IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA19-723

Filed: 7 July 2020

Union County, No. 17 CRS 54843

STATE OF NORTH CAROLINA

v.

MARQUES JULIOUS JENKINS

Appeal by defendant on writ of certiorari from judgment entered 20 February 2019 by Judge Christopher W. Bragg in Union County Superior Court. Heard in the Court of Appeals 4 March 2020.

Attorney General Joshua H. Stein, by Assistant Attorney General Rajeev K. Premakumar, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Anne M. Gomez, for defendant-appellant.

ZACHARY, Judge.

Defendant Marques Julious Jenkins appeals from the trial court's judgment entered upon his conviction for robbery with a dangerous weapon. Defendant argues that the trial court erred by sentencing him as a Level IV offender after determining that the South Carolina offense of second-degree burglary is substantially similar to

the North Carolina offense of second-degree burglary. After careful review, we remand to the trial court for resentencing.

Background

On the evening of 30 September 2017, Yasmine Thigpin[1] and Emeka Iheme went to the movie theater to watch the LEGO Ninjago movie. Afterward, Thigpin and Iheme returned to Thigpin's vehicle, drove to a secluded area, and sat in the back seats. Soon thereafter, Defendant and two of his friends approached in another vehicle. Defendant robbed Thigpin and Iheme at gunpoint. He ordered them out of Thigpin's vehicle and told Iheme to get on the ground. Defendant took Thigpin's keys and drove off in her vehicle. Their cell phones and Thigpin's purse were still inside. One of Defendant's friends instructed Iheme to get in their vehicle, drove away, and left Thigpin behind.

On 4 October 2017, the Union County Sheriff's Office obtained an arrest warrant for Defendant. On 4 December 2017, a Union County grand jury returned true bills of indictment formally charging Defendant with (i) robbery with a dangerous weapon, (ii) larceny of a motor vehicle, and (iii) first-degree kidnapping.

Defendant's case came on for trial on 11 February 2019 in Union County Superior Court before the Honorable Christopher W. Bragg. At the conclusion of the

[1] Yasmine Thigpin's surname is spelled inconsistently throughout the record and transcripts. Accordingly, we adopt the spelling found in the judgment from which Defendant appeals by writ of certiorari, the trial court's first restitution worksheet, and Defendant's indictments.

evidence, the jury returned verdicts finding Defendant guilty of robbery with a dangerous weapon and felonious larceny, but not guilty of kidnapping.

At sentencing, the State submitted a prior record level worksheet that listed Defendant's 2004 North Carolina convictions for two counts of "Conspiracy Robbery w[ith] a Dangerous Weapon" (a Class E felony) and one count of second-degree murder (a Class B2 felony), and his 2000 North Carolina conviction for one count of simple assault (a Class 2 misdemeanor). The prior record level worksheet also listed Defendant's 2002 South Carolina conviction for second-degree burglary. On Defendant's prior record level worksheet, the trial court assigned six points to Defendant's prior Class B2 conviction and four points to his South Carolina conviction, which the State asserted was properly classified as a Class G felony. The trial court determined that Defendant had 10 prior record level points, and was thus a Level IV felony offender for sentencing purposes.

The trial court arrested judgment on Defendant's larceny conviction, which the court determined "merge[d] with the robbery with a firearm" conviction. The trial court then entered judgment upon Defendant's conviction for robbery with a dangerous weapon, sentencing him to 97 to 129 months in the custody of the North Carolina Division of Adult Correction. The trial court also ordered Defendant to pay $300 in restitution to Iheme, and $732.50 in court costs. The trial judge signed the

"restitution worksheet, notice and order." Defendant gave notice of appeal in open court, and the trial court entered an order of appellate entries.

On 18 February 2019, Defendant returned to court to be heard regarding the award of attorney's fees. Additionally, the parties reviewed the restitution worksheet and confirmed that the worksheet reflected an accurate calculation of the amount of restitution owed by Defendant. The State also provided the trial court with a copy of the South Carolina second-degree burglary statute, contending that the offense "falls in line with" the North Carolina offense of second-degree burglary. The trial court determined that the South Carolina offense of second-degree burglary was "sufficiently similar" to the North Carolina offense of second-degree burglary.

The trial judge signed another restitution worksheet identical to the first, and entered a new judgment directing Defendant to pay $500 in restitution to Thigpin and $300 to Iheme[2]; $732.50 in court costs; and $6,660 in court-appointed attorney's fees. Defendant did not give notice of appeal from the newly entered judgment, but a new order of appellate entries was entered on 20 February 2019.

On 16 October 2019, Defendant filed a petition for writ of certiorari with this Court. Defendant seeks our review of his appeal, noting that he properly entered oral notice of appeal following the first entry of judgment, but that he failed to give oral

[2] The judgment noted that "restitution is joint & severally liable with Brittany Jackson(17CRS54844) and Jamaya Marshall(17CRS54832)[.]"

or written notice of appeal following the entry of the second judgment. In our discretion, we allow Defendant's petition.

Discussion

On appeal, Defendant argues that the trial court erred by determining that the elements of the South Carolina offense of second-degree burglary are substantially similar to those of the North Carolina offense of second-degree burglary, and consequently sentencing him as a Level IV offender. We agree.

I. Standard of Review

A defendant's prior record level is a conclusion of law which we review de novo on appeal. *State v. Weldon*, 258 N.C. App. 150, 160, 811 S.E.2d 683, 691 (2018) (citation omitted). The "determination of whether [an] out-of-state conviction 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. Sanders*, 367 N.C. 716, 720, 766 S.E.2d 331, 334 (2014) (citation omitted).

II. "Substantial Similarity" of Out-of-State Offense

Before sentencing a criminal defendant, the trial court must first determine the defendant's prior record level. N.C. Gen. Stat. § 15A-1340.13(b) (2019). "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[.]"[3] *Id.* § 15A-1340.14(a). The defendant's prior record level, together with the class of offense for which he is being sentenced, determines the applicable sentencing range. *See id.* § 15A-1340.13(b).

When determining a defendant's prior record level, the trial court considers the defendant's prior North Carolina convictions, as well as any convictions from other jurisdictions. *See id.* § 15A-1340.14(e). If a defendant has a prior conviction from North Carolina, the trial court will assign a certain number of points to the conviction, depending upon the type and class of offense. *See State v. Edgar*, 242 N.C. App. 624, 626, 777 S.E.2d 766, 768 (2015) (noting that pursuant to N.C. Gen. Stat. § 15A-1340.14(b)(1)-(4), "Class A felony convictions are assigned ten points, Class B1 felony convictions are assigned nine points, Class B2, C, and D felony convictions are assigned six points, Class E, F, and G felony convictions are assigned four points, and Class H and I felony convictions are assigned two points").

If a defendant has a prior conviction from another jurisdiction, the number of sentencing points that the trial court assigns to the conviction will depend upon whether the State successfully proves that the offense is "substantially similar" to a North Carolina offense. *See id.* at 627, 777 S.E.2d at 768.

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[3] "For example, a prior offense that is classified as a Class G felony is assigned four prior record level points[,]" and "[a] defendant with four prior record level points is considered a Prior Record Level II for sentencing." *Weldon*, 258 N.C. App. at 160-61, 811 S.E.2d at 691 (citations omitted).

The State may prove the fact of a prior conviction in a number of ways, including:

> stipulation of the parties; an original or copy of the court record of the prior conviction; a copy of records maintained by the Division of Criminal Information, the Division of Motor Vehicles, or of the Administrative Office of the Courts; or any other method found by the court to be reliable.

State v. Bohler, 198 N.C. App. 631, 634, 681 S.E.2d 801, 804 (2009) (quoting N.C. Gen. Stat. § 15A-1340.14(f)), *disc. review denied*, __ N.C. __, 691 S.E.2d 414 (2010).

