

IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA18-538

Filed: 3 September 2019

Henderson County, Nos. 17CRS000236-238, 17CRS000613

STATE OF NORTH CAROLINA

v.

BRUCE WAYNE GLOVER, Defendant.

Appeal by Defendant from judgment entered 20 September 2017 by Judge W. Erwin Spainhour in Henderson County Superior Court. Heard in the Court of Appeals 27 February 2019.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Jonathan D. Shaw, for the State.

Appellate Defender Glenn Gerding by Assistant Appellate Defender Sterling Rozear, for the Defendant.

DILLON, Judge.

Defendant Bruce Wayne Glover appeals from the trial court's judgment entered upon a jury verdict finding him guilty of possession of various controlled substances. The jury was instructed on alternative theories of possession; namely, that Defendant was in "constructive" possession of the controlled substances and, alternatively, that Defendant "acted in concert" with another to possess the controlled substances. Defendant contends the trial court improperly instructed the jury on

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“acting in concert” and, thereafter, failed to properly calculate his prior record level (“PRL”) in sentencing.

After careful review, we conclude that there was sufficient evidence to support an instruction on possession by “acting in concert.” However, we conclude that the trial court committed prejudicial error in calculating Defendant’s PRL and remand for the limited purpose of resentencing.

I. Background

This case arises out of officers’ discovery of various drugs in Defendant’s home. The evidence at trial tended to show as follows:

Defendant lived in a home shared with a number of people, including a woman referred to herein as Ms. Stepp.

In September 2016, officers arrived at Defendant’s home to investigate drug complaints they had received. A detective spoke with Defendant in a bedroom of the home. Defendant told the detective that the bedroom was *his* private bedroom and that an alcove beyond the bedroom was also his “personal space.” Defendant consented to a search of his bedroom and his personal space. Prior to the search, Defendant told the detective that he did not believe officers would find any illegal substances in his bedroom or personal space, but only drug paraphernalia. Also prior to the search, when asked if he had ingested any illegal substances, Defendant admitted to having used methamphetamine and prescription pills.

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During the search of Defendant's bedroom, the detective found a white rectangular pill marked "G3722" masked in aluminum foil, a small bag of marijuana, scales, rolling papers, plastic bags, and a glass pipe in a dresser. But during the search of Defendant's "personal space" adjacent to the bedroom, the detective found more incriminating evidence; namely, a metal tin that contained, among other items, (1) methamphetamine, (2) cocaine, (3) heroin, and (4) a small white rectangular pill that was similar in size, shape, and markings to the white pill found in Defendant's bedroom.

Defendant was charged with and, following a jury trial, subsequently convicted of possession of methamphetamine, heroin, and cocaine, as well as having attained the status of an habitual felon. In sentencing, the trial court found Defendant to be a PRL VI and imposed two separate sentences of fifty (50) to seventy-two (72) months of imprisonment, running consecutively.

Defendant timely appealed.

II. Analysis

Defendant challenges his conviction in two respects, discussed below. In the alternative, Defendant contends that his sentencing based on a mistaken PRL was the result of ineffective assistance of counsel. We address each challenge in turn.

A. Jury Instructions on Acting in Concert

At trial, over Defendant's objection, the court instructed the jury that it could find Defendant guilty of possession on the theory of acting in concert, in addition to

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constructive possession. Defendant contends that the evidence did not support an instruction on acting in concert.

Whether evidence offered at trial is sufficient to warrant a jury instruction is a question of law; “therefore, the applicable standard of review is *de novo*.” *State v. Cruz*, 203 N.C. App. 230, 242, 691 S.E.2d 47, 54, *aff’d per curiam*, 364 N.C. 417, 700 S.E.2d 222 (2010).

To support an acting in concert instruction, the State must provide sufficient evidence that the defendant (1) was “present at the scene of the crime” and (2) “act[ed] [] together with another who [did] the acts necessary to constitute the crime pursuant to a common plan or purpose to commit the crime.” *State v. Joyner*, 297 N.C. 349, 357, 255 S.E.2d 390, 395 (1979); *State v. Erlewine*, 328 N.C. 626, 637, 403 S.E.2d 280, 286 (1991) (noting that each person may be actually or constructively present and is equally guilty of any crime committed in pursuance of their common purpose). A defendant may be guilty through acting in concert even where another person “does all the acts necessary to commit the crime.” *State v. Jefferies*, 333 N.C. 501, 512, 428 S.E.2d 150, 156 (1993). “It is not, therefore, necessary for a defendant to do any particular act constituting at least part of a crime in order to be convicted of that crime under the concerted action principle[.]” *Joyner*, 297 N.C. at 357, 255 S.E.2d at 395.

