NO. COA10-1373
NORTH CAROLINA COURT OF APPEALS

Filed: 5 July 2011

STATE OF NORTH CAROLINA

v. Mecklenburg County
Nos. 09 CrS 63690, 231622

TERRY ADONIS BALDWIN

Appeal by defendant from judgments entered 11 March 2010 by Judge Forrest D. Bridges in Mecklenburg County Superior Court. Heard in the Court of Appeals 28 April 2011.

Attorney General Roy Cooper, by Assistant Attorney General Amanda P. Little, for the State.

Anne Bleyman, for defendant-appellant.

CALABRIA, Judge.

Terry Adonis Baldwin ("defendant") appeals judgments entered upon jury verdicts finding him guilty of felonious breaking and entering, conspiracy to commit felonious breaking and entering, and attaining the status of an habitual felon. We find no error.

I. BACKGROUND

At 8:30 p.m. on 10 January 2009, defendant contacted Todd Drachman ("Drachman") and invited him to meet another man, later identified as Billy Meeks ("Meeks"), to hang out in a hotel room. Shortly after getting together, defendant, Drachman, and Meeks (collectively, "the men") drove in Drachman's vehicle to a local steakhouse for dinner. After the men finished dinner, Drachman drove them around "to look at some potential places . . . to break in . . . to get some money."

One of the places they identified was the Captain's Galley restaurant ("the restaurant") in Huntersville, North Carolina. At 9:30 p.m. that evening, Aristidis Ziogas ("Ziogas"), the general manager, closed the restaurant and locked all the doors. After Ziogas left the restaurant, the men drove into the restaurant's parking lot with "a bag of tools in the car." Defendant planned to go in the restaurant to get some money by breaking into a safe.

After defendant and Meeks exited Drachman's vehicle at the side of the building, Drachman drove to the front of the restaurant, parked, and waited for them to return. Sometime between twenty and ninety minutes later, defendant and Meeks exited the restaurant and returned to the vehicle. Drachman then drove defendant and Meeks back to the hotel.

During the early morning hours of 11 January 2009, Ziogas returned to open the restaurant. When he opened the front door, he saw the restaurant's alarm panel lying on the floor, dismantled. He then reported what he found to the Huntersville Police Department ("HPD").

When the officers from the HPD arrived, Ziogas accompanied them and observed that one of the cash registers, normally located on a counter in the restaurant lobby, "was smashed on the ground." He also observed that another cash register was "smashed up" and its drawers were "pulled open." The only items remaining in the registers were "loose change." In addition, Ziogas observed that several cabinets had been damaged and that their contents had been removed. Furthermore, he observed that the restaurant's rear door was unlocked, the exterior phone lines were cut, and the telephone lines were inoperable. The restaurant's safe, however, was secured and intact.

The restaurant's surveillance cameras recorded the events that occurred at the restaurant that night. Ziogas and officers from the HPD subsequently viewed the video footage from the restaurant's surveillance cameras. The footage showed that at 9:55 p.m., two men, later identified as defendant and Meeks, entered the restaurant after it was closed. Ziogas printed two

still photographs from the video footage and provided them to the HPD.

Sergeant Andrew Dempski ("Sgt. Dempski") of the HPD was assigned to investigate the case. The information Sgt. Dempski received from the Mooresville Police Department indicated that Drachman was a possible suspect in the incident at the restaurant. On 27 February 2009, Drachman gave a statement to Sgt. Dempski and admitted participating as a "look-out" driver for defendant and Meeks at the restaurant on the night of 10 January 2009.

Defendant was arrested and indicted for felonious breaking and entering, conspiracy to commit felonious breaking and entering, and attaining the status of an habitual felon. Defendant's case was heard at the 10 March 2010 Criminal Session of Mecklenburg County Superior Court. On 11 March 2010, the jury returned verdicts finding defendant guilty of all charges. On the charge of felonious breaking and entering, the trial court sentenced defendant as an habitual felon to a minimum term of 120 months to a maximum term of 153 months in the custody of the North Carolina Department of Correction ("NCDOC"). On the charge of conspiracy to commit felonious breaking and entering, the trial court sentenced defendant as an habitual felon to a

minimum term of 107 months to a maximum term of 138 months in the custody of the NCDOC. The trial court ordered the sentences to be served consecutively. Defendant appeals.

