An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority. Citation is disfavored, but may be permitted in accordance with the provisions of Rule 30(e)(3) of the North Carolina Rules of Appellate Procedure.

IN THE COURT OF APPEALS OF NORTH CAROLINA

2022-NCCOA-148

No. COA 21-287

Filed 1 March 2022

Cumberland County, No. 19 CRS 62090

STATE OF NORTH CAROLINA

v.

CALVIN LINDALE KELLY, JR., Defendant.

Appeal by Defendant from judgment entered 9 December 2020 by Judge James F. Ammons in Cumberland County Superior Court. Heard in the Court of Appeals 15 December 2021.

Attorney General Joshua H. Stein, by Assistant Attorney General Adrina G. Bass, for the State.

Michael E. Casterline for Defendant.

INMAN, Judge.

¶ 1 Calvin Lindale Kelly, Jr. ("Defendant") appeals from a judgment entered upon a jury verdict finding him guilty of failure to report a new address as a sex offender, arguing that the trial court failed to compare his out-of-state felony convictions to North Carolina felonies when determining his prior record level as required under N.C. Gen. Stat. § 15A-1340.14(e) (2021). After careful review, we vacate the judgment

and remand for resentencing.

I. FACTUAL AND PROCEDURAL HISTORY

¶ 2 Defendant was convicted of two sex offenses in Virginia in 2007. He moved to North Carolina and in 2017 registered with the Cumberland County sex offender registration unit.

¶ 3 In March 2019, Defendant began dating Jessica Flakes and, by May of that year, had moved belongings into her apartment and spent most nights there. He did not report this change of address. Defendant was arrested in October 2019 and in December 2020 was convicted by jury of failure to report a change of address as a sex offender.

¶ 4 The State presented a sentencing worksheet indicating Defendant had two prior convictions, both in Greensville, Virginia. The first, "RAPE:INTERCOURSE VIC<13YRS," was listed on the worksheet as a class B1 felony; the other, "VIOL SEX OFFNDER/MURDR," was listed as a class F felony. The State orally informed the court that the latter offense was a previous conviction for failure to register a change of address.

¶ 5 Defendant's attorney stipulated to the prior convictions on the sentencing worksheet. The worksheet, AOC-CR-600B, includes a line for the trial court to indicate that "[f]or each out-of-state conviction listed in Section V on the reverse, the Court finds by a preponderance of the evidence that the offense is substantially

similar to a North Carolina offense and that the North Carolina classification assigned to this offense in Section V is correct." The trial court did not check the box indicating it had made this finding.

¶ 6 Defendant was assigned 9 points for the class B1 conviction, 4 points for the class F conviction, and an additional point each for committing the offense while on probation and because the elements of the current offense were included in a prior offense. Defendant was assessed a total of 15 points and sentenced at prior record level V, receiving a mitigated sentence of 17 to 30 months.

¶ 7 Defendant appeals.

II. ANALYSIS

¶ 8 Defendant argues that the trial court erred in determining his prior record level absent a finding that his Virginia convictions were substantially similar to North Carolina felonies. He also argues that the trial court erred in assigning an additional point for a previous conviction containing the elements of his current offense. We agree on both points.

¶ 9 The use of out-of-state felony convictions when determining a defendant's prior record level is governed by Section 15A-1340.14(e) of our General Statutes. By default, a felony conviction from another jurisdiction is classified as a Class I felony in determining prior record points. N.C. Gen. Stat. § 15A-1340.14(e). However, if the State shows by a preponderance of the evidence that the prior offense is substantially

similar to a higher-class North Carolina felony, it is treated as that class of felony. *Id.*

¶ 10 The existence of the prior conviction is a question of fact and under Section 15A-1340.14(f)(1) may be established by stipulation. However, determining whether the offense is substantially similar to a North Carolina offense is a question of law to be determined by the trial court. *State v. Hanton*, 175 N.C. App. 250, 254, 623 S.E.2d 600, 604 (2006). The trial court must compare the elements of the defendant's foreign convictions with the elements of crimes under North Carolina statutes. *Id.* As the question is one of law, a defendant's stipulation that a foreign conviction is substantially similar to a North Carolina offense is ineffective. *Id.*

