

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT JACKSON

Assigned on Briefs August 4, 2026

FILED

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Clerk of the
Appellate Courts

STATE OF TENNESSEE v. CINDY SMITH

Appeal from the Criminal Court for Shelby County
No. 21-02578 Jennifer Fitzgerald, Judge

No. W2025-01497-CCA-R3-CD

The defendant, Cindy Smith, appeals her Shelby County Criminal Court jury convictions of driving under the influence (DUI); DUI with a blood alcohol concentration (BAC) greater than .08%; DUI with a BAC greater than .20%; and DUI, third offense, arguing that the trial court erred by refusing to order redaction of her repeated use of racial slurs from the video recording of her arrest. She asserts that the admission of this evidence violated Tennessee Rule of Evidence 403 and deprived her of the constitutional right to a fair trial. We conclude that the trial court did not err by refusing to redact the recording and that the Defendant has waived her constitutional challenge. Accordingly, we affirm.

Tenn. R. App. P. 3 Appeal as of Right; Judgments of the Criminal Court Affirmed

STACY L. STREET, J., delivered the opinion of the court, in which JOHN W. CAMPBELL, SR., and STEVEN W. SWORD, JJ., joined.

Rosalind Elizabeth Brown (on appeal), and Claiborne H. Ferguson and Megan Ostner (at trial), Memphis, Tennessee, for the appellant, Cindy Smith.

Jonathan Skrmetti, Attorney General and Reporter; Julia A. Johnson, Assistant Attorney General; Steven J. Mulroy, District Attorney General; and Kindle Nance and Shannon Mason, Assistant District Attorneys General, for the appellee, State of Tennessee.

OPINION

This appeal arises from the Defendant's November 17, 2020 arrest outside a Walmart in Bartlett where she was causing a disturbance.

Factual and Procedural Background

On October 5, 2021, the Shelby County Grand Jury charged the Defendant with four DUI counts: DUI; DUI with a blood alcohol concentration (BAC) greater than .08%; DUI with a BAC greater than .20%; and DUI, third offense.

Prior to trial, the Defendant moved the trial court pursuant to Tennessee Rule of Evidence 403 to exclude from evidence “any and all statements” she made to the police that included “a very derogatory word.” She stated that the video recording of her arrest included her using racial slurs to refer to police officers and argued that the probative value of this evidence was outweighed by the danger of unfair prejudice. The Defendant acknowledged that the video recording was relevant and admissible but asked “that the language in question be removed or muted.” The trial court denied the request.

I. Trial

The evidence adduced at trial established that between 7:00 and 7:45 a.m. on November 17, 2020, a co-worker alerted Walmart Neighborhood Market employee Bobbie Jo Robertson to a woman parked in the front of the store “cussing,” “complaining,” and “carrying on.” When she went outside to investigate, Ms. Robertson saw the Defendant in a white SUV parked in the middle of the crosswalk directly in front of the store. The Defendant was “belligerent” and “cussing” loudly that another employee had “messed up” her order. Despite the nature of her complaints, the Defendant “had no order, she had no merchandise, no bag, no anything with her that day.” Ms. Robertson attempted to speak to the Defendant, but the Defendant “didn’t make sense.” When Ms. Robertson approached the Defendant’s vehicle, she “could smell alcohol on her,” so she directed her co-worker to call the Bartlett Police Department (BPD). Because the Defendant “didn’t have the car in park,” the car would move forward “every time she went to talk and moved.” A regular customer “helped get the car in park” while Ms. Robertson attempted to “find out what was going on” and made small talk to stall the Defendant while waiting for the police. Ms. Robertson said that she did not want the Defendant to drive away because she was obviously intoxicated.

BPD Lt. Matthew Robinson responded to the scene and “observed a Nissan SUV, not in a parking space” but “blocking th[e] main drive.” When he approached the vehicle, he saw the Defendant seated in the driver’s seat and the keys to the vehicle in the cup holder. As he spoke to the Defendant, “[i]t became even more apparent how slurred her speech was.” He “smelled the odor of an intoxicant coming from her person” and saw that her eyes were “blood shot and watery.” The Defendant, who “appeared intoxicated,” “just didn’t seem to be making sense.” He recalled that when he asked her why she was driving, the Defendant replied, “I am not driving.” When he pointed out that she was seated in the driver’s seat of a vehicle, she replied, “I am not sitting behind the steering wheel of a

vehicle.” No one else was in or near the Defendant’s vehicle. At that point, Lt. Robinson determined that she was “severely intoxicated.”

