Cite as 2024 Ark. App. 340

ARKANSAS COURT OF APPEALS

DIVISION III
No. CR-23-629

CHASITY RASHELLE ROGERS APPELLANT V. STATE OF ARKANSAS APPELLEE	Opinion Delivered May 29, 2024 APPEAL FROM THE SALINE COUNTY CIRCUIT COURT [NO. 63CR-22-561] HONORABLE JOSH FARMER, JUDGE AFFIRMED; REMANDED TO CORRECT SENTENCING ORDER

BART F. VIRDEN, Judge

Chasity Rashelle Rogers appeals her conviction by the Saline County Circuit Court for driving while intoxicated (DWI), sixth offense. On appeal, Rogers argues that there is insufficient evidence to support her conviction, and the circuit court committed reversible error in denying her motion to suppress and by admitting evidence of her prior convictions. We affirm and remand for correction of the sentencing order.

I. *Relevant Facts*

On July 11, 2022, Rogers was charged with DWI. On July 19, Rogers moved to suppress statements she made to police after her arrest or detention, alleging that the police did not have probable cause to arrest her. After a hearing on the matter, the court denied the motion.

The bench trial took place on June 16, 2023. Officer Carson Collins testified that on May 27, 2022, he and Officer Zachery Wisenor responded to a 911 call about an unresponsive person in the Walmart parking lot. When they arrived with their vehicle's blue lights flashing, they were flagged down by a family who explained that they had called 911 after they tried to wake Rogers but could not do so. Local firefighters and the ambulance service responded as well. Collins stated that he and Wisenor banged on Rogers's windows but did not get any response. Wisenor unlocked the doors, and Collins opened Rogers's door. Rogers was in the driver's seat, wearing the seat belt, and the engine was running. Collins shook her a couple of times, and she slowly awoke. Rogers was disoriented and did not respond to requests to turn off the engine, so Collins leaned in and turned off the engine. Wisenor asked Rogers if she knew where she was, and she stated that she was in Benton but did not respond to further questioning about her specific location or what day it was, and she did not know the time. After Rogers was medically cleared, Collins told Rogers it was time for a sobriety test, to which Rogers replied, "I can't walk straight even if I was sober."[1] Rogers explained that she had been at a friend's house earlier and "tried to cut myself off in enough time where I could drive home, or what else, and I needed to run by Walmart real quick, because that's what I needed to do, and I guess everything just made me drop off." She told the officers, "I am a lightweight and I don't drink very often, so." Collins asked her if she wore glasses or contacts, and she responded that she wore glasses, but she

[1]Collins was in phase two of the program Field Training Officer Program, and Wisenor was overseeing his training.

had no medical condition that would prevent her from following the tip of his finger with her eyes. Both Collins and Wisenor explained the Horizontal Gaze Nystagmus (HGN) test to Rogers, and Wisenor initially corrected Collins stating, "You started the wrong way." In response, Collins "did an extra pass" to ensure the test was administered fairly. Next, Collins explained and performed the Vertical Gaze Nystagmus (VGN) test. For both tests, the officers repeatedly explained to Rogers that she was supposed to follow Collins's fingertip with only her eyes before she understood the instructions. Collins explained that the HGN and the VGN tests show if there is a high level of an intoxicating substance in the body. He stated that Rogers displayed six out of six clues for intoxication during the HGN test, though there are conditions or circumstances that can cause a person who is not intoxicated to fail the HGN test, including flashing blue lights on the police vehicle. Collins stated that the HGN is 88 percent accurate if done correctly. Collins recalled that Rogers swayed on her feet when standing. He decided to take Rogers to the station to perform further field sobriety testing because the station provided a more controlled environment, which would improve Rogers's chance to pass the tests. At the police station, Collins explained the walk and turn test (WAT), which he stated has a 79 percent accuracy rate, and then demonstrated how to do it. Rogers stated that she had poor balance and had broken her feet in the past. Rogers performed the test, and Collins observed five out of eight clues of impairment. Rogers completely stepped off the line somewhere around step eight, but Collins did not make a note of it in his report. Rogers showed zero clues of impairment during the one leg stand test (OLS), which Collins explained has an 83 percent accuracy rate. After testing, Collins

gave Rogers the "Arkansas Statement of Rights" form and read it aloud to her while she followed along. The form, which Rogers signed and initialed, provided that Collins had requested a breathalyzer test and a urine test, and had Rogers agreed to those tests. Rogers declined further blood testing. Rogers stated that she had taken her prescribed medication, alprazolam, "not too long ago, but I'm a light weight." She explained that she usually does not take alprazolam when she drives, but she was under a lot of pressure at work and knew there were outstanding warrants for her arrest. On cross-examination, Collins stated that he saw clues of Rogers's impairment, including slurred speech, inability to comprehend simple questions or do simple tasks, watery and glassy eyes, impaired ability to walk, and swaying on her feet. Among clues *not* noted were the odor of alcohol, "fumbling fingers," alcohol or drug containers, and hanging on to the frame of the door when she exited the vehicle. Collins testified that he did not search Rogers before he put her into the patrol car, and he did not find a key fob inside the car or on her person. He could not recall whether he found the vehicle's key fob that evening, but he agreed that it was a possibility that the vehicle could have been started remotely, and it was possible that if it was started remotely, the vehicle could not be put in gear.

Kristin Mauldin, the chief forensic toxicologist at the Arkansas State Crime Laboratory (ASCL), testified that the lab received a urine sample, which tested negative for all forms of alcohol. A urine immunoassay test was positive for the benzodiazepine and amphetamine drug classes. The general toxicology test showed the presence of alprazolam, amphetamine, doxylamine, methamphetamine, methorphan, nicotine, phentermine, and

promethazine in Rogers's urine. Mauldin explained that the test was not a quantitative analysis, and it detected only the *presence* of the drug in the urine and not the *amount* of the drug. Mauldin explained that urine is a waste product that measures only what was previously in, and eliminated from, the body. She testified that no blood sample was submitted, and "blood is a great indicator of what is circulating through the blood stream." Mauldin also explained that the lab would not have done quantitative testing on blood because "we reserve any kind of quantitative testing for our medical-examiner cases in an overdose situation or that type of case," and for DWI cases, qualitative testing is standard procedure.

The State concluded its case-in-chief, and Rogers moved to dismiss the charge, arguing that there was insufficient evidence of intoxication because the HGN test was not performed correctly, and when Officer Collins realized he had not done the test correctly, he did not start over. Rogers contended it was possible that the flashing lights affected the accuracy of the exam, and it was not clear whether she was wearing contacts. Rogers asserted that the WAT test was not recorded, Collins stated that he did not make any notes regarding the WAT test, and Rogers stepped off the line only one time. Collins also testified that Rogers passed the OLS test, which is the more accurate of the tests; thus, the State did not prove "beyond a reasonable doubt that she was intoxicated or impaired to such a degree as to be a substantial danger to herself." The urine test did not show that she was under the influence of any drugs or alcohol, and the State did not prove that she was in physical control of the vehicle or that the car was operable. There was no evidence presented regarding how long

she had been in the Walmart parking lot, no intoxicants were found on her person or in her car, and the State did not obtain video of the parking lot.

The State responded that the immunoassay test showed that Rogers had barbiturates and benzodiazepine in her system. The general toxicology showed alprazolam, methamphetamine, and phentermine. The State argued that Rogers was buckled into the seat of her vehicle, the engine was running, and she was clearly impaired because she did not respond to loud knocking on the window. She visibly swayed while standing, garbled her speech, and admitted drinking and that she was a "lightweight." Rogers also admitted taking alprazolam and driving to Walmart, which she acknowledged she should not do. Moreover, the State asserted, even though Collins made some mistakes administering the field sobriety test, it does not discount every clue he saw, and there was sufficient evidence of intoxication without the field sobriety tests. The State argued that it had presented sufficient evidence of Rogers's control over the vehicle because the vehicle was running and Rogers was in the driver's seat. The court denied the motion. The defense rested and renewed the motion to dismiss.

The court found Rogers guilty of DWI, sixth offense. Relying on her statement in the video that she drove the vehicle to Walmart and the fact that the engine was on when police arrived, the circuit court found there was sufficient evidence that she was in control of the vehicle. The court found that the State had met its burden of proof that Rogers was under the influence of controlled substances, basing its decision on the ASCL test results and Rogers's demeanor in the videos. Specifically, she was passed out when the police arrived

and did not respond to repeated knocking on her window; she swayed on her feet; her speech was not normal; and she stated that she had taken prescription medication that she normally takes at home, and she usually does not drive when she takes it. The court sentenced her to twenty years' imprisonment in the Arkansas Division of Correction. Rogers timely filed her notice of appeal, and this appeal followed.

II. *Discussion*

A. Sufficiency of the Evidence

Rogers propounds several arguments supporting her contention that the State did not present sufficient evidence of intoxication such that she presented a clear and substantial danger of physical injury or death to herself or others. None of her arguments are well taken.[2]

A motion to dismiss at a bench trial, like a motion for directed verdict at a jury trial, is a challenge to the sufficiency of the evidence. *See Gill v. State*, 2015 Ark. 421, 474 S.W.3d 77; Ark. R. Crim. P. 33.1 (2018). The test for determining the sufficiency of the evidence is whether substantial evidence, direct or circumstantial, supports the verdict. *Id.* Substantial evidence is evidence of sufficient certainty and precision to compel a conclusion one way or the other and pass beyond mere suspicion or conjecture. *Id.* Such a determination is a question of fact for the trier of fact to determine. *Thornton v. State*, 2014 Ark. 157, 433 S.W.3d 216. The trier of fact is free to believe all or part of any witness's testimony and may

[2]Although Rogers raises the issue of the sufficiency of the evidence as her final point on appeal, double-jeopardy considerations require us to consider a challenge to the sufficiency of the evidence before other points are raised. *Bowen v. State*, 342 Ark. 581, 30 S.W.3d 86 (2000).

resolve questions of conflicting testimony and inconsistent evidence. *Id.* On appeal, this court views the evidence in the light most favorable to the verdict, and only evidence supporting the verdict will be considered. *Gill*, *supra.*

It is unlawful for a person who is intoxicated to operate or be in actual physical control of a motorboat on the waters of this state or a motor vehicle. Ark. Code Ann. § 5-65-103(a)(1) (Repl. 2016). "Intoxicated" means influenced or affected by the ingestion of alcohol, a controlled substance, any intoxicant, or any combination of alcohol, a controlled substance, or an intoxicant, to such a degree that the driver's reactions, motor skills, and judgment are substantially altered, and the driver constitutes a clear and substantial danger of physical injury or death to himself or herself or another person. Ark. Code Ann. § 5-65-102(4) (Supp. 2023).

First, Rogers asserts that her drug screen was *qualitative* rather than *quantitative*; thus, the toxicologist's testimony regarding her positive drug test spoke to the presence of drugs in her system only at some time in the past and did not prove that she was impaired at the time of her arrest. We reject this argument. In *Henry v. State*, 2011 Ark. App. 169, at 8, 378 S.W.3d 832, 836, in which we held that

> Henry requests us to rule that when officers suspect intoxication as a result of ingestion of a controlled substance, the State must present both "a quantitative analysis of the controlled substance in the blood stream" and expert testimony that "the quantity was sufficient to cause impairment." We decline the invitation.

