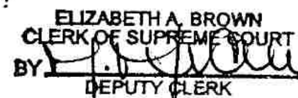
IN THE COURT OF APPEALS OF THE STATE OF NEVADA

CORNELL DEWITT CHILDRESS,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 87425-COA



OCT 04 2024

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

ORDER REVERSING, VACATING, AND REMANDING

Cornell Dewitt Childress appeals from a district court order denying a motion to correct an illegal sentence filed on August 2, 2023. Eighth Judicial District Court, Clark County; Eric Johnson, Judge.

Childress argues the district court erred by denying his motion to correct an illegal sentence. In his motion, Childress claimed his sentence was unlawful because he was erroneously sentenced pursuant to the small habitual criminal statute without ever having been charged as a habitual criminal, which resulted in his sentence exceeding the lawful sentencing range for attempted robbery.

A motion to correct an illegal sentence may only challenge the facial legality of the sentence: either the district court was without jurisdiction to impose a sentence or the sentence was imposed in excess of the statutory maximum. *Edwards v. State*, 112 Nev. 704, 708, 918 P.2d 321, 324 (1996). "A motion to correct an illegal sentence presupposes a valid conviction and may not, therefore, be used to challenge alleged errors in

proceedings that occur prior to the imposition of sentence." *Id.* (internal quotation marks omitted).

The Nevada Supreme Court has held that district courts lack jurisdiction to sentence defendants under the habitual criminal statutes when the State fails to formally file notices of habitual criminality. *See Grey v. State*, 124 Nev. 110, 123-24, 178 P.3d 154, 163-64 (2008). And here, the State does not dispute that it failed to include a count of habitual criminality in the information or file a separate notice of intent to seek habitual criminal adjudication. However, the State contends that Childress had actual notice of the State's intention to seek habitual criminal treatment and, thus, his adjudication was proper under *LaChance v. State*, 130 Nev. 263, 321 P.3d 919 (2014).

The supreme court rejected the proposition that a district court has the authority to impose a habitual criminal sentence if the defendant had any notice of the State's intent to seek habitual criminal adjudication in *Grey*. In that matter, the State faxed a copy of a notice of habitual criminality to the defendant's counsel; the supreme court nonetheless held that the district court did not have authority to impose a habitual criminal sentence because the State had failed to file an allegation of habitual criminality. *Grey*, 124 Nev. at 123, 178 P.3d at 163-64.

LaChance does not purport to overrule *Grey*, nor does it hold that a district court may impose a habitual criminal sentence when the defendant has any notice that the State will seek habitual criminal adjudication. Rather, the supreme court held that a district court did not commit plain error in allowing the State to file a separate notice of intent to

seek habitual criminal adjudication because, "[e]ven if it was error to file a notice rather than filing a separate count or amending the information to include the habitual criminal allegation," any error did not affect the defendant's substantial rights. *LaChance*, 130 Nev. at 276, 321 P.3d at 928-29. *LaChance* did not consider a situation where the State failed to file anything—a notice, separate count, or amended information—that included a habitual criminal allegation and is thus inapplicable to the current matter. Therefore, the State fails to demonstrate the district court had authority to sentence Childress as a habitual criminal under *LaChance*.

The State also contends that Childress invited any error by acknowledging the State would seek habitual criminal treatment in the written guilty plea agreement and by failing to object at sentencing to the State seeking habitual criminal treatment. The State does not cite, and we have not found, any authority that holds a defendant may be precluded from challenging an illegal sentence on the basis of invited error. However, even if this were so, the State fails to demonstrate Childress invited any error.

Under the doctrine of invited error, "a party will not be heard to complain on appeal of errors which he himself induced or provoked the court or the opposite party to commit." *Chadwick v. State*, 140 Nev., Adv. Op. 10, 546 P.3d 215, 227 (Nev. Ct. App. 2024) (quotation marks omitted). Childress did not induce or provoke the State into failing to file an allegation of habitual criminality. Although Childress acknowledged in the guilty plea agreement that the State retained the right to argue for habitual criminal

treatment at sentencing,[1] he did not waive the procedural requirements for seeking habitual criminal treatment. *See* NRS 207.010; NRS 207.016. Moreover, Childress's failure to object to the State seeking habitual criminal treatment at sentencing did not rise to the level of invited error. *Cf. Jeremias v. State*, 134 Nev. 46, 52, 412 P.3d 43, 50 (2018) (stating a defendant's failure to object to the removal of his family from a courtroom during jury selection did not rise to the level of invited error). Therefore, the State fails to demonstrate the district court had authority to impose the habitual criminal sentence under the doctrine of invited error.

