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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA18-1122

Filed: 2 June 2020

Rowan County, No. 16 CRS 053700

STATE OF NORTH CAROLINA

v.

JOHN LEWIS JACKSON, JR., Defendant.

Appeal by Defendant from judgment and order entered 23 February 2018 by Judge Lori I. Hamilton in Superior Court, Rowan County. Heard in the Court of Appeals 20 August 2019.

Attorney General Joshua H. Stein, by Assistant Attorney General Terence Steed, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Sterling Rozear, for Defendant.

McGEE, Chief Judge.

John Lewis Jackson, Jr. (“Defendant”) appeals from a judgment entered after a jury found him guilty of second-degree rape. Defendant contends that the trial court erred by allowing the State to present evidence of the complainant’s (“T.H.”) sexual behavior, excluding certain evidence offered by Defendant regarding T.H.’s

sexual behavior, and failing to intervene *ex mero motu* during the State's closing argument. Defendant further asserts the cumulative effect of these errors deprived him of a fair trial. We hold the trial court did not commit plain error in allowing the State to elicit testimony from T.H. regarding her sexual behavior, did not err by excluding certain testimony proffered by Defendant, and did not err by not intervening *ex mero motu* in the State's closing argument. Moreover, we hold that Defendant is not entitled to a reversal based on cumulative error.

Defendant also appeals by writ of *certiorari* from the trial court's order imposing lifetime satellite-based monitoring ("SBM"). Defendant argues that: the State failed to present evidence that lifetime SBM of Defendant was a reasonable Fourth Amendment search; SBM is facially unconstitutional because it involves a perpetual warrantless search that is not supported by probable cause; and SBM constitutes a general warrant in violation of Article I, § 20 of the North Carolina Constitution. We hold that the State failed to meet its burden of demonstrating the search was reasonable under the Fourth Amendment. As a result, we reverse the SBM order.

I. Factual and Procedural History

Defendant was indicted by a grand jury on 12 September 2016 for second-degree rape and first-degree kidnapping of sixteen-year-old T.H. The case came on

for hearing in Superior Court, Rowan County on 19 February 2018. Prior to trial, the State dismissed the charge of first-degree kidnapping.

At a pre-trial hearing, the parties discussed at length whether N.C.G.S. § 8C-1, Rule 412 of the North Carolina Rules of Evidence barred the State from eliciting testimony from T.H. regarding her sexual orientation and her virginity. Defendant stated that, following T.H.'s testimony, he "may need to request an in-camera hearing" under Rule 412. The following exchange ensued:

[THE STATE]: Actually, Judge, I wanted to clarify, I was looking at the law in this and it's, kind of, unclear to me. I know under Rule 412 that you're supposed to have a hearing if certain evidence is going to be presented.

THE COURT: Right.

[THE STATE]: Well, the State's evidence itself would be that this victim had never had sex before when this happened. And looking through the cases, I don't think that it's required when the victim herself is presenting that kind of evidence. But I just wanted to be clear on that, and if you feel like we need to have some kind of –

THE COURT: Do you have the case law? Let me look at this because this is not something, obviously, that we deal with a whole lot.

...

THE COURT: So I guess my question would be: If you intend to elicit testimony or evidence to indicate that the – the prosecuting witness in the case had not had sex, which is sexual behavior, or it at least goes to [the] issue of sexual behavior, then there needs to be a finding by the [c]ourt, as I understand it, that that's relevant?

STATE V. JACKSON

Opinion of the Court

[THE STATE]: Yes.

. . . .

[THE STATE]: And I have – and it took me a long time to get started with trying to find cases on my own from annotated statutes [sic]. I couldn't. I went to – I found these School of Government's publications on sexual assault cases in the rape shield, and that lead me to – there's a very basic statement here by Mr. Welty that said that, "victims can testify about this stuff. That it's not covered by [the] rape shield.

The State presented the trial court with a case from the North Carolina Supreme Court and provided a brief discussion of the applicability of the holding to the present case. The trial court then inquired about the relevance of testimony tending to show T.H. was a lesbian and a virgin:

THE COURT: So what is the – to what issue does that fact that your prosecuting witness had never had sex before go to? What does that go to corroborate or prove?

[THE STATE]: Well, the first thing, generally, is that – all of the other information says she is gay, and she, at the time, had considered herself to be gay. But it corroborates her . . . story that she was raped. The defendant is claiming its consensual sex, and she's saying, "Look, I was a virgin. I've never done anything before, and I'm gay," so that goes to corroborate and bolster the fact that she's saying, "I was raped. This was not consensual." And also it impeaches the defendant's own statement to the police that this was consensual sex. And also, that is brought up to the defendant in his interview that she is a lesbian, and he then tells the story to the – the officer about, "No. I – she's not a lesbian." And he's trying to convince the officer that she had consensual sex with him. Him saying that she

had previous sexual contact.

....

THE COURT: Well, let's assume for the sake of our argument, that we're going to get to a point where this witness is going to say in response to a question, "I have never had sex before."

[DEFENDANT]: Okay. And then I guess, the question becomes: Do I get to ask, "Have you had sex with X, and have you had sex with Y and were you on Facebook having sex with X?" And then I have a witness who would say he had sex with her. And I – I know that's getting into an extreme fact, but I – I think it goes to her credibility. It goes to the heart of her credibility if that's, sort of, the essence of her – her claim against him. I have a second witness who says that she saw her having sex with a male previously, and so I – I just – like I said, I don't want to have this as a mistrial because I didn't address this ahead of – of time.

THE COURT: Well it would seem hard to me – it would – it would be difficult, I think, for the [c]ourt to rule that his was admissible for the purposes of corroborating her position that she had never had consensual sex with anyone and was a lesbian if I do not allow cross-examination regarding specific instances and people who have actually witnessed her having consensual sex.

....

[THE STATE]: Your honor, I agree. If – with the cases that I have seen, if this testimony comes out that she says these things, then [defense counsel] would have to have a hearing to show what they're going to say – and, you know, if it goes to impeachment, then it may come in.

Thus, the trial court concluded, and the parties agreed, that the State could introduce evidence of T.H.'s virginity and sexual orientation without a hearing under Rule 412 but, the introduction of such evidence would trigger a Rule 412 hearing wherein Defendant would have the opportunity to present potential impeachment evidence.

At trial, T.H. testified that, in July of 2016, she was sixteen years old and lived with her grandmother and older sister, E.H., in a double wide mobile home in Woodleaf, North Carolina. Defendant had been T.H.'s neighbor for nine years. T.H. testified that she occasionally played basketball and video games with Defendant; however, she did not consider him a close friend.

T.H. testified that around midnight on 24 July 2016, she was playing "Grand Theft Auto V" in her bedroom when she received a message from Defendant on Facebook Messenger. Defendant asked T.H. if she had an iPhone; T.H. responded, "iPhone 6S, why?" Defendant asked T.H. to come to her back door and inquired whether E.H. was at home. T.H. responded, "[h]ell no, and no." After Defendant explained that he needed to ask T.H. "something important," T.H. finally agreed, walked to her back door, and let Defendant in the house. T.H. was wearing underwear, a sports bra, a t-shirt, and boxer shorts; Defendant was wearing only basketball shorts. T.H. smelled alcohol on Defendant and noticed Defendant's eyes were "bloodshot" and "red."

STATE V. JACKSON

Opinion of the Court

Defendant entered the home through the back door, walked straight to T.H.'s bedroom, and T.H. followed. At that time, T.H.'s grandmother was asleep in her bedroom with the door closed. T.H. testified that she sat next to Defendant on her bed and resumed playing her video game. Defendant began to ask T.H. questions regarding her sexuality, inquiring whether she was a virgin and whether she had ever "got ate out." T.H. said no and Defendant began to kiss her neck. At this point at trial, the State elicited the following testimony from T.H.:

[THE STATE]: And up to that point in your life, had you ever had any sexual experiences with anybody at that point?

