IN THE SUPREME COURT OF THE STATE OF NEVADA

NANCY L. LOWERY,

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

No. 37596

FILED

AUG 10 2001

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY J. Richards
CHIEF DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of one count of driving under the influence of alcohol, a category B felony. The district court sentenced appellant to a prison term of 16 to 48 months and fined appellant $2,000.00.

Appellant first contends that the district court erred by refusing her proffered instruction regarding the affirmative defense of subsequent alcohol consumption.[1] Instead of appellant's instruction, the district court gave an instruction that stated, in part:

> If you find that the defendant has shown by a preponderance of the evidence that she consumed a sufficient amount of alcohol after driving, and before she was tested, to cause the alcohol in her blood to equal or exceed 0.10 percent, then you must find the defendant not guilty of driving a motor vehicle with 0.10 percent or more by weight of alcohol in the blood within two hours of driving.

The instruction requested by appellant stated,

> If you find that the defendant has presented some evidence that she consumed sufficient quantity of alcohol after driving the vehicle and before her blood was tested to cause the alcohol in her blood to equal or exceed 0.10 percent, then the State must prove beyond a

[1]See NRS 484.379(4)

01-13630

> reasonable doubt that her blood alcohol level was 0.10 percent or greater at the time of driving the vehicle, or you must find the defendant not guilty.

The instruction given by the court correctly states the law as contained in NRS 484.379(4). Contrary to appellant's argument, the instruction given does not impermissibly shift the burden of proof to the defendant. Because the instruction correctly reflected the statute, in order to find that the instruction impermissibly shifted the burden of proof, this court would have to conclude that the statute unconstitutionally shifts the burden. "Statutes are presumed to be valid, and the burden is on the challenger to make a clear showing of their unconstitutionality."[2] Because appellant has not made such a showing, we decline to hold that the statute, and therefore the instruction, are unconstitutional. Moreover, in a separate instruction, the jury was instructed that appellant was presumed innocent and that the State had the burden of proving every element of the crime charged beyond a reasonable doubt. We therefore conclude that the district court did not err by refusing to give appellant's instruction.[3]

Appellant next contends that the district court erred by refusing to allow counsel for appellant to inquire about potential juror misconduct. Specifically, appellant argues that she should have been able to question the jurors regarding a question asked by a juror during deliberations. The juror's question was: "Why is [appellant] being charged

---

[2]Childs v. State, 107 Nev. 584, 587, 816 P.2d 1079, 1081 (1991).

[3]See Barron v. State, 105 Nev. 767, 773, 783 P.2d 444, 448 (1989) (a proffered instruction need not be given if it is adequately covered by other instructions).

with a felony DUI if there was no injury? Has she been previously convicted of two DUIs in the last seven years?"

In response, the district court informed the jurors that "[t]he instructions you need to decide guilt or innocence of the Defendant have been furnished to you. There are no instructions covering the questions asked, because they are not material to your deliberations." Counsel for appellant asked that she be allowed to question the juror who asked the question to determine whether that juror had been "interjecting outside information into the deliberations." The district court denied the request and counsel for appellant objected no further. We conclude that this issue has not been preserved for appellate review because counsel for appellant failed to move for a mistrial or a new trial.[4]

Appellant next contends that the evidence presented at trial was insufficient to support the jury's finding of guilt. Our review of the record on appeal, however, reveals sufficient evidence to establish guilt beyond a reasonable doubt as determined by a rational trier of fact.[5]

In particular, we note that a highway patrol trooper testified that he saw appellant get out of the driver's side of a vehicle parked in front of a 7-11 store. The trooper observed appellant stagger toward the store, and a few minutes later stagger back to the car. The trooper then observed appellant get back into the car, pull the car up to the gas pumps and put gas in the car. Appellant then pulled the car back up into a parking space in front of the store. When contacted by the trooper, appellant's speech was slurred, she

---

[4]See Arndt v. State, 93 Nev. 671, 676, 572 P.2d 538, 541 (1977).

[5]See Wilkins v. State, 96 Nev. 367, 609 P.2d 309 (1980).

smelled of alcohol, and her eyes were red and watery. A subsequent blood draw showed appellant's blood alcohol level to be .235 percent.

The jury could reasonably infer from the evidence presented that appellant drove a vehicle while under the influence of intoxicating liquor. 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 the verdict.[6]

Finally, appellant contends that the sentence constitutes cruel and unusual punishment in violation of the United States and Nevada constitutions because the sentence is disproportionate to the crime.[7] We disagree.

The Eighth Amendment does not require strict proportionality between crime and sentence, but forbids only an extreme sentence that is grossly disproportionate to the crime.[8] Regardless of its severity, a sentence that is within the statutory limits is not "'cruel and unusual punishment unless the statute fixing punishment is unconstitutional or the sentence is so unreasonably disproportionate to the offense as to shock the conscience.'"[9]

This court has consistently afforded the district court wide discretion in its sentencing decision.[10] This court

---

[6]See Bolden v. State, 97 Nev. 71, 624 P.2d 20 (1981).

[7]Appellant primarily relies on Solem v. Helm, 463 U.S. 277 (1983).

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

[9]Blume v. State, 112 Nev. 472, 475, 915 P.2d 282, 284 (1996) (quoting Culverson v. State, 95 Nev. 433, 435, 596 P.2d 220, 221-22 (1979)); see also Glegola v. State, 110 Nev. 344, 348, 871 P.2d 950, 953 (1994).

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

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."[11]

In the instant case, appellant does not allege that the district court relied on impalpable or highly suspect evidence or that the relevant statute is unconstitutional. Further, we note that the sentence imposed was within the parameters provided by the relevant statute.[12] Accordingly, we conclude that the sentence imposed does not constitute cruel and unusual punishment.

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

ORDER the judgment of conviction AFFIRMED.

_____, J.
Shearing

_____, J.
Agosti

_____, J.
Rose

cc: Hon. Michael R. Griffin, District Judge
Attorney General
Carson City District Attorney
State Public Defender
Carson City Clerk

---

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

[12]See NRS 484.3792(c).