

ARKANSAS COURT OF APPEALS

DIVISION I
No. CACR 10-1171

GREG EUGENE KELLAR, II
APPELLANT

V.

STATE OF ARKANSAS
APPELLEE

Opinion Delivered AUGUST 31, 2011

APPEAL FROM THE GARLAND
COUNTY CIRCUIT COURT
[NO. CR-09-353-4]

HONORABLE MARCIA R.
HEARNSBERGER, JUDGE

AFFIRMED

JOHN B. ROBBINS, Judge

Appellant Greg Eugene Kellar was convicted by a jury of first-degree battery based on evidence that Mr. Kellar struck the victim multiple times about the face and body with a padlock, resulting in serious physical injuries. Mr. Kellar was sentenced as a habitual offender to the maximum available penalty of thirty years in prison. For his sole argument on appeal, Mr. Kellar argues that the trial court erred in allowing the State to admit his previous misdemeanor convictions during the sentencing phase of the trial. We affirm.

After the jury returned its guilty verdict, an in-chambers hearing was conducted. During the hearing, the State submitted two prior felony convictions for sentence-enhancement purposes, and these were received by the trial court without objection. The State further sought to introduce six prior misdemeanor convictions, and Mr. Kellar objected to those convictions on the basis that they were not relevant for purposes of sentencing. The

State responded that all of Mr. Kellar's criminal history was relevant in sentencing, particularly because three of the prior misdemeanors were for battery. The trial court agreed, overruled appellant's objection, and admitted the misdemeanors during the sentencing phase of the trial.

Mr. Kellar now argues on appeal that five of his six misdemeanor convictions were erroneously admitted because, for those five convictions, he was not represented by counsel. He relies on *Mangiapane v. State*, 46 Ark. App. 64, 876 S.W.2d 610 (1994), where we held that a prior conviction cannot be used to enhance punishment unless the defendant was represented by counsel or he validly waived counsel. Mr. Kellar acknowledges that three of his misdemeanor judgments of conviction reflect a waiver of counsel, but he asserts that there was no indication that he validly waived counsel on those occasions. Mr. Kellar asserts that introduction of these uncounseled misdemeanors resulted in prejudice because he received the maximum sentence from the jury, and he argues that this case should be reversed. However, because Mr. Kellar is raising this argument for the first time on appeal, it is not preserved.

To preserve an argument for appeal, there must be an objection in the trial court that is sufficient to apprise the trial court of the particular error alleged. *Green v. State*, 365 Ark. 478, 231 S.W.3d 638 (2006). Additionally, a party cannot change the grounds for an objection or motion on appeal but is bound by the scope and nature of the arguments made

at trial. *Id.* Thus, even a constitutional argument is waived if it is not presented to the trial court. *Id.*

During the sentencing phase of the trial, Mr. Kellar objected to the admission of his prior misdemeanors on the basis that they were not relevant. On appeal, he has abandoned that argument and now contends that his uncounseled misdemeanors were erroneously admitted because prior convictions cannot be used to enhance punishment unless the defendant was represented by counsel or executed a valid waiver. Because the specific argument being raised on appeal was not presented to the trial court, it has now been waived.

Nonetheless, even had Mr. Kellar raised this argument below, it would provide no basis for reversal. Under the Habitual Offender Act, codified at Ark. Code Ann. § 5-4-501 et seq. (Repl. 2006), prior felonies, but not misdemeanors, may be used to increase the maximum sentencing range in the case of a felony conviction. However, Arkansas Code Annotated section 16-97-103(2) (Repl. 2006) provides that evidence relevant to sentencing includes prior convictions of the defendant, both felony and misdemeanor. In *Jiles v. State*, 78 Ark. App. 43, 82 S.W.3d 173 (2002), we held that the proof of legal representation required under the Habitual Offender Act does not apply to prior misdemeanor convictions introduced simply as relevant evidence during the sentencing phase of the trial. Because Mr. Kellar's prior misdemeanor convictions were presented to the jury only as relevant evidence admissible during the penalty phase of the trial, as opposed to felony convictions

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used to enhance punishment, it was unnecessary that there be any proof of legal representation.

Affirmed.

GRUBER and ABRAMSON, JJ., agree.