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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA19-113

Filed: 17 December 2019

Wake County, Nos. 17 CRS 207348-50

STATE OF NORTH CAROLINA

v.

WILLIAM ALFALLA

Appeal by Defendant from Judgments and Order entered 10 May 2018 by Judge Carl R. Fox in Wake County Superior Court. Heard in the Court of Appeals 5 September 2019.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Francisco Benzoni, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Wyatt Orsbon, for defendant-appellant.

HAMPSON, Judge.

Factual and Procedural Background

William Alfalla (Defendant) appeals from his convictions for two counts of First-Degree Forcible Rape, two counts of First-Degree Forcible Sexual Offense, one count of First-Degree Kidnapping, one count of Assault on a Female, and one count

of Domestic Criminal Trespass. The Record before us, including evidence presented at trial, tends to show the following:

After meeting in 2014, Defendant and Victoria¹ began dating and were married on 2 July 2015. On 17 July 2016, Defendant assaulted Victoria, hitting her in the head with a curtain rod. Victoria called the police, but no arrests were made. The following Friday, Defendant filed a police report alleging Victoria had hit him during the 17 July 2016 incident, and a warrant was issued for her arrest. Victoria turned herself in on the following Monday and was released later that afternoon.

When Victoria returned to her house, Defendant had moved out, and Victoria changed the locks on her doors. For approximately six months, Defendant called Victoria twenty to twenty-five times a day, often threatening her. If Victoria did not answer, Defendant would show up at her house and demand to speak to her. Defendant also began following Victoria to and from work. Because of Defendant's threatening behavior, Victoria developed a routine whereby she would look out her windows before work for Defendant and would not leave if she saw him.

On 21 April 2017, when Victoria was about to leave for work, she looked out her window and did not see Defendant. Once she opened the door, however, Defendant appeared and pushed her back inside her house. Over the next approximately eight hours, Defendant repeatedly sexually and physically assaulted

¹ A pseudonym used by the parties to protect the victim's identity.

Victoria while holding her captive. Defendant forced Victoria to perform oral sex on him and to have vaginal intercourse three times and anal intercourse. Defendant also made Victoria take a shower and stayed in the bathroom while she showered. Throughout this encounter, Defendant repeatedly said he was “in charge,” hit Victoria several times, and threatened to harm her daughter and grandchildren if Victoria did not comply with his demands.

Eventually, Defendant left Victoria’s house, and she called police. Defendant was arrested and ultimately charged with two counts of First-Degree Forcible Rape, two counts of First-Degree Forcible Sexual Offense, one count of First-Degree Kidnapping, one count of Assault on a Female, and one count of Domestic Criminal Trespass.

Defendant’s trial in Wake County Superior Court began on 30 April 2018. The State offered testimony, under Rule 404(b),² of Defendant’s former longtime girlfriend, Angela,³ who had four children with Defendant and had dated him for approximately ten years before ending their relationship in 2010. Prior to Angela’s testimony, the trial court gave a limiting instruction, informing the jury that it was only to consider this testimony as “proof of . . . [m]otive, opportunity, intent, preparation, plan, scheme, system, knowledge, identity, absence of mistake or

² See N.C. Gen. Stat. § 8C-1, Rule 404(b) (2017).

³ A pseudonym has been used to protect the witness’s identity.

accident as to the charges against” Defendant. Angela testified that after their relationship ended in 2010, Defendant would repeatedly call her and often dropped by her home uninvited. On 15 October 2010, Defendant showed up at Angela’s house and forced her inside. Once inside Angela’s house, Defendant then forced Angela to have vaginal and anal intercourse. Defendant also made Angela take a shower and stayed in the bathroom to watch her shower. During this encounter, Defendant hit Angela several times and threatened her. Angela eventually managed to escape after convincing Defendant to take her to the store to buy cigarettes.

Prior to the start of Defendant’s trial, the trial court ordered Defendant “not to have any contact with [Angela] or any other state’s witnesses during the course of this trial.” In defiance of this order, however, Defendant repeatedly attempted to contact Angela during the course of the trial, and the trial court revoked Defendant’s phone privileges.

Defendant did not testify in his defense at trial. On 10 May 2018, the jury returned verdicts finding Defendant guilty of all charges. Prior to pronouncing Defendant’s sentence, the trial court provided Defendant the opportunity to address the court, and the following exchange occurred between Defendant and the trial court:

THE COURT: Do you want to say anything about your case?

THE DEFENDANT: Yes.

THE COURT: Go right ahead.

THE DEFENDANT: As far as my case, when the jury came in at the beginning and they wanted me to take the stand, I really wanted to take the stand and give them my side of the story and let them see that there was a lot of things that weren't said and weren't shown to them as far as my character and who I really am.

And as far as [the Prosecutor] explaining that my daughter and my kids, we don't have a relationship, when in fact my daughter visited me two weeks ago here and she showed me the license and told me she got her license and she was happy to show it to me.

And I gave her some good advice on staying in school and things like that, and you know, and the importance of an education.

As far as this case, there was a lot of things that I could have took the stand and I could have said, but I took my lawyer's advice and I let him handle my case. But I really believe that there is a lot of things that I could have shown the jury that -- who I am as a character and what kind of relationship me and [Victoria] did have, that would have shown a different view of everything. I wasn't aware of those --

THE COURT: Now, let me say, the jury didn't want you to take the stand. They understand you don't have to take the stand.

THE DEFENDANT: I do understand. I just wish I had taken the stand so they would have known and, you know, got to see who I am and heard another different story upon, you know, the outcome of everything that they were looking at.

I am not a serial rapist. I didn't turn 42 to start raping people. I had no priors for that ever before that, so I didn't turn 42 to start doing this.

These are just things that I was never convicted of this before this. These were just things that came up in the trial.

And as far as the mother of my kids, we stayed in contact. We have [stayed] in contact because we have four kids and my kids do look for me. They ask for me. And I was their provider while they were out in the world. If they needed something, I would go to them and say no problem, required sneakers, take them to play baseball, things of that nature.

But I am not a monster. I spent three and a half years in school straight. I never failed a class. I was three classes short of graduating with my degree and I was actively involved in my kids' life.

And now I don't know what is going to happen to me now, but I didn't expect this from the verdict, and I am just hoping I get another chance to come back and take the stand and give my side of the story and let people know I am not a monster. I am not a serial rapist.

I am not anything she said I am, but just the father of four children and a person who was struggling and striving to have made better of myself in a society.

THE COURT: Well, you do know I asked you several times if you wanted to testify.

THE DEFENDANT: You did. And I did express that, that to a certain extent I did say that to a certain extent I wanted to go because one of the jurors said she had wanted to hear my side of the story. And I wanted to sit down and I wanted to explain what kind of a relationship I had with her and how we were seeing each other and things of that nature so they could have seen a different view of what happened and instead of just one-sided trial of what they were presenting.

And I am just hoping I get another chance to do that on the appeal. I apologize for not taking the stand for the jurors and I don't blame you for deciding what you decided. It was whatever you saw, but I am just hoping I get another chance on appeal to come back and maybe show my side of the story. That's all.

THE COURT: All right. You may have a seat.

THE DEFENDANT: Thank you.

THE COURT: [Defendant], I have to tell you, in 13 years as a judge, and 26 or 27 years as a prosecutor, I have never heard 404(b) evidence where the crimes so significantly mirrored each other. They literally were like an overlay of what [Angela] testified about what happened to her and she wasn't in this courtroom [when Victoria testified].

What she testified happened to her and what [Victoria] testified happened to her, they were literally mirror images of each other.

And what they really sort of said is that when a woman that you are involved in a relationship with or married to doesn't do what you want them to do, you have a way of punishing them and the way of punishing them is to harass them, to scare them, to threaten them, to sexually assault them.

This -- these convictions, these are serious convictions that you had -- assault on a female, assault with a deadly weapon and second degree kidnapping -- and you know, quite often folks sentenced don't seem to understand that when you were sentenced, that wasn't your probation officer telling you not to have contact with her. That was a judge telling you not to have contact with her. And you violated that condition of probation in that case and in this -- I am trying to think -- in the other courtroom, 703, I told you not to make any phone calls to [Angela].

