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IN THE COURT OF APPEALS OF NORTH CAROLINA

2022-NCCOA-254

No. COA21-377

Filed 5 April 2022

Cherokee County, Nos. 17CRS000563, 20CRS001026

STATE OF NORTH CAROLINA

v.

WILLIAM MONROE TURNER

Appeal by Defendant from judgment entered 18 November 2020 by Judge William H. Coward in Cherokee County Superior Court. Heard in the Court of Appeals 12 January 2022.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Charles G. Whitehead, for the State-Appellee.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Anne M. Gomez, for Defendant-Appellant.

COLLINS, Judge.

¶ 1 Defendant William Monroe Turner appeals from judgment entered upon guilty verdicts of possession of methamphetamine and attaining habitual felon status. Defendant argues that the trial court plainly erred by admitting into evidence a Jail Incident Report concerning a search of Defendant's person at the Cherokee County Detention Center, publishing the Report to the jury, and admitting other evidence

related to the Report; that he received ineffective assistance of counsel during the presentation of evidence; that he received ineffective assistance of counsel *per se* during closing argument in the habitual felon phase of trial when his trial counsel improperly conceded his guilt to having attained habitual felon status; and that he has been denied the right to appeal his sentence. The trial court did not err by admitting the Report and related evidence and did not plainly err by publishing the Report to the jury. Defendant has not shown that he received ineffective assistance of counsel. Because Defendant's right to appeal certain issues related to his sentencing has been frustrated by his inability to obtain a copy of his Prior Record Level Worksheet ("PRL Worksheet"), we vacate the judgment and remand for resentencing.

I. Procedural History

¶ 2 Defendant was indicted by a Cherokee County grand jury for possession of methamphetamine, possession of drug paraphernalia, and attaining habitual felon status. The State did not proceed with the possession of drug paraphernalia charge. Defendant pled not guilty and was tried before a jury on 18 November 2020. The jury found Defendant guilty of possession of methamphetamine and attaining habitual felon status. Following a sentencing hearing, the trial court sentenced Defendant, as an habitual felon with a prior record level of III, to 33 to 52 months in prison. Defendant gave notice of appeal in open court.

II. Factual Background

¶ 3 The evidence at trial tended to show that on the morning of 11 April 2017, then-deputy Paul Frye of the Cherokee County Sheriff's Office was dispatched to conduct a welfare check. Frye found Defendant sitting on the ground near a four-lane road. After approaching Defendant and asking for his name, Frye contacted dispatch and determined that there was an outstanding warrant for Defendant's arrest in Georgia. Frye arrested Defendant and transported him to the Cherokee County Detention Center.

¶ 4 Frye testified that upon his arrival at the Detention Center, Defendant was placed in the custody of Brian Carter. Carter testified that he was formerly an officer at the Detention Center and was on duty on the morning of 11 April 2017. Carter testified that when an arrestee arrives in the Detention Center, they are escorted to the booking area for an initial pat down. If this pat down reveals any contraband, the officer conducting the search will notify the arresting officer, booking agent, or sergeant and either hold the contraband up in plain sight or place the contraband on the booking counter.

¶ 5 Frye was not directly present for Defendant's search. Frye testified that he observed Carter in the room and standing with Defendant when Carter turned over a bag of suspected contraband. Frye testified, over objection, that Carter said he had "found a white crystallized substance" on Defendant. Frye identified a "small baggie

of crystallized substance" as the item which was found on Defendant and stated that this item was given to Frye during the search of Defendant. A forensic scientist in the drug chemistry section of the State Crime Lab tested the substance and identified it as methamphetamine.

¶ 6 At trial, Carter could not recall encountering Defendant on 11 April 2017 but recalled creating a report. Carter identified a Jail Incident Report ("Report") as his report. The Report stated,

> On 04/11/2017 at 08:10am I Officer Carter was patting down Mr. Turner at booking desk, who was brought in by Officer Frye. Upon searching Mr. Turners left front pants pocket I removed a small clear bag containing a white crystal substance. I notified officer Frye of the bag, and he collected it and took it for testing. Nothing further at this time.

