

ARKANSAS COURT OF APPEALSDIVISION III
No. CACR11-898DANNY FRANKLIN KING
APPELLANT

V.

STATE OF ARKANSAS
APPELLEE**Opinion Delivered** February 1, 2012APPEAL FROM THE HEMPSTEAD
COUNTY CIRCUIT COURT
[No. CR-09-411-2]HONORABLE WILLIAM RANDAL
WRIGHT, JUDGE

AFFIRMED

LARRY D. VAUGHT, Chief Judge

In this criminal case, appellant Danny Franklin King argues that his enhanced criminal sentences under Arkansas Code Annotated section 16-90-120 (Supp. 2009) should be found to be illegal and set aside. We affirm the convictions and sentences.

King was convicted by a jury of multiple offenses of committing a terroristic act under Arkansas Code Annotated section 5-13-310, for which he received a 240-month sentence, and domestic battery in the first degree, for which he received a 192-month sentence. In its third amended information, the State also sought firearm enhancements to each charge under Arkansas Code Annotated section 16-90-120. The jury enhanced the sentences on both charges by 144 months. It is on these enhancements that King's appeal is based.

As his first point on appeal, King claims that his sentences for his convictions for committing a terroristic act and domestic battering in the first degree should not have been enhanced pursuant to section 16-90-120, because that provision has been repealed by Arkansas

Code Annotated section 5-4-104 (a) (Supp. 2009). Although King failed to raise this argument below, our supreme court has held that claims of illegal sentences may be raised for the first time on appeal. *Sesley v. State*, 2011 Ark. 104, at 2. However, the claim asserted by King has also been considered (and repeatedly rejected) by our supreme court. *Polivka v. State*, 2010 Ark. 152, at 10–11, ___ S.W.3d ___, ___; *Williams v. State*, 364 Ark. 203, 207–09, 217 S.W.3d 817, 819–20 (2005). As we are bound by these precedents and are without the power to reverse the supreme court, we must affirm on this point. *Gause v. Shelter Gen. Ins.*, 81 Ark. App. 133, 137, 98 S.W.3d 854, 856 (2003).

As to his second claim, King asserts that the enhancement of his sentences resulted in impermissible stacking of enhanced sentences because the underlying offenses (committing a terroristic act and domestic battering) both contain the “essential element” of using a firearm or deadly weapon. However, King also failed to raise this argument below. Assuming, arguendo, that the argument is such that it could be classified as one relating to an illegal sentence, thereby qualifying it for consideration for the first time on appeal, it is without merit. *Sesley v. State*, 2011 Ark. 104, at 2.

The essential elements for King’s conviction for domestic battering did not include the use of a deadly weapon. In order to obtain a conviction for domestic battering (as charged and as the jury was instructed), the prosecution was required to prove that King “cause[d] serious physical injury to a family or household member under circumstances manifesting extreme indifference to the value of human life[.]” Ark. Code Ann. § 5-26-303(a)(3) (Supp. 2009). In proving the elements of the crime, it is ancillary that the proof adduced at trial showed that King

caused such harm by means of a firearm. The use of a firearm or deadly weapon was not an element that the prosecution had to prove. As such, to the extent that his argument qualifies for appellate review due to the illegal-sentence nature of his claim, there is no basis to support King's claim that his sentence was twice enhanced for using a deadly weapon.

Furthermore, if use of a firearm was considered to be an "essential element" of domestic battering, the argument that King presents on appeal is foreclosed by *Williams v. State*, 364 Ark. at 209–10, 217 S.W.3d at 820–21. In *Williams*, the court held that the enhancement of a sentence pursuant to § 16-90-120 does not result in the impermissible stacking of enhanced sentences if the underlying offense does not contain a separate enhancement provision for the commission of prior offenses of the same type, even if that offense required proof of the use of a deadly weapon or firearm. *Davis v. State*, 93 Ark. App. 443, 445–47, 220 S.W.3d 248, 249–50 (2005). Because King's sentences related to his commission of a terroristic act and of domestic battering were enhanced only by § 16-90-120, his claim of impermissible stacking is foreclosed by binding supreme court precedent.

As to his third point on appeal, King claims that the impermissible stacking (as argued in his second point) also violates the double-jeopardy provisions of the Constitution. King, however, failed to raise this claim below, and it will not be considered for the first time on appeal. *Scott v. State*, 2011 Ark. App. 296, at 8–9 (holding that double-jeopardy challenges to § 16-90-120 enhancement are barred when not timely raised below). As a secondary ground for affirming, we note that King's final claim of error was not supported by persuasive authority or citation to authority. *James v. State*, 2010 Ark. 486, at 12, ___ S.W. 3d ___, ___ (per curiam).

As a final point, we note that according to the judgment and conviction order contained in the record accompanying King's appeal, he did in fact receive an illegal sentence. The document reflects that King's "total time to serve on all offenses" is 240 months. We acknowledge that it is permissible to order King's three underlying sentences to run concurrently; however, our firearm-enhancement statute requires that §16-90-120 enhancements be run consecutively to the underlying punishment. As such, the minimum "total time" King could be ordered to serve is near double¹ the twenty-year, total sentence reflected in the judgment and conviction order. Although King undoubtedly received an illegal sentence, the statute authorizing the correction of illegal sentences at any time (regardless of lower-court preservation or argument on appeal) does not permit us to increase King's sentence to comply with the statutory minimum absent an appeal or cross-appeal from the State. As no such appeal was tendered here, we affirm the convictions and cumulative sentence as it stands. *Cook v. State*, 46 Ark. App.169, 878 S.W.2d 765 (1994).

Affirmed.

ABRAMSON and HOOFFMAN, JJ., agree.

¹According to our calculations, King's total sentence, when following the statutory scheme requiring the enhancements to run consecutively, would be no less than the thirty-two years.