[T.H.]: No, sir.

[THE STATE]: And you were telling him that; is that right?

[T.H.]: Uh-huh (affirmative.)

[THE STATE]: Up to that point in your life, did you have any interest in boys at all?

[T.H.]: No, sir.

[THE STATE]: Do you consider yourself to be gay?

[T.H.]: Yes, sir, I am.

T.H. then testified that she pushed her arm against Defendant's side, asked him what he was doing, and pleaded with him to stop. T.H. testified Defendant "aggressively pushed [her] back." Using his right hand, Defendant held T.H.'s right

arm behind her back and placed his left hand on her chest. T.H. was left with a visible bruise on her chest. A photograph of the bruise was introduced as evidence at trial.

T.H. testified that Defendant removed his shorts and pulled T.H.'s boxers and underwear down to the top of her knees. T.H. stated she "was devastated" and "couldn't believe it was happening." Defendant then "rammed his penis in [her] vagina." In an attempt to wake her grandmother up, T.H. hit the bottom of her headboard with her free left hand. T.H. repeatedly yelled "stop" until Defendant covered her mouth with his right hand. Eventually, T.H. "gave up" and stopped yelling. The assault lasted approximately seven or eight minutes. T.H. said she did not consent to Defendant kissing her neck or penetrating her vaginally.

T.H. testified that, after ejaculating on top of T.H.'s sheets, Defendant dismounted T.H., stood up, and put his shorts back on. Without saying a word, Defendant left T.H.'s house. T.H. "had a burn to [her] vagina" and observed blood in her urine. T.H. called E.H. on the phone and tearfully told her that she had been raped by Defendant. Unable to understand her crying sister, E.H. said, "I'm on my way home." Less than a minute later, E.H. arrived at home. T.H. explained to E.H. that Defendant "took advantage of [her]." T.H. had a mark resembling a "hickie" or a bruise on the left side of her neck.

E.H. testified that, when she returned home, T.H. explained that Defendant had raped her. E.H. went to Defendant's house and knocked on the door. Initially,

T.H. remained in her bedroom, crying; however, she came outside when she heard E.H. calling her name. When T.H. walked over to Defendant's house, Defendant was on the porch with his mom, dad, and older brother. E.H testified that when she asked Defendant what he had done with T.H., he denied anything had happened. T.H. then spoke up and said Defendant had raped her. Defendant called T.H. a liar. E.H. asked to see Defendant's phone. When Defendant gave E.H. her phone, E.H. realized he had deleted all the messages between him and T.H. T.H. walked back to her house.

T.H. testified that the following morning at 10:35 a.m., Defendant sent T.H. the following Facebook message: "[a]re you going to the cops? Please – please don't do that. I'm sorry, and, I didn't do that." About fifteen minutes later, Defendant sent another Facebook message stating, "[p]lease don't go to the police or hospital. Just chill, man. It wasn't like that. Your grandma don't know." At 11:19 a.m., Defendant sent a third message: "[j]ust let me know if you're going to the police, yes or no. I pray to God you don't." Defendant then tried to call T.H. and, when she did not pick up, sent her two more Facebook messages: "[y]o, does your grandma know?" and "I'm really sorry. I really am, but it wasn't like that." After unsuccessfully attempting to call T.H. again, Defendant sent her a final Facebook message: "[m]y family asked please don't do that. I could get a long time away from everybody and never see my mom again." Around 8:00 p.m. that night, T.H. told her grandmother about the rape, and the family contacted the police.

STATE V. JACKSON

Opinion of the Court

Following the State's direct examination of T.H., Defendant moved for a hearing to challenge T.H.'s testimony that she was a virgin and a lesbian. Defendant questioned T.H. in an *in camera* hearing outside the presence of the jury. T.H. testified, consistent with her earlier testimony, that she was a lesbian and she had never engaged in sexual activity with any person before 24 July 2016. The State argued that "[b]ecause all of her answers are the same thing she testified to[.]" cross-examination on those issues, at that time, would be inappropriate under Rules 403 or 412 of the North Carolina Rules of Evidence. The State explained, and the trial court agreed, that if Defendant proffered testimony that contradicted T.H.'s testimony, Defendant would *then* have the opportunity to call T.H. as a witness during his case-in-chief. Defendant withdrew his motion.

The State called Detective Ryan Barkley ("Detective Barkley") of the Rowan County Sheriff's Office as a witness. Detective Barkley testified that he drove to T.H.'s home and spoke with T.H., E.H., and their grandmother on 25 July 2016. Detective Barkley drafted written statements from both T.H. and E.H., and each girl signed her respective statement. After leaving T.H.'s home, Detective Barkley "immediately tried to find [Defendant] to speak with him and get his side of the story." When Detective Barkley was unsuccessful at reaching Defendant by phone, he drove to Defendant's house and spoke with his family members. Eventually, Detective Barkley left a neon green "door tag" with his contact information on Defendant's door.

Warrants were issued for the seventeen-year-old Defendant's arrest. Detective Barkley said that Defendant turned himself in at the Davie County Sheriff's Office on 4 August 2016 and was ultimately transported to the Rowan County Sheriff's Office. Detective Barkley then interviewed Defendant. At this point at trial, the State sought to introduce a recording of Defendant's interview with Detective Barkley.

Outside the presence of the jury, the parties engaged in another discussion about the admissibility of evidence regarding T.H.'s sexual orientation. The State addressed the portions of the recorded interview that it wished to redact, including the part when Detective Barkley asks Defendant, "[y]ou know she's a lesbian; right?" and Defendant responds, "[s]he's not a lesbian. I know her history." Defendant argued that portion of the interview should be admissible because the State had already introduced T.H.'s testimony that she was a lesbian. The trial court concluded that, "until I've made the determination that that is relevant information regarding her prior sexual conduct, then I think it's not admissible. I need to make that finding." Defendant responded, "[t]hat's fine." The recorded interview was played for the jury at trial. Detective Barkley then resumed his testimony. Detective Barkley testified that the hickie on T.H.'s neck and the bruise on her chest could have resulted from consensual sex as well as rape; however, he testified that the marks were consistent with T.H.'s story. The State rested its case.

STATE V. JACKSON

Opinion of the Court

Defendant moved to “reopen the Rule 412 hearing.” Defendant asked the trial court to take judicial notice of T.H.’s *in camera* testimony about her virginity and sexual orientation. The trial court agreed, and the following exchange ensued:

THE COURT: All right. So what you’re telling me is, you intend – or you want the [c]ourt to consider allowing you to elicit testimony regarding the prosecuting witness’s prior sexual activity?

[DEFENDANT]: Yes.

THE COURT: And pursuant to Rule 412, I am required to conduct a hearing to determine whether or not that information comes in under one of the exceptions.

[DEFENDANT]: Yes.

The Rule 412 hearing commenced, and Defendant called his cousin, Devante Mitchell (“Mr. Mitchell”), as his first witness. Mr. Mitchell testified that “a couple years” earlier, he had engaged in sexual intercourse with T.H. at Defendant’s house. He remembered it was summer but could not recall the year. Mr. Mitchell testified that he was playing a video game with T.H.; T.H. sat on his lap, removed his pants, climbed on top of him, and placed his penis into her vagina. He stated that about a week later, he and T.H. engaged in anal intercourse in the woods outside Defendant’s trailer. Mr. Mitchell explained that he was standing in the woods with T.H. when “she bent over and just pulled her pants down.” He responded by pulling down his own pants and anally penetrating T.H. for about ten minutes. He then ejaculated,

pulled up his pants, and walked away. Mr. Mitchell testified that he and T.H. never spoke about either time they engaged in sexual intercourse.

