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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA19-917

Filed: 1 December 2020

Onslow County, No. 17 CRS 53569-70, 18 CRS 726

STATE OF NORTH CAROLINA,

v.

HARVEY LEE ESSARY, JR.

Appeal by Defendant from judgment entered 7 February 2019 by Judge Charles H. Henry in Superior Court, Onslow County. Heard in the Court of Appeals 6 October 2020.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Melody R. Hairston, for the State.

Glover & Petersen, P.A., by Ann B. Petersen, for Defendant-Appellant.

McGEE, Chief Judge.

Harvey Lee Essary, Jr. (“Defendant”) appeals from judgments entered upon his conviction for statutory rape of a child by an adult, statutory rape of a person who is 13 years old, statutory rape of a person who is 14 years old, statutory rape of a person who is 15 years old, second-degree forcible rape and second-degree forcible sex offense. Defendant contends that the trial court erred by denying his motion to

dismiss the charge “of statutory rape of a child by an adult by engaging in sexual intercourse with [the child] when she was under the age of 13 years.” He specifically argues there was insufficient evidence that Defendant “engaged in sexual intercourse with [the child] at a time when she was under the age of 13 years old.” We hold that the trial court did not err in denying Defendant’s motion to dismiss and find no other error at trial.

Defendant also appeals by writ of certiorari from the trial court’s order imposing lifetime satellite-based monitoring (“SBM”). Defendant argues that the trial court erred by entering the lifetime SBM order without holding a hearing to determine whether the order was a reasonable Fourth Amendment search of defendant’s person. Because we hold that the SBM order is unconstitutional as applied to Defendant, we vacate the order without prejudice to the State’s ability to file a subsequent SBM application.

I. Factual and Procedural History

The record before us shows the following evidence presented by the State at trial: the child (“B.N.”) was born on 16 December 1999. When B.N. was about six years old, her mother met Defendant. Defendant and B.N.’s mother were married in July 2010. The family moved into a trailer located at 202 North Cambridge Street in Swansboro, North Carolina, in March 2011, when B.N. was around 11 years old. B.N.

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continued to live in the trailer with her mother, her two siblings, and Defendant until August 2013.

B.N. testified that when she was six or seven years old, before Defendant married B.N.'s mother, Defendant asked her to show him B.N.'s vagina and breasts. B.N. testified that "there was looking" when the family lived in the trailer, and "then the next thing [she knew], it became intercourse." B.N. stated that Defendant began having vaginal intercourse with her when she was in seventh grade. B.N. was 12 years old at the beginning of her seventh grade year at Swansboro Middle School, which began on 27 August 2012 and ended on 10 June 2013.

B.N. testified that Defendant continued to engage in these acts several days a week, sometimes multiple times a day, between the time B.N. was in seventh grade through her eleventh grade year. When B.N. was in eleventh grade, she became pregnant. The time of conception was determined to have been approximately six to seven weeks prior to an ultrasound performed on 12 May 2017, and B.N. identified Defendant as the father. At trial, the State presented a series of text messages from Defendant to B.N., including one sent the day after B.N.'s ultrasound in which Defendant asked B.N. not to get an abortion, and that Defendant wanted to raise the child. B.N.'s pregnancy was later terminated.

B.N. was interviewed by the Child Advocacy Center of Onslow County on 15 May 2017. During the interview, B.N. indicated to child interview specialist

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Elizabeth Pogroszewski, who testified at trial that Defendant would “put it in her[,]” beginning when B.N. was in the sixth or seventh grade. Ms. Pogroszewski testified that after B.N. stated that she thought she was in sixth or seventh grade, that she also stated that she thought she was 13 years old when the first sexual act occurred. When Ms. Pogroszewski asked B.N. what grade she was in, “she said Swansboro Middle School.”

Ms. Pogroszewski also testified that she had first interviewed B.N. on 30 July 2015 in an unrelated case involving one of her siblings. During the 2015 interview, B.N. made statements that Ms. Pogroszewski described as “concerning,” including that Defendant would require B.N. to rub his back and feet if B.N. wanted to “go places and have friends come over[,]” and that when she went into her bedroom, she was only allowed to shut the door while changing, and had to keep it unlocked. Ms. Pogroszewski testified that during the 2015 and the 2017 interviews, B.N. displayed a “flat” demeanor, avoided eye contact, and “was guarded, pretty quiet.”

