IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA16-366

Filed: 15 November 2016

Wake County, No. 14 CRS 1278

STATE OF NORTH CAROLINA

v.

JAMES HAROLD COURTNEY, III, Defendant

Appeal by defendant from judgment entered 1 October 2015 by Judge Michael R. Morgan in Wake County Superior Court. Heard in the Court of Appeals 4 October 2016.

Attorney General Roy Cooper, by Assistant Attorney General T. Hill Davis, III, for the State.

Richard J. Costanza, for defendant-appellant.

CALABRIA, Judge.

James Harold Courtney, III, ("defendant") appeals from a judgment entered upon a jury verdict finding him guilty of harassment of a juror. On appeal, defendant contends that the trial court improperly calculated his prior record level during sentencing. After careful review, we reverse and remand for resentencing.

I. Background

On 1 October 2015, a jury returned a verdict finding defendant guilty of felonious harassment of a juror, pursuant to N.C. Gen. Stat. § 14-225.2 (2015), based

on defendant's improper communication with a juror during the capital murder trial of defendant's former cellmate. Following the verdict, the trial court excused the jury and held a sentencing hearing. The State proffered a prior record level worksheet and requested that defendant be assigned twelve points based on four prior felony convictions, three from New York and one from North Carolina. Defense counsel refused to stipulate to the State's worksheet, noting that "[t]here are convictions that are outside of North Carolina." The State then produced a copy of defendant's Division of Criminal Information ("DCI") records, which contained information about his criminal history in both states.

Regarding defendant's New York convictions, the State requested that he be assigned: (1) two points for assault on a law enforcement officer, which the State classified as a Class I felony; (2) two points for third-degree criminal sale of a controlled substance, a Class I felony; and (3) six points for second-degree robbery, which the State contended was substantially similar to the North Carolina offense of robbery with a dangerous weapon. *See* N.C. Gen. Stat. § 14-87(a) (providing that armed robbery is a Class D felony). The State provided the court with a copy of New York's second-degree robbery statute, and after reviewing its elements, the court agreed that the offense was substantially similar to the North Carolina offense of armed robbery. The court assigned defendant twelve points and sentenced him, at

prior record level IV, to 11 to 23 months in the custody of the North Carolina Division of Adult Correction. Defendant appeals.

II. Analysis

On appeal, defendant only challenges the sentence imposed by the trial court. Defendant contends that the court erred by: (1) assessing him sentencing points for assault on a law enforcement officer, an offense for which he was not convicted; and (2) determining that the New York offense of second-degree robbery was substantially similar to the North Carolina offense of armed robbery. He further asserts that based on these errors, he was improperly sentenced at prior record level IV.

A. Assault on a Law Enforcement Officer

"The trial court's determination of a defendant's prior record level is a conclusion of law, which this Court reviews *de novo* on appeal." *State v. Threadgill*, 227 N.C. App. 175, 178, 741 S.E.2d 677, 679-80, (citing *State v. Boyd*, 207 N.C. App. 632, 642, 701 S.E.2d 255, 261 (2010)), *disc. review denied*, 367 N.C. 223, 747 S.E.2d 538-39 (2013). A defendant need not object to the calculation of his prior record level at the sentencing hearing in order to preserve the issue for appellate review. *Id.* at 175, 741 S.E.2d at 679; N.C. Gen. Stat. § 15A-1446(d)(5), (18). "[T]his assignment of error is not evidentiary; rather, it challenges whether the prosecution met its burden of proof at the sentencing hearing." *State v. Cao*, 175 N.C. App. 434, 441, 626 S.E.2d

301, 306, *appeal dismissed and disc. review denied*, 360 N.C. 538, 634 S.E.2d 537 (2006).

"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 . . . ." N.C. Gen. Stat. § 15A-1340.14(a). An offender has a "prior conviction" if, on the date that the criminal judgment is entered, he or she has been previously convicted of a crime in North Carolina's trial courts or "[i]n the courts of the United States, another state, the Armed Forces of the United States, or another country, regardless of whether the offense would be a crime if it occurred in North Carolina[.]" N.C. Gen. Stat. § 15A-1340.11(7). "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). The State must prove a defendant's prior convictions by one 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 Department of Public Safety,[1] the Division of Motor Vehicles, or of the Administrative Office of the Courts.
> (4) Any other method found by the court to be reliable.

