IN THE COURT OF APPEALS OF THE STATE OF NEVADA

NIKKI MARIE SHELLEY,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 74746-COA

ORDER OF AFFIRMANCE

Nikki Marie Shelley appeals from a judgment of conviction entered pursuant to a jury verdict of child abuse, neglect, or endangerment. Fourth Judicial District Court, Elko County; Alvin R. Kacin, Judge.

First, Shelley claims insufficient evidence supports her conviction because the State failed to prove she acted willfully and her conduct was nonaccidental. 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 Shelley kept her pregnancy secret, she gave birth to a baby girl while home alone, and she did not call 911. Shelley wrapped the baby in towels, placed the baby in a plastic bag, and placed the plastic bag in the trunk of her car. Shelley texted her friend Whitney Ellingson, and Ellingson came to her house. Shelley told Ellingson that she did not think the baby was alive, the baby was in the trunk, and not to call 911. Ellingson was worried about Shelley's health, she loaded Shelley into the car, and she took Shelley to the emergency room.

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Shelley told the ER nurses that she had vaginal bleeding, she had passed out at home, and she had had a miscarriage. She described the miscarriage as passing "some gooey stuff," and she stated she did not know how far along she was in her pregnancy. Ellingson's mother and Shelley's mother and grandmother arrived at the ER about 45 minutes later. Ellingson told the women there was a fetus in the car. Shelley's grandmother went to the car and found a baby girl wrapped in wet towels inside a plastic bag. The baby moved when she was picked up, and she squeaked and moved her arms as she was being dried off.

Dr. Brooks Keeshin, a child-abuse-pediatrics expert, testified the baby was a full-term baby and most likely "appeared normal at birth, moving and breathing shortly after delivery." Dr. Keeshin opined that wrapping a newborn baby in towels, putting the baby in a plastic bag, and then putting the baby in the trunk of a car for a couple of hours could put the child in a position where the child could suffer physical harm. And Dr. Keeshin stated that in determining whether the baby should be diagnosed with maltreatment he "could not find a benign, plausible explanation" for placing the baby in the trunk.

We conclude a rational juror could reasonably infer from this evidence that Shelley willfully placed the child "in a situation where the child may suffer physical pain or mental suffering as a result of abuse or neglect." NRS 200.508(1); *see Smith v. State*, 112 Nev. 1269, 1276-77, 927 P.2d 14, 18 (1996) (discussing the state of mind that must exist to prove an offense under NRS 200.508), *abrogated in part on other grounds by City of Las Vegas v. Eighth Judicial Dist. Court*, 118 Nev. 859, 863, 59 P.3d 477, 480 (2002). 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, sufficient evidence supports its verdict. *See Bolden v. State*, 97 Nev. 71, 73, 624 P.2d 20, 20 (1981).

Second, Shelly claims the district court abused its discretion at sentencing by not granting her probation because a psychiatrist determined she was a low risk to reoffend, she had a plan to deal with her continued controlled substances usage, and she did not have any prior criminal convictions.

We review a district court's sentencing decision for abuse of discretion. *Chavez v. State*, 125 Nev. 328, 348, 213 P.3d 476, 490 (2009). We will not interfere with a sentence imposed by the district court "[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." *Silks v. State*, 92 Nev. 91, 94, 545 P.2d 1159, 1161 (1976). The district court's decision to grant probation is discretionary. NRS 176A.100(1)(c).

Shelley's sentence of 15 to 38 months in prison falls within the parameters of the relevant statute, *see* NRS 200.508(1)(b)(1), Shelley does not allege the district court relied on impalpable or highly suspect evidence, and the district court found that probation was not warranted because Shelley had not taken any affirmative steps to rehabilitate herself before appearing for sentencing. We conclude the district court did not abuse its discretion by declining to suspend the sentence and place Shelley on probation.

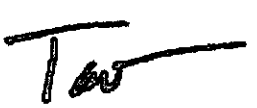
Third, Shelley claims her sentence constitutes cruel and unusual punishment because it is not proportional to the facts of her crime. She specifically argues there was no documented medical evidence that she caused any degree of substantial bodily harm to the child.

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." *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 Harmelin v. Michigan*, 501 U.S. 957, 1000-01 (1991) (plurality opinion) (explaining the Eighth Amendment does not require strict proportionality between crime and sentence; it forbids only an extreme sentence that is grossly disproportionate to the crime).

Shelly was sentenced pursuant to NRS 200.508(1)(b), which sets forth the sentencing parameters for persons convicted of child abuse, neglect, or endangerment when "substantial bodily or mental harm does *not* result to the child." (Emphasis added.) Shelley does not allege this statute is unconstitutional, and we conclude her sentence is not so grossly disproportionate to the crime as to constitute cruel and unusual punishment.

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

_____, C.J.
Silver



_____, J.
Tao

_____, J.
Gibbons

cc: Hon. Alvin R. Kacin, District Judge
Elko County Public Defender
Attorney General/Carson City
Elko County District Attorney
Elko County Clerk