IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA19-243

Filed: 5 November 2019

Wake County, No. 18CRS215701

STATE OF NORTH CAROLINA

v.

RYAN KIRK FULLER, Defendant.

Appeal by Defendant from order entered 23 October 2018 by the Honorable A. Graham Shirley in Wake County Superior Court. Heard in the Court of Appeals 18 September 2019.

Attorney General Joshua H. Stein, by Assistant Attorney General Narcisa Woods, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Andrew DeSimone, for the Defendant.

DILLON, Judge.

Defendant Ryan Kirk Fuller pleaded guilty to one count of felony secret peeping. During sentencing, the trial court determined that Defendant was a "danger to the community" and, accordingly, ordered that he register as a sex offender for thirty (30) years pursuant to N.C. Gen. Stat. § 14-202(l). Defendant appeals from this portion of the order. We affirm.

I. Factual and Procedural Background

The victim, Mrs. Smith[1], and her husband lived with their teenage son in their home in Apex. Defendant, a long-time friend of the Smiths, lived in the home as well.

On 17 August 2018, Mr. Smith walked into his living room and observed a video of his wife undressing in their bedroom playing on the television. Mr. Smith was confused as to how the image was appearing on his television. Mr. Smith then saw Defendant in the living room watching the video and immediately contacted the police.

Defendant soon admitted to the following: He was responsible for the video and other recordings of Mrs. Smith made while she was either in her bedroom or bathroom. He had developed romantic feelings for Mrs. Smith, leading him to purchase and install a phone charger with a secret camera to record her when she was in her bathroom and bedroom. The camera activated via a motion sensor and had the capability, not only to record and store, but also to cast a live feed. He had been recording Mrs. Smith for more than two months when Mr. Smith caught him. And he had sorted and downloaded approximately fifty (50) images of Mrs. Smith from his recordings onto his personal devices.

Defendant was indicted on three counts of secret peeping, pursuant to N.C. Gen. Stat. § 14-202. Defendant pleaded guilty to one count in exchange for dismissal

[1] Pseudonyms are used to protect the victims' identity.

of the two other counts. The trial court accepted his plea and sentenced Defendant to a suspended prison term.

The trial court then heard arguments on whether to require Defendant to register as a sex offender, as registration is not mandatory for those convicted under Section 14-202, but rather is appropriate only if the trial court makes certain findings. After hearing arguments from counsel, the trial court ordered Defendant to register as a sex offender. Defendant timely appealed.

II. Analysis

Defendant argues that the trial court erred in requiring him to register as a sex offender. We disagree.

When a person is convicted for secretly peeping pursuant to Section 14-202(d) of our General Statutes, registration as a sex offender is not automatically required. N.C. Gen. Stat. § 14-202 (2018). Rather, the General Assembly directs that "the sentencing court shall consider [(1)] whether the person is a danger to the community and [(2)] whether requiring the person to register as a sex offender pursuant to Article 27A of this Chapter would further the purposes of that Article as stated in G.S. 14-208.5." N.C. Gen. Stat. § 14-202(l).

In his appeal, Defendant argues that the trial court should not have ordered registration as there was no evidence that he was "a danger to the community."[2]

Our General Assembly has not defined "danger to the community," but it could be argued that a normal reading of the phrase would include someone who is willing and capable to violate a position of trust to install sophisticated, hard-to-detect devices to record his victim in intimate settings, as Defendant did in this case.

There is limited, controlling jurisprudence on who constitutes a "danger to the community" under Section 14-202(l). In support of his argument, Defendant relies primarily on two cases; namely, the one published opinion from our Court where this issue was squarely addressed, *State v. Pell*, 211 N.C. App. 376, 712 S.E.2d 189 (2011), and an unpublished case decided by our Court seven years later, *State v. Guerrette*, 818 S.E.2d 648, 2018 N.C. App. LEXIS 967 (N.C. Ct. App. Oct. 2, 2018). Neither party has cited to any other North Carolina opinion, nor has our research uncovered any, where the issue before our Court or our Supreme Court was whether the trial court erred in ordering registration for a defendant convicted pursuant to Section 14-202. In any event, as *Pell* is a published decision, we are bound by the holdings therein. *See In re Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989).

[2] Defendant makes no clear argument as to the second required finding, that requiring him to register would not serve the purposes set forth in N.C. Gen. Stat. § 14-208.5. *See* N.C. Gen. Stat. § 14-202(l). We, though, conclude that requiring Defendant to register *would* serve those statutory purposes.

In *Pell*, our Court defined one who is a "danger to the community" as a defendant who "pose[s] a risk of engaging in sex offenses following release from incarceration or commitment." *Pell*, 211 N.C. App. at 379, 712 S.E.2d at 191.

Pell then suggested that whether one is a "danger to the community" is a mixed question of fact and law, *Id.* at 380, 712 S.E.2d at 192, and that our review on appeal is as follows:

> Whether a trial court finds that a defendant poses a risk of engaging in sex offenses following release from incarceration [and is, therefore, a "danger to the community"] will be based upon a review of the surrounding factual circumstances. Accordingly, [our] Court will review the trial court's findings *to ensure that they are supported by competent evidence, and we review the conclusions of law to ensure that they reflect a correct application of law to the facts*.

Id. at 380-81, 712 S.E.2d at 192 (emphasis added).[3]

Here, the trial court determined that Defendant posed a risk of committing sexual offenses – and therefore was a danger to the community – based on its findings that (1) Defendant made the recordings "over a long period of time[;]" (2) Defendant

[3] We note that in another published opinion, our Court suggested in *dicta* that our standard of review is for an "abuse of discretion." *State v. Mastor*, 243 N.C. App. 476, 482, 777 S.E.2d 516, 520 (2015). Indeed, since we must consider the "danger to the community" determination, in part, as a question of fact, it could be argued that we are to afford the trial court some discretion in making that determination. That is, if the determination is not a pure question of law, then it is possible that in a close case, one judge could determine certain findings support a "danger to the community" determination and another judge could determine that these same findings do not support a "danger to the community" determination.

In any case, we are bound by the standard of review as set forth in *Pell*, and we apply that standard in this case.

used a sophisticated method of recording Mrs. Smith by use of a hidden camera; (3) Defendant invaded Mrs. Smith's private spaces on multiple occasions to move his camera back and forth between Mrs. Smith's bedroom and her bathroom when she was not present; (4) Defendant stored his recordings to allow him to view them at any time; and (5) Defendant would have no difficulty in repeating his crime as the recording devices were easily obtainable and inexpensive.

We conclude that these findings are supported by competent evidence. After he was caught in the act, Defendant essentially admitted to these findings and has not challenged any of them on appeal.

We further conclude that these findings and the uncontradicted evidence before the trial court support the determination that Defendant posed a risk of sexual offenses in the future to warrant imposition of the registration requirement.[4] Indeed, the evidence shows that Defendant is capable of taking advantage of long-time, close friends who trusted him to live in their home with them and their teenage son. They show that he is willing and able to devise and execute a scheme using sophisticated

[4] We note that the standard used by our Court in *Pell*, that registration should only be for those who "pose a risk of engaging in sex offenses [in the future]," was not clear on *how much of a risk* the trial court must determine a defendant to be in order to impose the registration requirement. *Pell*, 211 N.C. App. at 379, 712 S.E.2d at 191. Clearly, the trial court need not determine that the risk of recidivism is an absolute certainty. But the trial court must do more than rely on a determination that there is always a *slight* risk with every defendant to recidivate. We conclude that the trial court's findings must demonstrate that the level of risk is such that there is a reasonable likelihood that the defendant in question will recidivate. *See id.* at 382, 712 S.E.2d at 193 (stating that the State's evidence was insufficient to warrant the defendant's registration as a sex offender because the evidence "offered very little . . . concerning [the d]efendant's *likelihood* of recidivism") (emphasis added).

means to commit his crime in a way that would likely be undetected by his victim. They show that he is willing and able to put forth effort over a period of time to further his crime, in that he repeatedly invaded the personal space of his victim to re-position his camera. They show that he is willing and able to commit his crime in a manner which could cause greater harm to his victim that that suffered by typical victims of this crime: where the harm for most victims of peeping is the knowledge that they have been spied upon, here Defendant made permanent recordings which could be viewed numerous times by anyone in the future. They show that he could commit the crime again in the future with ease. And they show a lack of real remorse in that he only confessed when he was caught red-handed by his victim's husband.

