IN THE SUPREME COURT OF THE STATE OF NEVADA

CHARLES JOSEPH MESSORIA,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 38671

SEP 0 9 2002

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

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of one count of causing the death of another by driving a vehicle while intoxicated. The district court sentenced appellant Charles Joseph Messoria to serve a prison term of 72 to 180 months.

Messoria first contends that there was insufficient evidence to support the conviction because the State failed to prove he was driving while intoxicated. We disagree.

When reviewing a claim of insufficient evidence, the relevant inquiry is "'whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.'"[1] Furthermore, "it is the jury's function, not that of the court, to assess the weight of the

[1]Origel-Candido v. State, 114 Nev. 378, 381, 956 P.2d 1378, 1380 (1998) (quoting Jackson v. Virginia, 443 U.S. 307, 319 (1979)) (emphasis in original omitted).

evidence and determine the credibility of witnesses."[2] "Circumstantial evidence alone may sustain a conviction."[3]

Our review of the record on appeal reveals sufficient evidence to establish guilt beyond a reasonable doubt as determined by a rational trier of fact. In particular, Zachary Child, a paramedic who responded to the scene of the accident, testified that Messoria smelled strongly of alcohol and appeared to be intoxicated. Additionally, Dr. William H. Anderson, the Chief Toxicologist for the Washoe County Sheriff's Office, testified that Messoria's blood alcohol content at the time of the accident was .15, with a degree of error of .02.[4] Finally, Messoria testified that on the day of the accident he drank one shot of tequila and four beers. Accordingly, the jury's finding that Messoria was driving while under the influence is supported by sufficient evidence.

In a related argument, Messoria contends that there is insufficient evidence that he caused the accident that killed his wife. Specifically, Messoria argues that a cow in the roadway was the superseding cause of the accident. We disagree.

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[2]McNair v. State, 108 Nev. 53, 56, 825 P.2d 571, 573 (1992).

[3]Id. at 61, 825 P.2d at 576.

[4]Approximately four hours after the accident, a blood test indicated that Messoria's blood alcohol content was .08; Anderson then used a reverse extrapolation calculation to determine Messoria's blood alcohol content at the time of the accident. We conclude that Anderson's testimony was proper and note that, despite Messoria's contention, Anderson's testimony was based on underlying facts, which were entered into evidence. See NRS 50.275; NRS 50.285.

In Etcheverry v. State,[5] this court held that an intervening cause has to be the "sole cause" of the injury for it to break the chain of causation under Nevada's driving while under the influence law. Although Messoria testified he was not intoxicated while driving, and that a cow in the road was the sole cause of the accident, the jury did not believe Messoria. 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]

Messoria next contends that the district court erred at sentencing by receiving and relying on impalpable victim impact evidence. Particularly, Messoria contends that the victim's daughter improperly expressed her opinion regarding Messoria's sentence.[7] We disagree. We note that Messoria waived this issue by failing to object below.[8] Even assuming an objection was made, the district court did not err in admitting the victim impact statement with regard to sentencing. Indeed, this court has held that a victim may request that the district court

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[5]107 Nev. 782, 785, 821 P.2d 350, 351 (1991).

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

[7]At sentencing, the victim's daughter stated: "[A]n easy sentence will not teach him a lesson. I am hoping with a good amount of prison time under his belt, perhaps next time someone else will not be in the position I am in today."

[8]Smith v. State, 112 Nev. 871, 873, 920 P.2d 1002, 1002 (1996) (concluding that, by failing to object below, appellant waived contention that he was denied a fair sentencing hearing when victim asked court to impose maximum sentence).

impose a specific sentence in non-capital cases like the instant one.[9] Accordingly, Messoria's contention lacks merit.

Finally, Messoria contends that the district court abused its discretion at sentencing because the sentence is too harsh. We conclude that Messoria's contention is without merit.

This court has consistently afforded the district court wide discretion in its sentencing decision.[10] This court 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] Moreover, a sentence within the statutory limits is not cruel and unusual punishment where the statute itself is constitutional, and the sentence is not so unreasonably disproportionate as to shock the conscience.[12]

In the instant case, Messoria has failed to show that the district court relied on impalpable or highly suspect evidence or that the relevant statute is unconstitutional. Further, we note that the sentence

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[9]Randell v. State, 109 Nev. 5, 7-8, 846 P.2d 278, 280 (1993).

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

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

[12]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)).

imposed was within the parameters provided by the relevant statute.[13] Accordingly, the district court did not abuse its discretion at sentencing.

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

ORDER the judgment of conviction AFFIRMED.[14]

_____, J.
Shearing

_____, J.
Leavitt

_____, J.
Becker

cc: Hon. Brent T. Adams, District Judge
Robert Bruce Lindsay
Attorney General/Carson City
Washoe County District Attorney
Washoe District Court Clerk

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[13]See NRS 484.3795(1)(f).

[14]We have considered all proper person documents filed or received in this matter, and we conclude that the relief requested is not warranted.