

IN THE SUPREME COURT OF THE STATE OF NEVADA

MICHAEL JOHN MOE,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 54025

FILED

NOV 05 2009

ORDER OF AFFIRMANCE

THACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY *[Signature]*
DEPUTY CLERK

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of burglary. Second Judicial District Court, Washoe County; Brent T. Adams, Judge. Appellant Michael John Moe raises two issues on appeal.

Moe first argues that the district court abused its discretion in refusing to dismiss Juror Vanvalkenburg for cause. This claim does not warrant relief for two reasons. First, the district court did not abuse its discretion because the record supports the conclusion that Juror Vanvalkenburg could lay aside his opinion that Moe had a guilty expression on his face and that his opinion would not prevent or substantially impair the performance of his duties as a juror. See Nelson v. State, 123 Nev. 534, 543-44, 170 P.3d 517, 524 (2007) (“The test for determining if a veniremember should be removed for cause is whether a veniremember’s views ‘would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.’” (quoting Weber v. State, 121 Nev. 554, 580, 119 P.3d 107, 125 (2005))); Blake v. State, 121 Nev. 779, 795, 121 P.3d 567, 577 (2005) (explaining that rulings on for-cause challenges to prospective jurors

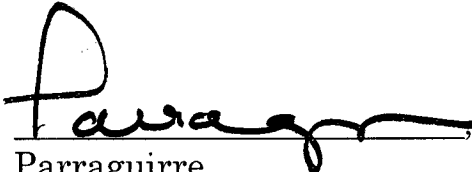
involve factual determinations and therefore the “district court enjoys broad discretion in ruling on challenges for cause” and that “[i]t is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court” (quoting Irvin v. Dowd, 366 U.S. 717, 723 (1961))). Second, even assuming that the district court abused its discretion, Moe has not demonstrated prejudice based on his being forced to use a peremptory challenge to remove Juror Vanvalkenburg. In particular, although Moe explains that he exhausted his peremptory challenges and would have used the peremptory challenge expended on Juror Vanvalkenburg to challenge another juror who was seated on the petit jury, Juror Goicoechea, he has not demonstrated that Juror Goicoechea or any other member of the petit jury was unfair or biased. See Blake, 121 Nev. at 796, 121 P.3d at 578 (“If the jury actually seated is impartial, the fact that a defendant had to use a peremptory challenge to achieve that result does not mean that the defendant was denied his right to an impartial jury.”).

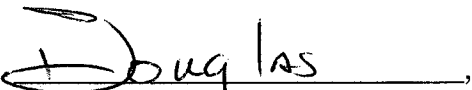
Moe next argues that the district court abused its discretion by adjudicating him as a habitual criminal based on stale convictions for non-violent offenses in other states. This claim also does not warrant relief. The district court adjudicated Moe as a habitual criminal under NRS 207.010 and sentenced him to serve a term of 10 to 25 years in prison. The prior felony convictions proved at sentencing support habitual criminal adjudication under NRS 207.010. And the record demonstrates that, in electing not to exercise its discretion to dismiss the habitual criminal allegation, the district court considered appropriate facts, including the non-violent nature and remoteness of the prior felony convictions and Moe’s subsequent history of multiple misdemeanor

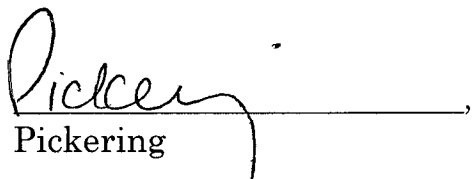
convictions involving similar conduct. See O'Neill v. State, 123 Nev. 9, 16, 153 P.3d 38, 43 (2007) (“[A] district court may consider facts such as a defendant’s criminal history, mitigation evidence, victim impact statements and the like in determining whether to dismiss [a habitual criminal] count.”), cert. denied, 128 S. Ct. 153 (2007); Arajakis v. State, 108 Nev. 976, 983, 843 P.2d 800, 805 (1992) (“NRS 207.010 makes no special allowance for non-violent crimes or for the remoteness of convictions; instead, these are considerations within the discretion of the district court.”). We perceive no abuse of discretion in the district court’s decision.

Having considered the issues raised on appeal and concluded that they lack merit, we

ORDER the judgment of conviction AFFIRMED.


Parraguirre J.


Douglas J.


Pickering J.

cc: Hon. Brent T. Adams, District Judge
Washoe County Public Defender
Attorney General Catherine Cortez Masto/Carson City
Washoe County District Attorney Richard A. Gammick
Washoe District Court Clerk