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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA23-162

Filed 19 March 2024

Stokes County, No. 20 CRS 050720

STATE OF NORTH CAROLINA

v.

MARK ANTHONY BURNETTE

Appeal by Defendant from Judgment entered 25 May 2022 by Judge Angela B. Puckett in Stokes County Superior Court. Heard in the Court of Appeals 31 October 2023.

*Attorney General Joshua H. Stein, by Assistant Attorney General Narcisa Woods, for the State.*

*Kimberly P. Hoppin for Defendant-Appellant.*

HAMPSON, Judge.

**Factual and Procedural Background**

Mark Anthony Burnette (Defendant) appeals from a Judgment entered 25 May 2022 upon a jury verdict finding him guilty of Statutory Rape of a Child Less Than or Equal to 15 Years of Age. The Record before us tends to reflect the following:

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On 14 September 2020, Defendant was indicted for one count of Statutory Rape of a Child Less Than or Equal to 15 Years of Age and one count of Second-Degree Forcible Rape. Prior to jury selection, the State dismissed the charge of Second-Degree Forcible Rape. This matter came on for trial on 23 May 2022. The State called Victim to testify. Victim testified to the following:

On 6 October 2018, Victim was sleeping on the couch of a friend's house. The friend's house was a small, prefabricated house beside a "main house." Victim was awakened during the night to her hands being held above her head. Victim felt a body on top of her and her underwear and shorts being pushed to the side. Victim told "him" to get off of her twice, but she did not fight back because she was scared he would hurt her. Victim then felt his penis in her vagina. Victim could not move from under his body. He did not say anything to Victim and only made grunting sounds. He then got up and went out the door towards the main house. Victim's underwear and shorts felt wet. Victim then saw him walking into the house and was able to see his profile. Victim identified Defendant as the man she alleged came into her friend's house and raped her.

On 23 October 2018, Victim was interviewed by a forensic interviewer at the Kaleidoscope Children's Advocacy Center. The forensic interviewer informed Victim the interview would be recorded. During the interview, Victim disclosed she had been raped and provided a detailed account of what happened.

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The State introduced an audio recording of Victim's interview, which was published to the jury. At the conclusion of the recording, defense counsel requested a bench conference. Defense counsel explained, on the Record, outside the presence of the jury, a portion of the audio recording contained a statement about Defendant's prior incarceration. The trial court had previously ruled evidence of Defendant's prior incarceration inadmissible. Specifically, Victim stated she "did not know what [Defendant] was in prison for." Defendant moved for a mistrial. The trial court denied the Motion and engaged in the following colloquy with defense counsel:

THE COURT: The Court does not believe it is something that -- it did not go into detail. It was just a question of what he may be in prison for. The Court is going to give -- at your request, would give a limiting instruction that that is to be disregarded and not be used. I'll hear from you on any language you want the Court to use.

[DEFENSE COUNSEL]: Judge, can I have a moment to speak with my client?

THE COURT: Yes.

[DEFENSE COUNSEL]: Judge, I'm not going to ask the Court to give a limiting instruction. And I want to make it clear on the record why. It's because I think it will bring additional attention to the matter. But I just want -- you know, obviously, the record is played at this point. But I do think it was extremely prejudicial to him getting a fair trial, so I just want to lay the record for that.

THE COURT: The Court does not think it was so prejudicial that it would cause a mistrial. That it was literally maybe one to two seconds worth of something in a long video. But the Court does note it was in violation of the Court's order. The Court does note that.

If you request and you do not believe it is so prejudicial that you do not want me to give any limiting instructions, then I will not. I'm leaving that in whatever your trial strategy in talking with your client is. I think that it could go -- if the Court was so concerned that it was indeed that prejudicial, then I would say I'm going to give a limiting instruction. I do not believe that that was the case. I do believe it was literally about two seconds of talking there in what was a very lengthy video. It was just a one sentence spoken rather quickly. However, it was in violation of my orders, so if you request, I will give one. If you do not request, and that's part of you and your client's trial strategy as to not request it be given, then of course I will not. If you want to talk with him.

[DEFENSE COUNSEL]: No, Judge. We've discussed it. I'm not asking for a limiting instruction.

At the close of the State's evidence, Defendant moved for a directed verdict and renewed his Motion for a Mistrial. In denying both Motions, the trial court stated:

The Court would deny both motions and, of course, stand by the Court's ruling from yesterday that the Court did not find that those few seconds were prejudicial and that the Defendant did indicate it was part of the trial strategy for me to not give any further segment to the jury regarding that.

On 25 May 2022, the trial court entered Judgment, sentencing Defendant to 422 to 566 months of imprisonment. The trial court ordered Defendant to register as a sex offender for the rest of his natural life and entered a permanent no-contact order with Victim. Defendant gave oral Notice of Appeal in open court. The trial court later entered a Corrected Judgment, sentencing Defendant to 422 to 567 months of imprisonment.

### **Issues**

The dispositive issues on appeal are whether: (I) the trial court abused its discretion in denying Defendant’s Motion for a Mistrial; and (II) the trial court erred in sentencing Defendant as a prior record level VI.