I told you in open court not to call her. And you called her anyway. It's like you don't have any respect for authority. And so, whatever you choose to do, you are going to do and you don't care. It sort of mirrors what [Victoria] said when she was on the stand, that you are the man. You are the person in charge. And when you decide, that is . . . the way it's going to be.

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Opinion of the Court

Your lawyer -- you don't seem to appreciate the fact that your lawyer probably saved you from a real real long and tedious cross-examination.

THE DEFENDANT: May I speak now?

THE COURT: No. No. These -- any prosecutor, not just these two, but any prosecutor sitting at that table would have loved to have you on that witness stand with these convictions on your record.

And if you think those convictions would have helped you with this jury, you are kidding yourself. Those convictions could have only helped convince[] these 12 people that you were guilty of everything.

One defense that people don't seem to understand who are seated in that chair like you is everybody is lying but me does not work. I have had people testify that in this courtroom and other courtrooms in the last 12 months and in no case has a jury found someone not guilty where there was evidence to the contrary based upon solely the word of the defendant saying [d]on't believe [your] lying eyes, don't believe your lying ears, believe me. I am the one telling the truth.

You are sort of like the quintessential Jekyll and Hyde. There is obviously a very good side of you that is supportive, giving, caring, but there is a very bad side that stalks, that does things to your ex and estranged spouses to let them know you have been there, that you can be there, that you can do what -- if you choose to, that you can make their lives miserable. I mean, that is just aberrant behavior. It's just demented behavior to do that.

If someone, a person who respects themselves, and who loves themselves would just, if they couldn't get along with their spouse or significant other, would just be respectful and walk away. And have only the contact necessary to have with their children if they had children involved.

You, on the other hand, cannot let it go. And you not only let her know that, but you let this other gentleman know that too. You wanted to make sure that he knew that you were around, that he knew that you knew who he was and that you were still the man.

See, you know, one of the sad things -- it's not true as it used to be, but one of the things that is really awful about this is when a woman has been violated like this and treated like this, she has to really weigh whether it's worth it to come in and report this to the police because she has a vision.

Most women have a vision of what they are going to have to go through if they choose to pursue this kind of case. They are going to have to prepare for it. They are going to have to get up on this witness stand in front of God and country and tell a box full of strangers and whoever is out in that audience about what had happened to them. No person would like to do that if they were just telling about their own voluntary sex life. I don't know a person in this courtroom who would like to come in and tell a group of strangers about how their sex life was or what they did in bed.

And yet, that is what has to happen in a case like this for a victim to get on the stand and testify. She has to be prepared that she is going to be raked over the coals and asked about all kinds of things, humiliated and embarrassed about something she didn't choose to do and had no role in it except to be there.

But, you know, it's -- I hope it's all worth it to her to have her courage and her willingness to go through this, affirmed by this jury's verdict.

See, one of the things that you will have to get past at some point is you are not the smartest person in the room. You think that you are smarter than the lawyers. You think you are smarter than the prosecutors. You think you are smarter than her. You think you are smarter than me. You think that whatever you -- you think that you are smarter than the jurors.

You think that if you had a chance to tell them your side of things that they would just magically sway with you and they would just disregard every single thing they have heard from not one wife, but two. They would just go, whoa, obviously he is telling the truth. He is the one. He is the person telling the truth. Those other people, they must be lying. You really believe that. You really believe that.

But, see, here is the thing. When you don't believe what a judge says, it has ramifications. You take your chances.

THE DEFENDANT: Your Honor, I apologize for calling [Angela].

THE COURT: Save it. Do you think I care about your apology. You showed me what you thought when I said -- when you violated that order when I ordered you to stop. I wasn't being your friend saying, Oh, [Defendant], if you choose to, would you mind not doing that.

All these papers in this file, they all show you are smarter than your lawyers. They don't know what they are doing. You are smarter than your lawyers. You are smarter than everybody.

And you may get to testify if you win your appeal. But if you did, I wouldn't recommend it still.

All right. If you will stand up, please, sir.

