IN THE SUPREME COURT OF THE STATE OF NEVADA

ARMANDO TORRES GONZALES A/K/A ARMONDO TORRES GONZALES,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 40781

FILED

JUN 06 2003

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY L. Richards
CHIEF DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of one count of battery with the use of a deadly weapon. The district court sentenced appellant to imprisonment for a maximum term of 100 months with a minimum parole eligibility of 40 months. The court further ordered that appellant receive credit for 365 days of presentence incarceration and pay restitution, a DNA testing fee and an administrative assessment fee.

Appellant first contends that his right to be tried by a jury selected from a venire constituting a fair cross section of the community was violated.[1] Appellant alleges that he is black and Hispanic and that no people of black heritage and only five people with Hispanic surnames were among the 120 prospective jurors summoned to serve on the venire from which his jury was selected. Appellant further complains that none of the venire members with Hispanic surnames were called as prospective jurors for his petit jury. Appellant admits, however, that the jury venire was

[1]See Holland v. Illinois, 493 U.S. 474 (1990); Duren v. Missouri, 439 U.S. 357 (1979); Taylor v. Louisiana, 419 U.S. 522 (1975); Evans v. State, 112 Nev. 1172, 1186-87, 926 P.2d 265, 274-75 (1996).

properly composed of qualified electors of the county randomly selected by computer pursuant to NRS 6.045(2). Moreover, he does not challenge the method in which his petit jurors were selected from the venire. Further, appellant concedes that he did not object to any perceived violation until after the jury returned its verdict. He contends, however, that the issue was preserved by objection at sentencing when counsel argued in part that appellant believed the jury "was not of his peers" and he should have had at least six black jurors.

We conclude that appellant failed to preserve this issue for appeal by making a timely objection below.[2] Even assuming, *arguendo*, that appellant had preserved the issue, his allegations are insufficient to show a constitutional violation. There is no constitutional requirement that the petit jury "actually chosen must mirror the community and reflect the various distinctive groups in the population."[3] Moreover, appellant has failed to set forth any allegations or evidence to show that the under representation of any distinctive group, "generally, and on his venire, was due to their systematic exclusion in the jury-selection process."[4]

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[2]Cf. Rhyne v. State, 118 Nev. ___, ___ & n.26, 38 P.3d 163, 170 & n.26 (2002) (holding that failure to object in the district court to exclusion of jurors as unconstitutional pursuant to Batston v. Kentucky, 476 U.S. 79 (1986), precludes raising the issue on appeal); Hanley v. State, 83 Nev. 461, 464, 434 P.2d 440, 442 (1967) (recognizing that failure to timely challenge jurors when grounds for disqualification are known results in waiver of the right to object).

[3]Taylor, 419 U.S. at 538; see also Holland, 493 U.S. at 483.

[4]Duren, 439 U.S. at 366.

Therefore, he failed to meet his burden of demonstrating a prima facie case of violation of the fair-cross-section requirement.[5]

Appellant next argues that the district court erred in refusing his request to enforce a post-verdict plea agreement to enter a guilty plea to assault with a deadly weapon and in refusing to accept his proffered guilty plea to the assault charge. We disagree.

The record shows that appellant moved for a mistrial after the jury returned its verdict finding him guilty of battery with a deadly weapon. While his motion was pending, the State offered to allow appellant to enter a guilty plea to the lesser charge of assault with a deadly weapon. However, when appellant asserted his intent to enter a guilty plea under the agreement, the State indicated that it did not intend to follow through with the agreement. The State explained to the district court that it had acted in haste when it made the ill-considered plea bargain offer, having initially misperceived the risk of a potential mistrial. We conclude that under these circumstances appellant cannot demonstrate error.

A criminal defendant does not have an absolute right under the Constitution to have his guilty plea to any particular charge accepted by the court.[6] Nevada courts have discretion to refuse a guilty plea.[7] As

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[5]See Duren, 439 U.S. at 364; Evans, 112 Nev. at 1186-87, 926 P.2d at 275.

[6]North Carolina v. Alford, 400 U.S. 25, 38 n.11 (1970); Jefferson v. State, 108 Nev. 953, 954, 840 P.2d 1234, 1235 (1992).

[7]NRS 174.035(1); Sandy v. District Court, 113 Nev. 435, 439, 935 P.2d 1148, 1150 (1997); Sturrock v. State, 95 Nev. 938, 940-41, 604 P.2d 341, 343 (1979).

argued by appellant, when parties reach a plea agreement, the district court must seriously consider the proffered plea and demonstrate a reasoned exercise of discretion if rejecting the plea.[8] However, here, the State had withdrawn from the plea agreement. Where there is no plea agreement, a district court may properly refuse a guilty plea to charges that deviate from the charges sought by the State.[9] "[A]ccepting such a unilateral guilty plea undermines prosecutorial discretion in charging and the state's interest in obtaining a conviction on the other charges."[10] Moreover, a prosecutor can withdraw a plea bargain offer anytime before a defendant pleads guilty, so long as the defendant has not detrimentally relied on the offer.[11] Here, the plea agreement remained wholly executory at the time the State withdrew its offer. The jury had already returned a guilty verdict, and appellant has not shown that he detrimentally relied on the offer. Therefore, we conclude that the district court did not err in declining to enforce the plea agreement and in refusing to accept appellant's proffered guilty plea.[12]

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[8]See Sandy, 113 Nev. at 439, 935 P.2d at 1150; Sparks v. State, 104 Nev. 316, 322, 759 P.2d 180, 184 (1988).

[9]Cf. Jefferson, 108 Nev. 953, 954, 840 P.2d 1234, 1235 (1992) (upholding district court's refusal of guilty plea where there was no plea agreement allowing guilty plea to only one charge which was lesser included offense of another charge); see also State of Nevada v. Dist. Ct., 116 Nev. 127, 138 n.10, 994 P.2d 692, 699 n.10 (2000).

[10]State of Nevada v. Dist. Ct., 116 Nev. at 138 n.10, 994 P.2d at 699 n.10.

[11]State v. Crockett, 110 Nev. 838, 845, 877 P.2d 1077, 1081 (1994).

[12]Cf. State v. Williams, 648 A.2d 1148, 1153 (N.J. Super. Ct. App. Div. 1994) (concluding that "vacating a valid jury verdict to allow the

*continued on next page . . .*

Having considered appellant's contentions and concluded that they lack merit, we

ORDER the judgment of the district court AFFIRMED.

_____, J.
Shearing

_____, J.
Leavitt

_____, J.
Becker

cc: Hon. John P. Davis, District Judge
Nye County Public Defender
Attorney General Brian Sandoval/Carson City
Nye County District Attorney/Tonopah
Nye County Clerk

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. . . *continued*
defendant to enter into an expired plea offer is contrary to public policy and the sound administration of justice and constitute[s] a miscarriage of justice").