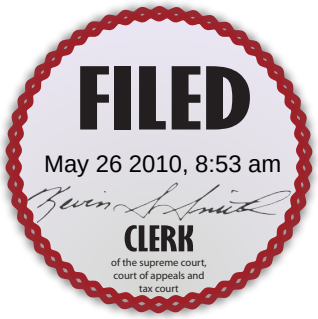

ATTORNEY FOR APPELLANT:

JAMES A. SHOAF
Columbus, Indiana

ATTORNEYS FOR APPELLEE:

GREGORY F. ZOELLER
Attorney General of Indiana

ARTURO RODRIGUEZ II
Deputy Attorney General
Indianapolis, Indiana

IN THE
COURT OF APPEALS OF INDIANA

JANYER PINTO,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 03A01-0908-CR-427
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE BARTHOLOMEW SUPERIOR COURT
The Honorable Chris D. Monroe, Judge
Cause No. 03D01-0812-FD-1926

May 26, 2010

MEMORANDUM DECISION – NOT FOR PUBLICATION

MATHIAS, Judge

Janyer Pinto ("Pinto") was convicted in Bartholomew Superior Court of Class D felony operating a vehicle while intoxicated ("OWI") and Class D felony resisting law enforcement. The trial court sentenced Pinto to two years, with one year suspended, on each count and ordered the sentences to be served consecutively. Pinto appeals and presents three issues, which we renumber and restate as the following two:

I. Whether the evidence is sufficient to support Pinto's convictions; and

II. Whether the trial court erred in sentencing Pinto.

We affirm.

Facts and Procedural History

On the evening of November 16, 2008, Deputy Kris Weisner ("Deputy Weisner") of the Bartholomew County Sheriff's Department parked his unmarked police car off U.S. 31 south of Columbus, Indiana and used a radar gun to gauge the speed of passing traffic. As he did so, he noticed a car, later determined to be driven by Pinto, approach him at what appeared to be a speed higher than the posted speed limit of fifty-five miles per hour. Pinto's wife and children were passengers in the car. Deputy Weisner pointed his radar gun at the car and determined that the car was travelling at sixty-five miles per hour. Deputy Weisner therefore decided to initiate a traffic stop of the vehicle, and pulled his car onto the highway behind Pinto and activated his emergency lights. Instead of slowing down, Pinto accelerated his car. Deputy Weisner then activated his siren, but Pinto continued down the road and turned into a nearby trailer park. As Deputy Weisner

followed Pinto into the trailer park, Pinto threw an open beer bottle out of the driver's side window. Pinto then continued to drive through the trailer park but eventually stopped his car.

Deputy Weisner ordered Pinto to exit the vehicle. As he approached Pinto, he noticed that Pinto smelled of alcohol and that his eyes were bloodshot. Deputy Weisner then performed a field sobriety test on Pinto, namely the horizontal gaze nystagmus test, which Pinto failed. Pinto admitted to Deputy Weisner that he had seen the emergency lights and heard the siren but stated that he was trying to get to his uncle's trailer. Pinto also claimed to have consumed only two beers that evening. However, the beer bottle Pinto threw from the car was a thirty-two ounce bottle. Pinto agreed to take a breath test at the police station.

At the station, Deputy Weisner asked if Pinto would perform two other field sobriety tests, i.e., the one-leg stand and walk test and the walk and turn test, but Pinto refused. When Deputy Weisner attempted to administer the breath test, Pinto refused to blow into the test machine sufficiently to complete the test. Deputy Weisner attempted to administer the test to Pinto four times, but each time, Pinto refused to blow into the machine. Deputy Weisner concluded that Pinto was deliberately refusing to complete the breath test.

On December 4, 2008, the State charged Pinto with Class D felony OWI, Class D felony OWI in a manner that endangered a person,[1] and Class D felony resisting law

[1] OWI is generally a Class C misdemeanor, but is a Class A misdemeanor if the defendant operates a vehicle in a manner that endangers a person. Ind. Code § 9-30-5-2 (2004). OWI is elevated to a Class D

enforcement. Following a trial held on June 17-18, 2009, the jury found Pinto guilty of Class D felony OWI and Class D felony resisting law enforcement, but not guilty of Class D felony OWI in a manner that endangered a person. At the conclusion of a sentencing hearing held on August 4, 2009, the trial court sentenced Pinto to two years, with one year suspended, on each count and ordered the sentences to be served consecutively. Pinto now appeals.

