

IN THE SUPREME COURT OF THE STATE OF NEVADA

JEFFREY SCOTT BROWN,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 58210

FILED

APR 12 2012

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY *R. Malone*
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction entered pursuant to a jury verdict of driving under the influence of alcohol causing substantial bodily harm. Eighth Judicial District Court, Clark County; Douglas W. Herndon, Judge.

First, appellant Jeffrey Scott Brown contends that insufficient evidence supports his conviction. He asserts that the State failed to prove that (1) he was not exercising due care when his car veered into the oncoming traffic because witness testimony contradicted the State's due care theory and the accident investigator's conclusions were suspect and contrary to the physical evidence, (2) his blood alcohol content (BAC) was 0.08 or greater within two hours of driving because the State was unable to provide the exact time of the accident, or (3) his BAC was 0.08 or more at the time of driving based on retrograde extrapolation because the expert relied upon a largely discredited extrapolation technique. We review the evidence in the light most favorable to the prosecution and determine whether any rational juror could have found the essential elements of the crimes beyond a reasonable doubt. McNair v. State, 108 Nev. 53, 56, 825 P.2d 571, 573 (1992).

The jury heard testimony that Brown was travelling

southbound when his car suddenly veered into the northbound lane and collided with a motorcycle. The motorcyclist suffered the loss of his left leg below the knee, brain injury, and damage to some of his fingers. A witness travelling immediately behind the motorcycle did not see anything on the road that would have caused Brown's car to swerve. The witness estimated that the accident occurred between 8:30 p.m. and 9:30 p.m. The witness's wife called 911 and the police arrived about ten minutes later. Trooper Lloyd Hixson arrived at 8:57 p.m. and made contact with Brown. Brown was disoriented, smelled of alcohol, and his eyes were bloodshot and glassy. Brown said that he had consumed 3 or 4 "strong beers" and had been prescribed medical marijuana and Valium for an injury. Brown failed both a horizontal gaze nystagmus test and a preliminary breath test, was arrested, and was taken to the county jail where his blood was drawn for testing. The first blood draw was made at 10:23 p.m. and had a BAC of 0.19 and the second blood draw was made at 10:53 p.m. and had a BAC of 0.20. The State's expert, a forensic toxicologist opined that retrograde extrapolation showed that Brown's BAC was above 0.08 when he was driving. The jury saw photographs of the accident scene and heard testimony that it occurred in a construction zone, but there was no construction going on at the time of collision, there was no debris on the road, and there was nothing that would prevent a driver from determining which side of the road to drive on.

We conclude that a rational juror could infer from this evidence that Brown was under the influence of alcohol and violated a duty imposed by law when he veered into the oncoming traffic and caused the victim's leg to be amputated below the knee. See NRS 484.3795(1) (currently codified as NRS 484C.430(1)). 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. Bolden v. State, 97 Nev. 71, 73, 624 P.2d 20, 20 (1981).

Second, Brown contends that the district court improperly instructed the jury on proximate cause and erred by rejecting his proposed instruction on proximate cause. Brown specifically claims that “[t]he issue is that the proximate cause instruction that was given is stricter than the one given in a civil proceeding” and cites to NRS 41.141(1)—the comparative negligence statute. “The 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.” Crawford v. State, 121 Nev. 744, 748, 121 P.3d 582, 585 (2005). Here, the district court heard argument on Brown’s proposed instruction, considered the relevant criminal caselaw, determined that a criminal defendant can only be exculpated if the intervening cause was a superseding cause or sole cause of the injury that completely excused the prior act, and concluded that the instruction approved of in Williams v. State, 118 Nev. 536, 550, 50 P.3d 1116, 1125 (2002), accurately placed the law before the jury. We conclude that the district court did not abuse its discretion or err in this regard.

Third, Brown contends that his 72- to 240-month prison sentence constitutes cruel and unusual punishment and is unconstitutionally vindictive because it punishes him for exercising his right to a jury trial. Because Brown does not argue that the relevant statute is unconstitutional, his sentence is within the parameters of that statute, and we are not convinced that the sentence is unreasonably disproportionate to the gravity of his offense, we conclude that the

sentence does not violate the constitutional proscriptions against cruel and unusual punishment. See NRS 484C.430(1)(f); Chavez v. State, 125 Nev. 328, 347-48, 213 P.3d 476, 489-90 (2009). Nothing in the record provided for our review indicates that Brown's sentence was imposed vindictively.

Having considered Brown's contentions and concluded that he is not entitled to relief, we

ORDER the judgment of conviction AFFIRMED.

Cherry, J.
Cherry

Pickering, J.
Pickering

Hardesty, J.
Hardesty

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