

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

SHAWN HEMINGWAY,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 70589

FILED

NOV 18 2016

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY: *[Signature]*
DEPUTY CLERK

ORDER OF AFFIRMANCE

Appellant Shawn Hemingway appeals from a felony judgment of conviction entered pursuant to a jury verdict of driving under the influence of a controlled substance. Second Judicial District Court, Washoe County; David A. Hardy, Judge.

Hemingway claims insufficient evidence supports his conviction because the State failed to prove he was under the influence of a controlled substance at the time he was driving or in actual physical control of his car. We review the evidence in the light most favorable to the prosecution and determine whether "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).

The jury heard testimony that REMSA paramedics responded to a call regarding an unconscious person and discovered Hemingway passed out in his car at the intersection of Longley and McCarran in Reno. Hemingway was seated in the driver's seat, the car engine was running, and loud music playing. He did not respond to knocking on the car window or tapping on his shoulder, so the paramedics woke him with a

painful stimulus. He told the paramedics he had to go, got out of the car, and walked away. The paramedics notified the police.

The police determined the car had been abandoned and had to be towed. They called a tow truck, conducted an inventory of the car, and ran the car's license plate number. They discovered two digital scales and a glass pipe during their inventory and learned the car was registered to Hemingway. They went to Hemingway's home address and found him walking towards his apartment shortly after they arrived. Approximately 25 minutes passed between the time the paramedics discovered Hemingway in his car and when the police encountered him walking towards his residence.

Initially, Hemingway was very cooperative with the police: he answered their questions and allowed them to search his person. However, when REMSA arrived, his demeanor changed, a struggle ensued, and he was taken into custody. The police obtained a warrant for a blood draw, a sample of Hemingway's blood was drawn, and the sample was tested by the Washoe County Sheriff's Office crime laboratory. The blood contained 44 nanograms per milliliter of a cocaine metabolite and 289 nanograms per milliliter of methamphetamine.

A certified drug-recognition expert testified he responded to Hemingway's residence. He observed Hemingway's pupils were constricted and his demeanor was up and down—one minute he was calm and the next minute he was yelling and screaming. He concluded Hemingway was on the downside of a stimulant based on his physical appearance and behavior. And he opined Hemingway could not have ingested methamphetamine or cocaine 25 to 45 minutes before encountering the police.

We conclude a rational juror could reasonably infer from this testimony that Hemingway was under the influence of a controlled substance while driving or in actual physical control of his car. See NRS 484C.110(2)(a), (3); *Hernandez v. State*, 118 Nev. 513, 531, 50 P.3d 1100, 1112 (2002) (“[C]ircumstantial evidence alone may support a conviction.”). 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, substantial evidence supports its verdict. See *Bolden v. State*, 97 Nev. 71, 73, 624 P.2d 20, 20 (1981).

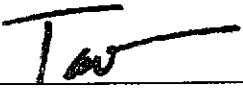
Hemingway also claims the district court erred by denying his request to continue sentencing so he could continue to gather important mitigating evidence.


We review a district court’s decision to grant or deny a motion for continuance for an abuse of discretion. *Higgs v. State*, 126 Nev. 1, 9, 222 P.3d 648, 653 (2010). “Each case turns on its own particular facts, and much weight is given to the reasons offered to the trial judge at the time the request for a continuance is made.” *Id.* “However, if a defendant fails to demonstrate that he was prejudiced by the denial of the continuance, then the district court’s decision to deny the continuance is not an abuse of discretion.” *Id.*

Hemingway claims the continuance was necessary so defense counsel could read his medical records and obtain a substance abuse evaluation which was not yet available. However, he has failed to show the medical records and the substance abuse evaluation actually contained evidence which may have mitigated his sentence. Accordingly, he has not demonstrated prejudice and we conclude the district court did not abuse its discretion in this regard.

Having concluded Hemingway is not entitled to relief, we
ORDER the judgment of conviction AFFIRMED.


_____, C.J.
Gibbons


_____, J.
Tao


_____, J.
Silver

cc: Hon. David A. Hardy, District Judge
Washoe County Public Defender
Attorney General/Carson City
Washoe County District Attorney
Washoe District Court Clerk