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IN THE COURT OF APPEALS OF NORTH CAROLINA

2022-NCCOA-146

No. COA21-87

Filed 1 March 2022

Haywood County, No. 20CRS000642

STATE OF NORTH CAROLINA

v.

REX DOUGLAS COCHRAN, JR.

Appeal by defendant from judgment entered on or about 10 November 2020 by Judge Athena Fox Brooks in Superior Court, Haywood County. Heard in the Court of Appeals 5 October 2021.

Attorney General Joshua H. Stein, by Assistant Attorney General Bettina J. Roberts, for the State.

Drew Nelson, for defendant-appellant.

STROUD, Chief Judge.

¶ 1 Defendant appeals a judgment convicting him of negligent child abuse resulting in serious physical injury. Defendant contends the trial court erred in classifying his prior convictions for purposes of his prior record level. Based upon defendant's stipulation that his prior Georgia marijuana conviction was a felony, the trial court properly classified this conviction at the default level, as a Class I felony.

Based upon a comparison of the Georgia and North Carolina statutes, the trial court correctly classified defendant's prior Georgia conviction for armed robbery as a Class D felony. Thus, we affirm.

I. Background

¶ 2 On or about 10 November 2020, defendant pled guilty pursuant to an *Alford* plea to negligent child abuse resulting in serious physical injury. Judgment was entered. Defendant gave oral notice of appeal.

II. Prior Convictions

¶ 3 Defendant's only argument on appeal is that for sentencing purposes the trial court wrongly categorized three of his prior convictions regarding felony status or felony classification. Because defendant seeks only to review his sentence and not his guilty plea, he has a right to appeal. *See State v. Robinson*, 249 N.C. App. 568, 571, 791 S.E.2d 862, 865 (2016) ("Here, defendant pled guilty to the charged offenses pursuant to a plea arrangement. Yet defendant does not seek to appeal his guilty plea but rather he seeks review of his prior record level calculation and sentencing based upon that calculation. . . . But defendant did have a right to appeal his prior record level calculation pursuant to N.C. Gen. Stat. § 15A–1444(a2)(1) despite his guilty plea since defendant contends that his prior record level was calculated erroneously.").

A. Standard of Review

> The trial court's determination of a defendant's prior record level is a conclusion of law, which this Court reviews

> *de novo* on appeal. Even so, whether a particular out-of-state comparison is substantially similar to a particular North Carolina offense is subject to harmless error review. A miscalculation of the points is harmless where deducting the improperly assessed points would not affect the defendant's prior record levels.

State v. Black, 2021-NCCOA-5, ¶ 10 (citations, quotation marks, and brackets omitted).

B. Georgia Marijuana Conviction

¶ 4 Defendant first contends "[t]he trial court erred by improperly classifying . . . [his] prior marijuana-related conviction as a felony rather than a misdemeanor." The State contends defendant stipulated that his marijuana-related conviction was a felony. Defendant counters that while a defendant may stipulate to the fact that an out-of-state conviction was a felony under the law of the jurisdiction of the conviction, that does not mean he is stipulating it should be classified as a felony in this State.

¶ 5 Defendant directs us to *State v. Bohler,* which explains that

> [t]he default classification for out-of-state felony convictions is Class I. Where the State seeks to assign an out-of-state conviction a more serious classification than the default Class I status, it is required to prove by the preponderance of the evidence that the conviction at issue is substantially similar to a corresponding North Carolina felony. However, where the State classifies an out-of-state conviction as a Class I felony, no such demonstration is required. 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.
>
> Thus, while the 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, it may accept a stipulation that the defendant in question has been convicted of a particular out-of-state offense and that this offense is either a felony or a misdemeanor under the law of that jurisdiction.

State v. Bohler, 198 N.C. App. 631, 637–38, 681 S.E.2d 801, 806 (2009) (citations and quotation marks omitted). Defendant contends the State still had to prove the Georgia conviction was substantially similar to a North Carolina felony, even though the trial court classified the Georgia conviction as a Class I felony. We disagree with defendant's interpretation.

¶ 6 Under *Bohler,* if a defendant stipulates that his out-of-state conviction is a felony, then the trial court must treat that conviction as a Class I felony in this State, unless the State offers additional evidence supporting classification at a higher level North Carolina felony. *See id.* (noting once a defendant has stipulated to a felony "where the State classifies an out-of-state conviction as a Class I felony, no such demonstration [of substantial similarity] is required"). It is only "[w]here the State seeks to assign an out-of-state conviction a more serious classification than the

default Class I status, it is required to prove by the preponderance of the evidence that the conviction at issue is substantially similar to a corresponding North Carolina felony." *Id.* at 637, 681 S.E.2d at 806. Accordingly, where a defendant stipulates that an out-of-state conviction was classified as a felony, the trial court may properly classify it as a Class I felony with nothing more from the State. *See id.* at 637-38, 681 S.E.2d at 806.