Defendant's aunt, Teresa Coleman ("Ms. Coleman"), testified that she witnessed T.H. and "the young boy across the street" in the woods "having intercourse" during the summer of 2014 or 2015. When Ms. Coleman saw T.H., "[s]he had her pants down and her shirt was up" and the boy's pants were also pulled down. She stated she could not recall whether T.H. was wearing shorts or pants but was certain she saw T.H.'s "pink panties" below her knees. Ms. Coleman further testified that although she did not actually witness vaginal penetration, "[w]ith the movements and the sounds[.]" she "kn[e]w what they were doing."

Defendant argued that the testimony of Mr. Mitchell and Ms. Coleman was not required to fall within an exception to Rule 412(b) because there "is a very explicit inconsistency between the fact that . . . [T.H.] is purporting to be [a] virgin and a lesbian and what Your Honor just heard. And so I should be allowed to present this evidence for impeachment purposes." Defendant argued that the "probative value" goes to T.H.'s "truthfulness as well as her credibility and her experience of having sex" and asserted "there is no particular prejudicial effect[.]" The trial court explained that it would allow Mr. Mitchell's testimony as to the first instance he described because it "closely matches the underlying facts of the conduct alleged in this particular case." The trial court excluded Mr. Mitchell's testimony about the

second incident and Ms. Coleman's testimony, ruling they were more prejudicial than probative.

The trial resumed, and Defendant called Mr. Mitchell as a witness. Mr. Mitchell testified, consistent with his testimony in the Rule 412 hearing, that he had once engaged in sexual intercourse with T.H. in his aunt's room at Defendant's house. Defendant also called his mother, Tracy Jackson ("Ms. Jackson"), as a witness. Ms. Jackson testified that on the night of 24 July 2016, she observed T.H., E.H., and Defendant smoking together outside. Later that evening, T.H., E.H., and E.H.'s friend approached Ms. Jackson as she sat on her front porch. T.H. said that she and Defendant had kissed, but denied they had sex. T.H. and E.H. began to argue and E.H. said she was going to the police. Defendant said "[y]ou know I didn't do that" and E.H. said, "you know what you done."

Defendant testified on his own behalf that on 24 July 2016, he played basketball with T.H. and, at night, he smoked cigarettes and marijuana with T.H. and E.H. in their driveway. Later that evening, Defendant sent T.H. a message on Facebook inquiring if she had an iPhone case and requesting that she meet him at her back door. When Defendant arrived at T.H.'s house, T.H. was waiting for him in the driveway; she asked him if he wanted to come inside. Defendant followed T.H. into her bedroom and began playing a video game. T.H. went to the bathroom and returned to her bedroom wearing a sports bra and boxers. T.H. cut off the lights,

paused the video game, and began kissing Defendant. T.H. stopped kissing Defendant and checked to see if her grandmother was awake; she then resumed kissing Defendant. Defendant testified that T.H. gave him oral sex for about four minutes. Defendant rolled on top of T.H. and the two had intercourse for about seven minutes. Defendant ejaculated, pulled up his shorts, and resumed playing the video game.

Defendant testified that, after they had intercourse, T.H. sat next to Defendant on the bed and texted on her phone. Defendant returned home and went to sleep. Defendant's parents later came to his room and woke him up. Defendant joined his parents on the porch, and E.H. asked him what he had done. Defendant denied doing anything; T.H. said they only kissed. Defendant testified that it appeared as though E.H. "was pushing the rape[.]" Days later, after being informed by his mother that Detective Barkley had left a "tag" on the door, Defendant turned himself into the police.

The jury found Defendant guilty of second-degree rape on 23 February 2018. Defendant was sentenced as a Prior Record Level I for a term of 73 to 148 months imprisonment. Following the sentencing hearing, the trial court conducted an SBM hearing.

At the hearing, the trial court found that Defendant had been convicted of a reportable conviction under N.C.G.S. § 14-208.6, which was a sexually violent offense

under N.C.G.S. § 14-208.6(5). The State explained that the trial court “needs to determine . . . under the totality of the circumstances including the nature and purpose of the search in the extent to which the search intrudes upon reasonable privacy expectations whether the search is reasonable under the circumstances.” The State provided the trial court with *Belleau v. Wall*, 811 F.3d 929 (2016), a case from the United States Court of Appeals for the Seventh Circuit and recited the headnotes it deemed relevant. Additionally, the State quoted the *Correctional North Carolina Sentencing and Policy Advisory Commission Report*. After reading statistics from the study, the State noted that the study found “sex offenders generally have lower recidivism rates than most groups.” The State argued:

under the totality of the circumstances, the crime that this individual has committed, the fact that society wants to make sure that this defendant knows that they’re keeping an eye on him, and if he is involved in another crime, we know where he’s going to be. It also – it would exonerate him if he wasn’t involved in it. But the expectation of privacy that – that this defendant has is diminished as the Court said here because he has proven that he has – that he has committed this type of heinous offense. Also the – the restriction on his freedom of movement is very slight, what – if there’s any whatsoever because all it’s doing is placing a monitor on him that can show where he is. It doesn’t affect anything that he does, and also the public already knows where he is going to be living at all times. And he’s restricted by the sex-offender registration laws. So, Your Honor, I would ask in the totality of the circumstances, would you find that this is reasonable under the United States Constitution and the Fourth Amendment?

Defendant responded, “my understanding is the State was required to put on a[n] evidentiary hearing and they have failed to put on evidence . . . While these statistics are informative, they are nonbinding.” The trial court stated, “I understand at his young age that a lifetime monitoring for someone of his age is a really long time . . . if he lives what one might naturally assume would be his lifespan. That’s all I’ve heard so far. What else [d]o you have to give me to weigh[]?” At that point, Defendant called his mother, Ms. Jackson, back to testify. Ms. Jackson discussed how the imposition of SBM on Defendant would affect his life and her family’s life.

The trial court conducted a “totality of the circumstances test” and considered “the likelihood of recidivism of sex offenders in general,” “the aggravating nature of this offense,” the monitor’s “*di minimus* intrusion on [Defendant’s] privacy[,]” the monitor’s “*de minimis* impact on [Defendant’s] family,” and the fact that Defendant’s profession allows him to be self-employed. The trial court explained the State has an “interest in protecting the community from a young man who is still refusing to accept responsibility for his conduct, which leaves the [c]ourt to be concerned that he has no motivation whatsoever . . . to curtail conduct of this nature in the future.” The trial court found that lifetime SBM of Defendant was not an unreasonable search under the Fourth Amendment. As a result, the trial court ordered Defendant to register as a sex offender and enroll in SBM for the rest of his life following his release from prison.

II. Appellate Jurisdiction and Petition for Writ of Certiorari

Defendant appeals from the judgment entered 23 February 2018 after the jury found him guilty of second-degree rape. Defendant also appeals from the trial court's order imposing lifetime SBM on Defendant. Although Defendant gave oral notice of appeal at the SBM hearing, he failed to file written notice of appeal. As a result, Defendant filed a petition for writ of *certiorari* to this Court on 6 February 2019.

A defendant must file a written notice of appeal from an SBM order pursuant to Rule 3 of the Rules of Appellate Procedure because of the civil nature of SBM proceedings. N.C. R. App. P. 3 (2018); *State v. Brooks*, 204 N.C. App. 193, 194–95, 693 S.E.2d 204, 206 (2010) (“In light of our decisions interpreting an SBM hearing as not being a criminal trial or proceeding for purposes of appeal, we must hold that oral notice pursuant to N.C.R. App. P. 4(a)(1) is insufficient to confer jurisdiction on this Court. Instead, a defendant must give notice of appeal pursuant to N.C. R. App. P. 3(a) as is proper ‘in a civil action or special proceeding.’”). Rule 3 provides that a party must enter notice of appeal from a civil action

(a) by filing notice of appeal with the clerk of superior court
and serving copies thereof upon all other parties . . .

