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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA22-1035

Filed 18 June 2024

Rockingham County, Nos. 20 CRS 559, 51985-87; 21 CRS 275

STATE OF NORTH CAROLINA

v.

DENKIMBE ANTONIO WILLIAMS, Defendant.

Appeal by Defendant from judgment entered 18 February 2022 by Judge William Anderson Long, Jr., in Rockingham County Superior Court. Heard in the Court of Appeals 7 June 2023.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Laura H. McHenry, for the state-appellee.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Katy Dickinson-Schultz, for the defendant-appellant.

STADING, Judge.

Defendant Denkimbe Antonio Williams appeals from a judgment after a jury found him guilty of two counts of first-degree kidnapping, felony larceny, two counts of robbery with a dangerous weapon, assault with a deadly weapon with intent to inflict serious injury, larceny of a firearm, and first-degree burglary. For the reasons below, we hold no error in part, vacate in part and remand.

I. Background

Around 10:00 p.m. on 22 July 2020, Mr. Knight fell asleep on a couch downstairs at his home while his wife retired to their upstairs bedroom for the night. Mr. Knight was jolted awake by loud banging on his front door. Peering outside, he spotted a woman pleading for assistance. As soon as he opened the door, an unidentified man pushed the woman aside and put a gun in Mr. Knight's face. Although Mr. Knight first observed only the male and female intruders entering, he suspected the presence of another individual lurking in his front yard.

The male assailant pushed Mr. Knight in the entry hallway. He was forced away from the front door, in the hall, past the staircase, and into the living room "off to the side." In the living room, he was made to lie face down on the floor. The gun was put to the back of Mr. Knight's neck as he was commanded to "stay right there" or he would be shot. The intruders then demanded the location of his safe, striking Mr. Knight in the head with the gun each time he insisted he had none. After enduring blows to his head from a gun and kicks to his ribs, a distressed Mr. Knight capitulated, disclosing the whereabouts of a firearm and some cash in hopes of ending the ordeal. Mr. Knight bled through a rug and onto the carpet due to his injuries and later required seven staples to close his wounds at the hospital. While keeping his head lowered, he discerned the sounds of the assailants dispersing, with one heading upstairs and the other rummaging through kitchen drawers. The man with the gun remained in the living room with Mr. Knight.

Meanwhile, the disturbance had awakened Mrs. Knight, who remained in her upstairs bed upon hearing the commotion emanating from below. She stayed in bed and did not get up. When she looked to her left, Mrs. Knight saw a girl standing on the stairs landing, looking through the drawer of a table. Then someone approached from behind and told her to turn over. Mrs. Knight's recent shoulder surgery created difficulty for her in turning over and "that's when they put the gun at [her] neck" and compelled her to reveal the locations of cash, jewelry, and purse. After realizing the intruders had left, Mrs. Knight ventured downstairs, only to find her husband injured. Mrs. Knight promptly called 911. The Knights reported multiple items had been stolen from various locations in the house, including \$360 in cash, silver coins, two firearms, jewelry, knives, other collectibles, a recently purchased iPad, and a newer model iPhone.

The next day, a North Carolina Department of Transportation ("NCDOT") employee, was working on a road near the Knights' home, and encountered a man later identified as Matthew Deve. The NCDOT worker kindly offered his cell phone to Deve, allowing him to make a call. Upon noticing the law enforcement presence at the Knights' home, the NCDOT employee informed deputies of his encounter with Deve and furnished them with the dialed number. Acting on this lead, officers located Deve near another vehicle in the vicinity described by the NCDOT employee. Deve then tried to speak with a narcotics officer, leading to his transportation to the sheriff's office.

On 30 July 2020, detectives interviewed Deve, unraveling his involvement in the burglary and armed robbery at the Knights' property. During the interrogation, it surfaced that Deve served as a drug dealer under a larger drug trafficker. Deve disclosed the identities of the individuals involved in the Knights' burglary and robbery as Defendant, Defendant's supposed "niece" Karina Espinosa, and an unidentified male known as "B.O." or "Boo."