Id.

[1] 2014 N.C. Sess. Laws ch. 100, § 17.1(q), effective 1 July 2014, substituted "Department of Public Safety" for "Division of Criminal Information" throughout the section.

Defendant first contends that the trial court improperly assigned him two sentencing points for assault on a law enforcement officer, an offense that did not result in a conviction. We agree.

At sentencing, the State presented to the trial court defendant's DCI records that included offenses from North Carolina, New Jersey, and New York. These records provide that when defendant was arrested for felonious assault on a law enforcement officer in New York on 25 October 1983, he used the alias "Hyrom Rodriguez." However, the DCI records provide no further information other than the fact that he was arrested. Specifically, there is no record evidence that this offense ever resulted in a conviction. By contrast, according to his DCI records, defendant was "convicted upon plea of guilty" and sentenced to active terms for second-degree robbery and third-degree criminal sale of a controlled substance, the other New York offenses that the trial court used in calculating defendant's prior record level. Furthermore, the prior record level worksheet includes dates of conviction for those two offenses that match those listed in defendant's DCI records. For assault on a law enforcement officer, however, the worksheet only provides 25 October 1983, the date of defendant's *arrest*.

The State contends that defendant stipulated to this conviction by failing to object at sentencing. Specifically, the State argues that defendant "acknowledged his prior convictions in arguing that they occurred 'a considerable amount of time' in the

past when [d]efendant was a 'teenager.' " However, defense counsel made this statement in response to the trial court's request for sentencing input, *after* the court determined that defendant's prior convictions made him "for sentencing purposes a Level [IV] with 12 points."

"[D]uring sentencing, a defendant need not make an affirmative statement to stipulate to his or her prior record level or to the State's summation of the facts, particularly if defense counsel had an opportunity to object to the stipulation in question but failed to do so." *State v. Alexander*, 359 N.C. 824, 829, 616 S.E.2d 914, 918 (2005); *see also Threadgill*, 227 N.C. App. at 180, 741 S.E.2d at 681 (holding that a defendant who "vigorously challenged" certain prior convictions at sentencing implicitly stipulated to another by failing to object); *State v. Hurley*, 180 N.C. App. 680, 685, 637 S.E.2d 919, 923 (2006) (determining that the defendant stipulated to his prior record level where he "had an opportunity to object and rather than doing so, asked for work release"), *disc. review denied*, 361 N.C. 433, 649 S.E.2d 394 (2007). However, "[w]hile a stipulation need not follow any particular form, its terms must be definite and certain in order to afford a basis for judicial decision, and it is essential that they be assented to by the parties or those representing them." *Alexander*, 359 N.C. at 828, 616 S.E.2d at 917 (citation omitted).

It is true that defendant did not specifically object to the existence of this conviction at sentencing, and "[s]ilence, under some circumstances, may be deemed

assent[.]" *Id.* (citation omitted). However, the circumstances in the instant case do not favor stipulation. At the sentencing hearing, defense counsel affirmatively stated that defendant "would not be stipulating" to the prior record level worksheet prepared by the State, and neither defendant nor his attorney signed the stipulation section of the worksheet. *Cf. State v. Burgess*, 216 N.C. App. 54, 57, 715 S.E.2d 867, 870 (2011) ("Defendant's counsel stipulated to the existence of the convictions by signing Section III of the worksheet."). Moreover, while his DCI records provide conviction dates and disposition information for the other three felonies that the trial court used in calculating defendant's prior record level, there is absolutely no record evidence that defendant was actually convicted of this offense. Accordingly, the State failed to meet its burden of proving this conviction by a preponderance of the evidence, and the trial court erred by adding two points to defendant's sentencing worksheet on that basis.

B. Second-Degree Robbery

Defendant next contends that the trial court erred by determining that the New York offense of second-degree robbery was substantially similar to the North Carolina offense of armed robbery. We agree.

Felony convictions from other jurisdictions are generally classified as Class I felonies for sentencing purposes. N.C. Gen. Stat. § 15A-1340.14(e). However,

> [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. "[W]hether 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). "[C]opies of the . . . statutes [from another jurisdiction], and comparison of their provisions to the criminal laws of North Carolina, [a]re sufficient to prove" substantial similarity. *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).

