NO. COA10-1534
NORTH CAROLINA COURT OF APPEALS

Filed: 4 October 2011

STATE OF NORTH CAROLINA

v. Forsyth County
Nos. 09 CRS 10354, 55894,
56151, 56154

KEVIN KENARD SIMMONS

Appeal by Defendant from judgment entered 12 July 2010 by Judge Joseph N. Crosswhite in Forsyth County Superior Court. Heard in the Court of Appeals 10 May 2011.

Attorney General Roy Cooper, by Assistant Attorney General John R. Green, Jr., for the State.

Appellate Defender Staples Hughes, by Anne Bleyman, for Defendant.

BEASLEY, Judge.

Kevin Kenard Simmons (Defendant) appeals from an order denying his motion to suppress evidence obtained as a result of a search and seizure following a traffic stop. We affirm.

After Defendant was indicted on 17 August 2009 for assault with a deadly weapon, attempted kidnapping, possession of a firearm by a felon, and three counts of robbery with a dangerous

weapon, he filed a motion to suppress the evidence obtained during a warrantless search which precipitated the charges. At a pre-trial suppression hearing, the State offered the testimony of the law enforcement officers involved in the matter, which was wholly uncontroverted. The evidence shows the following.

Officer M.B. Elsasser of the Winston-Salem Police Department (WSPD) was on patrol on 28 May 2009 when, at 1:50 a.m., he saw two black men dressed in black, running east out of a parking lot. As he entered the lot to turn around, a woman flagged him down to report having just been robbed at gunpoint by two black men in black clothes who ran east on the sidewalk. Proceeding east, Officer Elsasser saw an Oldsmobile with its headlights off dart out of a driveway. He observed therein two black men in black shirts—one driving and the other in the driver's side backseat—and pulled them over. When backup arrived seconds later, the driver, Devon Wilson, and his passenger, Defendant,[1] were ordered out of the car, handcuffed, frisked, and placed in separate patrol cars. Officer Elsasser then conducted what he termed a "vehicle frisk" for weapons and other occupants by scanning the Oldsmobile's interior through

[1] No question as to Defendant's standing was raised below; thus, the State has waived the issue. *See Steagald v. United States*, 451 U.S. 204, 68 L. Ed. 2d 38 (1981).

the windows. At that time, he saw the driver's license of a white man named Marc Harrison Hedrick sitting face-up on the "bench-style" front seat but did not remove it.

Ten minutes later, the robbery victim arrived for a show-up but did not positively identify either Defendant or Mr. Wilson as the perpetrators. The men, however, were kept in the patrol cars because the officers "were still investigating" the reason for "this other ID in the vehicle." Upon arrival, Officer B.G. Extrom was advised of the ID, and "[d]ue to it being a robbery," picked up Mr. Hedrick's license to run the information and see if a related incident had been reported. The search revealed nothing "amiss about the ID." Mr. Wilson's handcuffs were thus removed and he was told that Officer Elsasser would explain the reason for the stop. Defendant, however, remained restrained in the patrol car because an outstanding fugitive warrant for his arrest had been discovered. Mr. Wilson was advised that he "could leave the area" but agreed to answer Officer Elsasser's questions, at which time he gave contradictory accounts of why he had been in the driveway before pulling out quickly.

Meanwhile, Officer Michael Ford arrived at the scene. He had responded to a different armed robbery, reported by Marc Hedrick, an hour earlier that night. Thus, upon overhearing

mention of the ID, Officer Ford informed the other officers that Mr. Hedrick was the victim of the armed robbery in the north part of town. Officer Elsasser contacted officers on the north side to verify that Mr. Hedrick's ID "did belong to the victim of a robbery" that occurred forty-five minutes before the one being investigated. Believing the suspects to thus be in possession of stolen property, Officers Extrom and L.L. Williams searched the Oldsmobile for evidence of the Hedrick armed robbery and found a handgun and a wrench completely hidden under the driver's seat. Defendant later waived his *Miranda* rights and made statements implicating himself in three robberies. His statements and the items uncovered in the car were the evidence Defendant sought to suppress as the fruits of an allegedly unconstitutional search and seizure. The trial court disagreed and denied the motion by written order. Preserving his right to appeal this ruling, Defendant pled guilty to the charges and was sentenced to 117 to 150 months in prison.