**Analysis**

**I. Motion for Mistrial**

Defendant contends the trial court abused its discretion in denying Defendant’s Motion for a Mistrial. We disagree.

“[A] judge must declare a mistrial upon the defendant’s motion if there occurs during the trial an error or legal defect in the proceedings, or conduct inside or outside the courtroom, resulting in substantial and irreparable prejudice to the defendant’s case.” N.C. Gen. Stat. § 15A-1061 (2021). However, “[i]t is within the trial court’s discretion to determine whether to grant a mistrial, and the trial court’s decision is to be given great deference because the trial court is in the best position to determine whether the degree of influence on the jury was irreparable.” *State v. Hill*, 347 N.C. 275, 297, 493 S.E.2d 264, 276 (1997) (citation omitted). As such, “[o]ur standard of review when examining a trial court’s denial of a motion for mistrial is abuse of discretion.” *State v. Dye*, 207 N.C. App. 473, 482, 700 S.E.2d 135, 140 (2010) (citation and quotation marks omitted). “An abuse of discretion occurs ‘only upon a showing that the judge’s ruling was so arbitrary that it could not have been the result of a reasoned decision.’” *State v. Salentine*, 237 N.C. App. 76, 81, 763 S.E.2d 800, 804

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(2014) (quoting *State v. Dial*, 122 N.C. App. 298, 308, 470 S.E.2d 84, 91 (1996), *disc. review denied*, 343 N.C. 754, 473 S.E.2d 620 (1996)).

In the case *sub judice*, Defendant moved for a mistrial after the State placed prejudicial information—Defendant’s prior incarceration—before the jury, despite the trial court’s earlier ruling such evidence was inadmissible. However, upon Defendant’s Motion, the trial court and defense counsel engaged in a lengthy colloquy, and the trial court noted, on the Record, the statement violated the trial court’s order but was not so prejudicial to cause a mistrial. Further, the trial court offered to give limiting instructions regarding the statement, but Defendant elected not to have the trial court give limiting instructions as part of his trial strategy. Thus, given the trial court’s immediate and reasonable steps to address the statement regarding Defendant’s prior incarceration, we cannot conclude the trial court’s decision to deny Defendant’s Motion was not the result of a *reasoned* decision. *See Salentine*, 237 N.C. App. at 81, 763 S.E.2d at 804. Therefore, the trial court did not abuse its discretion in denying Defendant’s Motion for a Mistrial. Consequently, we affirm the trial court’s ruling.

### II. Prior Record Level

Defendant contends the trial court erred in calculating his prior record level, and the State agrees.

“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) (citation omitted). A miscalculation of the points is harmless where “deducting the improperly assessed points would not affect the defendant[’s prior] record levels.” *State v. Lindsay*, 185 N.C. App. 314, 316, 647 S.E.2d 473, 474 (2007) (citation omitted). “It is not necessary that an objection be lodged at the sentencing hearing in order for a claim that the record evidence does not support the trial court’s determination of a defendant’s prior record level to be preserved for appellate review.” *State v. Crook*, 247 N.C. App. 784, 796, 785 S.E.2d 771, 780 (2016) (citations and quotation marks omitted).

A prior record level is determined by calculating the sum of the points assigned to each of the offender’s prior convictions. N.C. Gen. Stat. § 15A-1340.14(a) (2021). “[T]hough defendant could and did stipulate to the existence of his out-of-state convictions, . . . he *could not* stipulate to a question of law, i.e., whether the State proved by the preponderance of the evidence that an offense classified as either a misdemeanor or a felony in the other jurisdiction is substantially similar to an offense in North Carolina[.]” *State v. Henderson*, 201 N.C. App. 381, 387, 689 S.E.2d 462, 466 (2009) (citations and quotation marks omitted) (emphasis in original).

Here, the Record establishes the State offered a prior record level worksheet to which Defendant stipulated he had been convicted of voluntary manslaughter in South Carolina; the worksheet assigned this conviction 6 points. However, as the State concedes, the Record does not reflect the State provided the trial court the applicable law to determine whether the South Carolina offense is substantially

similar. Thus, the State failed to meet its burden of showing Defendant's prior out-of-state conviction was substantially similar to a North Carolina offense. *See State v. Sanders*, 367 N.C. 716, 719, 766 S.E.2d 331, 333 (2014) ("We agree with the Court of Appeals that for a party to meet its burden of establishing substantial similarity of an out-of-state offense to a North Carolina offense by the preponderance of the evidence, the party seeking the determination of substantial similarity must provide evidence of the applicable law."). Therefore, it was error for the trial court to determine the out-of-state conviction was substantially similar to a North Carolina offense. Consequently, we remand this matter to the trial court for resentencing to allow the trial court to determine whether Defendant's South Carolina voluntary manslaughter conviction is substantially similar to the North Carolina offense.

**Conclusion**

Accordingly, for the foregoing reasons, there was no error in Defendant's trial, and we remand this matter to the trial court for resentencing.

NO ERROR IN PART; REMANDED FOR RESENTENCING.

Judges STROUD and GORE concur.

Report per Rule 30(e).