"[T]he trial court may not accept a stipulation to the effect that a particular out-of-state conviction is 'substantially similar' to a particular North Carolina felony or misdemeanor," although "it may accept a stipulation that the defendant in question has been convicted of a particular out-of-state offense and that th[e] offense is either a felony or a misdemeanor under the law of that jurisdiction." *Id.* at 637-38, 681 S.E.2d at 806; *see also State v. Palmateer*, 179 N.C App. 579, 581, 634 S.E.2d 592, 593 (2006) ("[S]tipulations as to questions of law are generally held invalid and ineffective, and not binding upon the courts, either trial or appellate." (citation omitted)).

In assessing out-of-state convictions for sentencing purposes, "the default classification for out-of-state felony convictions is Class I." *State v. Hinton*, 196 N.C. App. 750, 755, 675 S.E.2d 672, 675 (2009) (internal quotation marks omitted) (citing N.C. Gen. Stat. § 15A-1340.14(e)). "Where the State seeks to assign an out-of-state

conviction a more serious classification than the default Class I status," the State must prove "by the preponderance of the evidence that the conviction at issue is substantially similar to a corresponding North Carolina felony." *Id.* (emphasis and internal quotation marks omitted) (citing N.C. Gen. Stat. § 15A-1340.14(e)).

The "determination of whether [an] out-of-state conviction 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." *Sanders*, 367 N.C. at 720, 766 S.E.2d at 334 (citation omitted). "Unless the State proves by a preponderance of the evidence that the out-of-state felony convictions are substantially similar to North Carolina offenses that are classified as Class I felonies or higher, the trial court must classify the out-of-state convictions as Class I felonies for sentencing purposes." *Hinton*, 196 N.C. App. at 755, 675 S.E.2d at 675 (citation and emphasis omitted).

At the initial sentencing hearing, the State and Defendant stipulated that Defendant was a Level IV felony offender with 10 prior record level points. Four of the ten points were attributed to Defendant's 2002 conviction for second-degree burglary in South Carolina. Based upon its assessment that Defendant had 10 prior record level points, the trial court determined that Defendant was a Level IV felony offender and proceeded to sentence him accordingly upon his Class D felony

conviction for robbery with a dangerous weapon. Defendant entered notice of appeal in open court.

The parties reconvened on 18 February 2019 to discuss attorney's fees and restitution, among other matters. The State provided the trial court with a copy of South Carolina's second-degree burglary statute in support of the State's assertion that the offense is substantially similar to North Carolina's, classifying Defendant as a Level IV felony offender for sentencing purposes. Without comparing the elements of the offenses, the trial court determined that the South Carolina offense of second-degree burglary was substantially similar to the North Carolina offense of second-degree burglary. Nevertheless, as during the first hearing, Defendant again had no objection to the classification of the South Carolina second-degree burglary conviction on Defendant's prior record level worksheet.[4]

On appeal, Defendant contends that the trial court erred by determining that South Carolina's second-degree burglary offense was substantially similar to North Carolina's. Defendant maintains that he was prejudiced by the trial court's error because he was consequently sentenced as a Level IV felony offender rather than as a Level III felony offender. We agree.

[4] "It is not necessary that an objection be lodged at the sentencing hearing in order for a claim that the record evidence does not support the trial court's determination of a defendant's prior record level to be preserved for appellate review." *Bohler*, 198 N.C. App. at 633, 681 S.E.2d at 804.

In North Carolina, second-degree burglary is "punishable as a Class G felony." N.C. Gen. Stat. § 14-52. The elements of second-degree burglary are: (1) "the breaking"; (2) "and entering"; (3) "during the nighttime"; (4) "of [a] . . . dwelling house or sleeping apartment of another"; (5) "with intent to commit a felony therein." *State v. Jolly*, 297 N.C. 121, 127, 254 S.E.2d 1, 5 (1979) (citation omitted).

