NO. COA09-555

NORTH CAROLINA COURT OF APPEALS

Filed: 3 August 2010

STATE OF NORTH CAROLINA

v. Mecklenburg County
No. 06 CRS 223674
SEAN DREW STEWART 06 CRS 223676

Appeal by Defendant from judgments and commitments entered 12 June 2008 by Judge R. Stuart Albright in Superior Court, Mecklenburg County. Heard in the Court of Appeals 15 October 2009.

Attorney General Roy Cooper, by Assistant Attorney General Yvonne B. Ricci, for the State.

William D. Spence, for Defendant.

STEPHENS, Judge.

On 12 June 2008, a jury found Sean Drew Stewart ("Defendant") guilty of second-degree sexual offense and communicating threats. The jury found Defendant not guilty of two counts of first-degree rape and first-degree kidnapping. The trial court sentenced Defendant to a term of 168 months to 211 months on the second-degree sexual offense charge and a consecutive term of 120 days on the misdemeanor charge of communicating threats. Defendant was also ordered to enroll in satellite-based monitoring for the remainder of his life. The evidence presented at trial tended to show the following:

I. Factual Background

S.S.[1] testified as follows: On 26 April 2006 at approximately 11:00 p.m., she walked from a friend's apartment located on Glenwood Drive in Charlotte, North Carolina to a bus stop located on Tuckaseegee Road to catch a bus home. As she was walking, S.S. glanced to her left and noticed some lights, but continued walking. A few seconds later, S.S. felt someone grab her around her neck with a knife. S.S. identified Defendant as her attacker.

Defendant forced S.S. into a red truck, and Defendant drove the truck with his right arm around her in the passenger seat. S.S. did not look at Defendant because he instructed her not to look at him, but she was able to see the side of his face once while he was driving.

Defendant pulled the truck into a park and pulled S.S. out of the vehicle through the driver's side door. Defendant forced S.S. to bend over on a picnic table and placed her head and hands on the table. Defendant pulled S.S.'s pants down and "started having sex with [her] from the back." S.S. testified that she heard a wrapper open, and that she thought Defendant put a condom on before having intercourse with her.

Defendant then told S.S. to stand up and turn around on her back but not to look at him. Defendant told S.S. to put her shirt over her face. Defendant had vaginal intercourse with S.S. in this position "from the front." Defendant instructed S.S. to again

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[1]Initials have been used throughout to protect the victim's identity.

stand up and turn around and not to look at him. S.S. put her hands on the table, her head down, and pulled her jacket over her head. S.S. was bending over the table with her feet on the ground, when Defendant had anal intercourse with S.S. from behind. S.S. was "hollering" and "screaming" in pain as he performed this act, to which Defendant responded, "'Shut up, shut up, before I kill you. Be quiet, be quiet.'"

After the last act of intercourse, Defendant instructed S.S. to walk into the woods and not look back. S.S. put her clothes back on once she was in the woods. S.S. was scared and remained in the woods for approximately five minutes before walking out to find that the red truck and Defendant were gone. S.S. walked back to her friend's house where she had been before the attack, and told her friends that she had been raped. S.S.'s friend convinced S.S. to call the police. The police took S.S. to Presbyterian Hospital, where she was examined and tested.

Sometime later, S.S. was exiting a store on Glenwood Drive when she saw Defendant standing in the store's parking lot beside the red truck. S.S. wrote down the truck's license tag number and gave this information to Detective Michael Melendez of the Charlotte-Mecklenburg Police Department. Some days later, Detective Melendez presented S.S. with a photographic lineup, and S.S. identified Defendant as her attacker. S.S. also identified Defendant as her attacker in open court.

Victoria Roarke ("Roarke"), a sexual assault nurse examiner at Presbyterian Hospital, testified as an expert witness for the

State. Roarke testified that on 27 April 2006, she examined S.S. and noted significant swelling of S.S.'s anal opening and tears in the skin of her anus. Roarke testified that these injuries were the likely result of blunt-force trauma to the anus, and that this was consistent with S.S.'s report of being sexually assaulted.