Carter explained that although he was unable to fully remember what had happened on the morning of 11 April 2017, he "wrote every bit" of the Report, had personal knowledge of what happened when he made the Report, and would not have fabricated the contents of the Report. Carter did not type the Report immediately upon searching Defendant but indicated that such reports were "normally [prepared] within a minute" after an arrestee had been taken to a holding cell. Carter also testified that he always prepared an incident report when there was a suspected controlled substance found. The trial court admitted the Report into evidence without objection. Again without objection by Defendant, the State published copies of the

Report to the jury.

III. Discussion

A. Admissibility of the Report and Testimony Concerning the Search

¶ 7 Defendant argues that the Report was inadmissible hearsay and the trial court erred by admitting the Report, permitting Carter to testify to its contents, permitting the State to publish the Report to the jury, and failing to strike Frye's testimony concerning the search.

¶ 8 To preserve an issue for appellate review, a party "must have presented to the trial court a timely request, objection, or motion, stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context" and must "obtain a ruling upon the party's request, objection, or motion." N.C. R. App. P. 10(a)(1). Defendant did not object when the trial court admitted the Report into evidence, permitted Carter to testify to the contents of the Report, or permitted the State to publish the Report to the jury, and did not move to strike Frye's testimony concerning the search. Defendant has therefore failed to preserve these issues for appellate review. However, because Defendant specifically and distinctly contends that the trial court plainly erred, we will review these issues for plain error. N.C. R. App. P. 10(a)(4).

¶ 9 "For error to constitute plain error, a defendant must demonstrate that a fundamental error occurred at trial." *State v. Lawrence*, 365 N.C. 506, 518, 723

S.E.2d 326, 334 (2012). "To show that an error was fundamental, a defendant must establish prejudice—that, after examination of the entire record, the error 'had a probable impact on the jury's finding that the defendant was guilty.'" *Id.* (quoting *State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983)).

¶ 10 "'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." N.C. Gen. Stat. § 8C-1, Rule 801(c) (2020). Hearsay is inadmissible unless otherwise provided by statute or the Rules of Evidence. N.C. Gen. Stat. § 8C-1, Rule 802 (2020).

¶ 11 The hearsay rule does not exclude a recorded recollection, which is defined as a "memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable him to testify fully and accurately, shown to have been made or adopted by the witness when the matter was fresh in his memory and to reflect that knowledge correctly." N.C. Gen. Stat. § 8C-1, Rule 803(5) (2020).

¶ 12 The Report is hearsay because it constituted statements by Carter at a time other than while testifying at the trial and was offered by the State to prove the truth of the matter asserted—that Defendant was found in possession of the methamphetamine during the search. *Id.* § 8C-1, Rule 801(c). The trial court did not err in admitting the Report, however, because the State laid a proper foundation for

the admission of the Report as a recorded recollection. Carter testified that he did not recall encountering Defendant on 11 April 2017 or searching Defendant on that date, demonstrating that he had "insufficient recollection to enable him to testify fully and accurately[.]" *Id.* § 8C-1, Rule 803(5).

¶ 13 While Carter could not recall searching Defendant, the evidence established that he once had knowledge of doing so. Frye arrested Defendant and brought him to the Detention Center when Carter was on duty on 11 April 2017. The Detention Center had a policy of searching arrestees upon entry; Carter's responsibilities included processing arrestees. Carter would prepare an incident report whenever controlled substances were found. Frye testified that Carter gave him the bag of crystallized substance while Carter was standing in the booking area with Defendant. Carter testified that he created the Report that morning, he had personal knowledge when he made it, he "would have wrote every bit of it," and he would not have fabricated its contents. This evidence shows that the Report was "made or adopted by the witness when the matter was fresh in his memory and to reflect that knowledge correctly." *Id.* Because the State laid a sufficient foundation for the admission of the Report as a recorded recollection pursuant to N.C. Gen. Stat. § 8C-1, Rule 803(5), the trial court did not err, much less plainly err, in admitting the Report.

¶ 14 As the trial court properly admitted the Report, Defendant's argument that the trial court erred by failing to strike Frye's testimony is without merit. Frye

testified that Carter "had told me he found . . . a white crystallized substance on Mr. Turner and had presented it to me" and identified a piece of evidence as "the small baggie of crystalized substance that was found on Mr. Turner." This testimony was admissible to corroborate Carter's statements in the Report. *See State v. McNeill*, 90 N.C. App. 257, 261, 368 S.E.2d 206, 208 (1988) ("Corroborative evidence is supplementary evidence used to strengthen or confirm evidence already given."); *State v. Thompson*, 250 N.C. App. 158, 165, 792 S.E.2d 177, 182 (2016) (holding that victims' out of court statements to a police officer were admissible to corroborate their statements to medical personnel admitted at trial under N.C. Gen. Stat. § 8C-1, Rule 803(4)).

