An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority. Citation is disfavored, but may be permitted in accordance with the provisions of Rule 30(e)(3) of the North Carolina Rules of Appellate Procedure.

NO. COA10-169

NORTH CAROLINA COURT OF APPEALS

Filed: 2 November 2010

STATE OF NORTH CAROLINA

v. Buncombe County
Nos. 09 CRS 356, 56115, 56116

RICHARD JAY LUKE, JR.

Appeal by defendant from judgment entered 5 October 2009 by Judge Alan Z. Thornburg in Buncombe County Superior Court. Heard in the Court of Appeals 1 September 2010.

*Attorney General Roy Cooper, by Assistant Attorney General David B. Efird, for the State.*

*Robert W. Ewing, for defendant-appellant.*

STEELMAN, Judge.

Where the State failed to present sufficient evidence tending to show that defendant's prior out-of-state conviction for violation of a protective order was substantially similar to a Class A1 misdemeanor in North Carolina, defendant is entitled to a new sentencing hearing.

## I. Factual and Procedural Background

On 5 October 2009, Richard Luke, Jr. (defendant) pled guilty to the offenses of failing to register as a sex offender and resisting a public officer. Defendant also pled guilty to habitual felon status. Under the terms of the plea agreement, the State

agreed to consolidate all of defendant's charges into one habitual felon judgment with a sentence at the bottom of the mitigated range for the appropriate record level. The trial court accepted defendant's plea. At the sentencing hearing, defendant stipulated to three prior out-of-state convictions as set forth on the worksheet: (1) rape/sodomy in Kentucky; (2) violation of sex-offender registration in Illinois; and (3) violation of a protective order in Illinois. At the sentencing hearing, defense counsel objected to the Illinois violation of a protective order conviction being substantially similar to the North Carolina class A1 misdemeanor crime of a violation of a domestic violence protective order. After a comparison of the Illinois and North Carolina statutes, the trial court found that the Illinois violation of a protective order conviction was substantially similar to the North Carolina offense. With the additional point from the Illinois misdemeanor, the trial court found that defendant had 15 prior record level points and found him to be a prior record level V. The trial court sentenced defendant at the bottom of the mitigated range to 90 to 117 months imprisonment.

Defendant appeals.

## II. Prior Record Level

In his only argument, defendant contends that he is entitled to a new sentencing hearing because the trial court's determination of his prior record level was not supported by sufficient evidence and was erroneous as a matter of law. We agree, in part.

N.C. Gen. Stat. § 15A-1340.14(f) (2009) provides:

> Proof of Prior Convictions. — 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.

In the instant case, defendant stipulated to the existence of three out-of-state convictions. This Court recently held:

> while "a stipulation by a defendant may be sufficient to prove the defendant's prior record level, the trial court's assignment of a prior record level is a conclusion of law, which we review *de novo*." *State v. Mack*, 188 N.C. App. 365, 380, 656 S.E.2d 1, 12 (2008) (citing *State v. Fraley*, 182 N.C. App. 683, 690, 643 S.E.2d 39, 44 (2007)). "Stipulations as to questions of law are generally held invalid and ineffective, and not binding upon the courts, either trial or appellate. . . ." *State v. Prush*, 185 N.C. App. 472, 480, 648 S.E.2d 556, 561 (2007) (citations and quotation marks omitted), *disc. review denied*, 362 N.C. 369, 663 S.E.2d 855 (2008).

*State v. Williams*, ___ N.C. App. ___, ___, 684 S.E.2d 898, 901 (2009) (alterations omitted); *see also State v Fair*, ___ N.C. App. ___, ___, 695 S.E.2d 514, 516 (2010) (holding that although the defendant had stipulated to his prior record level on three separate occasions, the question of whether the defendant's convictions should be counted towards sentencing points to determine his structured sentencing level was a conclusion of law,

fully reviewable by this Court on appeal). Therefore, we are required to review the trial court's calculation of defendant's prior record level, despite his stipulation at the sentencing hearing.

N.C. Gen. Stat. § 15A-1340.14 provides the method for the classification of prior out-of-state convictions:

> 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) (2009).