I. Motion to Suppress

Defendant contends that the trial court erred in denying his motion to suppress, as the first nonconsensual, warrantless "search" violated his constitutional rights and the trial court

failed to make findings of fact and conclusions of law as to the legality of the initial "vehicle frisk." We disagree.

A. Standard of Review

We review the trial court's ruling on a motion to suppress to determine whether its findings are supported by competent evidence, and in turn, whether those findings support its conclusions of law. *In re Pittman*, 149 N.C. App. 756, 762, 561 S.E.2d 560, 565 (2002). We are bound by findings that are supported by competent evidence. *State v. Parker*, 183 N.C. App. 1, 7, 644 S.E.2d 235, 240 (2007). However, "conclusions of law must be legally correct," and "a trial court's conclusion that a police officer had either probable cause or reasonable suspicion to detain or search a defendant is reviewable *de novo*." *Id.* (internal quotation marks omitted).

B. Findings of Fact and Conclusions of Law

Defendant does not contest the legality of the stop, the pat-down of his person, or the nature of his detention. Nor does he dispute that the link between Mr. Hedrick's ID and an earlier armed robbery provided probable cause to search the car. Rather, he deems the initial "vehicle frisk" the constitutional infirmity rendering the subsequent search invalid and the fruits thereof inadmissible. Specifically, Defendant argues that "the

trial court failed to make any findings or conclusions whether the first search of the Oldsmobile [was lawful]." We disagree.

A judge's ruling on a motion to suppress "must set forth in the record his findings of facts and conclusions of law," N.C. Gen. Stat. § 15A-977(f) (2009), but "where there is no material conflict in the evidence presented at the suppression hearing, specific findings of fact are not required." *See State v. Leach*, 166 N.C. App. 711, 715, 603 S.E.2d 831, 834 (2004). While preferred, findings on all facts supporting the trial judge's determination are not required if there is no conflict "because we can determine the propriety of the ruling on the undisputed facts which the evidence shows." *State v. Lovin*, 339 N.C. 695, 706, 454 S.E.2d 229, 235 (1995). "In that event, the necessary findings are implied from the admission of the challenged evidence." *Leach*, 166 N.C. App. at 715, 603 S.E.2d at 834.

Here, the trial court made findings that: Officer Elsasser was on evening patrol when he saw two "black males all dressed in black, running east on the sidewalk"; a female 20 feet away flagged him down and said "two black men, all dressed in black" had just robbed her and "were running east on the sidewalk"; the "officer immediately went east in pursuit of the two black males

he had just observed" and saw a vehicle occupied by two black men in black shirts—one driving and one in "the driver's side backseat"—"pull out of a private driveway in a fast manner, with no lights on"; Officer Elsasser pulled the car over, and the men were ordered out of the car, handcuffed, searched for weapons, and "placed in separate patrol vehicles"; "Officer Elsasser then conducted what he termed a 'frisk search' of the vehicle for weapons and other hidden occupants," when, "from looking through the window," he "noticed a driver's license of a white male on the front seat" and was able to read the name of Marc Harrison Hedrick thereon. The trial court also found that the "frisk search" described by Officer Elsasser was simply a scanning the car's interior "to see if other occupants [were inside] or if there [was] a weapon in an immediately accessible area" and did not involve opening any compartments or looking under any seats.

Further findings were made as to the subsequent events that led the officers to believe "they had developed probable cause" to search the car for evidence of the robberies, and the trial court concluded: (1) the WSPD "did develop probable cause for the search upon finding the driver's license in the seat and confirming that Marc Harrison Hedrick was in fact a victim of a robbery earlier that night; and (2) pursuant to ***Arizona v. Gant***,

556 U.S. 332, __, 173 L. Ed. 2d 485, 504 (2009), it was reasonable for the officers to believe that the "vehicle contain[ed] evidence of the offense of [the] arrest," that being an armed robbery, based on the report of the earliest robbery victim and finding of evidence in the car connecting these individuals to that earlier arrest.

The trial court's order contains ample findings of fact and conclusions of law. While it did not, as Defendant argues, separately conclude that the "first search of the Oldsmobile was lawful," the court's specific, unchallenged findings as to the discovery of the ID revealed that Officer Elsasser did not violate any right of Defendant's. Moreover, the evidence detailing the observation of Mr. Hedrick's license in plain-view on the front seat was uncontroverted. Supplemental findings based on the undisputed testimony can thus be implied from the very admission of the evidence Defendant sought to suppress. Indeed, the trial court concluded that probable cause supported the later search and denied Defendant's motion. While the court did not conclude expressly so, inherent in its ultimate ruling and the reasoning therefor is the determination that nothing about noticing and reading Mr. Hedrick's ID was unlawful or tainted the propriety of the search following this so-called

"vehicle frisk." Thus, we dismiss Defendant's argument that this case should be remanded due to insufficient findings of fact or conclusions of law. We now review *de novo* the constitutionality of the "frisk search" and conclude that it was not, in fact, a search at all.

C. Denial of the Motion to Suppress

The Fourth Amendment prohibits unreasonable searches and seizures. U.S. Const. amend. IV. "[A] governmental search of private property or effects without prior judicial approval is *per se* unreasonable unless the search fits into a well-delineated exception to the warrant requirement and is conducted under circumstances that are, in fact, exigent." *State v. Motley*, 153 N.C. App. 701, 703-04, 571 S.E.2d 269, 271 (2002) (internal quotation marks and citation omitted). Several exceptions to the rule against warrantless searches arise in the automobile context, two of which the circumstances here evoke.

One exception is premised on the "stop and frisk" rule articulated in *Terry v. Ohio*. *See Terry v. Ohio*, 392 U.S. 1, 20 L. Ed. 2d 889 (1968) (allowing pat-down searches of a detainee's person where the officer reasonably believes the suspect to be armed and dangerous); *Michigan v. Long*, 463 U.S. 1032, 1049, 77 L. Ed. 2d 1201, 1220 (1983) (extending the *Terry* rule to permit

searches of a vehicle's passenger compartment, "limited to those areas in which a weapon may be placed or hidden" if it is reasonable to believe the suspect is dangerous and may gain immediate control of weapons); *see also Parker*, 183 N.C. App. at 9, 644 S.E.2d at 241 (noting that while these brief searches—essentially "frisks" of a vehicle's interior—are to ensure officer safety and "do[] not extend to searching for evidence," the officer is not required to ignore contraband or other potentially incriminating evidence seen during the protective search). The other relevant exception arises in the distinct context where an officer "has probable cause to believe that the vehicle contains evidence of a crime" and "may conduct an immediate warrantless evidentiary search of the vehicle, including closed containers found therein." *Id.* at 10, 644 S.E.2d at 242; *see also California v. Acevedo*, 500 U.S. 565, 580, 114 L. Ed. 2d 619, 634 (1991).

At the time Officer Elsasser saw the ID, although he did not exercise his authority to the extent allowed by either exception, both would have likely supported some search of the car's interior: whether limited to a protective sweep under the vehicle frisk rule or a search for evidence of the armed robbery

of the female victim under the "automobile exception."[2] However, we do not undertake this analysis because our threshold inquiry is dispositive: where not every observation by a law enforcement officer "constitutes a search within the meaning of the Fourth Amendment," *United States v. Taylor*, 90 F.3d 903, 908 (4th Cir. 1996), we must first determine if an alleged search was even a search at all before assessing its legality. *State v. Young*, 186 N.C. App. 343, 352, 651 S.E.2d 576, 582 (2007).

"A search compromises the individual interest in privacy," *Horton v. California*, 496 U.S. 128, 133, 110 L. Ed. 2d 112, 120 (1990), and occurs when one's reasonable expectation of privacy

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[2] The trial court's findings show that the female robbery victim's depiction of the perpetrators matched the description of the men Officer Elsasser had just seen running by. Officer Elsasser further testified that the woman specified that the robbery was *at gunpoint*, creating a reasonable belief that the suspects were dangerous and had weapons within reach. Officer Elsasser could have thus conducted a protective sweep of the vehicle even though Defendant was handcuffed in a patrol car. For, he was being detained at that point solely pursuant to a *Terry* stop, as evidenced by the fact that Mr. Wilson was released following the non-corroborating show-up, and "[i]f [he] had been released after the detention, as he presumably would have been [had his outstanding warrants not been discovered and had the firearm not been found during the search related to the Hedrick robbery], he would have regained access to his vehicle and any weapon inside." *United State v. Griffin*, 589 F.3d 148, 154 (4th Cir. 2009); *see also United States v. Elston*, 479 F.3d 314, 320 (4th Cir. 2007) ("[A] protective search is authorized even if the suspect is under police restraint at the time the search is conducted, because the suspect may be able to escape such restraint, or may later regain access to the vehicle if he is not arrested."). These facts—alongside the findings that the car sped out of a driveway with its headlights off, and that the occupants assumed an odd seating arrangement therein—might have supported a search for evidence of the armed robbery just reported, as the female victim had not yet made the non-identification.

is infringed upon. *State v. Washburn*, 201 N.C. App. 93, 96, 685 S.E.2d 555, 558 (2009). Thus, official conduct compromising no legitimate interest in privacy is not a Fourth Amendment search. *Id.* A search is generally understood to imply "a quest by an officer" or "a prying into hidden places for that which is concealed," *Young*, 186 N.C. App. at 352, 651 S.E.2d at 582 (internal quotation marks and citation omitted), as the Fourth Amendment does not protect "[w]hat a person knowingly exposes to the public." *Katz v. United States*, 389 U.S. 347, 351, 19 L. Ed. 2d 576, __ (1967). Whether in a home, car, or elsewhere, there is no expectation of privacy in objects left in the plain view of outsiders. *Id.* at 361, 19 L. Ed. 2d at __ (Harlan, J., concurring), so an "officer's observations from a public vantage point where he has a right to be and which renders [objects or] activities clearly visible" do not constitute a Fourth Amendment search. *California v. Ciraolo*, 476 U.S. 207, 213, 90 L. Ed. 2d 210, __ (1986). Moreover, "when officers are in a public place or some other area . . . that is not protected by the Fourth Amendment, knowledge that they gain from their plain-view observations does not constitute a search[.]" *State v. Nance*, 149 N.C. App. 734, 739, 562 S.E.2d 557, 561 (2002).

The courts have "approved observations into the interior of cars by officers located at a point where they legally had a right to be." *United States v. Bellina*, 665 F.2d 1335, 1341 (4th Cir. 1981); *see also United States v. Johnson*, 599 F.3d 339, 347 (4th Cir. 2010) (stating the viewing of contraband in plain view through a car window "in no way violated the Fourth Amendment"). Even the use of flashlights and shifting their position to gain a better view of potentially incriminating evidence during traffic stops does not rise to the level of a search. *See Texas v. Brown*, 460 U.S. 730, 75 L. Ed. 2d 502 (1983); *see also State v. Brooks*, 337 N.C. 132, 144, 446 S.E.2d 579, 587 (1994) ("Officers who lawfully approach a car and look inside with a flashlight do not conduct a 'search' within the meaning of the Fourth Amendment."). Furthermore, any incriminating evidence that is seen as a result may be used to establish probable cause for the occupants' arrest. *Brooks*, 337 N.C. at 144, 446 S.E.2d at 587.

