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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA23-557

Filed 20 February 2024

Vance County, Nos. 13CRS52640–43

STATE OF NORTH CAROLINA

v.

DWAYNE G. DAVIS, Defendant.

Appeal by defendant from judgments entered 11 July 2019 by Judge Josephine K. Davis in Vance County Superior Court. Heard in the Court of Appeals 23 January 2024.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Benjamin O. Zellinger, for the State.

Tin Fulton Walker & Owen PLLC, by Zachary Ezor and Abraham Rubert-Schewel, for defendant-appellant.

FLOOD, Judge.

Dwayne Davis (“Defendant”) appeals his convictions for possession of a firearm by felon, possession of a gun with an altered serial number, and trafficking heroin. Defendant argues the trial court erred by (A) denying his motion for appropriate relief (“MAR”) because he received ineffective assistance of counsel, and his motion to

suppress should have been granted; and (B) concluding a New Jersey robbery offense was substantially similar to the North Carolina robbery offense. After careful review, we conclude Defendant did not receive ineffective assistance of counsel, but the trial court erred in its conclusion of law that stated Defendant's motion to dismiss was properly denied, and the State did not meet its burden of showing the New Jersey armed robbery offense was substantially similar to the North Carolina offense of the same.

I. Factual and Procedural Background

On or around 18 September 2013, Trikiya Whiteside ("Whiteside") traveled from Tennessee to Henderson, North Carolina to see her friends, Whitney Kornegay ("Kornegay") and Corey Brown ("Brown"). While in Henderson, Whiteside, Brown, and Kornegay were staying at the home of Defendant's grandmother, which was located at 1319 Lehman Street. At some point after Whiteside arrived in Henderson, Defendant and Kornegay drove from Henderson to New Jersey, where Defendant and Kornegay lived, so Kornegay could get more clothes and personal items.

On 20 September 2013, when Defendant and Kornegay arrived back from their trip to New Jersey, Defendant walked into his grandmother's home carrying a black duffel bag and went into the kitchen. A few minutes later, Whiteside walked into the kitchen where she observed Brown and Defendant chopping up a white powdery substance, which she believed to be drugs. After seeing the substance in the kitchen, Whiteside told Brown, "I'm leaving, I can't be around this. I have kids, it's too much

going on.” When Defendant heard Whiteside say she was leaving, he told her she “was not going anywhere” and then punched her in the face. Whiteside attempted to fight back, but Defendant hit her several more times. Defendant then told Whiteside to get out of “my people’s house.” Whiteside grabbed her belongings, left the house, and called 911.

Officer Mitchell with the Henderson Police Department responded to Whiteside’s 911 call. When Officer Mitchell arrived at 1319 Lehman Street, he observed Whiteside, whose “right eye was swollen shut, [had] blood streaming down her face, and her clothing was disheveled, as though she had just been in a fight.” Whiteside advised Officer Mitchell that she had been “beaten badly by a subject named Dwayne.”

After additional officers arrived on the scene, they knocked on the door of 1319 Lehman Street and were eventually given consent to enter the home by Defendant’s uncle. At some point between Defendant assaulting Whiteside, and Whiteside calling 911, Defendant left 1319 Lehman Street. Upon entering the home, Officer Mitchell observed plastic baggies, tape, stamps, a pot of boiling water, a pan with a white residue on it, and white powder on the countertop. A more thorough search of the kitchen also revealed bars of sweetener, which acts as a cutting agent to heroin; bindles, commonly used to package heroin; a Breitling Arms .22-caliber chrome handgun; and a Morrison .25-caliber chrome handgun that had the serial number scratched off. The firearms were located in a cabinet above the stove.

After discovering heroin in the home, Officer Mitchell contacted two members of the drug unit—Sergeants Collier and Jackson.

While officers were still at 1319 Lehman Street, an anonymous caller reported seeing Defendant walk towards a home located at 519 Hickory Street, just around the corner from 1319 Lehman Street. Officers, including Collier, responded to 519 Hickory Street where they found Defendant and Brown and took them into custody.

After Collier put Defendant in a patrol car, Collier drove back to 1319 Lehman Street to find out if his assistance was needed for the ongoing investigation and determine whether to further detain Defendant. When they arrived at 1319 Lehman Street, Collier observed an ambulance that had responded to assist Defendant's grandmother, who was having a "medical event." Defendant's grandmother was on a gurney being put into the ambulance in full view of the patrol car in which Defendant had been placed.

