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NO. COA09-1433

NORTH CAROLINA COURT OF APPEALS

Filed: 21 September 2010

STATE OF NORTH CAROLINA

v. Sampson County
No. 07 CRS 50382
CORNELIUS WEBB 08 CRS 710

Appeal by defendant from judgment entered 8 April 2009 by Judge W. Allen Cobb, Jr., in Sampson County Superior Court. Heard in the Court of Appeals 23 March 2009.

Attorney General Roy Cooper, by Assistant Attorney General Kathleen N. Bolton, for State.

Appellate Defender Staples Hughes, by Assistant Appellate Defender David W. Andrews, for defendant.

ERVIN, Judge.

Defendant Cornelius Webb appeals from a judgment entered by the trial court sentencing him to a minimum term of 100 months and a maximum term of 129 months in the custody of the North Carolina Department of Correction based on his conviction for possession of a firearm by a felon. After careful consideration of Defendant's challenges to the trial court's judgment in light of the record and the applicable law, we conclude that Defendant is not entitled to any appellate relief.

I. Factual Background

A. Substantive Facts

Shortly before midnight on 19 January 2007, Defendant, accompanied by Maurice Blanks and another man, arrived at a nightclub in Roseboro, North Carolina, in a Jeep Cherokee. Sylyndrell Blanks; her aunt, Ernestine Cash; and Defendant's brother, Venor Webb, arrived at the club in a separate vehicle simultaneously with Defendant. While at the club, Ms. Blanks observed Defendant involved in an apparent argument with a man whom she described as being approximately six feet to six feet, four inches tall, dark-skinned, and having long "dreads."

Around 1:45 a.m., the club closed. As Ms. Blanks was leaving, she noticed the same man that had been arguing with Defendant lift up his shirt as if he were reaching for a gun, prompting her to hurry to her vehicle. As she went to her vehicle, Ms. Blanks saw Defendant standing between some trees and a van. After reaching her vehicle, Ms. Blanks heard fifteen to twenty gunshots, at which point she picked up Ms. Cash and Mr. Webb and went home.

Linda Weller lives in a mobile home located on the same property as the nightclub, which she owns and operates. After the nightclub closed, Ms. Weller went inside her residence. Upon entering her mobile home, Ms. Weller heard multiple gunshots. As she opened her kitchen door, Ms. Weller witnessed two people shooting. The first of the two participants in the shooting, whom Ms. Weller identified as Defendant, was standing at the end of her carport between some trees and a van, firing a handgun. The other individual involved in the exchange of gunfire was standing by a dog pen. After Ms. Weller witnessed these two individuals shooting

at each other, her son informed her that someone had been shot and that he had called 9-1-1. The individual who had been shot, Gerard Culbreth, died as a result of a gunshot wound to the left side of his head.

B. Procedural Facts

On 30 January 2007, a warrant for arrest was issued charging Defendant with murder. On 25 February 2008, the Sampson County grand jury returned bills of indictment charging Defendant with possession of a firearm by convicted felon, murder, and having attained the status of an habitual felon based on three separate Florida convictions for delivery of cocaine on 22 August 2000, 3 March 1997, and 28 June 2006. On 16 April 2008, the prosecutor filed notice that the State intended to attempt to establish the existence of certain aggravating factors and the applicability of certain prior record points, such as that Defendant "was armed with a deadly weapon at the time of the crime," that Defendant "used a deadly weapon at the time of the crime," that Defendant "committed the offense while on pretrial release on another charge," and that "the offense was committed while" Defendant "was on supervised or unsupervised probation, parole, or post-release supervision."

The cases against Defendant came on for trial before the trial court and a jury at the 6 April 2009 session of the Sampson County Superior Court. On 6 April 2009, Defendant stipulated that "prior to January 19, 2007 and January 20, 2007 the defendant had previously been convicted of the felony of delivery of cocaine;" that Defendant "was convicted of this felony on March 3, 1997 in .

. . Orange County[,] Florida;" that "this felony was committed on October 8, 1996;" and that Defendant "waive[d] any further requirement of the State to prove that on or about January 19, 2007 and January 20, 2007 . . . he had been convicted of the above offense of delivery of cocaine" and that "this element of the offense of possession of a firearm by a felon . . . need not be decided by the jury in this matter."