B.N.’s mother testified that at some point during the weekend when B.N. confirmed her pregnancy, Defendant left a note at the home in which he apologized for how “all this [happened],” but that “it was mutual” and he had “never forced her,” and wanted to “[make] it work.” The note was admitted into evidence. During interviews with Detective Lindsey Kensington of the Onslow County Sheriff’s Department on 12 May and 2 June 2017, Defendant acknowledged that he had

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engaged in sexual intercourse with B.N. and that he was responsible for impregnating B.N. Defendant was arrested on 2 June 2017.

At the close of the State's evidence, Defendant made several motions to dismiss, on the grounds that there was insufficient evidence for the charge of statutory rape of a child under the age of 13 years old by an adult, that there was insufficient evidence of constructive force for the charges of second-degree forcible rape and second-degree forcible sex offense, that the statutory rape of a person who is 15 years old should be dismissed in light of the interview that was played for the jury, and the remaining statutory rape charges should be dismissed because the age of B.N. was not clear enough for the jury to "know for certain that, at age 13 and 14, that vaginal intercourse had occurred[.]" All of Defendant's motions were denied. Defendant did not offer any evidence.

Defendant was found guilty by the jury on all charges on 7 February 2019. Defendant was sentenced to consecutive terms of 300 months to 420 months for the statutory rape offenses, 72 months to 147 months for the offense of second-degree forcible rape, and 72 months to 147 months for the offense of second-degree forcible sexual offense. The trial court made additional findings that the Defendant was convicted of an aggravated offense involving physical, mental, or sexual abuse of a minor, and accordingly ordered that upon release from imprisonment Defendant must register as a sex offender. The trial court further ordered Defendant to enroll

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in lifetime satellite-based monitoring (“SBM”) for the rest of Defendant’s natural life upon his release from prison. When the trial court asked if the State would like further findings with regards to lifetime SBM, the State replied in the negative. Defendant made post-trial motions to dismiss for insufficient evidence, for a new trial based on trial court error, and to renew the motion to dismiss with respect to constructive force and the charge of statutory rape of a child under the age of 13 years old by an adult. All motions were denied.

Defendant gave oral notice of appeal during the 7 February 2019 sentencing hearing.

II. Analysis

Defendant contends that the trial court erred in denying his motion to dismiss the charge of statutory rape of a child under the age of 13 years old by an adult and by imposing lifetime SBM when the State did not offer any evidence that SBM was reasonable under the Fourth Amendment.

A. Motion to Dismiss

We review the trial court’s denial of a motion to dismiss for insufficient evidence *de novo*. *State v. English*, 241 N.C. App. 98, 104, 772 S.E.2d 740, 744 (2015). “[T]he State must present ‘substantial evidence of all the material elements of the offense charged and that the defendant was the perpetrator of the offense.’” *State v. Campbell*, 368 N.C. 83, 87, 772 S.E.2d 440, 444 (2015) (citing *State v. Myrick*, 306

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N.C. 110, 113-14, 291 S.E.2d 577, 579 (1982)). “Substantial evidence is such evidence as a reasonable mind might accept as adequate to support a conclusion.” *State v. Herring*, 322 N.C. 733, 738, 370 S.E.2d 363, 367 (1988) (citing *State v. Smith*, 300 N.C. 71, 265 S.E.2d 164 (1980)). In making its determination on a motion to dismiss, the trial court must consider all evidence, whether competent or incompetent, in the light most favorable to the State, giving the State the benefit of every reasonable inference and resolving any contradictions in the State’s favor. *State v. Rose*, 339 N.C. 172, 192-93, 451 S.E.2d 211, 223 (1994) (citing *State v. Sumpter*, 318 N.C. 102, 107, 347 S.E.2d 396, 399 (1986)).

“A person is guilty of statutory rape of a child by an adult if the person is at least 18 years of age and engages in vaginal intercourse with a victim who is a child under the age of 13 years.” N.C. Gen. Stat. § 14-27.23 (2019). Defendant argues that evidence that an act of intercourse occurred while B.N. was in seventh grade does not establish that it occurred when she was less than 13 years old. We disagree.

