IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT JACKSON
April 4, 2023 Session

STATE OF TENNESSEE v. OVITTA VAUGHN

Appeal from the Criminal Court for Shelby County
No. C1900420 James M. Lammey, Judge

No. W2022-00364-CCA-R3-CD

A Shelby County jury convicted the defendant, Ovitta Vaughn, of driving with a blood alcohol concentration of .08 percent or more (DUI per se) and driving under the influence of an intoxicant (DUI) for which she received a sentence of 11 months and 29 days, suspended to supervised probation after serving 10 days in confinement. On appeal, the defendant contends the evidence presented at trial was insufficient to support her convictions. The defendant also argues the trial court erred in failing to allow the introduction of Deputy Goodman's prior adjudication for untruthfulness, in failing to issue a curative instruction following the prosecution's inappropriate closing argument, in failing to allow the inclusion of a special jury instruction on the operability of the defendant's vehicle, and in failing to require the State to make an election as to whether the defendant was driving her vehicle or merely had physical control. After reviewing the record and considering the applicable law, we affirm the judgments of the trial court. However, we remand the case for a corrected judgment form in count two.

Tenn. R. App. P. 3 Appeal as of Right; Judgments of the Criminal Court Affirmed and Remanded for Entry of Corrected Judgment

J. ROSS DYER, J., delivered the opinion of the court, in which ROBERT L. HOLLOWAY, JR., and JILL BARTEE AYERS, JJ., joined.

W. Price Rudolph (on appeal), and Jason Ballenger and Lauren Fuchs (at trial), Memphis, Tennessee, for the appellant, Ovitta Vaughn.

Jonathan Skrmetti, Attorney General and Reporter; Katharine K. Decker, Senior Assistant Attorney General; Amy P. Weirich, District Attorney General; and Vanessa Murtaugh, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

Facts and Procedural History

On July 29, 2017, Todd Goodwin, an emergency services volunteer with the Shelby County Sheriff's Department (SCSD), was driving on Macon Road near Highway 269 when he and his partner came upon an individual who was "passed out . . . in the middle of the road." As they were attending to the individual, a motorist stopped them and stated that there was another vehicle stalled in the road, and a woman was standing next to it.

Mr. Goodwin and his partner drove to the vehicle and observed the defendant attempting to direct traffic around her car. When Mr. Goodwin asked the defendant what happened, she stated that she was on her way home from a friend's house when her car "just stopped." The defendant was "stumbling around and her speech was slurred," so Mr. Goodwin asked if she had been drinking alcohol that evening. The defendant admitted to drinking, and Mr. Goodwin requested the assistance of a DUI officer.

Because the defendant's vehicle was in the middle of the road, Mr. Goodwin and his partner attempted to push it into a nearby driveway but were unable to move it completely out of the road. At one point, the defendant got into her vehicle and put the key in the ignition in an attempt to show Mr. Goodwin that it would not start. Mr. Goodwin denied acting aggressively toward the defendant or pressing his arm against the defendant's chest. Mr. Goodwin did not recall the defendant mentioning anyone named Joey or Joann.

Deputy Jeffrey Crook, a K-9 officer with the SCSD, responded to a stranded motorist call and observed the defendant sitting in the driver's seat of her vehicle, attempting to turn the key in the ignition. Deputy Crook asked the defendant what was wrong with the vehicle, and the defendant stated that "she ran out of gas." The defendant became irritated at Deputy Crook's questions and asked him why he would not help her "get the vehicle going so she could go on her way." However, at that point, Deputy Crook could smell alcohol on the defendant and was not going to allow her to leave the scene "under her own power."

The defendant told Deputy Crook that she was driving home that night and did not mention anyone else driving the vehicle or anyone named Joey or Joann. Deputy Crook denied yelling at the defendant or putting his arm against her chest while she was in the car. However, after the defendant exited her vehicle, Deputy Crook reached into it to check the gas gauge and noticed there was a quarter of a tank left. During the defendant's field sobriety tests, Deputy Crook was present but did not assist. Additionally, Deputy Crook's K-9 stayed in the back of his vehicle during the entire encounter with the defendant.

