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IN THE
COURT OF APPEALS OF INDIANA

TAMIKKA S. LUCIUS,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 45A04-1004-CR-251
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE LAKE SUPERIOR COURT
The Honorable Clarence D. Murray, Judge
Cause No. 45G02-0902-FB-13

FEBRUARY 15, 2011

MEMORANDUM DECISION - NOT FOR PUBLICATION

SHARPNACK, Senior Judge

STATEMENT OF THE CASE

Tamikka Lucius appeals her convictions of causing death while operating a motor vehicle with an alcohol concentration equivalent to at least 0.15 gram of alcohol per 100 milliliters of blood, a Class B felony, Indiana Code section 9-30-5-5(b) (2005); operating a motor vehicle while intoxicated, a Class A misdemeanor, Indiana Code section 9-30-5-2(b) (2001); and causing serious bodily injury while operating a motor vehicle with an alcohol concentration equivalent to at least 0.08 gram of alcohol per 100 milliliters of blood, a Class D felony, Indiana Code section 9-30-5-4(a) (2004). Lucius also appeals her sentence.

We affirm.

ISSUES

Lucius presents six issues, which we consolidate and restate as:

I. Whether the trial court abused its discretion by restricting Lucius' cross-examination of two State witnesses.

II. Whether the trial court abused its discretion by allowing the State to cross-examine Lucius regarding certain evidence that she alleges was inadmissible.

III. Whether the State presented evidence sufficient to sustain Lucius' convictions where the State's expert witness was allegedly not qualified to testify as to the conversion of serum blood alcohol content to whole blood alcohol content.

IV. Whether the trial court abused its discretion by refusing Lucius' tendered jury instruction.

V. Whether the trial court abused its discretion in sentencing Lucius and whether her sentence is inappropriate.

FACTS AND PROCEDURAL HISTORY

On August 30, 2008, Lucius, her boyfriend Teon Harris, Harris' cousin Steven Thomas, and Thomas' girlfriend Enora Royal all attended a birthday party where they drank alcohol. After leaving the party and dropping off other people, the four were headed to a bar. At that time, they were using the vehicle of Lucius' mother, and Harris was driving. However, Lucius kept insisting to Harris that she should drive because it was her mother's car. Harris pulled into a gas station and switched seats with Lucius so that she could drive. With Lucius driving, they reentered the highway. Lucius turned the music up to a high volume and increased the speed of the car to eighty or ninety miles per hour. She ignored the pleas of her passengers to slow down or stop and let them out. Lucius attempted to exit the highway but missed the ramp of her intended exit, causing the car to flip, land upside down and catch on fire. Harris was ejected from the passenger seat and died. Thomas and Royal sustained injuries but were able to exit the car.

Based upon this incident, Lucius was charged with Count I causing death when operating a motor vehicle with an alcohol concentration equivalent to at least 0.15 gram of alcohol per 100 milliliters of blood; Count II causing death when operating a motor vehicle while intoxicated; Count III reckless homicide; Counts IV and V operating a motor vehicle while intoxicated; Counts VI, VII and VIII confinement; and Counts IX and X causing serious bodily injury when operating a motor vehicle with an alcohol concentration equivalent to at least 0.08 gram of alcohol per 100 milliliters of blood.

Following a jury trial, she was found guilty of Counts I, II, III, IV, V and IX. At her sentencing hearing, the trial court merged Counts II and III into Count I, and Count V into Count IX, leaving Counts I, IV and IX. Lucius was sentenced to fifteen years on Count I, one year on Count IV and two years on Count IX, all to be served concurrently with three years suspended. It is from these convictions and this sentence that she now appeals.

DISCUSSION AND DECISION

I. CROSS-EXAMINATION

Lucius first contends that the trial court abused its discretion by limiting her cross-examination of both Thomas and Royal when she was attempting to show their bias. The right to cross-examine witnesses is guaranteed by the Sixth Amendment to the United States Constitution and Article I, Section 13 of the Indiana Constitution. *Nelson v. State*, 792 N.E.2d 588, 594 (Ind. Ct. App. 2003), *trans. denied*. The Sixth Amendment right of confrontation requires that the defendant be afforded an opportunity to conduct effective cross-examination of State witnesses to test their credibility. *Kirk v. State*, 797 N.E.2d 837, 840 (Ind. Ct. App. 2003), *trans. denied*. However, the trial judge has discretion to place reasonable limitations upon this right based upon concerns about harassment, prejudice, confusion of the issues, witness safety, or interrogation that is repetitive or only marginally relevant. *Nelson*, 792 N.E.2d at 594.

