

IN THE SUPREME COURT OF THE STATE OF NEVADA

WILLIAM JIMMI PEREZ,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 53634

**FILED**

MAR 11 2010

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

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of driving under the influence of intoxicating liquor. Seventh Judicial District Court, White Pine County; Robert E. Estes, Judge.

Appellant William Jimmi Perez first argues that his conviction for felony DUI should be reversed because his prior felony DUI conviction was never proved or entered into evidence during the sentencing hearing. We conclude that this argument lacks merit. The prior felony DUI was entered into evidence during the preliminary hearing, and the evidence from the preliminary hearing was transferred to the district court. When the prior conviction was mentioned during sentencing, Perez did not object or otherwise challenge the prior conviction.<sup>1</sup> Under the circumstances, we conclude that the State proved the existence of the prior conviction, and

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<sup>1</sup>We remind the State that NRS 484.3792(3) requires proof of the prior conviction and that the better practice is to present a certified copy of the prior conviction at sentencing rather than relying on the evidence offered at the preliminary hearing or the defendant's waiver.

the conviction was properly used to enhance the instant conviction to a felony. See Hudson v. Warden, 117 Nev. 387, 394-95, 22 P.3d 1154, 1159 (2001) (“In order to satisfy the requirements of due process when seeking to enhance an offense, the State must prove the prior convictions at or anytime before sentencing. Additionally, . . . a defendant may stipulate to or waive proof of prior convictions.” (emphasis added)).<sup>2</sup>

Perez next argues that the judgment should be reversed because the results of the preliminary breath test were admitted into evidence and argued to the jury in violation of NRS 484.382(3), which provides that “[t]he result of the preliminary test must not be used in any criminal action, except to show there were reasonable grounds to make an arrest.” Because Perez did not object below, we will reverse only upon a showing of plain error. See NRS 178.602; Green v. State, 119 Nev. 542, 545, 80 P.3d 93, 94-95 (2003). There was no plain error. Neither the

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<sup>2</sup>To the extent that Perez suggests that the prior conviction must be treated as an element of the offense, we disagree and are not inclined to predict a change in Supreme Court precedent on that question. See Apprendi v. New Jersey, 530 U.S. 466, 489-90 (2000) (expressing some concern with the continuing validity of prior Court decision allowing judge to determine existence of prior conviction for enhancement purposes but holding that “[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt” (emphasis added)); see also United States v. Booker, 543 U.S. 220 (2005) (“[W]e reaffirm our holding in Apprendi: Any fact (other than a prior conviction) which is necessary to support a sentence exceeding the maximum authorized by the facts established by a plea of guilty or a jury verdict must be admitted by the defendant or proved to a jury beyond a reasonable doubt” (emphasis added)).

challenged testimony nor the prosecutor's arguments based on that testimony violated NRS 484.382(3)—the result of the preliminary breath test was not used at trial. Even if there was a violation of NRS 484.382(3), Perez has not demonstrated that the error affected his substantial rights given the evidence presented by the State.

Perez further argues that the judgment should be reversed because his prior felony conviction was mentioned to the jury “by implication” based on a jury instruction that referred to the DUI charge as a “felony offense.” Contrary to Perez’s assertions, this situation does not involve the admission of evidence of other crimes, wrongs, or acts in violation of NRS 48.045. There also was no prejudicial error. The jury instruction, which had been approved by the parties, did not directly mention or suggest that Perez had prior convictions. And the district court determined that the reference was of a “short duration,” instructed the jury to disregard the offending instruction, and had the clerk read a corrected instruction. Under the circumstances, we conclude that reversal is not warranted. Cf. Valdez v. State, 124 Nev. \_\_\_, \_\_\_, 196 P.3d 465, 478 (2008) (concluding that there was no prejudice as result of improper comment by prosecutor when district court sustained objection and instructed jury to disregard comment).

Perez finally argues that the district court should have appointed substitute counsel after he complained about his trial attorney. We review the district court’s denial of a request for substitute counsel for an abuse of discretion. Young v. State, 120 Nev. 963, 968, 102 P.3d 572, 576 (2004). There was no abuse of discretion based on the factors set forth in Young: (1) Perez did not demonstrate a complete breakdown in the

attorney-client relationship; (2) the district court made a thorough inquiry into the substance of Perez's complaints about counsel; and (3) Perez did not inform the court that he wanted substitute counsel until the day before trial, making the request untimely. Id. at 969, 102 P.3d at 576.

We conclude that Perez's arguments lack merit and therefore  
ORDER the judgment of conviction AFFIRMED.

Hardesty, J.  
Hardesty

Douglas, J.  
Douglas

Pickering, J.  
Pickering

cc: Third Judicial District Court Dept. 3, District Judge  
State Public Defender/Carson City  
Attorney General/Carson City  
White Pine County District Attorney  
White Pine County Clerk