Possession of drugs requires proof that the defendant (1) knowingly (2) possessed (3) a controlled substance. *See State v. Galaviz-Torres*, 368 N.C. 44, 772

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S.E.2d 434, 437 (2015). Though we have stated that “[t]he acting in concert theory is not generally applicable to possession offenses, as it tends to become confused with other theories of guilt[,] [o]ur courts have instructed juries on both constructive possession and acting in concert in possession cases.” *State v. Diaz*, 155 N.C. App. 307, 314, 575 S.E.2d 523, 528 (2002) (internal citation omitted). “Under the doctrine of acting in concert, the State is not required to prove actual or constructive possession if it can establish that the defendant was present at the scene of the crime and the evidence is sufficient to show he [was] acting together with another who [did] the acts necessary to constitute the crime pursuant to a common plan or purpose to commit the crime.” *State v. Holloway*, ___ N.C. App. ___, ___, 793 S.E.2d 766, 774 (2016) (quotation omitted).

We conclude that there was *not only* sufficient evidence from which the jury could find that Defendant constructively possessed controlled substances, *but also* sufficient evidence from which the jury could alternatively find that Defendant acted in concert with Ms. Stepp to possess the controlled substances.

Defendant does not challenge that there was sufficient evidence that he constructively possessed the substances found in the metal tin; and, indeed, the evidence was sufficient to support the jury’s finding that Defendant constructively possessed those substances. *See State v. Davis*, 325 N.C. 693, 697, 386 S.E.2d 187, 190 (1989) (holding that a person is in constructive possession of narcotics when “he has both the power and the intent to control its disposition or use even though he

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does not have actual possession [of the narcotics on his person]”). Indeed, Defendant was present and identified the area where the metal tin was found as his “personal space.” Further, the jury could have inferred that Defendant admitted to having just ingested methamphetamine and prescription pills, substances which were found in the metal tin and nowhere else (except for the white pill found in his bedroom). And the white pill found in his bedroom matched a pill found in the metal tin. Based on Defendant’s own admissions to the detective and the results of the search, the jury could have determined that Defendant had both the power and the intent to control the disposition of the controlled substances found in the metal tin.

But we conclude that there also was sufficient evidence from which the jury could have alternatively determined that Defendant acted in concert to aid Ms. Stepp’s constructive possession of the controlled substances found in the metal tin. Specifically, Defendant called Ms. Stepp, who testified that *she* placed the metal tin in the dresser in Defendant’s personal space, that the drugs therein were *hers*, that she intended to come back later to use them, and that she and Defendant had taken drugs together in the past. This testimony is evidence that Ms. Stepp possessed (constructively) the drugs in the metal tin. Further, based on Ms. Stepp’s testimony along with the State’s evidence, the jury could have found that Defendant was aware of the presence of the drugs in the metal tin: (1) he admitted to the detective to having just used methamphetamine, and the only methamphetamine found in the house was in the metal tin; *and* (2) he admitted to the detective to having just ingested

prescription pills, and a pill found in his bedroom matched a pill found in the metal tin. And the evidence was sufficient to support findings that (1) Defendant facilitated Ms. Stepp's constructive possession by allowing her to keep her drugs in a place where they would be safe from others; (2) Defendant did not intend to exert control over the disposition of those remaining drugs, as they belonged to his friend, Ms. Stepp, and that she controlled their disposition; and (3) Defendant was actually present when the drugs were in Ms. Stepp's constructive possession.

We, therefore, conclude that the trial court did not err in instructing the jury on the theory of possession by "acting in concert." *See State v. Garcia*, 111 N.C. App. 636, 640-41, 433 S.E.2d 187, 189-90 (1993) (concluding that the evidence was sufficient to instruct on "constructive possession" *and* alternatively on possession by "acting in concert").

B. Calculation of Prior Record Level

Defendant next contends that the trial court erred by sentencing him as a PRL VI with twenty-one (21) points. We agree that Defendant should have been assigned fewer than twenty-one (21) points. We conclude that he should have been assigned seventeen (17) points, which would qualify Defendant to be sentenced as a PRL V offender. Therefore, we remand for resentencing.

A trial court's determination of a defendant's PRL is a conclusion of law that is subject to *de novo* review on appeal. *State v. Bohler*, 198 N.C. App. 631, 633, 681 S.E.2d 801, 804 (2009).

