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NO. COA13-498  
NORTH CAROLINA COURT OF APPEALS

Filed: 5 November 2013

STATE OF NORTH CAROLINA

v.  
ANTHONY DEAN<sup>1</sup> BEST

Buncombe County  
Nos. 12 CRS 366; 53996

Appeal by defendant from judgment entered 6 December 2012  
by Judge Marvin P. Pope in Buncombe County Superior Court.  
Heard in the Court of Appeals 9 October 2013.

*Attorney General Roy Cooper, by Assistant Attorney General  
Jill F. Cramer, for the State.*

*Appellate Defender Staples S. Hughes, by Assistant  
Appellate Defender Andrew DeSimone, for defendant-  
appellant.*

CALABRIA, Judge.

Anthony Deon Best ("defendant") appeals from a judgment  
entered upon jury verdicts finding him guilty of attempted

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<sup>1</sup> Both parties acknowledge in their briefs that the trial court's judgment contains a clerical error in that it erroneously lists defendant's middle name as "Dean" rather than "Deon."

robbery with a dangerous weapon ("attempted RWDW") and attaining the status of an habitual felon. We find no error.

### I. Background

On 24 March 2012, defendant entered Montfort Convenience Store in Asheville, North Carolina, and attempted to purchase beer. As David Walsh ("Walsh"), the store clerk, processed the transaction, defendant came around the counter and demanded money while raising a brick over his head. In response, Walsh locked the register and told defendant that it was jammed and would not open.

Defendant attempted to open the register but was unable to do so. When another individual entered the store, Walsh went into a back room of the store, retrieved a baseball bat, and confronted defendant. Defendant threw the beer on the ground and left the store.

On 9 July 2012, defendant was indicted for attempted RWDW and attaining the status of an habitual felon. The attempted RWDW indictment alleged that "defendant committed this act by means of an assault consisting of having in possession and threatening the use of a brick[.]" Beginning 4 December 2012, defendant was tried by a jury in Buncombe County Superior Court.

On 6 December 2012, the jury returned verdicts finding defendant guilty of both charges.

At sentencing, the trial court determined that defendant was a prior record level IV offender. This determination was partially based upon defendant's prior conviction for felony robbery in Connecticut in 1998. After the State provided the trial court with copies of the relevant 2012 Connecticut robbery statutes, the trial court concluded that defendant's Connecticut felony robbery conviction was substantially similar to a conviction for common law robbery in North Carolina, a class G felony. Defendant was then sentenced as a level IV offender to a minimum of 100 months to a maximum of 132 months in the North Carolina Division of Adult Correction. Defendant appeals.

## II. Sufficiency of Indictment

Defendant argues that the trial court lacked subject matter jurisdiction to enter a judgment against him for his attempted RWDW conviction because defendant's indictment for that offense failed to sufficiently allege that defendant used a dangerous weapon during the robbery. We disagree.

Although defendant did not challenge the validity of the indictment at trial, our Supreme Court has stated that "where an indictment is alleged to be invalid on its face, thereby

depriving the trial court of its jurisdiction, a challenge to that indictment may be made at any time, even if it was not contested in the trial court." *State v. Wallace*, 351 N.C. 481, 503, 528 S.E.2d 326, 341 (2000). If an indictment does not "include all the facts necessary to meet the elements of the offense ... the trial court lacks jurisdiction over the defendant and subsequent judgments are void and must be vacated." *State v. Ellis*, 168 N.C. App. 651, 655, 608 S.E.2d 803, 806 (2005) (citations omitted). This Court reviews the sufficiency of an indictment *de novo*. *State v. McKoy*, 196 N.C. App. 650, 652, 675 S.E.2d 406, 409 (2009).

"[T]he elements of attempted robbery are: (1) the unlawful attempt to take any personal property from another; (2) possession, use or a threatened use of a firearm or other dangerous weapon, and (3) danger or threat to the life of the victim." *State v. Lee*, \_\_\_ N.C. App. \_\_\_, \_\_\_, 720 S.E.2d 884, 895 (2012). In the instant case, defendant contends that the indictment fails to establish that he threatened the use of a dangerous weapon.