The offenses of first- and second-degree burglary differ only by the element of actual occupancy:

> If the crime be committed in a dwelling house, or in a room used as a sleeping apartment in any building, and any person is in the actual occupation of any part of said dwelling house or sleeping apartment at the time of the commission of such crime, it shall be burglary in the first degree. If such crime be committed in a dwelling house or sleeping apartment not actually occupied by anyone at the time of the commission of the crime, or if it be committed in any house within the curtilage of a dwelling house or in any building not a dwelling house, but in which is a room used as a sleeping apartment and not actually occupied as such at the time of the commission of the crime, it shall be burglary in the second degree. For the purposes of defining the crime of burglary, larceny shall be deemed a felony without regard to the value of the property in question.

N.C. Gen. Stat. § 14-51.

In South Carolina, second-degree burglary is codified at S.C. Code Ann. § 16-11-312, which provides, in pertinent part:

> (A) A person is guilty of burglary in the second degree if the person enters a dwelling without consent and with intent to commit a crime therein.

> (B) A person is guilty of burglary in the second degree if the person enters a building without consent and with intent to commit a crime therein, and either:
>
> (1) When, in effecting entry or while in the building or in immediate flight therefrom, he or another participant in the crime:
>
> (a) Is armed with a deadly weapon or explosive; or
>
> (b) Causes physical injury to any person who is not a participant in the crime; or
>
> (c) Uses or threatens the use of a dangerous instrument; or
>
> (d) Displays what is or appears to be a knife, pistol, revolver, rifle, shotgun, machine gun, or other firearm; or
>
> (2) The burglary is committed by a person with a prior record of two or more convictions for burglary or housebreaking or a combination of both; or
>
> (3) The entering or remaining occurs in the nighttime.

S.C. Code Ann. § 16-11-312(A)-(B) (2015). At the time of Defendant's 2002 conviction, burglary in the second degree was punishable as a Class D felony in South Carolina. *Id.* § 16-1-90(D) (2003).[5]

Upon comparison of the elements of the South Carolina offense of second-degree burglary and the elements of the North Carolina offense of second-degree burglary, it is evident that the offenses are not substantially similar, and that the

[5] The language of S.C. Code Ann. §§ 16-11-312(A)-(B) (2015) and 16-1-90(D) (2003) mirrors that of the statutes which were in effect at the time of Defendant's conviction in 2002.

trial court erred in determining the two offenses to be so. The South Carolina offense does not address "breaking" and "occupancy," whereas the North Carolina offense includes "breaking" as an essential element. *Compare id.* § 16-11-312, *with Jolly*, 297 N.C. at 127, 254 S.E.2d at 5 (noting the essential elements of burglary). To be guilty of second-degree burglary under South Carolina law, the defendant must enter a dwelling or building "with intent to commit *a crime* therein[,]" S.C. Code Ann. § 16-11-312(A) (emphasis added); in North Carolina, the defendant must enter "with intent to commit a *felony* therein[,]" *Jolly*, 297 N.C. at 127, 254 S.E.2d at 5 (emphasis added). Moreover, South Carolina's second-degree burglary offense is much broader in scope regarding where a second-degree burglary can be committed. *Compare* S.C. Code Ann. § 16-11-310(1) (defining "building" as "any structure, vehicle, watercraft, or aircraft . . . [w]here any person lodges or lives[,] or . . . [w]here people assemble for purposes of business, government, education, religion, entertainment, public transportation, or public use or where goods are stored"), *and id.* § 16-11-310(2) (defining "dwelling" as "its definition found in Section 16-11-10 and . . . the living quarters of a building which is used or normally used for sleeping, living, or lodging by a person")[6], *with* N.C. Gen. Stat. § 14-51 (noting that second-degree burglary can