After Collier learned of the drugs found in the home, he decided to detain Defendant, Brown, and Kornegay, and returned to the Henderson Police Department where he began interviewing Defendant. Prior to the interview, Collier gave Defendant his *Miranda* rights, and Defendant signed a written release form waiving those rights. During the interview, Defendant stated that he took responsibility for "what was found" at 1319 Lehman Street and represented that Brown and Kornegay had nothing to do with the items found in the home. To this effect, Defendant wrote and signed the following statement:

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I, Dwayne Davis, hereby acknowledge under oath that Whitney Kornegay and Corey Brown had no knowledge or understanding of what was recovered from my grandparents' residence. I, Dwayne Davis, take full responsibility for what was found in the house. I am stating this statement in front of [] Detective Morris and Detective Collier. Thank you for much. Signed, Dwayne Davis.

For clarity, Collier asked Defendant to write down for what he was specifically taking responsibility. At this point in the interview, Defendant had not been told what items the officers discovered in the home. With no knowledge of what was recovered from the home, Defendant wrote on the bottom of the statement, "the paraphernalia, the 50 grams of heroin, and the two gunz [sic] were mine." Following Defendant's confession, Kornegay and Brown were released from custody.

On 21 April 2014, a Vance County Grand Jury indicted Defendant for one count of trafficking opium or heroin, one count of possession of a firearm by a felon, and one count of possession of a firearm with an altered serial number. Following the indictment, Defendant obtained David Waters ("Waters") to represent him. Defendant was presented with an initial plea agreement in September 2014, which he rejected.

On 11 December 2015, Defendant filed a Motion to Suppress (the "2015 Motion") all evidence seized as a result of the search of 1319 Lehman Street, arguing the evidence obtained from the home violated Defendant's Fourth Amendment rights because consent for the search was not properly obtained. The 2015 Motion came

before Judge Hobgood who, on 13 January 2016, entered a written order (the “Hobgood Order”) denying Defendant’s motion.

Following the Hobgood Order, Defendant wanted to re-engage the State with plea negotiations. Steven Gheen (“Gheen”), the then-prosecutor assigned to Defendant’s case, proposed a second plea agreement to Waters. Gheen had been approached by members of the drug unit who saw Defendant drive a Bentley to the suppression hearing. The officers were interested in the vehicle because they thought it would be useful during their undercover operations. Gheen proposed Defendant forfeit the Bentley in exchange for a reduced prison sentence.

When Waters communicated this potential offer to Defendant, Defendant informed Waters that the Bentley was rented and he was unable to use it in any plea or “forfeiture scheme.” After learning the Bentley was rented, Waters saw at a dealership an “older model Mercedes” that he thought may be a suitable alternative to the Bentley. Waters inquired with Gheen as to whether this car would be suitable for forfeiture and if Waters could make those arrangements. While these negotiations were ongoing, Waters was clear with Defendant that Defendant did not have to buy the Mercedes if he did not want to, and the case could be resolved in other ways.

Despite Waters’ assurances, Defendant grew concerned about the propriety of this plea agreement and contacted a Henderson city councilwoman to report what he thought was possible extortion. After receiving Defendant’s call, the councilwoman contacted the chief of police who in turn called the district attorney’s office. After

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Gheen learned Defendant called the councilwoman, Gheen notified Waters that “any and all plea offers that might be outstanding” would be withdrawn and Gheen would prepare the case for trial. Waters subsequently withdrew from Defendant’s case.

Following Waters’ withdrawal, Defendant obtained Patrick Megaro (“Megaro”) to represent him. Megaro filed notices of unavailability in December 2016 and January, February, March, April, May, June, July, and August 2017. The only thing Megaro appears to have done to assist Defendant was to inform the North Carolina Bureau of Investigation (“SBI”) of the plea negotiations in which Waters engaged. The SBI conducted an investigation into the legality of the plea negotiations and concluded that Defendant had not been extorted, and there was no evidence of illegal activity. Megaro subsequently withdrew from Defendant’s case after the North Carolina State Bar began investigating him for his conduct in a different case.

On 23 October 2018, Defendant requested Isaac Wright, Jr. (“Wright”) be permitted to represent him at trial. Wright was a licensed attorney in the State of New Jersey, but he was not licensed to practice law in North Carolina. Wright submitted a request to represent Defendant *pro hac vice*, which would allow Wright to practice in North Carolina for the limited purpose of representing Defendant. The trial court granted this request.

On 11 December 2018, Defendant, through Wright, filed a Motion to Suppress (the “2018 Motion”) the statement he made to Collier. On 20 February 2019, Judge Davis conducted a pre-trial motions hearing on, most relevant to this appeal, the 2018

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Motion. In the 2018 Motion, Defendant argued the statement should be suppressed because Collier “coerced” Defendant to make the statement. Specifically, Defendant argued he “took responsibility” only because Collier threatened him with the arrest of Kornegay, Brown, and Defendant’s grandmother.

At the hearing, Collier testified that he did not threaten Defendant or say that Defendant’s grandmother would be arrested unless Defendant took responsibility for the drugs and firearms found inside the home. Officer Collier testified that he did not say anything about Defendant’s grandmother with respect to the crime. Collier further testified that, during the interview, Defendant was calm, laid back, and did not mention his grandmother nor inquire about her health. At the close of the hearing, Judge Davis orally denied the 2018 Motion and subsequently entered a written order (the “Davis Order”) memorializing the denial.

The morning after the motions hearing, on 21 February 2019, Defendant’s trial began. Defendant, who had been out on bond since his arrest in 2013, did not appear in court the morning of his trial. Instead, Defendant fled the United States for Morocco, a non-extradition country, and was not present for the remainder of his trial. The trial proceeded in his absence. Whiteside testified for the State, but neither Kornegay nor Brown could be located to testify for the defense.

On 27 February 2019, the jury found Defendant guilty of possession of a firearm by felon, possession of a firearm with an altered serial number, and trafficking heroin.

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On 1 May 2019, Defendant was captured on a cruise ship attempting to enter the United States through Miami, arrested, and brought back to Vance County for sentencing.

On 11 July 2019, a sentencing hearing was held. Wright did not represent Defendant at the sentencing hearing. Defendant told the trial court that he did not wish to represent himself but instead wanted time to hire a new attorney. Defendant also rejected the trial court's offer of obtaining court-appointed counsel. After discussing Defendant's options regarding obtaining an attorney, the trial court recessed for one and a half hours. Just prior to announcing the recess, Defendant stated, "I ain't [sic] coming back in; simple as that." When the sentencing hearing resumed, Defendant refused to leave his holding cell. The trial court instructed the bailiff to ask Defendant one more time if he would make a statement to the trial court as to whether he would be representing himself or if he would like a court-appointed counsel. Defendant told the bailiff he would not be coming out of his holding cell.

The trial court proceeded with Defendant's sentencing in his absence. During the hearing, the State presented a Division of Criminal Information ("DCI") record showing Defendant had been convicted of felony armed robbery in New Jersey. On the sentencing worksheet, the trial court made a finding that the North Carolina armed robbery offense and the New Jersey armed robbery offense were substantially similar. Defendant was entered as a prior record level III having received six points for the prior New Jersey felony conviction.

Defendant was sentenced to seventeen to thirty months' imprisonment for possession of a firearm by a felon, ten to twenty-one months' imprisonment for possession of a firearm with an altered serial number, and 225 to 282 months' imprisonment for trafficking heroin. The sentences were to be served consecutively.

On 18 July 2019, Defendant, through Wright, filed a Motion for Appropriate Relief requesting the trial court vacate Defendant's conviction and dismiss the case.

On 27 January 2021, Defendant, through newly obtained counsel, filed an Amended Motion for Appropriate Relief (the "MAR"), arguing the trial court erred in (1) denying Defendant's motion to suppress his written statement, (2) failing to dismiss the charges against him for insufficient evidence, (3) violating Defendant's due process, and (4) allowing Defendant to be sentenced *in absentia*. Defendant also argued he received ineffective assistance of counsel ("IAC"). Based on these alleged errors, Defendant requested the trial court vacate his convictions and sentences. On 8 February 2023, the trial court denied the MAR, concluding, most relevant to this appeal, that the trial court properly denied Defendant's motion to suppress and Defendant did not receive IAC.

On 20 February 2023, Defendant filed a notice of appeal from the convictions and sentences of the trial court and the 8 February 2023 order denying the MAR.

II. Jurisdiction

Defendant's appeal is properly before this Court pursuant to N.C.R. App. P. 4(a)(2). An appeal from a criminal conviction must be made within fourteen days

after the judgment or order is rendered or fourteen days after an entry of the order denying a defendant's MAR. N.C.R. App. P. 4(a)(2).

