

IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA14-915

Filed: 17 March 2015

STATE OF NORTH CAROLINA

v.

Mecklenburg County

Nos. 13 CRS 228504

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MICQUAN SMITH

Appeal by defendant from judgments entered 17 March 2014 by Judge W. Robert Bell in Mecklenburg County Superior Court. Heard in the Court of Appeals 4 February 2015.

*Roy Cooper, Attorney General, by Joseph Finarelli, Special Deputy Attorney General, for the State.*

*Edward Eldred, Attorney at Law, PLLC, by Edward Eldred, for defendant-appellant.*

STEELMAN, Judge.

Where the trial court's additional findings of fact were supported by competent record evidence, the trial court did not err in imposing satellite-based monitoring.

I. Factual and Procedural Background

On 6 January 2014, Micquan Smith (defendant) pled guilty to indecent liberties with a minor and attempted first-degree burglary, based on offenses committed on 10 July 2013. The trial court deferred sentencing to determine whether

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satellite-based monitoring (SBM) was required. On 7 February 2014, the State presented evidence that in January of 2012, defendant pled guilty to assault on a child under twelve, and that in September of 2012, defendant was charged with indecent liberties with a minor and indecent exposure, although these charges were voluntarily dismissed by the State prior to trial.

On 7 March 2014, the State presented the results of the Static-99 examination of defendant, which indicated that he had six points, and fell within the “High” risk category. One point was assigned for the January 2012 conviction, and one for the September 2012 charges. The officer who administered the examination, however, testified that she would have given defendant only five points, placing him in the “Moderate-High” risk category. The trial court found the initial examination to be in error, and that defendant’s Static-99 did not place him in the “High” risk category. The trial court then made the following findings:

Find that although the Static 99R takes into account prior convictions it does not explicitly consider the short duration between the criminal acts themselves,

That is: 1st 1-28-12 Picking up a 5 year old girl.

2nd 9-22-12 Exposure on a playground to a 5 year old, 3 year old and a 1 year female.

3rd 7-10-13 B&E physically break into a residence and commit an Indecent Liberties to wit being in bed with a young female child.

That the three evidences [sic] a pre-dereliction [sic] towards young pre-pubescent females a particularly

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vulnerable population.

That two of the occasions the young female children were being loosely supervised in open, public areas when approached by the defendant. In the third most recent case the defendant broke into a residential structure to gain access to the young victim. That the three incidences [sic] evidence a pattern of sexual increasing aggressiveness on the part of the defendant in his acting out with the young female victims.

Defendant was sentenced to consecutive active sentences of 23-40 months imprisonment for first-degree burglary and 15-27 months imprisonment for indecent liberties with a child. The trial court ordered that defendant be subject to SBM for 20 years following his release from prison.

Defendant appeals.

II. Standard of Review

On appeal from an order imposing SBM, “we review the trial court's findings of fact 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. Kilby*, 198 N.C. App. 363, 367, 679 S.E.2d 430, 432 (2009) (quoting *State v. Garcia*, 358 N.C. 382, 391, 597 S.E.2d 724, 733 (2004), *cert. denied*, 543 U.S. 1156, 161 L.Ed.2d 122 (2005)).

III. Findings of Fact

In his sole argument on appeal, defendant contends that the trial court's additional findings of fact are not supported by competent record evidence, and that the trial court erred in ordering defendant to be subject to SBM. We disagree.

We have held that, if the only evidence presented to the trial court is a STATIC-99 risk assessment of "Moderate," the trial court errs in imposing SBM.<sup>1</sup> *Kilby*, 198 N.C. App. At 369-70, 679 S.E.2d at 434. If the State presents additional evidence, and the trial court makes additional findings, then the trial court may order SBM. *State v. Morrow*, 200 N.C. App. 123, 132, 683 S.E.2d 754, 761 (2009).

The trial court's findings state that: (1) defendant committed multiple acts, (2) they were close together in time, (3) that all of the subjects of the incidents were young girls, (4) that two of the incidents involved public places, and one involved breaking into a private residence, and (5) that the incidents show that defendant's aggressive conduct was escalating.

Defendant contends that his prior offenses should not have been considered at all in the trial court's findings. We have previously held that the trial court is not to consider matters already included in the STATIC-99 assessment:

The purpose of allowing the trial court to make additional findings is to permit the trial court to consider factors not part of the STATIC-99 assessment. In *Morrow*, we held that, where an offender is determined to pose only a low or moderate risk of reoffending, the State must offer

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<sup>1</sup> We note that the STATIC-99 risk assessment has four categories: Low, Moderate-Low, Moderate-High, and High. We hold that Moderate-High still constitutes "Moderate" for the purposes of our precedent.

additional evidence, and the trial court make additional findings, in order to justify a maximum SBM sentence. *See Morrow*, 200 N.C. App. at 132, 683 S.E.2d at 761; *Jarvis*, \_\_\_ N.C. App. at \_\_\_, 715 S.E.2d at 259. To allow these “additional findings” to include matters already addressed in the STATIC-99 assessment would obviate the utility of the assessment. We hold that these “additional findings” cannot be based upon factors explicitly considered in the STATIC-99 assessment.

*State v. Thomas*, \_\_\_ N.C. App. \_\_\_, \_\_\_, 741 S.E.2d 384, 387 (2013). Even assuming *arguendo* that the charges from January and September 2012 were otherwise admissible, they were part of the STATIC-99 assessment, and the trial court was not permitted to rely upon them as factors in its final determination on the appropriateness of SBM. Further, we note that the September 2012 charges were dismissed; we have previously held that mere accusations of crimes, absent a conviction, “are generally inadmissible even if evidence that [the witness] actually committed the crimes would have been admissible.” *State v. Johnson*, 128 N.C. App. 361, 369, 496 S.E.2d 805, 810 (1998) (quoting *State v. Mills*, 332 N.C. 392, 407, 420 S.E.2d 114, 121 (1992)). As such, even in the absence of the STATIC-99, the September 2012 charges could not have been relied upon by the trial court.

However, there was evidence in the record to support the remainder of the trial court’s findings, with respect to the age of the alleged victims, the temporal proximity of the events, and defendant’s increasing sexual aggressiveness. We have held that “when the trial court is making its determination of whether the defendant requires the highest possible level of supervision, the court ‘is not limited to the DOC's risk

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assessment’ and should consider ‘any proffered and otherwise admissible evidence relevant to the risk posed by a defendant[.]’” *State v. Green*, 211 N.C. App. 599, 603, 710 S.E.2d 292, 295 (2011) (quoting *Morrow*, 200 N.C. App. at 131, 683 S.E.2d at 760-61). These factors were not part of the STATIC-99 evaluation, and the trial court was not barred from considering them. We hold that the trial court did not err in considering this evidence, making findings of fact based on this evidence, and imposing the requirement of post-sentence SBM.

Because the trial court made additional findings of fact that were supported by competent record evidence, we hold that it did not err in ordering defendant to be subject to SBM following his release from incarceration.

AFFIRMED.

Judges DIETZ and INMAN concur.