When an indictment charges a crime that requires the use of a deadly weapon, the State is required to (1) name the weapon and (2) either to state expressly that the weapon used was a "deadly weapon" or to allege such facts as would *necessarily*

demonstrate the deadly character of the weapon.

*State v. Ryder*, 196 N.C. App. 56, 65-66, 674 S.E.2d 805, 812 (2009) (internal quotations and citations omitted).

Defendant's indictment for attempted RWDW alleged that defendant

unlawfully, willfully and feloniously did attempt to steal, take and carry away another's personal property, U.S. Currency, from Aytes Investments, Inc., DBA: Montford Convenience Store, when David Harold Walsh was present and in attendance. The defendant committed this act by means of an assault consisting of having in possession and threatening the use of a brick, whereby the life of David Harold Walsh was threatened and endangered.

We find that the allegation that defendant threatened to use a brick that he had in his possession is sufficient to "demonstrate the deadly character of the weapon." *Id.* at 66, 674 S.E.2d at 812. Our Supreme Court has previously noted that "a brick thrown with force and violence in close proximity to the person of another, or used as a weapon to strike by holding it in hand, is a deadly weapon." *State v. Perry*, 226 N.C. 530, 535, 39 S.E.2d 460, 464 (1946) (internal quotation and citation omitted). The allegation that defendant threatened to use a brick against Walsh adequately encompasses both of these potential deadly uses, and thus, the indictment sufficiently

charged defendant with attempted RWDW. This argument is overruled.

### III. Sentencing

Defendant argues that the trial court erred by sentencing him as a prior record level IV offender because the State failed to prove that his 1998 Connecticut robbery conviction was substantially similar to North Carolina's common law robbery offense. We disagree.

This Court reviews alleged sentencing errors for “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)). Whether the State presented sufficient evidence at sentencing that a prior out-of-state conviction is substantially similar to a North Carolina criminal offense is a question of law which is reviewed *de novo*. *State v. Fortney*, 201 N.C. App. 662, 669, 687 S.E.2d 518, 524 (2010).

“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 . . . .” N.C. Gen. Stat. § 15A-1340.14(a) (2011).

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.

N.C. Gen. Stat. § 15A-1340.14(e). Whether an out-of-state offense 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. *State v. Hanton*, 175 N.C. App. 250, 254-55, 623 S.E.2d 600, 604 (2006). Consequently, while a defendant may stipulate to the existence of an out-of-state conviction and to whether that conviction was a felony or misdemeanor offense, he cannot stipulate to whether the conviction is substantially similar to a North Carolina offense. *State v. Henderson*, 201 N.C. App. 381, 387, 689 S.E.2d 462, 466 (2009).

In the instant case, the State included defendant's 1998 Connecticut conviction for "(F) Robbery" as part of his prior record level worksheet, and defendant stipulated that he had been convicted of that felony. The State asked the court to find that defendant's Connecticut robbery conviction was substantially similar to North Carolina's common law robbery offense, a Class G felony. Subsequently, the State provided the

trial court with copies of three 2012 Connecticut robbery statutes. After reviewing the statutes provided, the court concluded that defendant's Connecticut robbery conviction was for an offense which was substantially similar to North Carolina's common law robbery offense and assessed defendant four prior record level points.

Defendant contends that the State provided insufficient evidence to establish substantial similarity. In support of his argument, defendant relies upon *Henderson* and *State v. Burgess*, \_\_\_ N.C. App. \_\_\_, 715 S.E.2d 867 (2011). In *Henderson*, this Court held that the State failed to prove that the defendant's out-of-state convictions were substantially similar to a North Carolina offense because "[t]he out-of-state crimes were not identified by statutes in the record, but instead only by brief and non-specific descriptions, especially 'robbery' and 'domestic violence,' which could arguably describe more than one specific [out-of-state] crime." 201 N.C. App. at 388, 689 S.E.2d at 467. Moreover, although the State attempted to identify, in its appellate brief, the specific out-of-state statutes that the defendant was purportedly convicted under, it "did not identify these . . . statutes during sentencing before the trial court or in the record on appeal." *Id.* In *Burgess*, this Court



identified several errors in the trial court's substantial similarity determination. \_\_\_ N.C. App. at \_\_\_, 715 S.E.2d at 870. Pertinent to defendant's current argument, the Court found that the trial court's substantial similarity determination was erroneous because

[a]lthough the State presented the trial court with Exhibit 3, printed copies of out-of-state statutes purportedly serving as the basis for the nine out-of-state convictions the State used in computing defendant's prior record level, the out-of-state crimes [on the State's worksheet] were not identified by statutes, but only by brief and non-specific descriptions and could arguably describe more than one specific South Carolina and [Florida] crime, which makes it unclear whether those statutes were the basis for defendant's convictions.