Defendant filed a petition for writ of certiorari ("PWC") "out of an abundance of caution" because his notice of appeal was filed on 20 February 2023 while the MAR order was *filed* 8 February 2023, but *signed and dated* on 2 February 2023. This PWC is unnecessary as a judgment does not become final until it "is reduced to writing, signed by the judge, *and filed with the clerk of court*["] N.C. R. Civ. P. 58 (emphasis added). Because Defendant's notice of appeal was filed twelve days after the MAR order was entered, we dismiss Defendant's PWC as moot and proceed to his appeal on the merits. *See* N.C.R. App. P. 4(a)(2).

III. Analysis

Defendant presents two issues on appeal from the denial of the MAR and one issue on direct appeal from his sentencing. We will first address the issues presented based on the appeal from the MAR and then proceed to the issue presented on direct appeal.

A. Defendant's MAR

Defendant appeals the MAR, arguing (1) he received IAC through the individual errors, or, in the alternative, the cumulative errors of his attorneys, and (2) the trial court erred by denying the 2018 Motion.

"When considering rulings on motions for appropriate relief, we review the trial court's order to determine whether the findings of fact are supported by evidence,

whether the findings of fact support the conclusions of law, and whether the conclusions of law support the order entered by the trial court.” *State v. Ramsey*, 226 N.C. App. 363, 366, 739 S.E.2d 599, 602 (2013) (citation omitted). Unchallenged findings of fact are binding on appeal. *Id.* at 366, 739 S.E.2d at 602. The conclusions of law, however, “are fully reviewable on appeal.” *Id.* at 366, 739 S.E.2d at 602.

1. Ineffective Assistance of Counsel

Defendant argues each of the four lawyers he obtained between his arrest in 2013 and his trial in 2019 were ineffective. For clarity, we will review Defendant’s arguments as they pertain to each of the alleged errors.

“The burden is on the defendant to demonstrate that he received ineffective assistance of counsel ‘so . . . as to require reversal of [the defendant’s] conviction[.]’” *State v. Baskins*, 260 N.C. App. 589, 596, 818 S.E.2d 381, 389 (2018) (alterations in original) (citation omitted). This burden requires that the defendant show both elements of an ineffective assistance of counsel:

First, the defendant must show that counsel’s performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as “counsel” guaranteed by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel’s errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L. E. 2d. 674, 693 (1984). Both parts of the test are required for the defendant to show “the

conviction . . . resulted from a breakdown in the adversary process that renders the result unreliable.” *Id.* at 697, 104 S. Ct. at 2064, 80 L. E. 2d at 693. As for prejudice, “[t]he 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.” *State v. Lane*, 271 N.C. App. 307, 312, 844 S.E.2d 32, 38 (2020) (citation and internal quotation marks omitted). “Reasonable probability” means “[t]he likelihood of a different result must be substantial, not just conceivable.” *Id.* at 314, 844 S.E.2d at 39 (alteration in original) (citation omitted).

a. Plea Negotiations Conducted by Waters

First, Defendant argues Waters’ alleged misconduct in negotiating a car exchange with the police “undermined” any opportunity Defendant had to pursue a lawful plea agreement. We disagree.

A defendant’s Sixth Amendment right to counsel “extends to the plea-bargaining process.” *Lafler v. Cooper*, 566 U.S. 156, 162, 132 S. Ct. 1376, 1384, 182 L. E. 2d. 398 (2012). As such, defendants are entitled to effective assistance of counsel during plea negotiations. *Id.* at 162, 132 S. Ct. at 1384, 182 L. E. 2d. at 398. In keeping with the two-part test articulated in *Strickland*, “a defendant must show the outcome of the plea process would have been different with competent advice.” *Id.* at 163, 132 S. Ct. at 1384, 182 L. E. 2d. at 398; *see also Strickland*, 466 U.S. at 687, 104 S. Ct. at 2064, 80 L. E. 2d. at 693.

In *Lafler*, the United States Supreme Court considered how to apply the two-

part *Strickland* test for IAC claims where such ineffectiveness results in the rejection of a plea offer and a conviction at trial. *Id.* at 163, 132 S. Ct. at 1384, 182 L. E. 2d. at 398. The Supreme Court held:

[I]n these circumstances[,] a defendant must show that but for the ineffective advice of counsel there is a reasonable probability that the plea offer would have been presented to the court (*i.e.*, that the defendant would have accepted the plea and the prosecution would not have withdrawn it in light of intervening circumstances), and that the court would have accepted its terms, and that the conviction or sentence, or both, under the offer's terms would have been less severe than under the judgment and sentence that in fact were imposed.

