IN THE COURT OF APPEALS OF IOWA

No. 3-943 / 13-0085
Filed November 6, 2013

STATE OF IOWA,
Plaintiff-Appellee,

vs.

PAUL ANTHONY HALTOM,
Defendant-Appellant.

Appeal from the Iowa District Court for Polk County, Scott D. Rosenberg, Judge.

Paul Anthony Haltom appeals from the judgment and sentence entered following his conviction of third-offense operating while intoxicated as a habitual offender. **AFFIRMED.**

Angela Campbell of Dickey & Campbell Law Firm, P.L.C., Des Moines, for appellant,

Thomas J. Miller, Attorney General, Jean C. Pettinger, Assistant Attorney General, John P. Sarcone, County Attorney, and Kevin Bell, Assistant County Attorney, for appellee.

Considered by Potterfield, P.J., and Mullins and Tabor, JJ.

MULLINS, J.

Paul Anthony Haltom appeals from the judgment and sentence entered following his conviction of third-offense operating while intoxicated (OWI) as a habitual offender. He contends there is insufficient evidence that he is a habitual offender under Iowa Code section 902.9 (2011), and therefore, the district court entered an illegal sentence when it applied the habitual offender enhancement.

After Haltom pled guilty to operating while intoxicated, he agreed to trial on the stipulated minutes of evidence as to the allegations of prior OWI offenses and prior felonies. The district court found those minutes show he was convicted of two prior OWIs and two prior felonies. The district court properly found Haltom was subject to the habitual offender sentencing enhancement. We affirm.

I. BACKGROUND FACTS AND PROCEEDINGS.

The State charged Haltom with operating while intoxicated, third offense, as a habitual offender. With regard to the habitual offender enhancement, the trial information alleged Haltom had two prior felony convictions: one in 2004 and one in 1990. The minutes of evidence list two witnesses who could testify about these convictions. With regard to the 1990 conviction, the amended minutes of evidence state: "The witness will produce and can testify regarding certified records which document that the defendant, was previously convicted of Operating a Motor Vehicle While Under the Influence of Alcohol, or a Drug—Fourth Offense, a Class D Felony, on or about April 2, 1990 . . . ."

When Haltom pled guilty to operating while intoxicated, he did not admit to his prior convictions. Pursuant to Iowa Rule of Criminal Procedure 2.19(9),[1] a jury trial was scheduled to address the question of whether Haltom's charge qualified as a third offense and whether Haltom was a habitual offender as required for the sentencing enhancements.

On the day of trial, Haltom moved to exclude the court records of his 1990 conviction from evidence because the records show a conviction for operating while intoxicated, fourth offense—a charge that does not exist under Iowa statute. Haltom's counsel stated:

> The documents are vague. Nothing on the document says that it was a felony. Perhaps this was ultimately a conviction for a true second offense and they call it a fourth offense because that's how many he had in a lifetime, but I don't know how they operate in Warren County, if they just call it by how many it is you have in a lifetime or what.
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> But I would object to it on the basis of being more prejudicial to Mr. Haltom [than] probative and not being relevant in that on the face of it it doesn't present itself as a felony conviction. There's also no language in the sentencing order, the judgment order, advising that it's a felony conviction or anything like firearms rights or any of the language similar that we would have in a sentencing order during this time, and it's not present in that document.

The prosecutor responded by noting it is

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[1] Rule 2.19(9) states:

> After conviction of the primary or current offense, but prior to pronouncement of sentence, if the indictment or information alleges one or more prior convictions which by the Code subjects the offender to an increased sentence, the offender shall have the opportunity in open court to affirm or deny that the offender is the person previously convicted, or that the offender was not represented by counsel and did not waive counsel. If the offender denies being the person previously convicted, sentence shall be postponed for such time as to permit a trial before a jury on the issue of the offender's identity with the person previously convicted. Other objections shall be heard and determined by the court, and these other objections shall be asserted prior to trial of the substantive offense in the manner presented in rule 2.11.

> common practice in some counties to actually refer to the actual offense as the fourth offense if it is in fact an OWI fourth offense in that case, and the Court, understanding that 321J.2 does recognize the third and subsequent charges as felonies, we wouldn't necessarily need to present evidence that specifically said the word "felony" to the jury itself.