In the case *sub judice*, the trial court made unchallenged, thus binding, findings of fact that "[i]n the process of looking through the window," Officer Elsasser "noticed a driver's license of a white male on the front seat of the suspect's vehicle" and that "[f]rom looking in the window," he saw Mr.

Hedrick's name on the ID "and was able to read the driver's license." The trial court also found that, according to Officer Elsasser, the visual inspection which he termed a "vehicle frisk" involved only his "look[ing] in the car to see if other occupants are in the car or if there is a weapon in an immediately accessible area." The uncontroverted testimony further shows that when Officer Elsasser peered inside, he looked only "where [the suspects] had immediate access, any of the areas on the floorboards, on the seats, in between the seats." Where the officer testified that he did "not open the glove box or the trunk or any other closed areas," there is likewise no evidence to indicate that he even touched anything in the vehicle or looked under any of the seats.

The stop was indisputably lawful; thus, Officer Elsasser was clearly in a public place in which he had a right to be when he viewed through the car's windows an object of potentially incriminating evidence. Although he designated his conduct a "frisk search," his observing "an article that [was] already in plain view [did] not involve an invasion of privacy and, consequently, [did] not constitute a search implicating the Fourth Amendment." *United States v. Jackson*, 131 F.3d 1105, 1108 (4th Cir. 1997); *see also United States v. Rumley*, 588 F.3d

202 (4th Cir. 2010) (stating the pistol lying on the floorboard of the vehicle—seen by the officer as the passenger was removed after the defendant had been arrested, handcuffed, and placed in a patrol car—"came into plain view ***before*** any search of [the] vehicle"). Officer Elsasser was thus entitled to look through the windows, whether for his stated purpose of seeing how many people were in the Oldsmobile and determining whether its occupants were armed and dangerous, or otherwise. Any intrusion occasioned thereby is permissible, not only in view of officer safety, ***see Long***, 463 U.S. at 1049, 77 L. Ed. 2d at __, and diminished privacy interests in automobiles, ***see Cardwell v. Lewis***, 417 U.S. 583, 41 L. Ed. 2d 325 (1974), but because Officer Elsasser violated no legitimate expectation of privacy by scanning the car's interior from the outside under ***Brown***.

As neither the inspection nor the knowledge gained from his plain-view observation constituted a search, Officer Elsasser's discovery of an ID, suspiciously in the possession of the suspects, was properly built upon to develop probable cause to arrest the occupants and search the vehicle pursuant to ***Arizona v. Gant***, as the trial court concluded.[3] Defendant sets forth no

[3] While the State cites ***Gant*** to justify both the initial observation of Mr. Hedrick's ID and the subsequent discovery of the handgun and wrench, ***Gant*** applies only to this latter search, as Defendant was not

argument that the linking of the ID to another crime, in light of the other findings of fact, did not provide probable cause for the vehicle search for evidence of the Hedrick armed robbery. Thus, we affirm the denial of his motion to suppress.

II. Sentencing

Defendant contends the trial court erred in concluding that he was a prior record level IV offender, based, in part, on an Indiana robbery conviction. Specifically, Defendant argues that the trial court inappropriately treated his out-of-state conviction as a Class G felony in calculating his prior record level without determining whether the conviction was a felony or misdemeanor and whether it was substantially similar to a North Carolina offense. Defendant contends that the case should thus