According to Deve, the trio coerced him at gunpoint from a trailer park, demanding that he lead them to Johnson's safe house for a robbery. Contriving a deception, Deve misled them to believe that the Knights' residence was the drug trafficker's safe house. He recounted how, upon arriving, he was compelled to the front door, but then seized the moment to escape after witnessing Defendant assault Mr. Knight.

In a subsequent interview on 31 January 2022, Deve changed his initial account, revealing inaccuracies in his previous statements. He clarified that although his intention was not to lead them to the Knights but to kidnap and torture the trafficker, he failed to correct the misconception that the Knights' home belonged to the trafficker. Deve also confessed to having a personal connection with the Knights, as he had visited their home before, being acquainted with their son.

A grand jury indicted Defendant with an array of felonies, including two counts of first-degree kidnapping, felony larceny, two counts of robbery with a dangerous weapon, assault with a deadly weapon resulting in serious injury, two counts of

larceny of a firearm, and first-degree burglary. This case was brought before Rockingham County Superior Court for trial on 14 February 2022. Before the start of the trial, the State opted to dismiss one count of larceny of a firearm against Defendant.

Throughout the trial, Deve, a pivotal witness for the prosecution, delivered testimony aligned with his second interview with law enforcement officers. Defense counsel, seeking to illuminate potential biases and motivations behind Deve's testimony, endeavored to probe into Deve's bond reductions, his plea agreement with the State, the extent of the sentence Deve was potentially facing before striking the plea, and any sentencing concessions he was granted. These attempts, however, were met with restrictions from the trial court, which cited concerns such as the potential for jury confusion among its reasons for limiting this line of questioning.

After the State's presentation of evidence, Defendant moved to dismiss all charges, asserting that the evidence presented could not warrant a conviction. The trial court denied Defendant's motion and left the charges for the jury's consideration. Defendant reiterated his motion to dismiss at the close of all evidence, which the trial court once again denied. After deliberation, the jury convicted Defendant on all the charges. Subsequently, Defendant entered a guilty plea to attaining habitual felon status. The trial court sentenced Defendant and arrested judgment on the two counts of first-degree kidnapping. Defendant filed his notice of appeal on the same day.

II. Jurisdiction

As a final judgment, this Court has jurisdiction to hear Defendant's appeal per N.C. Gen. Stat. § 7A-27(b) (2023).

III. Analysis

Defendant raises these issues on appeal: (1) whether the trial court erred by preventing him from eliciting certain information upon cross-examining one of the State's witnesses, (2) whether the trial court erred by denying Defendant's motion to dismiss the kidnapping charges, (3) whether the trial court erred by denying Defendant's motion to dismiss the larceny charges, and (4) whether the trial court erred in sentencing Defendant as a prior record level IV.

A. Cross-Examination of Deve

Defendant first argues the trial court erred by limiting defense counsel's cross-examination of Deve because "the trial court prevented defense counsel from fully undermining the central prosecuting witness's credibility[.]" Yet the State alleges that Defendant did not properly preserve this issue for appellate review since Defendant failed to raise a Confrontation Clause or other constitutional issue about Deve's cross-examination.

"[T]o 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.*" N.C. R. App. P. 10(a)(1) (emphasis added). "[A] defendant

must voice his objection at trial such that it is apparent from the circumstances that his objection was based on the violation of a constitutional right.” *State v. Spence*, 237 N.C. App. 367, 370, 764 S.E.2d 670, 674 (2014). “If a party’s objection puts the trial court and opposing party on notice as to what action is being challenged and why the challenged action is thought to be erroneous . . . the specificity requirement has been satisfied.” *State v. McLymore*, 380 N.C. 185, 193, 868 S.E.2d 67, 74 (2022).

