IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA19-896

Filed: 6 October 2020

Duplin County, No. 15 CRS 51497

STATE OF NORTH CAROLINA

v.

RONALD LEE ENNIS, JR., Defendant.

Appeal by Defendant from judgments entered 3 August 2018 by Judge D. Jack Hooks in Superior Court, Duplin County. Heard in the Court of Appeals 14 April 2020.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Sandra Wallace-Smith, for the State.

Mark Montgomery for Defendant-Appellant.

McGEE, Chief Judge.

Ronald Lee Ennis, Jr. ("Defendant") appeals from judgments entered upon jury verdicts finding him guilty of assault with a deadly weapon inflicting serious injury, assault inflicting serious bodily injury, second-degree rape, possession of a controlled substance in jail, felony flee to elude arrest with motor vehicle, felony possession of

cocaine, and driving while impaired. On appeal, Defendant argues that it was error for certain State witnesses and the trial court to refer to the complainant as the "victim." We hold that the trial court did not commit plain error in admitting witness testimony or charging the jury.

Defendant also appeals from the trial court's order imposing lifetime satellite-based monitoring ("SBM") upon his release from prison. On appeal, Defendant argues that the trial court erred because it did not conduct a *Grady* hearing and the State did not present any evidence that SBM of Defendant was a reasonable search under the Fourth Amendment. Because we hold that the SBM order is unconstitutional as applied to Defendant, we vacate the order without prejudice to the State's ability to file a subsequent SBM application.

I. Factual and Procedural History

The evidence introduced at trial tended to show that Sandra[1] began dating Defendant in 2005 and, over the course of the following 10 years, the couple engaged in a tumultuous on-again/off-again relationship. Sandra testified that Defendant was "controlling" and explained that she had moved out of a number of residences that she and Defendant shared "[b]ecause of abuse." In July of 2015, Sandra lived with her sister in an apartment in Durham and was not involved in a romantic relationship with Defendant.

[1] To protect her privacy, we refer to the complainant as "Sandra." *See State v. Gordon*, 248 N.C. App. 403, 404, 789 S.E.2d 659, 661, fn1 (2016).

Sandra testified that she went to bed at approximately 8:00 p.m. on 27 July 2015 and woke up in the early hours of 28 July 2015 to a power outage in her apartment. Sandra walked to her front door to check if her porch light was working; Defendant "pushed himself in," "grabbed [Sandra] by [her] mouth," and "pushed [her] in the house." Defendant ordered Sandra to be quiet and asked if anyone else was in the apartment; she shook her head "no." Defendant led Sandra to her bedroom, stated "it's over for you," and explained that it was Sandra's fault that "he's in all of this mess." When Defendant was distracted, Sandra grabbed her Taser gun from her bedroom and hid it in her pajama pants.

Sandra testified that Defendant instructed her to get her car keys and to lock the front door. However, Sandra only pretended to lock the door so her "sister could see [the unlocked door] and realize that something [wasn't] right." Defendant took Sandra's car keys and unlocked her white Honda Accord; Defendant pushed Sandra into the car through the driver's side door and ordered her to move to the passenger's seat. She observed Defendant retrieve something from the bushes nearby and wrap it in a red hoodie. Sandra testified the item under the hoodie "looked like the barrel of a gun." Defendant got into the car, placed the hoodie in his lap, and started the car.

Defendant drove down Interstate 40 for about thirty minutes, then he pulled into a rest area. He opened Sandra's phone and "started going through messages and

asking [her] questions about certain people [she] was texting[.]" Sandra testified that when she did not "giv[e] him the answers he wanted[,]" Defendant slapped her. Defendant pulled back onto Interstate 40, took Exit 87, and turned onto a dirt road near a graveyard and a cornfield.

Sandra testified that after Defendant stopped the car, he put it in park, slapped her, pulled his pants down, and said, "shut the f--k up" and "don't try nothing stupid." When she attempted to use her Taser, Defendant slapped her across the face several times and threatened to knock out her teeth. Defendant forced Sandra to perform oral sex on him and ordered her to get on top of him. Defendant proceeded to insert his penis into her vagina. However, because he had "d[one] so much cocaine[,]" Defendant quickly stopped and told Sandra that her "family [was] going to find [her] dead and assaulted in th[e] cornfield."

Defendant decided to leave and returned to Interstate 40. He drove to a gas station and purchased a "Dutch" cigar to use for smoking marijuana. Sandra testified that despite her resistance, Defendant forced her to smoke marijuana with him and stated, "I'm losing everything" so "[y]ou're about to lose everything." Defendant started the car and returned to Interstate 40. At that point, Sandra testified that a patrol car began following the Accord and Defendant said, "[w]hatever you do, . . . don't give them my name."

