NO. COA11-389
NORTH CAROLINA COURT OF APPEALS

Filed: 18 October 2011

STATE OF NORTH CAROLINA

v. Guilford County
No. 09 CRS 81094

JOSE RODRIGO REYES

Appeal by defendant from judgment entered 29 September 2010 by Judge Catherine C. Eagles in Guilford County Superior Court. Heard in the Court of Appeals 19 September 2011.

Attorney General Roy Cooper, by Assistant Attorney General Elizabeth J. Weese, for the State.

Ryan McKaig, for defendant-appellant.

THIGPEN, Judge.

Defendant appeals from judgment entered after a jury found him guilty of second degree rape. Defendant's sole argument on appeal is the trial court erred in denying his request for an instruction on the lesser included offense of attempted rape. We find no error at trial.

The State's evidence tended to show that the victim rented a bedroom in her mobile home to the defendant in November 2008.

In April 2009, defendant started to go out drinking on the weekends. On 30 May 2009, between 12:30 a.m. and 1:00 a.m. defendant returned to the mobile home. The victim assumed defendant had been out drinking, and went to her bedroom to avoid defendant. A few minutes later, defendant entered the victim's bedroom. Defendant turned the victim on her back, got on top of her, and proceeded to have sexual intercourse with her. At some point, the victim was able to escape from her bedroom and called the police. When police arrived, they found defendant lying at the foot of the victim's bed, completely naked and snoring. It took the officers a long time to wake defendant up. When asked by an officer whether he had sex with the victim, defendant responded, "I don't remember."

On appeal, defendant argues the trial court erred in denying his request for an instruction on the lesser included offense of attempted rape. During the charge conference, the following exchange occurred:

> THE COURT: . . . I would propose to submit: We, the jury, unanimously find the defendant Jose Reyes guilty of second degree rape, or not guilty.
>
> [STATE]: I believe that's appropriate, Your Honor.
>
> [DEFENSE]: I would ask for a lesser included offense of assault with intent to

> commit rape, Your Honor.
>
> THE COURT: I'm not -- you mean attempted rape? What do you mean assault --
>
> [DEFENSE]: Attempted -- I know assault on a female, the case law would not permit that, but - -
>
> THE COURT: What would be the evidence that would support that? She testified to penetration. There's no evidence that she wasn't penetrated. It appears like it either happened or it didn't, is the evidence.
>
> I'm asking. If there's something there, I'd like to know. I certainly don't want to do it wrong.
>
> [DEFENSE]: Your Honor has heard all the evidence, and it may be best just to -- to be a guilty or not guilty charge for the jury. I don't -- he's testified he doesn't remember anything that happened until the policemen woke him up.
>
> THE COURT: All right. Well just submit second degree then. . . .

We first note defendant did not specifically request the judge to instruct the jury on the lesser included offense of attempted rape. Furthermore, at no time did defendant object to the trial court's jury instructions.

> A party may not make any portion of the jury charge or omission therefrom the basis of an issue presented on appeal unless the party objects thereto before the jury retires to consider its verdict, . . .; provided that opportunity was given to the party to make

> the objection out of the hearing of the jury, and, on request of any party, out of the presence of the jury.

N.C.R. App. P. 10(a)(2) (2009). "As defendant failed to preserve this issue by objecting during trial, we will review the record to determine if the instruction constituted plain error." *State v. Hardy*, 353 N.C. 122, 131, 540 S.E.2d 334, 342 (2000), *cert. denied*, 534 U.S. 840, 151 L. Ed. 2d 56 (2001). "Under a plain error analysis, defendant is entitled to a new trial only if the error was so fundamental that, absent the error, the jury probably would have reached a different result." *Id.*

A defendant is guilty of second degree rape if he engages in vaginal intercourse with another by force and against the will of the other person. N.C. Gen. Stat. § 14-27.3(a)(1) (2009). "In a prosecution for rape, evidence of the slightest penetration of the female sex organ by the male sex organ is sufficient for vaginal intercourse and the emission of semen need not be shown to prove the offense." *State v. Brown*, 312 N.C. 237, 244-45, 321 S.E.2d 856, 861 (1984). Defendant contends the trial court should have instructed the jury on the lesser included offense of attempted rape because the evidence as to penetration was conflicting. Instruction on the lesser

included offense is "warranted only when there is some doubt or conflict concerning the crucial element of penetration." *State v. Wright*, 304 N.C. 349, 353, 283 N.C. 502, 505 (1981).

In this case, the victim testified, without equivocation, that defendant's penis entered her vagina, but defendant did not ejaculate. The nurse practitioner who examined the victim testified that the victim had a tear along her vaginal opening. The tear was reddened and tender, indicating a recent tear. Moreover, in her reports to the police and the nurse practitioner, the victim described being penetrated by the defendant and that he did not ejaculate. Defendant denied having any sexual contact with the victim although he testified he did not remember what happened prior to being awakened by police. We find there was no conflicting evidence concerning the element of penetration. The trial court did not err in failing to instruct the jury on the lesser included offense of attempted rape.

NO ERROR.

Chief Judge MARTIN and Judge HUNTER, JR. concur.

Report per Rule 30(e).