Defendant argues that *Pell* compels a reversal since the trial court largely relied on the facts of his crime to determine whether he posed a risk of reoffending. We do not read *Pell* so narrowly. Specifically, in *Pell*, the State's evidence showed that the defendant was only a low to moderate risk and was moving in the right direction and that his psychiatric issues, which were a cause of his criminal behavior, were in remission. *Id.* at 381, 712 S.E.2d at 192-93. The State in that case, though, had relied on victim impact statements, which "all tended to address the manner in which [the d]efendant committed his past offenses and the effect his actions had on each of [the victims'] lives." *Id.* at 382, 712 S.E.2d at 193. The *Pell* Court rejected the State's argument that these statements were sufficient, holding that the State's

evidence "offered very little in the way of predictive statements concerning [the d]efendant's likelihood of recidivism." *Id.*

But, in so holding, the Court did *not* categorically reject the notion that a trial court could rely largely on the manner in which a defendant goes about committing his crime in determining that the defendant is a "danger to the community." Rather, the *Pell* Court held that "the victim impact statements [describing the manner in which the defendant had committed his crimes] *in this case* are insufficient to support the trial court's finding that [d]efendant represented 'a danger to the community.' " *Id.* (emphasis added).

Here, Defendant's manner of committing his crime was much more sophisticated and stealthier than that used by the defendant in *Pell*. That is, Defendant committed his crime in a way that was almost undetectable. Also, the findings here show that Defendant is willing to take advantage of even his close friends who had placed a great deal of trust in him. And, unlike *Pell*, there is no indication here that a cause of Defendant's behavior was in remission or that he was moving in the right direction. Indeed, Defendant chose his victim merely because he had a crush on her; and there is no indication that he will not develop a crush on a wife or girlfriend of a close friend in the future and, thereby, be a danger to that member of the community.

III. Conclusion

We conclude that the trial court's findings are supported by the evidence and that these findings support the trial court's imposition of the sex offender registration requirement in this case.

AFFIRMED.

Judge TYSON concurs, writing separately.

Judge BROOK dissents.

TYSON, Judge, concurring.

The majority's opinion correctly affirms the trial court's order for Defendant to register as a sex offender for thirty years, with a provision for Defendant, if he is not a recidivist, to petition after ten years to be removed from the registry. I vote to affirm the trial court's order. I write separately to assert and show the trial court's ruling is also properly affirmed under a less demanding abuse of discretion standard of review. *State v. Mastor*, 243 N.C. App. 476, 482, 777 S.E.2d 516, 520 (2015).

I. Background

Defendant agreed in his plea bargain agreement that "sex offender registration shall be determined by the court." The trial court included and read that provision aloud in its plea colloquy with Defendant, which Defendant affirmed on the record and in open court as being a part of his full plea agreement.

The trial court made several findings of fact after hearing the parties' arguments on sex offender registration:

> In this particular case it seems that there were recordings made over a long period of time. The fact that he only used one device as opposed to two and to move it place to place is to me more concerning than if he had had two devices, because he had to make – each time he had to move the device, he had to do an intentional act. You know, the statement that this occurred because he was having feelings for the victim, the – and the setup was apparently much more sophisticated than [*Guerrette*] where someone was just in a woman's bathroom with a cell phone. By having this secret device, moving – moving the secret

> device from room to room, the manner in which it was stored, and the fact of the – as you said, anybody could get anything on the internet, so it would make it easy for him to buy similar devices off the internet once he's – just make it easier for him to buy these devices off the internet, Court finds that he would be a danger to the community and the purpose of the Registry Act would be served by requiring him to register for a period of 30 years. If after 10 years he has a clean record, certainly can petition to get off.

II. Standard of Review

The majority's opinion asserts "this Court will review the trial court's findings to ensure that they are supported by competent evidence, and we review the conclusions of law to ensure that they reflect a correct application of law to the facts." *State v. Pell*, 211 N.C. App. 376, 381, 712 S.E.2d 189, 192 (2011) (citation omitted). While this standard of review requires a higher threshold for the State than an abuse of discretion, the trial court's ruling is also properly sustained and affirmed under an abuse of discretion standard of review.