¶ 7 Here, at defendant's plea hearing it was noted that "defendant stipulate[d] to the existence of these prior criminal convictions as described on the felony sentencing level worksheet[.]" On the sentencing level worksheet, signed by defendant's counsel, defendant's prior marijuana-related conviction is noted as a felony.

> For an out-of-state conviction, a trial court may accept a stipulation that the defendant in question has been convicted of a particular out-of-state offense and that this offense is either a felony or a misdemeanor under the law of that jurisdiction for sentencing purposes.

Black, 2021-NCCOA-5, ¶ 12 (citations and quotation marks omitted). The trial court ultimately classified defendant's Georgia marijuana conviction as a "felony Class I."[1] This determination was in accord with *Bohler*, and we are not persuaded by defendant's argument to read it otherwise. *See generally Bohler* at 637-38, 681 S.E.2d

[1] At the sentencing hearing, the State argued the Georgia marijuana conviction should be classified as a higher level felony. Defendant argued it should be classified as Class I; the trial court classified this conviction as defendant requested.

at 806. This argument is overruled.

C. North Dakota Child Abuse Conviction

¶ 8 Defendant next contends "[t]he trial court erred by improperly classifying . . . [his] prior conviction for felony child abuse of a Class D felony." While he stipulated that the North Dakota conviction was a felony, this conviction would require a substantial similarity analysis because the trial court classified it as a Class D felony rather than the default Class I, unlike his marijuana-related conviction. *See generally id.*

> [W]hether the 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. Printed copies of the out-of-state statutes and comparison of their provisions to the criminal laws of North Carolina are sufficient to prove by a preponderance of the evidence that the crimes of which defendant was convicted in those states were substantially similar to classified crimes in North Carolina.

Black, 2021-NCCOA-5, ¶ 13 (citations, quotation marks, and brackets omitted).

¶ 9 According to the transcript, defendant was convicted of two counts of child abuse in North Dakota in 2013 and 2016, and between those offense dates the elements of the statute were amended. Only one of these convictions was used to calculate defendant's prior record level. Defendant's prior North Dakota convictions are not a part of our record.

¶ 10 At the sentencing hearing, according to the transcript, the State addressed each of defendant's prior convictions in detail and provided to the trial court a packet, including information regarding each of defendant's prior out-of-state convictions, the corresponding statutes under which he was convicted, and the North Carolina statutes the State contended supported the proposed classification:

> MS. ROBINETTE: . . . . If I may approach? I've prepared a little packet comparing the statutes. Mr. Schechet already has this.
>
> THE COURT: Okay.
>
> MS. ROBINETTE: If you look at the papers in the first paperclip, we've pulled the statutes for impaired driving.

Counsel for the State referred to the documents in the "little packet" for each conviction, referring to page numbers for each one. The North Dakota convictions were included starting at page 25 of the "little packet":

> Last, on Mr. Cochran's criminal history, if you turn to page R-25 you'll see two convictions for felony child abuse or neglect. The file number is 53-2017-CR-00425 for one, and the other is 53-2017-CR-02079. The date of conviction for both was August 20, 2018, and these are out of North Dakota. These two counts are for two different children of Mr. Cochran[']s in North Dakota and so they have different dates of offense.

Defendant's counsel also referred to the "little packet" of documents and made arguments regarding the various statutes and classification of the prior convictions.

¶ 11 While from the transcript and briefs we can glean that both parties agree

defendant was convicted under North Dakota Century Code § 14-09-22 for both offenses, this statute, like our own North Carolina General Statute § 14-318.4, has subsections with different elements that change the class of the felony. Because the record does not include defendant's North Dakota judgments or any details beyond the name of the crime, file number, and statute under which he was convicted, we cannot determine which subsection defendant was convicted under and we cannot properly do a substantial similarity analysis. *See generally* N.D. Cent. Code Ann. § 14-09-22 (West) (noting statutory changes to the elements from 2013 to the present); N.C. Gen. Stat. § 14-318.4 (2013). The "little packet" of documents reviewed by the trial court is not in our record. It is defendant's burden to ensure the record is complete so that this Court may do a proper review:

> It is the appellant's responsibility to make sure that the record on appeal is complete and in proper form. . . .
>
> There is a longstanding rule that there is a presumption in favor of regularity and correctness in proceedings in the trial court, with the burden on the appellant to show error. When the appellant presents evidence to rebut such a presumption, we will not turn a deaf ear to that evidence. Defendant has not produced any evidence overcoming that presumption.

State v. Wardrett, 261 N.C. App. 735, 738–39, 821 S.E.2d 188, 191 (2018) (citations, quotation marks, and brackets omitted). Accordingly, we dismiss this argument. *See generally id.* at 739, 821 S.E.2d at 192.

