NO. COA08-1112

NORTH CAROLINA COURT OF APPEALS

Filed: 7 July 2009

STATE OF NORTH CAROLINA

v. Forsyth County
No. 08 CRS 3580; 05 CRS 37287, 63189-91, 63193, 63304, 63306

GILBERTO CRUZ HERNANDEZ,

Defendant.

Appeal by defendant from judgments entered 5 May 2008 by Judge A. Moses Massey in Forsyth County Superior Court. Heard in the Court of Appeals 11 March 2009.

Attorney General Roy Cooper, by Assistant Attorney General J. Philip Allen, for the State.

Reita P. Pendry for defendant.

ELMORE, Judge.

Gilberto Cruz Hernandez (defendant) was charged with two counts of first degree rape, one count of attempted first degree rape, one count of second degree rape, two counts of first degree sexual offense, one count of second degree sexual offense, three counts of first degree burglary, two counts of robbery with a dangerous weapon, one count of assault with a deadly weapon with intent to kill, and one count of breaking and entering. He was convicted on all counts and ordered to serve almost all of the sentences consecutively, resulting in a minimum total sentence of

1,304 months. Defendant now appeals. We hold that defendant received a trial free from error.

At trial, the State presented evidence tending to show that: (1) on 1 February 2005, Olga Barrientos was preparing dinner when a masked man entered her apartment, held a knife to her throat, and then raped her; (2) on 5 February 2005, Monique Moona, heavily intoxicated, was raped and anally penetrated by an intruder while Moona was asleep; (3) on 17 February 2005, Sinta Jiminez woke up in her apartment to find a masked man with a gun who digitally penetrated her and then forced her to have sex with him; and (4) on 22 February 2005, Minerva Dela Cruz Marin was sleeping when a masked man with a gun came into her bedroom, grabbed her child, and threatened to kill the child unless Marin gave him the PIN for her credit card; the man then lifted up Marin's shirt, touched her breast, and saw surgery staples from a recent hysterectomy; he then hit her on the head with his gun and forced her to perform oral sex on him.

DNA evidence gathered at each of the four scenes was later matched to that of defendant. During the trial, the court received State Bureau of Investigation (SBI) Special Agent Amanda Fox as an expert to testify on DNA analysis. Special Agent Fox testified as to how DNA samples from a crime scene are compared to SBI databases in order to determine the probability that the crime scene samples match those of a particular suspect.

With respect to the incident involving Barrientos, defendant was convicted of first degree rape and breaking and entering. With

respect to the incident involving Moona, defendant was convicted of second degree rape, second degree sexual offense, and first degree burglary. With respect to the incident involving Jiminez, defendant was convicted of first degree rape, first degree sexual offense, first degree burglary, and robbery with a dangerous weapon. With respect to the incident involving Marin, defendant was convicted of assault with a deadly weapon with intent to kill, attempted first degree rape, first degree sexual offense, first degree burglary, and robbery with a dangerous weapon.

ARGUMENTS

I.

Defendant first argues that the trial court erred by permitting Special Agent Fox to testify about the probabilities that defendant was the depositor of DNA evidence, without having first laid the proper foundation and shown that the testimony was within her expertise. We disagree.

Under Rule 702, expert witnesses are allowed to offer opinions regarding, *inter alia*, technical and scientific aspects of an issue. N.C. Gen. Stat. § 8C-1, Rule 702 (2007) ("If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion."). "When making determinations about the admissibility of expert testimony, the trial court is given wide latitude[,] and rulings under Rule 702 will not be reversed on appeal absent an

abuse of discretion." *State v. Anderson*, 175 N.C. App. 444, 448, 624 S.E.2d 393, 397 (2006) (quotations and citations omitted).

At trial, Special Agent Fox testified that the SBI

> collected samples from individuals from the four most common racial groups in North Carolina, which are white, black, Hispanic, and Lumbee Indian. We generated genetic profiles from each of those populations and determined how common or unique specific allele[s] [were] or those number of repeats [that] were in those populations. We were then able to use this database that we created to assign a statistical weight to our evidence to determine how common or unique that profile is. This is not a measure of guilt or innocence. It is a measure of the probability of finding another unrelated individual in the population at random with the same genetic profile.