Based upon Defendant's express agreement in his plea bargain that "sex offender registration shall be determined by the court," the trial court's ruling is properly reviewed for abuse of discretion. The defendant's plea agreement in *Pell* did not leave the issue of sex offender registration within the trial court's discretion. *Id.* at 376, 712 S.E.2d at 190. Here, Defendant acknowledged in his plea agreement, and again in open court, for the trial court to exercise its discretion to determine whether to order and the extent of Defendant's sex offender registration.

> It is well established that *where matters are left to the discretion of the trial court*, appellate review is limited to a determination of whether there was a clear abuse of discretion. A trial court may be reversed for abuse of discretion only upon a showing that its actions are manifestly unsupported by reason. *A ruling committed to a trial court's discretion is to be accorded great deference* and will be upset only upon a showing that it was so arbitrary that it could not have been the result of a reasoned decision.

White v. White, 312 N.C. 770, 777, 324 S.E.2d 829, 833 (1985) (emphasis supplied) (citations omitted).

A proper review of the trial court's findings and registration order is for abuse of that discretion. *Id.* The ruling of the trial court is presumed to be correct. *Hogsed v. Pearlman*, 213 N.C. 240, 243, 195 S.E. 789, 791 (1938). Defendant carries the burden to show prejudicial error on appeal. N.C. Gen. Stat. § 15A-1443(a) (2017). Defendant acknowledged in his plea agreement his sex offender registration "shall be determined by" and within the discretion of the trial court. Defendant received the full benefit of his plea bargain, had multiple other charges dismissed, and avoided an active prison term and potential consecutive sentences.

III. Analysis

As noted in the majority's opinion, the statute provides and the parties agree Defendant pled guilty to an offense, which qualifies him as eligible to be registered as a sex offender. N.C. Gen. Stat. § 14-202(*l*) (2017). For a defendant to be required to register, a trial court must first determine: "(1) the defendant is a 'danger to the

community;' and (2) the defendant's registration would further the purpose" of the Registry Act. *Pell*, 211 N.C. App. at 379, 712 S.E.2d at 191. The majority's opinion correctly notes Defendant fails to challenge or address this second factor, which the trial court properly found in this case. Defendant's argument rests solely upon the trial court's finding Defendant is a "danger to the community" under *Pell*'s less deferential standard of review.

Under *Pell*, " 'danger to the community' refers to those sex offenders who pose a risk of engaging in sex offenses following release from incarceration or commitment." *Id.* The evidence brought forward by the State in *Pell*, which "tended to address the manner in which Defendant committed his past offenses . . . . offered very little in the way of predictive statements concerning Defendant's likelihood of recidivism." *Id.* at 382, 712 S.E.2d at 193. Expert testimony in *Pell* consisted of "that Defendant represented a low to moderate risk of re-offending," "letters submitted by Defendant's psychiatrist and counselor," and "statements made by several of Defendant's victims." *Id.* at 381-82, 712 S.E.2d at 193.

Defendant argues the State has not brought forward evidence establishing the requisite likelihood of his recidivism. Even under *Pell*'s requirement for the State to show likelihood of recidivism with evidence beyond the manner of commission of the offense, Defendant cannot show the trial court abused its discretion, which he specifically agreed for the trial court to exercise in his plea bargain.

Because Defendant "only used one device as opposed to two," the trial court found "each time he had to move the device [between the victim's bedroom and bathroom], he had to do an intentional act." The court further found the Defendant had used a "secret device." While the number and surreptitious and concealed nature of devices used, or the multiple acts of moving the device between the victim's bedroom and bathroom, may arguably be manner-of-commission evidence, the trial court's finding of Defendant's intentionality is not and supports the trial court's ruling.

Defendant's claim his secret and repetitive acts "occurred because he was having feelings for the victim," also suggests Defendant's motive for his acts, which is separate and distinct from his manner of committing the crimes. Defendant grossly violated his relationship and position of trust and confidence as a close friend and guest in the Smiths' home to gain access to their most private and personal areas, where individuals rightfully expect the highest levels of privacy to disrobe, bathe, and engage in intimate bodily functions.