The dispositive issue in this case is whether the State proved by a preponderance of the evidence that defendant's prior out-of-state convictions were substantially similar to offenses under the North Carolina General Statutes. Defendant argues the State failed to present sufficient evidence because the prosecutor did not "present any of the judgments or DCI reports for any of these purported out-of-state convictions at the sentencing hearing." However, in arguing that the convictions were substantially similar, the prosecutor submitted the relevant Kentucky and

Illinois statutes[1] to the trial court. This Court has stated, "copies of [out-of-state] statutes, and comparison of their provisions to the criminal laws of North Carolina, [is] sufficient to prove by a preponderance of the evidence that the crimes of which defendant was convicted in those states were substantially similar to classified crimes in North Carolina for purposes of G.S. § 15A-1340.14(e)." *State v. Rich*, 130 N.C. App. 113, 117, 502 S.E.2d 49, 52, *disc. review denied*, 349 N.C. 237, 516 S.E.2d 605 (1998). A comparison of the elements of the relevant statutes is necessary. *See State v. Fortney*, ___ N.C. App. ___, ___, 687 S.E.2d 518, 525 (2010) ("Determination of whether the out-of-state conviction is substantially similar to a North Carolina offense is a question of law involving comparison of the elements of the out-of-state offense to those of the North Carolina offense." (citation omitted)).

Kentucky Rape/Sodomy Conviction

Defendant stipulated that on 6 April 2000, he was convicted of third degree rape and sodomy in Kentucky. Ky. Rev. Stat. Ann. § 510.060(1)(b) (2000) provides that a person is guilty of rape in the third degree when: "Being twenty-one (21) years old or more, he engages in sexual intercourse with another person less than sixteen (16) years old[.]" Third-degree sodomy is defined as:

---

[1] The State concedes that at the hearing the prosecutor submitted current statutes for the prior out-of-state convictions to the trial court rather than the statutes as they existed at the time of defendant's prior convictions. However, defendant neither argues nor do we find any substantive change in any of these statutes that would impact or change our analysis.

"Being twenty-one (21) years old or more, he engages in deviate sexual intercourse with another person less than sixteen (16) years old[.]" Ky. Rev. Stat. Ann. § 510.090(1)(b) (2000). The corresponding North Carolina statute provides that "[a] defendant is guilty of a Class B1 felony if the defendant engages in vaginal intercourse or a sexual act with another person who is 13, 14, or 15 years old and the defendant is at least six years older than the person, except when the defendant is lawfully married to the person." N.C. Gen. Stat. § 14-27.7A(a) (2000). Although the wording of the statutes is not identical, we hold these statutory offenses to be "substantially similar" as required by N.C. Gen. Stat. § 15A-1340.14(e). *See State v. Sapp*, 190 N.C. App. 698, 713, 661 S.E.2d 304, 312 (2008) ("[T]he requirement set forth in N.C. Gen. Stat. § 15A-1340.14(e) is not that the statutory wording precisely match, but rather that the offense be 'substantially similar.'"), *disc. review denied*, 363 N.C. 661, 685 S.E.2d 799 (2009). The trial court did not err by treating defendant's Kentucky conviction as a Class B1 felony for purposes of his prior record level.

Illinois Violation of Sex-Offender Registration Conviction

On 8 April 2008, defendant was convicted of a violation of the sex-offender registration. 730 Ill. Comp. Stat. 150/3(a) (2007) provides, in part, that: "[a] sex offender, as defined in Section 2 of this Act, or sexual predator shall, within the time period prescribed in subsections (b) and (c), register in person and provide accurate information as required by the Department of State

Police." Sex offender is defined as any person who is "charged pursuant to Illinois law, or any substantially similar federal, Uniform Code of Military Justice, sister state, or foreign country law, with a sex offense set forth in subsection (B) of this Section or the attempt to commit an included sex offense" and who is convicted of such offense. 730 Ill. Comp. Stat. 150/2(A)(1)(a) (2007). The Department of State Police mails a quarterly nonforwardable verification letter to each registered person, which must be signed and returned within 10 days. 730 Ill. Comp. Stat. 150/5-10 (2007). The registered offender has a duty to report any change in address, place of employment, school, or online identifier. 730 Ill. Comp. Stat. 150/6. A person who violates this statute is guilty of a Class 3 felony. 730 Ill. Comp. Stat. 150/10(a) (2007).

The corresponding North Carolina statute provides that: "A person who is a State resident and who has a reportable conviction shall be required to maintain registration with the sheriff of the county where the person resides." N.C. Gen. Stat. § 14-208.7(a) (2007). "Reportable conviction" is defined as, *inter alia*:

> [a] final conviction in another state of an offense, which if committed in this State, is substantially similar to an offense against a minor or a sexually violent offense as defined by this section, or a final conviction in another state of an offense that requires registration under the sex offender registration statutes of that state.

N.C. Gen. Stat. § 14-208.6(4)(b) (2007). The sheriff is tasked with mailing a semiannual nonforwardable verification form to the last reported address of the registered offender, which must be

returned within 10 business days of receipt. N.C. Gen. Stat. § 14-208.9A(a)(1)-(2) (2007). The registered offender has a duty to report any change of address, academic status, or employment status. N.C. Gen. Stat. § 14-208.9 (2007). A person who violates this article is guilty of a Class F felony. N.C. Gen. Stat. § 14-208.11 (2007).