The lieutenant asked the Defendant to step out of the vehicle, and “when she stepped out of the vehicle[,] she almost immediately started kind of falling over.” Officer Tyrone Randall, who had arrived to assist, caught the Defendant to keep her from falling. At that point, it appeared that the Defendant was too intoxicated to stand on her own. Because she could not stand unassisted, officers did not ask the Defendant to perform field sobriety tests. Lt. Robinson described her behavior as confused, argumentative, “profane, sarcastic[,] and talkative.”

Footage recorded by the lieutenant’s dash-mounted camera that captured his arrival was exhibited to the hearing and played for the jury. The video recording showed the Defendant seated behind the wheel of a white SUV and demonstrated the Defendant’s obvious intoxication.

Approximately two hours after his initial interaction with the Defendant, Lt. Robinson obtained a warrant for the Defendant’s blood. Bartlett Fire Department paramedic Christofer Davis collected two vials of the Defendant’s blood, both of which were sent to the Tennessee Bureau of Investigation (TBI) for blood alcohol testing.

Officer Randall also observed the Defendant seated behind the wheel of a white SUV. Officer Randall approached the vehicle, which was running, and saw that the Defendant’s “eyes were blood shot [and] watery, her speech was slurring[,] and she seemed to be a little confused.” The Defendant was too intoxicated to walk unassisted. Officer Randall and Lt. Robinson helped the handcuffed Defendant walk to Officer Randall’s patrol vehicle and placed her in the back seat. As the officers continued their investigation, the Defendant began “screaming and crying” and “causing a disturbance.” At that point, the officers elected to “remove her from the scene” so that Lt. Robinson could continue the investigation.

The Defendant’s erratic behavior continued while she was confined inside Officer Randall’s patrol vehicle. Footage captured by the rear-facing camera inside Officer Randall’s patrol car was exhibited to his testimony. The video recording demonstrated the Defendant’s evident intoxication as she screamed, cried, and cursed. At the scene, the Defendant alternately screamed, cried, and attempted to escape her handcuffs. She yelled obscenities at the officers and, at various points, called Officer Randall, who is black, a “n*****.”

After Officer Randall entered the patrol vehicle to drive the Defendant to jail, the Defendant cursed him, told him he was “going to jail,” and repeatedly called him a “n*****.” Officer Randall spoke only to ask the Defendant if she was okay. At the jail,

the Defendant was alternately cooperative, belligerent, and defiant. Eventually, she said she was going to be sick, and Officer Randall directed her to vomit outside the vehicle. Thereafter, the Defendant vomited, cried, and said, “Make it go away.”

Inside the jail, the Defendant invited a jailer “to go outside and see her brand new car.” Officer Randall described the Defendant as “pretty erratic,” recalling that at one point, she “started dancing and singing,” and then she would “cry and she’d stop and she’d yell and then she’d talk softly.” The Defendant grinned and displayed a peace sign in her booking photograph. Officer Randall, a trained crisis intervention officer, attributed the Defendant’s erratic behavior to intoxication rather than mental health issues, although he agreed that he was not a mental health professional.

TBI Special Agent and Forensic Scientist Corbin Hughes, an expert in forensic toxicology, tested the Defendant’s blood for the presence of alcohol and determined that it contained “.381 gram percent of ethyl alcohol.” He described .381% as “a very high blood alcohol concentration” and said that it would cause “very drastic, very impairing effects.” He said that a person with a BAC of .381% “would not be able to drive.” He acknowledged that because the Defendant’s blood was not drawn until 10:16 a.m. and because he did not know when she consumed her last alcoholic drink, he could not determine with certainty her BAC when officers arrived on the scene at 7:43 a.m. He explained, however, that BAC peaks between thirty and sixty minutes after ingestion of the last drink and that as a result, the Defendant’s BAC would have been decreasing between 7:43 and 10:16 a.m. while she was in police custody. He said that unless the Defendant had “auto-brewery syndrome, or something like that,” it would be impossible for her to achieve a BAC of .381% “endogenously.”

The Defendant chose to present no proof, and following a full *Momon* colloquy, elected not to testify.

Based upon this evidence, the jury convicted the Defendant as charged. The trial court merged the Defendant’s convictions and imposed a sentence of eleven months and twenty-nine days to be served as six months’ incarceration followed by one and one-half years’ probation.¹ The Defendant filed a timely but unsuccessful motion for new trial followed by a timely notice of appeal.

Analysis

In this appeal, the Defendant challenges only the trial court’s decision to allow the jury to hear the racist remarks she made while being arrested. She claims that the court’s

¹ The court imposed an extended term of probation to allow the Defendant to obtain substance abuse evaluation and treatment.

failure to redact or mute those portions of the video recording during which she referred to Officer Randall as n***** violated Tennessee Rule of Evidence 403 and deprived her of the constitutional right to a fair trial. The State argues that the trial court did not err by admitting the video recording in its entirety and that the Defendant waived plenary consideration of the constitutional challenge. We agree with the State on both points.

