IN THE SUPREME COURT OF THE STATE OF DELAWARE

MARKIEVIS JOHNSON,	§	
	§	No. 576, 2006
Defendant Below,	§	
Appellant,	§	Court Below: Superior Court of
	§	the State of Delaware in and for
v.	§	New Castle County
	§	
STATE OF DELAWARE,	§	Cr. I.D. No. 0509025689
	§	
Plaintiff Below,	§	
Appellee.	§	

Submitted: March 11, 2007
Decided: April 25, 2007

Before **STEELE,** Chief Justice, **HOLLAND** and **JACOBS**, Justices.

O R D E R

This 25th day of April 2007, upon consideration of the briefs of the parties and the record in this case, it appears to the Court that:

1. Markievis Johnson ("Johnson"), defendant-below appellant, appeals from a final judgment of conviction, entered in the Superior Court, of rape in the second degree. Johnson contends the trial judge erred by: (a) denying Johnson's request for jury instructions on the lesser included offense of rape fourth degree, and (b) failing to issue, *sua sponte*, an instruction on the lesser included offense of unlawful sexual contact second degree. We find no merit in either argument. Accordingly, we affirm.

2. On September 18, 2005, the victim, 15 year-old Jan Fields[1] ("Fields"), decided to run away from the Governor Terry Center. Fields arranged to meet Johnson (who at that time was 25 years old) at a stone wall a short distance from the Terry Center. Johnson was to give Fields a ride to her friend's grandmother's house. After a short walk, Fields and Johnson stopped to talk.

3. According to Fields, Johnson began "feeling on [her]" and pulled her pants down. Although Fields told Johnson to stop, she testified that Johnson continued the assault by holding her down and inserting his penis into her vagina. Fields believed Johnson already had a condom on when he began touching her. Fields further testified that after a short period of time, Johnson removed the condom, threw it on the ground, and pulled up his pants.

4. Thereafter, Johnson left. Fields got herself together and began walking back to the Terry Center. An officer driving by recognized Fields as a reported runaway, stopped, and drove Fields back to the Terry Center. Although Fields was with the officer for approximately 15 minutes, she did not report the sexual assault until one week later. At that time, Fields reported the crime to the staff at the Terry Center. Fields also gave a statement to police, but no medical examinations were conducted because of the one week delay. Police were still able, however, to retrieve a condom near the scene of the crime. DNA samples taken from the

[1] The Court, *sua sponte*, has assigned pseudonyms to protect the victim's identity.

condom matched blood samples taken from both Johnson and Fields.[2] Johnson was later arrested and charged with rape second degree.

5. On the first day of trial, defense counsel asked the court to instruct the jury on the lesser included offenses of rape third degree and rape fourth degree. At no time, however, did counsel request instructions on unlawful sexual contact second degree. The trial court denied the requests to give rape third degree and rape fourth degree instructions.[3] Johnson was subsequently found guilty of the indicted charge of rape second degree, and appeals from that conviction.

6. Johnson claims that he was entitled to have the jury instructed on the lesser offenses of rape fourth degree[4] and unlawful sexual contact second degree.[5] He contends that the evidence presented provided a rational basis for the jury to convict Johnson of either rape fourth degree or unlawful sexual contact second

[2] Rebecca Wallman, the State's forensic expert, testified that no semen was present in the condom and she could not tell where on the body the DNA came from. Further, there was no way for her to determine whether Johnson and Fields had sexual intercourse.

[3] The trial court denied Johnson's request for the instruction on rape third degree because the statute expressly states that it is inapplicable if the defendant is subject to prosecution under "§ 772 [rape second degree] . . . of this title." See 11 *Del. C.* § 771. Johnson does not appeal from the denial of that request.

[4] "A person is guilty of rape in the fourth degree when the person intentionally engages in sexual intercourse with another person, and the victim has not yet reached his or her sixteenth birthday." 11 *Del. C.* § 770(a)(1).

[5] "A person is guilty of unlawful sexual contact in the second degree when the person intentionally has sexual contact with another person who is less than 16 years of age. . . ." 11 *Del. C.* § 768. Sexual contact is defined as "[a]ny intentional touching by the defendant of the . . . genitalia of another person; [or any] intentional touching of another with the defendant's genitalia . . . which touching, under the circumstances as viewed by a reasonable person, is intended to be sexual in nature." 11 *Del. C.* § 761(f).

degree and acquit him of the indicted charge of rape second degree.[6] To support his claims, Johnson points to the following: (a) the absence of semen on the condom; (b) the inability of the forensic expert to conclude whether sexual intercourse occurred; (c) the inability of the expert to conclude what level of contact would have left behind the DNA evidence; (d) the fact that no physical examinations were conducted on Fields; (e) Fields' testimony regarding the brief nature of her contact with Johnson, and (f) the fact that Johnson never admitted to sexual intercourse with Fields.

7. This Court reviews the trial court's denial of a requested jury instruction *de novo*.[7] Johnson argues that the evidence presented at trial could have supported a conviction of rape fourth degree. The argument lacks merit. As this Court said in *Brown v. State*:[8]

> [T]he court is not obligated to charge the jury with respect to an included offense unless there is a rational basis in the evidence for a verdict acquitting the defendant of the offense charged and convicting him of the included offense. A lesser-offense charge is not proper where, on the evidence presented, the factual issues to be resolved by the jury are the same as to both lesser and greater offenses.

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[6] Under 11 *Del. C.* § 772(a)(1) "[a] person is guilty of rape in the second degree when the person . . . [i]ntentionally engages in sexual intercourse with another person, and the intercourse occurs without the victim's consent."

[7] *Henry v. State*, 805 A.2d 860, 863 (Del. 2002).

[8] 1986 WL 16976 at *1 (Del. June 16, 1986) *citing Sansone v. United States*, 380 U.S. 343 (1965) and *Berra v. United States*, 351 U.S. 131 (1956).

8. Stated differently, where, as here, the lesser offense is "completely encompassed by the greater," the defendant is not entitled to a lesser included offense instruction.[9] In the unique circumstances of this case, the elements necessary to sustain a conviction on rape second degree are identical to those required to convict of rape fourth degree. Here, both rape second degree and rape fourth degree require (i) the intentional act (ii) of sexual intercourse with (iii) a victim under the age of 16.[10]

9. The State presented evidence from which a jury could rationally conclude that Johnson intentionally had sexual intercourse with Fields, and that because of Johnson's and Fields' respective ages, the intercourse was non-consensual. Because the facts necessary to establish second degree rape and fourth degree rape are identical, fourth degree rape was not a lesser included offense to second degree rape. Thus, Johnson was not entitled to an instruction on fourth degree rape.

10. "Where a defendant fails to request a lesser included offense jury instruction at trial, we 'review that claim for plain error, which requires a showing

[9] *Sansone*, 380 U.S. 350.

[10] The difference between the two statutes is that the rape second uses the phrase "without the victim's consent." Under Delaware law, a child under the age of sixteen is deemed "unable to consent to a sexual act with a person more than 4 years older than said child." *See* 11 *Del. C.* § 761(j). The rape fourth degree statute does not use the term consent, but within its text expressly prohibits sex with a child under sixteen. *See* 11 *Del. C.* § 770(a)(1).

that the failure to grant that instruction would have affected the outcome of his trial.'"[11] Johnson argues that the evidentiary record provided a rational basis for the jury to conclude that he was guilty of unlawful sexual contact rather than rape. A defendant is generally entitled to an instruction on lesser included offenses, but only where there is evidence of record to support it.[12] That requirement is usually "satisfied by the presentation of some conflicting testimony on an element distinguishing the lesser offense from the greater offense."[13] Thus, to prevail on his claim of error, Johnson must be able to point to some evidence that his actions constituted unlawful sexual contact, but not rape.[14] Here, however, Johnson does not cite any conflicting evidence of record regarding that distinguishing element.[15] Rather, his "evidence" is merely the lack of physical evidence of rape. A claim of insufficient evidence, without more, does not entitle a defendant to an instruction

[11] *Perkins v. State*, 2007 WL 573637, at *5 (Del. Feb. 26, 2007) (quoting *Keyser v. State*, 893 A.2d 956, 960 (Del. 2006)).

[12] *Perkins*, 2007 WL 573637, at *6. See also 11 *Del. C.* § 206(c) which provides, "The court is not obligated to charge the jury with respect to an included offense unless there is a rational basis in the evidence for a verdict acquitting the defendant of the offense charged and convicting the defendant of the included offense."

[13] *Henry v. State*, 805 A.2d 860, 865 (Del. 2002).

[14] *See Keyser v. State*, 893 A.2d 961.

[15] Johnson did not testify at trial, and the record does not reflect that Johnson presented any evidence to contradict Fields' testimony that he did rape her.

on a lesser included offense under plain error review. Accordingly, Johnson's argument fails.

11. Johnson's argument also lacks merit because he has not demonstrated that his failure to request a lesser included instruction was not a tactical decision by his attorney. "Plain error assumes oversight, not a tactical decision by defense counsel."[16] Johnson's argument overlooks the fact that Delaware is a "party autonomy" jurisdiction. As we explained in *State v. Cox*:[17]

> [T]he trial judge should withhold charging on lesser included offense unless one of the parties requests it, since that charge is not inevitably required in our trials, but is an issue best resolved, in our adversary system, by permitting counsel to decide on tactics. If counsel asks for a lesser-included offense instruction, it should be freely given. If it is not requested by counsel, it is properly omitted by the trial judge[.][18]

We "adhere to our holding that in Delaware, the burden of requesting lesser-included offense instructions is properly placed upon trial counsel, 'for it is they who determine trial tactics and presumably act in accordance with a formulated strategy.'"[19] Because Johnson did not request the lesser included unlawful sexual

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[16] *Keyser v. State,* 893 A.2d 961.

[17] 851 A.2d 1269, 1273 (Del. 2003).

[18] *Id.* (explaining that Delaware is a "party autonomy" jurisdiction and quoting *Walker v. United States,* 418 F.2d 1116, 1119 (D.C. Cir. 1969)).

[19] *State v. Cox,* 851 A.2d 1269, 1274 (Del. 2003) (quoting *Chao v. State,* 604 A.2d 1351, 1358 (Del. 1992)).

contact instruction at trial, and has made no argument that that failure was not a strategic decision made by his attorney, his argument fails.

NOW, THEREFORE, IT IS ORDERED that the judgment of the Superior Court is **AFFIRMED**.

BY THE COURT:

/s/ Jack B. Jacobs
Justice