On 8 April 2009, the jury returned verdicts acquitting Defendant of murder and convicting him of possession of a firearm by a convicted felon. After the return of the jury's verdict, Defendant entered a plea of guilty to having attained the status of an habitual felon conditioned on an agreement that the State would "not proceed on the aggravating factors alleged" and that Defendant would be sentenced to a minimum of 100 months and a maximum of 129 months in the custody of the North Carolina Department of Correction.

At the sentencing hearing, the trial court found that Defendant had three prior record points based on an alleged Florida conviction for battery on a law enforcement officer and a finding that the offense for which Defendant had been convicted had been committed "while [Defendant was on] supervised or unsupervised probation, parole, or post-release supervision." As a result, the trial court concluded that Defendant should be sentenced as a Level II offender and entered a judgment requiring Defendant to serve a minimum term of 100 months and a maximum term of 129 months in the

custody of the Department of Correction. Defendant noted an appeal to this Court from the trial court's judgment.

II. Legal Analysis

A. Standard of Review

In reviewing alleged errors in the computation of a defendant's prior record level, this Court must consider "'whether [the] sentence is supported by evidence introduced at the trial and sentencing hearing.'" *State v. Deese*, 127 N.C. App. 536, 540, 491 S.E.2d 682, 685 (1997) (quoting N.C. Gen. Stat. § 15A-1444(a1)(Cum. Supp. 1996)). At sentencing, "[t]he State bears the burden of proving, by a preponderance of the evidence, that a prior conviction exists and that the offender before the court is the same person as the offender named in the prior conviction." N.C. Gen. Stat. § 15A-1340.14(f) (2009). The establishment of a defendant's prior record level is a conclusion of law that is subject to *de novo* review. *State v. Bohler*, __ N.C. App. __, __, 681 S.E.2d 801, 804 (2009) (citing *State v. Fraley*, 182 N.C. App. 683, 691, 643 S.E.2d 39, 44 (2007)*disc. review denied*, __ N.C. __, 691 S.E.2d 414 (2010)). "This Court applies 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).

B. Discussion

Defendant's sole contention on appeal is that the trial court erroneously found that he had three prior record points and should be sentenced as a Level II offender. More specifically, Defendant argues that (1) the trial court impermissibly assigned him two prior record points predicated on his alleged Florida conviction

for battery on a law enforcement officer and that (2) the trial court erroneously assessed an additional prior record point against Defendant on the grounds that "the offense was committed while the offender was on supervised or unsupervised probation, parole, or post-release supervision." N.C. Gen. Stat. § 15A-1340.14(b)(7). We conclude, in light of our review of the record and the applicable law, that Defendant's arguments do not entitle him to any relief on appeal.

A. Florida Battery on a Law Enforcement Officer Conviction

1. Existence of Conviction

First, Defendant challenges the trial court's decision to assess two prior record points stemming from an alleged Florida conviction for battery on a law enforcement officer. In essence, Defendant contends that, given the State's failure to present adequate evidence to support a finding of the existence of this conviction and the fact that Defendant had not stipulated to the existence of this conviction or admitted its existence during the entry of his negotiated plea, the State failed to properly establish that he had been convicted of battery on a law enforcement officer in Florida. We conclude, contrary to Defendant's argument, that he did, in fact, stipulate to this conviction.

Pursuant to N.C. Gen. Stat. § 15A-1340.14(f), prior convictions can be proved by:

> (1) Stipulation of the parties.
>
> (2) An original or copy of the court record of the prior conviction.

> (3) A copy of records maintained by the Division of Criminal Information, the Division of Motor Vehicles, or of the Administrative Office of the Courts.
>
> (4) Any other method found by the court to be reliable.

"The State bears the burden of proving that a prior conviction exists and that the defendant is the same person as the offender in the prior conviction." *State v. Wade*, 181 N.C. App. 295, 298, 639 S.E.2d 82, 85 (2007)(citing *State v. Eubanks*, 151 N.C. App. 499, 505, 565 S.E.2d 738, 742 (2002)). Neither a prior record worksheet nor a prosecutorial statement provide sufficient support for the assignment of prior record points. *State v. Riley*, 159 N.C. App. 546, 557, 583 S.E.2d 379, 387 (2003).