Deputy Ashley Goodman with the SCSD was working in the DUI division in July 2017 and responded to a possible DUI call on Macon Rd at 12:57 a.m. When she arrived

on the scene, Deputy Crook advised her that the defendant "was possibly under the influence." Deputy Goodman asked the defendant where she was going and if she had had anything to drink. The defendant responded that she had been in Warsaw at a fish dinner where she had some beers but that she had run out of gas on her way home. The defendant did not tell Deputy Goodman that anyone else had driven the vehicle or mention anyone named Joey or Joann. However, she told Deputy Goodman that Geico could pick the vehicle up.

Deputy Goodman then placed the defendant in the back of her police vehicle and transported her to a parking lot a short distance away because the road they were initially on was dark and unsafe. At the parking lot, Deputy Goodman asked the defendant if she had any injuries or other issues that could affect her balance or ability to walk in a straight line, and the defendant indicated that she had a back surgery eight years ago. Deputy Goodman then had the defendant perform three field sobriety tests: the horizontal gaze/nystagmus, the walk and turn, and the one-leg stand. The defendant did not follow directions on the walk and turn test and was unable to stay on the line. She was also unable to complete the one-leg stand test. The State played a video recording of the defendant's field sobriety tests for the jury.

Following the field sobriety tests, the defendant was taken to Jail East by Deputy Goodman. Once there, Deputy Goodman witnessed a phlebotomist draw the defendant's blood, and Deputy Goodman took the sample in a sealed and labeled vial to the sheriff's office substation where it was subsequently sent to the Tennessee Bureau of Investigation (TBI) for analysis.

Allison Clay, formerly a Special Agent with the TBI and an expert in forensic toxicology, analyzed the defendant's blood sample and found that it had a blood alcohol level of .153 percent, which is nearly twice the legal limit of .08 percent.

The defendant testified on her own behalf, asserting that she visited her nephew's garage that evening so he could work on her brakes and rotors. While there, her nephew, Joey Burton, offered her a beer. Because Mr. Burton was driving her home, the defendant "drank it and drank another one and just enjoyed [herself]" while he worked on her car. After Mr. Burton was finished, he began driving the defendant home. However, at some point the car began "cutting out, stalling out." Mr. Burton pulled onto Macon Road, and the car "just quit." The defendant told Mr. Burton to go to her house, which was approximately ten miles away, and get her other car while she called roadside assistance. The defendant flagged down a passing car, and Joann Cook stopped. The defendant asked Ms. Cook, who she did not previously know, to take Mr. Burton to the defendant's house. Ms. Cook "begged [the defendant] to get in with them," but the defendant did not want to leave her vehicle unattended in the road because it was a danger to others. After Ms. Cook

and Mr. Burton left, the defendant called her insurance company's roadside assistance service.

When Mr. Goodwin arrived on the scene, he identified himself as Deputy Crook, and the defendant believed he was an armed sheriff's deputy. The defendant was sitting in her vehicle speaking with roadside assistance, and Mr. Goodwin "ran at [her] with a big flashlight, shined it in [her] face, hollering, put down the phone and get in the car." The defendant was terrified and "told him to get his a** off of her." Deputy Goodman arrived approximately twenty minutes after Mr. Goodwin, but according to the defendant, she was "bullish and rude" to the defendant so the defendant "closed up on her."

Regarding the field sobriety tests, the defendant testified Deputy Goodman did not ask her if she was physically able to perform the tests or if she had any issues with balance, but the defendant offered information about her back surgery. However, Deputy Goodman did not ask any follow-up questions about the long-term effects of the surgery, and the defendant testified the surgery affected her ability to balance properly. The defendant also stated that Deputy Goodman failed to ask her about any visual impairments but that the defendant "offered that information as well." Although the defendant attempted to perform the field sobriety tests, Deputy Goodman spun the defendant "like a top" before the tests began. Following the tests, Deputy Goodman walked the defendant to the police vehicle and handcuffed her. Deputy Crook's K-9 was "right in front of [her]," and the defendant said, "What are you gone do now, sic[] your dog on me?" Deputy Goodman then shoved the defendant into her police vehicle and transported her to Jail East.

The defendant testified that the "real Deputy Crook" never came to the initial scene and did not arrive until Deputy Goodman transported the defendant to the parking lot where she administered the field sobriety tests. The defendant stated that she never spoke with Deputy Crook, only Mr. Goodwin, who called himself Deputy Crook.