After Defendant stipulated to an aggravating factor, the trial court imposed four consecutive aggravated sentences totaling 1,440 to 1,968 months' imprisonment. The trial court also entered an Order requiring Defendant to register as a sex offender and to enroll in satellite-based monitoring (SBM) for his lifetime upon release from imprisonment (SBM Order). In open court, Defendant gave Notice of Appeal from "the sentences imposed as well as the registry and the electronic monitoring."

Appellate Jurisdiction

On 1 April 2019, Defendant filed a Petition for Writ of Certiorari in the event this Court should determine his oral Notice of Appeal was deficient. In addressing the sufficiency of oral notices of appeal, our Court looks to whether the defendant manifested his intent to enter notice of appeal. *State v. Daughtridge*, 248 N.C. App. 707, 712, 789 S.E.2d 667, 670 (2016). Here, Defendant’s oral appeal from his “sentences” rather than from his “judgments,” as required by Rule 4 of our Rules of Appellate Procedure, does not render his Notice of Appeal defective. *See* N.C.R. App. P. 4(a) (allowing a defendant to appeal from “a *judgment* or order of a superior or district court” (emphasis added)). The trial court appointed counsel to represent Defendant on appeal, and the State does not contend it was misled or prejudiced in any way by this purported defect. *See State v. Williams*, 235 N.C. App. 201, 204, 761 S.E.2d 662, 664 (2014) (“Accordingly, as defendant’s intent to appeal can be fairly inferred and the State provides no indication it was misled by the defendant’s mistake, we do not dismiss defendant’s appeal on the basis of a defect in the notice of appeal.” (citation omitted)). Therefore, we dismiss this portion of Defendant’s Petition of Writ of Certiorari as moot.

As to Defendant’s oral Notice of Appeal from the trial court’s SBM Order, our Court has “interpreted SBM hearings and proceedings as civil, as opposed to criminal, actions, for purposes of appeal. Therefore, a defendant must give [written] notice of

appeal pursuant to N.C. R. App. P. 3(a), from an SBM proceeding.” *State v. Springle*, 244 N.C. App. 760, 763, 781 S.E.2d 518, 520 (2016) (citation and quotation marks omitted). Failure to file written notice of appeal in this instance is “a jurisdictional default that prevents this Court from acting in any manner other than to dismiss the appeal.” *Id.* (citation and quotation marks omitted). However, our Court routinely allows certiorari under these facts in order to address the merits of a defendant’s appeal. *See, e.g., State v. Dye*, 254 N.C. App. 161, 168, 802 S.E.2d 737, 741 (2017). Accordingly, in our discretion, we grant Defendant’s Petition of Writ of Certiorari to address this issue.

Issues

The dispositive issues on appeal are (I) whether the trial court violated Defendant’s constitutional right to a jury trial because the trial court based its sentence on improper factors; (II) whether the trial court violated Defendant’s constitutional right to be free from double jeopardy by sentencing him for both First-Degree Kidnapping and the First-Degree Forcible Rape and Forcible Sexual Offense convictions; and (III) whether the trial court failed to comply with the statutorily mandated procedures for determining Defendant’s SBM eligibility.

Analysis

I. Trial Court’s Presentencing Comments

Defendant first contends he is entitled to a new sentencing hearing because the trial court based Defendant's sentence on improper factors, thereby punishing him for exercising his constitutional right to a jury trial. "A sentence within the statutory limit will be presumed regular and valid." *State v. Boone*, 293 N.C. 702, 712, 239 S.E.2d 459, 465 (1977). However, if the trial "court considered irrelevant and improper matter in determining the severity of the sentence, the presumption of regularity is overcome, and the sentence is in violation of [the] defendant's rights." *Id.* (citation omitted). "The extent to which a trial court imposed a sentence based upon an improper consideration is a question of law subject to *de novo* review." *State v. Pinkerton*, 205 N.C. App. 490, 498, 697 S.E.2d 1, 6 (2010) (citation omitted), *rev'd per curiam on other grounds*, 365 N.C. 6, 708 S.E.2d 72 (2011).

