


IN THE COURT OF APPEALS OF THE STATE OF NEVADA

DARELL KEITH DAVIS,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 68219

FILED

FEB 04 2016

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY  DEPUTY CLERK

*ORDER AFFIRMING IN PART, REVERSING IN PART AND
REMANDING*

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of three counts of felony domestic battery, one count of false imprisonment with use of a deadly weapon, assault with use of a deadly weapon, and two counts of preventing or dissuading a witness in a prosecution. Second Judicial District Court, Washoe County; Lidia Stiglich, Judge.

Appellant Darell Davis raises two contentions on appeal. First, Davis argues the district court erroneously enhanced the penalty to a felony on each of three counts of domestic battery where respondent State of Nevada failed to prove at the sentencing hearing, that he had two constitutionally valid misdemeanor domestic battery convictions that had occurred within the preceding seven years, as alleged in the information. Second, Davis argues the district court abused its discretion by failing to aggregate the consecutive terms of imprisonment as required by NRS 176.035(1).¹

¹The State concedes the district court failed to aggregate the consecutive terms of imprisonment.

This appeal arises out of Davis' two-year relationship with girlfriend Erin Wallin, which culminated in its violent end in September 2014. Wallin went to America's Best Travel Inn, where she and Davis shared a room, to collect her belongings. Davis was waiting for her at the motel room and the two got into a verbal confrontation that led to a physical altercation. Davis grabbed Wallin by the arm, pulling her into the room and punched and kicked Wallin in the face. After this attack, Davis forced Wallin to accompany him to the Ponderosa Hotel and threatened to slit her throat with a pocketknife if she refused. Wallin was forced to stay at the Ponderosa Hotel with Davis that evening.

While walking to the Sands Hotel the next morning, Wallin managed to run away from Davis. Four days later, however, Davis attacked Wallin while she played a slot machine at the Diamond's Casino. Davis slammed Wallin's head into the machine and then walked away. Davis then returned and punched and kicked Wallin repeatedly before leaving the casino. Davis was arrested a few weeks later.

The State charged Davis by information seeking to enhance all three domestic battery charges to felonies based on two misdemeanor domestic battery convictions Davis received in February and August 2012. Additionally, the State charged Davis with one count of false imprisonment with use of a deadly weapon, assault with use of a deadly weapon, and two counts of preventing or dissuading a witness in a prosecution. Before trial, the State lodged copies of both prior misdemeanor domestic battery convictions with the district court clerk, who marked the exhibits for identification, but the State never offered, and the court never received the exhibits into evidence. At the conclusion of the trial, the jury convicted Davis of all seven counts.

At sentencing, the State asked the court to sentence Davis for the three domestic battery convictions as felonies, along with consecutive sentences for the four other charges. Inexplicably, the State did not attempt to admit evidence of the two prior convictions at sentencing, nor did it attempt to prove the constitutional validity of the two prior convictions. The court made no findings with regard to the prior convictions. Nevertheless, the district court enhanced Davis' current domestic battery offenses to felonies and sentenced Davis to serve consecutive sentences in the Nevada Department of Corrections totaling 120-324 months on the first five counts and 138 days, with credit for time served, on each of the last two gross misdemeanor counts of preventing or dissuading a witness from assisting in a prosecution and testifying. Davis now appeals.

Davis first argues that the State failed to prove at the sentencing hearing that he had two prior misdemeanor domestic battery convictions. He asserts that because of this failure, the district court erroneously enhanced his current domestic battery offenses to felonies. The State argues that it met its burden of proving the prior domestic battery convictions either by the fact they were submitted to the district court clerk prior to trial, or because Davis waived this requirement at sentencing. The State also argues that Davis failed to object to the State's lack of proof of the prior convictions. Alternatively, the State argues that two of the current domestic battery offenses can be used to enhance the third to a felony.

To enhance a domestic battery offense to a felony, the State must prove, at sentencing, that the defendant has two prior domestic battery convictions, NRS 200.485(1)(b), defined as: "An offense that occurred within 7 years immediately preceding the date of the principal

offense or after the principal offense . . . without regard to the sequence of the offenses and convictions,” NRS 200.485(4). The State must allege the facts supporting the prior offense in the charging document and must prove the prior conviction at the time of sentencing. *Id.*

“Due process requires the prosecution to shoulder the burden of proving each element of a sentence enhancement beyond a reasonable doubt.” *Phipps v. State*, 111 Nev. 1276, 1280, 903 P.2d 820, 823 (1995) (internal quotation marks and citation omitted). In addition to proving each element of a prior conviction, the State must also prove the constitutional validity of a prior conviction. *See Hobbs v. State*, 127 Nev. 234, 241, 251 P.3d 177, 178 (2011). The State may achieve this mandate by demonstrating the defendant was represented by counsel during the prior proceedings, or that the defendant waived the right to counsel “and that the spirit of constitutional principles was respected in the prior misdemeanor proceedings.” *Id.*