¶ 15 The trial court did err, however, by permitting the State to publish the Report to the jury by distributing copies of the Report to each juror. A recorded recollection "may be read into evidence but may not itself be received as an exhibit unless offered by an adverse party." N.C. Gen. Stat. § 8C-1, Rule 803(5). Still, Defendant has failed to show that this error rose to the level of plain error. Had the trial court fully complied with the restriction of Rule 803(5), the contents of the Report would have been read into evidence for the jury's consideration. The jury was therefore not exposed to any inadmissible or unfairly prejudicial information by virtue of receiving copies of the Report. Instead, Defendant argues that "[p]utting the statement in paper form and giving copies to the jury served to highlight the importance of the

evidence." But speculation that the jury may have accorded greater weight to the Report because it had access to hard copies is insufficient to establish that the trial court's error "had a probable impact on the jury's finding that the defendant was guilty." *See Lawrence*, 365 N.C. at 518, 723 S.E.2d at 334 (quotation marks and citation omitted).

B. Ineffective Assistance of Counsel

¶ 16 In the alternative, Defendant argues that he received ineffective assistance of counsel during the presentation of evidence to the extent his trial counsel (1) failed to request a limiting instruction for Frye's testimony; (2) failed to object to admitting the Report into evidence and publishing it to the jury; (3) failed to object to Carter's testimony based on the Report; (4) failed to renew her objections to and failed to move to strike Frye's hearsay testimony; and (5) failed to cross-examine Carter concerning the report.

¶ 17 We may reach the merits of an ineffective assistance of counsel claim on direct review "when the cold record reveals that no further investigation is required[.]" *State v. Fair*, 354 N.C. 131, 166, 557 S.E.2d 500, 524 (2001). No further investigation is required in this case, and we accordingly will review de novo whether Defendant was denied the effective assistance of counsel. *State v. Wilson*, 236 N.C. App. 472, 475, 762 S.E.2d 894, 896 (2014).

¶ 18 To prevail on a claim of ineffective assistance of counsel, a defendant must

make two showings. *State v. McNeill*, 371 N.C. 198, 218, 813 S.E.2d 797, 812 (2018) (quoting *Strickland v. Washington,* 466 U.S. 668, 687-88 (1984)). "First, the defendant must show that counsel's performance was deficient." *Id.* (quoting *Strickland*, 466 U.S. at 687). "Second, the defendant must show that the deficient performance prejudiced the defense." *Id.* (quoting *Strickland*, 466 U.S. at 687).

¶ 19 To establish that counsel's performance was deficient, the defendant must show that counsel's errors were "so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *State v. Augustine*, 359 N.C. 709, 718-19, 616 S.E.2d 515, 524 (2005) (quotation marks and citations omitted). In assessing whether counsel's performance was deficient, a reviewing court must "avoid the temptation to second-guess the actions of trial counsel"; "judicial review of counsel's performance must be highly deferential." *State v. Gainey*, 355 N.C. 73, 113, 558 S.E.2d 463, 488 (2002).

¶ 20 To establish prejudice, the "defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Lafler v. Cooper*, 566 U.S. 156, 163 (2012) (quotation marks and citations omitted). "Under *Strickland*, '[i]f it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice,' we need not determine whether counsel's performance was deficient." *State v. Phillips*, 365 N.C. 103, 122, 711 S.E.2d 122, 138 (2011) (quoting *Strickland*, 466 U.S. at 697).

¶ 21 Because the Report was admissible, counsel's performance was not deficient by virtue of failing to object to the admission of the Report or to Carter's related testimony. Similarly, because Frye's testimony was admissible for a non-hearsay purpose—to corroborate Carter's statements in the Report—counsel did not provide deficient performance by not moving to strike Frye's testimony.

¶ 22 Nor was counsel's performance deficient for failure to cross-examine Carter. To the contrary, the transcript reveals that counsel cross-examined Carter concerning the weight and credibility of his testimony, including his inability to presently recall the search, the potential delay between the execution of the search and the completion of the Report, whether the Report had been altered, and the circumstances under which Carter made the Report.