In addition to the constitutional right of confrontation, Indiana Evidence Rule 616 provides, "[f]or the purpose of attacking the credibility of a witness, evidence of bias,

prejudice, or interest of the witness for or against any party to the case is admissible." Evidence of bias, prejudice, or ulterior motives, on the part of a witness, is relevant at trial because it may discredit the witness or affect the weight of the witness's testimony. *Kirk*, 797 N.E.2d at 840.

Here, Lucius attempted during cross-examination to explore possible motive or interest of Thomas and Royal with regard to their testimony that Lucius was the driver of the vehicle and that she caused the accident. Lucius theorized that Thomas and Royal were obligated to testify that Lucius caused the accident because they had both settled claims based on that premise with the insurance company of Lucius' mother, who owned the vehicle, for injuries they sustained in the accident. Lucius maintained that Harris had grabbed the steering wheel when Lucius was driving, thereby causing the accident. Hence, Lucius intended to use evidence of Thomas' and Royal's settlements with the insurance company as evidence of their motive to testify in this case that Lucius was driving the vehicle and caused the accident.

"If a witness in a criminal trial has a financial motive for testifying in a certain fashion, then the jury should hear about those matters because they are relevant to the question of the witness' credibility." *McCarthy v. State*, 749 N.E.2d 528, 533 (Ind. 2001). However, here, the testimony of Thomas and Royal was not relevant to any motive or interest they may have had for testifying that Lucius caused the accident because their settlement with the insurance company was not pending at the time of trial.

According to the comments of counsel at trial, the settlement had been finalized prior to trial.

Moreover, at trial, Thomas, Royal and Lucius all testified that prior to the accident they had been drinking at a birthday party. Thomas and Royal testified that they begged Lucius to slow the car down, and they both unequivocally identified Lucius as the driver of the vehicle when the crash occurred. Tr. pp. 261 and 262, and 334; 277-78 and 340. When asked if Harris grabbed the steering wheel, Thomas testified, "He did not grab that wheel. He didn't touch that wheel." Tr. p. 277. Thomas was further asked if, at any point, Harris ever reached across and Thomas responded "No." Tr. p. 277. During cross-examination, Thomas was again asked if Harris in any way touched the steering wheel of the vehicle, and he responded, "No, he didn't touch no driver's wheel at all." Tr. p. 290. Additionally, during Royal's testimony, she was asked if Harris ever reached across and touched the steering wheel. Royal testified, "Never." Tr. p. 338.

Two police officers also testified that Lucius stated to them that she was driving the vehicle at the time of the crash, that she was going eighty or ninety miles per hour, and that she lost control when she attempted to exit the freeway. One of the officers was asked at trial whether Lucius indicated that anyone had touched the steering wheel; he responded, "No." Tr. p. 392. In contrast, Lucius testified on her own behalf and stated that Harris reached over and "yanked" the steering wheel, causing the accident, Tr. pp. 584-85 and 650-51, and she accused Thomas, Royal and the police officers of lying. Thus, based upon settlement of the insurance case prior to trial and the evidence

produced at trial, the subject area Lucius sought to explore on cross-examination was not relevant in the case at hand. The trial court did not abuse its discretion by limiting Lucius' cross-examination of these witnesses on this subject.

II. ADMISSION OF EVIDENCE

Lucius next asserts that the trial court erred by allowing the State to question her concerning an entry on her driving record regarding a fraudulent driver's license. Lucius claims that admission of evidence of this alleged prior bad act prejudiced her because it allowed the jury to make the forbidden inference that because she had allegedly done something illegal in the past with regard to her driving ability, she had done something illegal in the present case. Thus, on appeal, she bases her claim of error on Indiana Evidence Rule 404(b).

To preserve a claimed error in the admission of evidence, a party must make a contemporaneous objection that is sufficiently specific to apprise the trial judge of the issue. *Raess v. Doescher*, 883 N.E.2d 790, 797 (Ind. 2008). A general objection, or an objection on grounds other than those raised on appeal, is ineffective to preserve an issue for appellate review. *Id*.

