NO. COA01-896

NORTH CAROLINA COURT OF APPEALS

Filed: 18 June 2002

STATE OF NORTH CAROLINA

v. Pitt County
No. 00 CRS 53354

TERRENCE DWAYNE WOODEN

Appeal by defendant from judgment entered 31 January 2001 by Judge Quentin T. Sumner in Pitt County Superior Court. Heard in the Court of Appeals 24 April 2002.

Attorney General Roy Cooper, by Assistant Attorney General David G. Heeter, for the State.

Angela H. Brown for defendant-appellant.

WALKER, Judge.

In February of 2000, Lisa Overcash was a student at East Carolina University and resided in Clement Hall with her roommate, Sandy Hall. On the night of 10 February 2000, Ms. Overcash went out with friends and became intoxicated after drinking a six pack of beer in less than two hours. Although she was able to walk, she was staggering. Upon returning to the dorm, Ms. Overcash saw Ms. Hall's boyfriend, Josh Eason, and invited him up to the room to talk, although Ms. Hall was away from the dorm for the weekend.

Ms. Overcash went to the bathroom, changed into her pajamas, and went to sleep in her bed. Rachael Ratzlaff, who lived on the

hall, and Mr. Eason were in the room listening to music, using the computer, and talking. Defendant, who was not a student but was visiting on the hall, came into the room, sat down on Ms. Overcash's bed, and began talking with Mr. Eason and Ms. Ratzlaff.

Ms. Ratzlaff finally left the room and Mr. Eason went to sleep on Ms. Hall's bed. After a few minutes, he got up and turned on the light to get a drink from the refrigerator. Mr. Eason testified that with the light on, he looked over at Ms. Overcash's bed and saw that defendant had his hand on her. When he asked defendant what he was doing, "[h]e said like nothing." Mr. Eason did not think it seemed right because "[t]hey didn't know each other very well to begin with. And she was asleep so I don't see why contact was made.... I got up to see for myself and noticed that both of their pants were about down to mid thigh." Mr. Eason further testified:

> I told him that he was wrong. He needed to get out and leave. And he was like still saying he won't [sic] doing anything. And then he tried to tell me that she wanted him but was too embarrassed to say anything. I kept telling him to get out. And he told me I could stay and watch it happen if I wanted do [sic]. I -- that got me ticked off.... It was rude. He knew what he was doing. I knew what he was doing. She was asleep. It was real obvious. ... With both their pants down, her asleep, that's the only conclusion I could come to since he wouldn't get up and saying he wasn't doing nothing [sic] and looked real paranoid.

Mr. Eason went down the hall to Ms. Ratzlaff's room, told her to go to Ms. Overcash's room and to call the police. He then went to get a friend who lived on the hall to help him get defendant to leave.

Ms. Ratzlaff went to Ms. Overcash's room and "saw [defendant] on his knees with his pants down and her underwear and pants down." She testified that Ms. Overcash was "[o]n the bed sound asleep." Ms. Ratzlaff started yelling at defendant to put his clothes on and get out of the room. She further testified that defendant "knew she was [a]sleep and it was messed up." Defendant pulled up his pants and ran out of the room while Ms. Ratzlaff called the police.

Elisha Edwards also resided on the hall. She was awakened around 3:30 a.m. on 11 February 2000 by Ms. Ratzlaff yelling and screaming in Ms. Overcash's room. Ms. Edwards went to Ms. Overcash's room and saw that Ms. Overcash was asleep on her bed "wearing a shirt and pajama bottoms and pajama bottoms were pulled down to her knees along with the underwear were pulled down." She testified that, as she was entering the room, she saw defendant in the hallway and Ms. Ratzlaff was yelling at him. Ms. Edwards covered Ms. Overcash by pulling up her pants. Her attempts to awaken Ms. Overcash were unsuccessful and Ms. Overcash did not awaken until the paramedics were taking her to the hospital.

Ms. Overcash testified that she did not remember anything about the night from the time that she fell asleep until she awoke in the hospital emergency room. She further testified that, although she knew defendant prior to 10 February 2000, she had never had any romantic physical contact with him. She did not give him permission to sit on her bed, to touch her, or to pull down her pants. She testified that she did not want to have sex with him.

On 27 March 2000, after reading defendant his *Miranda* rights and having him sign a waiver of rights form, Sergeant Michael Jordan, an investigator with the East Carolina University Police Department, interviewed defendant regarding the events of the early morning hours of 11 February 2000. Sergeant Jordan testified that when he questioned defendant, "[h]e became very upset. He cried. ... Well, he told me he was unable to describe the scene of events that happened that night or that morning. He did make the comment if no one came into the room I probably would have raped her because of the drug."

