IN THE SUPREME COURT OF THE STATE OF NEVADA

ROBERT J. BELL,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 57861

FILED

DEC 07 2011

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY A. Ingerson
DEPUTY CLERK

ORDER OF AFFIRMANCE

This appeal is from a judgment of conviction, pursuant to a jury verdict, of driving while under the influence of intoxicating liquor. Eighth Judicial District Court, Clark County; Douglas W. Herndon, Judge. Appellant Robert Joseph Bell raises three issues on appeal.

First, Bell argues that there was insufficient evidence to support his conviction because the witness who testified about his drunken driving was not credible and the State failed to prove that his blood alcohol level was above the legal limit of 0.08 during or within two hours of driving. This claim lacks merit because the evidence, when viewed in the light most favorable to the State, is sufficient to establish guilt beyond a reasonable doubt as determined by a rational trier of fact. See Jackson v. Virginia, 443 U.S. 307, 319 (1979); Mason v. State, 118 Nev. 554, 559, 51 P.3d 521, 524 (2002); NRS 484C.110(1).[1] At trial, a

[1]Formerly codified as NRS 484.379(1).

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witness testified that Bell fell asleep in his car while stopped at a red light and he then drove erratically on a highway. The witness called the police and a police officer arrived approximately ten minutes after Bell had stopped on the side of the highway. The officer testified that Bell was disoriented, smelled of alcohol, had bloodshot and watery eyes, was slurring his speech, and could not stand up on his own. Approximately one hour after the officer responded to the scene, a blood sample was taken from Bell, which revealed a blood alcohol level of 0.37. Based on this evidence, we conclude that a rational juror could reasonably find that Bell committed the crime beyond a reasonable doubt. It is the jury's function to determine the credibility of witnesses, and a jury's verdict will not be disturbed on appeal where, as here, substantial evidence supports the verdict. See McNair v. State, 108 Nev. 53, 56, 825 P.2d 571, 573 (1992).

Second, Bell claims that the district court erred by refusing to take judicial notice of the fact that there was construction on the highway at the time of the offense. Bell sought to admit a news article about the completion of construction on the highway, which was written more than six months after his driving offense, in order to impeach the witness's testimony that there was no construction when the offense occurred. We conclude that the district court did not abuse its discretion by refusing to admit evidence, or take judicial notice of the fact, that the highway was under construction at the time of the offense because this fact was not established through the news article. See NRS 47.130; NRS 48.015.

Finally, Bell argues that his sentence constitutes cruel and unusual punishment because the district court improperly imposed a harsh sentence based solely on Bell's decision to exercise his right to a jury trial. We disagree. In sentencing Bell, the district court explained that the sentence was based on Bell's high blood alcohol concentration, the fact that Bell had absconded before trial, and his multiple prior convictions, including two for DUI. We conclude that Bell failed to demonstrate that the district court punished him for going to trial or otherwise abused its discretion in sentencing him. See Mitchell v. State, 114 Nev. 1417, 1428, 971 P.2d 813, 820 (1998) ("The defendant has the burden to provide evidence that the district court sentenced him vindictively."), overruled in part on other grounds by Sharma v. State, 118 Nev. 648, 56 P.3d 868 (2002); see also Martinez v. State, 114 Nev. 735, 737-38, 961 P.2d 143, 145 (1998) (recognizing that sentencing courts have wide discretion). We further conclude that Bell's sentence of 60 to 144 months in prison does not constitute cruel and unusual punishment. The sentence is within the statutory limits, see NRS 484C.410(1),[2] Bell does not allege that the sentencing statute is unconstitutional, and the sentence is not "so unreasonably disproportionate to the offense as to shock the conscience," Blume v. State, 112 Nev. 472, 475, 915 P.2d 282, 284 (1996) (internal quotation marks omitted).

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[2]Formerly codified as NRS 484.3792(2).

Having considered Bell's contentions and concluded that they lack merit, we

ORDER the judgment of conviction AFFIRMED.

Cherry, J.
Cherry

Gibbons, J.
Gibbons

Pickering, J.
Pickering

cc: Hon. Douglas W. Herndon, District Judge
Mueller Hinds & Associates
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk