NO. COA12-1436
NORTH CAROLINA COURT OF APPEALS

Filed: 3 September 2013

STATE OF NORTH CAROLINA

v. Hoke County
Nos. 10 CRS 934
10 CRS 937-42
10 CRS 50554-62
10 CRS 50565-69
10 CRS 50571-72
10 CRS 050603
10 CRS 050613-20

RICHARD ULA HELMS, JR.,
Defendant.

Appeal by defendant from judgments entered 6 March 2012 by Judge Richard T. Brown in Hoke County Superior Court. Heard in the Court of Appeals 9 April 2013.

Roy Cooper, Attorney General, by David Gordon, Assistant Attorney General, for the State.

Kevin P. Bradley for defendant-appellant.

DAVIS, Judge.

Defendant Richard Ula Helms, Jr. ("defendant") appeals from his convictions for various sex offenses. After careful review, we reverse in part, vacate in part, and remand for resentencing.

Factual Background

At trial, the State presented evidence tending to establish the following facts: Defendant became a stepfather to "Jamie,"[1] the victim, when he married her mother in 2001. Defendant began to sexually abuse Jamie in 2007, and at trial, Jamie testified about several specific instances of sexual abuse that she could recall.

The first incident of abuse occurred between 3 October 2007 and 31 October 2007, when Jamie was 14 years old. On that occasion, defendant came into her bedroom, blocked the door, and made Jamie take off her pants. He placed his tongue on both the inside and outside of her vagina and digitally penetrated her vagina. Jamie did not tell anyone at the time of the incident because she did not want to "ruin what little family" she had.

The second incident took place in either June or July of 2008, when Jamie was 15 years old. While taking her to practice driving, defendant drove the car behind a group of trees, told Jamie to remove her clothes, and ordered her to perform oral sex on him. Defendant then performed oral sex on Jamie, penetrated her vagina with his penis, and ejaculated on her chest.

A third incident occurred in August 2009. That particular morning, Jamie went into the bedroom shared by her mother and defendant to wake defendant up for work. Defendant threw her on

[1]Pseudonyms are used throughout the opinion to protect the identities of individuals who were minors at the time of the incident.

the bed and "entered [her] vaginally with his penis, and he tried to do anal." When Jamie yelled at him that it hurt, he put his penis back inside her vagina and ejaculated on her stomach.

The final incident took place in January 2010. Jamie's friend, "Alice," was visiting Jamie at her house. Jamie and Alice were in Jamie's bedroom when defendant came to her door. Defendant told them both to lay on their stomachs. Defendant then placed a blanket under the door frame so that the door would not open. Defendant proceeded to unclasp the girls' bras and rub their breasts. He also unbuttoned their pants and digitally penetrated their vaginas.

Defendant was indicted on one count of statutory rape, eight counts of statutory sexual offense, sixteen counts of sexual activity by a substitute parent, one count of attempted sexual activity by a substitute parent, two counts of incest, nine counts of indecent liberties with a minor, and one count of disseminating obscenity to a minor under 16. A jury trial was held during the February and March 2011 Criminal Sessions of Hoke County Superior Court.

When asked at trial if any other incidents of sexual abuse occurred between October of 2007 and June of 2008, Jamie responded "I don't remember. . . . I believe he licked my vagina and fingered my vagina." Jamie testified that she could

not remember how many times this happened but that it occurred more than once. When similarly asked about the period of time between July 2008 and August 2009, Jamie testified that defendant "penetrated [her] with his penis" and had her watch pornography with him. She again testified that she could not remember how many times this occurred.

Dr. Laura Gutman testified at trial as an expert witness in the field of child sex abuse and general pediatrics. She testified that she performed a physical examination of Jamie on 4 February 2010 and observed tears to her hymen in two places, "all the way down to the level of the vaginal floor." Dr. Gutman testified that these injuries were "diagnostic of penetrative trauma to the vaginal area." Dr. Gutman also took a medical history, and Jamie told her about numerous incidents of sexual activity between her and defendant.

