

## ARKANSAS COURT OF APPEALS

DIVISION III  
No. CACR09-1176

REINA ISABELL VANCE  
APPELLANT

V.

STATE OF ARKANSAS  
APPELLEE

Opinion Delivered September 29, 2010

APPEAL FROM THE CRAWFORD  
COUNTY CIRCUIT COURT  
[NO. CR2008-307]

HONORABLE MICHAEL MEDLOCK,  
JUDGE

AFFIRMED

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### RAYMOND R. ABRAMSON, Judge

Reina Vance appeals from her Crawford County convictions of first-offense driving while intoxicated (DWI), leaving the scene of an injury accident, and no proof of insurance. Her sole point on appeal is that the trial court erroneously admitted evidence of a subsequent DWI arrest during the sentencing phase of her trial. We affirm.

On June 27, 2008, the Van Buren Police Department was dispatched to a call involving a hit-and-run accident with injury. A witness to the accident followed the vehicle involved, stopped it in the AutoZone parking lot, and prevented it from leaving until police arrived. Officer Heather Threet responded to the dispatch, and, after talking with the witness, approached the driver of the suspect vehicle, Reina Isabell Vance. Vance refused

to roll down her window. Officer Threet opened the door to the vehicle and immediately recognized the smell of intoxicating beverages emanating from the vehicle. Officer Threet requested that Vance exit the vehicle, and Vance stumbled while doing so. Her pants were unzipped, her speech was slurred and rambling, and she did not realize that she had been involved in an accident. When asked if she had been drinking, Vance admitting having a few beers. Officer Threet performed three field-sobriety tests on Vance, and she failed all three. At that point, Officer Threet arrested Vance on suspicion of DWI. Her blood-alcohol content (BAC) at the time of the arrest was 0.20.

At the sentencing phase of the jury trial, the State, over defense counsel's objection, was allowed to introduce evidence that, six months after the accident at issue, Vance was again arrested on DWI charges. Officer Dewayne Richeson testified that, on December 14, 2008, Vance had been stopped on suspicion of DWI. Vance admitted drinking earlier in the day. Officer Richeson testified that he performed three field-sobriety tests and that Vance failed all three. He testified that Vance was transported to the Crawford County Detention Center where police attempted to perform a BAC test. The first and second tests were incomplete because Vance would only blow on the tube for a few seconds. When informed that she would be charged with refusal to submit if she didn't perform correctly, Vance successfully completed the test and registered a 0.14. Vance did not deny these matters in her testimony.

On the DWI conviction, the jury sentenced Vance to 24 hours in the county jail and imposed a \$1,000 fine. On the charge of leaving the scene of an injury accident, the jury

sentenced her to a term of six years imprisonment in the Arkansas Department of Correction. She was fined \$125 on the insurance count.

The sole issue raised by Vance on appeal is whether the trial court erroneously admitted evidence of her subsequent arrest for DWI during the sentencing phase of her trial. More specifically, she argues that the probative value of that evidence was substantially outweighed by the danger of unfair prejudice and should have been prohibited from consideration under Arkansas Rule of Evidence 403.

In Arkansas, criminal prosecutions in which a jury sits as the trier of fact are bifurcated into a guilt/innocence phase and a penalty phase. Ark. Code Ann. § 16-97-101 (Supp. 2006). A circuit court's decision to admit evidence in the penalty phase of a trial is reviewed for an abuse of discretion. *MacKool v. State*, 365 Ark. 416, 231 S.W.3d 676 (2006). An abuse of discretion is a high threshold that does not simply require error in the trial court's decision, but requires that the trial court acted improvidently, thoughtlessly, or without due consideration. *Pace v. State*, 2010 Ark. App. 491, 375 S.W.3d 751; *Rye v. State*, 2009 Ark. App. 839, 373 S.W.3d 354.