. . . .

(c)

(1) within thirty days after entry of judgment if the
party has been served with a copy of the judgment
within the three-day period prescribed by Rule 58 of

the Rules of Civil Procedure; or

(2) within thirty days after service upon the party of a copy of the judgment if service was not made within that three-day period[.]

N.C. R. App. P. 3(a), (c). In the present case, Defendant did not file a written notice of appeal in compliance with Rule 3. However, in our discretion, we allow Defendant's petition for writ of *certiorari*.

III. Analysis

A. State's Introduction of Evidence of T.H.'s Sexual Behavior

Defendant contends that the trial court committed plain error by allowing the State to question T.H. about her sexual orientation and virginity in violation of Rule 412 of the North Carolina Rules of Evidence. We disagree.

Defendant did not object to T.H.'s testimony about her sexual orientation and virginity and, therefore, we are limited to plain error review. *See State v. Wiley*, 355 N.C. 592, 615, 565 S.E.2d 22, 39–40 (2002) (“[P]lain error analysis applies only to jury instructions and evidentiary matters[.]”). “Plain error is applied only in extraordinary cases where, after reviewing the entire record, it can be said the claimed error is a fundamental error, something so basic, so prejudicial, so lacking in its elements that justice cannot have been done.” *State v. Barden*, 356 N.C. 316, 348, 572 S.E.2d 108, 130 (2002) (internal quotation marks and citations omitted). To establish plain error, a defendant must demonstrate “(i) that a different result

probably would have been reached but for the error or (ii) that the error was so fundamental as to result in a miscarriage of justice or denial of a fair trial.” *State v. Bishop*, 346 N.C. 365, 385, 488 S.E.2d 769, 779 (1997).

This Court has explained that “[t]he admissibility of evidence is governed by a threshold inquiry into its relevance.” *State v. Griffin*, 136 N.C. App. 531, 550, 525 S.E.2d 793, 806 (2000) (citing N.C.G.S. § 8C–1, Rules 401–403 (1999)). Rule 412 of the North Carolina Rules of Evidence, also known as the “Rape Shield Statute,” limits the admissibility of evidence regarding a victim’s prior sexual behavior in a sexual abuse case. N.C.G.S. § 8C–1, Rule 412 (2019). Rule 412 provides, in pertinent part, that “the sexual behavior of the complainant is irrelevant to any issue in the prosecution unless such behavior” falls into one of four enumerated exceptions:

(b) Notwithstanding any other provision of law, the sexual behavior of the complainant is irrelevant to any issue in the prosecution unless such behavior:

- (1) Was between the complainant and the defendant; or
- (2) Is evidence of specific instances of sexual behavior offered for the purpose of showing that the act or acts charged were not committed by the defendant; or
- (3) Is evidence of a pattern of sexual behavior so distinctive and so closely resembling the defendant’s version of the alleged encounter with the complainant as to tend to prove that such complainant consented to the act or acts charged or behaved in such a manner as to lead the defendant reasonably to believe that the complainant consented; or

- (4) Is evidence of sexual behavior offered as the basis of expert psychological or psychiatric opinion that the complainant fantasized or invented the act or acts charged.

N.C.G.S. § 8C–1, Rule 412(a), (b).

Rule 412 further provides that, prior to questioning a witness regarding her sexual behavior, “the proponent of such evidence shall first apply to the court for a determination of the relevance of the sexual behavior to which it relates.” N.C.G.S. § 8C–1, Rule 412(d). At that time, the trial court must conduct an *in camera* hearing “to determine the extent to which such behavior is relevant.” *Id.* Following the *in camera* hearing (the “Rule 412 hearing”), “[i]f the court finds that the evidence is relevant, it shall enter an order stating that the evidence may be admitted and the nature of the questions which will be permitted.” *Id.* Our Supreme Court has explained that the purpose of the Rape Shield Statute is “to protect the witness from unnecessary humiliation and embarrassment while shielding the jury from unwanted prejudice that might result from evidence of sexual conduct which has little relevance to the case and has a low probative value.” *State v. Younger*, 306 N.C. 692, 696, 295 S.E.2d 453, 456 (1982).

In the present case, on direct examination, T.H. testified that she had never had a prior sexual experience and she was gay. Defendant asserts that the plain language of Rule 412 prohibits *any party* from offering evidence about a complainant’s

sexual behavior, subject only to the established exceptions. As a result, Defendant argues the trial court erred by allowing the State to introduce evidence of T.H.'s sexual behavior that did not fall within any of the viable exceptions to its inadmissibility. Defendant argues that "the jury probably would have reached a different verdict if the State had not introduced, and then relied upon, the entirely irrelevant evidence of T.H.'s sexual behavior."

We are aware of no North Carolina appellate case specifically addressing the applicability of the Rape Shield Statute when the State introduces evidence of a complainant's sexual behavior. However, the North Carolina Supreme Court has acknowledged that, when the State elicits testimony from a victim regarding her sexual activity, the State "opens the door" for a defendant to initiate a Rule 412 hearing in order to impeach the victim's testimony. *State v. Degree*, 322 N.C. 302, 306, 367 S.E.2d 679, 682 (1988) (explaining that, had the defendant "possessed evidence of the victim's sexual behavior which he contended was relevant for impeachment purposes, he could have requested an in camera hearing to determine its relevancy and admissibility" because the State opened the door to the introduction of evidence regarding the victim's sexual behavior). This Court subsequently interpreted the Supreme Court's holding in *Degree*:

[i]n *Degree*, our Supreme Court held that once the State opens the door into a victim's sexual activity the defendant may request an in camera hearing so that the court may determine the admissibility and relevance of prior

inconsistent statements or other impeachment evidence concerning the victim's statements regarding her past sexual behavior if it exists. In the absence of such a request, a fishing expedition into the victim's past sexual behavior will not be permitted, as it is prohibited by G.S. sec. 8C-1, Rule 412.

State v. Fenn, 94 N.C. App. 127, 132, 379 S.E.2d 715, 718 (1989). Thus, although our courts have not specifically limited the applicability of the Rape Shield Statute to instances when a defendant introduces evidence of a complainant's sexual behavior, we have held that, if the State "opens the door" to such evidence, a defendant may request a Rule 412 hearing to determine the admissibility of otherwise inadmissible evidence in order to impeach the complainant. *Degree*, 322 N.C. at 306, 367 S.E.2d at 682; *Fenn*, 94 N.C. App. at 132, 379 S.E.2d at 718.

In the present case, the parties followed the procedure outlined in *Degree* and *Fenn*. At the pre-trial hearing, the State explained that the case law was unclear as to whether a Rule 412 hearing was necessary when the State proffered evidence of a victim's sexual behavior. The State, Defendant, and the trial court discussed the relevancy of T.H.'s forecasted testimony that she was gay and a virgin. The trial court agreed that the State could introduce such evidence without a Rule 412 hearing. The trial court also agreed that, if the State chose to elicit the forecasted testimony from T.H., Defendant would move for a Rule 412 hearing. At trial, the parties followed the procedures they had agreed upon at the pre-trial hearing. T.H. testified that at the

time she was raped by Defendant, she had never had a sexual experience with another person and that she was gay. Defendant moved for a Rule 412 hearing.

At the Rule 412 hearing, the trial court concluded it would allow Mr. Mitchell to testify about an instance when he allegedly had sexual intercourse with T.H. Thus, the trial court acted in accord with our precedent when it allowed T.H. to testify about her sexual behavior and granted Defendant the opportunity to impeach that testimony.

Assuming, *arguendo*, that the trial court violated Rule 412 by allowing the State to present evidence of T.H.'s sexual behavior, this error did not amount to plain error. At trial, the jury was presented with ample evidence demonstrating Defendant's guilt. First, the State entered into evidence a photograph of a bruise on T.H.'s chest that was consistent with her testimony that Defendant used his left hand to hold her down. Second, the State proffered testimony tending to show that after the assault, Defendant denied having intercourse with T.H. and deleted his messages with T.H. from his phone. Defendant later admitted he had engaged in intercourse with T.H., but claimed it was consensual. Third, the morning after his confrontation with E.H., Defendant called T.H. repeatedly and sent her numerous Facebook messages to the effect of "[p]lease don't go to the police or hospital. Just chill man. It wasn't like that. Your grandma don't know[;]" "[j]ust let me know if you're going to the police, yes or no. I pray to God you don't[;]" "I'm really sorry. I really am, but it

wasn't like that[;]" and "[m]y family asked please don't do that. I could get a long time away from everybody and never see my mom again." Moreover, the State's introduction of evidence regarding T.H.'s virginity and sexual orientation opened the door to Defendant offering what would otherwise be inadmissible impeachment evidence. Therefore, we hold Defendant has failed to carry his burden to show "a different result probably would have been reached but for the error[.]" *Bishop*, 346 N.C. at 385, 488 S.E.2d at 779.

B. Trial Court's Exclusion of Defendant's Witnesses

Defendant argues that the trial court erred by excluding Ms. Coleman's testimony and a portion of Mr. Mitchell's testimony. We disagree.

"[U]pon a finding by the trial court that certain evidence is relevant because it falls into one of the exceptions under Rule 412, or if the evidence falls outside of the rule, a Rule 403 balancing of probative value versus unfair prejudice should be utilized in the court's discretion." *In re K.W.*, 192 N.C. App. 646, 649, 666 S.E.2d 490, 493 (2008) (citing N.C.G.S. § 8C-1, Rule 403 (2007)). Rule 403 provides, "[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." N.C.G.S. § 8C-1, Rule 403 (2019). "It is within the trial court's sound discretion to decide whether to exclude evidence under Rule 403, and its ruling

will not be reversed absent a showing of abuse of that discretion.” *State v. Crockett*, 238 N.C. App. 96, 107, 767 S.E.2d 78, 85 (2014) (citation omitted).

In the present case, Defendant raised Rule 412 at various times throughout the trial and, each time, the trial court complied with the procedures required by the rule. After the State rested its case, the trial court commenced the formal Rule 412 *in camera* hearing outside the presence of the jury. The trial court granted Defendant’s request to take judicial notice of T.H.’s *in camera* testimony regarding her sexual orientation and virginity. Defendant elicited testimony from both Mr. Mitchell and Ms. Coleman. The trial court then considered the arguments of the State and Defendant before conducting its balancing analysis under Rule 403. Finding that the event “closely matches the underlying facts of the conduct alleged in this particular case[,]” the trial court admitted Mr. Mitchell’s testimony regarding the first sexual encounter he described. The trial court excluded Mr. Mitchell’s testimony about an instance he engaged in anal sex with T.H. in the woods, finding such testimony to be “more prejudicial than probative” and excluded the testimony of Ms. Coleman, explaining that “the information that was given to the [c]ourt by Ms. Coleman lacks the specificity and detail necessary for the [c]ourt to feel comfortable finding that its probative value outweighs its prejudicial effect.”

Defendant contends that “[t]he only factor weighing against admitting [Mr.] Mitchell and [Ms.] Coleman’s testimony is that the evidence bears no direct link to

the conduct at issue in the trial.” However, as discussed above, the similarity of the evidence to the conduct at issue was not the trial court’s sole consideration in determining the admissibility of each piece of evidence. For each consideration, the trial court balanced the probative nature of the evidence against its prejudicial effect. Although it excluded some evidence under Rule 403, the trial court allowed Defendant to proffer testimony that directly contradicted T.H.’s testimony. Thus, T.H.’s testimony that she was a lesbian and a virgin was counterbalanced by Mr. Mitchell’s testimony that he engaged in consensual vaginal intercourse with T.H. at a prior time, under similar circumstances. We hold that the trial court’s conclusion, after conducting the appropriate balancing test under Rule 403, was not an abuse of discretion.

C. State’s Closing Argument

Defendant contends that the trial court erred in failing to intervene *ex mero motu* during the State’s closing argument. Specifically, Defendant argues the State improperly referenced T.H.’s sexual behavior, implied Defendant was a liar and was guilty, stated that what Defendant did was “worse [than rape,]” and asked that the jury “give [Defendant] what he deserves.” We hold the State’s statements were not grossly improper and did not impede Defendant’s right to a fair trial.

“Argument of counsel must be left largely to the control and discretion of the trial judge, and counsel must be allowed wide latitude in their arguments which are

warranted by the evidence and are not calculated to mislead or prejudice the jury.”

State v. Riddle, 311 N.C. 734, 738, 319 S.E.2d 250, 253 (1984). Closing arguments are governed by N.C.G.S. § 15A-1230:

- (a) During a closing argument to the jury an attorney may not become abusive, inject his personal experiences, express his personal belief as to the truth or falsity of the evidence or as to the guilt or innocence of the defendant, or make arguments on the basis of matters outside the record except for matters concerning which the court may take judicial notice. An attorney may, however, on the basis of his analysis of the evidence, argue any position or conclusion with respect to a matter in issue.

N.C.G.S. § 15A-1230(a) (2019).

“The standard of review for assessing alleged improper closing arguments that fail to provoke timely objection from opposing counsel is whether the remarks were so grossly improper that the trial court committed reversible error by failing to intervene ex mero motu.” *State v. Jones*, 355 N.C. 117, 133, 558 S.E.2d 97, 107 (2002) (citation omitted). “Thus, when defense counsel fails to object to the prosecutor’s improper argument and the trial court fails to intervene, the standard of review requires a two-step analytical inquiry: (1) whether the argument was improper; and, if so, (2) whether the argument was so grossly improper as to impede the defendant’s right to a fair trial.” *State v. Huey*, 370 N.C. 174, 179, 804 S.E.2d 464, 469 (2017). “To establish such an abuse, [a] defendant must show that the prosecutor’s comments so infected the trial with unfairness that they rendered the conviction fundamentally

unfair.” *State v. Davis*, 349 N.C. 1, 23, 506 S.E.2d 455, 467 (1998) (citation omitted). Moreover, “[i]n circumstances in which a defendant in his or her role as an obvious interested party in a criminal trial fails to object to the other party’s closing statement at trial, yet assigns as error the detached trial judge’s routine taciturnity during closing arguments in the absence of any objection, this Court has consistently viewed the appealing party’s burden to show prejudice and reversible error as a heavy one.” *State v. Tart*, 372 N.C. 73, 81, 824 S.E.2d 837, 842–43 (2019).

In the present case, Defendant failed to object to the State’s closing argument. Defendant contends the State’s statements about T.H.’s sexual orientation and virginity were grossly improper. Defendant was the first to address this evidence in his closing argument. Defendant stated, “you heard the testimony that [T.H. is] a virgin and that she’s a lesbian and that she never had sex before” and then discussed the significance of Mr. Mitchell’s “credible” testimony. Because, earlier in the trial, the State “opened the door” for Defendant to impeach T.H. with contradictory evidence regarding her sexual behavior, Defendant was afforded the opportunity to call Mr. Mitchell as a witness and espouse his credibility during closing argument. Following Defendant’s closing argument, it was not improper for the State, in its closing argument, to discuss the evidence presented at trial regarding T.H.’s sexual orientation and virginity.

Defendant also argues that the following portion of the State's closing argument "appeal[s] to the passions of the jury":

You know, this case isn't just rape. I mean, rape in itself, rape [is] abhorrent. It's disgusting. It's horrific. It's one of the worst things you could possibly do to another human being. Okay. Some people may say it is the worst thing, and that's in any rape case. Any time a man takes advantage of a woman by force and has sex with her against her will it is horrible. But what he did was worse because he did that, but he didn't just take away her right to choose to have sex with someone. He took her right to choose to have sex with the very first person in her life because she's a virgin.

After noting that rape is "abhorrent," "disgusting," and "horrific" in all circumstances, the State used hyperbolic language to exemplify the egregious circumstances of this particular rape. The Supreme Court "has held that hyperbolic language is acceptable in jury argument so long as it is not inflammatory or grossly improper." *State v. Hill*, 347 N.C. 275, 298, 493 S.E.2d 264, 277 (1997); *see also State v. McCollum*, 334 N.C. 208, 227, 433 S.E.2d 144, 154 (1993) (explaining the State was not expressing its personal opinion when it told the jury "I won't have the opportunity to again get in front of you and try to convince you that this is probably the most cruel, atrocious and heinous crime you'll ever come in contact with" and holding the statement was "proper in light of his role as a zealous advocate for convictions in criminal cases[]"). Thus, we do not believe that the statement was so grossly improper as to impede Defendant's right to a fair trial.

Defendant also argues the State improperly appealed to the passions of the jury in stating:

He wasn't going to take no for an answer at the door. He wasn't going to take no for an answer when he wanted to have sex with her. And you know what, he got what he wanted. He got it. Now, you need to give him what he deserves.

We consider this statement a “type of vivid communication to the jury [that] falls within the realm of permissible hyperbole on the part of the State in line with our precedent.” *Tart*, 372 N.C. at 84, 824 S.E.2d at 844. We do not hold this statement rendered the proceedings fundamentally unfair.

Defendant also argues that the State implied in its closing argument that Defendant was guilty and had lied to the police. Referencing Defendant's recorded interview with Detective Barkley, the State explained that when a person “didn't do it[,] [t]hey don't sit there and not know what to say because they've already tried to lie one time.” When viewed contextually, the State had just discussed the portion of the recorded interview when Defendant told Detective Barkley that, on the night of the alleged assault, T.H. called him and asked him to come to her house. The State explained that Detective Barkley “called [Defendant] out on it[,]” informed Defendant he had seen the Facebook messages, and told Defendant, “you're not going to lie to me.” At that point, Detective Barkley again asked Defendant why he had gone over to T.H.'s house that night and, after a 24 second pause, Defendant finally answered.

The State's statement was an observation that, in the recorded interview, after being confronted with an inconsistency in his story, Defendant paused for 24 seconds before answering Detective Barkley's question. It is reasonable to draw from this evidence an inference that Defendant had a consciousness of guilt. *See State v. Clark*, 128 N.C. App. 87, 100, 493 S.E.2d 770, 778 (1997) ("Based upon the facts which were placed into evidence at trial, this was a reasonable inference to be put to the jury.") Thus, the State's statements in this regard were not improper because "counsel may argue facts in evidence and all reasonable inferences arising from those facts." *Id.*

Likewise, Defendant argues that by stating "all of the believable evidence in this case shows he's guilty of this," the State made an improper expression of Defendant's guilt. We agree and hold that it was not proper for the State to state that the "believable evidence" in the case demonstrated Defendant was guilty. *Huey*, 370 N.C. at 182, 804 S.E.2d at 471 ("Statutorily, the prosecutor is not permitted to inject his opinion as to the truth or falsity of the evidence or comment on a defendant's guilt or innocence during his argument." (citing N.C.G.S. § 15A-1230(a))). However, Defendant has not demonstrated that this statement "so infected the trial with unfairness that [it] rendered the conviction fundamentally unfair." *Davis*, 349 N.C. at 23, 506 S.E.2d at 467 (citation omitted).

In sum, Defendant has not met its "heavy" burden of demonstrating "prejudice and reversible error[.]" *Tart*, 372 N.C. at 81, 824 S.E.2d at 842–43. As a result, we

hold the State's statements during closing argument were not so "grossly improper that the trial court committed reversible error by failing to intervene ex mero motu." *Jones*, 355 N.C. at 133, 558 S.E.2d at 107 (citation omitted).

D. Cumulative Errors

Defendant contends the cumulative prejudice from the trial court's errors requires a new trial. We disagree.

"Cumulative errors lead to reversal when taken as a whole they deprived the defendant of his due process right to a fair trial free from prejudicial error." *State v. Wilkerson*, 363 N.C. 382, 426, 683 S.E.2d 174, 201 (2009) (internal quotation marks and brackets omitted). Since we hold that Defendant has failed to show any prejudicial error at trial, we necessarily find no cumulative error.

E. SBM

Defendant contends that the trial court erred by ordering lifetime SBM because: the State failed to meet its burden of proving that the search was reasonable under the Fourth Amendment; SBM is facially unconstitutional as it involves a perpetual warrantless search; and SBM constitutes a general warrant in violation of Article I, § 20 of the North Carolina Constitution. We agree that the State failed to meet its burden of demonstrating the search was reasonable under the Fourth Amendment and, because we reverse the SBM order, we need not address Defendant's additional SBM arguments.

In *State v. Grady*, 372 N.C. 509, 831 S.E.2d 542 (2019) (“*Grady III*”), the North Carolina Supreme Court modified and affirmed this Court’s opinion in *State v. Grady*, ___ N.C. App. ___, 817 S.E.2d 18 (2018) (“*Grady II*”). *Grady III* held that as to the specific and limited class of offenders—registered sex offenders subject to SBM solely on the basis of recidivism who are otherwise not under State supervision—the imposition of lifetime SBM was an unreasonable warrantless search in violation of the Fourth Amendment. *Grady III*, 372 N.C. at 547, 831 S.E.2d at 570 (“[T]he ‘reach’ of our holding extends to applications of mandatory lifetime SBM of unsupervised individuals authorized solely on a finding that the individual is a recidivist and without any findings that the individual was convicted of an aggravated offense, or is an adult convicted of statutory rape or statutory sex offense with a victim under the age of thirteen, or is a sexually violent predator.”).

1. *Griffin II*

This Court recently addressed the application of *Grady III* in the context of a non-recidivist offender subject to post-release supervision in *State v. Griffin*, ___ N.C. App. ___, No. COA17-386-2, 2020 WL 769356 (Feb. 18, 2020) (“*Griffin II*”).¹ Mr. Griffin entered an *Alford* plea in 2004 to a first-degree sex offense with a child who lived in his household. *Id.* at *1. He was released from prison eleven years later on

¹ In *State v. Griffin*, ___ N.C. App. ___, 818 S.E.2d 336 (2018) (“*Griffin I*”), this Court held that the State failed to demonstrate the reasonableness of subjecting Mr. Griffin to a thirty-year term of SBM. Following its decision in *Grady III*, the Supreme Court remanded *Griffin I* to this Court “for further consideration in light of . . . [*Grady III*].”

a five-year term of post-release supervision. *Id.* at *1-2. The trial court held a “bring-back” hearing in 2016 to determine if Mr. Griffin was eligible for SBM under N.C.G.S. § 14-208.40(a)(2).² *Id.* at *2. During the hearing, the State offered evidence that Mr. Griffin had presented a “moderate-low” risk of recidivism on his STATIC-99 assessment. *Id.* at *2. In addition, Mr. Griffin’s probation officer testified that, although Mr. Griffin had not completed the required sex offender treatment, he had not committed any new criminal offenses or violated the terms of his probation since being released from prison. *Id.* at *2. The probation officer “described the physical characteristics and operation of the SBM device[;]” however, “[t]he State did not introduce any evidence regarding how it would use the SBM data or whether SBM would be effective in protecting the public from potential recidivism by [the] [d]efendant.” *Id.* at *2. The trial court determined that the State’s evidence coupled with the fact that Mr. Griffin had held a “position of trust” with the victim was sufficient to warrant the imposition of SBM for a period of thirty years and entered an SBM order to that effect. *Id.* at *2. Mr. Griffin appealed.

