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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA19-1029

Filed: 15 September 2020

Randolph County, No. 18 CRS 51178

STATE OF NORTH CAROLINA

v.

ISRRAEL LENIN SUAREZ, Defendant.

Appeal by defendant from judgment entered 28 March 2019 by Judge V. Bradford Long in Randolph County Superior Court. Heard in the Court of Appeals 26 August 2020.

Attorney General Joshua H. Stein, by Associate Attorney General Jessica B. Helms and Assistant Attorney General Ebony J. Pittman, for the State.

Appellate Defender Glenn Gerding, by Appellate Defender Glenn Gerding and Assistant Appellate Defender Nicholas C. Woomer-Deters, for the defendant-appellant.

BERGER, Judge.

On March 28, 2019, a Randolph County jury found Isrrael Lenin Suarez (“Defendant”) guilty of assault with a deadly weapon inflicting serious injury and assault with a deadly weapon. Defendant appeals, arguing the trial court erred when it assigned one point for an out-of-state conviction on his prior record level worksheet

without determining that the offense was substantially similar to a North Carolina Class 1 misdemeanor. We agree.

Factual and Procedural Background

On or about January 11, 2018, Defendant began renting a room from Rosa Lopez Gamez and her son, Franklin Benjamin Castillo Lopez, in their house in Asheboro, North Carolina. On March 9, 2018, an altercation occurred in the home, during which Defendant stabbed Franklin in the back. Rosa was stabbed by Defendant when she attempted to intervene. Rosa called 911, and Defendant was detained when law enforcement officers arrived.

On August 13, 2018, Defendant was indicted for two counts of assault with a deadly weapon inflicting serious injury. On March 28, 2019, a Randolph County jury found Defendant guilty of assault with a deadly weapon inflicting serious injury and assault with a deadly weapon.

At sentencing, the parties stipulated to Defendant's prior record level. The worksheet submitted indicated Defendant's two prior Class H felonies and two prior Class 1 misdemeanors. One prior Class 1 misdemeanor was handwritten as "Theft – 12/17/04 – New Jersey – 1." However, during sentencing, the State failed to present any information concerning the prior conviction from New Jersey. Defendant was then sentenced to 33 to 52 months in prison at prior record level III.

Defendant appeals, arguing the trial court erred when it assigned one point for the New Jersey conviction on his prior record level worksheet without determining that the offense was substantially similar to a North Carolina Class 1 misdemeanor. We agree.

On February 13, 2020, Defendant also submitted a supplemental *pro se* brief. For the reasons stated herein, we dismiss Defendant's supplemental *pro se* brief.

Analysis

As a preliminary matter, we dismiss Defendant's *pro se* supplemental brief which raised several arguments not presented in the brief submitted by appellate counsel. "A party may appear either in person or by attorney in actions or proceedings in which he is interested." N.C. Gen. Stat. § 1-11 (2019). "Having elected for representation by appointed defense counsel, defendant cannot also file motions on his own behalf or attempt to represent himself. Defendant has no right to appear both by himself and by counsel." *State v. Grooms*, 353 N.C. 50, 61, 540 S.E.2d 713, 721 (2000). Because Defendant had the benefit of counsel and chose not to appear *pro se* before this court, Defendant's *pro se* supplemental brief is not properly before this Court. Thus, we decline to review those issues raised in Defendant's supplemental *pro se* brief.

"The determination of an offender's prior record level 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) (citation omitted). “Under a *de novo* review, the court considers the matter anew and freely substitutes its own judgment for that of the lower tribunal.” *State v. Green*, ___ N.C. App. ___, ___, 831 S.E.2d 611, 614 (2019) (citation and quotation marks omitted).

“Before imposing a sentence, the court shall determine the prior record level for the offender pursuant to G.S. 15A-1340.14.” N.C. Gen. Stat. § 15A-1340.13(b) (2019). A defendant’s prior record level “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) (2019). A defendant’s prior out-of-state convictions may be used in the calculation, which the State must prove by a “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.” N.C. Gen. Stat. § 15A-1340.14(e).

Here, the State failed to present evidence that Defendant’s prior out-of-state conviction was substantially similar to a North Carolina Class 1 misdemeanor. At sentencing, the State submitted Defendant’s prior record level worksheet that designated the New Jersey conviction for theft as a Class 1 misdemeanor. This determination elevated Defendant’s prior record level from II to III. However, “a worksheet, prepared and submitted by the State, purporting to list a defendant’s prior convictions is, without more, insufficient to satisfy the State’s burden in

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establishing proof of prior convictions.” *State v. Eubanks*, 151 N.C. App. 499, 505, 565 S.E.2d 738, 742 (2002).

The following colloquy occurred at sentencing when the worksheet was presented:

[THE COURT:] . . . Have you got a sentencing worksheet on [Defendant]?

[THE STATE:] I do, Your Honor. It was stipulated to this morning, is that correct, [Defense Counsel]?

[DEFENSE COUNSEL]: Yes, correct.

[THE STATE:] It’s level 3 for the misdemeanor and a level 3 for the felony.

Although defense counsel stipulated to the prior out-of-state conviction, a stipulation to an out-of-state conviction is legally ineffective to determine “whether an out-of-state conviction is substantially similar to a North Carolina offense . . . because it implicates a question of law that the trial court is responsible for resolving.” *State v. Edgar*, 242 N.C. App. 624, 629, 777 S.E.2d 766, 769 (2015) (citation omitted).

Thus, Defendant’s stipulation that his prior conviction from New Jersey is substantially similar to a Class 1 North Carolina misdemeanor is legally insufficient, and the trial court erred when it sentenced Defendant at prior record level III.

Conclusion

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For the reasons herein, we vacate Defendant's sentence of prior record level III and remand this matter to the trial court for a new sentencing hearing.

VACATED AND REMANDED FOR SENTENCING.

Judges INMAN and COLLINS concur.

Report per Rule 30(e).