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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA 15-452

Filed: 17 November 2015

Nash County, No. 12 CRS 55533

STATE OF NORTH CAROLINA

v.

DEBERAUX MOTLEY

Appeal by defendant from judgment entered 9 July 2014 by Judge Milton F. Fitch, Jr. in Nash County Superior Court. Heard in the Court of Appeals 2 November 2015.

Attorney General Roy Cooper, by Assistant Attorney General Karen A. Blum, for the State.

Peter Wood for defendant-appellant.

HUNTER, JR., Robert N., Judge.

Defendant Deberaux Motley appeals from a judgment entered upon his no contest plea to a single count of taking indecent liberties with a child. The trial court sentenced Defendant as a prior record level III offender, based on 6 prior record level points, to a term of 21 to 35 months' imprisonment. Defendant's sole argument on

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appeal is that the trial court erred in sentencing him as a prior record level III offender. The State concedes error, and we agree.¹

A trial court may use out-of-state convictions when calculating a defendant's prior record level for sentencing purposes 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 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) (2013). “[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.*

¹ On 12 May 2015, the State filed a motion to dismiss defendant's appeal, arguing that defendant had no appeal of right from the judgment entered against him. However, upon considering defendant's argument on appeal, the State conceded that defendant had a right to appeal. *See* N.C. Gen. Stat. § 15A-1444(a2)(1) (2013). Accordingly, we deny the State's motion to dismiss defendant's appeal.

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Hanton, 175 N.C. App. 250, 255, 623 S.E.2d 600, 604 (2006). “While the stipulation by defendant is binding as to the *existence* of the prior convictions (including the out-of-state convictions), it is not binding as to the substantial similarity of the out-of-state offenses under N.C. Gen. Stat. § 15A-1340.14(e).” *State v. Chappelle*, 193 N.C. App. 313, 333, 667 S.E.2d 327, 339 (emphasis added), *appeal dismissed and disc. review denied*, 362 N.C. 684, 670 S.E.2d 568 (2008). “This Court has found that the trial court errs if it sentences a defendant based in part on a prior foreign conviction that has not been proven to be substantially similar to the North Carolina equivalent by a preponderance of the evidence.” *State v. Lee*, 193 N.C. App. 748, 749, 668 S.E.2d 393, 394 (2008) (citation omitted).

Here, defendant’s prior record level worksheet for felony sentencing purposes lists three prior convictions: one North Carolina conviction for attempted sexual battery, listed as a Class A1 misdemeanor; one Texas conviction for common law robbery, listed as a Class G felony; and one Texas conviction for driving while impaired, listed simply as a misdemeanor. Defendant stipulated to the existence of these convictions, and the trial court assigned one prior record level point for defendant’s North Carolina conviction and five prior record level points for defendant’s Texas convictions, four for the felony and one for the misdemeanor. The State, however, presented no evidence as to the substantial similarity between the

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Texas offenses and corresponding North Carolina offenses. Because the State failed to meet its burden of showing defendant's Texas convictions were for offenses substantially similar to specific North Carolina offenses, the trial court could only have classified the Texas conviction for common law robbery as a Class I felony and the Texas conviction for driving while impaired as a Class 3 misdemeanor. *See* N.C. Gen. Stat. § 15A-1340.14(e) (2013). The trial court should therefore have assigned one point for the Class A1 misdemeanor of attempted sexual battery, two points for the Class I Texas felony, and zero points for the Class 3 misdemeanor. The trial court concluded that defendant had a prior record level of II based on three prior record level points. *See* N.C. Gen. Stat. § 15A-1340.14(b), (c) (2013). Accordingly, we hold the trial court erred in sentencing defendant as a prior record level III offender and remand for resentencing. However, "[i]n the interests of justice, both the State and defendant may offer additional evidence at the resentencing hearing." *State v. Hanton*, 140 N.C. App. 679, 690, 540 S.E.2d 376, 383 (2000).

REMANDED FOR RESENTENCING.

Chief Judge McGee and Judge Dillon concur.

Report per Rule 30(e).