Abby Moeykens ("Moeykens"), an analyst at the Charlotte crime lab, testified that a test of the rape kit collected from S.S. identified semen in S.S.'s panties and on vaginal swabs. D.N.A. testing later revealed that the D.N.A. profile obtained from S.S.'s panties was consistent with the profile obtained from Defendant.

Defendant did not present any evidence at trial. At the close of the State's evidence and at the close of all evidence, Defendant made a motion to dismiss the two first-degree rape charges, the first-degree sexual offense charge, and the charge of communicating threats. These motions were denied.

II. Motion to Dismiss

In the present case, Defendant was charged with first-degree sexual offense but convicted of second-degree sexual offense. A defendant indicted for a criminal offense "may be convicted of the charged offense or of a lesser included offense when the greater offense charged in the bill contains all the essential elements of the lesser offense, all of which could be proved by proof of the allegations of fact contained in the indictment." *State v. Riera*, 276 N.C. 361, 368, 172 S.E.2d 535, 540 (1970); N.C. Gen. Stat. § 15-170 (2009).

On appeal, Defendant argues the trial court erred by denying

his motion to dismiss the charge of second-degree sexual offense because there was insufficient evidence to establish every element of the crime. Defendant also argues his motion was erroneously denied because there was insufficient evidence to establish Defendant's identity as the perpetrator. We disagree.

> It is an established principle of law that upon a motion to dismiss in a criminal action, all of the evidence, whether competent or incompetent, must be considered in the light most favorable to the state, and the state is entitled to every reasonable inference therefrom. *State v. Witherspoon*, 293 N.C. 321, 237 S.E.2d 822 (1977); *State v. Poole*, 285 N.C. 108, 203 S.E.2d 786 (1974). Contradictions and discrepancies are for the jury to resolve and do not warrant dismissal. *State v. Witherspoon*, *supra*; *State v. Bolin*, 281 N.C. 415, 189 S.E.2d 235 (1972). In considering a motion to dismiss, it is the duty of the court to ascertain whether there is substantial evidence of each essential element of the offense charged. *State v. Allred*, 279 N.C. 398, 183 S.E.2d 553 (1971). Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Thompson v. Wake County Bd. of Educ.*, 292 N.C. 406, 233 S.E.2d 538 (1977); *Com'r. of Insurance v. Fire Insurance Rating Bureau*, 292 N.C. 70, 231 S.E.2d 882 (1977).

State v. Smith, 300 N.C. 71, 78-79, 265 S.E.2d 164, 169 (1980).

A person is guilty of a second-degree sexual offense "if the person engages in a sexual act with another person . . . [b]y force and against the will of the other person[.]" N.C. Gen. Stat. § 14-27.5 (2009). The definition of a "sexual act" includes "anal intercourse" and "also means the penetration, however slight, by any object into the genital or anal opening of another person's body[.]" N.C. Gen. Stat. § 14-27.1(4) (2009). Defendant argues

there was insufficient evidence that he engaged in the sexual act of anal intercourse because there was insufficient evidence that penetration occurred. This argument is meritless.

In *State v. Ashford*, 301 N.C. 512, 272 S.E.2d 126 (1980), our Supreme Court held that a victim's testimony that the defendant had "'intercourse'" and "'sex'" with her was sufficient to support a finding by the jury that there was penetration. *Id.* at 513-14, 272 S.E.2d at 127; *see State v. Bowman*, 232 N.C. 374, 376, 61 S.E.2d 107, 108 (1950) (Victim's "testimony that the defendant had 'intercourse' with her and 'raped' her under the circumstances delineated by her was sufficient to warrant the jury in finding that there was penetration of her private parts by the phallus of the defendant.").

However, in *State v. Hicks*, 319 N.C. 84, 352 S.E.2d 424 (1987), the Court held that the victim's testimony that the defendant "'put his penis in the back of me'" was insufficient to support a finding of penetration. *Id.* at 90, 352 S.E.2d at 427. In *Hicks*, the physician who examined the victim also testified that there was no evidence of anal intercourse. *Id.* Because of the ambiguity of the victim's testimony and the absence of any corroborative evidence that anal intercourse occurred, the Court held "that as a matter of law the evidence was insufficient to support a verdict, and the charge of first-degree sexual offense should not have been submitted to the jury." *Id.*

In the present case, S.S. testified that Defendant "stuck his private part in my butt" and that "he had anal sex with me[.]"

S.S. further described this incident as follows:

> [THE STATE]. Where did he put his penis?
>
> [S.S.]. In my butt.
>
> [THE STATE]. And how did you react when he did that?
>
> [S.S.]. It was hurting. I was hollering.
>
> [THE STATE]. What do you mean, hollering?
>
> [S.S.]. I was screaming.

On cross-examination, S.S. testified to the following:

> [DEFENSE COUNSEL]. And it was the third time that he turned you back around, so that your head was back down and your arms were on the table, and that's the time he attempted or had anal sex. Is that right?
>
> [S.S.]. Yes, sir.

Unlike in *Hicks*, S.S.'s testimony was not ambiguous. Further, Roarke's testimony regarding her medical evaluation of S.S. and the indication of "blunt-force trauma" to S.S.'s anus reasonably gives rise to an inference of penetration. As our Supreme Court held in *Ashford* and *Bowman*, S.S.'s testimony that Defendant "had anal sex with [her]" was sufficient to support a finding by the jury that there was penetration.

Defendant's argument that the evidence was insufficient to establish him as the perpetrator also fails. S.S. identified Defendant in both a photographic lineup and in open court. Further, Defendant's D.N.A. profile was consistent with the profile

from the semen found in S.S.'s panties. We conclude there was sufficient evidence presented at trial to identify Defendant as the perpetrator of these crimes. Defendant's argument is overruled.

III. Expert Opinion Testimony

In his second argument, Defendant argues the trial court committed plain error in allowing the State's expert witness, Roarke, to testify that the injuries she observed about S.S.'s anus were "consistent with Ms. [S.S.'s] story" of being sexually assaulted. Defendant contends that Roarke's testimony constituted impermissible opinion evidence regarding S.S.'s credibility. We disagree.

Defendant did not object to Roarke's testimony at trial, and therefore we consider his contentions under the plain error standard. N.C. R. App. P. 10(c)(4). "Under the plain error rule, [D]efendant must convince this Court not only that there was error, but that absent the error, the jury probably would have reached a different result." *State v. Jordan*, 333 N.C. 431, 440, 426 S.E.2d 692, 697 (1993).

"[O]ur Supreme Court has determined that when one witness 'vouch[es] for the veracity of another witness,' such testimony is an opinion which is not helpful to the jury's determination of a fact in issue and is therefore excluded by Rule 701." *State v. Gobal*, 186 N.C. App. 308, 318, 651 S.E.2d 279, 286 (2007) (quoting *State v. Robinson*, 355 N.C. 320, 335, 561 S.E.2d 245, 255, *cert. denied*, 537 U.S. 1006, 154 L. Ed. 2d 404 (2002)). This rule also applies to expert testimony, which is governed by N.C. R. Evid.

702. Expert opinion testimony is not admissible to establish the credibility of the victim as a witness. *State v. Kim*, 318 N.C. 614, 620, 350 S.E.2d 347, 351 (1986).

Defendant contends the present case is similar to *State v. Couser*, 163 N.C. App. 727, 594 S.E.2d 420 (2004), in which this Court held that a medical expert's opinion that "the victim was probably sexually abused" was impermissible and prejudicial because it amounted to an improper opinion on the victim's credibility. *Id.* at 730, 594 S.E.2d at 422. In *Couser*, the defendant had been convicted of taking indecent liberties with a child and attempted rape. *Id.* at 729, 594 S.E.2d at 422. The only direct evidence against the defendant was the victim's testimony and corroborative testimony from other witnesses. *Id.* at 731, 594 S.E.2d at 423. "There was no evidence that the victim's behavior or symptoms following the assault were consistent with being sexually abused." *Id.* The only medical evidence presented was that of abrasions which were not specific to, nor diagnostic of, sexual abuse. *Id.* The results of a rape suspect kit were negative, revealing "that the victim had no semen in her or on her clothing and that neither the victim nor defendant had transmitted hairs to each other." *Id.*

> Without the [medical expert opinion testimony], the jury . . . would have been left with only the testimony of the victim and corroborative testimony along with evidence of abrasions not necessarily caused by sexual assault. Thus, the central issue to be decided by the jury was the credibility of the victim. We conclude that the impermissible expert medical opinion evidence had a probable impact on the jury's result because it amounted to an improper opinion on the victim's credibility, whose testimony was the only direct evidence

> implicating defendant.

Id.; *see State v. O'Connor*, 150 N.C. App. 710, 712, 564 S.E.2d 296, 297 (2002) (Where there was no physical evidence of abuse and the State's case was almost entirely dependent on victim's credibility with the jury, admission of expert testimony that victim's story was credible was plain error.).

Contrary to Defendant's contention, the present case is readily distinguishable from *Couser* and *O'Connor*. Here, Roarke's testimony that the breaks in S.S.'s skin were "consistent with Ms. [S.S.'s] story" was not a statement about S.S.'s credibility, but rather was an expert opinion on the physical evidence. *See* N.C. R. Evid. 702(a) ("If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training or education, may testify thereto in the form of an opinion."). The trial court did not err in admitting Roarke's testimony, and thus the trial court did not commit plain error.

IV. Testimony Regarding D.N.A. Report

Defendant also argues the trial court committed plain error in allowing Moeykens, the D.N.A. analyst, to testify as to the results of a co-worker's report. Specifically, Defendant contends that Moeykens' testimony was testimonial hearsay and, thus, violated Defendant's rights under the Confrontation Clause. However, Defendant did not object to Moeykens' testimony at trial, nor did Defendant argue at trial that his rights under the Confrontation

Clause had been violated. "Constitutional issues not raised and passed upon at trial will not be considered for the first time on appeal." *State v. Lloyd*, 354 N.C. 76, 86-87, 552 S.E.2d 596, 607 (2001). Accordingly, this issue is not preserved for our review, *see id.*, and we decline to address this argument.

V. Corroborative Evidence

In his fourth argument, Defendant argues the trial court erred in admitting in evidence a recorded audio statement from S.S.'s friend, Latasha Howze ("Howze"), because this statement served to impermissibly bolster Howze's testimony where her credibility had not been attacked. We disagree.

"[T]he proper standard of review for reviewing a trial court's decision to admit or exclude evidence is abuse of discretion." *State v. Early*, __ N.C. App. __, __, 670 S.E.2d 594, 599 (2009). An abuse of discretion occurs where the trial court's decision "is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision." *State v. McDonald*, 130 N.C. App. 263, 267, 502 S.E.2d 409, 413 (1998) (internal quotation marks and citation omitted).

On 9 May 2006, Howze gave a recorded statement over the telephone to Detective Melendez. At trial, Howze testified that she was with S.S. at their friend's apartment on 26 April 2006 following S.S.'s attack. On direct examination by the State, Howze testified about the events that took place when S.S. returned to their friend's apartment reporting she had been raped. The State did not reference Howze's recorded statement during direct

examination. However, on cross-examination, defense counsel asked Howze about the statement she gave to Detective Melendez. At that time, defense counsel questioned Howze about a four-page paper writing marked as "Defendant's Exhibit 6" and entitled "Howze Statement" which is the same statement Defendant now objects to, labeled "State's Exhibit 8[.]" On re-direct examination of Howze, the State also questioned Howze about the contested statement:

> [THE STATE]. Referring to that same statement that you just spoke about with [defense counsel], do you know for a fact that she even got a ride, as opposed to walking?
>
> [HOWZE]. No, I don't.
>
> [THE STATE]. In that same statement -- I've marked my copy as State's Exhibit Number 8 for identification -- let me refer you to Page 3.