Moreover, opinion testimony regarding intoxication is admissible, and it is the fact-finder's province to determine its weight and credibility. *See Johnson v. State*, 337 Ark. 196,

987 S.W.2d 694 (1999) (stating that officers' testimony about the smell of alcohol and actions consistent with intoxication can constitute evidence of DWI). Rogers compares the instant case to *Robinson v. State*, 98 Ark. App. 237, 254 S.W.3d 750 (2007). In *Robinson*, this court held that there was insufficient evidence of intoxication from a positive drug screen alone. In *Robinson*, police officers did not believe the appellant was intoxicated, there was no drug paraphernalia in her car, coworkers observed no behavior beforehand that Robinson was under the influence of drugs or intoxicants, and toxicologists could not say that test results proved she was intoxicated. *Robinson* is distinguishable from the instant case because, unlike Robinson, Rogers demonstrated several signs of impairment when the police arrived and again later when she was taken to the police station. Specifically, Collins testified that he believed Rogers was intoxicated because he and others repeatedly, loudly pounded her car windows without waking her, and Collins had to physically shake her awake. Collins testified that when he finally woke Rogers, her pupils did not contract when he shined the flashlight in her eyes, her speech was slurred, she could not answer certain questions or follow instructions, and she swayed on her feet. Additionally, Rogers admitted she had ingested intoxicating substances and was not supposed to drive while taking alprazolam, and she failed at least one field sobriety test.

In light of the evidence and testimony and viewing the evidence in the light most favorable to the State, we hold that the circuit court did not err in determining that sufficient evidence supported that Rogers was intoxicated such that she presented a clear and present danger to others.

Rogers also attacks the sufficiency of the evidence of intoxication from a different angle, contending that Collins's flawed administration of the HGN test and his failure to take more specific notes during her WAT test bring the totality of the evidence into question and require reversal. We disagree. We know of no authority supporting her argument, and she cites none; thus, we affirm on this point. Moreover, this is a request for this court to reweigh the evidence in her favor, which we cannot do. *See Brawner v. State*, 2013 Ark. App. 413, at 3, 428 S.W.3d 600, 603 ("It is within the province of the finder of fact to determine the weight of the evidence.").

For the first time on appeal, Rogers argues that the State did not present sufficient evidence that her judgment was impaired. Rogers did not propound this argument below; therefore, it is not preserved for our review. *See Porter v. State*, 356 Ark. 17, 145 S.W.3d 376 (2004).

In her next point on appeal, Rogers argues that the State did not present sufficient evidence that she had control of the vehicle as required by the Ark. Code Ann. § 5-65-102. She contends that if the car was started remotely, it would have been impossible to put the car into gear. Rogers relies on *Rogers v. State*, 94 Ark. App. 47, 224 S.W.3d 564 (2006), to support her argument that "the supreme court has set a bright-line rule that if a person does not place the keys in the ignition, then this scenario falls short of the proof necessary to establish actual physical control of the vehicle[.]" In reversing the appellant's conviction, this court held that

> [t]he purpose of Arkansas laws against driving while intoxicated is to prevent accidents and protect persons from injury. *See, e.g.*, *Benson v. State*, 212 Ark. 905, 208 S.W.2d 767 (1948). The case law developed in this area makes clear that if a person does not place the keys in the ignition, then this scenario falls short of the proof necessary to establish actual physical control of the vehicle for purposes of DWI. Whether this demarcation line is reasonable or effective in attaining the purpose of ensuring public safety is not for our court to decide.

Rogers, 94 Ark. App. at 50–51, 224 S.W.3d at 566.

Rogers is distinguishable from the instant case for several reasons. First, in *Rogers*, there was testimony that the appellant's friend drove him to his car and helped him get into the vehicle and that appellant promised his friend he would sleep until he was sober before he drove home. Appellant's friend started the vehicle remotely because it was a cold night, and he wanted to leave appellant with the car's heater running. Additionally, the technician who installed the remote-start feature in appellant's vehicle testified that when this particular vehicle was started remotely, it was impossible to drive the car without first inserting the key into the ignition. Rogers suggests that the physical location of the key is the crux of our holding in *Rogers*. She is wrong. In the instant case, the "demarcation line" in *Rogers* simply has no application.