His multiple violations occurred over several months. Defendant sorted and stored over fifty images of the victim in both moving and still media, to allow him to review his "favorites" repeatedly and potentially share them with others.

Defendant's egregious violations of the victim's trust to gain access, his repeated invasions of the Smiths' most intimate private living areas over many

months, his sorting and storing the images, his intent, motive, and future access to the internet support the conclusion Defendant is a likely future recidivist and a danger to the community.

The trial court's "danger to the community" conclusion requires the court to look at the evidence and factually determine likelihood of recidivism as a question of fact. As a result, and as noted in the majority's opinion, the "danger to the community" determination is not entirely a question of law. As a question of fact, it is possible that one judge could review the evidence to support a finding that the defendant is a likely future recidivist and a danger to the community, whereas the same or another judge making these same findings about a different defendant could find a second defendant is not a danger to the community. *See Mastor*, 243 N.C. App. at 482, 777 S.E.2d at 520. Both conclusions are clearly within the trial judge's permitted range of discretion. The trial court clearly reviewed the undisputed evidence and articulated a reasoned decision within its discretion based upon the facts here.

The trial court also exercised its discretion of lenity and ruled, "[i]f after 10 years he has a clean record, [he] certainly can petition to get off" the registry. If Defendant is not a recidivist, as he claims, after ten years he can petition to be removed from the registry. Defendant has failed to carry his burden on appeal that the trial court's agreed-upon discretionary ruling for Defendant to register as a sex

offender is manifestly unsupported by reason, or so arbitrary that it could not have been the result of a reasoned decision. *White*, 312 N.C. at 777, 324 S.E.2d at 833.

The trial court's findings and conclusions also meet the more strict *Pell* standard of review asserted in the majority's opinion. The trial court's ruling comes before us with the presumption of being correct. Defendant cannot carry his burden to show any error or that any error was prejudicial to his agreed-upon plea agreement. Defendant's appeal is wholly frivolous.

IV. Conclusion

The trial court's finding Defendant was a danger to the community is not manifestly unsupported by reason and its ruling for Defendant to register as a sex offender is not shown to be an abuse of discretion. The trial court also properly found and concluded "the purpose of the Registry Act would be served by requiring him to register." These findings fully comply with the requirements of the statute and are supported by competent evidence. The trial court's conclusions are supported by unchallenged findings of fact.

The majority's opinion uses a competent evidence standard of review from *Pell* to affirm the trial court's order. Given the terms of Defendant's plea bargain, the trial court's order is also properly affirmed under the less demanding abuse of discretion standard. I concur with the majority's opinion and vote to affirm the trial court's order.

BROOK, Judge, dissenting.

I respectfully dissent. The governing statutory regime and our binding precedent require reversal of the trial court's order.

The Statutory Regime and Our Case Law

Our General Assembly has outlined a variety of offenses in N.C. Gen. Stat. § 14-208.6(4)(a) that constitute "reportable offenses" requiring sex offender registration upon conviction. A conviction for secret peeping under N.C. Gen. Stat. § 14-202(d) is not so designated. Instead of automatic registration, a trial court can order an individual so convicted to register as a sex offender upon finding "that the person is a danger to the community." N.C. Gen. Stat. § 14-202(l) (2017).[5] In assessing the trial court's imposition of sex offender registration, this Court reviews the trial court's findings to ensure that they are supported by competent evidence and reviews the conclusions of law to ensure they reflect a correct application of law to the facts. *State v. Pell*, 211 N.C. App. 376, 380-81, 712 S.E.2d 189, 192 (2011) (citing *State v. Kilby*, 198 N.C. App. 363, 367, 679 S.E.2d 430, 432 (2009)).