¶ 11 Substantial similarity can be shown by printed copies of out-of-state statutes "and comparison of their provisions to the criminal laws of North Carolina." *State v. Rich*, 130 N.C. App. 113, 117, 502 S.E.2d 49, 52 (1998). When the State has failed to provide the relevant text to the court, we have held that there was not sufficient evidence to show that the statutes in question are substantially similar—for example, this case is nearly identical to *State v. Henderson*, 201 N.C. App. 381, 689 S.E.2d 462 (2009). In *Henderson* the defendant stipulated to his prior out-of-state convictions, and the trial court relied on those stipulations to determine his prior record level. 201 N.C. App. at 384, 689 S.E.2d at 465. We held that the trial court erred in classifying the defendant's Pennsylvania conviction for robbery as a Class D felony, rather than

the default Class I, because the State presented no evidence of substantial similarity to a North Carolina offense. *Id.* at 387, 689 S.E.2d at 466; *see also State v. Burgess*, 216 N.C. App. 54, 57-58, 715 S.E.2d 867, 870 (2011) (holding the State's production of the 2008 versions of South Carolina statutes insufficient to show the defendant was convicted, under the 1993 and 1994 versions, for offenses substantially similar to North Carolina misdemeanors). We have also vacated sentencing based on out-of-state convictions where the State provided the text of the statutes but the prosecutor "made no attempt to compare their provisions to the purportedly similar classified crimes in North Carolina" and there was no indication that the trial court made that comparison. *State v. Black*, 2021-NCCOA-5, ¶ 14.

¶ 12 In this case, Defendant stipulated to the existence of two prior Virginia felony convictions. The trial court classified them as a Class B1 and a Class F felony, respectively, and sentenced Defendant accordingly. However, there is no indication from the record that the trial court made the required comparison between the elements of the foreign statutes and North Carolina statutes. The trial court left blank a checkbox on the felony sentencing worksheet to indicate it made the determination required by Section 15A-1340.14(e). Nor does the transcript reflect that a comparison between statutes was made at any time.

¶ 13 The sentencing worksheet lists two prior convictions: "RAPE:INTERCOURSE VIC<13YRS" and "VIOL SEX OFFNDER/MURDR." The record contains no details

about the latter offense beyond the prosecutor's statement that the conviction was listed as "fail to register as a sex offender/felony" on the original judgment. That judgment does not appear in the record, nor does the record contain either the elements of the offense or a citation to the Virginia statute under which Defendant was convicted. Defendant's sentencing order for his rape conviction was presented to the trial court and identifies the Virginia statute codifying the offense. However, there is no indication from the record that the trial court compared the actual elements of the offense to any North Carolina statutory offense.

¶ 14 Although the State did not provide the text of the Virginia statutes to the trial court, it argues that this Court can take judicial notice of those statutes and now make the required comparison of elements. We decline to do so.

¶ 15 In each of the cases cited *supra* we remanded to the trial court for resentencing rather than determine *de novo* whether the foreign statutes are substantially similar to North Carolina statutes. We have also rejected the same argument by the State in *Henderson*, holding it was "not the proper role of this Court to engage in that determination in this case as neither we nor the trial court were presented with the necessary facts to make such a determination." 201 N.C. App. at 388, 689 S.E.2d at 467. In this case, as in *Henderson,* the record contains no statutory reference for Defendant's apparent Virginia conviction for failure to register as a sex offender. "Accordingly, we will not speculate as to whether the State has for the first time, in

its brief on appeal, properly identified the out-of-state statutes for comparison." *Id.* Likewise, without that statute the trial court could not, and we cannot, determine that "all the elements of the present offense are included in any prior offense" such that it was correct to assign an additional point to Defendant's prior record level.

¶ 16 Finally, although the State concedes that a defendant cannot stipulate that an out-of-state conviction is substantially similar to a North Carolina offense, it argues that Defendant's stipulation to the sentencing worksheet operates as a waiver of any objection to the classifications of the previous felonies. But "[t]his is a legal issue that cannot be waived by a criminal defendant's stipulation." *Black*, 2021-NCCOA-5, ¶ 16. In *State v. Palmateer*, for example, we held that the defendant's stipulation as to the classification of her prior convictions was ineffective and we remanded the case for resentencing. 179 N.C. App. 579, 582, 634 S.E.2d 592, 594 (2006). Defendant has not waived his argument by stipulation.

III. CONCLUSION

¶ 17 We conclude that, because the State failed to demonstrate to the trial court the substantial similarity of Defendant's out-of-state convictions to North Carolina crimes, the trial court erred in assigning 15 prior record level points to Defendant. We must therefore remand for resentencing. At the resentencing hearing, the trial court may consider additional information presented by the State or Defendant as to Defendant's prior convictions.

VACATED AND REMANDED.

Judges ARROWOOD and HAMPSON concur.

Report per Rule 30(e).