¶ 23 Regardless of whether counsel's performance was deficient for failure to seek a limiting instruction on Frye's testimony, Defendant has not shown prejudice. Frye's testimony, even if considered by the jury for substantive purposes instead of for corroborative purposes, was almost identical to Carter's statements in the Report. Where the jury received almost identical information in the Report, Defendant cannot establish that a limiting instruction on Frye's testimony would have a reasonable probability of producing a different result at trial. Nor can Defendant establish prejudice from counsel's failure to object to publication of the Report to the jury. Again, had the trial court fully complied with Rule 803(5), the jury still would have

received the contents of the Report for their consideration. The jury did not receive any additional information by virtue of receiving copies of the Report instead of hearing the Report read into evidence. Defendant has not met his burden to prevail on his claim of ineffective assistance of counsel.

C. Trial Counsel's Closing Arguments

¶ 24 Defendant also argues that his trial counsel provided *per se* ineffective assistance of counsel by impliedly admitting his guilt of attaining habitual felon status.

¶ 25 A defendant claiming ineffective assistance of counsel must ordinarily show both that counsel's performance was deficient, and that counsel's deficient performance prejudiced the defense. *Strickland*, 466 U.S. at 687. However, our Supreme Court held in *State v. Harbison* that counsel's admission of the defendant's guilt to the jury without the defendant's consent amounts to *per se* ineffective assistance of counsel. 315 N.C. 175, 180, 337 S.E.2d 504, 507-08 (1985).

¶ 26 Recently, in *State v. McAllister*, the Court held that *Harbison* is not limited to instances where counsel expressly admits the defendant's guilt of a charged offense. 375 N.C. 455, 473, 847 S.E.2d 711, 722 (2020). "Although an overt admission of the defendant's guilt by counsel is the clearest type of *Harbison* error, it is not the exclusive manner in which a per se violation of the defendant's right to effective assistance of counsel can occur." *Id.* at 475, 847 S.E.2d at 723. The Court instructed

that "*Harbison* should instead be applied more broadly so as to also encompass situations in which defense counsel impliedly concedes his client's guilt without prior authorization." *Id.* at 473, 847 S.E.2d at 722. Simultaneously, the Court cautioned that "a finding of *Harbison* error based on an implied concession of guilt should be a rare occurrence." *Id.* at 476, 847 S.E.2d at 724.

¶ 27 In *McAllister*, defendant was tried on "charges of (1) habitual misdemeanor assault—based on the underlying offense of assault on a female, (2) assault by strangulation, (3) second-degree sexual offense, and (4) second-degree rape." *Id.* at 458-59, 847 S.E.2d at 714. During closing arguments, defense counsel referred to the defendant's taped police interview as follows: "You heard [defendant] admit that things got physical. You heard him admit that he did wrong. God knows he did." *Id.* at 473, 847 S.E.2d at 722. Defense counsel also described defendant as "being honest" about the altercation with the victim during the interview and told the jury, "what I'm asking you to do is you may dislike [defendant] for injuring Ms. Leonard, that may bother you to your core but he, without a lawyer and in front of two detectives, admitted what he did and only what he did." *Id.* at 473-74, 847 S.E.2d at 722. At the conclusion of the closing argument, defense counsel asked the jury to acquit defendant of only the rape, sexual offense, and assault by strangulation charges. *Id.* at 474, 847 S.E.2d at 722.

¶ 28 The Court deemed defense counsel's statements "problematic" because they

"attested to the accuracy of" and vouched for the truth of defendant's admissions in his taped interview; stated counsel's personal opinion that "God knows [defendant] did [wrong]," implying defendant's use of force was unjustified; and "asked the jury to find defendant not guilty of every offense for which he had been charged except for the assault on a female offense," leading to "the only logical inference in the eyes of the jury . . . that defense counsel was implicitly conceding defendant's guilt as to that charge." *Id.* at 474, 847 S.E.2d at 722-23. The Supreme Court concluded that the case presented "unique circumstances" demonstrating that defense counsel made an implied concession of guilt in violation of *Harbison*. *Id.* at 476, 847 S.E.2d at 724.