"It is well established that a criminal defendant may not be punished at sentencing for exercising his constitutional right to trial by jury." *State v. Tice*, 191 N.C. App. 506, 511, 664 S.E.2d 368, 372 (2008) (alterations, citation, and quotation marks omitted). "Where it can reasonably be inferred from the language of the trial judge that the sentence was imposed at least in part because defendant did not agree to a plea offer by the state and insisted on a trial by jury, defendant's constitutional right to trial by jury has been abridged, and a new sentencing hearing must result." *State v. Cannon*, 326 N.C. 37, 39, 387 S.E.2d 450, 451 (1990). In determining whether the trial judge's comments suggest improper considerations, the trial judge's remarks

must be considered contextually and in their entirety. *See Tice*, 191 N.C. App. at 515-16, 664 S.E.2d at 374-75 (citations omitted).

Defendant argues our Courts' decisions in *State v. Fuller*, 179 N.C. App. 61, 632 S.E.2d 509 (2006), and *State v. Peterson*, 154 N.C. App. 515, 571 S.E.2d 883 (2002), control our disposition in this case. In *Fuller*, the defendant was tried and convicted on three counts of first-degree rape and two counts of taking indecent liberties with a child based on at least three occasions where the defendant forced his ten-year-old son to have sex with the defendant's approximately thirty-four-year-old girlfriend. 179 N.C. App. at 64-65, 632 S.E.2d at 512. During sentencing, the trial court repeatedly "emphasized that [the] defendant, in contrast to [his adult girlfriend], had not come forward and admitted what he had done, but instead had forced his son to take the witness stand and be subjected to 'painful and embarrassing questions.' " *Id.* at 71, 632 S.E.2d at 516. The trial court also "made multiple references to [the] defendant's trying to manipulate the jury and the court." *Id.* Because of the trial court's "emphasis upon the pain imposed on [the victim son] in requiring him to testify[.]" our Court held the trial court impermissibly based the defendant's sentence "in part on [the] defendant's insistence on proceeding with a jury trial." *Id.*

In *Peterson*, the defendant was charged with and convicted of, *inter alia*, three counts of statutory rape, five counts of taking indecent liberties with a minor, and

two counts of participating in the prostitution of a minor based on the defendant, posing as a modeling agency employee, coercing several underage girls to have sexual intercourse with the defendant to “ ‘prove themselves ready’ ” for the modeling profession. 154 N.C. App. at 516, 571 S.E.2d at 884. During sentencing, the trial court directly addressed the defendant and stated:

[The d]efendant has shown himself to be a “master manipulator and con artist” and [the d]efendant “attempted to be a con artist with the jury.” Further, the trial court stated [the d]efendant had “rolled the dice in a high stakes game with the jury, and it’s very apparent that [the defendant] lost that gamble.” The court further stated the evidence against [the d]efendant “was overwhelming and such that any rational person would never have rolled the dice and asked for a jury trial.” The trial court concluded: “normally I will say that there’s a special place in hell reserved for villains like you. Meanwhile, it’s my intent that you will never walk in this society again as a free man because your crimes were deplorable and you’re going to get that type of sentence.”

Id. at 516-17, 571 S.E.2d at 884. Based on these remarks, our Court held the trial court had “improperly considered [the d]efendant’s decision to exercise his right to a jury trial” and that “it can reasonably be inferred the trial court based the sentences imposed on [the d]efendant, at least in part, on [the d]efendant’s insistence on a jury trial.” *Id.* at 518, 571 S.E.2d at 885 (footnote omitted). Therefore, the defendant was entitled to a new sentencing hearing. *Id.*

Here, however, the trial court’s statements do not express the same indication of improper motivation as in *Fuller* and *Peterson*—namely, the defendant’s insistence

