NO. COA09-11

NORTH CAROLINA COURT OF APPEALS

Filed: 8 December 2009

STATE OF NORTH CAROLINA

v.	Mecklenburg County No. 07 CRS 240084,
COREY EUGENE MOORE	07 CRS 240086, 07 CRS 240088, 07 CRS 57597

Appeal by Defendant from judgments entered 27 August 2008 by Judge Susan C. Taylor in Mecklenburg County Superior Court. Heard in the Court of Appeals 19 August 2009.

Attorney General Roy Cooper, by Assistant Attorney General Tracy Curther, for the State.

Robert W. Ewing for Defendant.

ERVIN, Judge.

At approximately 4:15 p.m. on 27 August 2007, sixty-four year old Bruce Voorheis drove to a McDonald's in Charlotte for a late lunch. Voorheis parked his car and went inside the restaurant to place his order. While waiting at the counter, Voorheis noticed a man sitting near the door wearing a Cincinnati Reds hat. Voorheis took a particular interest in this individual because he was a native of Cincinnati and an avid Reds fan. After ordering his lunch, Voorheis decided to visit the restroom in order to wash his hands. As he started to exit the restroom, two men came through the door in rapid succession and began attacking him. The first

entrant hit Voorheis in the face, after which both men began beating him in the face, head, and chest. At one point during the attack, one of the assailants ripped off the right rear pocket of Voorheis' pants and took his wallet. Voorheis' keys were also taken during the attack. Immediately thereafter, both perpetrators exited the restroom.

Voorheis identified one of the men, later determined to be Defendant Corey Moore, as the individual wearing the Cincinnati Reds hat. According to Voorheis, Defendant was also wearing a white shirt. Voorheis said that Defendant was the first of the two men to enter the bathroom. Voorheis could not describe the second assailant at trial; however, in a statement given to an investigating officer on the day of the incident, he indicated that the second man was wearing a blue shirt.

On that same day, the general manager of the McDonald's in which the robbery occurred, Belinda Mitchell, was working in her office. Mitchell reported hearing noises emanating from the bathroom and a voice loudly calling for help. As she hurried from the office to investigate, Mitchell witnessed two men running from the bathroom area. The two men went out the restaurant door with sufficient force to break its hinge. Immediately after the two men left the building, Voorheis stumbled out of the bathroom in a bruised and bloody condition.

Following their departure from the restaurant, the two men ran toward the In-Town Suites, another business located near Interstate 77. According to Mitchell, one of the two individuals running from

the McDonald's wore a white shirt and a red and white cap. Mitchell recognized the second individual as someone who had been "there since the last week, days, all the way up until that day" and indicated that "[h]e had been coming over every morning." Mitchell had requested the second individual to refrain from panhandling customers on the day before the robbery.

After Officer David Decker responded to the call for help, he alerted other officers to be on the lookout for two black males, both approximately 5' 10" in height, one of whom was wearing a red hat and a white shirt and the other of whom was wearing a dark colored shirt and pants. Among the officers who received the information transmitted by Officer Decker was Officer Jonathan Smith, who, shortly thereafter, observed two men walking on Interstate 77 approximately a quarter mile from the McDonald's at which the robbery had taken place and helped take them into custody. Immediately after the two men were apprehended, Mitchell was taken to the scene, where she identified Defendant and Efrem White (White) as the two individuals she had seen fleeing the restaurant.

At the time that he was spotted on Interstate 77, Defendant was wearing a white shirt and a red baseball cap with a "C" on it. As the police approached, Defendant threw the red hat and white shirt on the ground. Officer Smith noted that there were blood stains on the white shirt.

After Defendant was arrested, Detective Tom Ledford interviewed him. During the interview, Defendant admitted having

been present in the bathroom during the assault, but denied having taken an active part in what occurred there. On the contrary, Defendant claimed that he had accidentally bumped into Voorheis, at which point White began to attack him.

The next day, Detective Rick Andringa showed a photographic lineup to Voorheis, who identified Defendant as one of his assailants. Voorheis sustained two separated shoulders, a broken nose and numerous bruises and spent two days in Presbyterian Hospital as a result of the injuries he received at the time of the robbery.

On 19 September 2007, the Mecklenburg County grand jury returned bills of indictment charging Defendant with common law robbery, assault inflicting serious injury, conspiracy to commit common law robbery, and having attained the status of an habitual felon. On 27 August 2008, the jury convicted Defendant of common law robbery, assault inflicting serious injury, and conspiracy to commit common law robbery. On the following day, the jury found Defendant guilty of having attained the status of an habitual felon. In addition, the jury found that Defendant had committed the offenses for which he was being sentenced while on pre-trial release from another charge.

After accepting these verdicts, the trial court determined that Defendant had 25 prior record points, including a point stemming from the fact that "all the elements of the present offense [were] included in [a] prior offense," and that Defendant should be sentenced as a Level VI offender. As a result, the trial

court found that the aggravating factor found by the jury outweighed the mitigating factors[1] and sentenced Defendant to a minimum term of 210 months and a maximum term of 261 months imprisonment in the custody of the North Carolina Department of Correction in the case in which Defendant was convicted of common law robbery. The trial court then consolidated for judgment the cases in which Defendant was convicted of conspiracy to commit common law robbery and assault inflicting serious injury, found that the aggravating factor found by the jury outweighed the mitigating factors,[2] and sentenced Defendant to a minimum term of 210 months and a maximum term of 261 months imprisonment in the custody of the North Carolina Department of Correction, with this sentence to begin at the expiration of the sentence imposed upon Defendant for common law robbery. Defendant noted an appeal to this Court from the trial court's judgments.

I. Motions to Dismiss

On appeal, Defendant contends that the evidence was insufficient to support his convictions for conspiracy to commit common law robbery and common law robbery. After careful consideration of the record evidence in light of the applicable law, we disagree.

> Evidence is sufficient to sustain a conviction when, viewed in the light most favorable to the State and giving the State every reasonable inference therefrom, there is substantial evidence to support a jury finding

[1] No mitigating factors were found.

[2] Once again, no mitigating factors were found.

> of each essential element of the offense charged, and of defendant's being the perpetrator of such offense.

State v. Robledo, __ N.C. App. __, __, 668 S.E.2d 91, 94 (2008) (quoting *State v. Bagley*, 183 N.C. App. 514, 523, 644 S.E.2d 615, 621 (2007) (internal quotation omitted)). "Substantial evidence is that amount of relevant evidence necessary to persuade a rational juror to accept a conclusion." *State v. Scott*, 356 N.C. 591, 597, 573 S.E.2d 866, 869 (2002) (citing *State v. Mann*, 355 N.C. 294, 301, 560 S.E.2d 776, 781, *cert. denied*, 537 U.S. 105, 154 L. Ed. 2d 403 (2002)). When ruling on a motion to dismiss, the trial court should focus on the sufficiency of the evidence rather than its weight. *Scott*, 356 N.C. at 597, 573 S.E.2d at 869. "The evidence need only give rise to a reasonable inference of guilt in order for it to be properly submitted to the jury for a determination of defendant's guilt beyond a reasonable doubt." *State v. Stone*, 323 N.C. 447, 452, 373 S.E.2d 430, 433 (1988) (citing *State v. Jones*, 303 N.C. 500, 504, 279 S.E.2d 835, 838 (1981); *State v. Cutler*, 271 N.C. 379, 383, 156 S.E.2d 679, 682 (1967)).

A. Conspiracy to Commit Common Law Robbery

Defendant first contends that the trial court erred in finding the evidence sufficient to permit the jury to consider whether he conspired with White to commit the crime of common law robbery. In support of this contention, Defendant argues that the State's evidence failed to show the existence of the necessary agreement to commit a common law robbery between Defendant and White. Although Defendant admitted that he was in the bathroom during the incident

in which Voorheis was assaulted and robbed, he denied any involvement in the commission of these crimes and argues that his denial of involvement, coupled with what he claims to be the absence of conduct-based evidence tending to show the existence of an agreement between White and himself to rob Voorheis, demonstrates the inadequacy of the State's evidence to support a conspiracy conviction. After a careful review of the evidence taken in the light most favorable to the State, we conclude that the record contains substantial evidence tending to show the existence of a conspiracy to rob Voorheis in which Defendant participated.