Our Court's decision in *Pell* provides a roadmap for how we assess whether a trial court rightly concluded an offender is a danger to the community such that sex

[5] The provision in question also requires a finding that registration would further the purposes of the registration program. *Id.* Defendant's argument focuses on the "danger to the community" finding; thus, my analysis is similarly tailored.

offender registration is warranted. "The phrase 'danger to the community' is not defined" by the statute. *Pell*, 211 N.C. App. at 379, 712 S.E.2d at 191. *Pell* reasoned an offender is a "danger to the community" if he "pose[s] a risk of engaging in sex offenses following release from incarceration." *Id.* at 379, 712 S.E.2d at 191. Accordingly, our Court did not focus on "the manner in which Defendant committed his past offenses" as such evidence "offered very little in the way of predictive statements concerning Defendant's likelihood of recidivism." *Id.* at 381-82, 712 S.E.2d at 192-93. We instead looked forward, focusing on risk assessment evidence showing that the defendant posed a low to moderate risk of re-offending and testimony from the defendant's psychiatrist and counselor assessing his major depression, alcohol abuse, and paraphilia to be in remission. *Id.* at 381, 712 S.E.2d at 193. Based on the evidence heard by the trial court, we held that the State had not shown the defendant "represented a danger to the community" and reversed the trial court's imposition of registration. *Id.* at 382, 712 S.E.2d at 193.

Following *Pell*'s guidance, this Court reversed an imposition of sex offender registration in *State v. Guerrette*, ___ N.C. App. ___, 818 S.E.2d 648, 2018 WL 4702230 (2018) (unpublished). On 4 July 2016, the defendant entered a women's restroom at Carolina Beach and used his cell phone to film six women for about eight minutes. *Id.* The defendant pleaded guilty to two counts of secret peeping using a photographic device, two counts of creating a photographic image while secretly

peeping, and two counts of knowingly possessing a photographic image created through secretly peeping, and attaining the status of habitual felon. *Id.* at *2.

The trial court imposed a registration requirement, and this Court reversed. *Id.* at *10. To show the defendant was a danger to the community, the State argued that the defendant's 20 prior felony convictions, mental health issues, and current convictions supported the requisite "affirmative finding" that the defendant was a danger to the community. *Id.* at *2-3. We rejected each of these arguments in turn.

First, the "defendant's non-violent, non-sexual prior convictions do not indicate an increased risk he would commit another sexual offense." *Id.* at *7.

Second, the "[d]efendant's mental health issues *may* show he is a danger to the community *if* the State is able to show that those issues led [the] [d]efendant to have an increased risk of engaging in sex offenses after incarceration." *Id.* at *8 (emphasis in original). The State had offered no evidence connecting the defendant's diagnoses of schizophrenia, schizoaffective disorder, bipolar tied to social anxiety disorder, panic disorder, and post-traumatic stress disorder to an increased risk of committing sex offenses. *Id.*

Finally, as noted above, a conviction under N.C. Gen. Stat. §§ 14-202(d) does not constitute a "reportable offense" requiring registration. "[R]ather[,] an additional showing is required that a defendant is a danger to the community." *Id.* at *9. Our Court reasoned "[i]f the General Assembly had intended that a conviction for peeping

– in and of itself – would show that a defendant was a danger to the community, it would have included such offense in N.C.G.S. § 14-208.6(4)(a)[,]" amongst offenses requiring registration. *Id.*

Assessing the Facts of the Current Controversy

It bears repeating that on appeal, this Court "reviews the conclusions of law to ensure they reflect *a correct application of law* to the facts." *Pell*, 211 N.C. App. at 380-81, 712 S.E.2d at 192 (emphasis added). To an even greater extent than *Pell* or *Guerrette*, the trial court here focused its "danger to the community" analysis on how the crimes were committed. In rendering its order, the trial court first noted the window in which the recordings were made – from June through mid-August 2018. It reasoned that Defendant's use of one device was more troubling than if he had used multiple devices as "each time he . . . move[d] the device" between the bathroom and bedroom "he had to do an intentional act." The trial court then observed the setup was "more sophisticated than [*Guerrette*] where someone was just in a woman's bathroom with a cell phone." Finally, the court stated, "anybody could get anything on the [I]nternet" and presumably it would be "easy for [Defendant] to buy similar devices off the [I]nternet."