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A sentencing judge must determine a defendant's PRL pursuant to Section 15A-1340.14 of our General Statutes. *State v. Alexander*, 359 N.C. 824, 827, 616 S.E.2d 914, 917 (2005). First, "[t]he State bears the burden of proving, by a preponderance of the evidence, that a prior conviction exists." N.C. Gen. Stat. § 15A-1340.14(f) (2015). Second, the court determines the PRL by adding the points attributed to each of the defendant's prior convictions according to their classifications. N.C. Gen. Stat. § 15A-1340.14(a) (2015).

The State may prove a prior conviction "by . . . [s]tipulation of the parties[.]" among other methods. N.C. Gen. Stat. § 15A-1340.14(f). Typically, a "mere worksheet, standing alone, is insufficient to adequately establish a defendant's prior record level." *Alexander*, 359 N.C. at 827, 616 S.E.2d at 917. However, a worksheet that has been agreed upon by both parties will suffice to meet the State's "preponderance of the evidence" requirement for each conviction. *See Arrington*, ___ N.C. at ___, 819 S.E.2d at 333.

When the parties stipulate to a completed worksheet, they are stipulating that the facts underlying the conviction support the noted classification of each listed offense:

This proof by stipulation necessarily includes the factual basis and legal application to the facts underlying the conviction. . . . Thus, like a stipulation to any other conviction, when a defendant stipulates to the existence of a prior second-degree murder offense in tandem with its classification as either a B1 or B2 offense, *he is stipulating that the facts underlying his conviction justify that*

classification.

Id. (emphasis added). “Once a defendant makes this stipulation, the trial court then makes a legal determination by reviewing the proper classification of an offense so as to calculate the points assigned to that prior offense.” *Id.*

Here, Defendant stipulated to the record pursuant to Section 15A-1340.14(f) when his defense attorney signed and stipulated to the validity of the entire worksheet used to determine Defendant’s PRL. “Although we have found that [D]efendant stipulated to possessing a prior record level of [VI], we will review [D]efendant's record level to determine if it was unauthorized at the time it was imposed” or was otherwise invalid as a matter of law. *State v. Mack*, 188 N.C. App. 365, 380, 656 S.E.2d 1, 12 (2008).¹ In so doing, and insofar as the law allows, we will assume that the stipulated convictions listed in the worksheet are factually supported. *See Arrington*, ___ N.C. at ___, 819 S.E.2d at 334 (explaining that judges are not in the position to question convictions stipulated to by both parties).

Defendant’s PRL worksheet contains a total of forty-seven (47) prior convictions from North Carolina, Georgia, and Florida. We must first determine which convictions were eligible for inclusion in Defendant’s PRL calculation.

1. Convictions Supporting Habitual Felon Status

¹ We briefly note, here, that Defendant did not object to his sentencing during the trial. Regardless, a defendant’s appeal is statutorily preserved where he or she alleges the “[t]he sentence imposed was unauthorized at the time imposed, exceeded the maximum authorized by law, was illegally imposed, or is otherwise invalid as a matter of law.” *State v. Meadows*, ___ N.C. ___, ___, 821 S.E.2d 402, 406 (2018) (quoting N.C. Gen. Stat. § 15A-1446(d)(18) (2017)).

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To start, we must first disregard the three convictions used by the jury to convict Defendant of obtaining habitual felon status. Concurrent with his conviction in this case of felony possession of controlled substances, Defendant was found to have attained habitual felon status. And “convictions used to establish a person’s status as an habitual felon shall not be used” to determine that person’s PRL. N.C. Gen. Stat. § 14-7.6 (2015). As the jury used three of Defendant’s forty-seven (47) convictions to assign Defendant habitual felon status, they may not be used in his PRL calculations. This leaves forty-four (44) prior convictions.

2. Convictions Rendered in the Same Week or Session of Court

Next, though his convictions span nearly four decades, Defendant received many of his convictions in groups on the same day or session of court. “[I]f an offender is convicted of more than one offense in a single superior court during one calendar week [or in a single district court in one session of court], only the conviction for the offense with the highest point total is used.” N.C. Gen. Stat. § 15A-1340.14(d) (2015).

On 30 June 2006, Defendant was convicted in Henderson County district court of twelve (12) crimes. The eleven (11) convictions with the lowest point total may not be used to determine his PRL. Therefore, we are left with a single Class I felony conviction from 30 June 2006. This reduces the number of prior convictions from forty-four (44) to thirty-three (33).

On 14 May 2007, Defendant was convicted in Henderson County superior court of four crimes. After removing the three convictions with the lowest points, we are

left with one Class I felony conviction from 14 May 2007. Therefore, after removing three convictions, Defendant has thirty (30) remaining prior convictions.