A criminal conspiracy is an agreement, express or implied, between two or more persons to do an unlawful act or to do a lawful act by unlawful means or in an unlawful way. *State v. Bindyke*, 288 N.C. 608, 615, 220 S.E.2d 521, 526 (1975) (citing *State v. Littlejohn*, 264 N.C. 571, 574, 142 S.E.2d 132, 134 (1965)). "Direct proof of conspiracy is rarely obtainable, and a conspiracy generally is established by a number of indefinite acts, which taken collectively point to the existence of a conspiracy." *State v. Burmeister*, 131 N.C. App. 190, 199, 506 S.E.2d 278, 283 (1998) (citing *State v. Smith*, 237 N.C. 1, 17, 74 S.E.2d 291, 302 (1952)). As a result, the existence of the agreement necessary to support a finding of guilt in a conspiracy case is generally inferred from an analysis of the surrounding facts and circumstances rather than established by direct proof. However, the mere fact that the crime that the defendant allegedly conspired with others to commit took

place does not, without more, prove the existence of a conspiracy. *State v. Arnold*, 329 N.C. 128, 142, 404 S.E.2d 822, 831 (1991). Furthermore, "[i]f the conspiracy is to be proved by inferences drawn by the evidence, such evidence must point unerringly to the existence of a conspiracy." *State v. Massey*, 76 N.C. App. 660, 662, 334 S.E.2d 71, 72 (1985).

The evidence received at trial, when taken in the light most favorable to the State, was clearly sufficient to support a reasonable belief that Defendant and White conspired to rob Voorheis. According to Mitchell, White had been frequenting the McDonald's where the robbery occurred for some time and had been told to stop panhandling customers on the preceeding day. In addition, Voorheis testified that he had noticed Defendant sitting at a table near the door while he was at the counter. At the time that he started to leave the bathroom in order to eat his lunch, Voorheis testified that Defendant and another man, later identified as White, came into the bathroom, one right after the other, and began beating him in the face, head, and chest. Voorheis testified that:

> Q. [N]ow, do you recall which of the two individuals struck you first?
>
> A. The first person, coming in, I remember had the red hat. In terms of he [sic] being the first person to hit me, since I swore on the Bible (gesturing), I can say that all I know is within like ten seconds I was being hit by several individuals.
>
> Q. Several, you mean more than two?

> A. Several, meaning two. Whether it was in the side or the back or the head, it was just, just - - I want to say brutal. It was just unforgiving.
>
> . . . .
>
> Q. Now, you said that they were grabbing you and they grabbed your back right pocket; is that correct?
>
> A. Right, right there, back right pocket (indicating).
>
> Q. And is this tear as a result of them grabbing your pocket and your wallet?
>
> A. I guess that's the only way they could get my wallet.
>
> Q. Okay. And what is this (indicating)? There are some stains on the front.
>
> A. Blood.

In addition, Mitchell testified that, after they exited the restroom, "the two gentlemen ran, pushed and ran out the door[,]" and in the course of fleeing the scene "they kind of both went out that door at the same time. . . ." Although she acknowledged that she had not seen the two men together prior to this incident, Mitchell further noted that:

> They was running. And they went out the door running, they left out the door running together, and they went down across behind the parking lot to go--they entered through the bushes to go to the other side to the In-Town Suites, they was running together when they ducked to go through those bushes, they ducked and ran through those bushes together, and when they was apprehended, they was apprehended together on 77.

