



IN THE COURT OF APPEALS OF THE STATE OF NEVADA

RUSSELL HYSELL,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 92075-COA

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

Russell Hysell appeals from a judgment of conviction, entered pursuant to a guilty plea, of burglary of a motor vehicle, first offense. Second Judicial District Court, Washoe County; Hon. Scott N. Freeman, Judge.

First, Hysell claims the district court abused its discretion by adjudicating him a habitual criminal offender and sentencing him pursuant to the small habitual criminal enhancement. *See* NRS 207.010(1)(a). Specifically, Hysell contends habitual criminal adjudication was inappropriate because his prior convictions were stale, trivial, and non-violent. We review a district court's habitual criminal adjudication for abuse of discretion. *LaChance v. State*, 130 Nev. 263, 276, 321 P.3d 919, 929 (2014). "A sentencing court meets its obligations so long as it [is] not operating under a misconception of the law regarding the discretionary nature of a habitual criminal adjudication." *Id.* at 277, 321 P.3d at 929 (internal quotation marks omitted). Although "it *may* be an abuse of discretion for the court to enter a habitual criminal adjudication when the convictions used to support the adjudication are

nonviolent and remote in time,” *Clark v. State*, 109 Nev. 426, 428, 851 P.2d 426, 427 (1993) (emphasis added), “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.” *Arajakis v. State*, 108 Nev. 976, 983, 843 P.2d 800, 805 (1992).

The presentence investigation report noted that Hysell had 24 felony convictions. In its notice of intent to seek habitual criminal adjudication, the State provided documentation for 14 felony convictions occurring between 2004 and 2022. The district court acknowledged Hysell’s convictions primarily involved drug and property crimes but expressed its concerns that Hysell was a “habitual thief” with a “lengthy criminal history” and that his criminal conduct in this case involved breaking into an undercover vehicle owned by the Washoe County Sheriff’s Office and stealing police-issued equipment. Notwithstanding the fact that Hysell had enough prior felonies to be adjudicated a large habitual criminal, *see* NRS 207.010(1)(b), the district court adjudicated Hysell a small habitual criminal pursuant to NRS 207.010(1)(a) and imposed a sentence of 96 to 240 months in prison.

After review, we conclude the district court did not abuse its discretion in determining habitual criminal adjudication was warranted in this matter. *See Arajakis*, 108 Nev. at 983, 843 P.2d at 805; *see also Tanksley v. State*, 113 Nev. 997, 1003-04, 946 P.2d 148, 152 (1997) (holding a district court did not abuse its “very broad” discretion in adjudicating a defendant a habitual criminal where the defendant argued all three of his prior convictions were stale and two of his three convictions were nonviolent). Hysell points to the supreme court’s decision in *Sessions v. State*, 106 Nev. 186, 789 P.2d 1242 (1990), to

support his claim that the district court abused its discretion by considering some of his older convictions in adjudicating him a habitual criminal. In *Sessions*, however, the defendant's prior convictions "ranged from twenty-three to nearly thirty years old." *Sessions*, 106 Nev. at 191, 789 P.2d at 1245. Here, by contrast, the prior convictions the district court relied on to adjudicate Hysell a habitual criminal ranged from four to twenty-four years old. We therefore conclude the district court did not abuse its discretion in adjudicating Hysell a habitual criminal.¹

Second, Hysell claims the district court abused its discretion by depriving him of his statutory right to allocution at sentencing pursuant to NRS 176.015(2)(b). Hysell claims he was denied a meaningful opportunity to allocute because he was repeatedly interrupted by the district court and denied the ability to speak. Because Hysell did not object below, we review this claim for plain error. *Mendoza-Lobos v. State*, 125 Nev. 634, 644, 218 P.3d 501, 507 (2009) (applying plain-error analysis to a sentencing error). To demonstrate plain error, an appellant must show that: "(1) there was an 'error'; (2) the error is 'plain,' meaning that it is clear under current law from a casual inspection of the record; and (3) the error affected the defendant's