¶ 29 As the State argues, Defendant's *Harbison* argument is foreclosed by this Court's decision in *State v. Womack*, 211 N.C. App. 309, 712 S.E.2d 193 (2011). In *Womack*, the defendant argued that he received ineffective assistance of counsel because his trial counsel conceded his guilt to three previous felonies during closing argument in the habitual felon proceeding. *Id.* at 313, 712 S.E.2d at 196. This Court concluded that defense counsel's statements did not amount to a *Harbison* violation. *Id.* at 317, 712 S.E.2d at 198. Alternatively, we concluded that because "the alleged *Harbison* error occurred at a proceeding convened for the purpose of determining whether Defendant's sentence should be enhanced because of his prior criminal conduct, . . . *Harbison* has no application to Defendant's claim for this reason as well." *Id.* at 318, 712 S.E.2d at 199.

¶ 30 Defendant contends that the portion of *Womack* stating that *Harbison* is inapplicable to habitual felon proceedings should be disregarded as dicta. Defendant's argument is unavailing because "alternative, independent grounds for an appellate decision are not considered obiter dicta[.]" *Propst v. N. C. Dep't of Health & Hum. Servs.*, 234 N.C. App. 165, 171, 758 S.E.2d 892, 897 (2014) (citing *Hayes v. City of Wilmington*, 243 N.C. 525, 537, 91 S.E.2d 673, 682 (1956)). We are therefore bound by *Womack* and conclude that *Harbison* has no application to Defendant's ineffective assistance of counsel claim stemming from the habitual felon proceeding. *See In re Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989) ("Where a panel of the Court of Appeals has decided the same issue, albeit in a different case, a subsequent panel of the same court is bound by that precedent, unless it has been overturned by a higher court.").

¶ 31 Even assuming for the sake of argument that *Harbison* applies to Defendant's ineffective assistance of counsel claim, Defendant has not shown that his trial counsel either expressly or impliedly admitted his guilt of attaining habitual felon status. "Any person who has been convicted of or pled guilty to three [statutorily defined] felony offenses in any federal court or state court in the United States or combination thereof is declared to be an habitual felon[.]" N.C. Gen. Stat. § 14-7.1(a) (2020). The trial court instructed the jury as follows:

> The defendant has been charged with being an

> habitual felon. An habitual felon is an individual who has plead [sic] guilty to felony offenses on at least three separate occasions since July the 6th of 1967. Each of these crimes must have been committed after the plea of guilty of the one before it.
>
> For you to find the defendant guilty of being an habitual felon, the State must prove three things beyond a reasonable doubt:
>
> First, that on November 16, 1987, the defendant in Whitfield County Superior Court, Georgia, pled guilty to the felony of possession of a firearm by a convicted felon which was committed on September the 4th of 1987 in violation of the law in the State of Georgia.
>
> Second, that on September 24, 1993, the defendant in Whitfield County Superior Court, Georgia, pled guilty to the felony of burglary which was committed on June 26th of 1993 in violation of the law of the State of Georgia.
>
> And, third, that on August 22, 2016, the defendant in Whitfield County Superior Court, Georgia, pled guilty to the felony of possession of methamphetamine which was committed on July the 3rd of 2016 in violation of the law of the State of Georgia.
>
> If you find from the evidence beyond a reasonable doubt that [Defendant pled guilty to the foregoing offenses], it would be your duty to return a verdict of guilty.
>
> If you do not so find or have a reasonable doubt as to one or more of these things, it would be your duty to return a verdict o[f] not guilty.

¶ 32 Defendant's trial counsel made the following closing argument at the habitual felon phase:

> We appreciate you all being here today, tonight, and listening to all of the evidence. This part of the trial is not -- I'm not in a position like I was the last time. The evidence sort of is out there.
>
> And if you all find that he has committed three prior felonies, then I will trust your judgment and that you've examined the exhibits and that you have found that he has committed three prior felonies making him -- giving him habitual felony status.
>
> So we would just like to thank you all for your attention to detail and for being here tonight and this week. We appreciate your service.