On 16 October 2009, Defendant was convicted in Henderson County district court of two crimes. After removing the conviction with the lowest points, we are left with one Class 1 misdemeanor conviction from 16 October 2009. Therefore, Defendant has twenty-nine (29) remaining prior convictions.

On 12 February 2010, Defendant was convicted in Henderson County district court of five crimes. We must remove four of these convictions, leaving a single Class 1 misdemeanor conviction with the most points from 12 February 2010. Therefore, after removing four convictions, Defendant has twenty-five (25) remaining prior convictions.

Lastly, on 2 August 2013, Defendant was convicted in Henderson County district court of six crimes. After removing his five convictions with the lower points, we are left with one Class I felony conviction from 2 August 2013. Therefore, after removing these five convictions, Defendant has twenty (20) prior convictions remaining that may be considered in calculating his PRL.

3. Irrelevant Misdemeanor Convictions

Only prior felonies, “Class A1 and Class 1 nontraffic misdemeanor offense[s], impaired driving, impaired driving in a commercial vehicle, and misdemeanor death by vehicle” may be used to calculate a PRL in felony sentencing. N.C. Gen. Stat. Ann. § 15A-1340.14(b) (2015). Other misdemeanor traffic offenses, including driving while

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license revoked, may not be used to calculate a felony PRL. *Id.*; *State v. Flint*, 199 N.C. App. 709, 728, 682 S.E.2d 443, 454 (2009) (“Being that driving while license revoked is a misdemeanor traffic offense, which is not included in Section 15A–1340.14(b)(5), it is not a conviction that can be used in determining a defendant's prior record level.”).

Of the remaining twenty (20) convictions on Defendant’s worksheet, five are either classified as Class 2 or lower misdemeanor offenses or are factually described as “DWLR,” a conviction for driving while license revoked. These five convictions may not be used to calculate Defendant’s PRL following his present, felony conviction. After removing these five convictions, Defendant has fifteen (15) prior convictions remaining.

4. Split Crimes

Defendant’s remaining fifteen (15) convictions include two convictions for possession of drug paraphernalia, from 1983 and 2008. Defendant contends that these two convictions were improperly considered in the PRL calculation because the crime has since been split into two categories, one of which is a Class 3 misdemeanor not eligible for calculation.

It is true that “the classification of a prior offense is the classification assigned to that offense at the time the offense for which the offender is sentenced [was] committed.” N.C. Gen. Stat. § 15A-1340(c). Defendant committed the crimes for which he is being sentenced in 2016. In 2014, possession of drug paraphernalia was

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split into two separate crimes: (1) possession of marijuana paraphernalia under N.C. Gen. Stat. § 90-113.22A (2014), a Class 3 misdemeanor; and (2) possession of drug paraphernalia under N.C. Gen. Stat. § 90-113.22 (2014), a Class 1 misdemeanor. Defendant argues that the two instances of possession of drug paraphernalia on his worksheet should be considered Class 3 misdemeanors, and therefore not included in the PRL calculus, rather than Class 1 misdemeanors, because no evidence was presented as to what sort of drug paraphernalia was possessed.

However, following our Supreme Court's recent decision in *Arrington*, we must assume that the classifications stipulated to by the parties on the worksheet are correct and sufficiently supported by the underlying facts of the crime. *Arrington*, ___ N.C. at ___, 819 S.E.2d at 333. Each of Defendant's possession of drug paraphernalia charges is classified as a Class 1 misdemeanor, and may be considered in the present PRL calculation. Fifteen (15) of Defendant's prior convictions still remain.

5. Out-of-State Convictions

Of the fifteen (15) remaining convictions, six arise from offenses committed outside of North Carolina. Defendant contends that these crimes were incorrectly classified and received more points than allowed as a matter of law.

Out-of-state felony convictions are, by default, treated as Class I felony convictions under North Carolina law. N.C. Gen. Stat. § 15A-1340.14(e) (2015).

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Similarly, out-of-state misdemeanor convictions are, by default, treated as Class 3 misdemeanor convictions, *id.*, and are initially not usable in a felony PRL calculation, N.C. Gen. Stat. § 15A-1340.14(b)(5) (2015). However, either party may overcome these presumptions by proving, by a preponderance of the evidence, that the out-of-state conviction reflects an offense that is substantially similar to an offense that North Carolina classifies differently. N.C. Gen. Stat. § 15A-1340.14(e). If proven, the felony conviction is not treated as a Class I felony, but rather is treated as the classification given to the substantially similar North Carolina offense. *Id.*

Our Court has long held that, while the parties may stipulate that a defendant was convicted of an out-of-state offense and that the offense was considered either a felony or misdemeanor under that state's law, neither party may stipulate that the out-of-state conviction is substantially similar to a North Carolina felony or misdemeanor.² We have traditionally held that “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 to be resolved by the trial court.” *State v. Hanton*, 175 N.C. App. 250, 255, 623 S.E.2d 600, 604 (2006).

² *State v. Burgess*, 216 N.C. App. 54, 59, 715 S.E.2d 867, 871 (2011) (“This Court has repeatedly held a defendant's stipulation to the substantial similarity of offenses from another jurisdiction is ineffective because the issue of whether an offense from another jurisdiction is substantially similar to a North Carolina offense is a question of law.”); *see also State v. Powell*, 223 N.C. App. 77, 81, 732 S.E.2d 491, 494 (2012); *State v. Wright*, 210 N.C. App. 52, 71, 708 S.E.2d 112, 125 (2011); *State v. Moore*, 188 N.C. App. 416, 426, 656 S.E.2d 287, 293-94 (2008); *State v. Palmateer*, 179 N.C. App. 579, 581-82, 634 S.E.2d 592, 593-94 (2006).

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It may be argued that our Supreme Court's reasoning in *Arrington* overrules this line of precedent. In *Arrington*, our Supreme Court held that a conviction's classification may be stipulated to because it is, in essence, "fact driven." *Arrington*, ___ N.C. at ___, 819 S.E.2d at 331. For the purposes of in-state convictions, when the defendant stipulates to a conviction, "he is stipulating that the facts underlying his conviction justify that classification." *Id.* at ___, 819 S.E.2d at 333. Similarly, it can be said that, when the parties stipulate to an out-of-state conviction and its appropriate classification in North Carolina, they are stipulating that the underlying facts correspond to a particular North Carolina offense and its respective classification. We do not believe this is the appropriate interpretation of our Supreme Court's holding.

Allowing this form of stipulation requires an additional logical step that was not present in *Arrington*. The facts of *Arrington* concern the appropriate classification of the defendant's prior conviction for second-degree murder. *Arrington*, ___ N.C. at ___, 819 S.E.2d at 332. Between the time the defendant was convicted of second-degree murder and the time of the sentencing at issue in the case, our General Assembly split second-degree murder into two separate sentencing classifications, B1 and B2, depending on the nature of the offender's conduct. *Id.* The defendant in *Arrington* stipulated that his conviction was classified as B1, but later argued that this classification was improper as a matter of law because questions of law are not subject to stipulation. *Id.* Our Supreme Court held that the defendant

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had stipulated that the nature of his conduct underlying his murder conviction supported a B1 classification, and that such a stipulation was proper. *Id.* at ___, 819 S.E.2d at 333.

Notably, there was never any doubt that the facts underlying the conviction corresponded to the crime of second-degree murder and the Court considered only the classifications that may be attributed to that offense. For instance, if the offense in consideration had been forgery instead of second-degree murder, we do not interpret *Arrington* to allow a stipulation to a conviction for forgery with a classification of Class A felony. While second-degree murder may be classified as either Class B1 or B2, N.C. Gen. Stat. § 14-17(b)(1)-(2) (2017), there are no facts possible which would support a conviction for a Class A forgery, as no such crime exists, *see* N.C. Gen. Stat. § 14-119–125 (2017) (stating that each forgery crime is punishable as either a Class G, H, or I felony).

In the same respect, in order to equate an out-of-state conviction with a North Carolina offense, the parties must first establish that the elements of the out-of-state offense are similar to those of a North Carolina offense. This additional legal comparison must be made before an appropriate range of classifications can be determined. A stipulation that a defendant committed “burglary” in another state does not necessarily mean that he or she satisfied the elements of burglary in North Carolina. Once the legal similarities have been drawn between an out-of-state offense and its North Carolina corollary, it may be that the North Carolina offense

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can have an array of classifications; only then may a stipulation determine the underlying facts and the respective classification.

For these reasons we do not interpret the holding in *Arrington* to overrule our longstanding precedent that the parties may not stipulate to the substantial similarity of an out-of-state conviction, nor its resulting North Carolina classification. Here, the State put on no evidence to support a comparison of any of Defendant's out-of-state convictions to North Carolina offenses. Therefore, we must classify each misdemeanor conviction as a Class 3 misdemeanor and each felony conviction as a Class I felony.

On the worksheet, the parties appropriately stipulate that three of Defendant's six out-of-state convictions are misdemeanors in their state of origin, two are felonies, and one does not have a classification noted. We must classify these misdemeanors as Class 3 misdemeanors, and therefore may not include them in Defendant's felony PRL calculations. We must classify the two felony convictions as Class I felonies in our calculations. There is no information regarding the remaining conviction's classification, so we elect to exclude it from our calculations.

After removing the three out-of-state misdemeanors *and* the conviction without a classification, the total prior convictions eligible for calculating Defendant's PRL is reduced from fifteen (15) to eleven (11).

6. Calculation

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Our *de novo* review of Defendant’s sentencing worksheet shows a total of eleven (11) convictions that may be used to calculate his felony PRL. The eleven convictions, their stipulated or required classifications, and the point values assigned to those classifications are as follows:

<u>Offense</u>	<u>Date</u>	<u>State</u>	<u>N.C. Classification</u> Misdemeanor (M) Or Felony (F)	<u>Point Value</u> ³
Possession of Drug Paraphernalia	12/5/1983	N.C.	M - Class 1	1
Felony Possession SCH II CS	5/14/2007	N.C.	F - Class I	2
Assault on a Female	10/11/1988	N.C.	M - Class 1	1
Driving While Impaired	10/20/1988	N.C.	M - Class 1	1
Felony Possession SCH II CS	06/30/2006	N.C.	F - Class I	2
Possession of Drug Paraphernalia	7/2/2008	N.C.	M - Class 1	1
Simple Possession SCH II CS	2/12/2010	N.C.	M - Class 1	1
Receiving Stolen Goods/Property	10/16/2009	N.C.	M - Class 1	1
Possession Methamphetamine	8/2/2013	N.C.	F - Class I	2
Delivery of Cocaine w/i 1000 Ft of a Place of Worship	8/5/2003	FL	F - Class I	2
VOP on Delivery of Cocaine	3/26/2004	FL	F - Class I	2
			Total Points:	16

Additionally, Defendant receives an extra point because his worksheet includes previous convictions for felony possession of controlled substances, the same crime he was convicted of in this case. N.C. Gen. Stat. § 15A-1340.14(b)(6) (2015) (“If all the elements of the present offense are included in any prior offense for which the offender was convicted, whether or not the prior offense or offenses were used in

³ The point values are derived from Section 15A-1340.14(b). See N.C. Gen. Stat. § 15A-1340.14(b).

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determining prior record level, 1 point.”). Per our calculations, the Defendant should have received only seventeen (17) total points, giving him a PRL of V. *See* N.C. Gen. Stat. § 15A-1340.14(c) (2015). Therefore, as Defendant is entitled to have his sentence bated, we remand to the trial court for the limited purpose of sentencing Defendant within the range corresponding to PRL V.

C. Ineffective Assistance of Counsel

Lastly, Defendant has filed a Motion for Appropriate Relief (MAR) alongside his appeal, arguing that he received ineffective assistance of counsel. We disagree, and deny Defendant’s MAR.

The necessary components of ineffective assistance of counsel are “(1) ‘counsel’s performance was deficient,’ meaning it ‘fell below an objective standard of reasonableness,’ and (2) ‘the deficient performance prejudiced the defense,’ meaning ‘counsel’s errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.’” *State v. Garcell*, 363 N.C. 10, 51, 678 S.E.2d 618, 644 (2008) (quoting *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984)); *see also State v. Braswell*, 312 N.C. 553, 562-63, 324 S.E.2d 241, 248 (1985).

Specifically, Defendant argues that his trial attorney was deficient because he stipulated to the underlying facts and classifications of three prior convictions from Florida in March of 2004 that should not have been considered at all. Defendant contends that he was materially prejudiced because the trial court’s consideration of these offenses raised his PRL. Further, Defendant argues, there is no rational trial

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strategy that would warrant stipulation to a higher class of offense than what was actually committed. Attached to the MAR, Defendant provides the Florida court records concerning the convictions and an affidavit by a Florida attorney.

Defendant has filed a MAR with our Court based on his erroneous classification as a PRL VI offender. But we cannot say that any error by his trial counsel prejudiced the sentence Defendant will receive on remand as a PRL V offender. Our *de novo* review of Defendant's convictions already removes most of his out-of-court convictions from the PRL calculation. If we were to assume the allegations in Defendant's MAR were true, we would remove only the conviction for "VOP on Delivery of Cocaine," as "VOP" likely refers to a violation of probation that may not be appropriately considered as a distinct crime. *See State v. Clayton*, 206 N.C. App. 300, 305, 697 S.E.2d 428, 432 (2010). Removing this conviction would reduce Defendant's point total from seventeen (17) to fifteen (15) points, leaving him still within a PRL of V. Therefore, any deficient performance by Defendant's trial counsel was not prejudicial. We deny Defendant's MAR.

III. Conclusion

We conclude that the trial court's decision to instruct the jury on the theory of acting in concert was not error, as there was sufficient evidence to support the instruction. However, we further conclude that the trial court erred by sentencing Defendant as a PRL VI, because the worksheet stipulated to by the parties supported a PRL of V. Therefore, we remand the trial court's judgment for the limited purpose

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of entering a sentence appropriate for a PRL V. Further, by this opinion, we deny Defendant's MAR because, based on our disposition, any possible deficiency by his trial counsel in the calculation of Defendant's PRL did not cause Defendant to be classified as a PRL V.

NO ERROR IN PART; REVERSED AND REMANDED IN PART FOR RESENTENCING.

Judge INMAN concurs.

Judge COLLINS concurs in part and dissents in part by separate opinion.

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COLLINS, Judge concurring in part and dissenting in part.

I concur in the majority’s opinion regarding Defendant’s prior record level. However, I would not reach that issue because I conclude there was insufficient evidence to support the trial court’s jury instruction on the theory of acting in concert. I further conclude the trial court’s erroneous instruction was not harmless error and entitles Defendant to a new trial. I therefore respectfully dissent.

Defendant was found guilty of possession of methamphetamine, possession of heroin, and possession of cocaine. The elements of possession of a controlled substance are that defendant (1) knowingly (2) possessed (3) a controlled substance. *State v. Galaviz-Torres*, 368 N.C. 44, 48, 772 S.E.2d 434, 437 (2015).

The “knowingly possessed” elements of possession of a controlled substance may be established by a showing that: “(1) the defendant had actual possession; (2) the defendant had constructive possession; or (3) the defendant acted in concert with another to commit the crime.” *State v. Diaz*, 155 N.C. App. 307, 313, 575 S.E.2d 523, 528 (2002) (citing *State v. Garcia*, 111 N.C. App. 636, 639-40, 433 S.E.2d 187, 189 (1993). “According to well-established North Carolina law, ‘it is error for the trial judge to charge on matters which materially affect the issues when they are not supported by the evidence.’” *State v. Malachi*, 371 N.C. 719, 731, 821 S.E.2d 407, 416

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COLLINS, J., concurring in part and dissenting in part.

(2018) (quoting *State v. Jennings*, 276 N.C. 157, 161, 171 S.E.2d 447, 449 (1970) (citations omitted)).

“Actual possession requires that a party have physical or personal custody of the item.” *Malachi*, 371 N.C. at 730, 821 S.E.2d at 416 (2018) (quotation marks and citation omitted). In this case, it is undisputed that neither Defendant nor Ms. Stepp actually possessed the narcotics found in the metal tin in the dresser drawer.⁴

“Constructive possession of contraband material exists when there is no actual personal dominion over the material, but there is an intent and capability to maintain control and dominion over it.” *State v. Brown*, 310 N.C. 563, 568, 313 S.E.2d 585, 588 (1984). Where an accused has nonexclusive possession of the premises where the contraband is found, “constructive possession of the contraband materials may not be inferred without other incriminating circumstances.” *Id.* at 569, 313 S.E.2d at 588-589 (citation omitted). The State’s evidence showed the metal tin containing methamphetamine, heroin, and cocaine was found in a dresser drawer in Defendant’s personal space. The personal space was separated from Defendant’s bedroom by a door. Four people were in this personal space, while Defendant was in his bedroom, when officers knocked on Defendant’s bedroom door and asked to search the surrounding areas. Defendant admitted to officers to having ingested

⁴ Although the trial court instructed the jury on actual possession, Defendant did not object to this instruction at trial and did not argue plain error on appeal. N.C. R. App. P. 10(a)(2), (a)(4). Any argument related to this instruction is thus deemed abandoned. N.C. R. App. P. 28(a).

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methamphetamine, a substance found in the metal tin and nowhere else in the residence, and the white, rectangular pill found in his bedroom was similar in shape and markings to a pill found in the metal tin. As Defendant concedes on appeal, this evidence was sufficient to support a jury instruction on constructive possession of a controlled substance.

“To act in concert means to act together, in harmony or in conjunction one with another pursuant to a common plan or purpose.” *State v. Joyner*, 297 N.C. 349, 356, 255 S.E.2d 390, 395 (1979). While it is not “necessary for a defendant to do any particular act constituting at least part of a crime in order to be convicted of that crime under the concerted action principle[,]” the defendant must be “present at the scene of the crime and the evidence [must be] sufficient to show he is acting together with another who does the acts necessary to constitute the crime pursuant to a common plan or purpose to commit the crime.” *Id.* at 357, 255 S.E.2d at 395. Where a defendant did not do any particular act forming a part of the crime charged, evidence of the existence of concerted action must come from other facts. *Id.* at 356-57, 255 S.E.2d at 395. “The acting in concert theory is not generally applicable to possession offenses, as it tends to become confused with other theories of guilt.” *Diaz*, 155 N.C. App. at 314, 575 S.E.2d at 528 (citing *State v. James*, 81 N.C. App. 91, 97, 344 S.E.2d 77, 81 (1986)).