¹Hysell additionally argues that the district court failed to make a record as to the constitutionality of each of his prior convictions. However, so long as the State "produces valid records of a judgment of conviction which do not, on their face, raise a presumption of constitutional deficiency," the burden is on the defendant to "present[] evidence rebutting the presumption of regularity given to a judgment of conviction." *Dressler v. State*, 107 Nev. 686, 693, 819 P.2d 1288, 1292-93 (1991). On their face, the records that the State submitted regarding each of Hysell's convictions do not raise a presumption of constitutional infirmity, and Hysell did not challenge their constitutionality below.

substantial rights.” *Jeremias v. State*, 134 Nev. 46, 50, 412 P.3d 43, 48 (2018). “[A] plain error affects a defendant’s substantial rights when it causes actual prejudice or a miscarriage of justice (defined as a ‘grossly unfair’ outcome).” *Id.* at 51, 412 P.3d at 49.

Allocution is the right of a defendant to stand before the sentencing authority and present an unsworn statement in mitigation of sentence, including “statements of remorse, apology, chagrin, or plans and hopes for the future.” *Homick v. State*, 108 Nev. 127, 133, 825 P.2d 600, 604 (1992) (internal quotation marks omitted). NRS 176.015(2)(b)(1) provides that, before imposing sentence, the district court must address the defendant and inquire whether “[t]he defendant wishes to make a statement in his . . . behalf and to present any information in mitigation of punishment.” The transcript of the sentencing hearing shows Hysell began his allocution by acknowledging his criminal history but was interrupted by the district court. Hysell attempted to continue his allocution after the interruption, but the district court interrupted him again, and Hysell was unable to complete his allocution. We therefore conclude that the district court erred by not allowing Hysell to allocute.

The district court’s error, however, did not cause actual prejudice or a miscarriage of justice such that Hysell is entitled to relief on this claim. First, Hysell does not explain with any specificity what he might have said to the district court at sentencing that may have affected his sentence. Second, and more significantly, the record reflects the district court considered Hysell’s mitigation evidence in imposing sentence. Hysell submitted a sentencing memorandum and supporting documentation in advance of the sentencing hearing. The supporting

documentation included several letters of support and several educational certificates Hysell earned while in custody awaiting sentencing. Additionally, counsel made mitigating argument at the sentencing hearing. The district court stated that it had reviewed Hysell's mitigation evidence and expressed that Hysell's effort to improve himself while in custody was "impressive." The district court then stated that, because Hysell had demonstrated a desire to make positive changes, it had decided to sentence him as a small habitual criminal rather than as a large habitual criminal. Considering the record, Hysell fails to demonstrate the district court's error affected his substantial rights. Accordingly, we conclude Hysell has not demonstrated he is entitled to relief on this claim.

Finally, Hysell claims the district court abused its discretion by ordering him to pay \$500 in attorney fees for legal representation by the Washoe County Public Defender's Office. The State agrees, noting that recent amendments to NRS Chapter 178 preclude imposition of such fees. During the 2025 legislative session, the legislature amended NRS Chapter 178 to, among other things, include a new section providing that "[a] court shall not order a defendant for whom an attorney is appointed at public expense on account of indigency to pay any part of the expenses incurred by the county, city, or State in providing the defendant with an attorney." 2025 Nev. Stat., ch. 163, § 2 at 1018. This change to NRS Chapter 178 went into effect on October 1, 2025, approximately three months prior to the entry of Hysell's judgment of conviction. *See* NRS 218D.330(1) (providing that each law passed by the legislature "becomes effective on October 1 following its passage" unless the law specifically prescribes another date). Thus, we conclude the district court abused its

discretion in ordering Hysell to pay \$500 in attorney fees. We therefore vacate the judgment of conviction as to the imposition of attorney fees and remand to the district court for entry of an amended judgment of conviction. Accordingly, we

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



Bulla, C.J.



Gibbons, J.



Westbrook, J.

cc: Hon. Scott N. Freeman, District Judge
Attorney General/Carson City
Washoe County District Attorney
Washoe County Public Defender
Second District Court Clerk