At the close of all the evidence, defendant moved to dismiss the charges against him for insufficient evidence, and the trial court dismissed one count of statutory sex offense, one count of incest, and four counts of sexual activity by a substitute parent. The jury found defendant guilty of one count of statutory rape, twelve counts of sexual activity by a substitute parent, one count of attempted sexual activity by a substitute parent, one count of disseminating obscenity to a minor under the age of 16, seven counts of statutory sex

offense, nine counts of indecent liberties, and one count of incest.

The trial court arrested judgment on the attempted sexual activity by a substitute parent offense and consolidated the remaining offenses into four presumptive-range terms — two terms of 240-297 months and two terms of 25-39 months — to be served consecutively and one presumptive-range term of 240-297 months to be served concurrently. The trial court also entered orders requiring defendant to enroll in satellite-based monitoring ("SBM") for the rest of his natural life. Defendant gave notice of appeal from both his convictions and the SBM orders.

Analysis

I. Ineffective Assistance of Counsel

Defendant asserts two separate ineffective assistance of counsel claims. First, he contends that his counsel violated his Sixth Amendment right to effective assistance of counsel by failing to argue that there was a fatal variance between the indictments and the evidence presented at trial in file numbers 10 CRS 937 and 10 CRS 50560. Second, he argues that his counsel was ineffective in failing to argue the lack of sufficient evidence of fellatio in connection with his motion to dismiss in file number 10 CRS 938. We discuss each in turn.

"In general, claims of ineffective assistance of counsel should be considered through motions for appropriate relief and

not on direct appeal." *State v. Stroud*, 147 N.C. App. 549, 553, 557 S.E.2d 544, 547 (2001), *cert. denied*, 356 N.C. 623, 575 S.E.2d 758 (2002). This is so because this Court, in reviewing the record, is "without the benefit of information provided by defendant to trial counsel, as well as defendant's thoughts, concerns, and demeanor[,] that could be provided in a full evidentiary hearing on a motion for appropriate relief." *Id.* at 554-55, 557 S.E.2d at 547 (alteration in original) (citation and quotation marks omitted). However, ineffective assistance of counsel claims are appropriately reviewed on direct appeal "when the cold record reveals that no further investigation is required, i.e., claims that may be developed and argued without such ancillary procedures as the appointment of investigators or an evidentiary hearing." *State v. Thompson*, 359 N.C. 77, 122-23, 604 S.E.2d 850, 881 (2004) (citation and quotation marks omitted), *cert. denied*, 546 U.S. 48, 163 L.Ed.2d 80 (2005).

Defendant's ineffective assistance of counsel claims here fall into this latter category because our analysis of his claims does not require additional evidence beyond what is contained in the record on appeal. *See State v. Phillips*, 365 N.C. 103, 144, 711 S.E.2d 122, 151 (2011) ("The incidents that defendant here argues constitute ineffective assistance of counsel may be determined from the record on appeal, so we can address them on the merits without the necessity to remand for

an evidentiary hearing."), *cert. denied*, ___ U.S. ___, 182 L.Ed.2d 176 (2012).

In order to establish ineffective assistance of counsel, "a defendant must show that (1) 'counsel's performance was deficient' and (2) 'the deficient performance prejudiced the defense.'" *Id.* at 118, 711 S.E.2d at 135 (quoting *Strickland v. Washington*, 466 U.S. 668, 687, 80 L.Ed.2d 674, 693 (1984)).

> Deficient performance may be established by showing that counsel's representation fell below an objective standard of reasonableness. Generally, to establish prejudice, a defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.

State v. Allen, 360 N.C. 297, 316, 626 S.E.2d 271, 286 (internal citations and quotation marks omitted), *cert. denied*, 549 U.S. 867, 166 L.Ed.2d 116 (2006).