² An offender sentenced to SBM pursuant to N.C.G.S. § 14-208.40 must: (1) be convicted of a reportable conviction as defined by N.C.G.S. § 14-208.6(4); (2) be required to register under Part 2 of Article 27A of Chapter 14 of the General Statutes; (3) have committed an offense involving the physical, mental, or sexual abuse of a minor; *and* (4) be determined by the trial court to require the highest possible level of supervision and monitoring based on a risk assessment conducted by the Division of Adult Correction and Juvenile Justice. N.C.G.S. § 14-208.40(a)(2) (2017). If an offender meets these criteria, the trial court “*shall* order the offender to enroll in a satellite-based monitoring program for a period of time to be specified by the court.” N.C.G.S. § 14-208.40B(c) (2017) (emphasis added).

In order “to discern the scope, effect, and import of *Grady III*[,]” *Griffin II* provided a thorough discussion of both *Grady II* and *Grady III*. *Id.* at *2. This Court explained that because Mr. Griffin was on post-release supervision, was convicted of an offense involving the physical, mental, or sexual abuse of a minor, and was sentenced to SBM for a thirty-year period, he fell outside of the facial aspect of *Grady III*’s holding. *Id.* at *5. However, we held that “[a]lthough *Grady III* does not compel the result we must reach in this case, its reasonableness analysis does provide us with a roadmap to get there.” *Id.* at *6. We explained that the same factors were considered by our appellate courts in both *Grady II* and *Grady III* to determine whether, under the totality of the circumstances, SBM was a reasonable warrantless search of Mr. Grady, namely:

- (1) the nature of the defendant’s legitimate privacy interests in light of his status as a registered sex offender;
- (2) the intrusive qualities of SBM into the defendant’s privacy interests; and (3) the State’s legitimate interests in conducting SBM monitoring and the effectiveness of SBM in addressing those interests.

Id. at *3 (internal citations omitted). Accordingly, we applied the factors utilized by this Court in *Grady II* and the Supreme Court in *Grady III* to the facts of Mr. Griffin’s appeal. *Id.* at *6 (citing *Grady III*, 372 N.C. at 527, 534, 538, 831 S.E.2d at 557, 561, 564).

First, we addressed Mr. Griffin’s privacy interest. *Id.* at *6. We explained that, by virtue of being on the sex offender registry and being subject to post-release

supervision, Mr. Griffin has “a diminished expectation of privacy in some respects.” *Id.* at *6. However, “[h]is appearance on the sex offender registry does not mean . . . that his rights to privacy in his person, his home, and his movements are forever forfeit.” *Id.* at *6 (citing *Grady III*, 372 N.C. at 534, 831 S.E.2d at 561). We noted that although those “rights may be appreciably diminished during his five-year term of post-release supervision, that is not true for the remaining 25 years of SBM imposed[.]” *Id.* at *6. This Court then wrote that, following his five-year term, Mr. Griffin “will enjoy appreciable, recognizable privacy interests that weigh against the imposition of SBM for the remainder of [his] thirty-year term.” *Id.* at *6.

Second, we addressed the intrusive nature of SBM. *Id.* at *6. Noting that “the physical qualities of the monitoring device used . . . appear largely similar to those in *Grady III*, and thus meaningfully conflict with [Mr. Griffin’s] privacy rights[.]” *id.* at *7, we also explained that, like Mr. Grady, “SBM’s ability to track [Mr. Griffin’s] location is ‘uniquely intrusive,’ and thus weighs against the imposition of SBM.” *Id.* at *7 (quoting *Grady III*, 372 N.C. at 537, 831 S.E.2d at 564 (internal citation omitted)). We then distinguished the lifetime SBM imposed on Mr. Grady from the thirty-year term of SBM imposed on Mr. Griffin, explaining that, “[i]n this aspect, the intrusion of SBM on [Mr. Griffin] is greater than the intrusion imposed [on Mr. Grady]

because[,] unlike an order for lifetime SBM,³ which is subject to periodic challenge and review, an order imposing SBM for a period of years is not subject to later review.” *Id.* at *7 (internal quotation marks and citations omitted). From this analysis, this Court held that “the intrusive nature of SBM as implemented in this case weighs against the reasonableness of the warrantless search ordered [on Mr. Griffin].” *Id.* at *7.

Finally, we considered the State’s interests in conducting SBM and the effectiveness of SBM in addressing those interests. We acknowledged that “the State has advanced legitimate interests in favor of SBM” which include “protecting the public from sex offenders, reducing recidivism, solving crimes, and deterring criminality.” *Id.* at *7 (internal citations omitted). However, although the State has argued these valid objectives,

‘the State bears the burden of proving the reasonableness of a warrantless search’ which, in the context of SBM, includes ‘the burden of coming forward with some evidence that its SBM program assists in apprehending sex offenders, deters or prevents new sex offenses, or otherwise protects the public.’ [*Grady III*, 372 N.C.] at 543–44, 831 S.E.2d at 568. The State’s failure to produce any evidence in this regard ‘weighs heavily against a conclusion of reasonableness.’ *Id.* at 543, 831 S.E.2d at 567.

³ Pursuant to N.C.G.S § 14-208.43, an offender such as Mr. Grady, “who is required to submit to satellite-based monitoring for the offender’s life[,] may file a request for termination of monitoring requirement with the Post-Release Supervision and Parole Commission.” N.C.G.S § 14-208.43(a) (2017). An offender subject to SBM for a period of years does not have this same opportunity. *Griffin II*, 2020 WL 769356, at *7

Id. at *7 (brackets omitted).

In *Griffin II*, the State failed to produce any record evidence demonstrating that “SBM is effective in accomplishing any of the State’s legitimate interests.” *Id.* at *7 (citation omitted). The State offered testimony tending to show Mr. Griffin betrayed the trust of his minor victim and did not participate in the SOAR program; however, the SBM order did not indicate that the trial court believed this behavior increased the likelihood that Mr. Griffin would recidivate. *Id.* at *7. Likewise, the State’s production of the STATIC-99 revealing a “moderate-low risk” of reoffending was not sufficient evidence to support the imposition of SBM on Mr. Griffin. *Id.* at *7. This Court explained that although the State has a legitimate interest in monitoring Mr. Griffin during his five-year term of post-release supervision, that interest “is already accomplished by a mandatory condition of post-release supervision imposing that very thing.” *Id.* at *8 (citing N.C.G.S. § 15A-1368.4(b1)(7) (2017)). As a result, we concluded that the State “failed to carry its burden to produce evidence that the thirty-year term of SBM imposed in this case is effective to serve legitimate interests.” *Id.* at *8.

This Court ultimately resolved *Griffin II* by considering the aforementioned factors under the totality of the circumstances in order to determine whether the imposition of SBM on Mr. Griffin for a thirty-year period was reasonable. *Id.* at *8. After stating that Mr. Griffin has “appreciable privacy interests in his person, his

home, and his movements—even if those interests are diminished for five of the thirty years that he is subject to SBM[,]” we explained that his privacy interests are “substantially infringed by the SBM order imposed in this case.” *Id.* at *8. We concluded that, “these factors caution strongly against a conclusion of reasonableness and they are not outweighed by evidence of any legitimate interest served by monitoring [Mr. Griffin] given the State’s failure to meet its burden showing SBM’s efficacy in accomplishing the State’s professed aims.” *Id.* at *8. Therefore, we held that, under the totality of the circumstances, the imposition of SBM on Mr. Griffin for a thirty-year period constitutes an unreasonable search under the Fourth Amendment and we reversed the trial court’s order. *Id.* at *8.

