Satellite-Based Monitoring Update

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It's been a while since I wrote anything about satellite-based monitoring (SBM) of sex offenders. A recent case from the court of appeals provides a nice opportunity for an update.

The case, *State v. Sprouse*, dealt with (among other issues) the heavily-litigated question of what constitutes an "aggravated offense" for purposes of the SBM law. The defendant was convicted of multiple counts of (1) statutory rape of a person who is 13, 14, or 15 years old by a defendant who is at least six years older than the defendant; (2) statutory sexual offense of a person who is 13, 14, or 15 years old by a defendant who is at least six years older than the defendant; (3) taking indecent liberties with a child; and (4) sexual activity by a substitute parent. The trial court found that all of the convictions were for aggravated offenses, and thus required enrollment in SBM for life.

Under G.S. 14-208.6(1a), an aggravated offense is a one that includes:

(1) A sexual act involving vaginal, anal, or oral penetration

(2) (a) With a victim of any age through the use of force or the threat of serious violence, or

(b) With a victim who is less than 12 years old.

North Carolina's appellate courts have repeatedly held that when making a determination as to whether an offense is aggravated, the court can consider only the elements of the conviction offense. It may not look at the factual scenario giving rise to the conviction. State v. Davison, 201 N.C. App. 354 (2009). With that rule in mind, the defendant in *Sprouse* argued that none of his convictions were aggravated offenses.

The court of appeals agreed as to three of the four crimes for which the defendant was convicted. Indecent liberties can never be an aggravated offense because its elements can be satisfied by acts that do not involve penetration, force, or a defendant under age 12. *See id.* at 363. Sexual activity by a substitute parent and statutory sexual offense are likewise excluded because they do not necessarily require penetration (because some qualifying "sexual acts," such as cunnilingus and analingus, can be committed without penetration). *See also* State v. Mann, __ N.C. App. __, 715 S.E.2d 213 (2011) (holding sexual offense by a substitute parent is not an aggravated offense); State v. Treadway, __ N.C. App. __, 702 S.E.2d 335 (2010) (reaching the same conclusion for first-degree statutory sexual offense).

For the rape, however, the appellate court disagreed with the defendant. Rape necessarily involves penetration, and thus satisfies the first prong of the aggravated offense definition. Rape of a 13-, 14-, or 15-year-old obviously does not satisfy the victim-age pathway of the second prong ("a victim who is less than 12," set out as (2)(b) above), so the court was left to determine whether the act necessarily involves the use of force or the threat of serious violence. For that analysis the court looked to its recent decision in *State v. Clark*, __ N.C. App. __, 714 S.E.2d 754 (2011), discussed here, in which it concluded that statutory rape of a child under 13 under G.S. 14-27.2(a)(1) is an aggravated offense. In *Clark* the court had reasoned that any rape of a child under 13 necessarily involves the threat of serious violence, because a child of that age is "inherently incapable of consenting to sexual intercourse." The *Sprouse* court saw "no meaningful distinction" between a victim under 13 and a victim who is 13, 14, or 15—the child is still incapable

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of consent, and thus the crime necessarily involves violence. The court therefore affirmed the trial court's determination that rape under G.S. 14-27.7A is an aggravated offense.

Writing about an SBM case also gives me a chance to post the most recent version my sex offender registration and monitoring information sheet. (I've previously referred to it as a flow chart, but it doesn't really flow in the traditional sense.) In addition to incorporating *Sprouse* and several other recent cases, the latest version makes some pretty extensive organizational changes. Everything to do with the threshold question of what constitutes a reportable offense is on the front page; everything to do with SBM is on the back. I even increased the font size slightly. The chart is available here.

Before you go laminating it, though, note that State v. Brown, __ N.C. App. __, 710 S.E.2d 265 (2011), is pending before the supreme court. In *Brown*, statutory rape of a victim under 13 under G.S. 14-27.2(a)(1) was held to be an aggravated offense under the same rationale set out in *Clark*. The supreme court has agreed to review the propriety of that determination in *Brown*, s*ee* __ N.C. __, 717 S.E.2d 371 (2011) (allowing review on issues in addition to those presented as the basis for the dissenting opinion in the court of appeals), so that will be a case to watch.

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