IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA23-148

Filed 2 January 2024

Robeson County, No. 16 CRS 55641

STATE OF NORTH CAROLINA

v.

JONATHAN REVELS

Appeal by defendant from judgment entered 8 August 2022 by Judge James G. Bell in Robeson County Superior Court. Heard in the Court of Appeals 3 October 2023.

Attorney General Joshua H. Stein, by Assistant Attorney General Brent D. Kiziah, for the State.

Richard J. Costanza for defendant-appellant.

ZACHARY, Judge.

Defendant appeals from the sentence entered upon his conviction for voluntary manslaughter, arguing that the trial court improperly calculated his prior record level. After careful review, we conclude that the trial court did not err in calculating Defendant's prior record level and in sentencing Defendant as a prior record level V offender.

BACKGROUND

Defendant was indicted on 8 January 2018 for second-degree murder. On 3 August 2022, a jury convicted Defendant of voluntary manslaughter.

At sentencing, the State presented the trial court with a prior-record-level worksheet, a copy of which the prosecutor had given defense counsel a day earlier. Defendant's record included within the worksheet amounted to Defendant having 16 prior-record-level points, which corresponded to a prior record level V for sentencing. The worksheet included a 2021 federal conviction of possession of a firearm by a felon, which arose from the same 4 September 2016 incident in which Defendant killed the victim in the case at bar.

For the voluntary manslaughter conviction, the trial court sentenced Defendant as a prior record level V offender to a term of 89 to 119 months' imprisonment, to be served upon expiration of Defendant's 120-month sentence for his federal conviction for possession of a firearm by a felon.

Defendant gave oral notice of appeal in open court.

DISCUSSION

Defendant first argues that the trial court erred when it sentenced him as a prior record level V offender without the parties' stipulation to Defendant's prior convictions or evidence sufficient to prove Defendant's prior convictions. The State contends that Defendant stipulated to his prior record level when defense counsel explicitly referred to the worksheet, without objection or request for clarification, in

alerting the court to the fact that "Defendant's last felony conviction was 33 years ago." We agree with the State that the trial court did not err in sentencing Defendant as a prior record level V offender.

The standard of review is clear: "[t]he 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), *disc. review denied*, ___ N.C. ___, 691 S.E.2d 414 (2010). Although Defendant raised no objection to the prior record level worksheet before the trial court, the parties agree that "[i]t 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." *Id.* Thus, "the issue before the Court is simply whether the competent evidence in the record adequately supports the trial court's decision that [the defendant] had accumulated" the assigned prior record points. *Id.*

"The State bears the burden of proving, by a preponderance of the evidence, that a prior conviction exists" for the purposes of determining a defendant's criminal history. *Id.* at 634, 681 S.E.2d at 804 (citation omitted). "[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 establishing proof of prior convictions." *Id.* (citation omitted); *see also State v. Alexander*, 359 N.C. 824, 827, 616 S.E.2d 914, 917 (2005).

The General Assembly has provided the methods by which a prior conviction may be proved:

> [a] prior conviction may be proved by stipulation of the parties; an original 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.

Bohler, 198 N.C. App. at 634, 681 S.E.2d at 804 (cleaned up); *see also* N.C. Gen. Stat. § 15A-1340.14(f)(1)–(4).

"A statement by the State asserting that an offender has a certain number of points, corresponding to a specified record level, is not sufficient . . . , even if the statement is uncontested by the defendant." *State v. Mack*, 188 N.C. App. 365, 378, 656 S.E.2d 1, 11 (2008). However, "defense counsel need not affirmatively state what a defendant's prior record level is for a stipulation with respect to that defendant's prior record level to occur." *Id.* (cleaned up). "Silence, under some circumstances, may be deemed assent" to the prior record level. *Alexander*, 359 N.C. at 828, 616 S.E.2d at 917 (citation omitted).

In *Mack*, the defendant contended that the State failed to present sufficient evidence of his prior convictions. 188 N.C. App. at 379, 656 S.E.2d at 11. At the hearing, the State announced that the defendant "will be a record Level IV[,]" to which defense counsel responded, "IV." *Id.* at 378, 656 S.E.2d at 11. The defendant argued that defense counsel's statement was not the equivalent of a stipulation to the

defendant's prior record level. *Id.* at 379, 656 S.E.2d at 11. This Court "note[d] that defense counsel did not voice any objection to the State's assertion, nor did defense counsel seek clarification as to how the record level was determined. Defense counsel simply stated 'IV' when asked what prior record level applied to [the] defendant." *Id.* at 379, 656 S.E.2d at 12. We concluded that counsel's statement was sufficient to evince the "defendant['s] stipulat[ion] to his prior record level pursuant to N.C. Gen. Stat. § 15A-1340.14(f)(1)." *Id.*

In the instant case, the prior record level worksheet that the State presented was not signed by Defendant or defense counsel, nor did the State introduce official records of Defendant's prior convictions. However, the following exchange occurred at sentencing regarding Defendant's prior convictions and the prior record level worksheet submitted by the State:

> [THE STATE]: Your Honor, [Defendant] having been found guilty of a Class B felony, if I can approach with the record level?
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> THE COURT: Yes.
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> [THE STATE]: I provided one to [defense counsel] yesterday, your Honor. . . . Your Honor, the jury having returned a guilty verdict for voluntary manslaughter, Class B felony, and [Defendant] being a prior record level of five, your Honor, the [State] would be asking for the high end of the presumptive sentence. No aggravating factors were filed in this case, your Honor. High end of the presumptive would be 111 to 146 months . . . . Asking for that sentence to be consecutive to the sentence that [Defendant] received for his conviction of possession of a firearm by a felon in the federal system.

