NO. COA11-267
NORTH CAROLINA COURT OF APPEALS

Filed: 1 November 2011

STATE OF NORTH CAROLINA

v. Alamance County
No. 09 CRS 50814

RODNEY LEE MOORE

Appeal by Defendant from judgment and order entered 23 September 2009 by Judge J.B. Allen, Jr. in Alamance County Superior Court. Heard in the Court of Appeals 13 September 2011.

Attorney General Roy Cooper, by Deputy Director Caroline Farmer, for the State.

Appellate Defender Staples Hughes, by Assistant Appellate Defender Daniel R. Pollitt, for Defendant-appellant.

HUNTER, JR., Robert N., Judge.

Rodney Lee Moore ("Defendant") appeals his conviction for sexual battery and an order requiring him to register as a sex offender for thirty years upon release from imprisonment. Defendant raises five issues on appeal: (1) the warrant procured for his arrest was invalid because it failed to sufficiently

identify the victim of the alleged sexual battery; (2) the trial court committed plain error by admitting Officer Doug Murphy's testimony that he weighed the statements made by Defendant and the victim in determining there was probable cause to arrest Defendant for sexual battery; (3) the trial court committed plain error by admitting testimony that Defendant "refused to talk" after being read his *Miranda* rights; (4) the trial court committed plain error by allowing the State to impeach Defendant's credibility as a witness with evidence of Defendant's prior probation violations and a Class 3 misdemeanor conviction; and (5) the trial court erred by ordering Defendant to register as a sex offender for a period of thirty years upon release from imprisonment. We vacate the trial court's order requiring Defendant's sex offender registration and remand the matter back to the Superior Court for a new sentencing hearing. We find no error with respect to Defendant's remaining contentions.

I. Factual Background & Procedural History

The State's evidence at trial tended to show the following. On the afternoon of 2 February 2009, 16-year-old T.B.[1] accompanied her friend, Terrance Farrish, to Terrance's house in

[1] The pseudonym "T.B." or "the victim" will be used throughout this opinion to protect the minor's identity.

Burlington. Upon entering the house, T.B. went into Terrance's bedroom and began watching television. A short while later, Terrance's mother entered the house with several other adults, including Defendant. The adults proceeded into the living room where they began talking and watching television. T.B. sat at the foot of Terrance's bed and continued to watch television while Terrance cleaned up around the house, entering and exiting the bedroom periodically.

T.B. was sitting alone on Terrance's bed when Defendant entered the room. As Defendant moved into the bedroom, he stated to T.B., "I heard that you wanted me." Defendant then pushed T.B. down onto the bed and "got on top of" her in a straddling position. Defendant used one hand to hold T.B.'s hands behind her head, while using his other hand to feel up and down her clothed body, including her private parts. Defendant's face was very close to hers, and the smell of alcohol on his breath was "very strong." Defendant pressed his pelvis up against T.B.'s and T.B. could feel Defendant's penis through his jeans. T.B. was "scared" and struggled to push Defendant off her. She plead with Defendant to "stop" and "get off me." T.B. testified that the attack lasted approximately two to three minutes but admitted it could have been shorter.

Soon after Defendant left the bedroom, T.B. went outside and telephoned her friend for a ride home. She told Terrance and her friend what had happened but she did not immediately tell her mother when she got home because she was "mad" and "didn't want to talk to nobody." When Terrance informed T.B.'s mother what had happened, T.B.'s mother called Defendant to confront him with her daughter's allegations. Defendant responded, "What you talking about?" and hung up before she could learn anything more. T.B.'s mother tried to ask T.B. what had happened, but T.B. "started crying" and her mother could only glean "bits and pieces" of the story. She "had to basically just drag it out of [T.B.]" that Defendant had "held [her] down" and was "trying to do something" to her.

That night, T.B.'s mother drove T.B. and Terrance to the police station. Officer Doug Murphy of the Burlington Police Department interviewed and obtained statements from T.B., Terrance, and T.B.'s mother. In her statement, T.B. explained to Officer Murphy that she was inside Terrance's bedroom, watching television when Defendant entered the room. Defendant threw her down on the bed and got on top of her. While on top, Defendant rubbed with his hands up and down T.B.'s body, including her private parts, while she pleaded with him to stop.

The attack ended when Defendant "heard someone come in the front door" and "jumped off [T.B.]." Officer Murphy testified that T.B. never "waivered" from her story.

After concluding his interview with T.B., Detective Jordan, who was assisting Officer Murphy with the case, contacted Defendant and asked him to come to the police station for questioning. Defendant arrived at the police station at approximately 8:45 p.m. Officer Murphy noted the smell of alcohol on Defendant's breath. Officer Murphy also observed that Defendant appeared nervous throughout the questioning and asked several times whether he would be arrested. Officer Murphy testified that after releasing Defendant, he "basically weighed the victim's statement and the interview, how the interview went with [Defendant] and [he] found there was probable cause to charge [Defendant with] sexual battery, and [he] went to the magistrate and took out a charge."

At approximately 11:00 p.m. on 2 February 2009, Officer Murphy served Defendant with a warrant for his arrest, charging Defendant with the misdemeanor offense of sexual battery under N.C. Gen. Stat. § 14-27.5A. Officer Murphy testified that he "read [Defendant] his Miranda Rights, but [Defendant] refused to talk about the case at that time."

Defendant's evidence at trial tended to show the following. Defendant testified on direct examination that he was at Terrance's house on the afternoon of 2 February 2009, but he had not been drinking and was at the house for only about thirty minutes. He stated that at some point during his visit, Terrance informed him that T.B. was in Terrance's bedroom and that she had requested to speak with Defendant. Defendant testified he had met T.B. once before at Terrance's house, but that was the extent of their acquaintance. Defendant went to Terrance's bedroom but did not physically enter the room; rather, he "stood right there at the door" and asked T.B. what she wanted. T.B. asked him for money to buy a blunt, to which Defendant replied "no" and left the room. According to Defendant, the exchange between himself and T.B. lasted less than ten seconds. Defendant then walked back into the living room where the other adults were still watching television and declared that he would not be buying T.B.—or anyone else—a blunt because "I don't smoke marijuana myself."

On cross-examination, Defendant stated he did not know how many times he had met T.B. prior to 2 February 2009. When the prosecutor asked Defendant whether he had consumed alcohol that day, Defendant replied he "might have drank a beer or

something." The prosecutor also examined Defendant concerning Defendant's conviction for possession of one half ounce of marijuana, a Class 3 misdemeanor, four probation violations, and several license suspensions. Defendant also stated on cross-examination that he had two DUI convictions, contrary to his testimony on direct examination that he had only one DUI conviction.

Terrance and Terrance's mother testified as witnesses on behalf of the defense. According to Terrance's testimony, T.B. was watching television in his bedroom when she requested to speak with Defendant. He located Defendant and said "[T.B.] wants you in the room." Terrance observed Defendant enter and then exit the bedroom after "six seconds at the most." Defendant came out of the bedroom into the living room, said "I ain't buying that girl no blunt," and sat down.

Terrance's mother testified that Defendant entered Terrance's bedroom and then exited less than one minute later. The door was cracked open so that she could see Defendant standing by the door. When asked on direct examination whether she took her eyes off the entrance to the bedroom door, she stated: "After, you know, I seen the back of his pant leg, you

know, I didn't think no more of it. So, you know, I started talking back to my other brother."

On 23 September 2009, the jury found Defendant guilty on the charge of sexual battery. Judge Allen entered Judgment and Commitment and sentenced Defendant to 150 days imprisonment. The trial court also entered its Judicial Findings and Order for Sex Offenders-Active Punishment finding Defendant had been convicted of "an offense against a minor," a reportable conviction under N.C. Gen. Stat. § 14-208.6(4). The court ordered Defendant to register as a sex offender for thirty years upon release from imprisonment. Defendant timely filed written notice of appeal with this Court on 2 October 2009.

II. Jurisdiction

Jurisdiction lies in this Court pursuant to N.C. Gen. Stat. § 7A-27(b), as Defendant appeals from the Superior Court's final judgment as a matter of right.

III. Analysis

A. The Arrest Warrant

Defendant first contends his conviction must be vacated because the warrant procured for his arrest was facially invalid in failing to sufficiently describe the victim's identity.

The issue of subject matter jurisdiction may be raised at

any time, even on appeal. *See State v. Wallace,* 351 N.C. 481, 503, 528 S.E.2d 326, 341 (2000). Lack of jurisdiction in the trial court due to a fatally defective indictment requires the appellate court to arrest judgment or vacate any order entered without authority. *State v. Hicks*, 148 N.C. App. 203, 205, 557 S.E.2d 594, 596 (2001). Like an indictment, an arrest warrant is a criminal pleading, and therefore a defective warrant will have the same effect as a defective indictment. N.C. Gen. Stat. § 15A-921 (2009). Because Defendant was never indicted, the trial court's jurisdiction in this case was solely dependent upon the arrest warrant. The subject matter jurisdiction of the trial court is a question of law, which this Court reviews *de novo* on appeal. *Ales v. T.A. Loving Co.,* 163 N.C. App. 350, 352, 593 S.E.2d 453, 455 (2004). Thus, we review the validity of the arrest warrant *de novo*.

On 2 February 2009, Magistrate Judge Brenda C. Brown of the Alamance County District Court issued a warrant for Defendant's arrest. The warrant states:

> I, the undersigned, find that there is probable cause to believe that on or about the date of offense shown and in the county named above the defendant named above unlawfully and willfully did for the purpose of sexual gratification engage in sexual conduct, BY HOLDING VICTIM'S HANDS OVER HER HEAD WITH ONE OF HIS HANDS WHILE FEELING UP

> AND DOWN HER BODY . . . . . INCLUDING HER PRIVATE PARTS . . . . . WITH HIS OTHER HAND, with another person, [T.B.], by force and against the will of the other person.

Defendant challenges the warrant's validity on two grounds: (1) the use of the phrase "with another person" renders the warrant invalid by naming T.B. as a co-conspirator; and (2) the warrant is invalid because it fails to state the victim's identity with exactitude.

"Generally, a warrant which substantially follows the words of the statute is sufficient [as a criminal pleading] when it charges the essentials of the offense in a plain, intelligible, and explicit manner." *State v. Garcia*, 146 N.C. App. 745, 746, 553 S.E.2d 914, 915 (2001) (internal quotation marks omitted and citation omitted). The North Carolina General Assembly has defined the offense of sexual battery as follows: "(a) A person is guilty of sexual battery if the person, for the purpose of sexual arousal, sexual gratification, or sexual abuse, engages in sexual contact *with another person*: (1) By force and against the will of the other person." N.C. Gen. Stat. § 14-27.5A(a)(1) (2009) (emphasis added).

Here, the language of the warrant mirrors the language of the statute. It states that Defendant "did for the purpose of sexual gratification . . . [description of the conduct] . . .

with another person, [T.B.], by force and against the will of the other person." The statute requires Defendant to have committed the defined act "with another person" and the warrant clearly names T.B. as that person. We cannot construe the statutory language "with another person" to mean "with a co-conspirator" because this reading would render a co-conspirator an essential element of sexual battery. The statute also requires Defendant to have committed the defined act "by force and against the will of that other person," which the warrant here quotes verbatim.

Defendant's second contention—that the warrant is invalid because it fails to recite the victim's name with exactitude—is a variant of Defendant's first argument. While this Court notes the importance of naming the alleged victim in a criminal pleading—largely to protect the defendant against double jeopardy, *see In re M.S.*, 199 N.C. App. 260, 266, 681 S.E.2d 441, 445 (2009)—this challenge is without basis in light of the preceding discussion. The arrest warrant clearly recites the victim's name. As explained *supra*, the plain language of N.C. Gen. Stat. § 14-27.5A(a)(1) refutes Defendant's position. We find the arrest warrant valid and sufficient to support Defendant's conviction.

B. Officer Murphy's Testimony

On appeal, Defendant challenges two portions of Officer Murphy's trial testimony. Defendant first contends the trial court committed plain error by admitting Officer Murphy's testimony that he "weighed" the statements of Defendant and the victim and "found there was probable cause to charge [Defendant with] sexual battery." Second, Defendant argues the trial court committed plain error by permitting Officer Murphy to testify that Defendant "refused to talk" after being read his *Miranda* rights.

At trial, the following exchange took place between the prosecutor and Officer Murphy during the State's direct examination of Officer Murphy:

> Q. After you released the defendant, what did you do?
>
> A. Umm, basically, weighed the victim's statement and the interview, how the interview went with [Defendant] and I found there was probable cause to charge [Defendant with] sexual battery, and I went to the magistrate and took out a charge.
>
> Q. And did you arrest him thereafter?
>
> A. Yes. I went to his residence on Faucette Street, and I took him into custody. Once he was in custody, I read him his Miranda Rights, but he refused to talk about the case at that time.

> Q. Have you ever spoken to the defendant or any of the other parties in this case since that time?
>
> A. No, I have not.

Defendant concedes he did not object to this testimony at trial, and therefore we review the trial court's evidentiary rulings for plain error. *State v. Gary*, 348 N.C. 510, 518, 501 S.E.2d 57, 63 (1998). We find plain error

> only in exceptional cases where, after reviewing the entire record, it can be said the claimed error is a fundamental error, something so basic, so prejudicial, so lacking in its elements that justice cannot have been done. Thus, the appellate court must study the whole record to determine if the error had such an impact on the guilt determination, therefore constituting plain error.

State v. Streater, 197 N.C. App. 632, 639, 678 S.E.2d 367, 372, *review denied*, 363 N.C. 661, 687 S.E.2d 293 (2009) (internal quotation marks and citations omitted). To prevail under the plain error standard, Defendant must show: (1) a different result probably would have been reached but for the error or (2) the error was so fundamental as to result in a miscarriage of justice or denial of a fair trial. *Id*.

1. Officer Murphy's Probable Cause Determination

Defendant assigns plain error to the trial court's admission of Officer Murphy's testimony that he "weighed" the

statements of the victim and Defendant and "found there was probable cause to charge [Defendant with] sexual battery." Defendant asserts this was a "he said, she said" case and Officer's Murphy's testimony that he thought probable cause to exist endorsed T.B.'s story, thereby tipping the scales in favor of a guilty verdict. We disagree.

It is obvious in any criminal pleading that an arresting officer believes there is probable cause to arrest a defendant. The criminal pleading—whether an indictment or a warrant—always meets this standard. The fact that a police officer said he thought about it and arrested a defendant under a probable cause standard has little relevance if a defendant must be proven guilty beyond a reasonable doubt. The trial court properly instructed the jury on the reasonable doubt standard:

> The defendant has entered a plea of not guilty. The fact that he has been charged is no evidence of guilt. Under our system of justice, when a defendant pleads not guilty, he is not required to prove his innocence. He is presumed to be innocent. The State must prove to you that the defendant is guilty beyond a reasonable doubt.
>
> A reasonable doubt is a doubt based on reason and common sense, arising out of some or all of the evidence that has been presented or lack or insufficiency of the evidence as the case may be. Proof beyond a reasonable doubt is proof that fully

> satisfies or entirely convinces you of the defendant's guilt.

Officer Murphy did not testify that he thought Defendant was guilty; he testified there was enough information to find *probable cause*. Probable cause is not synonymous with guilt. *See State v. Harris*, 279 N.C. 307, 311, 182 S.E.2d 364, 367 (1971) ("To establish probable cause the evidence need not amount to proof of guilt, or even to prima facie evidence of guilt, but it must be such as would actuate a reasonable man acting in good faith."). Probable cause requires only that a reasonable person acting in good faith could reasonably believe the defendant had committed a crime. *Id.*

We do not concede that an arresting officer's opinion on probable cause—a finding implicitly made in *every* criminal case—is of such probative value that its presence could influence the jury, given the pattern jury instructions. The trial court instructed the jury to apply the reasonable doubt standard, and we must presume that the jury followed the instructions. *See State v. Thomas*, 350 N.C. 315, 358, 514 S.E.2d 486, 512 (1999); *State v. Call*, 349 N.C. 382, 420, 508 S.E.2d 496, 520 (1998). We do not find the statements to meet the plain error standard here.

2. **Defendant's Post-Arrest Silence**

Defendant next assigns plain error to the trial court's admission of evidence concerning Defendant's post-arrest, post-*Miranda* warnings silence. Specifically, Defendant challenges the following exchange that took place during the State's direct examination of Officer Murphy:

> Q. And did you arrest him thereafter?
>
> A. Yes. I went to his residence on Faucette Street, and I took him into custody. Once he was in custody, I read him his Miranda Rights, *but he refused to talk about the case at that time*.
>
> Q. Have you ever spoken to the defendant or any of the other parties in this case since that time?
>
> A. *No, I have not*.

(Emphasis added).

Defendant contends the trial court committed plain error in permitting Officer Murphy to testify that Defendant "refused to talk about the case" after being read his *Miranda* rights. Because Defendant failed to object to the court's admission of this testimony at trial, we review for plain error. *State v. Mendoza*, ___ N.C. App. ___ , 698 S.E.2d 170, 174 (2010).

Defendant asserts that the court's admission of this testimony—in conjunction with the State's follow-up question concerning whether Officer Murphy had spoken with Defendant

since the time of the arrest—violated Defendant's rights under the Fifth and Fourteenth Amendments of the United States Constitution and Article I, §§ 19 and 23 of the North Carolina Constitution. We find that any error in admitting this testimony does not rise to the level of plain error.

In our legal system, a criminal defendant's right to remain silent is guaranteed under the Fifth Amendment to the United States Constitution, as incorporated by the Fourteenth Amendment. *State v. Ward,* 354 N.C. 231, 250, 555 S.E.2d 251, 264 (2001) (citing *Griffin v. California,* 380 U.S. 609, 14 L. Ed. 2d 106 (1965)). This right is also guaranteed under Article I, § 23 of the North Carolina Constitution. *State v. Reid*, 334 N.C. 551, 554, 434 S.E.2d 193, 196 (1993). It is equally well settled that when a defendant exercises his right to silence, it "shall not create any presumption against him." N.C. Gen. Stat. § 8-54 (2009).

"'Whether the State may use a defendant's silence at trial depends on the circumstances of the defendant's silence and the purpose for which the State intends to use such silence.'" *Mendoza*, ____ N.C. App. at ____ , 698 S.E.2d at 173-74 (quoting *State v. Boston,* 191 N.C. App. 637, 648, 663 S.E.2d 886, 894, *appeal dismissed and disc. review denied,* 362 N.C. 683, 670

S.E.2d 566 (2008)). A defendant's post-arrest, post-*Miranda* warnings silence may not be used for any purpose. *Id.*; *see also Doyle v. Ohio*, 426 U.S. 610, 619, 49 L. Ed. 2d 91, 98 (1976) (holding that "use for impeachment purposes of petitioners' silence, at the time of arrest and after receiving *Miranda* warnings, violated the Due Process Clause of the Fourteenth Amendment").

We find this Court's recent decision in *Mendoza* instructional in our review for plain error on this issue. In *Mendoza*, similar to the case at bar, the challenged testimony involved the State's direct examination of the arresting police officer. *Mendoza*, ___ N.C. App. at ___, 698 S.E.2d at 178. There, the prosecutor inquired: "When you had Mr. Mendoza in your vehicle . . . after you had read him his rights . . . *did he ever make any voluntary statements to you*?" *Id.* (emphasis added). The State proceeded to cross-examine the defendant extensively concerning his post-arrest silence: first, concerning *his failure to tell troopers* about the source of stolen money in his possession at the time of the arrest; and second, concerning *his failure to tell anyone* the name of two of the relevant parties in the case. *Id.* We held that the State's questioning of the police officer and the defendant about the

defendant's post-*Miranda* warnings silence was error, but did not rise to the level of plain error.

While there are some similarities between the facts presented in *Mendoza* and the facts now before this Court, we note two striking differences that render the trial court's error in this case considerably less prejudicial, and therefore less indicative of plain error: (1) the State in this case did not cross-examine Defendant with respect to his post-*Miranda* silence; and (2) the State did not directly inquire about Defendant's silence, nor did it elicit Officer Murphy's response.

In *Mendoza*, this Court based its finding of error upon the United States Supreme Court's holding in *Doyle*. *Mendoza*, ____ N.C. App. at ____ , 698 S.E.2d at 178-79. This Court explained that

> when a person under arrest has been advised of his Miranda rights, there is an implicit promise that the silence will not be used against that person, and it is therefore a violation of a defendant's rights under the Fourteenth Amendment to the United States Constitution *to subsequently impeach the defendant on cross-examination by questioning about his silence*.

Id. (citing *Doyle*, 426 U.S. at 619, 49 L. Ed. 2d at 98). Thus, our holding in *Mendoza* was based primarily on the State's cross-

examination of the defendant concerning his post-*Miranda* silence.

Furthermore, the prosecutor in *Mendoza* directly asked the police officer a question that required the police officer to comment on the defendant's post-arrest silence. *See Mendoza*, ____ N.C. App. at ____ , 698 S.E.2d at 178. Here, the prosecutor simply asked Officer Murphy whether he arrested Defendant after obtaining the arrest warrant. The prosecutor's question invited nothing more than a "yes" or "no" response. Officer Murphy replied "yes" and proceeded to elaborate without any prompting from the prosecutor whatsoever. Additionally, and unlike the situation in *Mendoza*, the State did not highlight or expound Officer Murphy's testimony, nor did the State cross-examine Defendant with respect to that testimony. *See State v. Walker*, 316 N.C. 33, 39, 340 S.E.2d 80, 84 (1986) (finding prosecutor's cross-examination of the defendant concerning the defendant's post-*Miranda* silence did not amount to plain error because the prosecutor was "developing the defendant's testimony and did not dwell on" the defendant's exercise of his right to remain silent).

In addition, the transcript reflects that the State's purpose in posing the follow-up question concerning whether

Officer Murphy had spoken with any of the parties, including Defendant, since the time of the arrest was to establish the point in time at which Officer Murphy ceased his involvement in the case—not to capitalize on Officer Murphy's previous statement regarding Defendant's "refusal to talk" at the time of the arrest. It is thus readily apparent that the State did not introduce, elicit, or use evidence of Defendant's post-*Miranda* silence against him. If Officer Murphy's statement was essential to the State's case, as Defendant contends, then surely the State would have made reference to it during its cross-examination of Defendant and/or reiterated the statement during its closing argument. The State took none of these actions. Defendant's assignment of error is overruled.

C. The State's Impeachment of Defendant

Defendant next contends that the prosecutor exceeded the scope of Rules 608 and 609 by impeaching him with evidence of four prior probation violations and a Class 3 misdemeanor conviction for possession of marijuana. Defendant failed to object to the prosecutor's elicitation of this evidence at trial, and therefore Defendant is entitled to review only for plain error. *See* discussion *supra* part III B.

Defendant cites three cases in support of his assignment of

plain error on this issue: *Cross v. State*, 586 S.W.2d 480 (Tex. Crim. App., 1979), *State v. Anonymous*, 384 A.2d 386 (Conn. Super., 1978), and *Favor v. State*, 389 So.2d 556 (Ala. Crim. App., 1980); none are binding authority on this Court, nor do they involve plain error review. Defendant nevertheless contends he is entitled to a new trial because the error undermined his credibility—a critical issue in this case - and ultimately led to his conviction. We conclude that even if Defendant's credibility did factor into the jury's finding of "guilty," we cannot say there is a reasonable probability the jury would have acquitted Defendant had this evidence been excluded.

The State presented ample evidence demonstrating Defendant's lack of credibility. First, Defendant contradicted his testimony regarding when he first met T.B. Defendant testified on direct examination he had met T.B. only once before, at which time he thought T.B. was Terrance's girlfriend. On cross-examination, however, Defendant admitted to "lying" on direct examination about the first time he met T.B. and stated: "I don't know how many times it's been." Second, Defendant contradicted his testimony concerning his alcohol consumption on the day of the incident. Defendant testified initially he had

not been drinking on the day of the incident, but conceded on cross-examination "I have might have drank a beer or something." Third, Defendant's testimony was inconsistent regarding his prior convictions. Defendant stated on direct examination that his only conviction in the past ten years that carried a minimum sentence of 60 days imprisonment was a "DUI," but later admitted to multiple DUI convictions on cross-examination. Finally, none of the other witnesses corroborated Defendant's contention that he did not physically enter Terrance's bedroom. Terrance, Terrance's mother, and T.B. all testified to observing Defendant enter Terrance's bedroom.

In sum, Defendant's inconsistencies undermined his credibility as a witness. Assuming the State's cross-examination of Defendant concerning his probation violations and misdemeanor marijuana conviction exceeded the permissible scope of impeachment under Rules 608 and 609, we hold that the trial court's admission of the evidence did not rise to the level of plain error.

D. Sex Offender Registration

Finally, Defendant contends the trial court erred by indicating he was convicted of the reportable conviction of "an offense against a minor" on the Administrative Office of the

Courts' Form AOC-CR-615, entitled "Judicial Findings and Order for Sex Offenders-Active Punishment." We agree and vacate the trial court's order, remanding the matter to the superior court for a new sentencing hearing.

Pursuant to North Carolina's sex offender registration regime, the trial court must enter specific findings during the sentencing phase indicating that the defendant has been convicted of a "reportable conviction" before it can require the defendant to register as a sex offender. N.C. Gen. Stat. § 14-208.7 (2009). Here, a jury convicted Defendant of sexual battery in violation of N.C. Gen. Stat. § 14-27.5A (2009). The offense of sexual battery is defined as a "sexually violent offense," *see* N.C. Gen. Stat. § 14-208.6(5) (2009), which is a reportable conviction under N.C. Gen. Stat. § 14-208.6(4) (2009).

When the trial court rendered its 23 September 2009 order in open court, the court mistakenly stated that Defendant's reportable conviction was an offense against a minor, which is the subject of Box 1(a) in the "Findings" section of Form AOC-CR-615. N.C. Gen. Stat. § 14-208.6(1m) (2009) defines "offense against a minor" as the kidnapping, abduction, or felonious restraint of a minor, where the person committing the offense is

not the minor's parent. The jury made no findings at trial to support the court's conclusion that Defendant had been convicted of this reportable offense (other than the fact that the victim was a minor at the time of the incident).

The State contends the trial court "inadvertently" marked Box 1(a) ("offense against a minor"), instead of Box 1(b) ("violent sexual offense"), constituting a clerical error and urges this Court to remand the matter to the trial court for correction. This Court has defined a "clerical error" as "[a]n error resulting from a minor mistake or inadvertence, [especially] in writing or copying something on the record, and not from judicial reasoning or determination." *State v. Lark*, 198 N.C. App. 82, 95, 678 S.E.2d 693, 702 (2009) (internal quotation marks and citations omitted). We have also held that "[w]hen, on appeal, a clerical error is discovered in the trial court's judgment or order, it is appropriate to remand the case to the trial court for correction because of the importance that the record speak the truth." *State v. Smith*, 188 N.C. App. 842, 845, 656 S.E.2d 695, 696 (2008) (internal quotation marks and citations omitted).

The State cites the following passage from the trial transcript in support of its assertion that the mistake was

inadvertent, and not the product of judicial reasoning or determination:

> COURT: I'm going to find that it would be under the findings of 1(b) . . . Under the order, it will be (b). . . .
>
> CLERK: Did you want, did you say 1(b) up here, or.
>
> COURT: It's 1(a).
>
> CLERK: Should be (a).
>
> COURT: Yeah, 1(a).

From the quoted passage, it would appear as if the trial court simply misread the sentencing form and marked the incorrect box. If this were the case, the appropriate relief would clearly be to remand the matter to the trial court to correct the error. *See, e.g., Smith*, 188 N.C. App. at 845, 656 S.E.2d at 696 (remanding for correction of clerical error where the transcript was "clear that the trial court simply misread the sentencing form and checked the wrong box").

The State omits an exchange between the trial court and Defendant's counsel, recorded on the same page of the transcript as the passage cited above:

> COURT: On the findings, what do I need to find?
>
> (The Court and Clerk confer)
>
> COURT: Is the minor included?

> . . . .
>
> COURT: I mean is it, was this an offense against a minor?
>
> [DEFENDANT'S COUNSEL]: She was 16 years old at the time, Your Honor.
>
> COURT: Is [she] considered minor up to 18?

The trial court made only three substantive inquiries concerning its findings on the sentencing form, ***all*** of which pertained to whether the victim was a minor at the time of the offense. After confirming the victim was in fact a minor, the trial court proceeded to mark the box labeled "sex offense against a minor." The State asserts in its brief that the clerk "confused the court," causing the court to mark Box 1(a). In fact, the clerk's question, "Did you want, did you say 1(b) up here . . . ," was simply alluding to the fact that the court's three questions on the issue had been directed ***only*** at the subject matter pertaining to Box 1(a).

There is no indication the trial court inadvertently checked Box 1(a). On the contrary, the transcript indicates that the trial court ***intentionally*** checked Box 1(a) after determining that the victim was a minor at the time of the incident. Further lending support to this conclusion is the fact that the trial court never once mentioned Defendant's

"sexually violent offense" in making its findings.

Nevertheless, the State argues we should construe this error as a clerical error and remand for correction. This we cannot do. "Although a court of record has the inherent power to make its records speak the truth and, to that end, to amend its records to correct clerical mistakes or supply defects or omissions therein, it cannot under the guise of an amendment of its records, correct a judicial error." *State v. Jarman,* 140 N.C. App. 198, 202, 535 S.E.2d 875, 878 (2000) (internal quotation marks and citations omitted). The trial court's questions concerning the victim's status as a minor, and subsequent selection of the "offense against a minor" box reflect sufficient reasoning for this Court to conclude that the error was not clerical, but rather judicial in nature. Accordingly, we vacate the trial court's order and remand to the superior court for a new sentencing hearing.

IV. Conclusion

For the foregoing reasons, we vacate the trial court's order requiring Defendant's sex offender registration and remand the matter back to the superior court for a new sentencing hearing. We find no error with respect to Defendant's remaining contentions.

Vacated in part. No error in part.

Judges MCGEE and ELMORE concur.

Report per Rule 30(e).