II. JURY INSTRUCTIONS

Defendant argues that the trial court committed plain error by instructing the jury on felonious breaking and entering without defining felony larceny. We disagree.

Since defendant did not object to the instructions at trial, he asks this Court to review for plain error. *State v. Odom*, 307 N.C. 655, 656, 300 S.E.2d 375, 376 (1983). Although plain error analysis applies to evidentiary matters and jury instructions in criminal cases, "'the appellate court must be convinced that absent the error the jury probably would have reached a different verdict.'" *State v. Doe*, 190 N.C. App. 723, 732, 661 S.E.2d 272, 278 (2008) (citations omitted). However, "[a] prerequisite to our engaging in a 'plain error' analysis is the determination that the [trial court's action] constitutes 'error' at all." *State v. Bethea*, 173 N.C. App. 43, 51, 617 S.E.2d 687, 693 (2005) (internal quotation and citations omitted).

"The essential elements of felonious breaking or entering are (1) the breaking or entering (2) of any building (3) with

the intent to commit any felony or larceny therein." *State v. Litchford*, 78 N.C. App. 722, 725, 338 S.E.2d 575, 577 (1986). "Our Supreme Court has addressed the similar question of whether the failure to define the underlying felony of larceny in a burglary case constituted prejudicial error." *State v. Robbins*, 99 N.C. App. 75, 78, 392 S.E.2d 449, 451 (1990) (citing *State v. Simpson*, 299 N.C. 377, 261 S.E.2d 661 (1980)). In *Simpson*, our Supreme Court held that the trial court did not commit prejudicial error when it failed to define "larceny" in a jury instruction for first degree burglary "because there was no evidence suggesting the [missing item] was borrowed, or taken for some temporary purpose, or otherwise negating a taking with felonious intent to steal." 299 N.C. at 384, 261 S.E.2d at 665.

In the instant case, the State presented undisputed testimony from Drachman that when defendant broke into and entered the restaurant when it was closed on the night of 10 January 2009, he intended to steal money from the restaurant. Specifically, Drachman stated that defendant "was going to go in [the restaurant] and try to get some money." Drachman's testimony was supported by surveillance video evidence, still photographs, and also by Ziogas' testimony that on the morning of 11 January 2009, he entered the restaurant and observed two

damaged cash registers with open money drawers. No evidence was presented showing that defendant had any purpose other than to commit a felony or larceny when he broke into and entered the closed restaurant. Therefore, the trial court did not commit plain error by failing to define "larceny" in its instructions to the jury.

Defendant also argues that the trial court erred because if it had instructed the jury that felonious larceny was defined as the taking of goods valued in excess of $1,000.00, the jury probably would have found that the State had not met its burden in proving the larceny element and would have reached a different verdict. We disagree.

In the instant case, defendant was charged with felonious breaking and entering, not felonious larceny. "A defendant convicted of felonious breaking or entering need not have completed the crime of larceny." *State v. Smith*, 66 N.C. App. 570, 576, 312 S.E.2d 222, 225 (1984). For felonious breaking and entering, the relevant factor is defendant's intent to commit a larceny upon breaking and entering. *Id.* at 576, 312 S.E.2d at 225-26. Since the State presented undisputed evidence that defendant intended to steal money from the restaurant, the trial court was not required to instruct the jury that the

definition of felonious larceny is the taking of goods valued in excess of $1,000.00.

Even assuming *arguendo* that the trial court's failure to define "larceny" was error, defendant has not met his burden of showing that the trial court committed plain error because defendant has not shown "that absent the error the jury probably would have reached a different verdict." *Doe*, 190 N.C. App. at 723, 661 S.E.2d at 278 (internal quotation and citation omitted). Defendant's issue on appeal is overruled.