In this case, the defense’s line of questioning aimed to preserve issues for appeal concerning Defendant’s ability to confront Deve. The defense questioned Deve about his bond reduction when the State objected before the inquiry could be completed. A sidebar discussion ensued outside of the jury’s presence, during which defense counsel clarified his intention to explore whether Deve’s bond was reduced as a concession. The trial court acknowledged this intent and advised defense counsel that he could question Deve regarding any concessions he had received in exchange for the information he provided.

When the jury returned to the courtroom, the defense resumed its examination of Deve. The questioning shifted towards the specifics of the plea agreement, particularly what sentence Deve believed he would face had he not entered into the agreement. The trial court intervened at this point, calling for the jury to be excused once again. In the absence of the jury, defense counsel expressed the belief that probing into the penalties Deve anticipated before the plea agreement and the benefits he perceived from it could influence the reliability of his testimony. Here,

the defense preserved for appeal any issues related to Defendant's right to confront witnesses by clarifying the intended line of questioning and its underlying reason, thereby ensuring that the context and purpose of the inquiries were unmistakably documented in the trial record.

"In general, we review a trial court's limitation on cross-examination for abuse of discretion." *State v. Bowman*, 372 N.C. 439, 444, 831 S.E.2d 316, 319 (2019) (citation omitted). Though a defendant generally may not cross-examine a witness about pending charges, "[a]n exception to this rule is compelled by the Sixth Amendment Confrontation Clause when a defendant seeks to show bias or undue influence by the [S]tate because of the pending charges." *Id.* at 444, 831 S.E.2d at 320 (citations omitted). Yet "[t]he trial judge's rulings in controlling cross examination will not be disturbed unless it is shown that the verdict was improperly influenced." *State v. Hatcher*, 136 N.C. App. 524, 526, 524 S.E.2d 815, 816 (2000) (citation omitted). "[T]he trial judge has discretion to ban unduly repetitious and argumentative questions, as well as inquiry into matters of tenuous relevance." *Id.* (citation omitted).

In the cross-examination of Deve, the defense explored: the rationale for the consent-driven bond reduction for Deve, his understanding of the potential length of his sentence, and any advantages promised to him for his testimony. Defendant argues that the trial court's restriction on these lines of inquiry was prejudicial and curtailed the defense's ability to cross-examine Deve comprehensively. Defendant

argues Deve's testimony was crucial as he was the key witness linking Defendant to the crimes.

Defendant further argued the reasons behind the reduction of Deve's \$200,000 bond was crucial for establishing Deve's potential bias, as such an action could suggest a concession for his cooperation. When the defense attempted to question the specifics of Deve's bond, the State objected, deeming the inquiry irrelevant, prejudicial, and potentially confusing for the jury. Defense counsel clarified his intention to investigate whether the reduction of Deve's bond was a form of concession. The trial court suggested that a consent order for bond reduction is commonly granted without necessarily implying any further agreement, labeling the defense's conjecture as "a stretch." Ultimately, the trial court expressed concern over the potential for jury confusion when discussing concessions but permitted inquiries about any concessions linked to the information Deve provided.

The trial court's decision to curtail Defendant's questioning was not an abuse of its discretion, especially given that it had allowed questions about any concessions Deve may have received in exchange for his cooperation. Though the trial court permitted general questions about the consent bond, defense counsel eventually decided not to pursue further questions along this vein. *See State v. Wilson*, 322 N.C. 117, 135–36, 367 S.E.2d 589, 600 (1988) ("It was not an abuse of discretion to prohibit the witness from answering since the witness had already stated that he was

motivated to testify for the State because of a plea bargain arrangement—testimony more probative of bias than the legal distinction asked of him by the defense.”).

Defendant also contends the trial court improperly limited his inquiry into how much time Deve thought he was facing because “[i]f defense counsel had been able to elicit what Deve’s expectation was, the jury would have concrete evidence of how motivated Deve was to testify against [Defendant].” Defendant added that he failed to show the full extent of Deve’s bias because the line of questioning the trial court allowed only permitted him to discuss certain concessions and not others, like Deve’s bond reduction.

