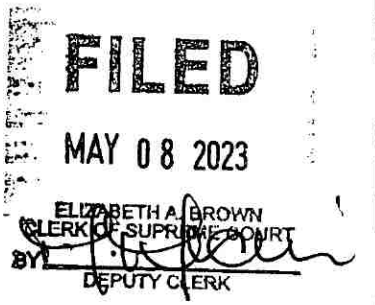
IN THE COURT OF APPEALS OF THE STATE OF NEVADA

RICHARD DUANE DOW,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 84972-COA




*ORDER OF AFFIRMANCE*

Richard Duane Dow appeals pursuant to NRAP 4(c) from a judgment of conviction entered pursuant to a jury verdict of driving or being in actual physical control of a motor vehicle while being under the influence of an intoxicating liquor (DUI) with a prior felony DUI conviction. Ninth Judicial District Court, Douglas County; Thomas W. Gregory, Judge.

First, Dow argues that the sentencing structures found in NRS 484C.110 and NRS 484C.410 amount to cruel and unusual punishment.[1] Regardless of its severity, "[a] sentence 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

[1]NRS 484C.110 sets out the prohibited conduct but is not a sentencing statute.



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require strict proportionality between crime and sentence; it forbids only an extreme sentence that is grossly disproportionate to the crime).

Dow contends that his prison sentence imposed pursuant to NRS 484C.410 is unconstitutional because once a defendant has been convicted of a felony DUI, it requires any subsequent DUI to be enhanced to a felony with a mandatory prison sentence regardless of the circumstances of the subsequent DUI. *See* NRS 484C.410(1).

We review the constitutionality of statutes de novo. *Silvar v. Eighth Judicial Dist. Court*, 122 Nev. 289, 292, 129 P.3d 682, 684 (2006). "Statutes are presumed to be valid, and the challenger bears the burden of showing that a statute is unconstitutional." *Tam v. Eighth Judicial Dist. Court*, 131 Nev. 792, 796, 358 P.3d 234, 237-38 (2015) (internal quotation marks omitted). "In order to meet that burden, the challenger must make a clear showing of invalidity." *Id.* at 796, 358 P.3d at 238 (internal quotation marks omitted).

A sentence is not rendered grossly disproportionate to the offense merely because a recidivist statute enhances the length of a defendant's sentence and thereby imposes upon a criminal defendant a harsher sentence than what he might have otherwise received. *See Ewing v. California*, 538 U.S. 11, 29 (2003) (plurality opinion) (explaining "the State's interest is not merely punishing the offense of conviction, or the triggering offense," as there is an additional interest "in dealing in a harsher manner with those who by repeated criminal acts have shown that they are simply incapable of conforming to the norms of society as established by its criminal law" (internal quotation marks omitted)). Moreover, enhanced penalties based upon a defendant's criminal history may be "justified by the

State's public safety interest in incapacitating and deterring recidivist felons." *Id.*

Nevada has a legitimate interest in dealing with both the punishment for the commission of a DUI and in deterring recidivism for such offenses. *See Lader v. Warden*, 121 Nev. 682, 691, 120 P.3d 1164, 1169 (2005) (recognizing that "the interest of protecting the public from recidivist DUI offenders support[s] an increased punishment"). In providing that a person previously convicted of a felony DUI shall be punished with a mandatory prison term for a subsequent DUI, the Legislature plainly expressed its intent for persons who have previously committed a felony DUI to face felony treatment for any subsequent DUIs that those persons may commit.[2] *See Bd. of Parole Comm'rs v. Second Judicial Dist. Court (Thompson)*, 135 Nev. 398, 404, 451 P.3d 73, 79 (2019) ("When the language of a statute is plain and unambiguous, and its meaning clear and unmistakable, this court must give effect to that plain meaning as an expression of legislative intent without searching for meaning beyond the statute itself." (internal quotation marks omitted)).

In light of Nevada's legitimate interest in dealing with both the punishment for the offense and in deterring recidivism, we conclude that the punishment provided by NRS 484C.410 does not cause sentences that are grossly disproportionate to the crimes committed by recidivist DUI offenders. Dow thus fails to meet his burden to demonstrate that NRS

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[2]NRS 484C.410(1) provides that a person who has previously been convicted of "[a] violation of NRS 484C.110 or 484C.120 that is punishable as a felony . . . and who violates the provisions of NRS 484C.110 or 484C.120 is guilty of a category B felony and shall be punished by imprisonment in the state prison for a minimum term of not less than 2 years and a maximum term of not more than 15 years . . . ."