B.N. testified that Defendant’s inappropriate behavior began when Defendant asked to look at her genitals when she was six or seven years old. B.N. further testified that Defendant began to engage in vaginal intercourse with her while B.N. was in seventh grade, and that Defendant would sometimes engage in vaginal intercourse several days each week. B.N. was 12 years old at the beginning of seventh grade, and turned 13 in December of her seventh grade year.

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Additionally, child interview specialist Elizabeth Pogroszewski testified that she had interviewed B.N. on two occasions, once in 2015 and once in 2017. Ms. Pogroszewski testified that during the 2015 interview, B.N. described “concerning” behavior by Defendant, including that Defendant would require B.N. to rub his back and feet if B.N. wanted to “go places and have friends come over[,]” and that when she went into her bedroom, she was only allowed to shut the door while changing, and had to keep it unlocked. Ms. Pogroszewski further testified that during the 2017 interview, B.N. told her that Defendant began to “put it in her[,]” in sixth or seventh grade. Ms. Pogroszewski noted that during both the 2015 and 2017 interviews, B.N. displayed a “flat” demeanor, avoided eye contact, and “was guarded, pretty quiet.”

Finally, Defendant admitted on at least two separate occasions that he had engaged in vaginal intercourse with B.N. First, B.N.’s mother testified that Defendant left a note at the home in which he apologized for how “all this [happened],” but that “it was mutual” and he had “never forced her,” and wanted to “[make] it work.” Second, Detective Kensington testified that during an interview, Defendant acknowledged the sexual acts with B.N., and admitted paternity in B.N.’s pregnancy.

Considering all evidence in the light most favorable to the State and giving the State the benefit of every reasonable inference, there was substantial evidence that the act of intercourse was committed by Defendant and it occurred when B.N. was

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less than 13 years old. Defendant began his pattern of inappropriate behavior when B.N. was only six or seven years old. Although B.N. did not specifically provide an exact date for Defendant's first act of vaginal intercourse, she testified that the first act occurred during her seventh grade year, and told Ms. Pogroszewski that the first act occurred during sixth or seventh grade. B.N. was 12 years old at the beginning of seventh grade. And finally, Defendant admitted to his actions on multiple occasions after impregnating B.N. Accordingly, the State presented substantial evidence sufficient for a reasonable mind to conclude that B.N. was less than 13 years old when the first act of vaginal intercourse occurred, and the trial court did not err in denying Defendant's motion to dismiss.

B. Lifetime SBM

1. *Petition for Writ of Certiorari*

Because of the civil nature of SBM hearings, a defendant must file a written notice of appeal from an SBM order pursuant to Appellate Rule 3. N.C.R. App. P. 3(a); *State v. Brooks*, 204 N.C. App. 193, 194-95, 693 S.E.2d 204, 206 (2010) (holding that oral notice of appeal from an SBM order does not confer jurisdiction on this Court). This Court, however, is authorized to issue writs of certiorari "to permit review of the judgments and orders of trial tribunals when the right to prosecute an appeal has been lost by failure to take timely action[.]" N.C.R. App. P. 21(a)(1). In the present case, because Defendant's oral notice of appeal was insufficient to confer

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jurisdiction on this Court under Rule 3, Defendant filed a petition for a writ of certiorari on 22 May 2020 seeking review of the order imposing lifetime enrollment in SBM. In our discretion, we allow Defendant's petition for writ of certiorari.

2. Preservation and Rule 2

Defendant asserts that the trial court erred in ordering that Defendant enroll in lifetime SBM upon his release from prison because the State failed to meet its burden of proving the imposition of lifetime SBM is a reasonable search under the Fourth Amendment. *See Grady v. North Carolina* (“*Grady I*”), 575 U.S. 306, 310, 135 L. Ed. 2d 459 (2015). However, Defendant did not raise any constitutional challenge or otherwise preserve this constitutional claim at any point during his sentencing hearing. Pursuant to Rule 10 of the North Carolina Appellate Rules of Procedure, “to preserve an issue for appellate review, a party must have presented to the trial court a timely request, objection, or motion, stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context.” N.C. R. App. P. 10(a)(1). Accordingly, because Defendant did not object to the imposition of lifetime SBM on constitutional grounds, he has waived the ability to argue it on appeal. *State v. Bursell* (“*Bursell II*”), 372 N.C. 196, 200, 827 S.E.2d 302, 305 (2019).