III. SENTENCING

Defendant argues that the trial court erred and abused its discretion by relying on improper and insufficient evidence to determine his prior record level and sentence. More specifically, defendant contends the trial court did not conduct the statutorily required analysis when classifying his convictions from Florida. We disagree.

> Errors based upon any of the following grounds, which are asserted to have occurred, may be the subject of appellate review even though no objection, exception or motion has been made in the trial division.
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> . . .
>
> (18) The sentence imposed was unauthorized at the time imposed, exceeded the maximum authorized by law, was illegally imposed, or is otherwise invalid as a matter of law.

N.C. Gen. Stat. § 15A-1446(d)(18) (2010). This Court reviews this error *de novo*. *State v. Boyd*, ___ N.C. App. ___, ___, 701 S.E.2d 255, 261 (2010).

"Under the Structured Sentencing Act, before imposing a felony sentence, the sentencing judge must determine a defendant's prior record level pursuant to N.C.G.S. § 15A-1340.14." *State v. Alexander*, 359 N.C. 824, 827, 616 S.E.2d 914, 916-17 (2005) (citing N.C. Gen. Stat. § 15A-1340.13(b) (2003)). N.C. Gen. Stat. § 15A-1340.14 provides:

> A prior conviction shall be proved by any of the following methods: (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.

N.C. Gen. Stat. § 15A-1340.14(f) (2010). "The State bears the burden of proving, by a preponderance of the evidence, that a prior conviction exists . . . ." *Id.*

In the instant case, the State submitted to the trial court, without objection, a full copy of defendant's criminal record maintained by the Division of Criminal Information. Defendant does not claim that this method of proof did not satisfy the requirements of N.C. Gen. Stat. § 15A-1340.14.

Instead, he argues that the trial court incorrectly found him to be a prior record level IV offender rather than a prior record level III offender.

"The 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 in accordance with this section." N.C. Gen. Stat. § 15A-1340.14(a) (2010). Each prior Class H or I felony conviction is assigned two points; each misdemeanor conviction as defined in the statute is assigned one point. *See* N.C. Gen. Stat. § 15A-1340.14(b)(4) and (5) (2010). If defendant's prior convictions are assigned at least six but not more than nine points, his corresponding prior record level for sentencing purposes is a Level III. N.C. Gen. Stat. § 15A-1340.14(c) (2010). If defendant's prior convictions are assigned at least ten but not more than thirteen points, his corresponding prior record level is a Level IV. *Id.*

Our General Statutes provide for the inclusion of out-of-state convictions when calculating prior record levels as follows:

> 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 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.

N.C. Gen. Stat. § 15A-1340.14(e) (2010).

"[T]he question of whether a conviction under an out-of-state statute is substantially similar to an offense under North Carolina statutes is a question of law to be resolved by the trial court." *State v. Hanton*, 175 N.C. App. 250, 255, 623 S.E.2d 600, 604 (2006). However, the trial court is only required to make a substantial similarity determination when the

State 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). Otherwise, "the trial court must classify the out-of-state [felony] convictions as Class I felonies for sentencing purposes." *Id*.

In the instant case, defendant admits that he has two prior North Carolina class H or I felony convictions and four prior Class A1 or 1 misdemeanor convictions, which equates to eight prior record level points. Defendant argues that the trial court erred by assigning two additional prior record level points for a burglary conviction in Florida on 19 August 1994 because the State failed to prove that the classification of this conviction was a felony or that it was "substantially similar" to an offense in North Carolina.

However, the State did not have to prove that the Florida conviction was "substantially similar" to a particular North Carolina offense because the State classified the Florida conviction as the default "Class I" category on the sentencing worksheet submitted to the trial court, and did not attempt to assign a more serious felony classification to it. *See Hinton*, 196 N.C. App. at 755, 675 S.E.2d at 675; N.C. Gen. Stat. § 15A-

1340.14(e) (2010). *See also* Fla. Stat. § 810.02 (2009) (classifying burglary as a felony).