Later in the trial, during Detective Melendez's testimony, the State offered into evidence "State's Exhibit 8 . . . for corroborative purposes[.]" Defendant objected to this exhibit offered by the State despite having questioned Howze about it earlier. Defense counsel objected as follows:

> Your Honor, my objection is that the State has offered this exhibit for corroborative purposes. Ms. Howze's credibility was not intact [sic]. This is improper bolstering at this point. I did not -- on cross examination, I did not go into her veracity, I did not attack any of her representations, I asked her questions pertaining to [S.S.], but I did not go into the details of her representations or in any way attack what she claimed happened between she and the victim.
>
> At this point, to corroborate something that hasn't been attacked is just bolstering.

Defendant argues that the trial court erred in admitting Ms.

Howze's recorded statement to corroborate her testimony when her credibility had not been attacked. North Carolina law is clear, however, that "[p]rior consistent statements of a witness are admissible as corroborative evidence even when the witness has not been impeached[]" if the statements corroborate the witness's testimony. *State v. Riddle*, 316 N.C. 152, 157, 340 S.E.2d 75, 78 (1986). Furthermore, Defendant has failed to demonstrate that he suffered any prejudice from the alleged error. Accordingly, the assignment of error upon which Defendant's argument is based is overruled.

VI. Inconsistent Verdicts

Defendant also argues the trial court erred in accepting the jury's verdict of guilty of committing a second-degree sex offense where the same jury found Defendant not guilty of two counts of first-degree rape which occurred during the same course of events. We disagree.

"Where several offenses charged allegedly arise from the same transaction, and the offenses are mutually exclusive, a defendant may not be convicted of more than one of the mutually exclusive offenses." *State v. Hames*, 170 N.C. App. 312, 322, 612 S.E.2d 408, 414 (2005) (quoting *State v. Hall*, 104 N.C. App. 375, 386, 410 S.E.2d 76, 82 (1991)). However, "[g]enerally rape is not a continuous offense, but each act of intercourse constitutes a distinct and separate offense." *State v. Dudley*, 319 N.C. 656, 659, 356 S.E.2d 361, 363 (1987) (internal quotation marks and citations omitted). Thus, the crimes of second-degree sex offense

and first-degree rape are not mutually exclusive. Furthermore, it is well-established that "a jury is not required to be consistent and that incongruity alone will not invalidate a verdict." *State v. Rosser*, 54 N.C. App. 660, 661, 284 S.E.2d 130, 131 (1981) (citations omitted).

In *State v. Shaffer*, 193 N.C. App. 172, 666 S.E.2d 856 (2008), *disc. review denied*, 363 N.C. 137, 674 S.E.2d 418 (2009), a jury found the defendant guilty of first-degree sexual offense and crime against nature, but acquitted the defendant of first-degree rape and assault by strangulation. *Id.* at 178, 666 S.E.2d at 859. Our Court held that "[a]lthough the results on these charges may be difficult to reconcile, this Court is not required to grant defendant a new trial." *Id.* at 178, 666 S.E.2d at 860. Accordingly, the seemingly inconsistent verdicts in the case *sub judice* do not entitle Defendant to a new trial. Defendant's argument is overruled.

