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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA24-810

Filed 21 May 2025

Onslow County, Nos. 21CRS055908-660, 21CRS055910-660

STATE OF NORTH CAROLINA

v.

THOMAS DONALD POULIN, Defendant.

Appeal by Defendant from judgment entered 2 February 2024 by Judge C. Ashley Gore in Onslow County Superior Court. Heard in the Court of Appeals 24 April 2025.

*Attorney General Jeff Jackson, by Special Deputy Attorney General Joseph Finarelli, for the State.*

*Mark Montgomery, for Defendant-Appellant.*

CARPENTER, Judge.

Thomas Donald Poulin (“Defendant”) appeals from judgment entered after a jury found him guilty of two counts of taking indecent liberties with a child. On appeal, Defendant challenges his sentence, arguing the trial court erred by finding the existence of an aggravating factor that was unsupported by the evidence. After careful review, we conclude the trial court erred by accepting Defendant’s prior

conviction as an aggravating factor. Accordingly, we vacate and remand for a new sentencing hearing.

### **I. Factual & Procedural Background**

On 4 April 2023, an Onslow County grand jury indicted Defendant for one count of taking indecent liberties with a child. The indictment named Ellen<sup>1</sup> as the victim and alleged that the acts occurred on or about 1 April 1975 through 1 July 1975. Eight days later, on 12 April 2023, an Onslow County grand jury indicted Defendant for three additional counts of taking indecent liberties with a child. The latter indictment named Stella as the victim and alleged that the acts occurred on or about 1 April 1975 through 1 July 1985.

Before trial, the State filed a Rule 609 notice indicating its intent to introduce, for impeachment purposes, evidence relating to Defendant's 1995 conviction of taking indecent liberties with a child (the "1995 conviction"). *See* N.C. Gen. Stat. § 8C-1, Rule 609 (2023) (providing that, under certain circumstances, the State may impeach a testifying defendant with evidence that they were previously convicted of a felony).

Defendant's case proceeded to trial on 29 January 2024. During the State's case-in-chief, Stella testified that between 1975 and 1985, when she was between the ages of six and sixteen, Defendant exposed his genitalia to her. Ellen testified that

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<sup>1</sup> Pseudonyms Ellen and Stella are used herein to protect the identities of the underage victims and for ease of reading. *See* N.C. R. App. P. 42(b).

in 1985, when she was nine years old, Defendant placed her hand on his genitalia. The State offered no evidence regarding Defendant's 1995 conviction.

At the close of the State's evidence, Defendant moved to dismiss all charges, which the trial court denied. Defendant did not present any evidence. Consequently, the State did not impeach Defendant with the 1995 conviction. The jury found Defendant guilty of two counts of taking indecent liberties with a child: one count relating to each victim.

After the verdict, the case proceeded directly to sentencing. Because the charged offenses occurred before the enactment of Structured Sentencing, the trial court was required to sentence Defendant under the Fair Sentencing Act. *See* N.C. Gen. Stat. § 15A-1340.1 (1993). Under the Fair Sentencing Act, the trial court was permitted to sentence Defendant to three years imprisonment for each conviction unless the State could prove the existence of one or more aggravating factors that outweighed any mitigating factors presented by Defendant. *See* N.C. Gen. Stat. § 15A-1340.4(f)(6). The State requested the trial court sentence Defendant in the aggravated range, stating:

Judge, the defendant has a prior conviction for indecent liberties with a child, and while it was subsequent as far as when this would've occurred, the conviction is prior to this conviction, so the State would request that the judge consider that as an aggravating factor.

In response, Defendant argued for, and presented evidence of, three mitigating factors, including his: (1) financial support of his family; (2) long-term employment; and (3) honorable discharge from the armed forces.

The trial court found the existence of two aggravating factors: the 1995 conviction and that Defendant committed the instant offense by taking advantage of a position of trust. The trial court found the existence of one mitigating factor: Defendant's honorable discharge. After finding that the aggravating factors substantially outweighed the sole mitigating factor, the trial court sentenced Defendant to the maximum term under the aggravated range—ten years for each conviction, to run consecutively. Defendant gave oral notice of appeal in open court.

## **II. Jurisdiction**

This Court has jurisdiction under N.C. Gen. Stat. §§ 7A-27(b)(1) and 15A-1444(a1) (2023).

## **III. Issue**

The sole issue is whether the trial court erred by considering the 1995 conviction as an aggravating factor. Additionally, the parties disagree on the trial court's authority in the event we remand for resentencing. First, Defendant argues the law does not permit the 1995 conviction to be used as an aggravating factor. Second, Defendant contends the trial court lacks jurisdiction to reconsider his eligibility for the sex offender registry and satellite-based monitoring.

## **IV. Analysis**

Defendant asserts, and the State concedes, that the trial court erred by utilizing the 1995 conviction as an aggravating factor without sufficient proof that the conviction occurred. We agree.

Since the offenses Defendant committed in the instant case occurred during or before 1985, the trial court was required to sentence Defendant under the Fair Sentencing Act. *See* N.C. Gen. Stat. § 15A-1340.1. In 1985, the offense of taking indecent liberties with a child was punishable as a Class H felony. *See* 1993 N.C. Sess. Laws 539 § 1201 (amendment increasing the classification of taking indecent liberties with a child to a Class F felony). Under the Fair Sentencing Act at that time, a defendant convicted of a Class H felony faced a presumptive sentence of three years. *See* N.C. Gen. Stat. § 15A-1340.4(f)(6). Upon a finding that the aggravating factors outweighed the mitigating factors, however, the trial court was permitted to impose a sentence exceeding the presumptive term. *See* N.C. Gen. Stat. § 15A-1340.4(a). Included among the aggravating factors were the following:

n. The defendant took advantage of a position of trust or confidence to commit the offense; and

o. The defendant has a prior conviction or convictions for criminal offenses punishable by more than 60 days' confinement.

N.C. Gen. Stat § 15A-1340.4(a)(1).

According to the Fair Sentencing Act, a prior conviction could be established “by stipulation of the parties or by the original or a certified copy of the court record

of the prior conviction.” See N.C. Gen. Stat. § 15A-1340.4(e). These statutorily-enumerated manners of proof were non-exhaustive, however, and other methods could be utilized. See *State v. Brooks*, 61 N.C. App. 572, 575, 301 S.E.2d 421, 423 (1983) (“[T]he language of [N.C. Gen. Stat. §] 15A-1340 is permissive rather than mandatory and does not preclude other methods of proof.”); see, e.g., *State v. Thompson*, 308 N.C. 421, 424, 307 S.E.2d 156, 159 (1983) (holding “a defendant’s own statements under oath constitute an acceptable alternative method of proof of a prior conviction”). The North Carolina Supreme Court, however, has held that “[a] prosecuting attorney’s statement concerning a prior conviction . . . constitut[es] insufficient evidence to support a finding of that prior conviction.” See *Thompson*, 308 N.C. at 424–25, 307 S.E.2d at 159.

Here, the State and Defendant did not stipulate to the existence of the 1995 conviction. Moreover, the record from sentencing contains no indication that the State submitted an original or certified copy of the 1995 conviction. See N.C. Gen. Stat. § 15A-1340.4(e). In fact, the only references to the 1995 conviction were in the Rule 609 notice filed by the State before trial, the State’s bare assertion during sentencing that Defendant had a prior conviction for indecent liberties with a child. As *Thompson* states unequivocally, the State’s assertion is insufficient to prove that the 1995 conviction occurred. See 308 N.C. at 424–25, 307 S.E.2d at 159. Therefore, the trial court erred by utilizing the 1995 conviction as an aggravating factor.

“[I]n every case in which it is found that the [trial] judge erred in a finding or

findings in aggravation and imposed a sentence beyond the presumptive term, the case must be remanded for a new sentencing hearing.” *State v. Ahearn*, 307 N.C. 584, 602, 300 S.E.2d 689, 701 (1983). This is because “every factor in aggravation measured against every factor in mitigation, with concomitant weight attached to each, contributes to the severity of the offense,” and “only the sentencing judge . . . is in a position to re-evaluate the severity of the sentence imposed in light of the adjustment.” *Ahearn*, 307 N.C. at 602, 300 S.E.2d at 701 (emphasis omitted). Because the State presented insufficient proof that the 1995 conviction occurred and Defendant was sentenced beyond the presumptive term, the trial court erred in sentencing Defendant. Accordingly, Defendant is entitled to a new sentencing hearing. *See id.* at 602, 300 S.E.2d at 701.

Defendant also contends the Fair Sentencing Act forecloses the use of the 1995 conviction as an aggravating factor and that the trial court cannot reconsider his eligibility for the sex offender registry and satellite-based monitoring on remand. As we have consistently expressed, however, “each sentencing hearing in a particular case is a *de novo* proceeding.” *See State v. Abbott*, 90 N.C. App. 749, 751, 370 S.E.2d 68, 69 (1988). “[O]n resentencing, the trial court must make a new and fresh determination of the sufficiency of the evidence[.]” *State v. Daye*, 78 N.C. App. 753, 755, 338 S.E.2d 557, 559 (1986). Therefore, on remand, if the State presents evidence of the 1995 conviction, the trial court must determine whether the 1995 conviction can be used as an aggravating factor consistent with section 15A-1340.4, *see Daye*, 78

N.C. App. at 755, 338 S.E.2d at 559, and may reconsider Defendant's eligibility for the sex offender registry and satellite-based monitoring, *see* N.C. Gen. Stat. § 14-208.6(2b) (2023); N.C. Gen. Stat. § 14-208.6(3e) (2023).

### **V. Conclusion**

In conclusion, though the language of section 15A-1340.4(e) is permissive rather than mandatory with respect to proving a prior conviction, the State's bare assertion failed to establish the 1995 conviction. *See Thompson*, 308 N.C. at 424–25, 307 S.E.2d at 159. Because the trial court was provided with insufficient proof of the 1995 conviction, we vacate and remand for a new sentencing hearing. On remand, the trial court must determine whether the 1995 conviction can be used as an aggravating factor if the State presents evidence of its existence. Moreover, the trial court may also reassess Defendant's eligibility for the sex offender registry and the satellite-based monitoring program.

VACATED AND REMANDED.

Judges GORE and FLOOD concur.

Report per Rule 30(e).