The trial court determined questions about Deve’s understanding of “the laws concerning parole” were “questions asked for legal knowledge of a lay witness[.]” Although the trial court agreed “with counsel for the defense in so far that [he had] the right to question with respect to did he anticipate, for example, some reduction in exchange for his testimony.” But, the trial court continued “when we start talking about specifics and his understanding of maximum punishments, et cetera, we get way off course.”

While a party may inquire into plea agreements between a witness and the State, “[i]t is entirely proper for a trial court, in the exercise of its discretion, to sustain an objection calling for the legal knowledge of a lay witness.” *State v. Atkins*, 349 N.C. 62, 80, 505 S.E.2d 97, 109 (1998) (citations omitted). Here, the trial court first provided defense counsel with specific parameters to ask about Deve’s testimony.

The defense then made specific inquiries from Deve, including the following: (1) the terms of Deve's plea agreement, (2) the consolidation of his charges, (3) the requirement that he testify against Defendant and Karina Espinosa, (4) the charges to be dropped in exchange for his testimony, and (5) that sentencing hinged on his testimony at this trial. The defense was allowed to inquire into any potential bias had by Deve based on any arrangement between Deve and the prosecution. Such a line of questioning sufficed to elicit potential bias, and the limitation on further questioning was not an abuse of discretion on the trial court. *See Atkins*, 349 N.C. at 81, 505 S.E.2d at 109; *Wilson*, 322 N.C. at 135–36, 367 S.E.2d at 600.

Lastly, Defendant contends that the trial court violated his Sixth Amendment right to impeach Deve, and such error was not harmless. However, as established above, the trial court committed no error in limiting Defendant's questioning.

B. Defendant's Motion to Dismiss

Next, Defendant argues the trial court erred by denying his motion to dismiss kidnapping and felony larceny charges. At trial, Defendant made a general motion to dismiss all charges for insufficient evidence at the close of the State's case and then renewed it at the close of evidence. Thus, Defendant "preserved all issues related to the sufficiency of the evidence for appellate review." *State v. Golder*, 374 N.C. 238, 246, 839 S.E.2d 782, 788 (2020); N.C. R. App. P. 10 (a)(3).

Our Court reviews a trial court's denial of a motion to dismiss *de novo*. *State v. Guin*, 282 N.C. App. 160, 175, 870 S.E.2d 285, 296 (2020) (citation omitted). When

considering a motion to dismiss for insufficient evidence, the trial court determines “whether there is substantial evidence of each essential element of the crime and that the defendant is the perpetrator.” *State v. Winkler*, 368 N.C. 572, 574, 780 S.E.2d 824, 826 (2015) (citation omitted). “Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” *State v. Hoyle*, 373 N.C. 454, 458, 838 S.E.2d 435, 439 (2020) (citation omitted). The trial court must consider the evidence “in the light most favorable to the State; the State is entitled to every reasonable intendment and every reasonable inference to be drawn therefrom.” *Golder*, 374 N.C. at 250, 839 S.E.2d at 790 (citing *Winkler*, 368 N.C. at 574, 780 S.E.2d at 826).

1. Kidnapping Charges

Under double jeopardy, an individual may not be convicted of kidnapping if the restraint, confinement, or movement is an inherent feature of another felony committed at the same time as the alleged kidnapping. *Guin*, 282 N.C. App. at 176, 870 S.E.2d at 269 (citation omitted). Under N.C. Gen. Stat. § 14-39(a)(2):

Any person who shall unlawfully confine, restrain, or remove from one place to another, any other person 16 years of age or older without the consent of such person . . . shall be guilty of kidnapping if such confinement, restraint or removal is for the purpose of . . . [f]acilitating the commission of any felony or facilitating flight of any person following the commission of a felony[.]

