IN THE SUPREME COURT OF THE STATE OF NEVADA

RONALD TERRY WILHOITE,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 39129

FILED

SEP 09 2002

JANETTE M. BLOOM
CLERK OF SUPREME COURT
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of one count each of felony driving under the influence (DUI) and misdemeanor hit and run. The district court sentenced appellant Ronald Terry Wilhoite to serve a prison term of 15 to 48 months for the DUI count and a concurrent jail term of 30 days for the hit and run count.

Wilhoite first contends that there was insufficient evidence to support the DUI conviction because the State failed to prove he was driving while intoxicated. Wilhoite also claims the evidence substantiates his claim that he drank the alcohol while at home after the accident occurred and, therefore, is not guilty of DUI. 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, Maria Trowbridge testified that Wilhoite's vehicle hit the gas pump outside of the Quick Mart, and that Wilhoite came stumbling out of the vehicle. Wilhoite then entered the Quick Mart and bought a fifth of whiskey from Missy Yi, a market employee. Yi informed Wilhoite that she had called the police to report the accident, and that he should wait for them. Wilhoite refused to wait at the scene for the police, explaining he had to take care of a sick horse.

Zane Jordan, a White Pine County Sheriff, responded to Yi's call. Jordan, who traced the license plate of the vehicle, found Wilhoite at his apartment. Jordan testified that he smelled alcohol on Wilhoite's breath, but Wilhoite denied drinking alcohol. Wilhoite then failed several field sobriety tests and was arrested. On his booking form at the jail, Wilhoite admitted drinking alcohol, but stated that he did not drink for twenty-four hours before the accident. A Washoe County toxicologist testified that Wilhoite's blood alcohol level approximately one hour and thirty minutes after the accident was .281. Although Wilhoite's defense theory was that he drank alcohol only after the accident, while at home in his apartment, the jury did not find that theory credible. It is for the jury to determine the weight and credibility to give conflicting testimony, and the jury's verdict that Wilhoite was driving while intoxicated will not be

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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.

disturbed on appeal where, as here, substantial evidence supports the verdict.[4]

Wilhoite next contends that the district court erred in using his 1996 White Pine County misdemeanor conviction to enhance his sentence to a felony because the State failed to proffer sufficient evidence of that conviction. In particular, Wilhoite argues that the court records are incomplete because the judgment of conviction was not file-stamped. We conclude that Wilhoite's contention lacks merit.

To enhance a DUI sentence to a felony based on prior convictions, the State must prove the prior DUI convictions beyond a reasonable doubt.[5] However, the State need not establish the prior DUI convictions through a formal, written judgment of conviction; other evidence, such as witness testimony or court docket sheets, may be used in support of the district court's finding of a prior DUI conviction.[6]

In the instant matter, the State proffered sufficient documentary evidence of Wilhoite's prior 1996 misdemeanor DUI conviction. In particular, the State proffered certified copies of the White Pine County Municipal Court records, including the complete case history (docket sheet), a written judgment of conviction, the guilty plea agreement, and the waiver-of-rights form. Although the judgment of conviction was not file-stamped, the case history indicates that, on June 27, 1998, Wilhoite pleaded guilty to DUI, the "[p]lea agreement was filed with the Court," and sentence was imposed. Thereafter, the case history

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

[5]See Phipps v. State, 111 Nev. 1276, 1280, 903 P.2d 820, 823 (1995).

[6]See Pettipas v. State, 106 Nev. 377, 379, 794 P.2d 705, 706 (1990).

indicates that a bench warrant was issued because Wilhoite failed to meet some of the conditions of this sentence, namely, attending the victim impact panel and paying fees and fines. Because the case history established the judgment of conviction was entered, we conclude that the State proffered sufficient evidence of Wilhoite's 1996 DUI conviction.

Finally, Wilhoite contends that reversal of his conviction is warranted because the prosecutor engaged in misconduct by belittling his defense that he drank the alcohol after the accident. In particular, after claiming there was no evidence to support the defense theory, the prosecutor remarked: "Space officers could have come down and poured whiskey down his throat. Is there any evidence of that? No, there's not." Defense counsel did not object.

As a preliminary matter, we note that Wilhoite failed to object to the alleged instance of prosecutorial misconduct. As a general rule, the failure to object to prosecutorial misconduct precludes appellate review.[7] After considering the comment challenged by Wilhoite, we further conclude that it does not rise to the level of plain or constitutional error that would warrant deviation from this general rule. Moreover, even if we were to consider Wilhoite's contention, we would conclude that the prosecutor's remark did not rise to the level of improper argument that would justify overturning his conviction.[8]

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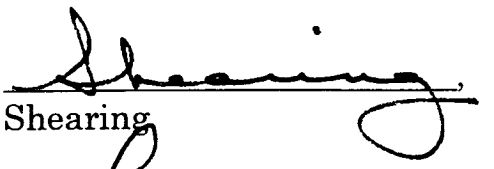
[7]Williams v. State, 103 Nev. 106, 110-11, 734 P.2d 700, 703 (1987).

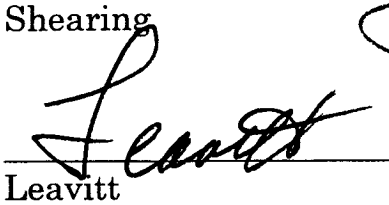
[8]See Greene v. State, 113 Nev. 157, 169-70, 931 P.2d 54, 62 (1997), modified prospectively on other grounds by Byford v. State, 116 Nev. 215, 994 P.2d 700 (2000).

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

ORDER the judgment of conviction AFFIRMED.



_____, J.
Shearing



_____, J.
Leavitt

_____, J.
Becker

cc: Hon. Dan L. Papez, District Judge
State Public Defender/Carson City
State Public Defender/Ely
Attorney General/Carson City
White Pine County District Attorney
White Pine County Clerk