Our review of the trial transcript in this case reveals that during the State's cross-examination of Lucius, defense counsel objected based on his claim that he had not been provided with any of the documents the State was using to cross-examine Lucius. Defense counsel's objection did not refer to Evidence Rule 404(b), but rather was based upon an alleged violation of the court's discovery order. The trial court's comments

indicate the court understood defense counsel's objection to be one regarding a violation of the court's discovery order, as well. Thus, Lucius is raising a different claim of error on appeal than she raised at trial, and her claim of erroneous admission of evidence based upon a violation of Evidence Rule 404(b) is barred by procedural default.

To the extent that Lucius raises in her brief a claim of a discovery violation because she was not provided with a copy of her driving record before trial, we note that, as a general rule, the proper remedy for a discovery violation is a continuance. *Warren v. State*, 725 N.E.2d 828, 832 (Ind. 2000). Failure to request a continuance as an alternative to excluding the evidence constitutes a waiver of any alleged error pertaining to noncompliance with the court's discovery order. *Id*. Lucius did not request a continuance; therefore, the issue is waived.

Waiver notwithstanding, Lucius' argument still fails. Exclusion of evidence as a remedy for a discovery violation is only proper where there is a showing that the State's actions were deliberate or otherwise reprehensible, and this conduct prevented the defendant from receiving a fair trial. *Id*. In this case, Lucius has not demonstrated that the State's action was deliberate or otherwise reprehensible. Additionally, Lucius has not demonstrated that she was prevented from receiving a fair trial. On redirect examination, Lucius testified that the fraudulent license notation on her driving record indicates that she had been a victim of identity theft. Lucius explained that when she went to the Bureau of Motor Vehicles to reinstate her identification card, she found out that someone claiming to be her had obtained an identification card using her name but their picture.

She further described the actions she had to take in order to clear up the issue and obtain a new identification number. Lucius failed to make a showing of any error upon this issue.

III. SUFFICIENCY OF EVIDENCE

For her third claim of error, Lucius alleges that the State failed to present evidence to sustain her convictions of causing death while operating a motor vehicle with an alcohol concentration equivalent to at least 0.15 gram of alcohol per 100 milliliters of blood, pursuant to Indiana Code section 9-30-5-5(b), and causing serious bodily injury while operating a motor vehicle with an alcohol concentration equivalent to at least 0.08 gram of alcohol per 100 milliliters of blood, pursuant to Indiana Code section 9-30-5-4(a). When reviewing claims of insufficiency of the evidence, we neither weigh the evidence nor judge the credibility of the witnesses. *Caruthers v. State*, 926 N.E.2d 1016, 1022 (Ind. 2010). If there is substantial evidence of probative value from which a reasonable trier of fact could find guilt beyond a reasonable doubt, we will affirm the conviction. *Id*.

To obtain convictions pursuant to both Indiana Code sections 9-30-5-5(b) and 9-30-5-4(a), the State must prove the defendant's alcohol content in terms of weight of alcohol in the whole blood. *See Melton v. State*, 597 N.E.2d 359, 360-61 (Ind. Ct. App. 1992), *trans. denied*. Thus, where a serum blood test has been taken of the defendant's blood, the State must present expert testimony concerning conversion of the serum test results into whole blood percentage by weight. *Datzek v. State*, 838 N.E.2d 1149, 1161

(Ind. Ct. App. 2005), *trans. denied*. This is the only element upon which Lucius challenges the sufficiency of the evidence supporting her convictions.

Lucius maintains that the testimony of the State's expert witness did not constitute reliable evidence of her whole blood alcohol concentration because the expert's qualifications in the area of toxicology were lacking. Dr. Cavanaugh was the State's witness who testified regarding the conversion of Lucius' blood serum alcohol content to whole blood alcohol content. Prior to doing so, he testified that he is a medical doctor and forensic pathologist with training in alcohol concentration levels in the blood, as well as the effects of alcohol in the human body. Beyond his general experience in toxicology, he is considered an expert in the effects of toxins on the human body. Generally, he is called to testify as a forensic pathologist, but in many cases that includes testimony on clinical toxicology as well. He has previously testified regarding clinical toxicology and as an expert on blood alcohol concentration in the human body.