Id. at 164, 132 S. Ct. at 1385, 182 L. E. 2d. at 398. The defendant in *Lafler*, on advice of counsel, went to trial rather than accept a plea deal and received a sentence three-and-a-half times more severe than he likely would have received by accepting the plea deal. *Id.* at 166, 132 S. Ct. at 1386, 182 L. E. 2d. at 398.

In Defendant's case, unlike in *Lafler*, Defendant was not counseled to reject the plea deal and take his chances at trial. A formal plea deal had not been offered by the State; instead, Waters and Gheen were engaged in ongoing negotiations. Further, Waters communicated to Defendant that he did not have to pursue forfeiture but could deal with the case in another way. While this "forfeiture scheme" may have been unconventional—perhaps unreasonable—the SBI investigation determined that it was not illegal. Further, unreasonable errors alone are insufficient to show Defendant received IAC. *See State v. Braswell*, 312 N.C. 553, 563, 324 S.E.2d 241,

248 (1985) (“The fact that counsel made an error, even an unreasonable error, does not warrant reversal of a conviction unless there is a reasonable probability that, but for counsel’s errors, there would have been a different result in the proceedings.”).

Defendant has not carried his burden of showing there was a reasonable probability that a different result would have been reached even without such possibly “unreasonable” negotiations. Defendant had already rejected one plea deal offered by the State, and he has presented no evidence that the State was willing to consider an alternative plea deal that did not involve forfeiture. Nothing in the Record indicates the State was open to a more traditional plea deal involving a guilty plea in exchange for a reduced sentence. Defendant has not shown, above mere conceivability, that he would have received a different plea deal without Waters pursuing the forfeiture scheme. *See Lane*, 271 N.C. App. at 312, 844 S.E.2d at 38.

Defendant, therefore, has failed to carry his ultimate burden of showing he was prejudiced by Waters’ actions. *See Strickland*, 466 U.S. at 687, 104 S. Ct. at 2064, 80 L. E. 2d. at 693; *see also Baskins*, 260 N.C. App. at 596, 818 S.E.2d at 389.

b. Wright’s Failure to Secure Witnesses

Second, Defendant argues Wright’s failure to present Kornegay and Brown as witnesses at trial constitutes “deficient performance.” We disagree.

At the motions hearing, Wright represented to the trial court that he was unable to find Kornegay, stating she had “disappeared.” Wright further represented that he was unable to locate Brown. When asked what efforts had been made to

locate these witnesses, particularly Kornegay, who had submitted an affidavit in 2014 favorable to Defendant, Wright told the trial court he used an online public records database, searched Kornegay's social media, and asked the State and Defendant for assistance. Wright stated Kornegay did not respond to any messages he sent her on her social media accounts regarding Defendant's case. The State and Defendant were likewise unable to locate Kornegay.

Defendant argues an affidavit Kornegay submitted after Defendant's conviction, stating she was not contacted by Wright and would have been willing to testify on Defendant's behalf, shows the unreasonableness of Wright's failure to secure her testimony. Given Wright's attempts to locate Kornegay, however, this is insufficient to rise to the level of IAC. *See Strickland*, 466 U.S. at 690-91, 104 S. Ct. at 2066, 80 L. E. 2d. at 693 ("[S]trategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation.").

Moreover, given Defendant's inculpatory statement and Whiteside's testimony, Defendant cannot show a reasonable probability that the outcome of his trial would have been different. *See Strickland*, 466 U.S. at 687, 104 S. Ct. at 2064, 80 L. E. 2d. at 693.

c. Cumulative Errors

Alternatively, Defendant argues that, if the above alleged errors, standing alone, do not amount to IAC, the cumulative errors of each attorney are sufficient

when considered together. Specifically, Defendant requests this Court to consider the above errors cumulatively with Megaro's failure to prepare Defendant's case for trial, Wright's courtroom conduct during trial, and local counsel's failure to be present at trial. Defendant, however, merely lists these errors as possible reasons he received IAC. It is Defendant's burden, not this Court's, to show how these errors prejudiced him, and Defendant has failed to do. *See Baskins*, 260 N.C. App. at 596, 818 S.E.2d at 389.

In sum, we conclude Defendant has not carried his burden of showing he received IAC and therefore affirm the trial court's conclusion that Defendant did not receive IAC. *See Strickland*, 466 U.S. at 687, 104 S. Ct. at 2064, 80 L. E. 2d. at 693; *see also Baskins*, 260 N.C. App. at 596, 818 S.E.2d at 389.