A stipulation to the existence of a prior conviction can result from a colloquy between the defendant's trial counsel and the trial court. *Eubanks*, 151 N.C. App. at 506, 565 S.E.2d at 743. Although no particular set of words need be used at the time that the parties enter into such a stipulation, "'its terms must be definite and certain in order to afford a basis for judicial decision, and it is essential that they be assented to by the parties or those representing them.'" *State v. Crawford*, 179 N.C. App. 613, 620, 634 S.E.2d 909, 914 (2006) (quoting *State v. Alexander*, 359 N.C. 824, 828, 616 S.E.2d 914, 917 (2005)), *disc. review denied*, 361 N.C. 360, 644 S.E.2d 363 (2007). "[A] defendant need not make an affirmative statement [in order] to stipulate to" a prior record level, *Alexander*, 359 N.C. at 829, 616 S.E.2d at 918; in fact, a stipulation sufficient to support an award of prior

record points may exist despite the silence of the defendant or his trial counsel, "particularly if the defendant had an opportunity to object and failed to do so." *Wade*, 181 N.C. App. at 298, 639 S.E.2d at 85 (citing *Alexander*, 359 N.C. at 828-29, 616 S.E.2d at 917-18).

At Defendant's sentencing hearing, the trial court, the prosecutor, and Defendant's trial counsel engaged in the following colloquy:

> THE COURT: . . . But while we're here, where does [Defendant] fall?
>
> [PROSECUTOR]: C-2, Judge.
>
> THE COURT: So you're quarreling, it look[s] like, a potential two years on his sentence.
>
> [PROSECUTOR]: Yes, sir. If I could have a few moments to speak with Mr. Hudson?
>
> THE COURT: Maybe you could work out something in the middle as opposed - - that he get two or one; I'm not sure.
>
> [DEF. COUN.]: I'm willing to - - you know, again, the difficulty is not with me and the district attorney. The difficulty is with my client.

A short time later, following the entry of the plea agreement under which Defendant admitted that he had attained habitual felon status in return for the imposition of a specific sentence and the State's agreement to refrain from attempting to prove the existence of certain aggravating factors, the following exchange occurred:

> [DEF. COUN.]: Sir, we would just like to point out that the defendant

> does ha[ve] support in the community. We would also ask you to consider some of [the] circumstances involving the evidence that the jury heard. We would ask you to give a lower range of the presumptive. Thank you.
>
> THE COURT: What says the State?
>
> . . . .
>
> [PROSECUTOR]: Also, Judge, as it relates to sentence, his prior record - - he has a prior felony from the State of Florida, battery on a law enforcement officer in violation of Florida Statute 775.082. As I read that Florida statute, it is a felony in the - - strike that - - 784.07, battery against a law enforcement officer. That is a felony in the third degree in the Florida Sentencing Statutes, 775.082. A third-degree felony is punishable by up to a term of imprisonment not exceeding five years. The State would submit that should be counted as a Class I felony, making him a level two offender. The State would ask you to sentence him in the top end presumptive 100 to 129 months.
>
> THE COURT: Mr. McNeil, do you want to be heard any further?
>
> [DEF. COUN.]: Sir, we would ask that you acknowledge the fact that my client has, in fact, agreed to waive the jury for this presence, has admitted his guilt, and would ask you to consider it.

At the conclusion of the sentencing hearing, the trial court complied with the State's request by awarding Defendant two prior

record points based on his conviction for battery on a law enforcement officer and entered judgment in accordance with the plea agreement between the State and Defendant.

In challenging the trial court's decision to assign these prior record points, Defendant places principal reliance on our decision in *State v. Jeffery*, 167 N.C. App. 575, 605 S.E.2d 672 (2004). In *Jeffery*, the defendant entered guilty pleas to six counts of taking indecent liberties with a child and was sentenced as a Level III offender. The plea agreement between the defendant and the State provided that the defendant would be sentenced to a minimum of 20 months and a maximum of 24 months imprisonment in the custody of the North Carolina Department of Correction for each offense. *Id.* at 576, 605 S.E.2d at 673. On appeal, the defendant challenged the court's calculation of his prior record level on the grounds that the State had failed to properly prove his prior convictions. *Id.* at 580, 605 S.E.2d at 675. In response, the State argued that the plea agreement between Defendant and the State resulted in a sentence that fell within the presumptive range for Class F felonies assessed against Level III offenders; based on that logic, the State contended that the defendant "impliedly stipulated" to the existence of the necessary prior record points by virtue of having entered into this negotiated plea. *Id.* In ordering that the defendant be resentenced, we concluded that the plea agreement was "of insufficient specificity to rise to the level of a stipulation" and that the "[d]efendant's agreement to six presumptive range sentences [was] not a 'definite and certain'

indication that defendant should has a prior record Level III. It [was] merely indicative of the bargain into which he entered with the State." *Id.* at 581, 605 S.E.2d at 676.