¶ 33 During this argument, counsel did not expressly ask the jury to find Defendant guilty of attaining habitual felon status or expressly admit to the jury that Defendant was guilty of attaining habitual felon status. Nor has Defendant shown that this case is one of the "rare occurrence[s]" where counsel violated *Harbison* by impliedly conceding Defendant's guilt. *See McAllister*, 375 N.C. at 476, 847 S.E.2d at 724. Counsel did not concede to the jury that Defendant had either pled guilty to or been convicted of three previous felonies, let alone three qualifying felonies which would support a conviction for attaining habitual felon status. Counsel stated that she trusted the jury to exercise its judgment and examine the State's exhibits. While defense counsel acknowledged the State's evidence by stating that the "evidence sort of is out there," she did not attest to the evidence's accuracy or sufficiency to support a conviction. Because counsel neither expressly nor impliedly conceded that

Defendant attained habitual felon status, Defendant has not shown that he received *per se* ineffective assistance of counsel under *Harbison*.[1]

D. Denial of Right to Appeal Sentence

¶ 34 Defendant argues that he has effectively been denied the right to appeal his sentence because the trial court file did not contain, and his appellate counsel was otherwise unable to obtain, the completed PRL Worksheet upon which his sentence was based. Absent this document, Defendant seeks a new sentencing hearing.

¶ 35 Generally, "[i]t is the appellant's duty and responsibility to see that the record is in proper form and complete." *State v. Alston*, 307 N.C. 321, 341, 298 S.E.2d 631, 644 (1983) (citations omitted). Here, despite a diligent effort, Defendant was unable to obtain a copy of the PRL Worksheet before raising this issue on appeal. Defendant contacted and followed up with the Clerk of Superior Court, the assistant district attorney, and Defendant's trial counsel, but none were able to provide the PRL Worksheet. Additionally, the Rules of Appellate Procedure permitted the State to supplement the record after Defendant raised this issue in his brief, but the State did not do so. *See* N.C. R. App. P. 9(b)(5)(a) (2021) ("If the record on appeal as settled is insufficient to respond to the issues presented in an appellant's brief . . . the

[1] Defendant makes no argument that counsel's closing argument in the habitual felon proceeding amounted to ineffective assistance of counsel under the two prong *Strickland* test. Accordingly, that issue is deemed abandoned. *See* N.C. R. App. P. 28(a) ("Issues not presented and discussed in a party's brief are deemed abandoned.").

responding party may supplement the record on appeal with any items that could otherwise have been included pursuant to this Rule 9.”).

¶ 36 A criminal defendant’s right to appeal a conviction in North Carolina “is provided entirely by statute.” *State v. Berryman*, 360 N.C. 209, 214, 624 S.E.2d 350, 354 (2006) (citations omitted). In the present case, Defendant has a statutory right to appeal because he pled not guilty and the trial court entered final judgment on the jury’s guilty verdicts. *See* N.C. Gen. Stat. §§ 7A-27(b)(1) (2020) (“[A]ppeal lies of right directly to the Court of Appeals . . . [f]rom any final judgment of a superior court, other than one based on a plea of guilty or nolo contendere[.]”); 15A-1444(a) (2020) (“A defendant who has entered a plea of not guilty to a criminal charge, and who has been found guilty of a crime, is entitled to appeal as a matter of right when final judgment has been entered.”).

¶ 37 A trial court must, prior to imposing a sentence for a felony conviction, determine the offender’s prior record level. N.C. Gen. Stat. § 15A-1340.13(b) (2020). The offender’s prior record level “is determined by calculating the sum of the points assigned to each of the offender’s prior convictions that the court, or . . . the jury, finds to have been proved” in accordance with the sentencing statute. N.C. Gen. Stat. § 15A-1340.14(a) (2020). The offender’s prior convictions may be proved by (1) “[s]tipulation of the parties,” (2) “[a]n original or copy of the court record of the prior conviction,” (3) “[a] copy of records maintained by the Department of Public

Safety, the Division of Motor Vehicles, or of the Administrative Office of the Courts," or (4) "[a]ny other method found by the court to be reliable." *Id.* § 15A-1340.14(f). The trial court must adhere to a statutory formula for the classification of out-of-state convictions. *Id.* § 15A-1340.14(e). Once the offender's prior convictions are proven, the trial court must assign a specified number of points to each conviction, *id.* § 15A-1340.14(b), and must total the points to determine the corresponding prior record level, *id.* § 15A-1340.14(c). "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).

¶ 38 The State argues that, notwithstanding the absence of the PRL Worksheet from the record, this Court may conduct a de novo review of Defendant's prior record level. We are unable to do so on the current record.

¶ 39 The transcript reflects the following colloquy occurred at Defendant's sentencing hearing:

> THE COURT: Are we ready for sentencing?
>
> [THE STATE]: Yes. . . . [Defense Counsel] and I have both signed stipulating that [Defendant] is a record level 3 with 7 points for felony sentencing.
>
> THE COURT: What would have been his prior record level if the felonies wouldn't have been his criminal convictions? I saw a worksheet in there, somebody has worked on it, that showed a prior record level 6.