I. Sufficiency of the Evidence

Pinto first claims that the State failed to present evidence sufficient to support either of his convictions. Upon a challenge to the sufficiency of evidence, we neither reweigh the evidence or judge the credibility of the witnesses; instead, we respect the exclusive province of the trier of fact to weigh any conflicting evidence. McHenry v. State, 820 N.E.2d 124, 126 (Ind. 2005). We consider only the probative evidence and reasonable inferences supporting the verdict, and we will affirm if the probative evidence and reasonable inferences drawn from the evidence could have allowed a reasonable trier of fact to find the defendant guilty beyond a reasonable doubt. Id.

A. *Resisting Law Enforcement*

To convict Pinto of Class D felony resisting law enforcement, the State had to prove beyond a reasonable doubt that Pinto used a vehicle to knowingly or intentionally flee from a law enforcement officer after the officer had identified himself by visible or

---

felony if the defendant has a previous conviction for OWI that occurred within the five years immediately preceding the occurrence of the instant violation. Ind. Code § 9-30-5-3(a)(1) (2004). Here, the State alleged that Pinto did have a prior OWI conviction within the five years immediately preceding the present incident.

audible means, including operation of the officer's sirens or emergency lights, and ordered Pinto to stop. Ind. Code § 35-44-3-3(a)(3), -3(b)(1)(A) (2004).

Here, the facts most favorable to the verdict reveal that Deputy Weisner pulled his car behind Pinto and activated his emergency lights. Instead of pulling the car over to the side of the road, Pinto accelerated the car and continued to drive. Even when Deputy Weisner activated his siren, Pinto continued to drive and turned into the nearby trailer park. Inside the park, Pinto still did not stop the vehicle until after he threw an open beer bottle out of the car window and pulled further into the trailer park. Pinto also admitted to Deputy Weisner that he saw his emergency lights and heard the siren.

Pinto claims that he travelled only 200 to 350 feet from the time Deputy Weisner activated his siren to the point where Pinto stopped the vehicle. As noted by the State, the resisting statute does not contain a requirement that the State prove that the defendant fled any specific distance. Although a driver cannot reasonably be expected to stop the very second that a police officer activates his emergency lights and siren, here, after Deputy Weisner attempted to stop him, Pinto accelerated his car, pulled into a trailer park, threw a beer bottle out of the car, and continued to drive further into the park. Under these facts and circumstances, the jury could reasonably conclude that Pinto knowingly fled in his car after Deputy Weisner used his emergency lights and siren to order Pinto to stop. Thus, the State presented evidence sufficient to support Pinto's conviction for Class D felony resisting law enforcement.

B. *Operating While Intoxicated*

Pinto also claims that the evidence insufficient to support his conviction for OWI. To convict Pinto of Class D felony OWI, the State had to prove beyond a reasonable doubt that Pinto operated a vehicle while intoxicated and that Pinto had a previous conviction for OWI that occurred within the five years immediately preceding the occurrence of the instant violation. See Ind. Code §§ 9-30-5-2(a), 9-30-5-3(a)(1).

Here, Pinto challenges only the element of intoxication. "Intoxication" is defined as "under the influence of . . . alcohol . . . so that there is an impaired condition of thought and action and the loss of normal control of a person's faculties." Ind. Code § 9-13-2-86 (2004). Proof of intoxication does not require proof of blood alcohol content, and it is sufficient to show that the defendant was impaired. Ballinger v. State, 717 N.E.2d 939, 943 (Ind. Ct. App. 1999). Evidence of impairment may include: (1) the consumption of significant amounts of alcohol; (2) impaired attention and reflexes; (3) watery or bloodshot eyes; (4) the odor of alcohol on the breath; (5) unsteady balance; (6) failure of field sobriety tests; and (7) slurred speech. Id.

Pinto argues that the evidence was insufficient to establish his intoxication because there was no chemical test establishing intoxication. However, as stated above, proof of intoxication does not require proof of blood alcohol content.[2] Pinto also argues that his behavior and actions, as observed by Deputy Weisner, were insufficient to establish his intoxication beyond a reasonable doubt. We are unable to agree.

[2] In fact, there is a separate statute regarding operating a vehicle with a blood alcohol concentration of 0.08 or greater. See Ind. Code § 9-30-5-1 (2004).