As a result, the testimony of both Voorheis and Mitchell tends to show that Defendant and White entered the bathroom to which

Voorheis had gone to wash his hands together; that Defendant had had an opportunity to observe Voorheis' movements after entering the restaurant; that White had been loitering around the restaurant for several days; that the initial attack on Voorheis was committed by Defendant and White, acting in combination; that Defendant and White fled the scene together in the direction of Interstate 77; and that Defendant and White were still together when they were apprehended on Interstate 77 some time later. When all of this evidence is considered in the light most favorable to the State, a reasonable juror could infer that Defendant and White had agreed to engage in "the felonious taking of money or goods of any value from the person of another, or in his presence, against his will, by violence or putting him in fear." N.C. Gen. Stat. § 14-87.1*; State v. Smith*, 305 N.C. 691, 700, 292 S.E.2d 264, 270, *cert. denied*, 459 U.S. 1056, 74 L. Ed. 2d 622 (1982). As a result, the trial court did not err by denying Defendant's motion to dismiss the conspiracy to commit common law robbery charge.

B. Common Law Robbery

Next, Defendant challenges the trial court's denial of his motion to dismiss the charge of common law robbery on the grounds that the evidence was insufficient to support a conviction. More particularly, Defendant argues that Voorheis could not identify the individual who ripped his pants and took his wallet "because his eyes were closed and his head down during this incident." In addition, Defendant contends that there was no evidence that any of the items stolen from Voorheis were on Defendant's person at the

time that he was taken into custody and that there was no evidence that he had acted in concert with White. On the contrary, Defendant points to his post-arrest statement to Detective Ledford to the effect that he accidentally bumped into Voorheis in the bathroom; that, after this collision, White jumped on Voorheis and began beating him; and that Defendant had no involvement in the robbery. As a result, Defendant contends that the trial court erred by failing to dismiss the common law robbery charge.

Common law robbery is the "felonious taking of money or goods of any value from the person of another, or in his presence, against his will, by violence or putting him in fear." *Smith*, 305 N.C. at 700, 292 S.E.2d at 270. Under the acting in concert doctrine, a defendant does not have to commit any particular act constituting part of a crime in order to be found guilty. *State v. Rush*, __ N.C. App. __, __, 674 S.E.2d 764, 769 (2009), *disc. review denied,* 363 N.C. 587,__ S.E.2d __ (2009) (citing *State v. Moore*, 87 N.C. App. 156, 159, 360 S.E.2d 293, 295 (1987), *disc. review denied*, 321 N.C. 477, 364 S.E.2d 664 (1988)). Instead, in order for a defendant to be convicted under an acting in concert theory, the defendant must be "present at the scene of the crime" and he or she must "act[] together with another who does the acts necessary to constitute the crime pursuant to a common plan or purpose to commit the crime." *Moore*, 87 N.C. App. at 159, 360 S.E.2d at 295.

In this case, the fact that Voorheis could not identify which of his two assailants physically removed his wallet from his rear pocket and the fact that Defendant denied involvement in the attack

on Voorheis did not require the trial court to dismiss the common law robbery charge that had been lodged against Defendant. According to Voorheis, "the first person coming in . . . had the red hat[;]" "[t]here were two men that came in[;]" and "two men were attacking me." During the course of the attack, one of the two assailants ripped Voorheis' rear pocket and removed his wallet. Voorheis identified Defendant as one of the two assailants in a photographic lineup conducted shortly after the robbery. Officer Smith testified that, when he approached the suspects shortly before taking them into custody, Defendant "had thrown the [red] hat and the white tee-shirt on the ground." In addition, Officer Smith also testified that:

> Q. Okay. After you placed Corey Moore and Efrem White in handcuffs, what other involvement did you have in this case?
>
> A. I was involved in what's called a show-up that took place there on the shoulder of I-77.
>
> Q. Okay. Who came down to I-77?
>
> A. It was a McDonald's employee, a manager I believe, Belinda Mitchell.
>
> Q. And what is exactly a show-up? Just explain that.
>
> A. A show-up is a, it's an identification process that takes place just moments after an actual crime, particularly felonies that take place. And what it is is it's a process where a victim or witness will show up to the location where an officer has stopped a potential suspect and goes through the process of actually identifying whether or not that suspect was involved in a crime that they witnessed or was a victim of.

> Q. Was Corey Moore positively identified as one of the people in McDonald's?
>
> A. Yes, he was.