N.C. Gen. Stat. § 14-39(a)(2) (2023). The kidnapping statute “was not intended by the Legislature to make a restraint, which is an inherent, inevitable feature of such

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other felony, also kidnapping so as to permit the conviction and punishment of the defendant for both crimes.” *State v. Thomas*, 196 N.C. App. 523, 533–34, 676 S.E.2d 56, 63 (2009) (citing *State v. Fulcher*, 294 N.C. 503, 523, 243 S.E.2d 338, 351 (1978)). Thus, the pertinent question before us is “whether the victim is exposed to greater danger than that inherent in the armed robbery itself or subjected to the kind of danger and abuse the kidnapping statute was designed to prevent.” *State v. Warren*, 122 N.C. App. 738, 741, 471 S.E.2d 667, 669 (1996) (quoting *State v. Johnson*, 337 N.C. 212, 221, 446 S.E.2d 92, 98 (1994)).

Defendant’s argument centers on the assertion that the restraint experienced by both Mr. and Mrs. Knight during the armed robbery does not suffice to uphold his first-degree kidnapping convictions. He posits that the actions constituting the alleged kidnapping were integral to the execution of the armed robbery, thereby warranting the vacation of the kidnapping charges. The State counters that the purpose of the victims’ restraint was to reduce their ability to resist, prevent them from seeking or receiving help, and allowing Defendant to flee following the commission of the felony. Further, the State argues that the victims were exposed to a greater danger than that inherent in the armed robbery itself and subjected to the type of danger the kidnapping law was designed to prevent.

We first consider the record as it pertains to Mr. Knight. Defendant urges us to hold that this matter mirrors the facts in *State v. Wade*, 181 N.C. App. 295, 639 S.E.2d 82 (2007). There, the defendant was found guilty of robbery with a dangerous

weapon, assault with a deadly weapon inflicting serious injury, and kidnapping. *Id.* at 301, 639 S.E.2d at 87. The evidence showed the defendant grabbed the victim while the other robber struck the victim with his fists; one of the assailants then hit the victim with a pistol and, when the victim dropped to the floor, kicked the victim and asked, “Where is the money at?”; the assailants then “start[ed] to drag” the victim “*a very short distance*” toward a safe they sought to open. *Id.* at 300–01, 639 S.E.2d at 87 (emphasis added). In vacating the kidnapping charge, this Court held “[a]ny confinement and restraint was inherent in the assault of” the victim and “[t]he removal was inherent in the robbery with a dangerous weapon[.]” *Id.* at 301–02, 639 S.E.2d at 87–88.

The State maintains this case is more akin to *State v. Warren*, 122 N.C. App. 738, 471 S.E.2d 667. There, the defendant was found guilty of kidnapping and robbery with a dangerous weapon. *Id.* at 740, 471 S.E.2d at 668. Evidence showed that the defendant robbed a convenience store; punched the clerk in the face; forced him into a storage area; hit him on top of his head with a gun requiring staples; and choked him with a chain. *Id.* at 739, 471 S.E.2d at 668. Citing the North Carolina Supreme Court’s ruling in *State v. Johnson*, 337 N.C. 212, 221, 446 S.E.2d 92, 98, this Court ultimately determined that “the removals by [the] defendant were not an integral part of the crime nor necessary to facilitate the robbery” and thus held no error since there was evidence sufficient to withstand a motion to dismiss. *Warren*, 122 N.C. App. 740-42, 471 S.E.2d at 669.