Deputy Kevin Crissey ("Deputy Crissey") of the Special Operations Division of the Duplin County Sheriff's Office testified that on 28 July 2015, he was driving on Interstate 40 when he observed a speeding white Honda Accord. As he pulled up beside the car and saw that the driver "was physically hiding inside the vehicle," Deputy Crissey activated his lights and siren. The Accord turned at the exit for Highway 24 and increased its speed. Deputy Crissey estimated that the Accord was traveling approximately 110 miles per hour through the city of Clinton, as it approached the intersection of Highway 24 and Highway 701. Although there was a red light at the intersection, Deputy Crissey testified that the Accord did not stop; instead, the vehicle ran the light, collided with a Toyota Tacoma, and spun out of control.

Deputy Crissey approached the Accord with his gun raised, removed Defendant—who had "a very strong odor of marijuana"—from the vehicle, and placed him in handcuffs. Deputy Crissey saw Sandra in the passenger seat with "blood all over her." According to Deputy Crissey, Sandra's arm "was severed" and the "only thing holding her arm was the meat of the back of her arm." Sandra appeared "scared" and stated, "he kidnapped me. Oh, my God. I'm going to die."

Sandra was transported by ambulance to Wake Medical Center in Raleigh. Defendant was also taken by ambulance to the hospital, treated for "minor scrapes,"

and transferred to the Duplin County Jail. A lab director testified at trial that Defendant's urine sample revealed the presence of cocaine and THC.

Detective David Vereen ("Detective Vereen") of the Domestic Violence Unit of the Durham Police Department testified that prior to 28 July 2015, he had been involved in two investigations where Sandra had accused Defendant of domestic violence. The first time, Detective Vereen interviewed Sandra about an incident on 18 July 2015, where Defendant allegedly shattered Sandra's car windshield with an ashtray and stole her television. Detective Vereen interviewed Sandra a second time about an incident on 24 July 2015, where Defendant allegedly slapped Sandra in the face and threatened her. Detective Vereen mailed Sandra domestic violence brochures, advised her to file for a domestic violence protective order, and recommended that she establish a safety plan.

Inspector Jon Alcala ("Inspector Alcala") of the Durham Police Department testified that he also interviewed Sandra about the 18 July 2015 incident. Sandra told Inspector Alcala that she believed Defendant had smashed her car with an ashtray because he wanted to get in the car "in an attempt to assault her." Inspector Alcala later provided Sandra with a Victim's Rights Form that listed available resources about domestic violence prevention in Durham and a warrant was obtained for Defendant's arrest.

Detective Vereen testified that on 28 July 2015, he spoke with Sandra for about 15 minutes in the emergency room but, because Sandra "was in a lot of pain," Detective Vereen just tried "to get the preliminary information from her as to what happened." The recorded interview was played for the jury at trial. Sandra testified that she did not initially report that Defendant had raped her when she got to the hospital because "[e]verything was happening so fast" and she was "still trying to wrap [her] head around what just happened to [her]." She explained that "it was hard for [her] to accept what happened from someone that [she had] known almost [her] entire life[.]"

Sandra underwent surgery on her lacerated arm and broken femur bone in her left leg on 28 July 2015. The following day, Sandra told hospital personnel that Defendant had raped her because she "didn't consent to having sex with [Defendant], and [she] felt like they needed to know that."

Jennifer Farmer ("Ms. Farmer"), a Sexual Assault Nurse Examiner ("SANE"), performed a rape kit on Sandra on 29 July 2015. Ms. Farmer testified that Sandra told her that she had been raped by Defendant in a graveyard off Interstate 40, Exit 87. According to Ms. Farmer, during the seven hour rape kit processing, Sandra was "very upset" and appeared "fearful and sad." Ms. Famer later called Detective Vereen and informed him of Sandra's disclosure.

Detective Vereen returned to the hospital and interviewed Sandra on 30 July 2015. During the recorded interview that was played for the jury at trial, Sandra relayed to Detective Vereen that Defendant "made her perform oral sex on him and told her to take her pants off and made her continue to have sexual intercourse with him." At trial, a forensic biologist testified that Sandra's rape kit showed the presence of Defendant's sperm; however, the sperm could have been deposited up to five to seven days prior.

Officer Charlotte Tenzca ("Officer Tenzca"), a crime scene specialist with the Durham Police Department, testified that on 29 July 2015, she went to Sandra's apartment to take photographs and process areas for latent fingerprints. That day, Officer Tenzca, Detective Vereen, and Deputy Crissey met at the Duplin County Jail Annex to search and process Sandra's Accord. Deputy Crissey testified that the officers discovered a "plastic baggy with a white powder substance" on the floor behind the driver's seat and a tire iron "wrapped in a shirt material" in the trunk.

Sandra was discharged from the hospital on 15 August 2015. Sandra testified that when she came home, she felt like "a complete wreck" and she "isolated [herself] from everyone." She explained that she "couldn't wrap [her] mind around [Defendant] doing what he did to [her]." Defendant did not present evidence.

The jury returned verdicts on 3 August 2018 finding Defendant guilty of driving while impaired, felonious operation of a motor vehicle to elude arrest, felony

possession of cocaine, assault with deadly weapon inflicting serious injury, assault inflicting serious bodily injury, second-degree rape, and possession of a controlled substance in jail. Defendant pleaded guilty to habitual felon status. The trial court sentenced Defendant to a minimum term of 146 months and a maximum term of 188 months imprisonment. Defendant gave notice of appeal in open court.

On the same day, without conducting a separate hearing or taking any evidence, the trial court entered the "Judicial Findings and Order for Sex Offenders" (the "SBM order"), finding that Defendant was convicted of an aggravated offense that "did not involve the physical, mental, or sexual abuse of a minor." The trial court ordered that "upon release from imprisonment, [D]efendant shall enroll in satellite-based monitoring[.]"

II. Analysis

A. *Witness Testimony*

Defendant argues the trial court erred by not intervening *ex mero motu* when Ms. Farmer and four law enforcement officers referred to Sandra as the "victim." Specifically, Defendant contends that Ms. Farmer's reference to the "victim" constituted improper witness vouching and communicated her expert opinion that Sandra "was a victim of rape rather than a false accuser" without a proper foundation. Defendant asserts that the law enforcement officers' references to the "victim" constituted improper witness vouching and communicated their lay opinion that

"Sandra's story is the truth" without a proper foundation. In the alternative, Defendant argues that he received ineffective assistance of counsel.

Defendant acknowledges that his trial counsel did not object to the portions of testimony Defendant challenges on appeal and he requests plain error review. "The plain error rule . . . is always to be applied cautiously and only in the exceptional case 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[.]'" *State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983) (citation omitted). Thus, "the error will often be one that 'seriously affect[s] the fairness, integrity or public reputation of judicial proceedings.'" *State v. Lawrence*, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012) (alteration in original) (quoting *Odom*, 307 N.C. at 660, 300 S.E.2d at 378). "To prevail under a plain error analysis, a defendant must establish not only that the trial court committed error, but that absent the error, the jury probably would have reached a different result." *State v. Perkins*, 154 N.C. App. 148, 152, 571 S.E.2d 645, 648 (2002) (citation omitted).

The Supreme Court of North Carolina has held that a reference to the prosecuting witness as "the victim" is not an error "so` basic and lacking in its elements that justice could not have been done." *State v. McCarroll*, 336 N.C. 559, 566, 445 S.E.2d 18, 22 (1994); *see also State v. Jackson*, 202 N.C. App. 564, 569, 688 S.E.2d 766, 769 (2010) ("Our Supreme Court has held that a trial court referring to

the prosecuting witness as 'the victim' does not constitute plain error." (citation omitted)).

1. Ms. Farmer

Defendant challenges the following portion of Ms. Farmer's[2] testimony:

> Q: What did you do next?
>
> A: At that point was when the victim had identified that she was ready for the vaginal exam. And because of the policies within Wake Med, I consulted the OB-GYN physician at that time to come and standby to perform those swabs.

Defendant contends that Ms. Farmer's reference to the "victim" constituted "improper expert vouching for Sandra's claim to have been raped" and cites cases where our Courts have found plain error where the trial court admitted expert testimony that vouched for the prosecuting witness. *See e.g., State v. Towe*, 366 N.C. 56, 64, 732 S.E.2d 564, 569 (2012) (finding plain error when a physician characterized a child complainant as sexually abused); *State v. Frady*, 228 N.C. App. 682, 685, 747 S.E.2d 164, 167 (2013) (finding plain error when a physician testified that a child complainant's disclosure was "consistent with sexual abuse"); *State v. Couser*, 163 N.C. App. 727, 732, 594 S.E.2d 420, 424 (2004) (finding plain error when a physician testified that that the child complainant was diagnosed as having suffered "probable

[2] Both Defendant and the State mistakenly attribute this testimony to Lori Weis, a forensic biologist at the North Carolina State Crime Lab, who testified about the results of Sandra's rape kit. However, Ms. Farmer was the SANE who testified about the process of collecting Sandra's rape kit.

sexual abuse"); and *State v. O'Connor*, 150 N.C. App. 710, 712, 564 S.E.2d 296, 297 (2002) (finding plain error when a physician testified that a child complainant's disclosure was credible). However, none of the cases cited by Defendant "rests on a witness's mere reference to the complainant as a victim" and, as a result, they "provide no support for [D]efendant's claim." *State v. Womble*, ___ N.C. App. ___, ___, 846 S.E.2d 548, 554 (2020).

Further, this Court has consistently "rejected the premise that the use of the term 'victim' by prosecution witnesses represents a 'reinforcing the complainant's credibility at the expense of [a] defendant.'" *Id.* (citation omitted). To that end, we recently explained that a SANE's reference to the "victim" "did not offer any opinions but merely recounted the step-by-step evidence-collection process she used with the sexual assault kit." *Id.* at ___, 846 S.E.2d at 555. Similarly, in this case, Ms. Farmer's reference to the "victim" did not convey an opinion that Sandra "was a victim of rape rather than a false accuser." *Id.* Black's Law Dictionary defines "opinion testimony" as "[t]estimony based on one's belief or idea rather than on direct knowledge of the facts at issue." Opinion testimony, Black's Law Dictionary (11th ed. 2019). Ms. Farmer testified about her process of collecting a rape kit. This testimony is not opinion testimony.

2. Law Enforcement Officers

Defendant argues that references to the "victim" by four law enforcement officers—Deputy Crissey, Detective Vereen, Officer Tenzca, and Inspector Alcala—constituted improper witness vouching. Detective Vereen and Officer Crissey each referred to the "victim" in their testimonies about the investigation into the events of 28 July 2015. For example, when Deputy Crissey identified Sandra's address, he testified, "I believe that is the address of the victim"; Detective Vereen testified, "I wound up speaking with the victim, [Sandra], who was in the ER being tended to by the physicians," when he explained the chronology of events on 28 July 2015. Detective Vereen and Inspector Alcala each used the term "victim" when they testified about *prior* investigations into incidents involving Sandra and Defendant. Additionally, Officer Tenzca referred to the "victim" when she described her investigation of the crime scene; for example, Officer Tenzca testified that she photographed the "victim's apartment" and the "victim's bathroom."

Viewed in context, the officers' use of "victim" in their testimonies neither conveyed the officers' opinions that Sandra was indeed the victim of rape, kidnapping, or assault, nor vouched for Sandra's credibility. Detective Vereen's and Deputy Crissey's references to the "victim" when testifying about their investigation into the 28 July 2015 incident, as well as Detective Vereen's and Officer Alcas's references to the "victim" when testifying about their respective roles in prior investigations, did not express the officers' opinions about the case or convey that the officers believed

Sandra's account of the events of 28 July 2015. Similarly, in the absence of any evidence that Officer Tenzca *ever* interacted with either Sandra or Defendant, Officer Tenzca's use of the term "victim" to identify the various locations she took photographs and collected evidence did not convey an opinion about Sandra's credibility. Thus, the officers' references to Sandra as the "victim" in their testimonies about the investigative process were not offered as opinion testimony.

3. Prejudice

In any event, in order to show plain error, a defendant must demonstrate prejudice *i.e.*, but for the error, "the jury probably would have reached a different result." *Perkins*, 154 N.C. App. at 152, 571 S.E.2d at 648. In light of the substantial evidence of Defendant's guilt, Defendant has failed to demonstrate how he was prejudiced by the innocuous references to the "victim." Sandra's account of the events on 28 July 2015 was corroborated by the testimony of numerous law enforcement officers and medical personnel and is consistent with her physical injuries, the rape kit, and the evidence found in the Accord. Thus, because these stray references to Sandra as the "victim" did not prejudice Defendant, we hold the trial court did not commit plain error in admitting the testimony of which Defendant complains.

4. Ineffective Assistance of Counsel

Alternatively, Defendant asserts that he received ineffective assistance of counsel because his trial counsel failed to object to the witnesses' use of the term

"victim." "When a defendant attacks his conviction on the basis that counsel was ineffective, he must show that his counsel's conduct fell below an objective standard of reasonableness." *State v. Braswell*, 312 N.C. 553, 561-62, 324 S.E.2d 241, 248 (1985). In order to prevail on an ineffective assistance of counsel claim, "a defendant must show that (1) 'counsel's performance was deficient' and (2) 'the deficient performance prejudiced the defense.'" *State v. Phillips*, 365 N.C. 103, 118, 711 S.E.2d 122, 135 (2011) (quoting *Strickland v. Washington*, 466 U.S. 668, 687, 80 L.Ed.2d 674, 693 (1984)). However, "[i]f it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, [this] Court need not determine whether counsel's performance was deficient." *State v. Gillespie*, 240 N.C. App. 238, 243, 771 S.E.2d 785, 788–89 (2015). This Court recently explained that

> "[t]he fact that counsel made an error, even an unreasonable error, does not warrant reversal of a conviction unless there is a reasonable probability that, but for counsel's errors, there would have been a different result in the proceedings." *Braswell*, 312 N.C. at 563, 324 S.E.2d at 248 (citing *Strickland*, 466 U.S. at 694, 104 S.Ct. at 2068, 80 L. Ed.2d at 698). Importantly, "*Strickland* asks whether it is 'reasonably likely' the result would have been different[,]" and "[t]he likelihood of a different result must be substantial, not just conceivable." *Harrington* [*v. Richter*, 562 U.S. 86, 111-12, 131 S.Ct. 770, 792, 178 L. Ed.2d. 624, 647 (2011] (citing *Strickland*, 466 U.S. at 693, 696, 104 S.Ct. at 2067-68, 2069, 80 L. Ed.2d at 697, 699)[)].

State v. Lane, ___ N.C. App. ___, ___, 844 S.E.2d 32, 42 (2020) (alterations in original).

In the present case, based on all the evidence presented by the State, we are not persuaded that the State's witnesses' references to the "victim" prejudiced Defendant such that "'there is a reasonable probability that, but for counsel's errors, there would have been a different result in the proceedings.'" *Id.* at ___, 844 S.E.2d at 42 (quoting *Braswell*, 312 N.C. at 563, 324 S.E.2d at 248). We reject Defendant's ineffective assistance claim.

B. *Trial Court*

Defendant also argues that the trial court's reference to Sandra as the "victim" was an improper expression of judicial opinion on the evidence. Defendant specifically challenges the trial court's use of term "victim" seven times during jury instructions, once during jury selection, and once during the State's case.

Defendant acknowledges that his counsel did not object to the trial court's use of the term "victim" but he argues that the trial court's expression of a judicial opinion and failure to comport with statutory requirements are preserved as a matter of law. However, "where our courts have repeatedly stated that the use of the word 'victim' in jury instructions is not an expression of opinion, we will not allow [D]efendant, after failing to object at trial, to bring forth this objection on appeal, couched as a statutory violation, and thereby obtain review as if the issue was preserved." *State v. Phillips*, 227 N.C. App. 416, 420, 742 S.E.2d 338, 341 (2013). "As a result, we review this argument for plain error." *Id.*

As our Supreme Court has declared several times, the "use of the word 'victim' in the jury charge [is] not improper[ ]" and "[b]y using the term 'victim,' the trial court [is] not intimating that the defendant committed the crime." *State v. Hill,* 331 N.C. 387, 411, 417 S.E.2d 765, 777 (1992) (citation omitted). Specifically, "[o]ur Supreme Court has held that a trial court referring to the prosecuting witness as 'the victim' does not constitute plain error." *Jackson*, 202 N.C. App. at 569, 688 S.E.2d at 769. Although the Supreme Court has cautioned that "the best practice would be for the trial court to modify the pattern jury instructions *at defendant's request* to use the phrase 'alleged victim' or 'prosecuting witness' instead of 'victim[,]'" *State v. Walston*, 367 N.C. 721, 732, 766 S.E.2d 312, 319 (2014) (emphasis added), in order to be entitled to a new trial, a defendant still must demonstrate that he is prejudiced by the use of the term, S*tate v. Henderson*, 155 N.C. App. 719, 722, 574 S.E.2d 700, 703 (2003). In the present case, where Defendant made no objection or special request to the jury instructions, and Defendant has failed to demonstrate prejudice, we hold the trial court did not commit plain error by using the term the "victim."

C. *Satellite-Based Monitoring*

Defendant argues that the trial court erred in ordering lifetime SBM because "[t]here was no hearing of any kind, no argument by the State, [and] nothing to support the trial court's order." Prior to reaching the merits of Defendant's argument, however, we must address this Court's jurisdiction.

1. Appellate Jurisdiction

a. Writ of Certiorari

Because of the civil nature of SBM hearings, a defendant *must* file a written notice of appeal from an SBM order pursuant to Appellate Rule 3. N.C. R. App. P. 3; *State v. Brooks*, 204 N.C. App. 193, 194-95, 693 S.E.2d 204, 206 (2010) (holding that oral notice of appeal from an SBM order does not confer jurisdiction on this Court). When a defendant has not properly given notice of appeal, this Court is without jurisdiction to hear the purported appeal. *State v. McCoy*, 171 N.C. App. 636, 638, 615 S.E.2d 319, 320 (2005). Our appellate courts, however, are authorized to issue writs of certiorari "to permit review of the judgments and orders of trial tribunals when the right to prosecute an appeal has been lost by failure to take timely action[.]" N.C. R. App. P. 21(a)(1).

In the present case, because Defendant's oral notice of appeal was insufficient to confer jurisdiction on this Court, N.C. R. App. P. 3, in order to reach the merits of Defendant's purported appeal, we would need to issue a writ of certiorari. N.C. R. App. P. 21(a)(1). We note that Defendant has not filed a petition for such writ; however, "[t]his Court does have the authority pursuant to North Carolina Rule of Appellate Procedure 21(a)(1) to 'treat the purported appeal as a petition for writ of certiorari' and grant it in our discretion." *Luther v. Seawell*, 191 N.C. App. 139, 142, 662 S.E.2d 1, 3 (2008) (citation omitted). Indeed, this Court has exercised its

discretionary authority to *ex mero motu* treat a defendant's brief as a petition for writ certiorari where, as here, the defendant failed to file a written notice of appeal from an SBM order. *See State v. Oxendine*, 206 N.C. App. 205, 209, 696 S.E.2d 850, 853 (2010) ("However, in the interest of justice, and to expedite the decision in the public interest, we *ex mero motu* treat [the] defendant's brief as a petition for certiorari and grant said petition to address the merits of [the] defendant's appeal.").

Moreover, in a recent case involving a jurisdictional defect in an appellant's notice of appeal, this Court treated the appellant's brief as a petition for writ of certiorari:

> we find the facts of [the appellant's] case worthy of treating his brief as a petition for writ of certiorari. We also note that the State has not raised this jurisdictional issue in its brief, and we do not contemplate any resulting prejudice to the State. Thus, in our discretion, we invoke this Court's authority pursuant to our caselaw and Appellate Rule 21, and proceed to the merits of [the appellant's] appeal.

In re E.A., ___ N.C. ___, ___, 833 S.E.2d 630, 631 (2019). We do the same here because we find Defendant's case "worthy of treating his brief as a petition for writ of certiorari."[3] *Id.*

[3] We note that in its brief, the State quotes Appellate Rule 3 and *State v. Bishop*, 255 N.C. App. 767, 805 S.E.2d 367 (2017) for the proposition that Defendant is "ask[ing] this Court to take two extraordinary steps to reach the merits, first by issuing a writ of certiorari to hear this appeal, and then by invoking Rule 2 of the North Carolina Rules of Appellate Procedure to address his unpreserved constitutional argument." *Id.* at 768-69, 805 S.E.2d at 369. Thus, our treatment of Defendant's purported appeal as a petition for writ of certiorari cannot be said to prejudice the State where the State has already been heard in regard to Defendant's jurisdictional defect.

b. Preservation and Rule 2

Defendant contends the trial court erred by imposing lifetime SBM because the State did not offer any evidence that the search was reasonable under the Fourth Amendment. However, the transcript of the sentencing hearing shows that Defendant did not argue that the imposition of lifetime SBM constituted an unreasonable search under the Fourth Amendment. Pursuant to Rule 10 of our Appellate Rules of Procedure, "to 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). Accordingly, because Defendant did not object to the imposition of lifetime SBM on constitutional grounds, he has waived the ability to argue it on appeal. *State v. Bursell* ("*Bursell II*"), 372 N.C. 196, 200, 827 S.E.2d 302, 305 (2019).

Defendant requests that "[s]hould this Court deem the issue somehow unpreserved, this Court should address the merits by invoking Rule 2 and suspending Rule 10's preservation requirements 'to prevent manifest injustice.'" Under Rule 2 of our Rules of Appellate Procedure, "[t]o prevent manifest injustice to a party[] . . . either court of the appellate division may[] . . . suspend or vary the requirements or provisions of any of these rules in a case pending before it . . . upon its own initiative[.]" N.C. R. App. P. 2. An appellate court's decision to invoke Rule 2 and

suspend the appellate rules is always an exercise of discretion. *Bursell II*, 372 N.C. at 201, 827 S.E.2d at 306.

"Rule 2 relates to the residual power of our appellate courts to consider, *in exceptional circumstances*, significant issues of importance in the public interest or to prevent injustice which appears manifest to the Court *and only in such instances*." *State v. Campbell*, 369 N.C. 599, 603, 799 S.E.2d 600, 602 (2017) (emphasis in original) (citation omitted). The determination of whether a particular case is an "instance" appropriate for Rule 2 review "must necessarily be made in light of the specific circumstances of individual cases and parties, such as whether 'substantial rights of an appellant are affected.'" *Id*, (quoting *State v. Hart*, 361 N.C. 309, 316, 644 S.E.2d 201, 205 (2007)).

In two recent cases, *State v. Ricks*, ___ N.C. App. ___, 843 S.E.2d 652, *writ allowed*, ___ N.C. ___, 842 S.E.2d 602 (2020) and *State v. Graham*, ___ N.C. App. ___, 841 S.E.2d 754, *writ allowed*, ___ N.C. ___, 845 S.E.2d 788 (2020), *and review allowed in part, denied in part*, ___ N.C. ___, 845 S.E.2d 789 (2020),[4] this Court invoked Rule 2 and suspended Rule 10(a)(1) to review appeals from SBM orders entered without a *Grady* hearing and without the State presenting any evidence of reasonableness. And, although we recognize that "precedent cannot create an automatic right to

[4] We note that *Ricks* and *Graham* have been stayed by our Supreme Court and are of questionable precedential value as a result. However, because the invocation of Rule 2 is a discretionary decision, we nonetheless find their reasoning persuasive.

review via Rule 2[,]" *Campbell*, 369 N.C. at 603, 799 S.E.2d at 603, we consider these cases informative in our exercise of discretion.

Just as we look to *Ricks* and *Graham* for instruction, *Ricks* sought guidance from *Bursell II*, 372 N.C. at 201, 827 S.E.2d at 306 (affirming this Court's invocation of Rule 2 to suspend Rule 10(a)(1) and review an appeal from an SBM order in *State v. Bursell* ("*Bursell I*"), 258 N.C. App. 527, 813 S.E.2d 463 (2018), *aff'd in part, rev'd in part*, 372 N.C. 196, 827 S.E.2d 302 (2019)). *Ricks* identified several factors that this Court considered in *Bursell I* when it exercised its discretion and invoked Rule 2 including: "whether the case involved a substantial right[,] . . . the State's and the trial court's failures to follow well-established precedent in applying for and imposing SBM, and the State's concession of reversible *Grady* error." *Ricks*, ___ N.C. App. at ___, 843 S.E.2d at 662–63 (quotation marks, citation, and brackets omitted). We too consider these factors "instructive in our exercise of discretion here." *Id.* at ___, 843 S.E.2d at 662.

First, in light of the United States Supreme Court's holding that the imposition of SBM effects a continuous warrantless search, *Grady v. North Carolina*, 575 U.S. 306, 310, 191 L.Ed.2d 459, 462-63 (2015), this Court has held the Fourth Amendment right implicated by the imposition of SBM "is a substantial right that warrants our discretionary invocation of Rule 2." *Graham*, ___ N.C. App. at ___, 841 S.E.2d at 769

(emphasis added) (internal citations omitted). Moreover, in the present case, as in *Ricks*,

> the State and the trial court . . . had the benefit of even more guidance regarding the State's burden than in *Bursell*. Indeed, *State v. Greene*, 255 N.C. App. 780, 806 S.E.2d 343 (2017), *State v. Grady* ("*Grady II*"), 259 N.C. App. 664, 817 S.E.2d 18 (2018), *aff'd as modified*, 372 N.C. 509, 831 S.E.2d 542 (2019) ("*Grady III*"), *State v. Griffin*, 260 N.C. App. 629, 818 S.E.2d 336 (2018), and *State v. Gordon* ("*Gordon I*"), 261 N.C. App. 247, 820 S.E.2d 339 (2018), all were published prior to Defendant's sentencing hearing. *These cases make clear that the trial court must conduct a hearing to determine the constitutionality of ordering a defendant to enroll in the SBM program, and that the State bears the burden of proving the reasonableness of the search.*

Ricks, ___ N.C. App. at ___, 843 S.E.2d at 663 (emphasis added). Although the trial court in this case had the benefit of the precedent referenced above, it did not conduct a *Grady* hearing and the State failed to offer any evidence regarding the reasonableness of the search. Further, the State has conceded a *Grady* hearing was required. For all of these reasons, we exercise our discretion and invoke Rule 2 to reach the merits of Defendant's appeal.

2. Merits

In this case, at the time of Defendant's sentencing hearing, the State filed its satellite-based monitoring application in accordance with N.C. Gen. Stat. § 14-208.40A. Defendant was ordered to submit to satellite-based monitoring solely due to his conviction of an aggravated offense; however, he will not actually enroll in the

program until after he has completed his active prison sentence. In North Carolina, it is well-established that a trial court *must* conduct a *Grady* hearing before imposing lifetime SBM:

> After determining that a criminal defendant falls into one of the statutory categories that requires the imposition of SBM, *see* N.C. Gen. Stat. § 14-208.40(a)(1)-(3) (2019), "the trial court *must conduct a hearing* in order to determine the constitutionality of ordering the targeted individual to enroll in the SBM program," [*State v. Gordon* ("*Gordon II*"), ___ N.C. App. ___, ___, 840 S.E.2d 907, 912 (2020)]. That determination "depends on the totality of the circumstances, including the nature and purpose of the search and the extent to which the search intrudes upon reasonable privacy expectations." *Grady I*, 575 U.S. at 310, 135 S. Ct. at 1371. The trial court must weigh the State's "interest in solving crimes that have been committed, preventing the commission of sex crimes, and protecting the public," *Grady III*, 372 N.C. at 545, 831 S.E.2d at 568, against SBM's "deep . . . intrusion upon an individual's protected Fourth Amendment interests," *id.* at 538, 831 S.E.2d at 564. The State bears the burden of "showing . . . that the SBM program furthers the State's interests." *Id.* at 545, 831 S.E.2d at 568.

Ricks, ___ N.C. App. at ___, 843 S.E.2d at 664 (emphasis added) (brackets omitted). Furthermore, if the trial court imposes a *future term of SBM* to follow a defendant's active sentence, as the trial court did in this case, "the State also must 'demonstrate what a defendant's threat of reoffending will be after having been incarcerated for' the duration of his sentence with some 'individualized measure of the defendant's threat of reoffending.'" *Id.* (quoting *Gordon II*, 2020 WL 1263993, at *6).

