

IN THE SUPREME COURT OF THE STATE OF NEVADA

KIMBERLY KAUTZ,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 41021

FILED

OCT 16 2003

ORDER OF AFFIRMANCE

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

This is an appeal from a judgment of conviction, pursuant to a guilty plea, of two counts of driving while having a prohibited substance in the blood and causing the death of another person. The district court sentenced appellant to two consecutive prison terms of 96 to 240 months. The district court further ordered appellant to pay a fine of \$2,000.00 for each count and restitution in the amount of \$8,300.00.

The charges in this case arose from an incident in which appellant was driving her pickup while under the influence of alcohol and with measurable amounts of THC in her blood. Appellant swerved and rolled the pickup. At the time of the accident, there were seven children riding in the bed of the pickup and two other children riding in the cab, without wearing seatbelts. Two of the children were killed and the others were seriously injured. Appellant was originally charged with two counts of DUI causing the death of another, and six counts of DUI causing substantial bodily harm. Appellant pleaded guilty to the two counts of DUI causing death and, in exchange, the State dropped the remaining charges.

Appellant contends that the district court violated her due process rights at the sentencing hearing by admitting unsworn testimony

from the mothers of the two victims that were killed and from the father of another of the victims. We conclude that any error involving the admission of the victim impact statements was harmless.

In Buschauer v. State,¹ this court held that due process requires that a victim must be sworn in prior to testifying at the sentencing proceeding. Here, as appellant notes, the district court failed to swear in the witnesses giving victim impact statements prior to their testimony. However, appellant failed to object or otherwise request that the witnesses be sworn in prior to testifying.² Further, our review of the transcript of the sentencing proceeding reveals that the district court's failure to swear in the witnesses prior to testifying was harmless error because there is no indication that the district court based its sentencing decision on that unsworn testimony.³ In fact, at the sentencing hearing, the district court specifically stated that the sentence was based on the fact that two children were killed and numerous others injured when appellant rolled her pickup after drinking and while having a level of THC

¹106 Nev. 890, 804 P.2d 1046 (1990).


²See Sterling v. State, 108 Nev. 391, 394, 834 P.2d 400, 402 (1992) (noting that the failure to object to the admission of witness testimony generally precludes appellate review absent plain or constitutional error).


³See Lane v. State, 110 Nev. 1156, 1166, 881 P.2d 1358, 1365 (1994), vacated on other grounds on rehearing, 114 Nev. 299, 956 P.2d 88 (1998) (recognizing that the erroneous admission of victim-impact statements is subject to harmless-error analysis); Randell v. State, 109 Nev. 5, 8, 846 P.2d 278, 280 (1993) ("The district court is capable of listening to the victim's feelings without being subjected to an overwhelming influence by the victim in making its sentencing decision.").

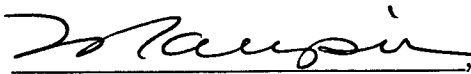
in her blood above the legal limit. Accordingly, we conclude that appellant is not entitled to a new sentencing hearing.

Having considered appellant's contention and concluded that it is without merit, we

ORDER the judgment of conviction AFFIRMED.


_____, J.
Rose


_____, J.
Leavitt


_____, J.
Maupin

cc: Hon. Archie E. Blake, District Judge
Lyon County Public Defender
Attorney General Brian Sandoval/Carson City
Lyon County District Attorney
Lyon County Clerk