Mr. Knight's testimony details that he was pushed away from the front door at gunpoint, in the hall, past the staircase, and into the living room where he was made to lie face down on the floor and told to "stay right there" or he would be shot. Defendant was seeking the location of a safe and continued striking Mr. Knight in the head with the gun each time he denied its existence, no such safe was located in the room where he was held captive. Detained in the living room, Mr. Knight heard the assailants rummaging and taking items from various locations in the house. Mr. Knight kept his face in the ground and believed the man with the gun remained in the same room with him. Here, "in the light most favorable to the State," *Golder*, 374 N.C. at 250, 839 S.E.2d at 790, our *de novo* review, *Guin*, 282 N.C. App. 160, 175, 870 S.E.2d 285, 296, reveals that Mr. Knight's removal to the living room was not an inherent and integral part of the robbery. *See Warren*, 122 N.C. App. 738, 471 S.E.2d 667. The record shows that the facts of this case bear a greater similarity to those cited by the State and Defendant's actions "subjected [Mr. Knight] to the kind of danger and abuse the kidnapping statute was designed to prevent." *Johnson*, 337 N.C. 212, 221, 446 S.E.2d 92, 98. We therefore hold that the trial court did not err in denying Defendant's motion to dismiss the kidnapping charges of Mr. Knight.

As to the kidnapping of Mrs. Knight, the record reveals that she learned of the intrusion upon hearing disturbances from the lower level of her home and encountering an unidentified female intruder beside her bed. Mrs. Knight remained in her bed and was directed to turn to over. She had difficulty doing so, due to

surgery, and then was threatened by an assailant pressing a gun to the back of her neck. Under gunpoint, she directed the assailant towards her jewelry box and purse upon his demand for money. The ordering of Mrs. Knight to remain in bed and turn over “was a mere technical asportation and insufficient separate restraint to support conviction for a separate kidnapping offense.” *State v. Stephens*, 175 N.C. App. 328, 337, 623 S.E.2d 610, 616 (2006) (citation omitted) (holding the defendant’s pushing the victim toward a register at gunpoint was “inherent” and “integral” to the armed robbery). While the acts of Defendant and his counterparts “were vile and reprehensible, we are unable to discern how any confinement, restraint, or removal of [Mrs. Knight] was not an inherent and integral part of either the robbery with a dangerous weapon or the assault.” *Wade*, 181 N.C. App. at 302, 639 S.E.2d at 88. Accordingly, even in the light most favorable to the State, insufficient evidence exists to supports separate charges of the armed robbery and kidnapping of Mrs. Knight. Thus, we vacate the kidnapping conviction with respect to Mrs. Knight. *See State v. Pakulski*, 326 N.C. 434, 439-40, 390 S.E.2d 129, 132 (1990) (“When judgment is arrested because of a fatal flaw which appears on the face of the record, such as a substantive error on the indictment, the verdict itself is vacated and the state must seek a new indictment if it elects to proceed again against the defendant []. However, we hold that when judgment is arrested on predicate felonies in a felony murder case to avoid a double jeopardy problem, the guilty verdicts on the underlying felonies remain on the docket and judgment can be entered if the conviction for the

murder is later reversed on appeal, and the convictions on the predicate felonies are not disturbed upon appeal.”).

2. Fair Market Value of Stolen Items

Defendant next argues that the State failed to establish the fair market value of the items taken—*i.e.*, two firearms, silver coins, jewelry, knives, “collectibles,” an iPad, an iPhone, and \$360 in cash. As a result, he contends his felony larceny conviction must be vacated.

To obtain a conviction for felony larceny, the State has the burden of proving the value of the goods stolen is more than \$1,000. N.C. Gen. Stat. § 14-72(a) (2023). “However, the State is not required to produce direct evidence of . . . value to support the conclusion that the stolen property was worth over \$1,000.00, provided that the jury is not left to speculate as to the value of the item.” *State v. Wright*, 273 N.C. App. 188, 191, 848 S.E.2d 252, 254 (2020) (internal quotation marks and citations omitted). “Rather, the State is merely required to present some competent evidence of the fair market value of the stolen property, which the jury may then consider.” *Id.* “[I]f a reasonable inference of defendant’s guilt can be drawn from the evidence, then it is the jury’s decision whether such evidence convinces them beyond a reasonable doubt of defendant’s guilt.” *State v. Irwin*, 304 N.C. 93, 98, 282 S.E.2d 439, 443 (1981) (citations omitted).

Defendant argues that because the only item the Knights valued in their testimony was cash, the jury was left to speculate the value of the remaining items.