*Id.* (internal quotations and citation omitted). Thus, in both *Henderson* and *Burgess*, this Court found that a generic description of an out-of-state conviction coupled with the failure of the State to provide definitive evidence of the actual out-of-state statutes the defendants were purportedly convicted under did not provide sufficient evidence for the sentencing court to make a substantial similarity finding. Defendant contends that this precise scenario occurred in the instant case.

However, defendant's sentencing hearing in this case is distinguishable from the sentencing hearings in *Henderson* and *Burgess*. While the description of defendant's Connecticut conviction on his prior record level worksheet, "(F) Robbery," is similar to the generic descriptions in those cases which were found to be insufficient, the evidence presented by the State at defendant's sentencing hearing exceeds the evidence presented in *Henderson* and *Burgess*.

In *Henderson*, the State failed to provide any out-of-state statutes to the trial court, and in *Burgess*, the State only provided a single statute for each conviction. In the instant case, the State provided the trial court with *all* of the potentially applicable Connecticut felony robbery statutes. After reviewing each of the statutes provided by the State, the trial court determined that defendant's Connecticut robbery conviction was substantially similar to the North Carolina offense of common law robbery. The elements of common-law robbery are "the felonious, non-consensual taking of money or personal property from the person or presence of another by means of violence or fear." *State v. Moss*, 332 N.C. 65, 72, 418 S.E.2d 213, 217 (1992) (internal quotations and citation omitted). Analogous elements are included in all three of the

Connecticut robbery statutes provided to the trial court, and as a result, a conviction pursuant to any of the three statutes would be, at the very least, substantially similar to a common law robbery conviction in North Carolina.<sup>2</sup> Thus, unlike *Henderson* and *Burgess*, the instant case presents no danger that the trial court examined only the wrong specific out-of-state offense when performing its substantial similarity comparison. Since the trial court considered all of the possible Connecticut robbery statutes and each statute is substantially similar to our common law robbery offense, the State provided sufficient evidence for the trial court to conclude that defendant was convicted of an offense that was substantially similar to common law robbery.

Defendant also argues that the trial court erred in concluding that defendant's Connecticut robbery conviction was substantially similar to common law robbery because the State only submitted the 2012 version of the Connecticut robbery statutes, without establishing that those statutes remained unchanged since defendant's conviction in 1998. See, e.g., *State v. Morgan*, 164 N.C. App. 298, 309, 595 S.E.2d 804, 812

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<sup>2</sup> The State did not argue that defendant's prior conviction was substantially similar to any offense other than common law robbery.

(2004) (remanding for resentencing when the State presented a copy of a 2002 out-of-state homicide statute but offered no evidence that the statute was unchanged from the 1987 version under which the defendant was convicted). However, unlike *Morgan*, the 2012 Connecticut statutes provided to the trial court in the instant case included statutory history which sufficiently demonstrated that the 2012 statutes were the same version of the statutes which were in effect at the time of defendant's 1998 conviction. Thus, the trial court properly relied upon these statutes and correctly determined that defendant's Connecticut robbery conviction was substantially similar to our common law robbery offense. Accordingly, the trial court did not err when it assigned four prior record level points to that conviction. This argument is overruled.

#### IV. Conclusion

Defendant's indictment for attempted RWDW included sufficient allegations to demonstrate that he used a brick as a dangerous weapon during the course of the robbery. The State provided sufficient evidence for the trial court to conclude that defendant's 1998 Connecticut robbery conviction was substantially similar to North Carolina's common law robbery offense. Consequently, the trial court properly sentenced

defendant as a level IV offender. Defendant received a fair trial, free from error.

No error.

Judges ELMORE and STEPHENS concur.

Report per Rule 30(e).