When viewed in the light most favorable to the State, this evidence is sufficient to show that Defendant and another individual who appeared to be acting in concert with him assaulted Voorheis in the restroom at the McDonald's restaurant and that, in the course of this assault, Voorheis' wallet was removed from his pants pocket by force and against his will by one or the other of the two assailants. As a result, the record contains substantial evidence tending to show Defendant's guilt of common law robbery under an acting in concert theory, so that the trial court properly denied Defendant's dismissal motion directed toward that charge.

II. Sentencing

Finally, Defendant contends that the trial court erroneously calculated his prior record level. More particularly, Defendant challenges the trial court's decision to assign him six prior record points on the grounds that his conviction for third degree rape in North York was "substantially similar" to the North Carolina offense of second degree rape and that he should be assigned an additional prior record point in the case in which he was sentenced for conspiracy to commit common law robbery and assault inflicting serious injury on a consolidated basis because all of the elements of conspiracy to commit common law robbery were included in an offense for which Defendant had been previously convicted. As a result, Defendant contends that he is entitled to be resentenced. Although we agree with Defendant that the trial

court committed two errors in its sentencing determination, we conclude that these errors did not prejudice Defendant and that he is not entitled to a new sentencing hearing.

A. Prior Rape Conviction

At the sentencing hearing, the prosecutor tendered a certified copy of Defendant's conviction for third degree rape in New York, a DCI report, and a copy of the New York rape statute in an effort to make the "substantial similarity" showing required by N.C. Gen. Stat. § 15A-1340.14(e). According to the prosecutor, Defendant's New York rape conviction was "substantially similar to the North Carolina offense of second degree rape" and should result in an award of six prior record points for felony sentencing purposes. Defendant's trial counsel did not object to the prosecutor's analysis. After reviewing the materials submitted by the prosecutor, the trial court found that Defendant's New York third degree rape conviction was "more similar" to North Carolina's second degree rape statute and awarded Defendant six prior record points based upon this conviction.

The treatment of out-of-state convictions for purposes of felony sentencing is governed by N.C. Gen. Stat. § 15A-1340.14(e), which provides that:

> Except as otherwise provided in this subsection, a conviction occurring in a jurisdiction other than North Carolina is classified as a Class I felony if the jurisdiction in which the offense occurred classifies the offense as a felony, or is classified as a Class 3 misdemeanor if the jurisdiction in which the offense occurred classifies the offense as a misdemeanor. If the offender proves by the preponderance of

> the evidence that an offense classified as a felony in the other jurisdiction is substantially similar to an offense that is a misdemeanor in North Carolina, the conviction is treated as that class of misdemeanor for assigning prior record level points. If the State proves by the preponderance of the evidence that an offense classified as either a misdemeanor or a 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. If the State proves by a preponderance of the evidence that an offense classified as a misdemeanor in the other jurisdiction is substantially similar to an offense classified as a Class A1 or Class 1 misdemeanor in North Carolina, the conviction is treated as Class A1 or Class 1 misdemeanor for assigning prior record level points.

In determining whether there is "substantial similarity" between an out-of-state offense and a North Carolina crime, the Court compares the elements of the former to the elements of the latter. *State v. Hanton*, 175 N.C. App. 250, 254, 623 S.E.2d 600, 604 (2006). "However, the requirement set forth in N.C. Gen. Stat. § 15A-1340.14(e) is not that the statutory wording precisely match[es], but rather that the offense be substantially similar." *State v. Sapp*, 190 N.C. App. 698, 713, __ S.E.2d __, __ (2008). As this Court has noted, "the statute does not instruct the trial court how to determine which North Carolina offense is most substantially similar to the out-of-state offense when the out-of-state offense has elements that are similar to multiple North Carolina offenses." *Hanton*, 175 N.C. App. at 259, 623 S.E.2d at 606. In such

instances, "the rule of lenity requires us to interpret the statute in favor of defendant." *Id.*[3]

According to the materials presented by the State at Defendant's sentencing hearing, his New York conviction involved a violation of NYS CLS Penal Sec. 130.25, which provides that:

> A person is guilty of rape in the third degree when:
>
> 1. He or she engages in sexual intercourse with another person who is incapable of consent by reason of some factor other than being less than seventeen years old;
>
> 2. Being twenty-one years old or more, he or she engages in sexual intercourse with another person less than seventeen years old; or
>
> 3. He or she engages in sexual intercourse with another person without such person's consent where such lack of consent is by reason of some factor other than incapacity to consent.

