicit PBT evidence but merely mentioned the initials "PBT" in the context of field-sobriety testing.

Appellant claims *Fuller* bars a second trial if the prosecutor's conduct in the first was sufficiently egregious. A series of prosecutorial errors in the first trial, culminating in a reference to the "portable breath test," has been held not to meet the *Fuller* standard because the prosecutor was "merely negligent." *State v. Schroepfer*, 416 N.W.2d 491,

492-93 (Minn. App. 1987). *Fuller* did not close the door on construing the state constitutional protection against double jeopardy more broadly than the federal constitutional protection. *Id.* at 493. But because the prosecutorial misconduct that prompted the mistrial in *Schroepfer* was "merely negligent," it did not meet any of the standards that had been proposed as an alternative to *Kennedy*, all of which required either intentional conduct or grossly negligent conduct. *Id.*

The misconduct prompting the mistrial in this case was significantly less serious than that in *Schroepfer*, in which the prosecutor both referred to the level of offense (misdemeanor) and referenced the defendant's request to speak to an attorney, and the arresting officer referred to the "portable breath test." *Id.* at 492. Here, the only error was the prosecutor's reference to the "PBT," which was a less explicit reference than the one to a "portable breath test" in *Schroepfer*.

Appellant argues that the prosecutor's misconduct was "egregious" and worse than the conduct in *Fuller*. But, even if egregiousness were the appropriate standard, a single reference to the "PBT," made in the context of discussing field-sobriety testing, is not egregious. In *Fuller*, the prosecutor asked a witness whether the defendant's drivers license was suspended or revoked despite a pretrial stipulation that the driver's license was suspended and that no evidence would be presented to the jury on that fact. 374 N.W.2d at 724. The prosecutor also asked whether the defendant was licensed to drive, and the witness referred to appellant's having just gotten out of jail. *Id.* Thus, in *Fuller*, the prosecutor elicited inadmissible evidence, whether inadvertently or not. Here, no inadmissible evidence was elicited; the jury heard only a vague reference to the PBT,

without any indication as to its result, and there was no violation of a pretrial order or stipulation.

Appellant has not shown that the prosecutor acted with intent to provoke a mistrial when he referred to the PBT and has presented no argument in favor of applying a standard less strict than the *Kennedy* standard.

2. Prosecutorial misconduct

Appellant also argues that the prosecutor committed prejudicial misconduct in closing argument in the second trial. Appellant acknowledges that defense counsel did not object, and, therefore, plain-error review must be applied. *See State v. Ramey*, 721 N.W.2d 294, 302 (Minn. 2006). The prosecutor's conduct must constitute error, therefore, that is plain and that affects the substantial rights of the defendant. *Id.* The defendant bears the burden of persuasion as to the first two prongs of the plain-error test, but the burden then shifts to the state to show that the misconduct did not affect the defendant's substantial rights. *Id.*

Appellant argues that the prosecutor's characterization of the defense claims as "excuses" was improper and that the prosecutor improperly argued that appellant should "face the music" or "face the consequences."

A prosecutor may not disparage a defense in the abstract, without regard to its merits in the case. *State v. Griese*, 565 N.W.2d 419, 428 (Minn. 1997); *State v. Salitros*, 499 N.W.2d 815, 818 (Minn. 1993). A prosecutor, for example, should not argue that a particular defense is one that is raised when "nothing else will work." *State v. Williams*, 525 N.W.2d 538, 549 (Minn. 1994); *Salitros*, 499 N.W.2d at 819. But here the

prosecutor's references to appellant's "excuses" were aimed at appellant's own testimony about his actions on the night of the offense, not to any defense trial tactic. And, as references to appellant's specific testimony, these arguments were closely tied to the facts of the case, particularly the facts as viewed by appellant. There was no argument, for example, that drivers commonly decline to do the one-leg stand, claiming it is too icy, or that they contend it is impossible to fully perform the walk-and-turn test. Those claims are too closely tied to the facts of this case to be disparaged in the abstract.

Appellant also argues that the prosecutor improperly contended that the jury should make sure that appellant "faces the music," or the "consequences," for his conduct. The prosecutor argued that "everyone who is driving while they're impaired" should "have to accept the consequences," or "have to face the consequences."

The supreme court has discouraged prosecutors from emphasizing accountability "to such an extent as to divert the jury's attention from its true role of deciding whether the state has met its burden of proving defendant guilty beyond a reasonable doubt." *State v. Montjoy*, 366 N.W.2d 103, 109 (Minn. 1985). The "jury's role is not to enforce the law or teach defendants lessons or make statements to the public" but to decide "dispassionately" whether the defendant has been proven guilty. *Salitros*, 499 N.W.2d at 819.

The prosecutor's argument that "everyone" who drives drunk should "face the consequences" did not over-emphasize the notion of accountability. Testimony indicated that appellant may have tried to use his local prominence to dissuade police from arresting him. Thus, the prosecutor's argument was fair comment on evidence presented

at trial, not an improper "accountability" argument urging the jury to use a particular defendant as an example to other law-breakers.

3. Award of costs

Finally, appellant argues that the district court erred in denying his motion to award him costs for his expert witness's appearance at the second trial. Appellant acknowledges that there is no specific authority for awarding such costs, but contends the district court has inherent authority to require the state to pay the costs occasioned by its causing the mistrial in the first trial. Appellant also analogizes his request to a request for attorney fees and costs in a prosecution pretrial appeal. *See* Minn. R. Crim. P. 28.04, subd. 2(6).

The rule allowing attorney fees in prosecution pretrial appeals is strictly construed to apply only to that type of appeal and the costs incurred in the appeal itself. *See State v. Liebrenz*, 292 Minn. 475, 477, 194 N.W.2d 291, 292 (1972) (holding that costs could be awarded only for services made necessary by the appeal); *State v. Bauerly*, 520 N.W.2d 760, 763 (Minn. App. 1994) (denying request for fees in state's sentencing appeal based on lack of rules provision authorizing them), *review denied* (Minn. Oct. 27, 1994). The general rule is that, under the common law, awards of costs in criminal cases are not allowed. *State v. Lopez-Solis*, 589 N.W.2d 290, 292 (Minn. 1999). There is a statute authorizing awards of costs to the prosecution. Minn. Stat. § 631.48 (2006). But there is no statute authorizing the court to depart from the common law by awarding costs to a criminal defendant.

Appellant's argument that the district court had inherent authority to award costs is not supported by any citation to authority. Inherent judicial authority applies only when the act to be done is necessary to achieve a unique judicial function and can be done without infringing on a legislative or executive function. *State v. Chauvin*, 723 N.W.2d 20, 24 (Minn. 2006). But courts have required statutory authority, or a court rule authorizing costs, before awarding costs. *See, e.g.*, *Liebrenz*, 292 Minn. at 477, 194 N.W.2d at 292; *Bauerly*, 520 N.W.2d at 763. In the related area of attorney fees, the rule is that fees are not recoverable absent a contractual or statutory authorization. *See Osborne v. Chapman*, 574 N.W.2d 64, 68 (Minn. 1998). Thus, we conclude that an award of costs in a criminal case is not within the inherent authority of the court.

Affirmed.