3. Effect of Grady III and Griffin II on This Appeal

In the present case, as in *Grady III* and *Griffin II*, we must determine whether the imposition of SBM on Defendant is a reasonable Fourth Amendment search. Defendant is an aggravated offender subject to mandatory lifetime SBM following his release from incarceration, placing his circumstances outside of the limited facial holding of *Grady III*. Accordingly, as we did in *Griffin II*, we employ *Grady III* as a roadmap, “reviewing Defendant’s privacy interests and the nature of SBM’s intrusion into them before balancing those factors against the State’s interests in monitoring Defendant and the effectiveness of SBM in addressing those concerns.” *Griffin*, 2020 WL 769356 at *6.

a. Privacy Interest

The trial court ordered Defendant to submit to lifetime sex-offender registration and ordered Defendant to enroll in the SBM program for the remainder of his natural life upon his release from prison. Defendant's placement on the sex offender registry does not mean "that his rights to privacy in his person, his home, and his movements are forever forfeit." *Id.* at *6 (citing *Grady III*, 372 N.C. at 534, 831 S.E.2d at 561). Notably, it is unclear based on the record before us whether Defendant will be on supervised or unsupervised release at the time he completes his active sentence and becomes subject to SBM. *See State v. Gordon*, ___ N.C. App. ___, ___, No. COA17-1077-2, 2020 WL 1263993, at *6 (Mar. 17, 2020) ("Nor does the record before this Court reveal whether Defendant will be on supervised or unsupervised release at the time his monitoring is set to begin, affecting Defendant's privacy expectations in the wealth of information currently exposed" (citations omitted)). Assuming that Defendant will be subject to post-release supervision, his "rights may be appreciably diminished during his . . . term of post-release supervision[;]" however, after the period of supervision ends, Defendant "will enjoy appreciable, recognizable privacy interests that weigh against the imposition of SBM for the remainder of [his lifetime] term." *Id.* at *6.

b. Intrusive Nature of SBM

We have held that because SBM tracks Defendant's location, it "is 'uniquely intrusive,' . . . and thus weighs against the imposition of SBM." *Id.* at *7 (quoting *Grady III*, 372 N.C. at 537, 831 S.E.2d at 564). However, in the present case, "we are unable to consider 'the extent to which the search intrudes upon reasonable privacy expectations' because the search will not occur until Defendant has served his active sentence." *Gordon*, 2020 WL 1263993, at *5 (quoting *Grady III*, 372 N.C. at 527, 831 S.E.2d at 557). Additionally, "[t]he State makes no attempt to report the level of intrusion as to the information revealed under the [SBM] program, nor has it established that the nature and extent of the monitoring that is currently administered, and upon which the present order is based, will remain unchanged by the time that Defendant is released from prison." *Id.* at *5 (citation omitted).

c. State's Interest

The Supreme Court held in *Grady III* that "the extent of a problem justifying the need for a warrantless search cannot simply be assumed; instead, the existence of the problem and the efficacy of the solution need to be demonstrated by the government." *Grady III*, 372 N.C. at 540–41, 831 S.E.2d at 566. As discussed above, "[t]he State has the burden of coming forward with some evidence that its SBM program assists in apprehending sex offenders, deters or prevents new sex offenses, or otherwise protects the public." *Grady III*, 372 N.C. at 543–44, 831 S.E.2d at 568. "The State's failure to produce any evidence in this regard 'weighs heavily against a

conclusion of reasonableness.” *Griffin II*, 2020 WL 769356, at *7 (quoting *Grady III*, 372 N.C. at 543, 831 S.E.2d at 567 (brackets omitted)).

At the hearing, the State presented excerpts from reports of the North Carolina Sentencing and Policy Advisory Commission. The State conceded that the report found “sex offenders generally have lower recidivism rates than most groups.” Thus, as in *Grady III*, “the only actual evidence concerning the threat posed by the recidivism of sex offenders tends to suggest that sex offender recidivism rates are not unusually high.” *Grady III*, 372 N.C. at 540, 831 S.E.2d at 565. The State also read specific headnotes from a case from the Seventh Circuit; however, these judicial statements are not evidence. Finally, the arguments advanced by the State at the hearing were simply conclusory legal arguments untethered to facts or documentary evidence. See *State v. Collins*, 345 N.C. 170, 173, 478 S.E.2d 191, 193 (1996) (explaining that “it is axiomatic that the arguments of counsel are not evidence”). For example, the State argued that SBM of Defendant would protect the public. However, “to the extent that the current [SBM] program is justified by the State’s interest in deterring future sexual assaults, the State’s evidence falls short in demonstrating what Defendant’s threat of reoffending will be after having been incarcerated[.]” *Gordon*, 2020 WL 1263993, at *6 (citation omitted). The State also argued that SBM “would exonerate [Defendant] if he wasn’t involved in” the commission of another crime. However, our Supreme Court explained it was unaware of “a single instance

dating back to the initial implementation of the SBM program in January 2007 in which the SBM program assisted law enforcement in apprehending or exonerating a suspected sex offender in North Carolina, or anywhere else.” *Grady III*, 372 N.C. at 542–43, 831 S.E.2d at 567.

The State failed to provide *any* evidence that SBM helps the State achieve any of its stated purposes, which include reducing recidivism, aiding investigators in solving crime, and deterring future criminal acts. *See Griffin II*, 2020 WL 769356, at *7. The absence of such evidence “weighs heavily against a conclusion of reasonableness” in this case. *Grady III*, 372 N.C. at 543, 831 S.E.2d at 567.

d. Reasonableness of SBM Under the Totality of the Circumstances

As discussed above, “[i]t is manifest that the State has not met its burden of establishing that it would otherwise be reasonable to grant authorities unlimited discretion to continuously and perpetually monitor Defendant’s location information upon his release from prison.” *Gordon*, 2020 WL 1263993, at *5. Additionally, “we are unable to consider ‘the extent to which the search intrudes upon reasonable privacy expectations’ because the search will not occur until Defendant has served his active sentence.” *Id.* at *5 (quoting *Grady III*, 372 N.C. at 527, 831 S.E.2d at 557). Likewise, we are uncertain, and the State “provides no indication[,] that the monitoring device currently in use will be the same as—or even similar to – the device that will be employed approximately [one] decade[] from now.” *Id.* at *5. “[T]hese

factors caution strongly against a conclusion of reasonableness, and they are not outweighed by evidence of any legitimate interest served by monitoring Defendant given the State's failure to meet its burden showing SBM's efficacy in accomplishing the State's professed aims." *Griffin II*, 2020 WL 769356, at *8. As a result, we hold that the imposition of lifetime SBM on Defendant constitutes an unreasonable warrantless search under the Fourth Amendment and we reverse the SBM order. *Griffin II*, 2020 WL 769356, at *8.⁴

Because we reverse the SBM order, we need not address Defendant's additional SBM arguments.

IV. Conclusion

For the reasons stated above, we hold the trial court did not commit plain error by allowing the State to elicit testimony from T.H. regarding her sexual orientation and virginity and did not err by excluding the testimony of Ms. Coleman and Mr. Mitchell. We also hold the trial court did not err in failing to intervene *ex mero motu* in the State's closing argument. Finally, we hold the trial court erred by imposing lifetime SBM on Defendant because the State failed to meet its burden of proving SBM was a reasonable search.

NO PLAIN ERROR IN PART; NO ERROR IN PART; REVERSED IN PART.

⁴ We note that *Griffin II* and *Gordon* have been stayed by our Supreme Court and are of questionable precedential value as a result. However, because these are the most recent decisions from this Court applying the general totality of the circumstances test used in *Grady III* to facts outside the facial aspect of that decision's holding, we consider them for their persuasive value.

STATE V. JACKSON

Opinion of the Court

Judge STROUD concurs.

Judge MURPHY concurs in result only.

Report per Rule 30(e).