IN THE SUPREME COURT OF THE STATE OF NEVADA

GONZALO ALBELO-GONZALES,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 56384

FILED

FEB 09 2011

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

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction entered pursuant to a jury verdict of one count each of burglary and petit larceny. Eighth Judicial District Court, Clark County; Stefany Miley, Judge.

Jury venire

Appellant Gonzalo Albelo-Gonzales contends that the district court violated his constitutional right to have a jury venire selected from a fair cross section of the community by denying his motion to strike the entire venire. The defendant has the burden to demonstrate a prima facie violation of the fair-cross-section requirement by showing (1) the excluded group is distinctive in the community, (2) the group's representation in jury venires does not fairly and reasonably reflect its presence in the community, and (3) the group's underrepresentation in jury venires is caused by a systematic exclusion of the group. Williams v. State, 121 Nev. 934, 940, 125 P.3d 627, 631 (2005). Our review of the record reveals that Albelo-Gonzales failed to provide any evidence to support his claim that the jury commissioner's use of Department of Motor Vehicle lists systematically excludes Hispanics and African Americans from the jury selection process. See id. at 941-42, 125 P.3d at 632. Accordingly, we

conclude that the district court did not err by denying Albelo-Gonzales' motion to strike the entire venire.

Sufficiency of evidence

Albelo-Gonzales contends that there was insufficient evidence to support his conviction for burglary because the State failed to prove he intended to commit larceny at the time he entered the store. We review the evidence in the light most favorable to the prosecution and determine whether any rational juror could have found the essential elements of the crime beyond a reasonable doubt. McNair v. State, 108 Nev. 53, 56, 825 P.2d 571, 573 (1992). Here, the jury heard testimony that Albelo-Gonzales was in Wal-Mart, concealed products with an approximate value of $150 in his jacket and backpack, and was detained after he passed all of the points of payment. Albelo-Gonzales had $7.01 on his person and told the arresting officer that he came to Wal-Mart to steal some items that he intended to sell on the street. We conclude that a rational juror could reasonably infer from this evidence that Albelo-Gonzales entered the store with the intent to commit larceny. See NRS 193.200 (intent); NRS 205.060(1); Sharma v. State, 118 Nev. 648, 659, 56 P.3d 868, 874 (2002) (observing that "intent . . . is inferred by the jury from the individualized, external circumstances of the crime"). 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 the verdict. Bolden v. State, 97 Nev. 71, 73, 624 P.2d 20, 20 (1981).

Habitual criminal adjudication

Albelo-Gonzales contends that the district court abused its discretion by adjudicating him a habitual criminal because the State failed

to prove that punishment under NRS 207.010 was warranted, the district court did not make a "just and proper" finding, the prior judgments of conviction were not made part of the record, and the prior judgments of conviction were stale and for non-violent crimes. However, the record reveals that the State met its burden of proof when it filed certified copies of Albelo-Gonzales' prior felony convictions in the district court, the district court considered the parties' arguments and Albelo-Gonzales' long history of criminal recidivism, and the district court declined to dismiss the habitual criminal count. See NRS 207.016(5); O'Neill v. State, 123 Nev. 9, 15, 153 P.3d 38, 42 (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 conclude that the district court did not abuse its discretion in this regard.

Albelo-Gonzales also contends that the district court erred by failing to conduct a jury trial on the habitual criminal count. However, the district court was not required to submit the habitual criminal count to a jury because habitual criminal adjudication does not require fact-finding beyond the fact of a prior conviction. See NRS 207.010(1); Apprendi v. New Jersey, 530 U.S. 466, 490 (2000); O'Neill, 123 Nev. at 16, 153 P.3d at 43.

Albelo-Gonzales further contends that his 5- to 20-year prison sentence for a single incident of shoplifting shocks the conscience and constitutes cruel and unusual punishment. Because Albelo-Gonzales does not argue that the habitual criminal punishment statute is unconstitutional, his sentence is within the parameters of that statute, and we are not convinced that the sentence is so grossly disproportionate

to the gravity of the offense (burglary) and Abelo-Gonzales' history of recidivism as to shock the conscience, we conclude the sentence does not violate the constitutional proscriptions against cruel and unusual punishment. See NRS 207.010(1)(a); Ewing v. California, 538 U.S. 11, 29 (2003) (plurality opinion); Harmelin v. Michigan, 501 U.S. 957, 1000-01 (1991) (plurality opinion); Blume v. State, 112 Nev. 472, 475, 915 P.2d 282, 284 (1996); Glegola v. State, 110 Nev. 344, 348, 871 P.2d 950, 953 (1994).

Prosecutorial misconduct

Albelo-Gonzales contends that he was deprived of a fair trial as the result of multiple acts of prosecutorial misconduct. Albelo-Gonzales objected to the prosecutor's comment that "The thief is worried about his stuff getting stolen. That's just funny," but his objection was overruled. Albelo-Gonzales did not object to the prosecutor's comment that "He's got somewhat of a brain in his head." We have reviewed the prosecutor's comments in context. We conclude that the first comment constitutes harmless error because there is overwhelming evidence of Albelo-Gonzales' guilt and the second comment does not constitute error. See Valdez v. State, 124 Nev. 1172, 1188-90, 196 P.3d 465, 476-77 (2008); McGuire v. State, 100 Nev. 153, 158, 677 P.2d 1060, 1064 (1984) ("Disparaging comments have absolutely no place in a courtroom, and clearly constitute misconduct."). Accordingly, Albelo-Gonzales is not entitled to relief on this contention.

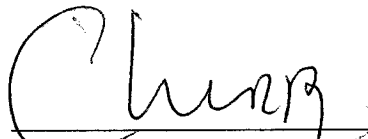
Impeachment evidence

Albelo-Gonzales contends that the district court abused its discretion by denying his motion in limine to preclude the State from using a 1997 felony conviction as impeachment evidence if he were to

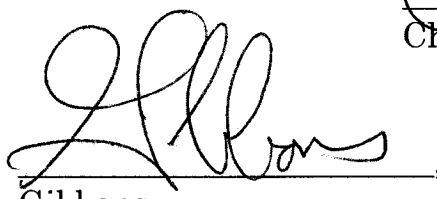
testify. However, Albelo-Gonzales did not preserve this issue for appeal and he has not demonstrated plain error because he did not testify, he did not make an offer of proof to the district court outlining his intended testimony, it is not clear from the record that he would have testified but for the district court's in limine ruling, and he has not shown that his substantial rights were affected. See NRS 178.602; Warren v. State, 121 Nev. 886, 894-95, 124 P.3d 522, 528 (2005); Green v. State, 119 Nev. 542, 545, 80 P.3d 93, 95 (2003).

Having considered Albelo-Gonzales' contentions and concluded that he is not entitled to relief, we

ORDER the judgment of conviction AFFIRMED.



_____, J.
Cherry



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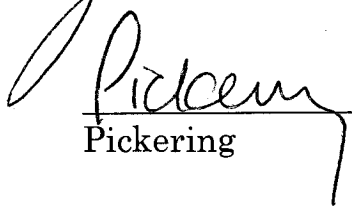

_____, J.
Pickering

cc: Hon. Stefany Miley, District Judge
Clark County Public Defender
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk