IN THE SUPREME COURT OF THE STATE OF NEVADA

THOMAS ROPER,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 47007

FILED

SEP 06 2006

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY [signature]
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of one count of failure to stop at the scene of an accident involving death or personal injury. Seventh Judicial District Court, White Pine County; Steve L. Dobrescu, Judge. The district court sentenced appellant Thomas Roper to serve a prison term of 26-120 months and ordered him to pay a fine of $2,000.00.

First, Roper contends that the district court committed reversible error by rejecting his proffered jury instruction on the lesser-included misdemeanor offense of duty to stop at the scene of a non-injury accident involving damage to a vehicle or property.[1] We disagree.

A lesser offense is lesser-included when "the elements of the lesser offense are an entirely included subset of the elements of the charged offense."[2] In this case, NRS 484.221 is not a lesser-included offense because a violation of NRS 484.219(1) does not require property

[1]See NRS 484.221; NRS 484.999(1).

[2]Barton v. State, 117 Nev. 686, 694, 30 P.3d 1103, 1108 (2001); see also Blockburger v. United States, 284 U.S. 299 (1932); Smith v. State, 120 Nev. 944, 102 P.3d 569 (2004).

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damage as an element of the offense. We also note that the jury was properly instructed on the elements of NRS 484.219 and reasonable doubt.[3] Therefore, we conclude that the district court did not err by rejecting Roper's proffered jury instruction.[4]

Second, Roper contends that the district court erred by allowing evidence that the non-testifying victim moved away. Roper challenges the following exchange between the State and its witness:

> Q. Do you know where [the victim] is now?
>
> A. I'm not sure. She moved before Christmas.
>
> DEFENSE COUNSEL: We object. That's irrelevant.
>
> PROSECUTOR: He opened the door in his opening statement.
>
> THE COURT: I'll allow it.
>
> Q. You don't know where she is currently?
>
> A. Not exactly where but she moved away to California.

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[3]For the first time on appeal, Roper challenges the jury instructions on "reasonable doubt" and "equal and exact justice." See Hernandez v. State, 118 Nev. 513, 527, 50 P.3d 1100, 1109-10 (2002) (unpreserved challenges to jury instructions must demonstrate plain error affecting substantial rights). Roper concedes that this court has rejected such challenges and asks the court to reconsider. We decline to do so. See Elvik v. State, 114 Nev. 883, 897-98, 965 P.2d 281, 290-91 (1998); Leonard v. State, 114 Nev. 1196, 1209, 969 P.2d 288, 296 (1998).

[4]See Crawford v. State, 121 Nev. ___, ___, 121 P.3d 582, 585 (2005) (holding that "[t]he district court has broad discretion to settle jury instructions, and this court reviews the district court's decision for an abuse of that discretion or judicial error.").

Roper argues that the evidence regarding the victim's whereabouts was inadmissible because it was prejudicial and irrelevant,[5] and was the State's improper attempt to provide the jury with an explanation for the victim's absence. We disagree.

"'[T]he introduction of inadmissible evidence by one party allows an opponent, in the court's discretion, to introduce evidence on the same issue to rebut any false impression that might have resulted from the earlier admission.'"[6] The district court's decision to admit or exclude evidence will not be overturned by this court absent manifest error.[7] In the instant case, defense counsel informed the jury at the beginning of his opening statement that the victim would not be testifying. Therefore, Roper opened the door to the challenged line of questioning. Moreover, Roper cannot demonstrate that any substantial right was affected by the admission of the evidence.[8] Accordingly, we conclude that the district court did not commit manifest error in overruling Roper's objection.

Third, Roper contends that the evidence presented at trial was insufficient to support the jury's finding that he was guilty beyond a

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[5]See NRS 48.035(1); NRS 48.025(2).

[6]Taylor v. State, 109 Nev. 849, 860, 858 P.2d 843, 850 (1993) (Shearing, J., concurring in part and dissenting in part) (quoting United States v. Whitworth, 856 F.2d 1268, 1285 (9th Cir. 1988)).