While the defendant was in the parking lot with Deputy Goodman, she asked Deputy Goodman about her car and was told that they were "getting it out of the way." A short time later, the defendant saw her car being taken away on a wrecker. When she went to the tow lot to retrieve her vehicle the next day, "[t]he secretary there stated [she] need[ed] to bring gas because the car [was] out of gas." The defendant brought gas with her and stated that she could not have operated the vehicle if she had not.

The defendant denied ever telling anyone on the scene that she had driven her vehicle that night. She testified that Mr. Burton suffered a stroke in 2019 and is in bad health and that Ms. Cook passed away the week before the trial. The defendant also testified about numerous medical conditions from which she suffered or had previously suffered, including diabetes, "scram cell" carcinoma of the mouth, and breast cancer.

Additionally, the defendant entered into evidence photographs of bruises on her wrists that she testified were from the handcuffs used during her arrest.

On cross-examination, the defendant agreed she made a mistake when she testified that Deputy Goodman handcuffed her after the field sobriety tests. She stated that Mr. Goodwin "is a liar," Deputy Crook's testimony that he spoke with the defendant "wasn't correct," and Deputy Goodman's testimony "that she saw [the defendant] behind the wheel with the keys . . . was a lie." The defendant denied that Mr. Goodwin and his partner tried to move her vehicle out of the road, stating that the wrecker had to "wrench[] it" onto their vehicle. She accused the wrecker of "mess[ing] up [her] rack and pinion steering cause he hooked onto that." However, when asked how she was able to drive the vehicle off of the tow lot if the rack and pinion steering were damaged, the defendant stated the wrecker "just broke the seal on the rack – steering wheel." The defendant also agreed that, during the field sobriety tests, Deputy Goodman asked the defendant whether the glasses around her neck were for reading, and the defendant stated that they were.

Following deliberations, the jury found the defendant guilty of DUI per se and DUI, and the trial court imposed a sentence of 11 months and 29 days, suspended to supervised probation after serving 10 days in confinement for each count and then merged the counts. The defendant filed a motion for new trial which the trial court denied. This timely appeal followed.

Analysis

On appeal, the defendant argues the evidence presented at trial was insufficient to support her convictions. The defendant also argues the trial court erred in failing to allow the introduction of Deputy Goodman's prior adjudication for untruthfulness, in failing to issue a curative instruction following the prosecution's inappropriate closing argument, in failing to allow the inclusion of a special jury instruction on the operability of the defendant's vehicle, and in failing to require the State to make an election as to whether the defendant was driving her vehicle or merely had physical control. The State contends the evidence was sufficient to support the defendant's convictions; the trial court properly disallowed Deputy Goodman's prior adjudication, denied the defendant's request for a curative instruction, and denied the defendant's request for a special jury instruction; and the State was not required to make an election.

I. Sufficiency

The defendant argues the evidence at trial is insufficient to support her convictions for DUI per se and DUI. The defendant does not challenge the sufficiency of the evidence with regard to whether she had a blood alcohol concentration of .153 or was under the

influence of an intoxicant on the night that she was arrested. Rather, relying on *State v. Lawrence*, 849 S.W.2d 761 (Tenn. 1993), and *State v. Butler*, 108 S.W.3d 845 (Tenn. 2003), the defendant argues that the State failed to prove she was driving or in physical control of the vehicle. Specifically, the defendant contends that no one witnessed her driving the vehicle and "no rational trier of fact would find the vehicle operational." The State submits the evidence was sufficient to support the defendant's convictions for DUI per se and DUI.

When the sufficiency of the evidence is challenged, the relevant question of the reviewing court is "whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319 (1979); *see also* Tenn. R. App. P. 13(e) ("Findings of guilt in criminal actions whether by the trial court or jury shall be set aside if the evidence is insufficient to support the findings by the trier of fact of guilt beyond a reasonable doubt."); *State v. Evans*, 838 S.W.2d 185, 190-92 (Tenn. 1992); *State v. Anderson*, 835 S.W.2d 600, 604 (Tenn. Crim. App. 1992). All questions involving the credibility of witnesses, the weight and value to be given the evidence, and all factual issues are resolved by the trier of fact. *State v. Pappas*, 754 S.W.2d 620, 623 (Tenn. Crim. App. 1987). "A guilty verdict by the jury, approved by the trial judge, accredits the testimony of the witnesses for the State and resolves all conflicts in favor of the theory of the State." *State v. Grace*, 493 S.W.2d 474, 476 (Tenn. 1973). Our Supreme Court has stated the following rationale for this rule:

> This well-settled rule rests on a sound foundation. The trial judge and the jury see the witnesses face to face, hear their testimony and observe their demeanor on the stand. Thus, the trial judge and jury are the primary instrumentality of justice to determine the weight and credibility to be given to the testimony of witnesses. In the trial forum alone is there human atmosphere, and the totality of the evidence cannot be reproduced with a written record in this Court.