Furthermore, during the sentencing phase of defendant's trial, the State submitted the sentencing worksheet without objection, and the trial court accepted it. When defendant failed to object, and advanced an argument for leniency, he effectively stipulated to the prior Florida burglary conviction as a felony offense in Florida. *See State v. Bohler*, 198 N.C. App. 631, 637-38, 681 S.E.2d 801, 806 (2009), *disc. review denied*, ___ N.C. ___, 691 S.E.2d 414 (2010) (holding that while a trial court cannot accept a stipulation that an out-of-state offense is substantially similar to a 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 misdemeanor under the law of that jurisdiction."). A defendant's silence may be deemed assent if he had an opportunity to object, failed to do so, and discussed other subjects instead. *Alexander*, 359 N.C. at 828-29, 616 S.E.2d at 917-18.

The State presented sufficient evidence in accordance with N.C. Gen. Stat. § 15A-1340.14 of defendant's prior conviction for burglary in Florida, which was listed on his prior record

level worksheet. Therefore, the trial court properly assigned two points for this conviction in its calculation of defendant's prior record level points. The trial court properly sentenced defendant as a prior record level IV offender. Defendant's issue on appeal is overruled.

IV. SENTENCING FOR HABITUAL FELONS

Defendant argues that the trial court committed plain error by determining his sentence as an habitual felon, and asks for plain error review of this issue.

"We first note that plain error analysis in criminal cases is only applicable to evidentiary rulings and to jury instruction errors." *State v. Scott*, 180 N.C. App. 462, 464, 637 S.E.2d 292, 293 (2006). Therefore, defendant's argument based on plain error is "improper." *Id.*

> Essentially, defendant's argument is that the sentence seems too long given the crimes for which he was convicted. He does not argue that the term imposed was incorrect under the statutory guidelines, nor that defendant should not have been classified as a habitual felon; he argues simply that the punishment seems excessive and in violation of the Eighth Amendment.

State v. Hager, ___ N.C. App. ___, ___, 692 S.E.2d 404, 408 (2010). Therefore, we construe defendant's argument as a constitutional challenge to the Habitual Felon Act. *Id.*

Defendant argues this constitutional issue for the first time on appeal. However, constitutional issues not raised at trial will not be addressed on appeal. *State v. Mitchell*, 317 N.C. 661, 670, 346 S.E.2d 458, 463 (1986). Therefore, defendant's argument is dismissed.

Assuming *arguendo* defendant's argument is proper,

> [W]e note that our Supreme Court has considered this issue and found the Act constitutional. *See State v. Todd*, 313 N.C. 110, 118, 326 S.E.2d 249, 253 (1985).

Hager, ___ N.C. App. at ___, 692 S.E.2d at 408.

In the instant case,

> as in *Todd*, "although defendant's challenge to the severity of his sentence is couched in terms of an eighth amendment proportionality analysis, we believe that the proper review involves a determination, under the Fair Sentencing Act, of whether there has been a showing of abuse of discretion, procedural conduct prejudicial to defendant, circumstances which manifest inherent unfairness or injustice, or conduct which offends the public sense of fair play." *Id.* at 119, 326 S.E.2d at 254 (quotations and citation omitted).

Id.

Defendant argues only that "[s]entences of 120 to 153 months imprisonment for breaking and entering and 107 to 138 months imprisonment for conspiracy to commit breaking and entering are grossly disproportionate." "We decline to hold

that such circumstances rise to the level of grievous error outlined by the Court in *Todd*." *Hager*, ___ N.C. App. at ___, 692 S.E.2d at 408. Moreover, to accept defendant's arguments, "we would have to overrule our Supreme Court which we do not have the power to do." *State v. Porter*, 48 N.C. App. 565, 570, 269 S.E.2d 266, 269 (1980). Therefore, defendant's general argument regarding the length of sentences for certain convictions is more properly addressed to our General Assembly.

V. CONCLUSION

Defendant received a fair trial, free from error.

No error.

Judges ERVIN and THIGPEN concur.

Report per Rule 30(e).