The facts most favorable to the verdict reveal that Deputy Weisner saw Pinto throw an open beer bottle out of the driver's side window of his car. Deputy Weisner noticed that Pinto's eyes were bloodshot and that Pinto smelled of alcohol, both of which are evidence of intoxication. See Ballinger, 717 N.E.2d at 943. Further, Pinto failed the horizontal gaze nystagmus field sobriety test, which is also evidence of intoxication. See id. Pinto also admitted that he had been drinking beer, refused to undergo further field sobriety tests at the police station, and refused to complete the breath test. Under these facts and circumstances, the jury court reasonable conclude that Pinto was intoxicated.[3]

II. Sentencing

Pinto also claims that the trial court erred in sentencing him. As noted, the trial court sentenced Pinto to two years, with one year suspended, on each count and ordered the sentences to be served consecutively.

A. *Sentencing Discretion*

In arguing that his sentence is improper, Pinto first claims that the trial court erred by not finding specific aggravators and mitigators "as required by Indiana Code [section] 35-38-1-7.1." Appellant's Br. at 17-18. However, Section 7.1 no longer requires the trial court to consider any specific aggravating or mitigating circumstances. The current

[3] In the middle of his argument regarding the sufficiency of the evidence, Pinto argues that the prosecuting attorney acted improperly in referring to Woodward v. State, 770 N.E.2d 897 (Ind. Ct. App. 2002), claiming that the prosecuting attorney misstated the holding of that case. To the extent that Pinto attempts to present this as a separate issue of prosecutorial misconduct, he failed to preserve this issue by failing to object to the prosecutor's statement, failing to request an admonishment, and failing to move for a mistrial. See Flowers v. State, 738 N.E.2d 1051, 1058-59 (Ind. 2000). Moreover, Pinto does not separately delineate his argument as one of prosecutorial misconduct, nor does he cite any case law regarding standard of review or otherwise supporting a finding of misconduct. Pinto has therefore waived consideration of this issue by failing to present a cogent argument regarding prosecutorial misconduct. See Ind. Appellate Rule 46(a)(8)(A).

version of Section 7.1(d) provides that the trial court "may impose any sentence that is . . . authorized by statute . . . and . . . permissible under the Constitution of the State of Indiana . . . regardless of the presence or absence of aggravating circumstances or mitigating circumstances." As noted by our supreme court in Anglemyer v. State, 868 N.E.2d 482, 488 (Ind. 2007), clarified on reh'g, 875 N.E.2d 218, our General Assembly has eliminated the requirement that trial courts must consider certain mandatory circumstances when determining the exact sentence to be imposed.

Still, if "if the trial court 'finds' the existence of 'aggravating circumstances or mitigating circumstances' then the trial court is required to give 'a statement of the court's reasons for selecting the sentence that it imposes.'" Anglemyer, 868 N.E.2d at 489-90 (quoting Ind. Code § 35-38-1-3). In fact, the trial court is required to enter a sentencing statement whenever it imposes a sentence for a felony offense. Id. at 490. The statement must include a reasonably detailed recitation of the trial court's reasons for imposing a particular sentence. Id. If the recitation includes a finding of aggravating or mitigating circumstances, then the sentencing statement must identify all significant mitigating and aggravating circumstances and explain why each circumstance has been determined to be mitigating or aggravating. Id. "[O]nce the trial court has entered a sentencing statement, which may or may not include the existence of aggravating and mitigating factors, it may then 'impose any sentence that is . . . authorized by statute; and . . . permissible under the Constitution of the State of Indiana.'" Id. (citation omitted). "So long as the sentence is within the statutory range, it is subject to review only for abuse of discretion." Id. at 490.

A trial court abuses its sentencing discretion if it: (1) fails to enter a sentencing statement at all, (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 that are 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. Under the current "advisory" sentencing scheme, trial courts no longer have any obligation to weigh aggravating and mitigating factors against each other when imposing a sentence. Id. at 491. Thus, the relative weight or value assignable to reasons properly found, or to those which should have been found, is not subject to review for abuse of discretion. Id.