Bolin v. State, 405 S.W.2d 768, 771 (Tenn. 1966) (citing *Carroll v. State*, 370 S.W.2d 523 (Tenn. 1963)). "A jury conviction removes the presumption of innocence with which a defendant is initially cloaked and replaces it with one of guilt, so that on appeal a convicted defendant has the burden of demonstrating that the evidence is insufficient." *State v. Tuggle*, 639 S.W.2d 913, 914 (Tenn. 1982).

Tennessee Code Annotated section 55-10-401(a)(1)-(2) defines the offense of driving under the influence as follows:

> (a) It is unlawful for any person to drive or to be in physical control of any automobile or other motor driven vehicle on any of the public roads and highways of the state, or on any streets or alleys, or while on the premises of any shopping center, trailer park, or apartment house complex, or any other premises that is generally frequented by the public at large, while:
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> (1) Under the influence of any intoxicant, marijuana, controlled substance analogue, drug, substance affecting the central nervous system, or combination thereof that impairs the driver's ability to safely operate a motor vehicle by depriving the driver of the clearness of mind and control of oneself that the driver would otherwise possess;
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> (2) The alcohol concentration in the person's blood or breath is eight-hundredths of one percent (0.08%) or more[.]

The Tennessee Supreme Court declared that "in order for a violation of T.C.A. § 55-10-401(a) to occur, the vehicle's engine need not be running, and the vehicle need not be actually moving at the time. Convictions have been sustained even though no one saw the vehicle in motion or the accused driving. This is so because '[l]ike any other crime, driving under the influence of an intoxicant can be established by circumstantial evidence.'" *Lawrence*, 849 S.W.2d at 763-64 (citations and footnote omitted). In *Lawrence*, our supreme court also established a totality of the circumstances test that considers the presence or absence of several factors to determine whether a person is in physical control of a vehicle for the purposes of the DUI statute. Those factors include: (1) the location of the defendant in relation to the vehicle; (2) the whereabouts of the ignition key; (3) whether the motor was running; (4) the defendant's ability, but for her intoxication, to direct the use of the vehicle; and (5) the extent to which the vehicle is capable of being operated or moved under its own power or otherwise. *Id.* at 765. Our supreme court later expounded on the fifth factor and adopted the "reasonably capable of being rendered operable" standard where "the proper focus was not narrowly on the 'mechanical condition of the vehicle when it comes to rest, but upon the status of its occupant and the nature of the authority he or she exerted over the vehicle in arriving at the place from which, by virtue of its inoperability, it can no longer move.'" *Butler*, 108 S.W.3d at 852 (quoting *State v. Smelter*, 674 P.2d 690, 693 (Wash. App. 1984)). Therefore, "where 'circumstantial evidence permits a legitimate inference that the vehicle was where it was and was performing as it was because of the defendant's choice, it follows that the defendant was in' physical control of the vehicle." *Id.* (quoting *Smelter*, 674 P.2d at 693).

The evidence presented at trial established that Mr. Goodwin observed the defendant standing next to the vehicle directing traffic. The defendant stated that she was on her way home from a friend's house when her car "just stopped." Because the defendant

was "stumbling around and her speech was slurred," Mr. Goodwin requested assistance from a DUI officer. While they waited, the defendant got into her vehicle and attempted to start it but was unable to do so. When he arrived, Deputy Crook observed the defendant sitting in the vehicle. The defendant stated that she was on her way home and had run out of gas, and Deputy Crook could smell alcohol on her. Additionally, the defendant told Deputy Goodman that she was at a fish fry in Warsaw where she had a few beers.

Looking specifically to the *Lawrence* factors, the record establishes the vehicle was located in the middle of Macon Road, a public road. The location is particularly important because it gives rise to the inference that the vehicle had been driven immediately prior to the arrival of officers on the scene. The defendant was clearly exercising some authority over the vehicle as she remained at the scene and directed passing vehicles around it. No one else was around vehicle, the defendant did not deny driving the vehicle to the officers or mention anyone else to them, and no one appeared while the officers were present. The defendant had the physical ability to direct the use or non-use of the vehicle. Moreover, Mr. Goodwin and Deputy Crook testified the defendant placed the keys in the ignition and attempted to start the car. Though the defendant testified Mr. Burton was driving the vehicle before it broke down, the jury, as the trier of fact, is entrusted with determining the weight of the evidence and evaluating the credibility of witnesses, and, based on the verdict, the jury reconciled the conflicting proof in favor of the State. Tenn. Code Ann. § 39-11-115; *State v. Campbell*, 245 S.W.3d 331, 335 (Tenn. 2008); *State v. Dorantes*, 331 S.W.3d 370, 379 (Tenn. 2011). This Court will not reweigh the evidence. *Dorantes*, 331 S.W.3d at 379. Therefore, we conclude the circumstantial evidence is sufficient to show the defendant had been driving or was in physical control of the vehicle, and the defendant is not entitled to relief on this issue.

II. Rule 608 Ruling

The defendant asserts the trial court erred in prohibiting her from cross-examining Deputy Goodman about a prior adjudication for untruthfulness. The defendant argues the evidence was admissible pursuant to Tennessee Rule of Evidence 608(b). The State contends the trial court properly limited the cross-examination.

Tennessee Rule of Evidence 608 permits a party to cross-examine a witness with specific instances of conduct if probative of truthfulness or untruthfulness. Tenn. R. Evid. 608(b). Before allowing such examination, the trial court upon request must hold a hearing outside the jury's presence and determine that the alleged conduct has probative value and a reasonable factual basis exists for the inquiry. *Id.* 608(b)(1). If the conduct occurred more than ten years before commencement of the prosecution, it is admissible if the party is given sufficient advance notice of intent to use such evidence and the court "determines in the interests of justice that the probative value of that evidence, supported by specific

facts and circumstances, substantially outweighs its prejudicial effect[.]" *Id.* 608(b)(2). This Court reviews a trial court's ruling under Rule 608(b) using an abuse of discretion standard. *State v. Reid*, 91 S.W.3d 247, 303 (Tenn. 2002).

The defendant filed a pretrial motion for continuance due to the late disclosure of evidence pursuant to *Brady v. Maryland*.[1] The defendant argued the State had recently disclosed a previous disciplinary action against Deputy Goodman for untruthfulness but had not released her personnel file. The defendant subsequently filed an amended motion for continuance, and in support of the motion, the defendant offered a 2007 SCSD case file, which showed that Deputy Goodman was suspended for 30 days without pay for violating "Shelby County Sheriff's Office Standards of Conduct: SOR 108 Truthfulness." According to the information in the case file, Deputy Goodman was not truthful in her statement to an investigator during a federal investigation of her boyfriend, a fellow sheriff's deputy.

At the pre-trial motion hearing, the trial court found

> you know, looking at the rule, it says it had to be within ten years, but you can make exceptations (sic) for certain cases[.]
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> . . .
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> And this is not a crime. She wasn't charged with a crime. This is – this is under 608, evidence of character and conduct of witness and it's pretty specific. And if it goes into – and then assuming that I find there was proof that she did lie, I suppose, it would have to be this – let me read the rule here. If such evidence the [c]ourt determines in the interest of justice if the probative value of that evidence supported by specific facts and circumstances . . . substantially outweighs this prejudicial effect. I don't think it substantially outweighs prejudicial effect. Assuming she just out and out lied to them, I suppose, but that's not it and she wasn't charged with perjury. This is an Internal Affairs thing. It has nothing to do with DUI. You know, it doesn't show that she's a dishonest person because some guy named David R. King thinks she wasn't being truthful what the investigator back dealing with a guy named Thomas Braswell, whether or not he stole a Rolex watch – and some sort of illegal steroid use in her presence.
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> . . .

[1] *Brady v. Maryland*, 373 U.S. 83, 87 (1963).

> It's not perjury and it's way past ten years and I think that it would substantially – it is substantially outweighed by the prejudicial effect.

