

**IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO**

STATE OF OHIO,	:	APPEAL NOS. C-140757
		C-140758
Plaintiff-Appellee,	:	TRIAL NOS. 13TRC-49529A
		13TRC-49529C
vs.	:	
		<i>JUDGMENT ENTRY.</i>
BRANDON STEUER,	:	
Defendant-Appellant.	:	

We consider these appeals on the accelerated calendar, and this judgment entry is not an opinion of the court. *See* S.Ct.R.Rep.Op. 2; App.R. 11.1(E); 1st Dist. Loc.R. 11.1.1.

Defendant-appellant Brandon Steuer was charged with speeding, operating a vehicle while under the influence of alcohol (“OVI”) and operating a vehicle with a prohibited concentration of alcohol in his system (“high-tier OVI”). The trial court found Steuer guilty of speeding. Following a jury trial on the remaining charges, Steuer was acquitted of the OVI charge, but found guilty of the high-tier OVI charge. Steuer filed notices of appeal from both convictions. We consolidated these appeals for our review, but in Steuer’s appellate brief, he states that he is abandoning the appeal of his speeding conviction. Therefore, we dismiss the appeal numbered C-140758, and consider only the appeal numbered C-140757 in which Steuer asserts two assignments of error challenging his high-tier-OVI conviction. For the following reasons, we affirm.

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In his first assignment, Steuer contends that the trial court abused its discretion by denying his motion for a mistrial.

“A mistrial should not be ordered in a criminal case merely because some error or irregularity has occurred. It is only appropriate when the substantial rights of the accused or prosecution are adversely affected, and a fair trial is no longer possible.” *State v. Pawlak*, 8th Dist. Cuyahoga No. 99555, 2014-Ohio-2175, citing *State v. Franklin*, 62 Ohio St.3d 118, 127, 580 N.E.2d 1 (1991). We review the trial court’s denial of a motion for a mistrial under an abuse-of-discretion standard, mindful that the trial court is in the best position to determine whether the circumstances warrant the declaration of a mistrial. *State v. Ahmed*, 103 Ohio St.3d 27, 2004-Ohio-4190, 813 N.E.2d 637, ¶ 9.

Steuer argues that a mistrial should have been granted, because the state’s cross-examination of defense witness Alicia Trammel introduced character evidence and other-acts evidence that was inadmissible under Evid.R. 404(A)(1) and (B), and resulted in prejudice to Steuer. Specifically, he maintains that the state’s line of questions implying that he was a “big drinker” with a high tolerance caused the jury to rely on that alleged “character trait” instead of other credible evidence—Trammel’s testimony that he was sober when he left her apartment, the police cruiser video recording demonstrating his sobriety, and testimony that the breath-test machine was taken out of service a month after his arrest—to disregard Steuer’s defense that the breath-test machine used to determine his breath-alcohol content had not been properly working.

But even if the state’s line of questioning was improper, it clearly was not the jury’s basis for finding Steuer guilty of the high-tier-OVI charge. The record demonstrates that the breath-test machine passed a calibration check five days

before Steuer was tested and two days afterward. That evidence alone was more than sufficient to support the jury's conclusions that the machine was working properly on the night that Steuer was tested and that Steuer actually did have a prohibited level of alcohol in his system. Therefore, we cannot say that the trial court abused its discretion in denying the motion for a mistrial. The first assignment of error is overruled.

In his second assignment of error, Steuer argues that the trial court erred in admitting improper character and other-acts evidence, which resulted in an unfair trial. We review the admission or exclusion of evidence under an abuse-of-discretion standard. *State v. Maurer*, 15 Ohio St.3d 239, 265, 473 N.E.2d 768 (1984).

Steuer again argues that the state's line of questioning on the cross-examination of Trammel was improper, and that the trial court erroneously allowed it to continue over his objection. But again, even if we presume that the evidence admitted was improper, its admission was harmless error in light of the jury's acquittal of Steuer on the OVI charge and the overwhelming evidence of Steuer's guilt of the high-tier-OVI charge—the breath-test machine was working properly, and Steuer tested well-above the legal limit of alcohol permitted in one's system while driving.

Next, Steuer contends that the trial court erroneously admitted other acts and character evidence during the cross-examination of defense witness Rebekah Resnik, the friend who drove Steuer home from the police station the night he was arrested. On direct, Resnik testified that Steuer appeared sober when she picked him up from the police station. On cross, she testified that she had seen Steuer both drunk and tipsy and that he was not a sloppy drunk.

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Because Steuer did not object to this testimony, we review for plain error. Plain error is only established where it is demonstrated that the outcome of the proceedings would have been different but for the trial court's error. *See State v. Waddell*, 75 Ohio St.3d 163, 166, 661 N.E.2d 1043 (1996). We cannot say that the outcome of the trial would have been different given the reliable results of Steuer's BAC test.

The second assignment of error is overruled.

Therefore, the trial court's judgment in the appeal numbered C-140757 is affirmed. The appeal numbered C-140758 is dismissed.

Further, a certified copy of this judgment entry shall be sent to the trial court under App.R. 27. Costs shall be taxed under App.R. 24.

HENDON, P.J., MOCK and STAUTBERG, JJ.

To the clerk:

Enter upon the journal of the court on December 23, 2015
per order of the court _____.

Presiding Judge