Though Defendant is correct that exact values for the remaining items were not proffered, the State’s evidence still allowed the jury to reasonably infer that the fair market value of all the stolen items cumulatively exceeded \$1,000.00. Because N.C. Gen. Stat. § 14-72 does not require the State to establish the exact dollar amount of each item, “the jury was free to exercise their own reason, common sense and knowledge acquired by their observation and experiences of everyday life.” *State v. Gorham*, 262 N.C. App. 483, 488, 822 S.E.2d 313, 316 (2018) (citing *State v. Edmondson*, 70 N.C. App. 426, 430, 320 S.E.2d 315, 318 (1984), *aff’d*, 316 N.C. 187, 340 S.E.2d 110 (1986)).

The evidence of the stolen items—an estimated \$360 in cash, silver coins, jewelry, knives, a “pretty new” iPad, “a newer model” iPhone, and two firearms, and collectibles—allowed the jury, by the exercise of their reason, common sense, and knowledge, to determine the cumulative value of greater than \$1,000.00. *Id.* “The State is not required to produce direct evidence of value to support the conclusion that the stolen property was worth over \$ 1,000.00, provided that the jury is not left to speculate as to the value of the item.” *State v. Davis*, 198 N.C. App. 146, 151–52, 678 S.E.2d 709, 714 (2009) (internal quotation marks, ellipsis, and citation omitted). Considering the evidence in the light most favorable to the State, the Knights’ testimony describing the items did not leave the jury to mere speculation and was adequate to survive a motion to dismiss.

C. Sentencing

Finally, Defendant argues the trial court erred in sentencing him as a prior record level four because the record does not contain written notice of the State's intent to prove he committed these crimes while on probation for a prior, unrelated offense. "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. Wright*, 265 N.C. App. 354, 356, 826 S.E.2d 833, 835 (2019) (citation omitted). "Pursuant to N.C. Gen. Stat. § 15A-1340.14(b)(7), one point is added to a defendant's aggregate prior record level '[i]f the offense was committed while the offender was on supervised or unsupervised probation[.]'" *State v. Dalton*, 274 N.C. App. 48, 56, 850 S.E.2d 560, 566 (2020) (quoting N.C. Gen. Stat. § 15A-1340.14(b)(7) (2023)). If the State intends to prove the existence of the prior record point, it must provide the defendant with written notice at least thirty days before trial. N.C. Gen. Stat. § 15A-1340.16(a6) (2023). The statute, however, does allow a defendant to waive notice. *Id.*

Defendant maintains that this case is controlled by *State v. Snelling*, 231 N.C. App. 676, 752 S.E.2d 739 (2014). In *Snelling*, the defendant was found guilty and stipulated that he had six points and was thus a prior record level three. *Id.* at 678, 752 S.E.2d at 742. One of the defendant's points derived from the fact that he was on probation at the time the offenses were committed. *Id.* This Court held that the trial court erred by including a point for probation in its sentencing since: (1) the trial court never determined whether the statutory requirements of N.C. Gen. Stat. § 15A-

1340.16(a6) were met; (2) there was no evidence in the record to show that the State provided sufficient notice of its intent to prove the probation point; and (3) the record did not indicate that the defendant waived his right to receive such notice. *Id.* at 682, 752 S.E.2d at 744.

Here, the record does not show that the statutory requirements of N.C. Gen. Stat. § 15A-1340.16(a6) were met or that the State provided prior statutory notice of its intent to prove the probation point. Therefore, we are left to determine whether Defendant waived such notice. During the sentencing phase of the proceeding, the following exchange occurred between the trial court and Defendant's trial counsel:

TRIAL COURT: All right. [Defendant's attorney], do you agree that [Defendant] is a prior record level of [four]?

DEFENANT'S ATTORNEY: We do, for habitual felon sentencing purposes. Your Honor, we'd also stipulate that he was on— you've heard evidence that he was on probation at the time of the alleged offense. That in effect gives him one point. We— and just acknowledge that.