Here, Pinto argues that the trial court failed to enter a reasonably detailed statement that identified the aggravating and mitigating circumstances used by the trial court to justify Pinto's sentence. We disagree. When pronouncing sentence, the trial court explained its reasons from the bench. Specifically, the trial court noted that Pinto's prior criminal history suggested that he would reoffend. Pinto had two prior OWI convictions in addition to two prior convictions for domestic battery. Despite his prior convictions, Pinto again drove while intoxicated, with his wife and children in the car. The trial court further noted that the time Pinto had previously spent in jail had not altered Pinto's criminal behavior, nor had Pinto taken any steps to address any issues he had with alcohol. The trial court also noted that Pinto could not claim that his behavior

was due to any cultural differences[4] because Pinto's prior convictions would have familiarized him with Indiana's OWI laws. The trial court also noted that Pinto intentionally failed to complete the breath test. The trial court found no mitigating circumstances. Based on Pinto's failure to alter his criminal behavior despite his prior convictions, the trial court concluded that the safety of the community was best served by sentencing Pinto consecutively to two years, with one year suspended.

Given this rather detailed sentencing statement, we reject Pinto's argument that the trial court failed to make a reasonable detailed explanation for the sentence it imposed. Although the trial court's sentencing order does not discuss aggravating and mitigating circumstances, the transcript of the trial court's oral sentencing statement is more than sufficient to allow meaningful appellate review. And we are permitted to consider such oral statements in reviewing the trial court's sentencing discretion. See McElroy v. State, 865 N.E.2d 584, 589 (Ind. 2007). Nor does Pinto explain how the trial court otherwise abused its sentencing discretion.

B. *Appellate Rule 7(B)*

Pinto also claims that his sentence is inappropriate, citing Indiana Appellate Rule 7(B). Even when the trial court has acted within its lawful discretion in determining a sentence, the Indiana Constitution authorizes independent appellate review and revision of a sentence imposed by the trial court. Anglemyer, 868 N.E.2d 491. This appellate authority is implemented through Appellate Rule 7(B), which provides that the "Court

[4] Pinto is apparently an immigrant and not yet a U.S. citizen. Pinto's suggestion on appeal that the trial court should have considered his immigrant status as a mitigating circumstance fails because he never proffered such as a mitigating circumstance to the trial court.

may revise a sentence authorized by statute if, after due consideration of the trial court's decision, the Court finds that the sentence is inappropriate in light of the nature of the offense and the character of the offender." Anglemyer, 868 N.E.2d at 491. "It is on this basis alone that a criminal defendant may now challenge his or her sentence where the trial court has entered a sentencing statement that includes a reasonably detailed recitation of its reasons for imposing a particular sentence that is supported by the record, and the reasons are not improper as a matter of law, but has imposed a sentence with which the defendant takes issue." Id. Although we have the power to review and revise sentences, "[t]he principal role of appellate review should be to attempt to leaven the outliers, and identify some guiding principles for trial courts and those charged with improvement of the sentencing statutes, but not to achieve a perceived 'correct' result in each case." Cardwell v. State, 895 N.E.2d 1219, 1225 (Ind. 2008). On appeal, it is the defendant's burden to persuade us that the sentence imposed by the trial court is inappropriate. Anglemyer, 868 N.E.2d at 494.

Considering the nature of Pinto's offenses, we note that Pinto was driving while intoxicated with his wife and children in the car. Although Pinto's act of fleeing does not appear to have been particularly egregious, he threw a beer bottle out of his car as he fled in an apparent attempt to hide evidence of his intoxication. Pinto's sentence is also justified by the character of the offender. Pinto pleaded guilty to Class C misdemeanor OWI in 2002. In 2004, he again pleaded guilty to Class D felony OWI. Six months later, he pleaded guilty to Class C misdemeanor domestic battery. In 2008, Pinto pleaded guilty to Class C misdemeanor domestic battery and Class A misdemeanor interference

with the reporting of a crime. Pinto was given the grace of probation in his prior convictions. It is apparent that, despite the lenience shown to him in the past, Pinto has not yet learned to lead a law-abiding life. Considering the nature of the offense and the character of the offender, and giving due consideration to the trial court's sentencing decision, we are unable to conclude that Pinto has met his burden of establishing that his sentence is inappropriate.

Conclusion

The State presented evidence sufficient to establish that Pinto committed the crime of resisting law enforcement. The State also presented evidence sufficient to establish that Pinto was indeed intoxicated when he operated his vehicle. The trial court did not abuse its discretion in sentencing Pinto, and the sentence imposed by the trial court is not inappropriate in light of the nature of the offense and the character of the offender.

Affirmed.

RILEY, J., and BRADFORD, J., concur.