[6] S.C. Code Ann. § 16-11-10 (2015) is entitled " 'Dwelling house' defined in case of burglary, arson and other criminal offenses" and reads as follows:

> With respect to the crimes of burglary and arson and to all criminal offenses which are constituted or aggravated by being committed in a

be committed "in a dwelling house or sleeping apartment not actually occupied by anyone at the time of the commission of the crime, or . . . in any house within the curtilage of a dwelling house or in any building not a dwelling house, but in which is a room used as a sleeping apartment and not actually occupied as such at the time of the commission of the crime"). Lastly, in North Carolina, second-degree burglary can only occur "during the nighttime[,]" *Jolly*, 297 N.C. at 127, 254 S.E.2d at 5, whereas this is merely one of several ways that the offense may be committed in South Carolina. *See* S.C. Code Ann. § 16-11-312(B)(3).

Rather than accepting the parties' stipulation as to the class of offense and the number of points assigned to Defendant's South Carolina conviction, the trial court should have compared the elements of the two second-degree burglary offenses to determine their substantial similarity for the purpose of calculating Defendant's prior record level. *See Sanders*, 367 N.C. at 718, 766 S.E.2d at 332 ("[F]or purposes of determining substantial similarity under N.C. [Gen. Stat.] § 15A-1340.14(e), a party may establish the elements of an out-of-state offense by providing evidence of the . . .

> dwelling house, any house, outhouse, apartment, building, erection, shed or box in which there sleeps a proprietor, tenant, watchman, clerk, laborer or person who lodges there with a view to the protection of property shall be deemed a dwelling house, and of such a dwelling house or of any other dwelling house all houses, outhouses, buildings, sheds and erections which are within two hundred yards of it and are appurtenant to it or to the same establishment of which it is an appurtenance shall be deemed parcels.

The language of S.C. Code Ann. § 16-11-10 (2015) mirrors that of the statute which was in effect at the time of Defendant's conviction in 2002.

law of such state. Further . . . when evidence of the applicable law is not presented to the trial court, the party seeking a determination of substantial similarity has failed to meet its burden of establishing substantial similarity by a preponderance of the evidence." (citations and internal quotation marks omitted)).

Here, the State offered no argument or evidence in support of its assertion of the substantial similarity, other than the print-out of the South Carolina statute proffered at the second hearing, and the trial court failed to conduct the requisite analysis. Having done so, we conclude that the trial court should have classified Defendant's prior South Carolina conviction for second-degree burglary as a Class I felony and accordingly assigned him *two* points toward the calculation of his prior record level, rather than classifying the South Carolina offense as a Class G felony, for which Defendant received four sentencing points. *See* N.C. Gen. Stat. § 15A-1340.14(e).

A defendant with eight prior record level points is a Level III felony offender for sentencing purposes. *Id.* § 15A-1340.14(c)(3). Here, however, Defendant was improperly sentenced as a Level IV offender, due to the trial court's erroneous conclusion that Defendant's prior South Carolina conviction for second-degree burglary was substantially similar to the same offense in North Carolina. *See id.* § 14-52 (providing that second-degree burglary is a Class G felony); *see also id.* § 15A-1340.14(b)(3) (instructing that a defendant shall receive four sentencing points for

each prior Class G felony conviction). Thus, "it is clear that the trial court's error . . . adversely affect[ed] the sentencing process[,]" *Bohler*, 198 N.C. App. at 638, 681 S.E.2d at 806, and that Defendant was prejudiced thereby.

Conclusion

For the reasons stated herein, we conclude that the trial court erred by failing to conduct a substantial similarity analysis for Defendant's prior South Carolina conviction for second-degree burglary. Furthermore, due to the trial court's error, Defendant was improperly sentenced as a Level IV felony offender, rather than Level III. Accordingly, we remand to the trial court for resentencing.

REMANDED FOR RESENTENCING.

Judges DILLON and HAMPSON concur.

Report per Rule 30(e).