In the present case, at the close of the sentencing hearing, the State asked the trial court to "make the appropriate SBM and sex offender registration findings" and provided the court with a pre-printed order with a check next to the box finding that Defendant was convicted of an aggravated offense. The trial court stated that the "findings look correct" and then, based on its finding that Defendant had been convicted of an aggravated offense, ordered Defendant to enroll in lifetime SBM upon his release from prison. *See* N.C. Gen. Stat. § 14-208.40A(c) (2019) ("If the court finds that the offender . . . has committed an aggravated offense, . . . the court shall order the offender to enroll in a satellite-based monitoring program for life."). However, as in *Ricks*,

> the above was the entirety of the trial court's SBM consideration. The State presented no evidence or testimony at the sentencing hearing regarding the reasonableness of the search entailed by SBM in general or in this instance. And the trial court made no findings regarding the reasonableness of the search, let alone its reasonableness when Defendant is released . . . . Such consideration is constitutionally obligatory.

Ricks, ___ N.C. App. at ___, 843 S.E.2d at 665 (citation omitted).

As a result, we hold that the SBM order is unconstitutional as applied to Defendant and, as a result, we vacate the order without prejudice to the State's ability to file a subsequent SBM application. *See id.*, ___ N.C. App. at ___, 843 S.E.2d at 665 (citing *Bursell I* and *Bursell II* and holding that "the trial court order imposing SBM pursuant to N.C. Gen. Stat. § 14-208.40(a) is unconstitutional as applied to [the

d]efendant and must be vacated"); *Bursell I*, 258 N.C. App. at 534, 813 S.E.2d at 468 ("Because no *Grady* hearing was held before the trial court imposed SBM, we vacate its order without prejudice to the State's ability to file a subsequent SBM application."); *Bursell II*, 372 N.C. at 201, 827 S.E.2d at 306 (affirming this Court's decision in *Bursell I* to vacate the trial court's SBM order without prejudice).

III. Conclusion

For the reasons discussed above, we hold that the trial court did not commit plain error in admitting witness testimony or charging the jury. Further, because the trial court ordered Defendant to enroll in lifetime SBM without holding a *Grady* hearing and without the State offering any evidence proving the search of Defendant was reasonable under the Fourth Amendment, we vacate the SBM order without prejudice to the State's ability to file another SBM application.

NO PLAIN ERROR IN PART; VACATED IN PART.

Judge BROOK concurs.

Judge MURPHY concurs in part and concurs in result only in part.

Report per Rule 30(e).

MURPHY, Judge, concurring in part and concurring in result only in part.

The Majority exercises Rule 2 discretion based on an antiquated and rejected framework applying past cases before our Court; specifically, it considers *Ricks* and *Graham* as informative to its exercise of Rule 2 discretion here. *Supra* at *22-23. Such consideration does not satisfy our Supreme Court's requirements as reiterated in *Campbell*:

> As this Court has repeatedly stated, "Rule 2 relates to the residual power of our appellate courts to consider, *in exceptional circumstances*, significant issues of importance in the public interest or to prevent injustice which appears manifest to the Court *and only in such instances*." *Steingress v. Steingress*, 350 N.C. 64, 66, 511 S.E.2d 298, 299-300 (1999) (citing *Blumenthal v. Lynch*, 315 N.C. 571, 578, 340 S.E.2d 358, 362 (1986)) (emphases added); *see also Dogwood Dev. & Mgmt. Co. v. White Oak Transp. Co.*, 362 N.C. 191, 196, 657 S.E.2d 361, 364 (2008). This assessment—whether a particular case is one of the rare "instances" appropriate for Rule 2 review—must necessarily be made in light of the *specific circumstances of individual cases and parties*, such as whether "substantial rights of an appellant are affected." *State v. Hart*, 361 N.C. 309, 316, 644 S.E.2d 201, 205 (2007) (citing, *inter alia*, *State v. Sanders*, 312 N.C. 318, 320, 321 S.E.2d 836, 837 (1984) (per curiam) ("*In view of the gravity of the offenses for which defendant was tried and the penalty of death which was imposed*, we choose to exercise our supervisory powers under Rule 2 of the Rules of Appellate Procedure and, in the interest of justice, vacate the judgments entered and order a new trial.") (emphasis added)). *In simple terms, precedent cannot create an automatic right to review via Rule 2.* Instead, whether an appellant has demonstrated that his matter is

> the rare case meriting suspension of our appellate rules is always a discretionary determination to be made on a case-by-case basis. *See Dogwood Dev. & Mgmt. Co.*, 362 N.C. at 196, 657 S.E.2d at 364; *Hart*, 361 N.C. at 315-17, 644 S.E.2d at 204-06; *Steingress*, 350 N.C. at 66, 511 S.E.2d at 299-300.

State v. Campbell, 369 N.C. 599, 603, 799 S.E.2d 600, 602-03 (2017) (final emphasis added) (footnote omitted). The Majority's interpretation of the proper exercise of Rule 2 in prior SBM cases, even as a small part of its calculus, violates the clear holding of *Campbell*.

In consideration of the "specific circumstances" of this case, *and only this case*, I reach the same result as the Majority and choose to exercise our Rule 2 discretion to "prevent injustice." Therefore, I respectfully concur in result only as to Part II-C-1-b and concur fully in the remainder of the Majority's opinion.