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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA23-736

Filed 21 May 2024

Guilford County, No. 19 CRS 81734

STATE OF NORTH CAROLINA

v.

PATRICK MARQUIS THOMAS

Appeal by Defendant from orders entered 4 November 2022 by Judge Julia L. Gullett in Guilford County Superior Court. Heard in the Court of Appeals 5 March 2024.

*Attorney General Joshua H. Stein, by Assistant Attorney General Latasia A. Fields, for the State.*

*Mary McCullers Reece, for the Defendant.*

WOOD, Judge.

Patrick Marquis Thomas (“Defendant”) appeals from his jury conviction and sentence of the trial court entered on 4 November 2022. Defendant filed a timely, written notice of appeal on 15 November 2022. Defendant did not include the order imposing satellite-based monitoring (“SBM”) in his notice of appeal. On 25 September 2023, Defendant filed a petition for writ of certiorari (“PWC”), seeking

review of the 4 November 2022 order imposing satellite-based monitoring. Because Defendant did not specifically include the order for SBM in his notice of appeal, he failed to comply with N.C. R. App. P. 3. In our discretion, we grant Defendant's PWC and address the merits of Defendant's appeal. After careful review of the record and applicable law, we affirm the trial court's orders.

### **I. Factual and Procedural History**

This case arose from Defendant's actions on 16 August 2019, when he raped a fourteen-year-old girl, Nena.<sup>1</sup> Defendant, who was then twenty-three-years-old, met Nena on either Snapchat or Instagram. They communicated virtually for a few months prior to meeting in person. Subsequently, they met in person "a couple of times" and on a few occasions Defendant picked her up from school.

On the night of the offense, Defendant sent Nena a message asking if she wanted to "go get food and go back to his house to chill." After Nena agreed, Defendant picked her up from her cousin's house in Greensboro and drove to his apartment in High Point. Once inside his apartment, Defendant began touching Nena while she repeatedly told him to stop. Defendant then turned Nena around, pulled her pants down, and raped her. Afterwards, Nena ran out of Defendant's apartment and called 911. Nena was taken to the hospital and underwent an

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<sup>1</sup> Pseudonyms are used to protect the identity of the juveniles pursuant to N.C. R. App. P. 42(b).

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examination for a rape kit which revealed findings consistent with her narrative of the evening.

At trial, under Rule 404(b) of the Rules of Evidence, the State called D.N.G., another juvenile, to provide evidence about a similar incident. D.N.G. testified before the jury about a similar incident in April of 2019. Defendant met and communicated with D.N.G., then fifteen-years-old, on Facebook. After they communicated for a period virtually, Defendant picked her up from her home and drove back to his apartment. Once at the apartment, Defendant began touching D.N.G. over her objections, and raped her. D.N.G. did not report her assault until her mother discovered the conversations about the meeting on her cellphone. During D.N.G.'s interviews, she also reported having witnessed the Defendant on a FaceTime call with her neighbor, a then thirteen or fourteen-year-old girl. D.N.G. heard Defendant tell her neighbor that he wanted to meet up and have sexual relations with her.

On 9 December 2019, Defendant was indicted for statutory rape pursuant to N.C. Gen. Stat. § 14-27.25(A). The matter came on for trial by jury on 1 November 2022. On 3 November 2022, the jury returned a unanimous verdict finding Defendant guilty of the offense charged. The following day, the trial court sentenced Defendant to a minimum of 276 and a maximum of 392 months of imprisonment with credit for 1175 days served prior to judgment.

Prior to sentencing, a Static-99R form was completed by an assessor at the North Carolina Department of Adult Correction. The Static-99R form is an “actuarial

assessment instrument [that provides] the basis for requesting the imposition of SBM.” *State v. Blankenship*, 270 N.C. App. 731, 733, 842 S.E.2d 177, 179 (2020). The assessment is “designed to estimate the probability of sexual and violent recidivism among male offenders who have already been convicted of at least one sexual offense against a child or non-consenting adult.” *State v. Morrow*, 200 N.C. App. 123, 125 n. 3, 683 S.E.2d 754, 757 n. 3 (2009). The probability is calculated by scoring individual risk factors and tallying those scores for a final, total score. *Id.* The individual risk factors include the following:

(1) the age of the offender, (2) whether the offender has “ever lived with a lover for at least two years[,]” (3) non-sexual violence convictions, (4) prior sexual offense charges and convictions, (5) prior sentencing dates, (6) convictions for non-contact sex offenses, (7) any unrelated victims, (8) stranger victims, or (9) male victims.

*Id.* The total score reveals the “levels of supervision required for offenders.” The individual is then classified as very low, below average, average, above average, or well above average risk. Following the categorization and results of the Static-99R form, the court must:

determine whether, based on the Department’s risk assessment and all relevant evidence, the offender requires the highest possible level of supervision and monitoring. If the court determines that the offender does require the highest possible level of supervision and monitoring, the court shall order the offender to enroll in a satellite-based monitoring program . . . .