[7]See Baltazar-Monterrosa v. State, 122 Nev. ___, ___, 137 P.3d 1137, 1142 (2006).

[8]See NRS 47.040(1) ("error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected").

reasonable doubt. Specifically, Roper argues that the State failed to prove beyond a reasonable doubt that (1) he was the driver of the vehicle, (2) the accident resulted in bodily injury to the other individual in the vehicle, and (3) he failed to fulfill the statutory duty to give information and render aid.[9] Roper also claims that his confession to being the driver was the only evidence proving that he was the driver of the vehicle. We disagree.

A review of the record on appeal reveals sufficient evidence to establish guilt beyond a reasonable doubt as determined by a rational trier of fact.[10] In particular, we note that the owner of the vehicle involved in the accident, Andrea Steiner, testified at trial that Roper came to her house and she let him borrow the vehicle. Steiner gave Roper the keys to her vehicle; the victim accompanied Roper. At that time, Steiner's car was not damaged and the victim had no visible injuries to her head and face. A little while later, Steiner received a telephone call from the victim, informing her that there had been an accident. Steiner got a ride and met up with the victim and noticed that her face was cut and she was bleeding.

When Deputy Todd Fincher of the White Pine County Sheriff's Department arrived at the scene of the accident, neither Roper nor the victim were present. Deputy Fincher testified that the vehicle apparently collided with a fire hydrant; he noticed that the driver's airbag was deployed, and the passenger-side windshield was "broken spider webbed."

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[9]See NRS 484.223.

[10]See Mason v. State, 118 Nev. 554, 559, 51 P.3d 521, 524 (2002) (quoting Jackson v. Virginia, 443 U.S. 307, 319 (1979)).

Upon closer inspection, Deputy Fincher discovered "some strand of long black hair" on the inside of the passenger-side windshield where it cracked, blood, "and just a small amount of human tissue." Photographs of the damaged vehicle were admitted without objection. Approximately five minutes after Deputy Fincher arrived at the scene, Steiner and the victim arrived. Deputy Fincher described the victim as having "a small abrasion or laceration over her right eye and blood covering her face. And she had long black hair consistent with the hair that I found inside the vehicle." Deputy Sheriff Matthew Pearson also testified that the hair imbedded in the windshield was "extremely comparable" to the victim's. Photographs of the victim's injuries were admitted without objection.

Information gathered at the scene of the accident indicated that Roper may have been the driver of the vehicle. Deputies Fincher and Pearson soon located Roper in his apartment. Roper initially stated that he was seated in the passenger side of the vehicle during the accident, but upon further questioning, confessed to being the driver. The only noticeable injury on Roper was a scraped chin, which he claimed was likely from either the steering wheel or airbag. Deputies Fincher and Pearson testified that other than the initial 9-1-1 telephone call from a bystander, no calls came through the Sheriff's office dispatch reporting the accident. Deputy Fincher explained that if a reporting call is made to the Nevada Highway Patrol about an accident within the White Pine County jurisdiction, NHP forwards the call to the Sheriff's office.

Based on the above, we conclude that the jury could reasonably infer from the evidence presented that Roper committed the crime of failure to stop at the scene of an accident involving death or personal injury. It is for the jury to determine the weight and credibility

to give conflicting testimony, and the jury's verdict will not be disturbed on appeal where, as here, sufficient evidence supports the verdict.[11] Moreover, we note that circumstantial evidence alone may satisfy the corpus delicti rule and sustain a conviction.[12] Therefore, we conclude that the State presented sufficient evidence to sustain the conviction.

Finally, Roper contends that the district court abused its discretion at sentencing by imposing an overly harsh sentence constituting cruel and/or unusual punishment in violation of the United States and Nevada Constitutions.[13] More specifically, Roper argues that a lesser sentence would be more appropriate in light of his difficult childhood and his need for treatment for alcohol and substance abuse. We disagree.