"A strong presumption exists that a counsel's conduct falls within the range of reasonable professional assistance." *State v. Frazier*, 142 N.C. App. 361, 367, 542 S.E.2d 682, 687 (2001). If "the strategy of trial counsel is well within the range of professionally reasonable judgments, the action of counsel is not constitutionally ineffective." *State v. Campbell*, 142 N.C. App. 145, 152, 541 S.E.2d 803, 807 (2001) (citation and quotation marks omitted). However, counsel will be deemed

ineffective if "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Strickland*, 466 U.S. at 686, 80 L.Ed.2d at 692-93.

A. File Numbers 10 CRS 937 and 10 CRS 50560

Defendant argues that he received ineffective assistance of counsel by virtue of his attorney's failure to bring to the trial court's attention the fatal variance between the indictments for sexual activity by a substitute parent in file numbers 10 CRS 937 and 10 CRS 50560 and the evidence actually introduced at trial. We agree.

In the indictments in 10 CRS 937 and 10 CRS 50560, defendant was charged with "engag[ing] in a sexual act" with Jamie in violation of N.C. Gen. Stat. § 14-27.7(a) between 1 August 2009 and 31 August 2009 and between 1 June 2008 and 31 July 2009, respectively. Under N.C. Gen. Stat. § 14-27.7(a), "a defendant who has assumed the position of a parent in the home of a minor victim [and] engages in vaginal intercourse *or* a sexual act with a victim who is a minor residing in the home . . . is guilty of a Class E felony." N.C. Gen. Stat. § 14-27.7(a) (2011) (emphasis added).

The General Assembly has specifically omitted vaginal intercourse from the statutory definition of the term "sexual act," stating, in pertinent part, that "sexual act means

cunnilingus, fellatio, analingus, or anal intercourse, ***but does not include vaginal intercourse*** . . . ." N.C. Gen. Stat. § 14-27.1(4) (2011) (emphasis added).

Although the above-referenced indictments in 10 CRS 937 and 10 CRS 50560 allege that defendant engaged in a "sexual act" with Jamie, the evidence actually introduced at trial — as well as the trial court's jury instructions as to these specific charges — referred to vaginal intercourse as the basis for the offenses.

This Court has previously held that a defendant's conviction for sexual activity by a substitute parent in violation of N.C. Gen. Stat. § 14-27.7(a) cannot stand when the conviction is premised on a different type of sexual activity than that specified in the indictment. *State v. Bruce*, 90 N.C. App. 547, 550, 369 S.E.2d 95, 97, *disc. review denied*, 323 N.C. 367, 373 S.E.2d 549 (1988). In *Bruce*, the indictment charging the defendant with sexual activity by a substitute parent alleged that the defendant engaged in vaginal intercourse with the victim. *Id.* at 549, 369 S.E.2d at 97. At trial, however, the State provided evidence of fellatio and did not present evidence of vaginal intercourse. *Id.* The defendant moved to dismiss the charge — arguing that there was a fatal variance between the indictment and the evidence of sexual activity offered at trial. *Id.* The trial court denied the motion to

dismiss and instructed the jury on sexual activity by a substitute parent based on the act of fellatio. *Id.* We reversed the defendant's conviction for sexual activity by a substitute parent, explaining as follows:

> While a conviction for the offense defined by G.S. 14-27.7 may be based upon either vaginal intercourse or a sexual act, and while fellatio is a "sexual act" within the definition of that term . . . , *the rule is that a defendant must be convicted, if he is convicted at all, of the particular offense with which he has been charged in the bill of indictment. Where the evidence tends to show commission of an offense not charged in the indictment, the defendant's conviction thereof cannot stand.*

Id. at 550, 369 S.E.2d at 97 (emphasis added).

It is apparent from our review of the record that — as was the case in *Bruce* — there was, in fact, a fatal variance between the indictments in 10 CRS 937 and 10 CRS 50560 and the evidence produced at trial. However, defendant's trial counsel failed to raise this issue before the trial court. As such, he failed to preserve the issue for appellate review. *See State v. Redman*, ___ N.C. App. ___, ___, 736 S.E.2d 545, 549 (2012) ("To preserve the issue of a fatal variance for review, a defendant must state at trial that a fatal variance is the basis for the motion to dismiss."); *State v. Curry*, 203 N.C. App. 375, 385, 692 S.E.2d 129, 138, (holding that a defendant who "fail[s] to argue a variance between his indictment and the evidence presented at

trial . . . has waived this issue for appeal"), *appeal dismissed and disc. review denied*, 364 N.C. 437, 702 S.E.2d 496 (2010).