At trial, prior to Deputy Goodman's testimony, the defendant requested the opportunity to question Deputy Goodman outside the presence of the jury in order to place an offer of proof on the record. Deputy Goodman testified that she was dating a fellow sheriff's deputy named Thomas Braswell in 2006 and that he later came under federal investigation. She was interviewed by Charles Eldridge in 2007 as part of Deputy. Braswell's investigation and told Mr. Eldridge that she watched Deputy Braswell take steroids. However, she later told another investigator that it was actually cattle growth hormone and not steroids because she was "taking Braswell's word for it." She testified that she told Mr. Eldridge that Deputy Braswell received a Rolex watch from a jailer because that is what Deputy Braswell told her; however, she later told another investigator that she was not sure if Deputy Braswell received the watch from the jailer. On cross-examination, Deputy Goodman testified that her statements to the investigators were not under oath and were taken at a Taco Bell. She also stated that she was not represented by an attorney at the internal affairs hearing and was not placed under oath during questioning at the hearing. On redirect examination, she agreed that she was represented by her union representative at the internal affairs hearing. Following Deputy Goodman's testimony, the trial court upheld its prior ruling, noting, "I think it would it would be unconscionable to ask her about it to be honest."

We conclude the trial court did not abuse its discretion by prohibiting the defendant from questioning Deputy Goodman about her prior thirty-day suspension. Following both the pre-trial and jury out hearings, the trial court found that the probative value of the evidence did not substantially outweigh its prejudicial effect. The trial court noted the twelve-year gap between the report finding Deputy Goodman to be untruthful and the commencement of the prosecution in the present case. The trial court also found no evidence that Deputy Goodman had been under oath during her statements and stated that she would have been fired or given a more severe punishment if the matter had been serious. Finally, the trial court noted that the subject matter, an investigation into Deputy Goodman's boyfriend, had no bearing on her ability to perform or testify as a DUI officer and found that it would be "unconscionable" to allow her reputation to be destroyed by allowing the testimony.

While probative of truthfulness or untruthfulness, Deputy Goodman's suspension occurred over ten years prior to the commencement of the prosecution and has little relevance to the issue being tried, *i.e.*, the defendant's driving while under the influence. Accordingly, the trial court did not abuse its discretion in excluding evidence of Deputy Goodman's prior adjudication for untruthfulness. The defendant is not entitled to relief on this issue.

III. Failure to Issue Curative Instruction

The defendant argues the trial court erred in failing to issue a curative instruction when the State argued that Joann Cook "may not be a real person." The defendant submits the prosecutor's statement "constitute[d] an inference that the prosecutor [knew] to be false" and was highly prejudicial. The State contends the trial court properly denied the defendant's request for a curative instruction.

Closing arguments are an important tool during trial, so attorneys are given a wide-range of autonomy when making them, and the trial court has a wide-range of discretion when controlling them. *See State v. Carruthers*, 35 S.W.3d 516, 577-78 (Tenn. 2000) (appendix). "Notwithstanding such, arguments must be temperate, based upon the evidence introduced at trial, relevant to the issues being tried, and not otherwise improper under the facts or law." *State v. Goltz*, 111 S.W.3d 1, 5 (Tenn. Crim. App. 2003). It is possible for five general areas of prosecutorial misconduct to occur during closing arguments:

> (1) intentionally misleading or misstating the evidence; (2) expressing a personal belief or opinion as to the truth or falsity of the evidence or defendant's guilt; (3) making statements calculated to inflame the passions or prejudices of the jury; (4) injecting broader issues than the guilt or innocence of the accused; and (5) intentionally referring to or arguing facts outside the record that are not matters of common public knowledge.

Id. "In determining whether statements made in closing argument constitute reversible error, it is necessary to determine whether the statements were improper and, if so, whether the impropriety affected the verdict." *State v. Pulliam*, 950 S.W.2d 360, 367 (Tenn. Crim. App. 1996). In assessing whether comments made by the prosecution are so inflammatory or improper as to affect the verdict, the court must consider five factors:

> (1) The conduct complained of viewed in the context and the light of the facts and circumstances of the case;
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> (2) The curative measures undertaken by the court and the prosecution;
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> (3) The intent of the prosecutor in making the improper statements;
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> (4) The cumulative effect of the improper alleged conduct and any other errors in the record; and

(5) The relative strength or weakness of the case.

Judge v. State, 539 S.W.2d 340, 344 (Tenn. Crim. App. 1976); see also *Goltz*, 111 S.W.3d at 5-6.

During closing argument, the following exchange occurred:

> [PROSECUTOR]: And I would ask for you to take that proof, the proof that the State gave you from the stand, whether it was through a toxicologist or through a deputy or through a video, and use your life skills of common sense and find that [the defendant] was driving that car. There was no Joey. There was no Joann.
>
> I mean, is there a Joann, maybe, right? Is there a Joey, maybe? But were they there that night? I don't think so, right. She never once said hey – they many, many times we saw on video, many, many, many, many times we saw on video where she said, what's gone happen to my car? What gone happen to my car? Any one of those times she could have said, are you gonna wait for Joey? Is somebody gone call Joey, right? Here's Joey's phone number, right. She was calling Geico. Let me call Joey and let him know what happened. No.
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> . . .
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> [DEFENSE COUNSEL]: Your Honor, may we approach briefly?
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> TRIAL COURT: Yes.
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> [DEFENSE COUNSEL]: I think that [the prosecutor] telling the jury that Joann Cook does not exist is not an accurate depiction of what she knows to be true given that she had seen Ms. Cook in this building for the past two years.
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> TRIAL COURT: You're going to argue.
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> [PROSECUTOR]: I did say that, did they exist yeah, they did.
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> [DEFENSE COUNSEL]: No, she did not.
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> [PROSECUTOR]: I followed up with at the statement that yes, perhaps they do, but they weren't there that night.

[DEFENSE COUNSEL]: That was misleading to the jury and I'd ask for a curative instruction about that.

TRIAL COURT: That's within the proof.

[DEFENSE COUNSEL]: That Joann Cook did not exist was not within the proof.

TRIAL COURT: She said that maybe she does exist. She said, but she wasn't there.

[DEFENSE COUNSEL]: But she knows that she exist[s].

TRIAL COURT: Her argument was that she really wasn't there.

[PROSECUTOR]: I followed with it saying that yes, perhaps she does exist, but she wasn't there.

TRIAL COURT: Listen, you can argue. I'm not gonna tell them – comment on the evidence. I'm not gonna comment on the evidence. The State's position is that they weren't there. Your position was that she was there. So, you can argue that, but I'm not gonna –

During rebuttal closing argument, the prosecutor clarified

> the car, the 2003 Grand Marquis, Mercury Grand Marquis, I believe is what it was, did not fall out of the sky and land in the middle of Macon Road. [The defendant] drove it there, right. Joey was not there that night. Ms. Joann Cook was not there that night. Only [the defendant]. Only [the defendant]. Nobody else. Just her.

At trial, the defendant testified that her nephew, Joey Burton, was driving her vehicle until it broke down and that Joann Cook, a complete stranger, was driving by, picked Mr. Burton up, and took him to the defendant's house to retrieve another vehicle. The defendant testified that she did not tell any of the of the deputies or first responders that she had driven the vehicle that evening and called their testimony to the contrary "lie[s]." When viewed in the context of closing argument, the prosecutor's remarks that Mr. Burton and Ms. Cook were not present at the scene were made in response to the defendant's insinuation that the deputies and Mr. Goodman were fabricating what happened that evening and lying during their trial testimony. Moreover, the jury was

instructed that closing arguments are not evidence, and they are presumed to have followed the court's instructions in this regard. *State v. Cannon*, 642 S.W.3d 401, 444 (Tenn. Crim. App. 2021) (citing *State v. Jordan*, 325 S.W.3d 1, 55 n.12 (Tenn. 2010)). The defendant is not entitled to relief on this issue.

IV. Special Jury Instruction

The defendant argues the trial court erred in denying her request for a special jury instruction on the operability of her vehicle. The defendant argues the requested instruction would have clarified the "physical control" instruction given by the trial court. The State contends the trial court properly denied the defendant's request. The requested instruction was as follows:

> Operability of Motor Vehicle
>
> The State must prove beyond a reasonable doubt that the vehicle, from a mechanical standpoint, could be started and driven under its own power while in the physical control of this defendant.

The trial court declined to provide the jury with the defendant's requested jury instruction and instead charged the jury with the pattern jury instruction for "physical control." The trial court instructed the jury that:

> In deciding whether or not the defendant was in physical control of an automobile or motor driven vehicle, you may take into account all of the circumstances proven in the trial, including the location of the defendant in relation to the vehicle, the whereabouts of the ignition key, whether the motor was running, the defendant's ability, but for her intoxication, to direct the use or non-use of the vehicle, or the extent to which the vehicle itself is capable of being operated or moved under its own power or otherwise. The same considerations may be used by you as circumstantial evidence that the defendant had or had not been driving the vehicle. Before you can convict the defendant, the State must prove the defendant was in physical control of an automobile or motor driven vehicle beyond a reasonable doubt. Whether or not the circumstances shown in the trial prove that the defendant drove or was in physical control of an automobile or motor driven vehicle are matters for your determination.