This evidence sufficiently establishes that Cavanaugh had the necessary training and credentials to qualify as an expert capable of rendering an opinion on the conversion of the serum blood alcohol concentration to whole blood alcohol concentration. As such, he testified that to convert the serum blood alcohol content to whole blood alcohol content, he multiplies the serum blood alcohol content number by 85%, which is in the middle of the accepted range. At trial, his testimony included his conversion of Lucius' serum blood alcohol test results of .239 to a corresponding whole blood alcohol content of .20. Therefore, we conclude that the State presented sufficient evidence to show that

Lucius operated a vehicle with a blood alcohol content of at least .08 and .15 as required by the statutes under which Lucius was charged and convicted.

IV. JURY INSTRUCTION

Lucius claims that the trial court erred by refusing her tendered instruction regarding intoxication as the cause of death and injury because it is a correct statement of the law. We review the trial court's decisions on instruction of the jury for an abuse of discretion. *Treadway v. State*, 924 N.E.2d 621, 636 (Ind. 2010). When determining whether a trial court erroneously gave or refused to give a tendered instruction, we consider the following: (1) whether the tendered instruction correctly states the law; (2) whether there was evidence presented at trial to support the giving of the instruction; and (3) whether the substance of the tendered instruction was covered by other instructions that were given. *Id*.

In the instant case, the proposed instruction tendered by Lucius read as follows: "The State must prove beyond a reasonable doubt that the intoxication caused the death or other injuries." Tr. p. 673. In support of this instruction, Lucius cited *Shuman v. State*, 489 N.E.2d 126 (Ind. Ct. App. 1986), *trans. denied*. However, *Shuman* cited *Higginbotham v. State*, 427 N.E.2d 896 (Ind. Ct. App. 1981), for this language, and *Higginbotham* was overruled on this very issue by *Micinski v. State*, 487 N.E.2d 150, 154 (Ind. 1986).

Therefore, the trial court properly refused Lucius' tendered instruction because it misstates the law. "The State need not establish a causal link between a driver's

intoxication and the fact that injury resulted from his driving." *Brown v. State*, 911 N.E.2d 668, 674 (Ind. Ct. App. 2009) (citing *Micinski*, 487 N.E.2d at 154). Thus, the State was not required to prove that Lucius' intoxication caused Harris' death and/or Thomas' injury; rather, the State need only prove that Lucius' conduct caused the death and/or the injury. *See Brown*, 911 N.E.2d at 674. Given that Lucius' tendered instruction incorrectly stated the law, the court did not err in refusing it.

V. SENTENCE

A. Abuse of Discretion

Lucius also contends that the trial court abused its discretion in sentencing her with regard to her conviction of causing death while operating a motor vehicle with an alcohol concentration equivalent to at least 0.15 gram of alcohol per 100 milliliters of blood, a Class B felony. Ind. Code § 9-30-5-5(b). Particularly, she alleges that the trial court erred by using the nature and circumstances of the crime, as well as her criminal history, as aggravating circumstances.

Sentencing decisions rest within the sound discretion of the trial court and are reviewed on appeal only for an abuse of discretion. *Anglemyer v. State*, 868 N.E.2d 482, 490 (Ind. 2007), *clarified on rehearing*, 875 N.E.2d 218 (Ind. 2007). When imposing a sentence for a felony, a trial court must enter a sentencing statement including reasonably detailed reasons for imposing a particular sentence. *Id.* at 490. A trial court abuses its discretion when it: 1) fails to issue any sentencing statement; 2) enters a sentencing statement that explains reasons for imposing a sentence, but the record does not support

the reasons; 3) enters a sentencing statement that omits reasons clearly supported by the record and advanced for consideration; or 4) considers reasons that are improper as a matter of law. *Id*. at 490-91.

In discussing these factors, the trial court stated:

> Although the jury did not find Ms. Lucius guilty on the confinement counts, the circumstances of the crime couldn't be more clear here. These people could not get out of the vehicle because she chose to drive at extreme speeds, from all accounts, out of pure meanness. Whatever the gripe was, whatever was eating her, it manifested itself in her decision to drive like a mad woman down the expressway. It put the people in the car in jeopardy. We know what happened to them. Other motorists were put at extreme risk because of her driving. This was an extremely irresponsible act. It goes beyond poor judgment.

Tr. p. 812.

Lucius argues that the record does not support the trial court's use of the nature and circumstances of the crime as an aggravating factor because she was acquitted of the confinement charges.