VII. SBM Order

Defendant next contends that the trial court committed error by failing to follow statutory procedures in ordering Defendant to enroll in lifetime satellite-based monitoring ("SBM"). Defendant also argues that the trial court erred in ordering him to enroll in lifetime SBM because he contends that the issue of whether he was convicted of an "aggravated offense" was a question for the jury, and that the trial court's determination violated his Sixth Amendment right to trial by jury. *See Blakely v. Washington*, 542 U.S. 296, 159 L. Ed. 2d 403 (2004). Under recent decisions of this

Court, however, we do not have jurisdiction to consider Defendant's challenge to the SBM order because Defendant failed to give *written* notice of appeal from the order requiring him to enroll in SBM. *State v. Brooks*, __ N.C. App. __, __, 693 S.E.2d 204, 206 (2010); *see also State v. Singleton*, __ N.C. App. __, __, 689 S.E.2d 562, 565 (2010) ("for purposes of appeal, a[n] SBM hearing is not a 'criminal trial or proceeding' for which a right of appeal" arises under N.C. Gen. Stat. § 15A-1442 or N.C. Gen. Stat. § 15A-1444). We are bound by these decisions to dismiss Defendant's arguments.[2]

> In light of our decisions interpreting an SBM hearing as not being a criminal trial or proceeding for purposes of appeal, we must hold that oral notice pursuant to N.C.[]R. App. P. 4(a)(1) is insufficient to confer jurisdiction on this Court. Instead, a defendant must give notice of appeal pursuant to N.C.[]R. App. P. 3(a) as is proper "in a civil action or special proceeding[.]" N.C. R. App. P. 3(a).
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> N.C. R. App. P. 3(a) requires that a party "fil[e] notice of appeal with the clerk of superior court and serv[e] copies thereof upon all other parties[.]" *Id.* Because the record on appeal does not contain a written notice of appeal filed with the clerk of superior court, which was served upon the State, this appeal must be dismissed.

Brooks, __ N.C. App. at __, 693 S.E.2d at 206.

We are cognizant of the fact that, in the case *sub judice*, entry of the trial court's SBM order occurred during sentencing of Defendant for his convictions on charges tried to the jury, whereas

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[2] "Where a panel of the Court of Appeals has decided the same issue, albeit in a different case, a subsequent panel of the same court is bound by that precedent, unless it has been overturned by a higher court." *In re Appeal from Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989).

in *Brooks* and *Singleton*, the SBM hearing was conducted as an independent proceeding separate and apart from the proceedings which resulted in those defendants' convictions.[3] In light of this Court's prior decisions regarding the nature of an SBM proceeding, however, and this Court's specific holding in *Brooks*, this is a distinction without a difference. This Court has made clear that an SBM proceeding, no matter the manner in which it is conducted, is in the nature of a civil action, *see, e.g. State v. Bare*, __ N.C. App. __, __, 677 S.E.2d 518, 531 (2009), and thus, that the failure to file written notice of appeal from an SBM order, as is required in all civil actions, divests this Court of jurisdiction to consider the order.

However, this Court has also recognized that it is appropriate to permit review in the Court's discretion by *certiorari* in cases where the notice of appeal is absent or deficient.

> This 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. *State v. San Miguel*, 74 N.C. App. 276, 277-78, 328 S.E.2d 326, 328 (1985); *see also Guthrie v. Conroy*, 152 N.C. App. 15, 19, 567 S.E.2d 403, 407 (2002) (where notice of appeal was filed 97 days late, Court "exercise[d] its discretion and grant[ed] *certiorari* to review plaintiff's claims on

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[3] "Under N.C. Gen. Stat. § 14-208.40A(a), the SBM determination is made 'during the sentencing phase,' where the defendant has been convicted of a 'reportable conviction.' However, the SBM determination is separate from the sentencing hearing." *Singleton*, __ N.C. App. at __, n.5, 689 S.E.2d at 565, n.5; *see State v. Causby*, __ N.C. App. __, __, 683 S.E.2d 262, 263 (2009) (After defendant's sentencing hearing, the trial court conducted a separate hearing to determine whether defendant should be enrolled in a[n] SBM program.).