Although the prosecutor did not specify the statutory subsection under which Defendant was convicted in New York, Defendant reads the materials introduced into evidence to mean that Defendant was convicted under subsection 2. N.C. Gen. Stat. § 14-27.3, on the other hand, provides that:

> A person is guilty of rape in the second degree if the person engages in vaginal intercourse with another person:

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[3] Although this Court has not definitively resolved the issue of the extent, if any, to which the underlying circumstances surrounding Defendant's out-of-state conviction are relevant to the "substantial similarity inquiry, we need not address that issue in this case given that the record does not contain any information concerning the nature of the events which led to Defendant's New York rape conviction.

> 1. By force and against the will of the other person; or
>
> 2. Who is mentally defective, mentally incapacitated, or physically helpless, and the person performing the act knows or should reasonably know the other person is mentally defective, mentally incapacitated, or physically helpless.

N.C. Gen. Stat. § 14-27.3(a). A careful analysis of the relevant New York and North Carolina statutes reveals that the offenses prohibited by the two statutory provisions are not "substantially similar." On the one hand, the New York statute prohibits intercourse with individuals who are incapable of consent for some reason other than "being less than seventeen years old," who are "less than seventeen years old," or who do not give "consent where such lack of consent is by reason of some factor other than incapacity to consent." On the other hand, N.C. Gen. Stat. § 14-27.3(a) prohibits forcible sexual intercourse or sexual intercourse with a person who is known to the offender or reasonably should be known to the offender to be "mentally defective, mentally incapacitated, or physically helpless." Although engaging in actions sufficient to result in a conviction under either prong of N.C. Gen. Stat. § 14-27.3(a) would probably suffice to support a conviction under NYS CLS PL Sec. 130.25, it is not at all clear that the reverse is true, particularly if Defendant has correctly identified the statutory subsection which undergirds Defendant's New York conviction. As a result, we cannot conclude that Defendant's New York third degree rape conviction was "substantially similar" to a conviction for second degree rape in

violation of N.C. Gen. Stat. § 14-27.3(a), rendering the trial court's decision to award Defendant six prior record points for this conviction erroneous.

According to N.C. Gen. Stat. § 15A-1340.14(e), an out-of-state felony conviction not shown to be substantially similar to a North Carolina offense is deemed to be a Class I felony for purposes of the assignment of prior record points. There is no question but that third degree rape is a felony in New York. As a result, N.C. Gen. Stat. § 15A-1340.14(e) would tend to suggest that, instead of the six prior record points actually assigned by the trial court, Defendant should have been assigned the two points ordinarily awarded for a prior Class I felony conviction in the absence of a showing that Defendant's New York third degree rape conviction was "substantially similar" to a more serious North Carolina offense. N.C. Gen. Stat. § 15A-1340.14(b)(4). However, Defendant contends that, since "the North Carolina third degree rape statute is not substantially similar to any North Carolina felony offense nor is it substantially similar to any North Carolina misdemeanor offense," his "New York conviction could at most be classified as a Class 3 misdemeanor" and be assigned no prior record points. N.C. Gen. Stat. § 15A-1340.14(b)(5). Defendant's argument rests on a misreading of N.C. Gen. Stat. § 15A-1340.14(e), since it assumes that, in the absence of a finding that an out-of-state conviction is "substantially similar" to a North Carolina offense that is assigned prior record points, that offense is treated as a Class 3 misdemeanor. A careful reading of the relevant statutory language