Here, there was no testimony that the car was remotely started, and there was no expert testimony regarding the function of the remote-start feature in appellant's vehicle or even that the vehicle's ignition allowed for the insertion of a key or fob. There was nothing more than the mere suggestion during Collins's cross-examination that this vehicle *could* have been remotely started and that, generally, remotely started vehicles must have a key or fob in the ignition to put the car into gear. The circuit court was free to discount the alternative

hypothesis that perhaps the car was remotely started, and the insertion of a key or fob was necessary to drive the car. Factual determinations are for the court to make as the trier of fact. *Grillot v. State*, 353 Ark. 294, 107 S.W.3d 136 (2003). On appeal, we will not weigh the evidence; we simply determine whether the evidence supports the verdict. *Johnson v. State*, 70 Ark. App. 343, 346, 19 S.W.3d 66, 69 (2000). The fact-finder need not lay aside common sense in evaluating the ordinary affairs of life and may infer a defendant's guilt from improbable explanations of incriminating conduct. *Worsham v. State*, 2017 Ark. App. 702, at 8, 537 S.W.3d 789, 79.

The evidence introduced at trial is more than sufficient to support the court's determination that Rogers was in control of the vehicle. The engine was running, and the headlights and taillights were on. Rogers was in the driver's seat wearing a seat belt, and she admitted to Officer Collins that she had driven herself to Walmart. This case is akin to *Blakemore v. State*, 25 Ark. App. 335, 758 S.W.2d 425 (1988), in which police officers saw Blakemore sitting in a truck parked in front of a business with the motor running and the lights on. Blakemore was either "asleep or passed out" in the front seat, and the officer had difficulty waking him. Blakemore also asserted on appeal that he was not in actual physical control of the vehicle, and this court held that because he could have awakened at any moment and driven the car, he had the requisite control. In the instant case, there was evidence that Rogers could have awakened at any moment and driven the car; thus, the circuit court did not err in determining that she was in actual physical control of the vehicle. We find no error and affirm this point.

B. Motion to Suppress

Rogers argues on appeal that the circuit court erred in denying her motion to suppress evidence because her seizure was without reasonable suspicion, probable cause, or any other valid justification, violating her Fourth Amendment right to be free from unreasonable search and seizure.

In reviewing a circuit court's denial of a motion to suppress, we conduct a de novo review based on the totality of the circumstances, reviewing findings of historical fact for clear error and determining whether those facts give rise to reasonable suspicion or probable cause, giving due weight to inferences drawn by the circuit court and proper deference to the circuit court's findings. *Baird v. State*, 357 Ark. 508, 182 S.W.3d 136 (2004). We defer to the superior position of the circuit court to evaluate the credibility of witnesses at a suppression hearing, and any conflicts in the testimony of witnesses are for the circuit court to resolve. *Id.* We reverse only if the circuit court's ruling is clearly against the preponderance of the evidence. *Miller v. State*, 2010 Ark. 1, 362 S.W.3d 264.

There are three categories of police-citizen encounters: (1) an arrest based on probable cause, (2) a stop based on a reasonable suspicion a person has committed or is about to commit a crime, and (3) an officer's approaching an individual on the street and asking if that person is willing to answer questions, which does not constitute a seizure. *See Frette v. City of Springdale*, 331 Ark. 103, 108, 959 S.W.2d 734, 736 (1998). Officers also engage in "community caretaking functions, [which are] totally divorced from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute." *Szabo*

v. State, 2015 Ark. App. 512, at 5–6, 470 S.W.3d 696, 699–700 (citing *Cady v. Dombrowski*, 413 U.S. 433, 441 (1973)).