Defendant requests that this Court exercise its discretion to invoke Rule 2 of the Rules of Appellate Procedure to reach the merits. Under Rule 2, “[t]o prevent

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manifest injustice to a party[] . . . either court of the appellate division may[] . . . suspend or vary the requirements or provisions of any of these rules in a case pending before it . . . upon its own initiative[.]” N.C. R. App. P. 2. An appellate court’s decision to invoke Rule 2 and suspend the appellate rules is always an exercise of discretion. *Bursell II*, 372 N.C. at 201, 827 S.E.2d at 306. “Rule 2 relates to the residual power of our appellate courts to consider, *in exceptional circumstances*, significant issues of importance in the public interest or to prevent injustice which appears manifest to the Court *and only in such instances*.” *State v. Campbell*, 369 N.C. 599, 603, 799 S.E.2d 600, 602 (2017) (emphasis in original) (citation omitted). The determination of whether a particular case is an “instance” appropriate for Rule 2 review “must necessarily be made in light of the *specific circumstances of individual cases and parties*, such as whether ‘substantial rights of an appellant are affected.’” *Id.* (emphasis in original) (quoting *State v. Hart*, 361 N.C. 309, 316, 644 S.E.2d 201, 205 (2007)).

In two recent cases, *State v. Ricks*, ___ N.C. App. ___, 843 S.E.2d 652, *writ allowed*, ___ N.C. ___, 842 S.E.2d 88 (2020) and *State v. Graham*, ___ N.C. App. ___, 841 S.E.2d 754, *writ allowed*, ___ N.C. ___, 845 S.E.2d 788 (2020), *and review allowed in part, denied in part*, ___ N.C. ___, 845 S.E.2d 789 (2020),¹ this Court invoked Rule

¹ We note that *Ricks* and *Graham* have been stayed by our Supreme Court and are of questionable precedential value as a result. However, because the invocation of Rule 2 is a discretionary decision, we nonetheless find their reasoning persuasive.

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2 and suspended Rule 10(a)(1) to review appeals from SBM orders entered without a *Grady* hearing and without the State presenting any evidence of reasonableness. Also, although we recognize that “precedent cannot create an automatic right to review via Rule 2[.]” *Campbell*, 369 N.C. at 603, 799 S.E.2d at 603, we consider these cases informative in our exercise of discretion.

In *Ricks*, this Court sought guidance from our Supreme Court’s decision in *Bursell II*, 372 N.C. at 201, 827 S.E.2d at 306 (affirming this Court’s invocation of Rule 2 to suspend Rule 10(a)(1) and review an appeal from an SBM order in *State v. Bursell* (“*Bursell I*”), 258 N.C. App. 527, 813 S.E.2d 463 (2017), *aff’d in part, rev’d in part*, 372 N.C. 196, 827 S.E.2d 302 (2019)). *Ricks* identified several factors that this Court considered in *Bursell I* when it exercised its discretion and invoked Rule 2 including: “whether the case involved a substantial right[,] . . . the State’s and the trial court’s failures to follow well-established precedent in applying for and imposing SBM, and the State’s concession of reversible *Grady* error.” *Ricks*, ___ N.C. App. at ___, 843 S.E.2d at 662–63 (quotation marks, citation, and brackets omitted). We too consider these factors “instructive in our exercise of discretion here.” *Id.* at ___, 843 S.E.2d at 662.

First, in light of the United States Supreme Court’s holding that the imposition of SBM effects a continuous warrantless search, *Grady I*, 575 U.S. at 310, 191 L.Ed.2d at 462-63, this Court has held the Fourth Amendment right implicated by the

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imposition of SBM “is a substantial right that warrants our discretionary invocation of Rule 2.” *Graham*, ___ N.C. App. at ___, 841 S.E.2d at 769. Moreover, in the present case, as in *Ricks*,

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

Ricks, ___ N.C. App. at ___, 843 S.E.2d at 663 (emphasis added). The multiple cases referenced above clearly state a *Grady* hearing must be conducted and the State must present any evidence regarding the reasonableness of the search. Although the trial court in this case had the benefit of the precedent referenced above, it did not conduct a *Grady* hearing and the State failed to offer any evidence regarding the reasonableness of the search. For these reasons, we exercise our discretion and invoke Rule 2 to reach the merits of Defendant’s appeal.