The Eighth Amendment of the United States Constitution does not require strict proportionality between crime and sentence, but forbids only an extreme sentence that is grossly disproportionate to the crime.[14] This court has consistently afforded the district court wide

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[11]See Bolden v. State, 97 Nev. 71, 624 P.2d 20 (1981); see also McNair v. State, 108 Nev. 53, 56, 825 P.2d 571, 573 (1992).

[12]See West v. State, 119 Nev. 410, 416, 75 P.3d 808, 812 (2003); Buchanan v. State, 119 Nev. 201, 217, 69 P.3d 694, 705 (2003); see also Smith v. United States, 348 U.S. 147, 154 (1954) (holding that when there is no tangible injury to prove that a crime has been committed, the existence of the crime can be proved through the accused's statement if the statement is supported by corroborative evidence); Azbill v. State, 84 Nev. 345, 351, 440 P.2d 1014, 1018 (1968).

[13]See U.S. Const. amend. VIII; Nev. Const. art. 1, § 6.

[14]Harmelin v. Michigan, 501 U.S. 957, 1000-01 (1991) (plurality opinion).

discretion in its sentencing decision.[15] The district court's discretion, however, is not limitless.[16] Nevertheless, we will refrain from interfering with the sentence imposed "[s]o long as the record does not demonstrate prejudice resulting from consideration of information or accusations founded on facts supported only by impalpable or highly suspect evidence."[17] Despite its severity, a sentence within the statutory limits is not cruel and unusual punishment unless the statute itself is unconstitutional or the sentence is so unreasonably disproportionate to the crime as to shock the conscience.[18]

In the instant case, Roper does not allege that the district court relied on impalpable or highly suspect evidence or that the relevant sentencing statute is unconstitutional. In fact, Roper concedes that the sentence imposed by the district court was within the parameters provided by the relevant statute.[19] Additionally, Roper's criminal history includes three felony and four misdemeanor convictions, and he committed the instant offense after absconding from California in violation of the terms of his probation. And finally, we note that the granting of probation is

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[15]Houk v. State, 103 Nev. 659, 747 P.2d 1376 (1987).

[16]Parrish v. State, 116 Nev. 982, 989, 12 P.3d 953, 957 (2000).

[17]Silks v. State, 92 Nev. 91, 94, 545 P.2d 1159, 1161 (1976).

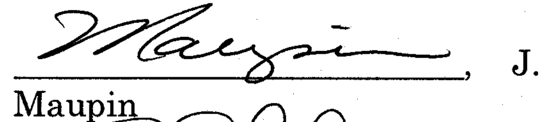
[18]Allred v. State, 120 Nev. 410, 420, 92 P.3d 1246, 1253 (2004).

[19]See NRS 484.219(3) (category B felony punishable by a prison term of 2-15 years).

discretionary.[20] Therefore, based on all of the above, we conclude that the district court did not abuse its discretion at sentencing

Having considered Roper's contentions and concluded that they are without merit, we

ORDER the judgment of conviction AFFIRMED.


_______________, J.
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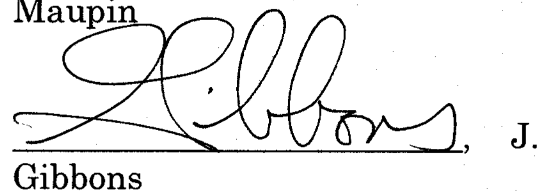
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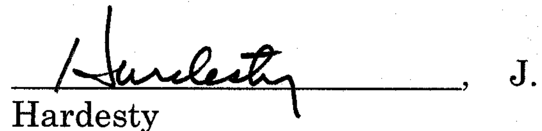
_______________, J.
Hardesty

cc: Hon. Steve L. Dobrescu, District Judge
State Public Defender/Carson City
State Public Defender/Ely
Attorney General George Chanos/Carson City
White Pine County District Attorney
White Pine County Clerk

[20] See NRS 176A.100(1)(c).