In answer to the court's question, the prosecutor then explained Haltom's sentence for the 1990 conviction included one year of imprisonment and a $1000 fine. The prosecutor also explained this sentence was consistent with the 1990 sentencing guidelines for a class D felony, which required imprisonment in county jail "for an indeterminate sentence of not more than one year, but not less than 30 days, . . . and . . . a fine of no less than $750."

The court denied Haltom's motion, stating: "It appears it's a legitimate felony at that time period." Haltom then waived his right to a jury trial in the matter and proceeded to a bench trial based on the stipulated minutes of evidence.

After reviewing the "uncontroverted" minutes of evidence, the district court found Haltom had been convicted twice of operating while intoxicated and had twice been convicted of a felony. Based on these convictions, the court entered its order finding Haltom guilty of third-offense operating while intoxicated as a habitual offender. Following a sentencing hearing, the district court sentenced Haltom to a prison term not to exceed fifteen years, with a three-year minimum.

II. STANDARD OF REVIEW.

Haltom contends there is insufficient evidence to support the finding he is a habitual offender, and therefore, the application of the habitual offender sentencing enhancement resulted in an illegal sentence. *See State v. Gordon*,

732 N.W.2d 41, 44 (Iowa 2007) ("[If] the habitual-offender statute does not apply, an enhanced sentence based on habitual-offender status is 'not permitted by statute' and is, therefore, illegal."). We review for corrections of errors at law. Iowa R. App. P. 6.4.

III. ANALYSIS.

Haltom challenges the sufficiency of the evidence showing he was previously convicted of two felonies. He does not challenge the evidence that shows he was convicted of a felony in 2004. His challenge rests on the sufficiency of the evidence establishing he was convicted of a felony in 1990, arguing "the court appears to have relied solely on the State's argument that because Haltom's sentence was within the proscribed penalties for OWI Third Offense, it must have been a felony." He notes that in 1990, section 321J.2 did not proscribe a maximum penalty for first and second offenses. *See* Iowa Code § 321J.2(2)(a), (b) (1989). Because the sentence he received for the offense also could have been given for a serious or aggravated misdemeanor, Haltom argues the State failed to prove a felony conviction.

If a defendant claims the habitual offender statute is inapplicable, the sole issue to be determined by a jury is defendant's identity as the person who has been twice previously convicted of a felony. *State v. Smith*, 282 N.W.2d 138, 143 (Iowa 1979). The question of whether Haltom's 1990 felony was a qualifying conviction under rule 2.19(9) falls under "other objections" that must be determined by the court. *See id.* While counsel now challenges the sufficiency of the evidence establishing a felony conviction, in the jury trial the challenge was

framed as a challenge to the record's admissibility into evidence, with counsel stating the records were more prejudicial to Mr. Haltom than probative and were not relevant.[2] The court's preliminary ruling as to the admissibility of the records pursuant to Iowa Rules of Evidence 5.402 and 5.403 was not a controlling determination as to whether the records established a felony conviction in 1990.

Following the court's ruling on the record's admissibility, Haltom agreed to a bench trial on the stipulated minutes of evidence. The only evidence in the record concerning Haltom's 1990 conviction is what is contained in the minutes. The court records from the 1990 conviction were never introduced into evidence at trial. Haltom did not present any evidence. The minutes unequivocally state that Haltom was convicted of a felony in 1990. Any legal argument that the 1990 sentence might have been consistent with a conviction for a serious or aggravated misdemeanor conviction in 1990 does not negate the minutes' identification of the offense as a felony, nor does it conflict with an appropriate sentence for a felony OWI in 1990. Any argument Haltom may have made regarding the sufficiency of the court records to prove a prior felony conviction was waived when he agreed to trial on the stipulated minutes. The district court cannot be faulted for failing to consider arguments that were never made regarding evidence that was not introduced into the record at trial.

The undisputed evidence in the record—which consists solely of the minutes of evidence—shows Haltom was convicted of a felony in 1990.

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[2] While there may be some question as to whether Haltom preserved error on the specific issue raised on appeal, we consider it most expedient to address and resolve the issue.

Accordingly, the district court's finding that Haltom is a habitual offender is supported by sufficient evidence and the habitual offender enhancement was properly applied to Haltom's sentence. Finding no illegal sentence, we affirm.

AFFIRMED.