At the sentencing hearing, the State did not present any evidence of the prior domestic battery convictions. A review of the sentencing hearing transcript reveals a general discussion about the defendant’s prior criminal record, but neither the State nor Davis specifically identified the 2012 convictions in any fashion.² The court did not sua sponte admit the previously marked exhibits into evidence nor did

²The parties and the court discussed possible corrections to the presentence investigation report and the defendant’s criminal record including the fact that the defendant had prior domestic violence convictions. The discussion, however, did not specifically include the two convictions the State could have used for enhancement nor did it describe the convictions as having occurred within seven years of the current offenses. The presentence report was not presented to this court as part of the record on appeal.

it take judicial notice of their existence. And even if Davis' statements or lack of objection could somehow be construed as a waiver of the requirement to prove the existence of the prior convictions, the State did not offer any evidence, and the court made no findings, that prove the constitutional validity of the prior convictions, despite the fact the marked, but unadmitted exhibits, demonstrate that Davis was represented by counsel and waived his constitutional rights when he plead guilty. Nevertheless, the State failed to meet its burden of proof to enhance Davis' current domestic battery convictions to felonies. *See id.* at 241, 251 P.3d at 182.

The State relies on *Baymon v. State*, 94 Nev. 370, 372, 580 P.2d 943, 944 (1978), to contend that Davis' unexcused failure to object during the sentencing hearing precludes Davis from raising this objection for the first time on appeal. When a defendant seeks to challenge the State's non-compliance with a statutory obligation, his failure to timely object can constitute a waiver of the issue. But a defendant may challenge for the first time on appeal the State's failure to meet its burden of proving prior misdemeanor convictions for enhancement purposes because the challenge is, in part, constitutional in nature. *See Hobbs*, 127 Nev. at 240 n.4, 251 P.3d at 181 n.4 ("[F]ailure to [object] would not divest the State of its due process burden to prove each element of the sentence enhancement beyond a reasonable doubt or to make an affirmative showing of the constitutional validity of the prior misdemeanor convictions.") (citing *Phipps v. State*, 111 Nev. 1276, 1280, 903 P.2d 820, 823 (1995)); *see also Dressler v. State*, 107 Nev. 686, 697, 819 P.2d 1288, 1295 (1991) (clarifying that the standard for using prior misdemeanor convictions for enhancement purposes is slightly higher than the standard for using prior felony convictions).


The State also argues that the first two domestic battery offenses charged within the information may be used to enhance the third domestic battery conviction to a felony. The offenses were not listed, however, in the information as offenses to be considered for enhancement purposes, nor did the State make that request at the time of sentencing. See NRS 200.485(4). Moreover, according to the same statute, enhancement is only permitted when the State provides evidence of a prior "conviction." "[A] district judge's pronouncement of judgment and sentence from the bench is not a final judgment and does not, without more, oust the district court of jurisdiction over the defendant." *Miller v. Hayes*, 95 Nev. 927, 929, 604 P.2d 117, 118 (1979); see also NRS 176.105(3) (requiring the judge to sign the judgment and the clerk to enter the judgment). Thus, because the judgments of conviction had not yet been entered for the first two counts when the defendant was sentenced on the third count, in that judgments were neither signed by the judge nor entered by the clerk, they were not final and could not be used for enhancement purposes under NRS 200.485(4).³


Based on the discussion herein, we conclude Davis' three domestic battery offenses were erroneously enhanced to felonies under NRS 200.485(4). As a result, we reverse the felony domestic battery convictions and remand to the district court to sentence Davis on three misdemeanor offenses. See *Hobbs*, 127 Nev. at 242, 251 P.3d at 182 (citing

³We decline to address the State's additional argument that any two of the current offenses would not be considered one prior offense pursuant to *Rezin v. State*, 95 Nev. 461, 596 P.2d 226 (1979), because that argument is neither cogently presented nor supported by relevant authority. See *Maresca v. State*, 103 Nev. 669, 673, 748 P.2d 3, 6 (1987) (stating issues not presented with relevant authority and cogent argument need not be addressed).

Phipps, 111 Nev. at 1280, 903 P.2d at 822-23) (reversing and remanding to district court to resentence defendant for a misdemeanor offense where the State failed to meet its burden of proof to enhance the sentence). We also instruct the district court to aggregate the minimum and maximum terms of imprisonment to comply with NRS 176.035(1). Therefore, we

ORDER the judgment of conviction AFFIRMED IN PART AND REVERSED IN PART AND REMAND this matter to the district court for proceedings consistent with this order.


_____, C.J.
Gibbons


_____, J.
Tao


_____, J.
Silver

cc: Hon. Lidia Stiglich, District Judge
Washoe County Public Defender
Attorney General/Carson City
Washoe County District Attorney
Washoe District Court Clerk