Had defense counsel identified the fatal variance and argued it as the basis of the motion to dismiss, then either (1) the trial court would have properly granted the motion; or (2) the issue would have been preserved for appellate review by this Court. We are unable to identify any conceivable strategic reason why defense counsel would not bring the fatal variance to the trial court's attention as the basis for defendant's motion to dismiss. *See State v. Canty*, ___ N.C. App. ___, ___, 736 S.E.2d 532, 537 (2012) (holding that defense counsel's failure to make motion to suppress evidence obtained from illegal search fell below objective standard of reasonableness where it was impossible to "discern a strategic advantage by not filing a motion to suppress the incriminating evidence").

We therefore conclude that defense counsel's failure to assert the fatal variance as the basis of the motion to dismiss these charges fell below the objective standard of reasonableness. Had counsel properly argued the fatal variance, there is a reasonable probability that the outcome with respect to these two charges would have been different.

As such, defendant has demonstrated that he received ineffective assistance of counsel in 10 CRS 937 and 10 CRS 50560. The remedy for a violation of a defendant's right to

effective assistance of counsel "should be tailored to the injury suffered from the constitutional violation and should not unnecessarily infringe on competing interests. Thus, a remedy must neutralize the taint of a constitutional violation, while at the same time not grant a windfall to the defendant . . . ." *Lafler v. Cooper*, ___ U.S. ___, ___, 182 L.Ed.2d 398, 411 (2012) (internal citations and quotation marks omitted).

Here, we believe that the proper remedy is to reverse the two counts of sexual activity by a substitute parent in file numbers 10 CRS 937 and 10 CRS 50560. *See Bruce*, 90 N.C. App. at 550, 369 S.E.2d at 98 (reversing conviction for sexual activity by substitute parent where there was fatal variance between sexual activity alleged in indictment and introduced at trial).[2]

B. File Number 10 CRS 938

Defendant also makes a separate argument that he received ineffective assistance of counsel by virtue of his trial counsel's failure to argue in connection with his motion to dismiss the charge of sexual activity by a substitute parent in 10 CRS 938 that there was insufficient evidence of fellatio between 1 August 2009 and 31 August 2009 — the time period specified in the indictment. We believe that defendant cannot establish that this alleged error prejudiced him and thus

[2]Defendant's ineffective assistance of counsel claim predicated on the fatal variance is limited to these two convictions and does not affect his remaining twenty-nine convictions.

conclude that his ineffective assistance claim as to this charge must fail. *See State v. Braswell*, 312 N.C. 553, 563, 324 S.E.2d 241, 249 (1985) ("[I]f a reviewing court can determine at the outset that there is no reasonable probability that in the absence of counsel's alleged errors the result of the proceeding would have been different, then the court need not determine whether counsel's performance was actually deficient.").

Here, Jamie testified as to numerous occasions on which defendant would engage in various sexual activities with her. These events spanned over an approximately two-year period and encompassed the time frame set out in the indictment in 10 CRS 938. Our courts have adopted a policy of leniency regarding the temporal specificity of indictments in child sex abuse cases. *State v. Everett*, 328 N.C. 72, 75, 399 S.E.2d 305, 306 (1991). "Unless a defendant demonstrates that he was deprived of the opportunity to present an adequate defense due to the temporal variance, the policy of leniency governs." *State v. Burton*, 114 N.C. App. 610, 613, 442 S.E.2d 384, 386 (1994) (applying policy of leniency to testimony of sex abuse victims who were 13 and 15 years old at time of underlying events).