3. *Merits*

In this case, at the time of Defendant’s sentencing hearing, Defendant was ordered to submit to lifetime SBM solely due to his conviction of an aggravated

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offense; however, he will not actually enroll in the program until after he has completed his multi-year active prison sentence. In North Carolina, it is well-established that a trial court *must* conduct a *Grady* hearing before imposing lifetime SBM. *State v. Gordon* (“*Gordon II*”), ___ N.C. App. ___, ___, 840 S.E.2d 907, 909 (2020) (“After determining that an individual meets the criteria for one of three categories of offenders subject to the satellite-based monitoring program, *see* [N.C. Gen. Stat.] § 14-208.40(a)(1)-(3), the trial court must conduct a hearing in order to determine the constitutionality of ordering the targeted individual to enroll in the satellite-based monitoring program” (citations omitted)). At the hearing, “the State must prove that the SBM program is reasonable as applied to the defendant, considering the totality of the circumstances, the nature and extent to which it intrudes upon the defendant’s reasonable privacy interests, and the extent to which it furthers legitimate governmental interests.” *Graham*, ___ N.C. App. at ___, 841 S.E.2d at 770 (citation omitted).

“The trial court must weigh the State’s ‘interest in solving crimes that have been committed, preventing the commission of sex crimes, and protecting the public,’ *Grady III*, 372 N.C. at 545, 831 S.E.2d at 568, against SBM’s ‘deep . . . intrusion upon an individual’s protected Fourth Amendment interests[.]’ [*Id.*] at 538, 831 S.E.2d at 564.” *Ricks*, ___ N.C. App. at ___, 843 S.E.2d at 664. And, if the trial court imposes a *future term of SBM* to follow a defendant’s active sentence, as the trial court did in

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this case, “the State also must ‘demonstrate what a defendant’s threat of reoffending will be after having been incarcerated for’ the duration of his sentence with some ‘individualized measure of the defendant’s threat of reoffending.’” *Id.* (quoting *Gordon II*, 2020 WL 1263993, at *6) (brackets omitted).

In the present case, at the close of the sentencing hearing, the trial court found that Defendant had been convicted of an aggravated offense under [N.C. Gen. Stat.] § 14-208.6(5), and accordingly ordered Defendant to enroll in lifetime SBM upon his release from prison. *See* N.C. Gen. Stat. § 14-208.40A(c) (2019) (“If the court finds that the offender . . . has committed an aggravated offense, . . . the court shall order the offender to enroll in a satellite-based monitoring program for life.”). However, as in *Ricks*, there were no additional findings nor further consideration of the lifetime SBM; “[s]uch consideration is constitutionally obligatory.” *Ricks*, ___ N.C. App. at ___, 843 S.E.2d at 665 (citation omitted). We hold that the SBM order is unconstitutional as applied to Defendant and, as a result, we vacate the order without prejudice to the State’s ability to file a subsequent SBM application. *See id.*, ___ N.C. App. at ___, 843 S.E.2d at 665 (citing *Bursell I* and *Bursell II* and holding that “the trial court order imposing SBM pursuant to N.C. Gen. Stat. § 14-208.40(a) is unconstitutional as applied to [the d]efendant and must be vacated.”); *Bursell I*, 258 N.C. App. at 534, 813 S.E.2d at 468 (“Because no *Grady* hearing was held before the trial court imposed SBM, we vacate its order without prejudice to the State’s ability

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to file a subsequent SBM application.”); *Bursell II*, 372 N.C. at 201, 827 S.E.2d at 306 (affirming this Court’s decision in *Bursell I* to vacate the trial court’s SBM order without prejudice).

III. Conclusion

For the foregoing reasons, we hold that the trial court did not err in denying Defendant’s motion to dismiss. Further, because the trial court ordered Defendant to enroll in lifetime SBM without holding a *Grady* hearing and without the State offering any evidence proving the search of Defendant was reasonable under the Fourth Amendment, we vacate the SBM order without prejudice to the State’s ability to file another SBM application.

NO ERROR IN PART, VACATED IN PART.

Judges STROUD and ARROWOOD concur.

Report per Rule 30(e).