...

TRIAL COURT: The parties have stipulated by worksheet, and the Court will make a finding that for the purposes of sentencing hereunder, [Defendant] is a prior record level of four. The Court is going to consolidate the guilty counts into two sentences for the purposes of sentencing.

This conversation and statements by Defendant's attorney directly admitting the basis for the point and its implication distinguishes the present matter from *State v. Snelling*, 231 N.C. App. 676, 752 S.E.2d 739 (2014).

In *State v. Wright*, this Court examined the waiver of the notice requirement of N.C. Gen. Stat. § 15A-1340.16(a6) and reiterated that “[w]aiver is the intentional relinquishment of a known right, and as such, knowledge of the right and an intent to waive it must be made plainly to appear.” 354, 357-58, 826 S.E.2d 833, 836 (2019) (citing *Ussery v. Branch Banking & Tr.*, 368 N.C. 325, 336, 777 S.E.2d 272, 279 (2015) (citation and quotation marks omitted)). Here, the statements to the trial court by Defendant’s attorney plainly appear to waive the notice requirement on behalf of his client. See *State v. Scott*, 287 N.C. App. 600, 610, 883 S.E.2d 505, 513 (2023) (holding “[t]hough the trial court did not question Defendant directly about his intent to waive notice, as in *Wright*, we hold that defense counsel’s stipulation and affirmation on behalf of his client was sufficient to constitute waiver of the notice requirement.).

However, our review of the record shows that the trial court did not conduct the statutorily required inquiry of considering the additional point for sentencing purposes under the Blakely Act. N.C. Gen. Stat. § 15A-1022.1 (2023).

When a defendant admits to a prior record finding for the offense of committing a crime while on probation, parole, or post-release supervision, the trial court must also perform a mandatory colloquy with the defendant personally and advise the defendant that:

- (1) He or she is entitled to have a jury determine the existence of any aggravating factors or points under G.S. 15A-1340.14(b)(7); and
- (2) He or she has the right to prove the existence of any mitigating factors at a sentencing hearing before the sentencing judge.

State v. Scott, 287 N.C. App. 600, 611, 883 S.E.2d 505, 514 (2023) (citing N.C. Gen. Stat. § 15A-1022.1(b). But these procedures are applicable “unless the context clearly indicates that they are inappropriate.” N.C. Gen. Stat. § 15A-1022.1(e).

In this case, the relevant portion of the colloquy between the trial court and Defendant was:

TRIAL COURT: Are you in fact guilty?

DEFENDANT: Yes, sir.

TRIAL COURT: Do you understand that you also have the right during a sentencing hearing to prove to the Court the existence of any mitigating factors that may apply to your case?

DEFENDANT: Yes, sir.

THE COURT: Do you understand that the courts have approved the practice of plea agreements, and you can discuss your plea agreement with me without fearing my disapproval?

DEFENDANT: Yes, sir.

Though Defendant’s attorney admitted the existence of the point, thereby negating further inquiry into whether Defendant received notice under the circumstances present here, the record does not show that that any such inquiry occurred with respect to the sentencing point and Defendant’s right to have a jury determine the existence of the additional sentencing point. As such, we vacate Defendant’s sentence and remand to the trial court for resentencing in accordance with this opinion.

IV. Conclusion

This Court has meticulously reviewed the trial court's decisions on the limitations placed on Defendant's cross-examination of a witness and the denial of Defendant's motion to dismiss the charges of larceny and kidnapping of Mr. Knight. We identify no judicial error in these rulings. But upon evaluating the motion to dismiss the charge of kidnapping Mrs. Knight, we determine that the trial court did err by denying this motion and so we must vacate this conviction. We have also identified an error in the sentencing phase; therefore, we must also vacate the sentencing and remand the case to the trial court for resentencing.

NO ERROR IN PART; VACATED IN PART; REMANDED.

Judges TYSON and MURPHY concur.

Report per Rule 30(e).