on a *jury trial*. See *Fuller*, 179 N.C. App. at 71, 632 S.E.2d at 516 (concluding the trial court's emphasis on the defendant not admitting guilt and "forc[ing] his son to take the witness stand" suggested an improper purpose in sentencing); see also *Peterson*, 154 N.C. App. at 516-18, 571 S.E.2d at 884-85 (holding the trial court's statement that the evidence " 'was overwhelming and such that any rational person would never have rolled the dice and *asked for a jury trial*' " suggested an improper motive at sentencing (emphasis added)). Although there is some similarity between some of the trial court's remarks in the present case and those in *Fuller* and *Peterson*, when viewed contextually, it is apparent the trial court did not base its sentencing decision on Defendant's insistence on a jury trial. Rather, the trial court was simply responding to statements made by Defendant at sentencing second-guessing his trial strategy and reflecting on Defendant's lack of credibility in claiming he could have convinced the jury to acquit him. See *State v. Person*, 187 N.C. App. 512, 527-28, 653 S.E.2d 560, 570 (2007) (concluding the trial court did not impermissibly consider the defendant's decision to go to trial when the trial court mentioned the defendant's refusal of a plea offer, but later remarks suggested, in referencing this rejected plea offer, the trial court was "commenting instead on [the] defendant's lack of credibility when claiming he wanted 'another opportunity to prove' himself as an 'honorable law abiding, caring, loving man [and] citizen' "), *rev'd per curiam on other grounds*, 362 N.C. 340, 663 S.E.2d 311 (2008).

For instance, the complained-of comments in this case were in direct response to Defendant's assertions that the jury "wanted [him] to take the stand," that Defendant "wanted to take the stand and give [the jury] my side of the story[,] and that he hopes to "get another chance to come back and take the stand and give my side of my story and let people know I am not a monster. I am not a serial rapist." In response, the trial court reminded Defendant that "you do know I asked you several times if you wanted to testify." Defendant then reiterated his belief that he wished he had taken the stand to give his "side of the story . . . instead of just one-sided trial of what [the State was] presenting." It was in this context that the trial court then went through the striking similarities between Victoria's and Angela's testimony, Defendant's repeated violations of its orders in court, and how Defendant's prior convictions arising from his interaction with Angela would have subjected him to a "real real long and tedious cross-examination[,] thereby further undermining any credibility he may have had with the jury. When viewed in its entirety, the trial court's remarks indicate it was not basing its sentencing decision on Defendant's insistence on a jury trial but rather responding only to Defendant's own comments that he could have convinced the jury to acquit him. The trial court's presentencing remarks here do not give rise to any inference that it considered Defendant's choice to exercise his constitutional right to a jury trial when sentencing Defendant.

II. Double Jeopardy

Defendant next contends, and the State concedes, the trial court violated his constitutional right to be free from double jeopardy by sentencing him for both First-Degree Kidnapping and the First-Degree Forcible Rape and Forcible Sexual Offense convictions. Although Defendant failed to raise this issue at trial, “[w]e elect, nevertheless, . . . pursuant to Rule 2 of the North Carolina Rules of Appellate Procedure, to review this issue on appeal.” *State v. Dudley*, 319 N.C. 656, 659, 356 S.E.2d 361, 363-64 (1987) (citations omitted) (reviewing the identical issue presented as here); *see also State v. Freeman*, 319 N.C. 609, 617-18, 356 S.E.2d 765, 769-70 (1987) (citations omitted) (same).

Our Supreme Court has explained: “A kidnapping is in the first degree ‘[i]f the person kidnapped either was not released by the defendant in a safe place or had been seriously injured or sexually assaulted.’” *State v. Johnson*, 320 N.C. 746, 753-54, 360 S.E.2d 676, 681 (1987) (alteration in original) (quoting N.C. Gen. Stat. § 14-39(b)). Here, as in *Johnson*, “[t]he trial court instructed generally on this element in the language of [N.C. Gen. Stat. § 14-39(b)], and the jury returned a general verdict of guilty of first degree kidnapping.” *Id.* at 754, 360 S.E.2d at 681. As the *Johnson* Court explained, however, “[a]n ambiguous verdict must be construed in favor of the defendant.” *Id.* (citation omitted). “Since the jury may have used one of the rapes to elevate the kidnapping from second to first degree, the case must be remanded for resentencing.” *Id.* (citations omitted). “The trial court may arrest judgment on the

[First-Degree Kidnapping] conviction and resentence [D]efendant for second degree kidnapping or it may arrest judgment on one of the [First-Degree Forcible Rape or Forcible Sexual Offense] convictions.” *Id.* (citation omitted).