We hold a violation of the Illinois Sex-Offender Registration Act is "substantially similar" to a violation of the North Carolina Sex Offender and Public Protection Registration Program. The trial court did not err by treating defendant's Illinois conviction for his violation of the sex-offender registration as a Class F felony for purposes of his prior record level.

Illinois Protective Order Violation Conviction

On 2 September 2004, defendant was convicted in Illinois of violating a protective order. In Illinois, there are two methods of enforcing such an order: (1) by a criminal court when the violation is pursuant to the criminal statute 720 Ill. Comp. Stat. 5/12-30; or (2) criminal or civil contempt proceedings. 750 Ill. Comp. Stat. 60/223(a)-(b) (2004). Defendant stipulated to the existence of a violation of a protective order conviction. However, at the sentencing hearing, defense counsel argued that there was no evidence before the trial court to determine whether defendant was prosecuted under the criminal statute or for criminal contempt. This distinction is critical.

720 Ill. Comp. Stat. 5/12-30 provides that a person who commits an act which was prohibited by a court after the person has

been served notice of the contents of the protective order is guilty of a Class A misdemeanor. 720 Ill. Comp. Stat. 5/12-30(a), (d) (2004). N.C. Gen. Stat. § 50B-4.1(a) (2003) is substantially similar: "a person who knowingly violates a valid protective order entered pursuant to this Chapter or who knowingly violates a valid protective order entered by the courts of another state or the courts of an Indian tribe shall be guilty of a Class A1 misdemeanor." Therefore, if defendant was prosecuted under 720 Ill. Comp. Stat. 5/12-30 for violation of a protective order, the trial court properly classified his prior conviction as a Class A1 misdemeanor.

However, defendant could have also been convicted of criminal contempt for violation of the protective order. 750 Ill. Comp. Stat. 60/223 provides that a violation of a protective order may be enforced through criminal contempt procedures. 750 Ill. Comp. Stat. 60/223(b). In Illinois, "[a] criminal contempt of court is a crime against the court and against the people and is a misdemeanor[.]" *People v. Howarth*, 114 N.E.2d 785, 788 (Ill. 1953). "[C]onvictions for criminal contempt are indistinguishable from ordinary criminal convictions . . . ." *County of McLean v. Kickapoo Creek, Inc.*, 282 N.E.2d 720, 722 (Ill. 1972) (quotation omitted). To the contrary, a criminal contempt adjudication is not a misdemeanor in North Carolina. "A person who commits criminal contempt, whether direct or indirect, is subject to censure, imprisonment up to 30 days, fine not to exceed five hundred dollars ($ 500.00), or any combination of the three[.]" N.C. Gen. Stat. §

5A-12(a) (2003). This Court has previously held that "the General Assembly did not intend an adjudication of criminal contempt to constitute a 'prior conviction' for sentencing purposes under G.S. § 15A-1340.21." *State v. Reaves*, 142 N.C. App. 629, 633, 544 S.E.2d 253, 256 (2001). This Court reasoned that "[h]ad the General Assembly intended that criminal contempt adjudications as well as misdemeanors be considered 'crimes,' so as to qualify as 'prior conviction' under G.S. § 15A-1340.11(7), it would have been a simple matter for it to have included that explicit phrase, within the statutory amendment." *Id.* at 636, 544 S.E.2d at 257-258 (internal quotations, citations, and alterations omitted). Therefore, a criminal contempt adjudication in North Carolina does not have the same implications as a criminal contempt conviction in Illinois. If defendant was convicted of criminal contempt for a violation of the protective order in Illinois, it would not be proper to classify the prior conviction as a Class A1 misdemeanor in calculating defendant's prior record level.

Because there was no evidence before the trial court indicating whether defendant was convicted pursuant to 720 Ill. Comp. Stat. 5/12-30 or if he was convicted of criminal contempt for violation of a protection order, the State failed to produce sufficient evidence tending to show that defendant's prior conviction for violation of a protective order was substantially similar to a Class A1 misdemeanor in North Carolina. This case must be remanded to the trial court for a new sentencing hearing during which both parties may present additional evidence necessary

to determine this issue. *See State v. Ayscue*, 169 N.C. App. 548, 556, 610 S.E.2d 389, 395 (2005) (holding that where the State failed to present sufficient evidence that the defendant's prior out-of-state conviction was substantially similar to a Class 1 misdemeanor in North Carolina, the defendant was entitled to a new sentencing hearing).

REMANDED FOR NEW SENTENCING HEARING.

Judges BRYANT and BEASLEY concur.

Report per Rule 30(e).