Roges argues that her case is similar to *Meeks v. State*, 2016 Ark. App. 9, 479 S.W.3d 559, in which this court held that the police officer did not have reasonable suspicion to stop a vehicle driven by appellant after the officer had observed a passenger leaning out of the vehicle and vomiting while the appellant's car was parked in the parking lot of a closed supermarket. This court held that the stop was not authorized by the officer's community-caretaking function on the sole basis of his observation of a vomiting passenger in the vehicle, and the officer did not have an objectively reasonable basis for believing that anyone in the appellant's vehicle was in danger or in need of immediate aid; therefore, the stop was not authorized by the emergency-aid exception to the warrant requirement. *See, e.g.*, *Mincey v. Arizona*, 437 U.S. 385, 390 (1978); *Miller v. State*, 2010 Ark. 1, 362 S.W.3d 264. *Meeks* is distinguishable because, here, the officers' community-caretaking function was initiated by a phone call regarding a possible medical emergency when passersby could not wake Rogers by pounding on her window and shouting. The court found that multiple factors established that the officers were exercising their community-caretaking function. Specifically, the court found that Rogers was passed out and unresponsive; her vehicle was running; her vehicle was parked over the line, touching two to three parking spots; she was alone without assistance from any other source; and, due to her level of unresponsiveness, she could have been in danger.

Again, *Blakemore* is instructive. In *Blakemore*, the officer approached a vehicle with its motor running and lights on. He observed that Blakemore was "either asleep or passed out" in the front seat. *Blakemore*, 25 Ark. App. at 336–37, 758 S.W.2d at 426. After the officer repeatedly knocked on the window, Blakemore awoke, and the officer smelled alcohol and saw Blakemore stumble when he got out of his vehicle. *Id.* This court held that

> [a]lthough he did not see any blood or physical injuries, Deputy Rushing did not know if the appellant was ill, drunk, or merely asleep. Given these circumstances we believe that Deputy Rushing, as part of his community caretaking function, was justified in knocking on the appellant's window to question him and make an inquiry."

Id. at 340, 758 S.W.2d at 428–29.

Additionally, in *Szabo*, 2015 Ark. App. 512, at 6, 470 S.W.3d at 700, a police officer approached the appellant's vehicle and saw him "in the front seat, unconscious, with the motor running." The officer knocked on his window, and when he did not respond, the officer "continued his community caretaking function in opening the unlocked door. The trial court specifically found that once Corporal Dawson opened the door, he smelled an odor of alcohol." *Id.* Here, under similar circumstances, Collins was acting within his community-caretaking role when he opened the driver's-side door. Collins did not smell alcohol; however, he observed other clues of intoxication, including Rogers's pupils failing to constrict when a light was shone in her eyes, slurred speech, disorientation, and the inability to answer certain questions or understand simple instructions. Rogers's contact with the police began within the parameters of the community-caretaking function; thereafter,

Collins saw signs of intoxication, and Rogers admitted she had taken an intoxicating substance and driven. Rule 3.1 of the Arkansas Rules of Criminal Procedure provides that

> [a] law enforcement officer lawfully present in any place may, in the performance of his duties, stop and detain any person who he reasonably suspects is committing, has committed, or is about to commit (1) a felony, or (2) a misdemeanor involving danger of forcible injury to persons or of appropriation of or damage to property, if such action is reasonably necessary either to obtain or verify the identification of the person or to determine the lawfulness of his conduct.

Our courts have determined that a possible driving-while-intoxicated offense falls within the ambit of the rule. *See Murrell v. State*, 2011 Ark. App. 311. Once Collins observed clues of intoxication and became suspicious that a crime had been committed or was about to be committed, Rule 3.1 permitted him to detain Rogers for further investigation, and the circuit court did not err in denying her motion to suppress.