Special Agent Fox further testified that, by using these genetic profiles, she could determine that the DNA obtained from the four crime scenes was:

> 337 thousand trillion times more likely to be observed if it came from [defendant] than if it came from another unrelated individual in the North Carolina Caucasian population . . . [;] 758 million trillion times more likely to be observed if it came from [defendant] than if it came from another unrelated individual in the North Carolina black population . . . [;] 1.55 million trillion times more likely to be observed if it came from [defendant] than from another unrelated individual in the North Carolina Lumbee Indian population . . . [;] [a]nd 25.1 thousand trillion times more likely to be observed if it came from [defendant] [than] if it came from another unrelated individual in the North Carolina Hispanic population.

Defendant argues that Special Agent Fox was an expert solely on DNA analysis and testing methods and that her expertise did not carry over to the subject of population statistics as they relate

to DNA traits. However, we addressed this precise topic in *State v. Watts*. 172 N.C. App. 58, 616 S.E.2d 290 (2005). In *Watts*, an expert was qualified as a DNA analyst, yet he also testified about population statistics related to the DNA analysis. *Id.* at 62, 616 S.E.2d at 293. On appeal, this Court outlined the three steps of DNA testing as follows:

> First, the "known" and "unknown" samples of DNA molecules are chemically cut into fragments, separated into single strands, and lined up longest to shortest. . . .
>
> [Second, b]ands derived from the known and unknown samples are thereafter compared visually. If the numbers and positions of the bands on the autorad appear consistent with one another . . . , they are then sized by computerized measurement. . . .
>
> Finally, the statistical significance of the "match," that is, the probability of finding identical strands of DNA in someone other than the accused, is determined. This is accomplished by ascertaining the frequency with which a particular pattern of bands will appear within a relevant population, this latter being initially established by the race of the individual involved and by references to the pertinent data base compiled by the testing agency.

Id. at 64, 616 S.E.2d at 295 (citation omitted).

This Court then addressed whether the expert was allowed to testify about population statistics.

> Given that this Court has found that a population-statistical analysis is the third step in DNA analysis, our case law evidences the admissibility of testimony on population statistics by (forensic) DNA analysis experts, and Defendant cites no authority in support of his argument, we uphold the trial court's ruling that [the expert], who was qualified as an expert in DNA analysis, was qualified to

> testify as to the population statistics in this case.

Id. at 65-66, 616 S.E.2d at 296.

As was true in *Watts*, Special Agent Fox's testimony regarding population statistics was the necessary third step that explained the statistical relevance of the DNA testing and analysis that the SBI had done. Allowing her to testify about such population statistics was not error, and defendant's argument fails.

II.

Defendant next argues that the trial court erred by denying defendant's motion to dismiss the charge of attempted first degree rape of Marin because the evidence on that charge was insufficient. We disagree.

"The standard of review on a motion to dismiss for insufficient evidence is whether the State has offered substantial evidence of each required element of the offense charged." *State v. Goblet*, 173 N.C. App. 112, 118, 618 S.E.2d 257, 262 (2005). Evidence is substantial if it is relevant and is sufficient to persuade a rational juror to accept a particular conclusion. *State v. Frogge*, 351 N.C. 576, 586, 528 S.E.2d 893, 899 (2000). In ruling on a motion to dismiss for insufficient evidence, this Court must view the evidence in the light most favorable to the State and every reasonable inference drawn from the evidence must be afforded to the State. *Id.* at 585, 528 S.E.2d at 899.

In order to convict a defendant of attempted rape, the State must prove two elements beyond a reasonable doubt: (1) that the accused had the specific intent to commit rape and (2) that he

committed an overt act for that purpose which goes beyond mere preparation but falls short of the completed offense. *State v. Bell*, 311 N.C. 131, 140, 316 S.E.2d 611, 616 (1984). Defendant makes arguments as to both elements.

As to intent, defendant's argues that, while Marin's attacker forced her to perform oral sex, there is no evidence that he intended to rape her. Defendant maintains that the attacker said nothing about his intentions and did not persist in sexual conduct once the oral sex was over. Defendant also contends that the State's argument that defendant was intending to rape Marin but was dissuaded when he saw her surgery staples is mere speculation.

However, "[e]vidence [that] an attack is sexually motivated will support a reasonable inference of an intent to engage in vaginal intercourse with the victim even though other inferences are also possible." *State v. Dunston*, 90 N.C. App. 622, 625-26, 369 S.E.2d 636, 638 (1988). Given that Marin's attacker touched her breast and forced her to perform oral sex, there is clear evidence that the attack was sexually motivated, thus allowing an inference of an intent to engage in vaginal intercourse. Additionally, the "State need not show that the defendant made an actual physical attempt to have intercourse or that he retained the intent to rape his victim throughout the incident." *Id.* at 625, 369 S.E.2d at 638. Marin testified that her attacker lifted her shirt and touched her breast, and only after that did he force her to perform oral sex. The fact that defendant did not persist in sexual conduct after the oral sex does not preclude an inference

that he had the intent to commit rape before the oral sex but was dissuaded by Marin's surgery staples. Given that the attack was clearly sexually motivated and that defendant forced Marin to perform oral sex only after noticing her surgery staples, it is a reasonable inference that defendant intended to engage in vaginal intercourse with Marin. We find this to be substantial evidence, sufficient to persuade a rational juror, that defendant intended to rape Marin.

As for the overt act required by *Bell*, this Court has repeatedly equated a defendant's touching of the victim's breast to an overt act that went beyond mere preparation but fell short of committing rape, thus allowing the charge of attempted rape to properly reach the jury. *State v. Schultz*, 88 N.C. App. 197, 201, 362 S.E.2d 853, 856 (1987) (defendant grabbed the victim and then put his hand down her shirt and touched her breasts); *State v. Hall*, 85 N.C. App. 447, 453, 355 S.E.2d 250, 254 (1987) (defendant pulled the victim's shirt down and touched her breasts); *State v. Norman*, 14 N.C. App. 394, 397, 188 S.E.2d 667, 669 (1972) (defendant touched the victim's breasts and then choked her into unconsciousness). Applying the clear precedents of this Court, we find that defendant's acts of lifting Marin's shirt and touching her breast were sufficient to qualify as an overt act that went beyond mere preparation but fell short of committing rape.

Therefore, the State provided substantial evidence that defendant both intended to rape Marin and that he committed an overt act that went beyond mere preparation but fell short of rape.

As such, there was no error by the trial court in failing to dismiss this charge, and defendant's argument fails.

III.

Defendant next argues that the trial court erred by allowing the issue of first degree attempted rape of Marin to reach the jury because there was insufficient evidence to support the charge. We disagree.

As discussed *supra* at Section II, the trial court did not err by denying defendant's motion to dismiss the charge of attempted first degree rape of Marin for insufficient evidence, as the State presented substantial evidence on all required elements of that crime. Therefore, the trial court did not err by properly instructing the jury on this same charge. *See Schultz*, 88 N.C. App. at 202, 362 S.E.2d at 856; *Hall*, 85 N.C. App. at 453, 355 S.E.2d at 254; *Norman*, 14 N.C. App. at 398, 188 S.E.2d at 669-70.

IV.

Defendant's fourth argument is that the trial court's instruction to the jury on second degree rape of Moona was defective because the trial court failed to inform the jury that in order to find that Moona was mentally incapacitated, it must find that the incapacitation was the result of an act done upon her. We disagree.

"The choice of instructions given to a jury is a matter within the trial court's discretion and will not be overturned absent a showing of abuse of discretion." *State v. Shepherd*, 156 N.C. App.

603, 607, 577 S.E.2d 341, 344 (2003) (quotations and citation omitted).

North Carolina General Statute section 14-27.3 provides:

> A person is guilty of rape in the second degree if the person engages in vaginal intercourse with another person:
>
> (1) By force and against the will of the other person; or
>
> (2) *Who is mentally disabled, mentally incapacitated, or physically helpless*, and the person performing the act knows or should reasonably know the other person is mentally disabled, mentally incapacitated, or physically helpless.

N.C. Gen. Stat. § 14-27.3 (2007) (emphasis added).

Defendant focuses his argument on the element of the victim's physical helplessness or mental incapacity. If guilt is based upon the victim's mental incapacitation, then the jury must also find beyond a reasonable doubt that the mental incapacity was brought about by "any act committed upon the victim." N.C. Gen. Stat. § 14-27.1(2) (2007). The phrase "act committed upon the victim" is a material element of the crime. *State v. Haddock*, ___ N.C. App. ___, ___, 664 S.E.2d 339, 346-47 (2008). Therefore, if a defendant could be found guilty because the victim met the "mentally incapacitated" prong, then the jury must also find beyond a reasonable doubt that the mental incapacity was not due to the victim's own acts.