All relevant evidence on the question of sentencing may be considered by the sentencing body. *Marshall v. State*, 342 Ark. 172, 27 S.W.3d 392 (2000). The admissibility of proof in the penalty phase of a jury trial is governed by the Arkansas Rules of Evidence; however, pursuant to Ark. Code Ann. § 16-97-103 (Repl. 2006), certain evidence is admissible at sentencing that would not have been admissible at the guilt phase of the trial.

*Helms v. State*, 92 Ark. App. 79, 211 S.W.3d 53 (2005). Section 16-97-103 allows for relevant character evidence and evidence of aggravating or mitigating circumstances to be presented during the penalty phase. Ark. Code Ann. § 16-97-103(5), (6). Even evidence of uncharged and subsequent misconduct has been held admissible as relevant to sentencing. See, e.g., *Rhodes v. State*, 102 Ark. App. 73, 281 S.W.3d 758 (2008) (fifteen-year-old girl's unrelated claim of rape by appellant was relevant evidence of appellant's character during penalty phase of trial); *Davis v. State*, 60 Ark. App. 179, 962 S.W.2d 815 (1998) (finding no error in trial court's admission of prior, uncharged misconduct during sentencing phase); *Crawford v. State*, 362 Ark. 301, 208 S.W.3d 146 (2005) (evidence of subsequent drug offenses admissible during sentencing).

Here, the evidence of Vance's subsequent DWI arrest speaks directly to her character and to her propensity to continue to engage in similar activity—both of which are relevant in sentencing. See *Williams v. State*, 363 Ark. 395, 214 S.W.3d 829 (2005) (evidence of a subsequent, unrelated rape was relevant to Williams's character and his propensity to engage in similar activity and was admissible at sentencing). However, while this evidence is clearly relevant, not all relevant evidence is admissible. Rule 403 provides as follows:

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

Ark. R. Evid. 403 (2010).

Here, the State presented the testimony of a disinterested police officer relating the facts of his investigation that took place six months after Vance's arrest on the current charge. While the evidence of her subsequent arrest may have been prejudicial to Vance—it is axiomatic that all relevant evidence is prejudicial—it is only unfair prejudice, substantially outweighing probative value that mandates exclusion of relevant matter under Rule 403. That simply is not present here. There was no unsettling victim testimony, the event was not remote in time, and the allegations were fully investigated. The trial court considered the nature of the evidence and the arguments of counsel, found the evidence was not unduly prejudicial, and deemed the evidence admissible during the sentencing phase. Nothing in the record indicates that the circuit court acted improvidently, thoughtlessly, or without due consideration. Accordingly, the trial court did not abuse its discretion.

Moreover, even if the evidence of her subsequent DWI arrest was improperly introduced, reversal is not warranted because Vance failed to establish she was prejudiced by the alleged error. A trial court error requires reversal only if prejudice has resulted. The law is well settled that prejudice is not presumed, and we will not reverse absent a showing of prejudice. *Donovan v. State*, 71 Ark. App. 226, 32 S.W.3d 1 (2000); *Camp v. State*, 66 Ark. App. 134, 991 S.W.2d 611 (1999).

Here, the statutory maximum range for a first-offense DWI is up to one year's imprisonment. Ark. Code Ann. § 5-65-111(a)(1)(A) (Repl. 2005). Yet Vance only received twenty-four hours in the county jail, which is the statutory minimum sentence. A defendant

Cite as 2010 Ark. App. 646

who has received a sentence within the statutory range short of the maximum sentence cannot show prejudice from the sentence itself. *Buckley v. State*, 349 Ark. 53, 76 S.W.3d 825 (2002) (citing *Young v. State*, 287 Ark. 361, 699 S.W.2d 398 (1985)). Given the fact that the jury imposed the minimum sentence on the DWI charge while imposing the maximum sentence on the felony charge of leaving the scene of an injury accident, it seems apparent that the jury gave more weight to the fact that someone was injured by Vance's actions in this case rather than the evidence of the subsequent DWI arrest. As Vance cannot show prejudice, reversal is not required.

Affirmed.

GLADWIN and GLOVER, JJ., agree.