Defendant testified that, on the evening of 10 February 2000, he was "[h]anging out with friends, drinkinging [sic] beer, hanging out." He further testified that he took an ecstasy pill that night. Around 2:00 a.m., defendant went to Clement Hall and met a female friend who let him into the building. He went to another friend's room which was on the same hall as Ms. Overcash's room. He testified that he had met Ms. Overcash through mutual friends on the hall and had previously socialized with her at the dorm and at Mr. Eason's house.

Later, he left the room he was in to go see Ms. Edwards. When she told him she was sleeping, he went next door to Ms. Overcash's room. Mr. Eason let defendant into the room. Defendant sat on the bed where Ms. Overcash was lying and talked with Mr. Eason and Ms. Ratzlaff. After Ms. Ratzlaff left and Mr. Eason was lying on Ms. Hall's bed, defendant started tapping on Ms. Overcash's leg and testified that he thought she was waking up. He started massaging

her legs and "[s]he made a pull up against me" in response to his actions. He continued to massage her legs. He testified, "I felt response was good towards what she gave me. So I got down to the point you know I unbuckled my pants.... I just I kept on caressing her leg hoping -- seeing, you know, would she respond even more towards the response that I got from her the first time."

Defendant testified that Mr. Eason got up from the other bed, turned on the light and asked him what he was doing. Mr. Eason looked angry and left the room. Defendant testified, "I didn't leave the room. Because you know to me myself I know I felt like I wasn't doing -- really doing anything wrong. You know I was responding to a response." He admitted that Ms. Overcash had not said anything to him the entire time he was on her bed.

During the day of 11 February 2000, defendant called Ms. Edwards and "told her to tell Lisa and Josh I was sorry for my actions. I told her to tell Lisa that I didn't mean to try to take advantage of her because I wasn't. I told her that I had taken a drug that night. A new drug." He made the call because he wanted to let Ms. Overcash know that "[he] was sorry for [his] actions." He stated that he had never done anything "like that" before.

In rebuttal, the State called Amanda Cauffenberry. She testified that, in January of 2000, she attended a rave with defendant where she became impaired through the use of drugs and painkillers and defendant also became impaired. She testified that, after the party, she and the defendant returned to her room in Clement Hall and defendant was lying on her bed with her. She

took a sleeping pill and wanted to go to sleep. "[Defendant] started messing with me and I told him to stop.... Kissing on me and messing with my belt buckle, stuff like that." Ms. Cauffenberry further testified that, a few days later, defendant called her and "asked me if I felt weird about what happened the other night. And I told him I didn't know what he was talking about.... He said well I think we slept together." She had never given defendant consent to try anything or do anything with her that night in her bed.

Defendant was convicted of attempted second degree rape of Ms. Overcash. On appeal, defendant first contends that the trial court erred in refusing to admit statements defendant made to Ms. Ratzlaff as he was leaving the dorm room in the early hours of 11 February 2000. Defendant attempted to get Ms. Ratzlaff to testify to his statement that he thought Ms. Overcash was trying to "make out" with him. The trial court did not allow it to be admitted.

However, defendant testified that Ms. Overcash "made a pull up against me" and that he was "responding to a response." He further testified, "I felt response was good towards what she gave me." Mr. Eason testified that defendant stated that Ms. Overcash wanted him. This supports defendant's theory that he thought Ms. Overcash was trying to "make out" with him. Thus, the statement was merely self-serving but assuming defendant's prior statement was improperly excluded from evidence, we find that any such error was harmless.

Defendant next contends the trial court erred in denying his motion to dismiss for insufficient evidence. A motion to dismiss should only be granted where the State fails to present substantial evidence of each element of the crime charged. *State v. McDowell*, 329 N.C. 363, 389, 407 S.E.2d 200, 214 (1991). "Substantial evidence is evidence from which any rational trier of fact could find the fact to be proved beyond a reasonable doubt." *State v. Sumpter*, 318 N.C. 102, 108, 347 S.E.2d 396, 399 (1986).

To prove attempted second degree rape, the State must show (1) defendant had specific intent, (2) to engage in vaginal intercourse with Ms. Overcash, (3) who was physically helpless, (4) that defendant knew or should have reasonable known that Ms. Overcash was physically helpless, and (5) that "defendant committed an act that goes beyond mere preparation, but falls short of the actual commission of the rape." *State v. Shultz*, 88 N.C. App. 197, 200, 362 S.E.2d 853, 855 (1987), *aff'd*, 322 N.C. 467, 368 S.E.2d 386 (1988); N.C. Gen. Stat. § 14-27.3 (2001). Defendant admitted his intent to have consensual sexual intercourse with Ms. Overcash. However, he contends there was insufficient evidence to show an act on his part which went beyond mere preparation or that he knew Ms. Overcash was physically helpless.