A careful analysis of the record in this case indicates that there is a material distinction between the facts at issue here and those at issue in *Jeffery*. The Court in *Jeffrey* explicitly predicated its decision to the effect that there had been no stipulation concerning the defendant's prior record level on the absence of a colloquy between defense counsel and the trial court concerning the defendant's prior record level and the fact that the trial court relied solely upon the prior level worksheet submitted by the prosecutor in establishing the defendant's prior record level. *Id.* The *Jeffrey* Court further noted that an exchange which "specifically mentioned" the defendant's prior record level and included admissions by the defendant's counsel concerning the validity of the prior record level worksheet submitted at the sentencing hearing might constitute an adequate stipulation to the defendant's prior record level. *Id.*; *see State v. Johnson*, 164 N.C. App. 1, 24, 595 S.E.2d 176, 189, *disc. review denied*, 359 N.C. 194, 607 S.E.2d 659 (2004); *Eubanks*, 151 N.C. App. at 505, 565 S.E.2d at 742 (2002).

In this case, the State clearly contended at the sentencing hearing that Defendant's Florida conviction for battery on a law enforcement officer conviction should be treated as a Class I felony for prior record level calculation purposes and that the associated prior record points would "mak[e] him a Level II

offender." Given the State's contention and Defendant's response to the State's presentation at the sentencing hearing, we believe that the facts of this case are more analogous to those at issue in *Wade*, 181 N.C. App. at 295-96, 639 S.E.2d at 84-85, than to those at issue in *Jeffrey*. In *Wade*, the following colloquy occurred at the sentencing hearing:

> "THE COURT: Are you ready to proceed with sentencing, Mr. D. A.?
>
> [PROSECUTOR]: Yes, Your Honor, the State is ready.
>
> THE COURT: All right. Are you ready to proceed with sentencing, [Defense Counsel]?
>
> [DEF. COUN.]: Yes, Your Honor.
>
> THE COURT: All right.
>
> [PROSECUTOR]: May I approach, Your Honor?
>
> THE COURT: Yes, sir.
>
> So the State contends his prior record level will be II?
>
> [PROSECUTOR]: That's correct, Your Honor.
>
> THE COURT: All right. [Defense Counsel], I'll hear from you on sentencing, sir.
>
> [DEF. COUN.]: Your Honor, [the defendant] is here this week supported by various members of his extended family. He has no prior conviction approaching this type of incident. He is a young man. He still has a lot maybe to learn and a lot that he can accomplish, and I would ask you to consolidate where appropriate and give him the benefit of a second chance at some point.
>
> THE COURT: All right. So you would contend at least one mitigating factor; he has a support system in the community?"

Id. at 298, 639 S.E.2d at 85-86. In upholding the assignment of prior record points to the defendant made by the trial court, this Court determined that the prior level worksheet tendered at the defendant's sentencing hearing coupled with the colloquy involving the defendant's counsel that occurred during the sentencing hearing resulted in a stipulation that sufficiently proved the existence of the convictions necessary to establish the defendant's prior record level. *Id.*; *see also State v. Hurley*, 180 N.C. App. 680, 685, 637 S.E.2d 919, 923 (2006) (holding that a stipulation to the existence of a prior conviction occurred when counsel, despite being given an opportunity to object, "asked for work release"), *disc. review denied*, 361 N.C. 433, 649 S.E.2d 394 (2007).