N.C. Gen. Stat. § 14-208.40A(e).

“Our General Assembly enacted ‘a sex offender monitoring program that uses a continuous satellite-based monitoring system . . . designed to monitor’ the locations of individuals who have been convicted of certain sex offenses.” *State v. Gordon*, 270 N.C. App. 468, 469, 840 S.E.2d 907, 909 (2020) (citation omitted). The purpose of the monitoring is to protect “the public, particularly minors, from dangerous sex offenders[.]” *State v. Griffin*, 270 N.C. App. 98, 102, 840 S.E.2d 267, 271 (2020) (citation omitted). Therefore, the court must determine, based on the calculated level of supervision and relevant evidence, whether the program is necessary. “[W]here an offender is determined to pose only a low or moderate risk of reoffending, the State must present additional evidence to support a determination that the offender requires the highest possible level of supervision and monitoring.” *State v. Thomas*, 225 N.C. App. 631, 633, 741 S.E.2d 384, 386 (2013) (citation omitted). However, a high-risk assessment is not “a necessary prerequisite to SBM.” *Morrow*, 200 N.C. App. at 132, 683 S.E.2d at 761.

In the present case, the Static-99R form showed a total score of 4, which corresponded with “Above Average Risk.” In addition to these results, the trial court made additional findings that Defendant had a prior conviction “of a similar nature” and that the 404(b) evidence showed a “common plan or scheme to commit similar offenses.”

After the completion of the Static-99R form, the court entered two separate orders. In one order, the court found that Defendant required the highest level of supervision and ordered him to register as a sex offender for a period of 30 years. In the second order, Defendant was ordered to submit to SBM for a period of 10 years upon his release. On 15 November 2022, Defendant filed written notice of appeal.

## **II. Analysis**

### **A. Appellate Jurisdiction**

On appeal, Defendant's brief does not raise any argument of error at trial nor contest his conviction for statutory rape. Rather, Defendant only contests the trial court's SBM order. Defendant, through counsel, filed a notice of appeal of the criminal conviction and resulting judgment to this Court, but failed to set forth the order for SBM in the notice of appeal. Accordingly, Defendant has filed a PWC with this Court, requesting appellate review of the merits of his appeal. Defendant asks this Court to conclude that he did not lose his right to appeal due to counsel's failure to properly designate the order in his notice of appeal, or, in the alternative, to issue his PWC and reinstate his appeal of the SBM provision.

To appeal an SBM order, a defendant must file a written notice of appeal, and the notice must "designate the judgment or order from which appeal is taken and the court to which appeal is taken." N.C. R. App. P.3(d). "This 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

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pursuant to N.C. R. App. P. 3(a), from an SBM proceeding.” *State v. Dye*, 254 N.C. App. 161, 168, 802 S.E.2d 737, 741 (2017) (cleaned up) (citations omitted). “The North Carolina Rules of Appellate Procedure are mandatory and ‘failure to follow these rules will subject an appeal to dismissal.’ ” *Viar v. N.C. Dep’t of Transp.*, 359 N.C. 400, 401, 610 S.E.2d 360, 360 (2005) (citation omitted). Defendant’s written notice of appeal stated:

NOW COMES the Defendant, Patrick Marquis Thomas, and, by and through counsel, gives notice of appeal to the North Carolina Court of Appeals from his jury conviction in the above-captioned case entered on November 3, 2022 in High Point Superior Court and the sentence of the Court entered that same day of active imprisonment of 276 months and a maximum of 392 months.

Since the SBM order was not included in the written notice of appeal, Defendant’s failure to comply with N.C. R. App. P. 3 is a jurisdictional defect “that prevents this Court ‘from acting in any manner other than to dismiss the appeal.’ ” *State v. Springle*, 244 N.C. App. 760, 763, 781 S.E.2d 518, 520-21 (2016) (citation omitted).

This Court, however, is permitted to grant a PWC as an alternative, extraordinary basis for parties to obtain appellate jurisdiction. Rule 21(a)(1) provides, “[t]he writ of certiorari may be issued in appropriate circumstances by either appellate court to permit review of the judgment and orders of trial tribunals when the right to prosecute an appeal has been lost by failure to take timely action.” N.C. R. App. P. 21(a)(1). As Defendant’s appeal of his criminal judgment was timely

and the imposition of SBM was heard in conjunction with Defendant's sentencing, in our discretion, we grant Defendant's PWC and address the merits of Defendant's appeal.

### **B. Satellite-Based Monitoring Order**

Defendant argues: (1) the Static-99R form erroneously reflected his age at release and the error resulted in an inflated score on the form; (2) the inflated score prejudiced Defendant because the error resulted in him being placed in the "above-average risk" category instead of the "average risk" category; and (3) the trial court's additional findings were insufficient to support the determination that Defendant requires the highest possible level of supervision and monitoring. We disagree.