T.P.I. Crim. § 38.06. The trial court omitted a bracketed portion of the instruction which stated, "You have heard proof that the vehicle allegedly controlled by the defendant was incapable of being operated. In making your decision as to whether the defendant was in

physical control, you may also consider whether or not the vehicle was reasonably capable of being rendered operable by the defendant." *Id.*

"It is well-settled in Tennessee that a defendant has a right to a correct and complete charge of the law so that each issue of fact raised by the evidence will be submitted to the jury on proper instructions." *State v. Farner*, 66 S.W.3d 188, 204 (Tenn. 2001) (citing *State v. Garrison*, 40 S.W.3d 426, 432 (Tenn. 2000); *State v. Teel*, 793 S.W.2d 236, 249 (Tenn. 1990)). Whether jury instructions are sufficient is a question of law, which we review de novo with no presumption of correctness. *State v. Clark*, S.W.3d 268, 295 (Tenn. 2014). "It is not error to refuse a special request where the charge as given fully and fairly states the applicable law." *Edwards v. State*, 540 S.W.2d 641, 649 (Tenn. 1976).

Our review of the jury charge in its entirety reveals that the trial court correctly and completely instructed the jury on the law as it applied to the facts of the case, which included the pattern instruction on driving under the influence and physical control. Additionally, the defendant's requested instruction is a misstatement of the law. *See Butler*, 108 S.W.3d at 852 (adopting "the reasonably capable of being rendered operable standard in cases where a defendant contests the element of physical control based upon alleged inoperability of the vehicle). Accordingly, the trial court did not err by declining to give the defendant's proposed jury instruction, and the defendant is not entitled to relief on this issue.

V. Election of Offenses

The defendant argues the trial court erred in failing to require the State to make an election as to whether the defendant was driving the vehicle or merely had physical control. The State contends that, because DUI is a continuing offense, an election was not required.

In Tennessee, a defendant is entitled to a unanimous jury verdict. *State v. Brown*, 992 S.W.2d 389, 391 (Tenn. 1999) (citing *State v. Shelton*, 851 S.W.2d 134, 137 (Tenn. 1993); *Tidwell v. State*, 922 S.W.2d 497, 501 (Tenn. 1996)). Requiring an election "safeguards the defendant's state constitutional right to a unanimous jury verdict by ensuring that jurors deliberate and render a verdict based on the same evidence." *State v. Johnson*, 53 S.W.3d 628, 631 (Tenn. 2001) (citing *Brown*, 992 S.W.2d at 391). However, when the evidence does not establish that multiple offenses have been committed, the need to make an election never arises. *State v. Adams*, 24 S.W.3d 289, 294 (Tenn. 2000) (discussing that no election is required for continuing offenses).

This Court has repeatedly held that DUI is a continuing offense, and therefore, the State was not required to make an election as to whether the defendant was driving the vehicle or merely had physical control. *See State v. Joseph Scott Morrell*, No. E2013-

02431-CCA-R3-CD, 2014 WL 4980400, at *8 (Tenn. Crim. App. July 22, 2014), *perm. app. denied* (Tenn. Oct. 7, 2014); *State v. Corder*, 854 S.W.2d 653, 654 (Tenn. Crim. App. 1992); *State v. Rhodes*, 917 S.W.2d, 708, 713 (Tenn. Crim. App. 1995); *State v. Ford*, 725 S.W.2d 689, 690 (Tenn. Crim. App. 1987). The defendant is not entitled to relief on this issue.

Finally, we note one issue concerning the judgments in this case. We previously remanded the case to the trial court to supplement the record with the judgment forms for the defendant's convictions. However, on the judgment form in count two the trial court marked both "pled guilty" and "guilty by jury verdict." Therefore, we remand the case to the trial court for entry of a corrected judgment in count two reflecting the defendant's conviction by jury verdict.

Conclusion

Based on the foregoing authorities and reasoning, we affirm the judgments of the trial court. However, we remand this case for entry of a corrected judgment as specified in this opinion.

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J. ROSS DYER, JUDGE