These facts "address the manner in which Defendant committed his past offenses[,]" but "offer very little in the way of predictive [evidence] concerning Defendant's likelihood of recidivism." *Pell*, 211 N.C. App. at 382, 712 S.E.2d at 193.

The fact that Defendant moved the camera in question, the sophistication of the technology employed, and its easy availability—none of this aids in answering the critical question of whether Defendant is likely to re-offend. *See id.* at 381, 712 S.E.2d at 192. In a similar vein, the trial court focused on the window in which filming occurred—three months—in imposing registration. Again, the connection of this fact to the likelihood of future recidivism is tenuous at best.[6] And simply convicting Defendant of the offense of secret peeping, of course, does not prove the requisite danger to the community. *See Guerrette*, at *9.

The evidence of Defendant's likelihood of recidivism, the lodestar of the requisite danger to the community analysis, borders on non-existent here. While a risk assessment tool may have provided some insight into Defendant's likelihood to re-offend, *see Guerrette*, at *6 ("[T]he absence of a risk assessment or expert testimony fails to support that Defendant poses a risk of committing sex offenses upon release from incarceration."), the trial court here refused Defendant's request for a Static 99 assessment. And the scant record evidence that is arguably pertinent tends to point

[6] A review of the record in *Pell* shows the grand jury returned 16 bills of indictment against the defendant for secretly peeping on his employees and neighbor for nearly 16 years. R. at 46, *State v. Pell*, 211 N.C. App. 376, 712 S.E.2d 189 (2011) (COA10-415). The defendant pleaded guilty to eight counts of secret peeping spanning *four years*. R. at 52, *State v. Pell*, 211 N.C. App. 376, 712 S.E.2d 189 (2011) (COA10-415). Despite this, this Court held the record evidence did not support the imposition of sex offender registration given the defendant's evidence showed he was not likely to recidivate and thus was not a "danger to the community." *See Pell*, 211 N.C. App. at 381-82, 712 S.E.2d at 192-93.

in the opposite direction: for example, Defendant has no prior convictions, no history of mental health or substance abuse issues, and cooperated with law enforcement.

The majority and concurring opinions recognize the trial court's cardinal misstep and then promptly repeat it. Both opinions nod toward *Pell*'s admonition that the manner of the offense "offer[s] very little in the way of predictive statements concerning the likelihood of recidivism." *Supra* at ___; *supra* at ___ (Tyson, J., concurring) (noting "*Pell*'s requirement for the State [to] show likelihood of recidivism with evidence beyond the manner of commission of offense"). And both then flout this governing precedent by focusing their inquiry on the nature of the offense at hand. *Supra* at ___; *supra* at ___ (Tyson, J., concurring). Even efforts at distinction are merely return trips to forbidden ground. *Supra* at ___ ("Here, Defendant's manner of committing his crime was much more sophisticated and stealthier than in *Pell*.").

More than failing to abide by the statutory regime and case law, the majority inverts the approach of the controlling authority. Where both call for evidence that a defendant is a danger to the community beyond the simple fact of conviction, the majority repeatedly points to the absence of evidence (even when Defendant sought to fill the vacuum). For example, while noting the defendant in *Pell* "was only a low to moderate risk" for recidivism according to test results, the majority fails to mention that the trial court rejected Defendant's request for such testing in this case. *Supra* at ___. Relatedly, the majority closes by noting "there is no indication that

[Defendant] will not develop a crush on a wife or girlfriend of a close friend in the future." *Supra* at ___. One can abhor Defendant's criminal betrayal while also concluding that such reasoning stands our precedent's inquiry into "predictive [evidence] concerning Defendant's likelihood of recidivism" on its head. *Pell*, 211 N.C. App. at 382, 712 S.E.2d at 193.

Conclusion

In many ways, this case is quite distinct from *Pell* and *Guerette*. The State could point to four years of offenses in *Pell*; the offenses at issue here span less than three months. The State in *Guerette* highlighted defendant's criminal record and history of mental health challenges; there is no similar backstory here. But these cases are similar in the most salient aspect: the State has not brought forward evidence establishing the requisite likelihood of future offense. In the absence of such a showing, I would reverse the trial court's order requiring Defendant to register as a sex offender and remand for resentencing.

With respect, I dissent.