The court "shall determine whether, based on the Department's risk assessment, the offender requires the highest possible level of supervision and monitoring." N.C. Gen. Stat. § 14-208.40A(e). "The 'highest level of supervision and monitoring' simply refers to SBM." *State v. Kilby*, 198 N.C. App. 363, 366-67 n.2, 679 S.E.2d 430, 432 n.2 (2009). If the assessment does not result in a "high risk" determination, the trial court must make additional findings of fact to justify its conclusion that the defendant requires SBM. *Id.* at 369, 679 S.E.2d at 434.

Here, the Static-99R assessment scored Defendant as a level four, indicating an "above average risk." Defendant argues the Static-99R assessment contained errors and that correcting those errors would result in a score of two, indicating an "average risk." Specifically, Defendant contends, because he could not be released



prior to reaching 40 years of age, he should have been assigned a negative one on that item, rather than a one. Irrespective of this alleged error, the trial court made additional findings of fact to support the need for the highest level of supervision.

Thus, we must determine whether the court made sufficient additional findings based on competent evidence to support the highest level of supervision. *State v. Cheers*, 285 N.C. App. 394, 403, 878 S.E.2d 149, 155 (2022). As this Court previously stated:

On appeal from an order imposing satellite-based monitoring, this Court reviews ‘the trial court’s findings of fact to determine whether they are supported by competent record evidence, and we review the trial court’s conclusions of law for legal accuracy and to ensure that those conclusions reflect a correct application of law to the facts found.’

*State v. Harding*, 258 N.C. App. 306, 321, 813 S.E.2d 254, 265 (2018) (citation omitted). The trial court’s order is reviewed “to ensure that the determination that defendant requires the highest possible level of supervision and monitoring reflect[s] a correct application of law to the facts found.” *Kilby*, 198 N.C. App. at 367, 679 S.E.2d at 432 (citations and internal quotations omitted).

In the present case, the trial court marked the checkbox for “[b]ased on the risk assessment . . . and the additional findings on the attached [AOC-CR-618]” on the order for SBM. The AOC-CR-618 form, under additional findings, stated “[i]n addition to the results of the Static 99 Coding form, the court finds that the defendant had a prior conviction of a similar nature. Court further finds that 404(b) evidence

shows a common plan or scheme to commit similar offenses.” Defendant argues that even if the form is adjusted to “average risk” rather than “above average risk,” the additional findings are still insufficient to support the trial court’s determination.

Defendant references *State v. Cheers* for the proposition that the trial court needed to reach more additional findings, citing the seven additional findings the court in *Cheers* made about the risks posed by the defendant. *Cheers*, 285 N.C. App. at 403-04, 878 S.E.2d at 155. However, a specific threshold number of additional findings is not required; rather, all that is required is that the trial court make sufficient additional findings and those findings be supported by the evidence presented.

The first finding of “the defendant had a prior conviction of a similar nature” is supported by evidence of Defendant’s prior conviction of soliciting statutory rape of a female greater than four but fewer than six years younger than him in 2016. The second finding is supported by the 404(b) evidence presented by the State, which was offered for the purpose of showing a common plan or scheme. The “common scheme” was demonstrated by Defendant’s use of various social media platforms to meet minors, his continued communication with these minors through electronic means, arranging a meet-up, and taking them to his apartment then raping them. The Defendant’s use of electronic means and his targeted, specific demographic, young girls ranging from ages thirteen to fifteen, is indicative of a scheme that poses a substantially high risk.

Defendant's prior conviction for an offense of a similar nature and his scheme to use social media as a means to meet, communicate, and facilitate meetings with minors, supports the trial court's conclusion that Defendant requires the highest level of supervision and monitoring. Thus, the trial court relied on *more* than the Static-99R form, whether it contained an erroneous calculation or not. Even if, as Defendant argues, the North Carolina Department of Adult Correction miscalculated Defendant's Static-99R assessment, a reclassification from "above average risk" to "average risk" has no impact. The additional findings regarding Defendant's 2016 conviction and the State's 404(b) evidence were based on competent evidence sufficient to support the highest level of supervision. *See State v. Jones*, 234 N.C. App. 239, 243, 758 S.E.2d 444, 448 (2014) ("A trial court may order a defendant receive the highest level of supervision and monitoring if it makes additional findings regarding the need for the highest level of supervision and where there is competent record evidence to support those additional findings.") (citation and internal quotation marks omitted). Therefore, even assuming *arguendo* that the trial court miscalculated the results of the Static-99R assessment, Defendant has failed to prove that such error impacted the SBM order.

### III. Conclusion

For the foregoing reasons, we conclude the trial court did not err by ordering SBM for a period of 10 years as it made sufficient additional findings that were supported by competent evidence. Thus, we affirm the trial court's SBM order.

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AFFIRMED.

Judges ZACHARY and THOMPSON concur.

Report per Rule 30(e).