IN THE SUPREME COURT OF THE STATE OF NEVADA

RYAN JAMES LARUE,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 53996

FILED

FEB 03 2010

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of two counts of theft and one count of injury to or destruction of property (gross misdemeanor). Sixth Judicial District Court, Humboldt County; Michael Montero, Judge.

Insufficient Evidence

Appellant Ryan James Larue contends that there was insufficient evidence adduced at trial to support his conviction for injury to or destruction of property (gross misdemeanor) because the cost to repair the damaged fence surrounding the victim's business did not exceed $250, and there was insufficient evidence to support his theft convictions because he never intended to deprive the victim of his property. These claims lack merit because the evidence, when viewed in the light most favorable to the State, is sufficient to establish guilt beyond a reasonable doubt as determined by a rational trier of fact. McNair v. State, 108 Nev. 53, 56, 825 P.2d 571, 573 (1992); Jackson v. Virginia, 443 U.S. 307, 319 (1979). We conclude that a rational juror could reasonably infer from the victim's testimony that the cost associated with repairing the fence was at least $250. See NRS 206.310 (defining injury to property); NRS 193.155

(providing for gross misdemeanor punishment if the value of the loss is $250 or more but less than $5,000); Romero v. State, 116 Nev. 344, 348, 996 P.2d 894, 897 (2000) (holding that when property is damaged rather than destroyed, "the appropriate measure of damages is the cost related to repair or restore the property"). We also conclude that a rational jury could reasonably infer that Larue intended to deprive the victim of the ATV and the dirt bike when he attempted to drive the ATV through the victim's fence and when he attempted to remove the dirt bike from the yard by throwing it over the damaged fence. See NRS 205.0832(1)(c) (defining actions which constitute theft); Buchanan v. State, 119 Nev. 201, 217, 69 P.3d 694, 705 (2003) (circumstantial evidence is enough to support a conviction). 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, substantial evidence supports the verdict. See Bolden v. State, 97 Nev. 71, 73, 624 P.2d 20, 20 (1981); Walker v. State, 91 Nev. 724, 726, 542 P.2d 438, 439 (1975).[1]

Prosecutorial Misconduct

Larue contends that the prosecutor committed misconduct during closing arguments by making a "Golden Rule" argument. Because Larue did not object to the prosecutor's allegedly improper comment, we review for plain error. See NRS 178.602; Parker v. State, 109 Nev. 383, 391, 849 P.2d 1062, 1067 (1993). We conclude that no plain error occurred

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[1]To the extent that Larue also asserts that the district court erred by denying his motion to dismiss the charges, this claim lacks merit because a mid-trial motion to dismiss is not authorized in Nevada. See NRS 175.381(1); State v. Combs, 116 Nev. 1178, 1180, 14 P.3d 520, 521 (2000).

and no relief is warranted because the remarks in question did not ask the jury to place themselves in the shoes of the victim and therefore did not constitute a "Golden Rule" violation.

Cruel and Unusual Punishment

Larue asserts that his sentence constitutes cruel and unusual punishment because it was manifestly disproportionate to the seriousness of his offense and he should have been sentenced to probation instead of a prison term. We will not disturb a district court's sentencing determination "absent a showing of abuse of discretion." Houk v. State, 103 Nev. 659, 664, 747 P.2d 1376, 1379 (1987). The sentences imposed are within the statutory guidelines. See NRS 193.130(2)(b), (c); NRS 193.140; NRS 193.155(2); NRS 205.0835(3), (4); and NRS 206.310. Additionally, the sentences are not "'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)). Finally, Larue does not assert that the relevant statutes are unconstitutional, id., or that the district court relied on impalpable or highly suspect evidence, Silks v. State, 92 Nev. 91, 94, 545 P.2d 1159, 1161 (1976). Therefore, we conclude that the sentences imposed do not constitute cruel and unusual punishment and the district court did not abuse its discretion when imposing sentence.

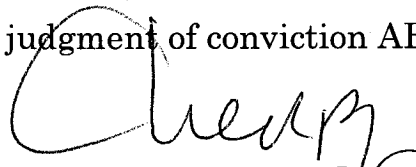
Restitution

Larue contends the district court improperly ordered him to pay restitution in the amount of $877.86 because this amount exceeded the actual costs the victim paid to repair the damaged fence. We conclude that Larue waived this issue by failing to object at sentencing to the

amount of restitution imposed. See Martinez v. State, 115 Nev. 9, 12, 974 P.2d 133, 135 (1999).

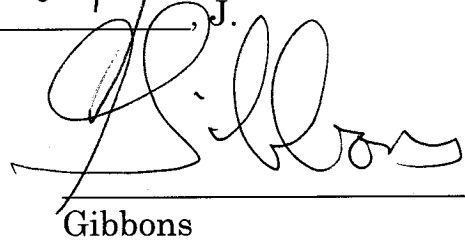
Having considered Larue's contentions and concluded that they lack merit or were waived, we

ORDER the judgment of conviction AFFIRMED.



_____, J.
Cherry

_____, J.
Saitta



_____, J.
Gibbons

cc: Hon. Michael Montero, District Judge
Humboldt County Public Defender
Attorney General/Carson City
Humboldt County District Attorney
Humboldt County Clerk