The exchange that occurred during Defendant's sentencing hearing was quite similar to the one that this Court evaluated in *Wade*. As in *Wade*, the State argued for the existence of a prior record level, to which Defendant failed to object. Instead, after the prosecutor announced the State's position, Defendant's trial counsel proceeded immediately to a discussion of reasons that the trial court should impose a lighter sentence rather than taking advantage of the opportunity to dispute the existence of the convictions contended for by the State. In fact, the argument for finding the existence of a stipulation in this case is even stronger than the case for finding a stipulation in *Wade* given that the prosecutor in this case, unlike the prosecutor in *Wade*, made specific reference to the conviction on which he based his contention that Defendant should be sentenced as a Level II

offender during the colloquy that occurred at Defendant's sentencing hearing. Given the lack of any material difference between the present case and the facts at issue in *Wade*, we hold that, under the circumstances disclosed by the present record, Defendant stipulated to the existence of his prior Florida conviction for battery on a law enforcement officer by declining the opportunity afforded by the trial court to rebut the State's contention.

2. Treatment of the Florida Conviction as a Felony

In addition, Defendant contends that the trial court erred by treating his Florida battery on a law enforcement officer conviction as a Class I felony for the purpose of assigning prior record points because the State failed to prove that Defendant's conviction was for a felony or for an offense that was substantially similar to a North Carolina Class A1 or Class 1 misdemeanor. We do not find Defendant's argument persuasive.

N.C. Gen. Stat. § 15A-1340.14(e) provides, in pertinent part, that:

> 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 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 the

> 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 a Class A1 or Class 1 misdemeanor for assigning prior record level points.

As we have already noted, the colloquy between the trial court, the prosecutor, and Defendant's trial counsel constituted a stipulation that Defendant had been convicted of battery against a law enforcement officer in Florida. In addition, we conclude that the same factors that support our determination that Defendant had been convicted of battery on a law enforcement officer support a determination that Defendant's conviction constituted a felony under Florida law. In essence, the prosecutor stated during Defendant's sentencing hearing that battery on a law enforcement officer "is a felony in the third degree" pursuant to Florida Statutes 755.082 and 784.07. Instead of taking the opportunity afforded to him by the trial court to contest the State's assertion, Defendant proceeded to discuss his request that the trial court consider the fact that he "agreed to waive the jury for this presence." As a result, under the logic adopted by this Court in *Wade*, Defendant stipulated that battery against a law enforcement officer is a felony under Florida law.

This Court noted in *Bohler* that, while a trial judge may not accept a stipulation that a particular out-of-state offense is substantially similar to a particular North Carolina offense, "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,* __ N.C. App. at __, 681 S.E.2d at 806. For that reason, while the trial court's finding that the "record [should] reflect that the offenses utilized to get [Defendant] to prior record level two are the same or substantially similar" to certain North Carolina offenses was erroneous in light of the parties' inability to stipulate that a particular out-of-state offense is substantially similar to a particular North Carolina offense, *State v. Lee,* 193 N.C. App. 748, 750, 668 S.E.2d 393, 395 (2008); *State v. Palmateer*, 179 N.C. App. 579, 581-82, 634 S.E.2d 592, 594 (2006); *State v. Hanton*, 175 N.C. App. 250, 255, 623 S.E.2d 600, 604 (2006), *disc. review denied*, 362 N.C. 477, 666 S.E.2d 766, *and cert. denied*, 172 L. Ed. 2d 759, 129 S. Ct. 769 (2008), the trial court's ultimate decision to classify Defendant's Florida battery on a law enforcement officer as a Class I felony for sentencing purposes was still proper given the fact that Defendant stipulated that battery against a law enforcement officer was a felony under Florida law and the fact that, in the absence of a showing of substantial similarity to a more serious North Carolina offense, out-of-state felony convictions are awarded two prior record points. *State v. Hinton*, __ N.C. App. __, __, 675 S.E.2d 672, 675 (2009) (stating that it is unnecessary for the State to prove that a conviction is the same or "substantially similar" to a North Carolina offense unless the State seeks to treat the out-of-state felony conviction as more serious than a Class I felony conviction for structured sentencing purposes). As

a result of the fact that Defendant's Florida conviction for battery against a law enforcement officer was properly treated as a Class I felony for purposes of calculating Defendant's prior record level, the trial court correctly assigned two prior record points to Defendant based on this conviction. Thus, since the number of points actually included in the trial court's prior record point calculation stemming from the Florida conviction was correct, even though some of its statements concerning the "substantial similarity" between the offense for which Defendant was convicted in Florida and a North Carolina Class I felony were not, any error that the trial court made in calculating Defendant's prior record level did not prejudice Defendant.