indicates, however, that in order for a defendant to have a crime that is classified as a felony in another jurisdiction treated as a misdemeanor for North Carolina felony sentencing purposes, the defendant has to prove "by the preponderance of the evidence that an offense classified as a felony in the other jurisdiction is substantially similar to an offense that is a misdemeanor in North Carolina . . . ." N.C. Gen. Stat. § 15A-1340.14(e). In other words, the burden is not on the State to prove that the out-of-state felony is "substantially similar" to a North Carolina offense in order for that conviction to merit the assignment of any prior record points, as Defendant's argument appears to suggest; instead, the burden is on Defendant to prove that an offense that is classified as a felony in the other jurisdiction is "substantially similar" to a North Carolina misdemeanor in order to avoid having it treated as at least a Class I felony for North Carolina sentencing purposes. Since Defendant did not demonstrate at trial that his New York third degree rape conviction was "substantially similar" to a North Carolina misdemeanor, it is properly classified as a Class I felony and assigned two prior record points for North Carolina sentencing purposes. Thus, given the materials submitted at the sentencing hearing, the trial court should have assigned two prior record level points to Defendant based on his New York conviction for third degree rape.

B. Common Elements

The trial court also awarded Defendant an additional prior record point in the case in which he was convicted of conspiracy to

commit common law robbery because "all the elements of the present offense are included in any prior offense whether or not the prior offenses were used in determining [the] prior record level[.]" N.C. Gen. Stat. § 15A-1340.14(b)(6). In determining whether an additional prior record point should be awarded pursuant to N.C. Gen. Stat. § 15A-1340.14(b)(6), the trial court must conduct "a comparison of the present offense with prior offenses." *State v. Bethea*, 122 N.C. App. 623, 627, 471 S.E.2d 430, 432-33 (1996). Although Defendant had evidently been convicted of common law robbery on three previous occasions, there is no evidence that he had previously been convicted of conspiracy to commit common law robbery. As a result, given the absence of such evidence, the trial court erred by awarding an additional prior record point to Defendant pursuant to N.C. Gen. Stat. § 15A-1340.14(b)(6).

C. Conclusion

At the sentencing hearing, the trial court awarded Defendant 25 prior record points in both the case in which he was being sentenced for common law robbery and the case in which he was being sentenced for conspiracy to commit common law robbery and assault inflicting serious injury and sentenced Defendant as a Level VI offender. In both instances, Defendant was awarded six prior record points for his New York conviction for third degree rape when he should have been awarded only two prior record points for that conviction. In addition, Defendant should not have been awarded a prior record point pursuant to N.C. Gen. Stat. § 15A-1340.14(b)(6) in the case in which he was being sentenced for

conspiracy to commit common law robbery and assault inflicting serious injury on a consolidated basis. As a result, assuming that the trial court had properly calculated Defendant's prior record points, he should have been awarded 21 points in the case in which he was sentenced for his common law robbery conviction and 20 points in the case in which he was sentenced for his conspiracy to commit common law robbery and assault inflicting serious injury convictions. Since both prior record level point totals are sufficient to support the trial court's decision to sentence him as a Level VI offender, the trial court's sentencing errors did not prejudice Defendant, rendering the trial court's errors harmless. *State v. Bethea*, 173 N.C. App. 43, 60-61, 617 S.E.2d 687, 697-98 (2005) (holding that, despite the fact that the trial court erroneously awarded the defendant eleven prior record points instead of nine, this error was harmless since the defendant would still be a Level IV offender had a correct prior record calculation been performed); *State v. Smith*, 139 N.C. App. 209, 219-20, 533 S.E.2d 518, 524, *appeal dismissed*, 353 N.C. 277, 546 S.E.2d 391 (2000) (holding that trial court's erroneous determination that the defendant had ten prior record points instead of nine constituted harmless error since the defendant would still have been a Level IV offender had the prior record calculation been performed correctly).

III. Conclusion

Thus, for the reasons set forth above, we conclude that Defendant's trial and sentencing hearing were free from prejudicial

error. As a result, Defendant is not entitled to any relief on appeal.

NO PREJUDICIAL ERROR.

Judges MCGEE and JACKSON concur.

Report per Rule 30(e).