Although the jury determined that Lucius' actions did not amount to the criminal act of confinement, the trial court was not prohibited from considering the evidence at sentencing. Thomas and Royal testified that they, as well as Harris, begged Lucius to slow down and to stop the vehicle and let them out. Harris' sister also testified that she heard, over the cell phone, the vehicle's occupants pleading for Lucius to slow down. In addition, two police officers testified to Lucius' post-crash statement that she was driving eighty or ninety miles per hour. Lucius' argument on this issue fails.

Lucius next claims that the trial court improperly used her criminal history as an aggravating factor because there was not a sufficient nexus between her prior offenses and the current offense. In this case, the document used to establish criminal history is Lucius' driving record.

The significance of a defendant's criminal history as an aggravating factor varies based on the gravity, nature and number of prior offenses as they relate to the current offense. *Vasquez v. State*, 762 N.E.2d 92, 97 (Ind. 2001) (citing *Wooley v. State*, 716 N.E.2d 919, 929 n.4 (Ind. 1999)). Here, the offense is an operating while intoxicated offense. Such an offense encompasses the operation of a vehicle; therefore, Lucius' driving record is not an improper consideration. The evidence at trial showed that Lucius was speeding and was driving on a suspended license. Her driving record shows a prior incident of speeding and several prior license suspensions. Moreover, one such license suspension is for driving while suspended. Unfortunately, the gravity of Lucius' offenses escalated to the point where it resulted in the death of another person. We find no abuse of the trial court's discretion.

B. Inappropriateness

Finally, Lucius asserts that her sentence is inappropriate. The trial court sentenced her to fifteen years with three years suspended.

We may revise a sentence authorized by statute if, after due consideration of the trial court's decision, we determine that the sentence is inappropriate in light of the nature of the offense and the character of the offender. Ind. Appellate Rule 7(B). A defendant

bears the burden of persuading the appellate court that his or her sentence has met the inappropriateness standard of review. *Anglemyer*, 868 N.E.2d at 494.

To assess the appropriateness of the sentence, we look first to the statutory range established for the class of the offense. Here, the offense is a Class B felony, for which the advisory sentence is ten years, with a minimum sentence of six years and a maximum sentence of twenty years. Ind. Code § 35-50-2-5 (2005).

Next, we look to the nature of the offense and the character of the offender. The nature of the current offense is that Lucius, with a suspended license, drove with a BAC of .20. She ignored her passengers' pleas to slow down and drove at speeds of eighty to ninety miles per hour upon a highway. She missed the exit ramp of her intended exit, causing the vehicle to flip, land upside down and catch on fire. Harris, who was Lucius' front seat passenger and the father of her baby, was ejected from the vehicle and died as a result of massive internal injuries. Two other passengers suffered injuries, as well.

With regard to the character of the offender, we note that Lucius had a disregard for the law as evidenced by her driving record. At the time of the accident, her driver's license was suspended, and she had several previous suspensions. She had also been caught previously for driving while her license was suspended. Her driving record also shows several failures to appear and failures to pay. At trial, Lucius placed the blame for the accident on the deceased Harris, claiming he grabbed the steering wheel and caused the accident.

Lucius has not carried her burden of persuading this Court that her sentence has met the inappropriateness standard of review. *See Anglemyer*, 868 N.E.2d at 494. Our review of the nature of the offense and the character of the offender does not lead us to conclude that Lucius' sentence is inappropriate.

CONCLUSION

Based upon the foregoing discussion and authorities, we conclude that the subject area was not relevant to the issues of the case and therefore the trial court did not err by limiting Lucius' cross-examination of two State's witnesses. In addition, Lucius waived any error with regard to the State's cross-examination of her regarding her driving record. Waiver notwithstanding, she failed to make the requisite showing for a violation of a discovery order. We also conclude that the trial court did not err by allowing the State's expert witness to testify to the conversion of serum blood alcohol content to whole blood alcohol content, and, therefore, there is sufficient evidence of Lucius' convictions. Further, the trial court did not err by refusing Lucius' tendered jury instruction because it was not a correct statement of the law. Finally, the trial court did not abuse its sentencing discretion by using the nature and circumstances of the crimes and Lucius' driving record as aggravating factors, and Lucius failed to show that her sentence is inappropriate.

Affirmed.

ROBB, C.J., and MATHIAS, J., concur.