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Although Defendant was present when the narcotics were found in the dresser drawer, and was thus present at the scene of the crime, there is no evidence that Defendant was present when the tin containing the narcotics was placed in the dresser drawer. Moreover, Ms. Stepp admitted on the stand to her possession of the narcotics. Ms. Stepp testified that the tin was hers and that the last place she had it was at Southbrook Drive, where she and Defendant used to live amongst other people. When asked where she last left the tin, Ms. Stepp answered,

I put it inside a drawer. I want to say I tried to put something over it. But I didn't intend – I wasn't there. I wasn't arrest that day, because I had just left. I didn't intend to be gone long. But I didn't get back as quickly as I would like to, and I didn't tell anybody it was there, because I didn't think it was relevant.

While the evidence presented was sufficient evidence of Defendant's constructive possession, and the evidence presented was sufficient evidence of Ms. Stepp's constructive possession, the State failed to produce any evidence of concerted action – Defendant *acting together* with Ms. Stepp pursuant to a *common plan or purpose* to possess the contraband in the metal tin. *Joyner*, 297 N.C. at 356, 255 S.E.2d at 395. The majority concludes that the evidence was sufficient to support a finding that “Defendant facilitated Ms. Stepp’s constructive possession by allowing her to keep her drugs in a place where they would be safe from others[.]” I discern no evidentiary support for this conclusion, and believe the acting in concert theory of possession has become confused with the constructive theory of possession in this

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case, which is precisely why “[t]he acting in concert theory is not generally applicable to possession offenses[.]” *Diaz*, 155 N.C. App. at 314, 575 S.E.2d at 528 (citation omitted).

As there was insufficient evidence to support an acting in concert instruction, the trial court erred in giving such instruction. *Malachi*, 371 N.C. at 731, 821 S.E.2d at 416. The trial court’s error, however, is subject to harmless error analysis. *Id.* at 738, 821 S.E.2d at 421. Thus, Defendant must show “there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial out of which the appeal arises.” *Id.* at 738, 821 S.E.2d at 421 (quoting N.C. Gen. Stat. § 15A-1443(a) (2017)). Our North Carolina Supreme Court has emphasized the serious nature of instructional error, as occurred in this case, and the close scrutiny required, explaining that

the history of this Court’s decisions in cases involving the submission of similar erroneous instructions and our consistent insistence that jury verdicts concerning a defendant’s guilt or innocence have an adequate evidentiary foundation persuade us that instructional errors like the one at issue in this case are exceedingly serious and merit close scrutiny to ensure that there is no “reasonable possibility” that the jury convicted the defendant on the basis of such an unsupported legal theory. However, in the event that the State presents exceedingly strong evidence of defendant’s guilt on the basis of a theory that has sufficient support and the State’s evidence is neither in dispute nor subject to serious credibility-related questions, it is unlikely that a reasonable jury would elect to convict the defendant on the basis of an unsupported legal theory.

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Malachi, 371 N.C. at 738, 821 S.E.2d at 421.

While the State's evidence was adequate to support a conclusion of Defendant's constructive possession, and thus sufficient to support a jury instruction, it was not "exceedingly strong evidence" of Defendant's guilt based on a constructive possession theory. On the other hand, the State's evidence of Ms. Stepp's constructive possession is "exceedingly strong" and disputes the evidence of Defendant's guilt. Ms. Stepp testified, "The yellow tin is mine. . . . I put it inside a drawer. . . . I didn't tell anybody it was there, because I didn't think it was relevant. . . ." When asked, "You realize that you are admitting now that you had possession of drugs correct?", Ms. Stepp responded, "Yes. Yes."

Where the evidence of Defendant's constructive possession was not exceedingly strong, Ms. Stepp admitted to possession of the controlled substances, and the jury was allowed to convict Defendant for acting in concert with Ms. Stepp, there is certainly a "reasonable possibility" that the jury elected to convict Defendant on the basis of the unsupported legal theory of acting in concert to possess the controlled substances. Accordingly, I would vacate Defendant's convictions for possession of methamphetamine, possession of heroin, possession of cocaine, and having attained habitual felon status, and remand the case for a new trial.