It is important to note that Rogers relies heavily on the fact that the police arrived with the vehicle's blue lights flashing, arguing that this is the hallmark of a police seizure, and probable cause did not exist such that Rogers was subject to detainment. The critical difference here is that the officers did not approach the Walmart parking lot with the vehicle's blue lights flashing to conduct a traffic stop or investigate the report of a crime. As the circuit court noted in denying the motion to suppress, "the presence of blue lights alone were not enough to deem the contact in this case a seizure." We agree. The officers were on their way to render aid in a possible medical emergency; thus, Rogers's argument that the use of the blue lights is a form of seizure within the meaning of the Fourth Amendment is not well taken.

C. Prior Convictions

Rogers argues on appeal that the circuit court erred by admitting into evidence three prior convictions for DWI and allowing the convictions to be used to enhance the penalties associated with this DWI conviction. We affirm on this point.

A person who is found guilty of driving while intoxicated pursuant to Ark. Code Ann. § 5-65-103 for a sixth or subsequent offense occurring within twenty years of the first offense is guilty of a Class B felony. Ark. Code Ann. § 5-65-111(f) (Supp. 2021). A certified judgment of conviction may be used to establish prior DWI convictions. Ark. Code Ann. § 5-65-111(g). This certified copy constitutes prima facie evidence of a conviction for a person on trial facing a second or subsequent offense and may be used as evidence against the person. Ark. Code Ann. § 16-90-204 (Repl. 2016).

Below, Rogers objected to the admission of State's exhibit 6, asserting that the docket entry did not clearly state that she was convicted of DWI because "[i]t only says 'Guilty plea entered. Found Guilty. Drugs.'" Rogers is incorrect. The circuit court noted that the back of the docket sheet showed "DWI-1st Offense." Additionally, the front of the docket sheet provides that a condition of Rogers's guilty plea was that she not incur a *new* DWI charge within one year; thus, Rogers's argument that the circuit court erred in deeming the prior conviction admissible fails.

Rogers also appeals the admission of State's exhibit 8, arguing that it is not clear that she was represented by counsel when she entered her guilty plea because counsel is not listed on the docket next to the plea date. Rogers is correct that representation by counsel cannot

be presumed from a silent record. *See Neville v. State*, 41 Ark. App. 65, 848 S.W.2d 947 (1993). However, the record here demonstrates that Rogers was represented by counsel. Indeed, her attorney's name, Ray Baxter, is on the line designated for the name of defense counsel. Rogers cites *Tims v. State*, 26 Ark. App. 102, 760 S.W.2d 78 (2011), in which this court held that though the record was not silent, it was ambiguous because "Atty O'Bryan" had been written in the space for the name of the arresting officer. Here, there is no such confusion, and we hold that the circuit court did not err in admitting the prior conviction.

Rogers also contends that a third DWI conviction, State's exhibit 12, was improperly admitted by the court because she did not sign the order, and there was no proof that her guilty plea was actually imposed in open court in her presence as required by Ark. R. Crim. P. 24.3(a), which provides that a plea of guilty or nolo contendere shall be received only from the defendant in open court. Contrary to Rogers's assertion, there is no requirement that a prior conviction show whether the guilty plea was given in open court for it to be admissible for the purpose of sentencing enhancement, and we affirm.

D. Sentencing Order

Regarding the sentencing order, the first order showed that the conviction was for DWI, fourth offense, rather than DWI, sixth offense. A second order was filed the same day correcting the error; however, the new order was not designated as an amended order, and it shows the conviction as an unclassified felony instead of a Class B felony. Arkansas Code Annotated section 5-65-111(f) provides that "[a] person who pleads guilty or nolo contendere to or is found guilty of violating § 5-65-103 for a sixth or subsequent offense occurring within

twenty (20) years of the first offense upon conviction is guilty of a Class B felony." Therefore, we remand for the error to be corrected in keeping with this opinion.

Affirmed; remanded to correct sentencing order.

HARRISON, C.J., and BARRETT, J., agree.

Digby Law Firm, by: *Bobby R. Digby II* and *Mathew R. Ingle*, for appellant.

Tim Griffin, Att'y Gen., by: *Christopher R. Warthen*, Ass't Att'y Gen., for appellee.