III. SBM Order

Lastly, Defendant challenges the trial court’s SBM Order, asserting the trial court failed to comply with the statutorily mandated procedures for determining SBM eligibility. Defendant contends *State v. Sheridan* controls this issue, and we agree. See ___ N.C. App. ___, 824 S.E.2d 146 (2019).

In *Sheridan*, the defendant was found guilty of, *inter alia*, four counts of first-degree sexual exploitation of a minor, two counts of statutory rape, one count of sexual offense in a parental role, and one count of indecent liberties with a minor, and the trial court concluded the defendant’s convictions were all “aggravated offenses” under N.C. Gen. Stat. § 14-208.6(1a). *Id.* at ___, ___, 824 S.E.2d at 150, 154. “Aggravated offenses include those where a defendant (1) engaged in a penetrative sexual act with a victim of any age ‘through the use of force or the threat of serious violence’ or (2) engaged in a penetrative sexual act with a child under twelve.” *Id.* at ___, 824 S.E.2d at 154 (quoting N.C. Gen. Stat. § 14-208.6(1a)). The *Sheridan* Court recognized: “When a defendant is convicted of a reportable offense under the sex offender registration scheme, the district attorney is required to present evidence at the sentencing phase of whether . . . the conviction is an aggravated offense[.]” *Id.*

(citing N.C. Gen. Stat. § 14-208.40A(a)). However, because no evidence was presented to support the trial court’s determination that all of the defendant’s convictions were aggravated offenses, this Court held “the trial court failed to comply with [these] statutory mandates[.]” *Id.* Our Court then “vacat[ed] the order requiring [the d]efendant to enroll in SBM for the remainder of his life, and remand[ed] for proper analysis and determination under N.C. Gen. Stat. § 14-208.40A.” *Id.* (citation omitted).

Here, the trial court also “failed to comply with [these] statutory mandates” by summarily concluding all of Defendant’s convictions qualified as aggravated offenses and triggered mandatory lifetime registration and monitoring. *Id.* Although some of Defendant’s convictions clearly qualify as aggravated offenses, others do not qualify. *See State v. Clark*, 211 N.C. App. 60, 72-73, 714 S.E.2d 754, 762 (2011) (“[I]t is clear that first degree rape fits within the definition of ‘aggravated offense[.]’ ” (alteration, citation, and quotation marks omitted)); *see also State v. Green*, 229 N.C. App. 121, 129, 746 S.E.2d 457, 464 (2013) (concluding because “penetration is not a required element of first-degree sexual offense,” a conviction for first-degree sexual offense is not an aggravated offense). Because the trial court concluded all of Defendant’s convictions were aggravated offenses—as this Court did in *Sheridan*—we “vacate the [SBM Order] requiring Defendant to enroll in SBM for the remainder of his life, and remand for proper analysis and determination under N.C. Gen. Stat. § 14-208.40A”

for correction as to which offenses constitute aggravated offenses under the statute.

___ N.C. App. at ___, 824 S.E.2d at 154 (citation omitted).

Conclusion

Accordingly, for the foregoing reasons, there was no error in the trial court’s presentencing remarks to Defendant. However, the trial court did err by sentencing Defendant to both First-Degree Kidnapping and the underlying sexual offenses. Accordingly, we remand on this matter so “[t]he trial court may arrest judgment on the [First-Degree Kidnapping] conviction and resentence [D]efendant for second degree kidnapping or it may arrest judgment on one of the [First-Degree Forcible Rape or Forcible Sexual Offense] convictions.” *Johnson*, 320 N.C. at 754, 360 S.E.2d at 681 (citation omitted). We also vacate the SBM Order and remand to the trial court for “proper analysis and determination under N.C. Gen. Stat. § 14-208.40A” as to which offenses constitute aggravated offenses under the statute. *Sheridan*, ___ N.C. App. at ___, 824 S.E.2d at 154 (citation omitted).

NO ERROR IN PART; VACATED IN PART; AND REMANDED FOR A NEW SENTENCING HEARING.

Judges ZACHARY and ARROWOOD concur.

Report per Rule 30(e).