2. Motion to Suppress

Defendant argues the trial court erred by failing to suppress his statement, and the MAR inappropriately relied on the denial of the 2015 Motion, which did not address whether the statement should have been suppressed. To remedy this alleged error, Defendant requests this Court remand this issue to Judge Davis to address coercion "in earnest."

The trial court's conclusions of law in an MAR "must be legally correct, reflecting a correct application of applicable legal principles to the facts found." *State v. Knudsen*, 229 N.C. App. 271, 281, 747 S.E.2d 641, 649 (2013) (citation omitted).

Defendant challenges the following conclusion of law:

a. **The trial court properly denied [] Defendant's motion to suppress his written statement.** The motion to suppress was heard before the Honorable Robert Hobgood on or about [7 January 2013.] The [North Carolina Supreme] Court held in *State v. Woolridge*, 357 NC 522, 592, S.E.2 1919 (2003), a second judge may reconsider the order of the first judge “only in the limited situation where the party seeking to alter that prior ruling makes a sufficient showing of a substantial change in circumstances during the interim which presently warrants a different or new disposition of the matter.” [] Defendant failed to provide a substantial change in circumstances.

This conclusion of law does not reflect a correct application of legal principles to the facts found because the Hobgood Order did not address whether Defendant's statement should be suppressed; rather, it addressed only the consent given for the search. Judge Davis issued her own suppression order denying the 2018 Motion, which *did* address Defendant's statement. The correct review for Judge Davis to undertake when reviewing the MAR was whether her denial of the 2018 Motion was in error, not whether the Hobgood Order was in error.

We therefore remand this issue to the trial court to adequately consider whether Defendant's 2018 Motion was properly denied.

B. Defendant's Direct Appeal

On direct appeal, Defendant argues this case should be remanded for re-sentencing because the trial court failed to show Defendant's New Jersey armed robbery conviction was substantially similar to the North Carolina armed robbery statute. We agree.

“In calculating a defendant’s prior record level, a trial court must determine whether the statute under which a defendant was convicted in another state is substantially similar to a statute of a particular felony in North Carolina[.]” *State v. Graham*, 379 N.C. 75, 79, 863 S.E.2d 752, 754–55 (2021). The State bears the burden of proving “by a preponderance of the evidence” that an offense in another jurisdiction is “substantially similar to an offense in North Carolina[.]” N.C. Gen. Stat. § 15A-1340.14(e) (2023). “[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.” *State v. Sanders*, 367 N.C. 716, 720, 766 S.E.2d 331, 334 (2014). Questions of law are reviewed *de novo*. See *State v. Fortney*, 201 N.C. App. 662, 669, 687 S.E.2d 518 (2010).

The State “may establish the elements of an out-of-state offense by providing ‘evidence of the statute law of such state.’” *Sanders*, 367 N.C. at 718, 766 S.E.2d at 332 (citation omitted). “[W]hen 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.” *Id.* at 718, 766 S.E.2d at 332 (holding the trial court erred by concluding the Tennessee offense of domestic assault was substantially similar to the North Carolina offense of assault on a female without reviewing the relevant Tennessee statute).

Here, the State presented the trial court with a DCI record that confirmed

Defendant had been convicted in New Jersey of armed robbery. What the State failed to provide was the New Jersey statute under which Defendant was convicted. There is no indication in the Record that the trial court compared the New Jersey statute against the relevant North Carolina statute. This case, therefore, must be remanded for re-sentencing to allow the trial court the opportunity to adequately consider whether the New Jersey armed robbery statute is substantially similar to the North Carolina armed robbery statute. “In the interest of justice,” however, both the State and Defendant shall have the opportunity to present additional evidence at the resentencing hearing. *See State v. Morgan*, 164 N.C. App. 298, 309, 595 S.E.2d 804, 812 (2004) (instructing the trial court, on remand, to allow the State and the defendant to present additional evidence at the re-sentencing hearing “[i]n the interest of justice”).

IV. Conclusion

We conclude Defendant has not met his burden of showing he was prejudiced by his attorney’s alleged errors and therefore affirm the MAR order as to this issue. We further conclude the trial court erred in denying the MAR as it pertains to the 2018 Motion and in sentencing Defendant. We therefore affirm the MAR order in part and reverse and remand in part, and we reverse and remand for re-sentencing.

AFFIRMED in Part, REVERSED in Part, AND REMANDED

Judges ARROWOOD and GORE concur.

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Report per Rule 30(e).