Jamie testified to numerous acts of fellatio over this two-year period, and defendant did not assert an alibi defense that was predicated on specific dates. Given our courts' policy of temporal leniency in child sex abuse cases, the lack of

testimony that an act of fellatio specifically occurred between 1 August 2009 and 31 August 2009 would not warrant dismissal of this charge. For these reasons, we find that defendant has not established that there is a reasonable probability that the outcome would been different had defense counsel pointed out the lack of evidence of fellatio during the specific one-month period set forth in the indictment in file number 10 CRS 938. *See id.* at 614, 442 S.E.2d at 386 (noting that "defendant has suffered no prejudice [from the temporal variance between the indictment and the evidence at trial] as his defense was based upon denial of the charges rather than [an] alibi during the time frames set out in the indictments.")

II. Motion to Dismiss Charges in 10 CRS 50554-56, 10 CRS 50565-66, and 10 CRS 50613

Defendant next contends that the trial court erred in denying his motion to dismiss for insufficient evidence two counts of taking indecent liberties with a minor (file nos. 10 CRS 50554 and 10 CRS 50613); two counts of sexual activity by a substitute parent (file nos. 10 CRS 50555 and 10 CRS 50556); and two counts of statutory sexual offense of a person who is 13, 14, or 15 years old (file nos. 10 CRS 50565 and 10 CRS 50566). Defendant asserts that Jamie's testimony regarding these offenses — which, based on her testimony, occurred between October 2007 and June 2008 — was vague and raises only a

"suspicion" of defendant's guilt of these crimes.

At trial, Jamie was asked to describe what happened between her and defendant between October 2007 and June 2008. She stated that she could not remember specific instances but testified that she "believe[d] that he licked [her] vagina and fingered [her] vagina." When asked if she recalled how many times that happened, Jamie testified that she could not remember but replied affirmatively when asked if it was more than once. Defendant argues that this testimony "cannot support more than a suspicion of guilt by the jurors." We disagree.

A trial court's denial of a defendant's motion to dismiss is reviewed *de novo*. *State v. Smith*, 186 N.C. App. 57, 62, 650 S.E.2d 29, 33 (2007). This Court must determine "whether there is substantial evidence (1) of each essential element of the offense charged, or of a lesser offense included therein, and (2) of defendant's being the perpetrator." *State v. Fritsch*, 351 N.C. 373, 378, 526 S.E.2d 451, 455 (citation and quotation marks omitted), *cert. denied*, 531 U.S. 890, 148 L.Ed.2d 150 (2000). Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Smith*, 300 N.C. 71, 78-79, 265 S.E.2d 164, 169 (1980). Evidence must be viewed in the light most favorable to the State with every reasonable inference drawn in the State's favor. *State v. Rose*, 339 N.C. 172, 192, 451 S.E.2d

211, 223 (1994), *cert. denied*, 515 U.S. 1135, 132 L.Ed.2d 818 (1995).

Defendant's argument here is similar to the contention made by the defendant in *State v. Bingham*, 165 N.C. App. 355, 598 S.E.2d 686 (2004). In *Bingham*, the defendant contended that the trial court had erred in denying his motion to dismiss several statutory rape charges because "the State did not present evidence of specific sexual acts that occurred during [the relevant] time periods" and that, for this reason, the evidence introduced at trial "raise[d] only suspicion or conjecture regarding the commission of the offenses and the identity of the perpetrator." *Id.* at 362, 598 S.E.2d at 690-91. We rejected this argument, stating as follows:

> "In cases involving allegations of child sex abuse, temporal specificity requirements are further diminished. Children frequently cannot recall exact times and dates; accordingly, a child's uncertainty as to the time of the offense goes only to the weight to be given that child's testimony. Judicial tolerance of variance between the dates alleged and the dates proved has particular applicability where, as in the case *sub judice*, the allegations concern instances of child sex abuse occurring *years before*. Unless a defendant demonstrates that he was deprived of the opportunity to present an adequate defense due to the temporal variance, the policy of leniency governs."

Id. (quoting *Burton*, 114 N.C. App. at 613, 442 S.E.2d at 386) (emphasis in original).