484C.410 is clearly unconstitutional. Therefore, Dow is not entitled to relief based on this claim.

Second, Dow argues the district court abused its discretion by failing to exclude the results of Dow's breath tests. Dow sought exclusion of the results on the grounds that the trooper's failure to comply with all of the intoxilyzer's checklist steps made the results of the test inherently unreliable. We review a district court's decision to admit or exclude evidence for an abuse of discretion. *Mclellan v. State*, 124 Nev. 263, 267, 182 P.3d 106, 109 (2008).

While NAC 484C.130 requires the operator of a breath test machine (here, an intoxilyzer) to follow a checklist when administering breath tests, it does not follow that the results of the breath test are inadmissible if the checklist is not followed. *See* NRS 484C.240(2). If the testing device has been properly certified, it is presumed that a person who is certified to operate the device in fact operated the device properly. *See* NRS 484C.630(3). Prior to the admission at trial of the breath test results, the trooper testified that he was certified to perform the breath tests with the intoxilyzer. The State's expert testified that the intoxilyzer had been calibrated and certified as operating properly before Dow was tested and that internal safeguards within the intoxilyzer indicated the tests were accurate. Therefore, the results of Dow's breath tests were not inherently unreliable despite the trooper's failure to comply with all of the checklist steps, and we conclude the district court did not abuse its discretion by admitting the results. Therefore, Dow is not entitled to relief based on this claim.

Third, Dow argues the district court plainly erred by failing to instruct the jury that, like any other testimony or evidence, it was free to

reject the State's expert's testimony. Dow did not request such an instruction below, and we therefore review this claim for plain error. *See Valdez v. State*, 124 Nev. 1172, 1190, 196 P.3d 465, 477 (2008). To prevail on plain error review, Dow must demonstrate that: (1) there was an error; (2) the error is plain, meaning that it is clear under current law from a casual inspection of the record; and (3) the error affected his substantial rights. *Jeremias v. State*, 134 Nev. 46, 50, 412 P.3d 43, 48 (2018). "[A] plain error affects a defendant's substantial rights when it causes actual prejudice or a miscarriage of justice (defined as a 'grossly unfair' outcome)." *Id.* at 51, 412 P.3d at 49.

While expert testimony is not binding on the trier of fact and can be accepted or rejected as the jurors see fit, *Allen v. State*, 99 Nev. 485, 488, 665 P.2d 238, 240 (1983), Dow provides no authority that the district court was required to sua sponte instruct the jury as Dow contends. Dow thus fails to demonstrate error plain from the record. *See Maresca v. State*, 103 Nev. 669, 673, 748 P.2d 3, 6 (1987) (explaining that this court need not consider an appellant's argument that is not cogently argued or lacks the support of relevant authority). In addition, not only does Dow fail to argue actual prejudice or a miscarriage of justice, but the jury was instructed that they were the "sole judges" of witness credibility and the weight and reasonableness of witness testimony, and we presume that juries follow their instructions. *See Lisle v. State*, 113 Nev. 540, 558, 937 P.2d 473, 484 (1997). Dow thus fails to demonstrate that the alleged error affected his substantial rights. Therefore, we conclude Dow is not entitled to relief based on this claim.

Finally, Dow argues the State chilled his exercise of his right to testify by noticing its intent to impeach him with his prior felony DUI

conviction if he testified. The State may impeach a witness with proof of prior felony DUI convictions. *See Whisler v. State*, 121 Nev. 401, 406-07, 116 P.3d 59, 62-63 (2005); NRS 50.095. However, in order to preserve the issue for appeal where a defendant does not testify, the defendant "must make an offer of proof to the trial court outlining his intended testimony." *Warren v. State*, 121 Nev. 886, 894-95, 124 P.3d 522, 528 (2005). Dow made no offer of proof regarding his intended testimony, and it is unclear from the record that he would have testified if not for the State's ability to impeach him with the prior conviction at issue. *See id.* at 895, 124 P.3d at 528. Therefore, we decline to review this unpreserved error on appeal. *See Valdez*, 124 Nev. at 1190, 196 P.3d at 477 (recognizing appellate review of unpreserved error as discretionary).

For the foregoing reasons, we

ORDER the judgment of conviction AFFIRMED.

_____, C.J.
Gibbons

_____, J.
Bulla

_____, J.
Westbrook

cc: Hon. Thomas W. Gregory, District Judge
Karla K. Butko
Attorney General/Carson City
Douglas County District Attorney/Minden
Douglas County Clerk