The State also contends that NRS 207.016(6) permitted the district court to impose a habitual criminal sentence regardless of whether it filed an allegation of habitual criminality. NRS 207.016(6) states that "[n]othing in the provisions of this section, NRS 207.010, 207.012 or 207.014 prohibits a court from imposing an adjudication of habitual criminality . . . based upon an agreement of the parties." This provision allows a district court to use a guilty plea agreement as a basis for habitual criminal adjudication so long as the defendant agrees to habitual criminal adjudication and agrees that he has prior convictions to support habitual criminal adjudication.[2] *See Hodges v. State*, 119 Nev. 479, 483-85, 78 P.3d

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[1]We note that the State agreed to cap its sentencing recommendation at 5 to 12.5 years in prison.

[2]We note that NRS 207.016(6) was amended in 2013 as part of Assembly Bill (A.B.) 97 and that this amendment replaced the phrase "a stipulation" with "an agreement." The State appears to contend that A.B. 97's legislative history indicates this change was intended to permit the

67, 69-70 (2003). Here, Childress did not agree to habitual criminal status or to the prior convictions in the guilty plea agreement. In fact, defense counsel argued at the sentencing hearing that Childress should receive a suspended prison sentence and a chance at drug court. Therefore, NRS 207.016(6) does not apply in this matter, and the State fails to demonstrate the district court had authority to impose the habitual criminal sentence under NRS 207.016(6).

Finally, the State contends that any error was harmless because Childress knew from the inception of the case that the State was seeking habitual criminal treatment. As previously discussed, whether Childress was aware that the State would seek habitual criminal treatment does not resolve the legality of Childress' sentence. *See Grey*, 124 Nev. at 124, 178 P.3d at 164 ("Therefore, we conclude that before a defendant may be sentenced as a habitual criminal under NRS 207.010, the State must duly file an allegation of habitual criminality."). Moreover, the imposition of an illegal sentence cannot constitute harmless error. *See* NRS 178.598 ("Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded."); *see also Aparicio v. State*, 137

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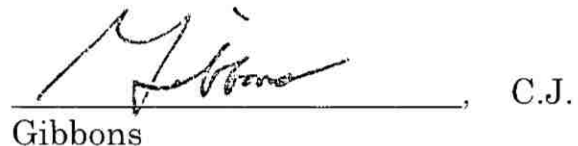
district court to impose a habitual criminal sentence even if the defendant did not agree to habitual criminal adjudication, so long as the State retained the right to argue for habitual criminal adjudication in the plea agreement. We disagree. Even assuming consideration of this legislative history is proper, *see State v. Lucero*, 127 Nev. 92, 95, 249 P.3d 1226, 1228 (2011) (stating legislative history may be considered in interpreting an ambiguous statute), there is nothing in A.B. 97's legislative history to support the State's interpretation of the statute.

Nev. 616, 620, 496 P.3d 592, 596 (2021) (stating a sentencing error is harmless if "the district court would have imposed the same sentence absent the erroneous factor" (quotation marks omitted)).

Because the State failed to file an allegation of habitual criminality in the information or in a separate notice of intent to seek habitual criminal adjudication, the district court lacked jurisdiction to sentence Childress under the habitual criminal statutes and consequently Childress' sentence is illegal. Therefore, we must reverse the district court's order denying Childress' motion, vacate Childress' habitual criminal sentence, and remand to the district court for a new sentencing hearing. Accordingly, we

ORDER the judgment of the district court REVERSED, Childress' habitual criminal sentence VACATED, and the matter REMANDED for a new sentencing hearing.


______________________, C.J.
Gibbons

______________________, J.
Bulla

______________________, J.
Westbrook

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