II. Rule 403

As an initial matter, we note that the State contends that the Defendant has waived consideration of this issue by failing to include in the appellate record the hearing on her motion to exclude and by failing to cite the record or appropriate authorities in her brief. Although the hearing on the motion to exclude is not included in the record on appeal, we conclude that the record is nevertheless adequate for our review of the evidentiary issue. Further, although we agree that the Defendant's citation to the record and to applicable authorities could be more precise, she has cited to the record and has included an authority in support of her argument, which is itself simple and straightforward. Under these circumstances, we will consider the evidentiary issue presented.

“Evidence which is not relevant is not admissible.” Tenn. R. Evid. 402. Evidence is relevant if it has “any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” Tenn. R. Evid. 401. The determination of evidentiary relevance lies within the discretion of the trial court; thus, we will not reverse the ruling of that court unless the record clearly establishes that the trial court abused its discretion. *See State v. DuBose*, 953 S.W.2d 649, 652 (Tenn. 1997); *State v. Van Tran*, 864 S.W.2d 465, 477 (Tenn. 1993); *State v. Harris*, 839 S.W.2d 54, 73 (Tenn. 1992). “A trial court abuses its discretion when it applies an incorrect legal standard, reaches an illogical conclusion, bases its decision on a clearly erroneous assessment of the evidence, or employs reasoning that causes an injustice to the complaining party.” *State v. Clark*, 452 S.W.3d 268, 287 (Tenn. 2014) (citing *State v. Banks*, 271 S.W.3d 90, 116 (Tenn. 2008)).

Even relevant evidence may be excluded if the probative value of the evidence “is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.” Tenn. R. Evid. 403; *see Banks*, 564 S.W.2d at 950-51. Prejudice is considered unfair if it has “[a]n undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one.” *See Banks*, 564 S.W.2d at 951. The exclusion of relevant evidence is considered “an extraordinary remedy” to be used only “sparingly, and the party seeking to exclude the evidence bears a heavy burden of persuasion.” *State v. Davidson*, 509 S.W.3d 156, 198 (Tenn. 2016) (citing *State v. James*, 81 S.W.3d 751, 757-58 (Tenn. 2002)).

The evidence complained of here, the video recording demonstrating the Defendant's behavior following her arrest, was unquestionably relevant to the jury's determination of whether she was driving under the influence of an intoxicant. Additionally, although the video was certainly prejudicial in that it was highly inculpatory, we cannot say that it carried with it the danger of *unfair* prejudice. Tennessee Rule of Evidence 403 does not empower a court to sanitize relevant evidence merely because it is unpleasant or offensive. Nothing in the recording, including the Defendant's use of a racial slur to refer to Officer Randall, invited the jury to convict her of DUI on an improper basis. The video recording was the only continuous documentation of the Defendant's behavior at or near the time the officers encountered her behind the wheel. Their observations were therefore supplemented, and in key respects corroborated, by the full recording, which displayed the Defendant's slurred speech, emotional volatility, confusion, inability to communicate coherently, and the loss of physical control. Her behavior, including the use of racial slurs, functioned as proof of the Defendant's extreme intoxication. In consequence, the trial court did not abuse its discretion by refusing to order the video to be redacted.

III. Due Process

The Defendant did not challenge the admission of the video recording on constitutional grounds in the trial court, and, accordingly, she has waived plenary review of her constitutional claim on appeal. The Defendant did not ask this court to consider this issue under the plain error doctrine, *see State v. Newman*, No. E2024-00600-CCA-R3-CD, 2025 WL 1378781, at *6 (Tenn. Crim. App. May 13, 2025), *perm. app. denied* (Tenn. Sept. 11, 2025) ("The first and best way to obtain plain error review is to ask for it." (citation omitted)), even after the State asserted that the issue had been waived, *see State v. Thompson*, No. W2022-01535-CCA-R3-CD, 2023 WL 4552193, at *5 (Tenn. Crim. App. July 14, 2023) ("Where a defendant fails to respond to a waiver argument, only particularly compelling or egregious circumstances could typically justify our *sua sponte* consideration of plain error relief." (citation omitted)). In addition to her failure to request plain error review, the Defendant failed to identify the applicable standard of review or to support her argument with citation to the record or to relevant authorities. *See* Tenn. R. App. P. 27(7)(A); Tenn. Ct. Crim. App. R. 10(b) ("Issues which are not supported by argument, citation to authorities, or appropriate references to the record will be treated as waived in this court."). Consequently, this issue is waived.

Conclusion

Based upon the foregoing, we affirm the judgments of the trial court.

s/ *Stacy L. Street*
STACY L. STREET, JUDGE