> their merits, pursuant to N.C. R. App. P. 21"); *Seyboth v. Seyboth*, 147 N.C. App. 63, 65, 554 S.E.2d 378, 380 (2001) (where record reflected no notice of appeal, Court "consider[ed] defendant's assignment of error to the . . . order as a petition for *writ of certiorari*" and reviewed merits of appeal); *Anderson v. Hollifield*, 345 N.C. 480, 482, 480 S.E.2d 661, 663 (1997) (affirming this Court's discretion to do same); *Fearrington v. University of North Carolina*, 126 N.C. App. 774, 778, 487 S.E.2d 169, 172 (1997) (where notice of appeal was fatally defective, Court ruled "N.C. R. App. P. 21(a)(1) gives this Court the authority to treat the purported appeal as a petition for writ of *certiorari* to review the . . . order, and we elect to do so and consider the merits of petitioner's assignment of error"); *Dogwood Dev. & Mgmt. Co., LLC v. White Oak Transp. Co.*, 362 N.C. 191, 197 fn. 3, 657 S.E.2d 361, 365 fn. 3 (2008) ("a discussion of the judiciary's inherent power to issue extraordinary and remedial writs, and this Court's general supervisory authority, is beyond the scope of this opinion").

Luther v. Seawell, 191 N.C. App. 139, 142, 662 S.E.2d 1, 3 (2008).

We believe it is particularly appropriate to treat defendant's purported appeal from the SBM order as a petition for writ of *certiorari* and to grant the petition to allow review in this situation, as the proper method of appeal of an SBM order was not entirely clear until 18 May 2010, when this court decided *Brooks*, __ N.C. App. __, 693 S.E.2d 204. Defendant gave his oral notice of appeal in open court on 12 June 2008, nearly two years prior to Brooks. This Court has granted *certiorari* to permit review of SBM orders in which oral notice of appeal was given in other cases, first in *Brooks*, as well as in *State v. Clayton*, __ N.C. App. __, __, __ S.E.2d __, __ (2010) and *State v. Inman* __ N.C. App. __, __, __ S.E.2d __, __ (2010). Therefore, in our discretion, we treat

Defendant's purported appeal as a petition for writ of *certiorari* pursuant to N.C. R. App. 21(a)(1), and grant the petition.

A. Failure to Follow Statutory Procedure

Defendant next contends that the trial court committed error by failing to follow statutory procedures in ordering Defendant to enroll in lifetime SBM. We disagree.

N.C. Gen. Stat. § 14-208.40A(a) "sets forth the procedural framework for a determination of SBM enrollment." *State v. Davison*, __ N.C. App. __, __, 689 S.E.2d 510, 513 (2009). "First, a trial court must determine whether a defendant's conviction is 'a reportable conviction' as defined by N.C. Gen. Stat. § 14-208.6(4)." *Id.* A "reportable conviction" is defined in pertinent part as "[a] final conviction for an offense against a minor, a sexually violent offense, or an attempt to commit any of those offenses unless the conviction is for aiding and abetting [.]" N.C. Gen. Stat. § 14-208.6(4)(a) (2009).

If the trial court determines that a defendant's conviction is a "reportable conviction," then

> during the sentencing phase, the district attorney shall present to the court any evidence that (i) the offender has been classified as a sexually violent predator pursuant to G.S. 14-208.20, (ii) the offender is a recidivist, (iii) the conviction offense was an aggravated offense, (iv) the conviction offense was a violation of G.S. 14-27.2A or G.S. 14-27.4A, or (v) the offense involved the physical, mental, or sexual abuse of a minor. The district attorney shall have no discretion to withhold any evidence required to be submitted to the court pursuant to this subsection.
>
> The offender shall be allowed to present to

> the court any evidence that the district attorney's evidence is not correct.