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yet arrested at the time Officer Elsasser scanned the interior through the vehicle's window. *See Gant*, __ U.S. at __, 173 L. Ed. 2d at __ (holding police may search a vehicle incident to a recent occupant's arrest "only when the arrestee is unsecured and within reaching distance of the passenger compartment at the time of the search."). Although we resolve that Officer Elsasser's conduct did not rise to the level of a full search, let alone a vehicle frisk, *Gant* is inapposite to the inquiry, as the Fourth Circuit has declined to apply the rationale of *Gant* beyond the search-incident-to-arrest exception. *See Griffin*, 589 F.3d at 154 n.8 ("[*Gant*'s] reasoning does not extend to protective searches under *Long* because in a *Terry* stop where the suspect has not been arrested, 'the possibility of access to weapons in the vehicle always exists, since the driver or passenger will be allowed to return to the vehicle when the interrogation is completed'"); *Rumley*, 588 F.3d at 205-06 (upholding search of vehicle and seizure of pistol under "plain-view" exception to the warrant requirement in the fact of a *Gant* challenge).

be remanded for resentencing. We disagree, as we conclude that Defendant has suffered no prejudicial error.

This Court may review asserted errors that an imposed sentence "exceeded the maximum authorized by law, was illegally imposed, or is otherwise invalid as a matter of law," even where no objection was made at the sentencing hearing. N.C. Gen. Stat. § 15A-1446(d)(18) (2009). The trial court's determination of a defendant's prior record level is a conclusion of law, which we review *de novo*, *State v. Bohler*, 198 N.C. App. 631, 633, 681 S.E.2d 801, 804 (2009), and we apply "a harmless error analysis to improper calculations of prior record level points." *State v. Lindsay*, 185 N.C. App. 314, 315, 647 S.E.2d 473, 474 (2007).

Before imposing a felony sentence under the Structured Sentencing Act, the sentencing judge must first "determine the prior record level for the offender pursuant to G.S. 15A-1340.14." N.C. Gen. Stat. § 15A-1340.13(b) (2009); *see also* N.C. Gen. Stat. § 15A-1340.14(a)-(b) (2009) (specifying the number of prior record points assigned to each class of misdemeanor and felony offense and providing that "[t]he prior record level of a felony offender is determined by calculating the sum of the points assigned to each of the offender's prior convictions that the court . . . finds to have been proved"). It is the State's

burden to prove, "by a preponderance of the evidence, that a prior conviction exists" and that the defendant "is the same person as the offender named in the prior conviction." N.C. Gen. Stat. § 15A-1340.14(f)(4) (2009). Among the several statutorily permissible methods available to the State, a prior conviction may be proven by "[s]tipulation of the parties." N.C. Gen. Stat. § 15A-1340.14(f)(1) (2009).

In calculating prior record levels, points may be allocated for out-of-state convictions, which are classified as Class I felonies "if the jurisdiction in which the offense occurred classifies the offense as a felony" or as Class 3 misdemeanors "if the jurisdiction in which the offense occurred classifies the offense as a misdemeanor." N.C. Gen. Stat. § 15A-1340.14(e) (2009). However,

> [i]f the State proves by the preponderance of the evidence that an offense classified as either a misdemeanor or felony in the other jurisdiction is substantially similar to an offense in North Carolina that is classified as a Class I felony or higher, the conviction is treated as that class of felony for assigning prior record level points.

Id. This "is a question of law to be resolved by the trial court," and where "[s]tipulations as to questions of law are generally held invalid and ineffective," a stipulation that an

out-of-state offense is substantially similar to a North Carolina offense is "not binding upon the courts, either trial or appellate[.]" *State v. Hanton*, 175 N.C. App. 250, 253, 623 S.E.2d 600, 603-04 (2006); *see generally Bohler*, 198 N.C. App. 631, 681 S.E.2d 801 (explaining how the rules for proving the prior record level points assigned to an out-of-state conviction differ from those applicable to in-state offenses with respect to stipulations). Thus, the substantially similar inquiry is one that the trial court must resolve if it seeks to assign an out-of-state felony conviction a more serious classification than the default Class I status. *State v. Hinton*, 196 N.C. App. 750, 755, 675 S.E.2d 672, 675 (2009). However, this "does not mean that the trial court lack[s] the authority to consider [such] convictions for purposes of sentencing at all":

> [W]hile the trial court may not accept a stipulation to the effect that a particular out-of-state conviction is "substantially similar" to a particular North Carolina felony or misdemeanor, it may accept a stipulation that the defendant in question has been convicted of a particular out-of-state offense and that this offense is either a felony or a misdemeanor under the law of that jurisdiction.