> [THE STATE]: There would have been 4 points added for possession of firearm by felon. There would have been a possession of methamphetamine, so that's two other points. That's six. An additional sentencing point which we gave notice of, that's seven points.
>
> THE COURT: Okay. So this is -- we now have seven points and a prior record level of 3. . . . Is that the stipulation of the parties?
>
> [DEFENSE COUNSEL]: Yes, it is.
>
> THE COURT: All right. What else do you want to say about the sentencing . . . ?
>
> [THE STATE]: Your honor, I would just like to say that this is a repeat offense of possession of methamphetamine. Unfortunately we don't have enough treatment centers around here that we need, and so what happens is that it ends up with people incarcerated.
>
> I will say, Your Honor, if we had been able to use the prior points, it would have made him a much higher level. It's kind of tricky to fill out these prior record levels. [Multiple prosecutors] looked at that to make sure that we finally got it right. At one point we had him as a level 5. We do stipulate that he is a level 3.
>
> But based upon -- Your Honor, if we had perhaps used a level H felony instead of the possess firearm by felon as a predicate offense, it would have given him four more points that way. So in any event, I would ask that you sentence at the top of the presumptive range, that being 33 to 52 months.

Beyond this portion of the transcript, the record contains neither Defendant's PRL Worksheet nor any documentation of the convictions used to calculate Defendant's

prior record level. The record contains only the State's Notice of Intent to Introduce Additional Sentencing Points and several judgments from the Georgia convictions which the State apparently used to establish Defendant's status as an habitual felon.

¶ 40 Even if Defendant had adequately stipulated to the prior convictions alluded to by the State at the sentencing hearing—possession of firearm by a felon and possession of methamphetamine—it remains impossible to effectively review de novo the determination of Defendant's prior record level. Without the PRL Worksheet or other documentation of Defendant's prior convictions in the record, there are no dates of conviction, jurisdictions, or file numbers to distinguish between the prior convictions at issue in this case. This specifically impedes review of at least three issues: (1) whether the trial court impermissibly assigned points to multiple convictions from a single court week, *see* N.C. Gen. Stat. § 15A-1340.14(d) (2020) ("For purposes of determining the prior record level, if an offender is convicted of more than one offense in a single superior court during one calendar week, only the conviction for the offense with the highest point total is used."); (2) whether "all the elements of the present offense are included in any prior offense for which the offender was convicted," *see id.* § 15A-1340.14(b)(6); and (3) whether the trial court impermissibly calculated Defendant's prior record level using any of the convictions used to establish habitual felon status, *see id.* § 14-7.6 (2020) ("In determining the prior record level, convictions used to establish a person's status as an habitual felon shall not be

used."). The latter issue is of particular concern because two of the convictions used to establish Defendant's habitual felon status have the same name as convictions cited by the State at the sentencing hearing.

¶ 41 Because the absence of the PRL Worksheet or other documentation of Defendant's prior convictions frustrates Defendant's right to appeal his sentence by rendering appellate review of Defendant's sentence impossible, we vacate the judgment and remand for a new sentencing hearing. On remand, we note that "the court may not impose a new sentence for the same offense . . . which is more severe than the prior sentence less the portion of the prior sentence previously served." N.C. Gen. Stat. § 15A-1335 (2022).

IV. Conclusion

¶ 42 Because the Report qualified as a recorded recollection, the trial court did not err by admitting the Report, permitting Carter to testify to its contents, or failing to strike Frye's testimony. The trial court did not plainly err by permitting the State to publish copies of the Report to the jury. Defendant has failed to show that his trial counsel provided ineffective assistance of counsel during the presentation of evidence at trial and has failed to demonstrate that his trial counsel provided *per se* ineffective assistance of counsel during closing argument. However, the absence of a PRL Worksheet or documentation of Defendant's prior convictions frustrates de novo review of the trial court's calculation of Defendant's prior record level and impedes

his right to appeal that issue. Accordingly, we vacate the judgment and remand to the trial court for a new sentencing hearing.

NO ERROR IN PART; NO PLAIN ERROR IN PART; VACATED AND REMANDED IN PART.

Judges MURPHY and GRIFFIN concur.

Report per Rule 30(e).