Here, the State's evidence tended to show that defendant was engaging in sexual activity with Jamie for a period of several years starting when Jamie was 14 years old. When Jamie testified at trial, she related events that had occurred approximately four years earlier. Jamie testified as to multiple occurrences of sexual abuse inflicted on her by defendant during this time period in which he (1) penetrated her vagina with his fingers and penis; (2) made her perform oral sex on him; and (3) performed oral sex on her. Her testimony about this sexual abuse was corroborated by her written statement and taped interview with law enforcement officers and her medical history as related by Dr. Gutman.

This Court has held that in cases involving long periods of sexual abuse, there is sufficient evidence to withstand a defendant's motion to dismiss "where a victim recounts a long history of repeated acts of sexual abuse over a period of time, but does not give testimony identifying specific events surrounding each sexual act." *State v. Bullock*, 178 N.C. App. 460, 471-72, 631 S.E.2d 868, 876 (2006), *disc. review denied*, 361 N.C. 222, 642 S.E.2d 708 (2007); *accord State v. Bates*, 172 N.C. App. 27, 35, 616 S.E.2d 280, 286 (2005) (upholding trial court's denial of defendant's motion to dismiss where defendant argued that motion should have been granted on charges "supported solely by [victim's] statements that, *e.g.*, defendant

touched her 'about six times' or '[l]ike four times'"), *abrogation on other grounds recognized by State v. Martin*, 208 N.C. App. 570, 706 S.E.2d 842 (2010).

Additionally, in holding that nonspecific testimony may be sufficient to support convictions for more than one sexually based offense, this Court has acknowledged "the realities of a continuous course of repeated sexual abuse," stating that

> [w]hile the first instance of abuse may stand out starkly in the mind of the victim, each succeeding act, no matter how vile and perverted, becomes more routine, with the latter acts blurring together and eventually becoming indistinguishable. It thus becomes difficult if not impossible to present specific evidence of each event.

Bullock, 178 N.C. App. at 473, 631 S.E.2d at 877.

Because the trial court is "concerned only with the sufficiency of the evidence, not with the weight of the evidence" when considering a defendant's motion to dismiss based on the insufficiency of the evidence, *Bingham*, 165 N.C. App. at 361-62, 598 S.E.2d at 690 (citation and quotation marks omitted), we believe that the trial court did not err in determining that the State introduced sufficient evidence to withstand defendant's motion to dismiss the offenses charged in file numbers 10 CRS 50554-56, 10 CRS 50565-66, and 10 CRS 50613.

III. Errors in Judgments and Satellite-Based Monitoring Orders

Defendant's final argument is that errors exist in the

trial court's judgment and commitment forms and in its SBM orders. Specifically, defendant argues that (1) the judgments do not accurately state the dates of the offenses as alleged in the indictments; (2) the judgment that includes the conviction for disseminating obscenity to a minor under the age of 16 should be revised to reflect the correct class of felony; and (3) the SBM orders should be amended so that box (1)(d) on the form order promulgated by the Administrative Office of the Courts is no longer checked. The State concedes that the judgment and commitment forms contain clerical errors but asserts that the checking of box (1)(d) was "based on judicial determination."

Initially, we note that our reversal of defendant's convictions in file numbers 10 CRS 937 and 10 CRS 50560 requires the vacating of the trial court's consolidated judgments and SBM orders as to those counts and necessitates remanding for resentencing. *See State v. Streater*, 197 N.C. App. 632, 649-50, 678 S.E.2d 367, 378 (holding that where two or more convictions are consolidated for judgment and some, but not all, are upheld on appeal, remand is appropriate for entry of new judgment on convictions being upheld), *disc. review denied*, 363 N.C. 661, 687 S.E.2d 293 (2009); *State v. Williams*, 150 N.C. App. 497, 506, 563 S.E.2d 616, 621 (2002) (remanding for resentencing after one offense in consolidated judgment was vacated because

whether one offense "warrants the sentence imposed in connection with the two consolidated crimes is a matter for the trial court to reconsider").[3]

We address each of defendant's specific contentions in turn.