Given that Moona's mental incapacity was brought on by voluntary consumption of alcohol, defendant claims that the trial court's jury instruction on second degree rape of Moona allowed the

jury to return a guilty verdict merely by determining that Moona was mentally incapacitated, even though she caused her own mental incapacity. That would stand in direct contrast with *Haddock*'s requirement that the mental incapacity be brought about by the acts of another. *Id.* However, defendant misconstrues the trial court's instruction, which directed that the jury must find beyond a reasonable doubt that the victim was "physically helpless and mentally incapacitated and/or unconscious." The trial court then immediately expounded upon this remark by saying that the jury must find that the victim "was so physically and mentally unable to resist a sexual act, and communicate willingness to submit to a sexual act, as to be physically helpless."

Therefore, in order to find defendant guilty of this charge, the jury must have concluded that Moona was physically and mentally unable to resist a sexual act and unable to communicate unwillingness to submit. As such, the jury could not have found guilt by determining that Moona was physically helpless or mentally incapacitated. Therefore, the jury must have found beyond a reasonable doubt that Moona was physically helpless. In this crucial way, the present case is distinguishable from *Haddock*, where the trial court's instruction allowed the jury to render a guilty verdict merely by finding that the victim was mentally incapacitated, regardless of who caused the incapacity. In the present case, there was only one path to finding guilt according to the trial court's instructions: the jury had to determine that Moona was both physically helpless and mentally incapacitated. If

the victim is physically helpless, then the existence of any additional mental incapacity is not required to find defendant guilty of second degree rape because the elements of the victim's condition under N.C. Gen. Stat. § 14-27.3(2) are disjunctive, meaning that the jury need only find the existence of one of them in order to find defendant guilty of second degree rape. N.C. Gen. Stat. § 14-27.3(2) (2007) (allowing a charge of second degree rape if the victim was "mentally disabled, [or] mentally incapacitated, or physically helpless").

The trial court's addition of a mental helplessness element is not required by N.C. Gen. Stat. § 14-27.3(2) and, as such, was merely surplusage. Given that the jury returned a guilty verdict on this charge, it had to have found that Moona was physically helpless, which is enough to satisfy N.C. Gen. Stat. § 14-27.3(2). Neither the trial court's instructions nor the jury's verdict was ambiguous.

Therefore, the jury found beyond a reasonable doubt that all statutory elements of second degree rape had been met. There is no error, and defendant's argument fails.

V.

Defendant's final argument is that the trial court's jury instruction on second degree sex offense of Moona was defective because the trial court failed to inform the jury that in order to find that Moona was mentally incapacitated, it must find that the incapacitation was the result of an act done upon her.

This is the same argument as Section IV, *supra*, except it concerns second degree sex offense rather than second degree rape. A person is guilty of a sexual offense in the second degree if the person engages in a sexual act with another person:

> (1) By force and against the will of the other person; or
>
> (2) Who is mentally disabled, mentally incapacitated, or physically helpless, and the person performing the act knows or should reasonably know that the other person is mentally disabled, mentally incapacitated, or physically helpless.

N.C. Gen. Stat. § 14-27.5(a) (2007).

The requirements of second degree sex offense that pertain to defendant's argument that the trial court improperly instructed the jury on the victim's physical and mental states are precisely the same requirements that were needed for second degree rape, as discussed *supra* at Section IV. Also, the trial court's instructions on second degree sex offense were identical to the instructions for second degree rape, namely that the jury must find beyond a reasonable doubt that the victim was "physically helpless and mentally incapacitated and/or unconscious." As such, using the same arguments from Section IV, *supra*, defendant's argument that the jury instruction for second degree sexual offense was improper also fails because the trial court did not ambiguously instruct the jury and the jury did not render an ambiguous verdict. The jury did find beyond a reasonable doubt that the victim was physically helpless, thereby satisfying N.C. Gen. Stat. § 14-27.5(a)(2).

Accordingly, we conclude that defendant received a trial free from error.

No error.

Judges BRYANT and STEELMAN concur.

Report per Rule 30(e).