IN THE COURT OF CRIMINAL APPEALS FOR THE STATE OF OKLAHOMA

CAROLE JEAN ARNOLD, Appellant, -vs- STATE OF OKLAHOMA, Appellee.	)	NOT FOR PUBLICATION No. F-2002-653

SUMMARY OPINION

STRUBHAR, J.:

Appellant, Carole Jean Arnold, was tried by jury in the District Court of Payne County, Case No. CF-2001-397, and convicted of Count I - Driving While Under the Influence and Count II - Driving While License is Suspended. The jury set punishment at five years imprisonment and a $500.00 fine on Count I and one year imprisonment and a $500.00 fine on Count II. District Judge Donald L. Worthington, who presided at trial, sentenced Appellant accordingly, but suspended the fines. From this judgment and sentence, she appeals.

After thorough consideration of the entire record before us on appeal, including the original record, transcripts, and briefs of the parties, we affirm the judgment and modify the sentence. The following propositions of error were considered:

I. The evidence is insufficient to support the verdict of driving while intoxicated;

II. The trial court erred by failing to correctly instruct the jury as to available punishment;

III. The trial court erred by allowing the results of the Horizontal Gaze Nystagmus test to be admitted into evidence at trial; and

IV. The sentence was excessive.

As to Proposition I, we find the trial evidence was sufficient for a rational trier of fact to conclude Appellant was under the influence while driving her car. *See Spuehler v. State,* 709 P.2d 202, 203-04 (Okl.Cr.1985).

As to Proposition II, we find the trial court erred in instructing the jury by only giving the punishment option of imprisonment and fine. 47 O.S.2001, § 11-902(C)(2). Although defense counsel did not object to the improper instruction, we have found incorrect instructions on the applicable range of punishment is fundamental error that cannot be waived. *Taylor v. State,* 45 P.3d 103, 105 n. 3; *Scott v. State,* 808 P.2d 73, 77 (Okl.Cr.1991); *Turner v. State,* 803 P.2d 1152, 1159 (Okl.Cr.1990), *cert. denied,* 501 U.S. 1233, 111 S.Ct. 2859, 115 L.Ed.2d 1026 (1991). When the minimum punishment has been incorrect, this Court has in the past modified the sentence. *See Taylor,* 45 P.3d at 105 n. 3; *Turner,* 803 P.2d at 1159. Accordingly, we modify Appellant's sentence to two years imprisonment.

As to Proposition III, we find the trial court erred in admitting Folden's testimony regarding the results of Appellant's HGN test without requiring the state to satisfy the criteria for the admission of scientific evidence as set forth in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993). *Yell v. State,* 856 P.2d 996, 997 (Okl.Cr.1993).

However, we find that the admission of Folden's testimony regarding the HGN testing and its results did not affect the outcome of Appellant's trial. The jury heard other evidence from which it reasonably could have found that Appellant was under the influence while operating her vehicle. The officers involved testified Appellant's breath smelled of alcohol, her speech was slightly slurred, her eyes were bloodshot and she was unsteady on her feet. Appellant admitted she had consumed two mixed drinks and two beers. In addition to the Horizontal Gaze Nystagmus test, Appellant also failed the walk and turn test and the one leg stand test. The field sobriety test administrator concluded that Appellant's demeanor and failure of the sobriety tests indicated that she was under the influence while operating her vehicle. Based on this evidence, we find that, absent the HGN testimony, the result of Appellant's trial would not have been different and therefore, the court's improper admission of the HGN testimony was harmless.

In Proposition IV, Appellant claims her sentence is excessive. As we have found modification is warranted due to instructional error, we find no relief is required on this claim.

DECISION

The Judgment of the trial court is **AFFIRMED.** The sentence imposed is hereby **MODIFIED** to two (2) years imprisonment.

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OPINION BY: STRUBHAR, J.
JOHNSON, P.J.: CONCUR
LILE, V.P.J.: CONCUR IN PART/DISSENT IN PART
LUMPKIN, J.: CONCUR IN RESULTS
CHAPEL, J.: CONCUR

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LILE, VICE PRESIDING JUDGE: CONCURS IN PART/DISSENTS IN PART

I would not modify the sentence. Here the jury gave the maximum sentence available, and it is clear that Appellant was not harmed by failure to instruct the jury that they could have ordered treatment instead. Further, this Court has previously authorized limited testimony concerning the horizontal gaze nystagmus test in *Yell v. State*, 1993 OK CR 34, 856 P.2d 996. Such evidence is neither novel nor scientific and *Daubert* does not apply.