Defendant argues vigorously that we should decline to recognize Defendant's stipulation concerning the status of battery on a law enforcement officer as a felony under Florida law on the grounds that *Bohler* is contrary to prior decisions of the Supreme Court, *Cannon v. Miller*, 313 N.C. 324, 324, 327 S.E.2d 888, 888 (1985), and this Court. *In re Appeal of Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 36-37 (1989). However, we do not believe that the authorities upon which Defendant relies in making this assertion justify a decision to overlook *Bohler*, particularly given the fact that it constitutes a decision of this Court that directly addresses the parties' ability to stipulate to whether an out-of-state conviction is a felony or a misdemeanor. For example, our decisions in *Lee*, *Palmateer*, and *Hanton* were discussed and distinguished in *Bohler* on the grounds that they addressed the

defendant's inability to stipulate to the "substantial similarity" between an out-of-state offense and a North Carolina offense rather than the defendant's ability to stipulate that an out-of-state offense was a felony or a misdemeanor. *Bohler*, __ N.C. App. at __, 681 S.E.2d at 805-807. In addition, the statement in *State v. Johnston*, 39 N.C. App. 179, 249 S.E.2d 879 (1978), *disc. review denied and appeal dismissed,* 296 N.C. 738, 254 S.E.2d 179 (1979), to the effect that the status of an offense as a felony or misdemeanor involved an issue of law was made in the context of setting out an alternative basis for this Court's holding that the trial court did not err by failing to dismiss an indictment for felonious conspiracy to commit larceny because it did not allege that the theft in question was not a felony in Virginia. Decisions such as *State v. McLaughlin,* 341 N.C. 426, 441, 462 S.E.2d 1, 8 (1995), *cert. denied*, 516 U.S. 1133, 133 L. Ed. 2d 879, 116 S. Ct. 956 (1996), and *State v. Fearing*, 315 N.C. 167, 174, 337 S.E.2d 551, 555 (1985), addressed stipulations concerning whether certain legal tests, such as the extent to which a defendant had been previously convicted of a felony involving the use of violence and the extent to which a witness was competent to testify, rather than stipulations relating to whether a crime was a felony or a misdemeanor. Such decisions shed little light on the viability of *Bohler*. In fact, by upholding the stipulation at issue in *McLaughlin*, the Supreme Court effectively held, as we did in *Bohler*, that parties can stipulate to whether an offense is a felony or a misdemeanor. Moreover, the Supreme Court's decision in

State v. Canady, 330 N.C. 398, 410 S.E.2d 875 (1991), addressed the entirely different issue of the extent to which the trial court had the authority to find the defendant's prior conviction as an aggravating factor under an earlier sentencing regime based on a statement by a prosecutor to which the defendant's trial counsel did not object. Finally, *State v. Moncree*, 188 N.C. App. 221, 655 S.E.2d 464 (2008), involved a challenge to the validity of an indictment purporting to charge the defendant with having attained the status of an habitual felon on the basis of three New Jersey offenses, one of which was not a felony. Unlike the defendant in *Moncree*, who erroneously stipulated that a New Jersey high misdemeanor was a felony, Defendant has never contended that his battery on a law enforcement officer is not a felony under Florida law. *Bohler* remains binding authority concerning the ability of parties to stipulate that an out-of-state conviction constitutes a felony or a misdemeanor. Therefore, the trial court did not commit prejudicial error by assigning Defendant two prior record points based on his Florida battery on a law enforcement officer conviction.

III. Conclusion

As a result, for the reasons set forth in detail above, we conclude that the trial court did not err by assigning two prior record points to Defendant based on his Florida conviction for battery on a law enforcement officer. Since the two points assigned to Defendant based on this conviction were sufficient to justify sentencing Defendant as a Level II offender, we need not

consider the validity of Defendant's challenge to the additional prior record point that the trial court assigned to him based on his alleged probationary status at the time of the commission of the offense given that any error that the trial court may have committed in awarding Defendant that additional prior record level point would have been harmless. *State v. Bethea*, 173 N.C. App. 43, 61, 617 S.E.2d 687, 698 (2005) (stating that, "[e]ven if the trial court had included only the points for the [felony larceny] conviction on 11 April 1996, the trial court still would have determined that defendant had a total of nine points, which is within the" prior record level determined to be appropriate by the trial court). Thus, Defendant is not entitled to any relief on appeal.

NO ERROR.

Judges MCGEE and GEER concur.

Report per Rule 30(e).