Here, the DCI records show that on 1 May 1984, defendant was convicted of second-degree robbery in New York. The State presented the trial court with a copy of the 2015 version of the New York statute, which provides:

> A person is guilty of robbery in the second degree when he forcibly steals property and when:
>
> 1. He is aided by another person actually present; or
>
> 2. In the course of the commission of the crime or of immediate flight therefrom, he or another participant in the crime:
>
> > (a) Causes physical injury to any person who is not a participant in the crime; or
> >
> > (b) Displays what appears to be a pistol, revolver, rifle, shotgun, machine gun or other firearm; or
>
> 3. The property consists of a motor vehicle, as defined in section one hundred twenty-five of the vehicle and traffic

> law.
>
> Robbery in the second degree is a class C felony.

N.Y.S. Penal Code § 160.10. At sentencing, the State contended that this offense was substantially similar to the North Carolina offense of robbery with a dangerous weapon, more commonly known as armed robbery. Pursuant to N.C. Gen. Stat. § 14-87(a),

> [a]ny person or persons who, having in possession or with the use or threatened use of any firearms or other dangerous weapon, implement or means, whereby the life of a person is endangered or threatened, unlawfully takes or attempts to take personal property from another or from any place of business, residence or banking institution or any other place where there is a person or persons in attendance, at any time, either day or night, or who aids or abets any such person or persons in the commission of such crime, shall be guilty of a Class D felony.

Id.

In comparing these two statutes, it is apparent that the offenses have different elements. North Carolina's armed robbery statute requires the "use or threatened use" of a firearm or other dangerous weapon. *Id.*; *see also State v. Hope*, 317 N.C. 302, 305, 345 S.E.2d 361, 363 (1986) (providing that the elements of armed robbery are: "(1) the unlawful taking or an attempt to take personal property from the person or in the presence of another (2) by use or threatened use of a firearm or other dangerous weapon (3) whereby the life of a person is endangered or threatened") (citation omitted). Conversely, a person may violate New York's second-degree

robbery statute without possessing a weapon at all. *See* N.Y.S. Penal Code § 160.10(1), (2)(a), 3; *see also People v. Rampulla*, 542 N.Y.S.2d 754, 754 (N.Y. App. Div. 1989) (affirming the defendant's conviction for second-degree robbery where "[t]he prosecution proved that the defendant, together with another assailant, grabbed the complainant by the neck, threw him to the ground and stole his wallet"). Because the North Carolina statute *requires* the use or threatened use of a dangerous weapon and the New York statute does not, these offenses are not substantially similar. *See Hanton*, 175 N.C. App. at 258-59, 623 S.E.2d at 606-07 (concluding that the New York offense of second-degree assault was not substantially similar to the North Carolina offense of assault inflicting serious injury because at least two of the acts described by the New York statute merely require causation of "physical injury," and not "*serious* injury" as required by the North Carolina statute). Consequently, the trial court erred by determining that the New York offense of second-degree robbery was substantially similar to the North Carolina offense of armed robbery, a Class D felony, and by assigning defendant six sentencing points based on his prior conviction.

Additionally, we agree with defendant that in order to establish substantial similarity to a North Carolina offense, "the State was required to produce . . . the [New York] statute in effect" on 1 May 1984, the date of defendant's conviction for second-degree robbery. *See, e.g., State v. Morgan*, 164 N.C. App. 298, 309, 595 S.E.2d 804, 812 (2004) (holding that the State failed to prove substantial similarity 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"). However, we decline to consider defendant's argument that the New York offense of second-degree robbery is substantially similar to the North Carolina offense of common law robbery; that is for the resentencing court to determine on remand. "[I]n the interests of justice, both the State and defendant may offer additional evidence at the resentencing hearing." *Id.* (citation omitted).

III. Conclusion

At sentencing, the State failed to prove, by a preponderance of the evidence: (1) that defendant was previously convicted of assault on a law enforcement officer; and (2) that the New York offense of second-degree robbery is substantially similar to the North Carolina offense of robbery with a dangerous weapon. The trial court, therefore, erred in assigning defendant a total of eight sentencing points based on these offenses and in calculating defendant's prior record level at IV. Accordingly, we reverse the trial court's judgment and remand for resentencing.

REVERSED AND REMANDED.

Judges BRYANT and STEPHENS concur.

Report per Rule 30(e).