N.C. Gen. Stat. § 14-208.40A(a) (2009). After presentation of the above-described evidence from the parties,

> the court shall determine whether the offender's conviction places the offender in one of the categories described in G.S. 14-208.40(a), and if so, shall make a finding of fact of that determination, specifying whether (i) the offender has been classified as a sexually violent predator pursuant to G.S. 14-208.20, (ii) the offender is a recidivist, (iii) the conviction offense was an aggravated offense, (iv) the conviction offense was a violation of G.S. 14-27.2A or G.S. 14-27.4A, or (v) the offense involved the physical, mental, or sexual abuse of a minor.

N.C. Gen. Stat. § 14-208.40A(b) (2009). Should the court find "that the offender has been classified as a sexually violent predator, is a recidivist, has committed an aggravated offense, or was convicted of [an offense under either] G.S. 14-27.2A or G.S. 14-27.4A, the court shall order the offender to enroll in a satellite-based monitoring program for life." N.C. Gen. Stat. § 14-208.40A(c) (2009).

Defendant argues that the trial court did not follow this procedure and that the trial court's written order does not specify whether Defendant was classified as a predator, a recidivist, or whether the convicted offense was an aggravated offense. Defendant's argument is without merit.

Contrary to Defendant's argument, the trial court followed the statutory procedure and found that second-degree sexual offense is a reportable conviction pursuant to N.C. Gen. Stat. § 14-208.6, and that this offense is an aggravated offense. Furthermore, the trial

court made the following oral findings of fact during the sentencing part of trial:

> The Court will find this is an aggravated offense, and that is not [t]he Court making findings of aggravation, that is a statutorily-listed crime. The Court will find that this [is] in fact [within] the aggravated offense statute as defined in 14-208.6, subparagraph (1)(a), subparagraph, lower-case, (I).
>
> Based on all those findings, [t]he Court will further find that this is in fact an aggravated offense. . . .
>
> The Court will further order that you enroll in a satellite-based monitoring program for your natural life upon release, as required by law.

Furthermore, in Defendant's final argument, Defendant contends that the trial court erred in finding that he had been convicted of an aggravated offense and not submitting this issue to the jury. Thus, by his final argument, Defendant acknowledges that the trial court made the necessary findings to impose SBM. Accordingly, we hold that the trial court complied with the statutory procedure set out in N.C. Gen. Stat. § 14-208.40A(a). Defendant's assignment of error upon which this argument is based is overruled.

B. Lifetime SBM

Lastly, Defendant argues the trial court erred in ordering Defendant to enroll in lifetime SBM. Specifically, Defendant argues that the issue of whether Defendant was convicted of an "aggravated offense" was a question for the jury, and that the trial court's determination violated his Sixth Amendment right to a trial by jury. *See Blakely v. Washington*, 542 U.S. 296, 301, 159

L. Ed. 2d 403, 412 (2004) ("Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be presented to a jury and proved beyond a reasonable doubt."). We are not persuaded by Defendant's contention.

N.C. Gen. Stat. § 14-208.6(1a) defines an "[a]ggravated offense" in pertinent part as "any criminal offense that includes . . . engaging in a sexual act involving vaginal, anal, or oral penetration with a victim of any age through the use of force or the threat of serious violence[.]" N.C. Gen. Stat. § 14-208.6(1a) (2008). "Reviewing the plain language of the statute, it is clear that an 'aggravated offense' is an offense including: first, a sexual act involving vaginal, anal or oral penetration; and second, . . . the use of force or the threat of serious violence against a victim of any age." *Davison*, __ N.C. App. at __, 689 S.E.2d at 515. "[W]hen making a determination pursuant to N.C.G.S. § 14-208.40A, the trial court is only to consider the elements of the offense of which a defendant was convicted and is not to consider the underlying factual scenario giving rise to the conviction." *Id.* at 517. Thus, whether an offense constitutes an aggravated offense is a question of law for the trial court and not, as Defendant contends, a question for the jury. Defendant's argument is overruled.

NO ERROR.

Judges STROUD and BEASLEY concur.

Report per Rule 30(e).