Bohler, 198 N.C. App. at 637-38, 681 S.E.2d at 806.

Here, during Defendant's guilty plea, the State provided a stipulated-to recitation of the facts and then asked defense

counsel if Defendant "stipulate[d] to being a level 4 for punishment and that that Indiana conviction would qualify as at least a Class G common law robbery for sentencing purposes and sentencing points." Defendant's counsel replied before the trial judge, "Yes, he does," and also stipulated on his client's behalf to the sentencing worksheet submitted by the State for the court's consideration. The worksheet set out a record level of IV based on Defendant's accumulation of eleven record points from five prior convictions in Forsyth County—three Class 1 misdemeanors, one Class I felony, and one Class H felony—and one conviction of "Armed Robbery" in "St. Joseph, IN," listed as a Class G felony. Having initially classified the Indiana conviction as a Class D felony, the State admitted to the trial court that while the offense "might have been the equivalent of *armed* robbery," it could not "really prove that." Without objection, however, the State asserted that Defendant was indeed "on probation out of Indiana for a robbery" and that the parties thus "stipulated to the G instead of the D points." The trial court accepted the plea and found—without making a substantial similarity conclusion—that Defendant "stipulate[ed] to being a prior record level 4." Consolidating the charges into two

counts of robbery with a dangerous weapon, the court imposed a presumptive range prison sentence of 117 to 150 months.

Defendant thus argues that his stipulation was ineffective, as his agreement that a prior record level of IV was proper was based, in part, on the underlying stipulation that the Indiana conviction would qualify as at least a Class G felony robbery for sentencing purposes. Defendant is correct that the trial court erred in assigning his out-of-state conviction a more serious classification than the default Class I status without making a substantial similarity determination. However, the claim that his stipulation to "[t]he worksheet was insufficient to prove that the Indiana conviction in question was a felony or a misdemeanor" fails to acknowledge this Court's rejection of the same allegation. *See Bohler*, 198 N.C. App. at 636, 681 S.E.2d at 805 ("The fundamental flaw in Defendant's argument is his assumption that stipulations between the State and a criminal defendant as to the fact of an out-of-state conviction for either a felony or a misdemeanor and stipulations as to the 'substantial similarity' between an out-of-state offense and a North Carolina crime are equally ineffective.").

The worksheet and Defendant's failure to object to the submission thereof, coupled with the colloquy between the trial

court and the parties, establishes that Defendant stipulated not only to the out-of-state conviction's similarity to a specific North Carolina classification, but also to the facts that he had been convicted of armed robbery in Indiana and that said conviction was a felony under Indiana law. Thus, while the trial court erred in accepting the stipulation to the effect that the Indiana conviction was substantially similar to a North Carolina offense, its decision to classify the Indiana robbery as a felony was still proper. Instead of accepting the stipulation to the points assigned the out-of-state conviction, however, the trial court should have simply applied the default Class I category to the Indiana robbery to determine Defendant's prior record level. *See id.* at 638, 681 S.E.2d at 806. In any event, the error was harmless because a correct application of the rules ascribes nine prior record points rather than the eleven stipulated to, as the four points assigned by treating the Indiana conviction as a Class G felony should have been two Class I points. Under the relevant prior record level schedule, nine points still relegates Defendant to Level IV offender status. *See* N.C. Gen. Stat. § 15A-1340.14(c)(4) (2007) ("Level IV — At least 9, but not more than 14 points."). Where the trial court's error did not adversely affect the prior record

level determination, Defendant suffered no prejudice and is entitled to no relief on appeal.

Affirmed; No Prejudicial Error.

Judges McGEE and STROUD concur.

Report per Rule 30(e).