> . . . .
>
> THE COURT: All right. Let me hear from the defense first . . . .
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> [DEFENSE COUNSEL]: . . . . *You have a copy of [Defendant's] record level worksheet. I will ask the court to take note, Judge, that with the exception of the firearm charge that [the State] has referenced that arose out of the same transaction as this case, [Defendant's] last felony conviction was 33 years ago* in 1989, 27 years before this incident. The only thing since then is driving charges in 2007.
>
> . . . .
>
> I will tell the court, [the State] has made reference to the federal conviction for possession of a firearm by a felon that arose out of this incident. I have a copy of that indictment, Judge. . . . I have a copy of his—if the court would like to see them, I would be happy to hand them up—copy of his judgment. . . .

(Emphasis added).

Defendant "did not voice any objection to the State's assertion" regarding the contents of the State's worksheet or its calculation of Defendant's prior record level, "nor did defense counsel seek clarification as to how the record level was determined." *Id*. Indeed, defense counsel referred to the prior record level worksheet in support of his statement to the court that Defendant's last felony conviction was 33 years ago. *See Alexander*, 359 N.C. at 830, 616 S.E.2d at 918 ("[W]e find it telling that [defense counsel] specifically directed the trial court to refer to the worksheet to establish that [the] defendant had no prior felony convictions. . . . If defense counsel's affirmative statement with respect to [the] defendant's lack of previous felony convictions was

proper, then so too was the implicit statement that [the] defendant's previous misdemeanor convictions were properly reflected on the worksheet in question.").

This colloquy reveals that Defendant implicitly accepted the contents of the prior record level worksheet and the determination that he had 16 points, which corresponds to prior record level V for sentencing. "[D]efense counsel need not affirmatively state what a defendant's prior record level is for a stipulation with respect to that defendant's prior record level to occur." *Mack*, 188 N.C. App. at 378, 656 S.E.2d at 11 (cleaned up). We conclude that Defendant stipulated to the prior record level worksheet and his prior record level. Accordingly, the trial court did not err in sentencing Defendant as a prior record level V offender.

Defendant next argues that the trial court erred when it assigned sentencing points for his federal conviction of possession of a firearm by a felon because that offense would have been a "joinable offense" in the instant state court proceeding. According to Defendant, "[t]he trial court assessed four sentencing points . . . for the federal conviction, based on the determination that the federal version of possession of a firearm by a felon was substantially similar [to] the North Carolina equivalent"; this determination "affected . . . Defendant's sentence, as it moved him from PRL-IV to PRL-V." Although the State agrees that "Defendant's federal possession of a firearm by a felon conviction on December 9, 2021, is based on the incident that occurred in this case at bar[,]" it contends that the trial court nevertheless properly

included the federal conviction in sentencing Defendant as a prior record level V offender.

Defendant relies on *State v. West*, 180 N.C. App. 664, 638 S.E.2d 508 (2006), *appeal dismissed and disc. review denied*, 361 N.C. 368, 644 S.E.2d 562 (2007), and *State v. High*, 271 N.C. App. 771, 845 S.E.2d 150 (2020), in support of his argument. This reliance is misplaced.

In *West*, the trial court assessed sentencing points for convictions arising from the same trial where the court sentenced the defendant on several of the convictions before a lunch recess, and then assigned prior record level points for those convictions when it sentenced the defendant on the remaining convictions after the lunch recess. *West*, 180 N.C. App. at 669, 638 S.E.2d at 512. This Court concluded that "the assessment of a defendant's prior record level using *joined* convictions would be unjust and in contravention of the intent of the General Assembly[,]" and that the trial court erred in so doing. *Id.* (emphasis added). We similarly determined that the trial court erred by assessing sentencing points for a joined conviction in *High*. 271 N.C. App. at 777, 845 S.E.2d at 155.

It is evident that both of these cases stand for the proposition that a defendant's prior record level may not be determined by assessing points for *joined* convictions, and not the converse. We decline Defendant's invitation to extend the holdings in *West* and *High* to cases in which the prior convictions for which points were assessed were not joined for trial with the convictions for which the defendant

challenges his prior record level classification and resultant sentence, even if the conviction (1) arises from the same transaction or series of acts as the conviction for which the defendant is being sentenced, and (2) could possibly have been joined for trial with the charge for which the defendant is being sentenced.

Accordingly, the trial court did not err by including Defendant's federal conviction for possession of a firearm by a felon in calculating Defendant's prior record level for sentencing.

CONCLUSION

For the reasons stated herein, we conclude that the trial court did not err in calculating Defendant's prior record level and sentencing him as a prior record level V offender.

NO ERROR.

Chief Judge STROUD and Judge MURPHY concur.

Report per Rule 30(e).