The State's evidence tended to show that defendant was lying on the bed with Ms. Overcash who was asleep and that he had his hands on her. Mr. Eason testified that he observed defendant and Ms. Overcash with "both of their pants down to mid thigh." He further testified that defendant asked him if he wanted to stay and

watch. Ms. Ratzlaff testified that she saw defendant "on his knees with his pants down and [Ms. Overcash's] underwear and pants down." Ms. Edwards testified that when she came into the room, she saw that Ms. Overcash's pants and underwear had been pulled down. Sergeant Johnson testified that defendant "made the comment if no one came into the room I probably would have raped her because of the drug." We find this evidence of defendant's actions and statements to be sufficient to show that he performed an act which was more than mere preparation but fell short of the actual commission of the rape.

The State's evidence further tended to show that Ms. Overcash was "passed out" on her bed throughout the evening until she was awakened by the paramedics on the way to the emergency room. Mr. Eason, who had not gone out with Ms. Overcash that night, testified "[defendant] knew what he was doing. I knew what he was doing. She was asleep. It was real obvious." Ms. Ratzlaff testified that defendant "knew she was [a]sleep." Ms. Edwards testified that, when she went into the room as defendant was leaving, she repeatedly attempted to wake Ms. Overcash but could not get her to awaken.

N.C. Gen. Stat. § 14-27.3 states that, to be guilty of second degree rape, the State must prove defendant "knows or should reasonably know the other person is mentally defective, mentally incapacitated, or physically helpless." "'Physically helpless' means (i) a victim who is unconscious; or (ii) a victim who is physically unable to resist an act of vaginal intercourse or a

sexual act or communicate unwillingness to submit to an act of vaginal intercourse or a sexual act." N.C. Gen. Stat. § 14-27.1(3). Thus, we find the State presented sufficient evidence to show that defendant knew or should have known that defendant was physically helpless. Therefore, the trial court did not err in denying defendant's motion to dismiss the charge of attempted second degree rape.

Defendant finally contends the trial court erred in admitting evidence of a prior incident involving defendant and a different female student. Rule 404(b) of the North Carolina Rules of Evidence states:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake, entrapment or accident....

N.C. Gen. Stat. § 8C-1, Rule 404(b). Our State is "markedly liberal" in the admission of evidence of prior sexual offenses under Rule 404(b). *State v. White*, 331 N.C. 604, 612, 419 S.E.2d 557, 561 (1992)(*quoting State v. Coffey*, 326 N.C. 268, 279, 389 S.E.2d 48, 54 (1990)). To be admissible, the prior incident must be sufficiently similar and "not too remote in time" to the present acts. *State v. Sneeden*, 108 N.C. App. 506, 509, 424 S.E.2d 449, 451 (1993), *aff'd*, 336 N.C. 482, 444 S.E.2d 218 (1994).

Here, in response to testimony by defendant that he had never done anything similar, the State presented the testimony of Ms. Cauffenberry. One month prior to the incident leading to the

present charges, Ms. Cauffenberry and defendant were together in the exact same dorm building as in the present incident. The two were lying on Ms. Cauffenberry's bed. Ms. Cauffenberry fell asleep due to sleeping pills, drugs, and painkillers that she took that night. Defendant had also taken drugs. Ms. Cauffenberry testified that, while lying on the bed, defendant "started messing with me" and "messing with my belt buckle." She further testified that defendant called her a few days later to talk about that night. He asked if she "felt weird" about what happened and he said they had slept together.

Similarly, here, Ms. Overcash, who was asleep after taking impairing substances, and defendant were lying on her bed in the dorm room. Defendant had also consumed alcohol and drugs that night. Defendant started playing with her legs and massaging them. Defendant pulled down his pants and underwear and those of Ms. Overcash. Later, defendant called about the incident because, as he stated, "I was not trying to take advantage of her. And I wanted to let her know that I was sorry for my actions." The trial court was justified in determining there were sufficient similarities between the events with Ms. Cauffenberry and the present case in overruling defendant's objection to the evidence. Thus, the testimony of Ms. Cauffenberry is sufficiently similar and not too remote in time to be admissible under Rule 404(b).

Further, the trial court gave the following limiting instruction in connection with Ms. Cauffenberry's testimony:

> This evidence is being received solely for showing there existed in the mind of this

> defendant a plan, scheme, system or design involving the crime involved in this case. If you believe this evidence you may consider it but only for the limited purpose of which it's being received.

The jury is presumed to follow the instructions of the trial court. *State v. Daniels*, 337 N.C. 243, 275, 446 S.E.2d 298, 318 (1994), *cert. denied*, 513 U.S. 1135, 130 L. Ed. 2d 895 (1995). Thus, we find the trial court did not err in admitting the testimony of Ms. Cauffenberry regarding the prior conduct of defendant.

In conclusion, we find there was no prejudicial error in the trial nor in the conviction of defendant for attempted second degree rape.

No error.

Judges McGEE and CAMPBELL concur.

Report per Rule 30(e).