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NO. COA12-500
NORTH CAROLINA COURT OF APPEALS

Filed: 4 December 2012

STATE OF NORTH CAROLINA

v. Buncombe County
No. 11 CRS 54845

JACKIE COX

Appeal by defendant from judgment entered 15 December 2011 by Judge Alan Z. Thornburg in Buncombe County Superior Court. Heard in the Court of Appeals 26 November 2012.

Roy Cooper, Attorney General, by Tammera S. Hill, Assistant Attorney General, for the State.

Levine & Stewart, by James E. Tanner, III, for defendant-appellant.

MARTIN, Chief Judge.

Defendant Jackie Cox appeals from a judgment entered upon his guilty plea to habitual impaired driving and driving while license revoked. Defendant contends the trial court erred in calculating his prior record level for sentencing purposes. We remand for re-sentencing.

Defendant pled guilty to habitual impaired driving and

driving while license revoked on 15 December 2011. At sentencing, defendant stipulated to his prior convictions as listed on the prior record level worksheet, except for two 1989 New York State "Petit larceny" convictions. The trial court found that the State proved by a preponderance of the evidence that defendant was the same offender who received the two New York larceny convictions, and that "the New York convictions are substantially similar to North Carolina misdemeanor larceny statutes[.]" The trial court determined defendant was a Level III offender with six points, including two points for the New York convictions. The trial court sentenced defendant to a presumptive-range term of 17 to 21 months imprisonment. Defendant appeals.

Defendant contends the trial court erred in finding defendant to have a prior record level III with 6 points because the trial court improperly relied upon out-of-state convictions. Specifically, defendant argues the State failed to produce sufficient evidence to show (1) that defendant had been convicted of the two New York convictions; and (2) that his 1989 petit larceny New York convictions were substantially similar to the North Carolina crime of misdemeanor larceny.

The standard of review relating to the sentence imposed by the trial court "is whether the sentence is supported by evidence introduced at the trial and sentencing hearing." *State v. Chivers*, 180 N.C. App. 275, 278, 636 S.E.2d 590, 593 (2006), *disc. review denied,* 361 N.C. 222, 642 S.E.2d 709 (2007). However, "the 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" requiring *de novo* review on appeal. *State v. Hanton*, 175 N.C. App. 250, 255, 623 S.E.2d 600, 604 (2006).

"The 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) (2011). The statute further provides that a prior conviction "shall be proved by" (1) stipulation of the parties, (2) an original or copy of the court record of the prior conviction, (3) copy of records maintained by the Division of Criminal Information, Division of Motor Vehicles, or Administrative Office of the Courts, or (4) any other method found by the court to be reliable. *Id.*

We first address whether the State proved by a preponderance of the evidence that defendant is the same person as the offender named in the two New York convictions. The record indicates that the State tendered to the trial court a computerized criminal history printout from the FBI's National Crime Information Center ("NCIC") database. As noted by this Court in *Fortney*, "[a]lthough NCIC reports are not among the enumerated items contained in N.C. Gen. Stat. § 15A-1340.14(f), the statute provides for proof by 'any other method' deemed reliable." *State v. Fortney*, 201 N.C. App. 662, 670, 687 S.E.2d 518, 524 (2010). Here, the NCIC printout, reporting convictions for two 1989 petit larceny convictions in New York, describes the offender as a black male with an identical date of birth, social security number and FBI number as defendant. Further, defendant's name on his North Carolina charges, Jackie Cox, is an alias to the name on the New York larceny charges of "Jackie McCoy." Since the NCIC printout included the offender's weight, height, eye color and hair color, the trial court had the opportunity to compare the characteristics to those of defendant. We conclude the report contained sufficient identifying information to prove by a preponderance of the evidence that defendant was the subject of the report and the

perpetrator of the petit larceny convictions specified in the report.

We now address whether the State proved that defendant's prior out-of-state convictions were substantially similar to offenses under the North Carolina General Statutes.

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

> [i]f 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.

Id. (2011). "[W]hether an out-of-state offense is substantially similar to a North Carolina offense is a question of law that must be determined by the trial court, not the jury." *Hanton*, 175 N.C. App. at 254, 623 S.E.2d at 604. In determining "whether the out-of-state conviction is substantially similar to a North Carolina offense," the trial court should compare "the elements of the out-of-state offense to those of the North Carolina offense." *Fortney*, 201 N.C. App. at 671, 687 S.E.2d at 525 (citation omitted).

Here, the State's worksheet indicates defendant's New York convictions for "Petit Larceny" were from 1989. However, the

State presented 2011 copies of the out-of-state statutes purportedly serving as the basis for those convictions and presented no evidence that the statutes were unchanged from the 1989 versions under which defendant had been convicted. We agree with defendant that the State's evidence was insufficient to provide the court with a basis for comparing the elements of the New York offense to the North Carolina offense. *See State v. Burgess*, ____ N.C. App. ___, ___, 715 S.E.2d 867, 870 (2011) (remanding for re-sentencing in part because "the State presented 2008 copies of the out-of-state statutes purportedly serving as the basis for those convictions and presented no evidence that the statutes were unchanged from the 1993 and 1994 versions under which defendant had been convicted."); *see also State v. Morgan*, 164 N.C. App. 298, 309, 595 S.E.2d 804, 812 (2004) (holding the State failed to prove by a preponderance of the evidence that a New Jersey offense was substantially similar to a North Carolina offense where "[t]he State presented no evidence . . . that the 2002 New Jersey homicide statute was unchanged from the 1987 version under which [the] [d]efendant was convicted."). Because the State failed to prove that the 2011 New York statute offered at the sentencing hearing is unchanged from 1989, it could not satisfy its burden of showing

substantial similarity between the out-of-state offense to the corresponding North Carolina offense pursuant to N.C. Gen. Stat. § 15A-1340.14(e). Therefore, we remand this matter for re-sentencing in order that the trial court may consider additional information presented by the State or by defendant regarding defendant's 1989 out-of-state convictions for larceny.

Reversed and remanded for re-sentencing.

Judges STROUD and HUNTER, JR. concur.

Report per Rule 30(e).