A. Incorrect Dates on Judgment and Commitment Forms

We agree with defendant that several of the offense dates listed in the consolidated judgment and commitment forms for file numbers 10 CRS 934, 10 CRS 50567, and 10 CRS 50565 do not accurately reflect the dates listed in the indictments or the evidence regarding the offense dates presented at trial. Therefore, we must remand so that the trial court can correct these errors. *See State v. Streeter*, 191 N.C. App. 496, 505, 663 S.E.2d 879, 886 (2008) (remanding for correction of clerical error when judgment and commitment form listed incorrect offense date).

B. Erroneous Felony Classification of Conviction for Disseminating Obscenity to a Minor Under the Age of 16

We likewise find merit in defendant's contention that the trial court incorrectly designated defendant's charge of disseminating obscenity to a minor under the age of 16 as a Class *E* felony. Under N.C. Gen. Stat. § 14-190.7, this offense

[3]On remand for resentencing, the trial court is directed to ensure that the new written judgments are also consistent with our discussion below.

is a Class *I* felony. Thus, we instruct the trial court to correct the classification in the written judgment on remand. *See State v. Dobbs*, 208 N.C. App. 272, 274, 702 S.E.2d 349, 350-51 (2010) (treating trial court's classification of Class H felony as Class G felony as clerical error and remanding for correction).

C. Satellite-Based Monitoring Orders

Finally, defendant correctly asserts that the trial court erred in checking box (1)(d) on the five SBM form orders the trial court entered. Selecting box (1)(d) indicates that defendant "has been convicted of a reportable conviction under G.S. 14-208.6, specifically . . . rape of a child, G.S. 14-27.2A, or sexual offense with a child, G.S. 14-27.4A."

> On appeal from an SBM order, this Court review[s] the trial court's findings to determine whether they are supported by competent record evidence, and we review the trial court's conclusions of law for legal accuracy and to ensure that those conclusions reflect a correct application of law to the facts found.

State v. Hadden, ___ N.C. App. ___, ___, 741 S.E.2d 466, 467-68 (2013) (citation and quotation marks omitted).

Both N.C. Gen. Stat. § 14-27.2A and N.C. Gen. Stat. § 14-27.4A — the two statutes listed in box (1)(d) — specifically require that the victim be under the age of 13 at the time of the offense. In this case, Jamie was 14 and 15 when the

offenses occurred. As such, the checking of box (1)(d) was in error.

The trial court's decision to check box (1)(d) on each SBM order reflects its erroneous oral findings that defendant's convictions "involve . . . rape of a child." We must, therefore, vacate the SBM orders and remand to the trial court for entry of new SBM orders that accurately reflect the offenses for which defendant has been convicted.[4]

Conclusion

For the reasons stated above, we (1) reverse defendant's convictions in file numbers 10 CRS 937 and 10 CRS 50560; (2) find no error in the trial court's denial of defendant's motion to dismiss; (3) vacate and remand the trial court's judgments in part for resentencing; and (4) vacate the trial court's SBM orders and remand for entry of new SBM orders consistent with this opinion.

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[4]While defendant does not raise this issue on appeal, we note that several of the file numbers listed on the SBM orders correspond to offenses that this Court has determined do not qualify as aggravated offenses for purposes of N.C. Gen. Stat. § 14-208.40A. *See State v. Sprouse*, ___ N.C. App. ___, ___, 719 S.E.2d 234, 242 (2011) (affirming trial court's lifetime SBM order for statutory rape of child who is 13, 14, or 15 years old but reversing lifetime SBM orders for statutory sex offense, sexual activity by a substitute parent, and indecent liberties as these offenses "do not meet the definition of an aggravated offense"), *disc. review denied*, ___ N.C. ___, 722 S.E.2d 787 (2012).

REVERSED IN PART; VACATED IN PART; REMANDED FOR RESENTENCING.

Judges McGEE and GEER concur.

Report per Rule 30(e).