D. Georgia Armed Robbery Conviction

¶ 12 Defendant finally contends, "The trial court erred by improperly classifying . . . [defendant's] prior conviction for armed robbery as a Class D felony." Again, we do not have defendant's Georgia conviction as part of our record on appeal, but unlike the North Dakota child abuse convictions, here, both briefs indicate defendant was specifically convicted under West's Code of Georgia Annotated § 16-8-41 which provides,

> A person commits the offense of armed robbery when, with intent to commit theft, he or she takes property of another from the person or the immediate presence of another by use of an offensive weapon, or any replica, article, or device having the appearance of such weapon. The offense of robbery by intimidation shall be a lesser included offense in the offense of armed robbery.

Ga. Code Ann. § 16-8-41 (West) (2004).

¶ 13 The State contends the appropriate substantially similar statute is North Carolina General Statute § 14-87(a), which provided,

> Any person or persons who, having in possession or with the use or threatened use of any firearms or other dangerous weapon, implement or means, whereby the life of a person is endangered or threatened, unlawfully takes or attempts to take personal property from another or from any place of business, residence or banking institution or any other place where there is a person or persons in attendance, at any time, either day or night, or who aids or abets any such person or persons in the commission of such crime, shall be guilty of a Class D felony.

N.C. Gen. Stat. § 14-87(a) (2004).[2]

¶ 14 Defendant contends because Georgia's statute allows for replicas or devices having the appearance of a weapon without actually being a weapon whereas North Carolina's statue specifically requires "use of any firearms or other dangerous weapon" the Georgia conviction is more akin to common law robbery in North Carolina General Statute § 14-87.1. N.C. Gen. Stat. § 14-87(a); *see* Ga. Code Ann. § 16-8-41. "Robbery as defined at common law, other than robbery with a firearm or other dangerous weapon as defined by G.S. 14-87, shall be punishable as a Class G felony." N.C. Gen. Stat. § 14-87.1 (2004).

¶ 15 The State argues that in *State v. Joyner*, 312 N.C. 779, 782, 324 S.E.2d 841, 844 (1985), our Supreme Court has clarified that North Carolina General Statute § 14-87 includes "implement[s] which appear[] to be a firearm or other dangerous weapon[.]" *See State v. Joyner*, 312 N.C. 779, 782, 324 S.E.2d 841, 844 (1985) ("When a person commits a robbery by the use or threatened use of an implement which appears to be a firearm or other dangerous weapon, *the law presumes*, in the absence of any evidence to the contrary, that the instrument is what his conduct represents it to be-an implement endangering or threatening the life of the person being robbed." (emphasis in original)).

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[2] North Carolina General Statute § 14-87 has been amended since 2004, but not the subsection we are addressing, subsection (a).

¶ 16 Defendant counters that

> *Joyner* does not, as implied by the [S]tate, establish that North Carolina law treats a replica of a weapon and an actual weapon in the same way. In fact, by demonstrating that North Carolina law distinguishes between an implement that endangers the life of the victim and one that does not, *Joyner* highlights the difference between the Georgia and North Carolina laws[.]

We disagree. *Joyner* clarifies, "Thus, where there is evidence that a defendant has committed a robbery with what appears to the victim to be a firearm or other dangerous weapon *and nothing to the contrary appears in evidence*, the presumption that the victim's life was endangered or threatened is mandatory." *Id.* at 782, 324 S.E.2d at 844 (emphasis in original).

¶ 17 *Joyner* presents North Carolina's law as essentially the same as the Georgia statute. *Compare* Ga. Code Ann. § 16-8-41; *Joyner*, 312 N.C. at 782, 324 S.E.2d at 844. *Joyner* states that North Carolina § 14-87 has a built-in presumption that dangerous weapon is used if it "appears" to be a weapon to the victim. *Joyner*, 312 N.C. at 782, 324 S.E.2d at 844. Georgia's statute does the same by noting armed robbery includes, "any replica, article, or device having the appearance of such weapon." Ga. Code Ann. § 16-8-41. Ultimately, both the Georgia and North Carolina armed robbery statutes address the "appearance" of a dangerous weapon and not the actual use of one. *See* N.C. Gen. Stat. § 14-87; Ga. Code Ann. § 16-8-41; *Joyner*, 312 N.C. at 782, 324 S.E.2d at 844.

¶ 18 As we conclude the substantially similar statute to defendant's Georgia armed robbery conviction is North Carolina General Statute § 14-87, we agree with the trial court's determination to classify defendant's felony as Class D. *See generally* N.C. Gen. Stat. § 14-87. This argument is overruled.

III. Conclusion

¶ 19 The trial court correctly determined defendant's marijuana-related conviction should be classified as a Class I felony and his armed robbery conviction should be classified as a Class D felony. We therefore affirm.

AFFIRMED.

Judges TYSON and INMAN concur.

Report per Rule 30(e).