NO. COA10-202

NORTH CAROLINA COURT OF APPEALS

Filed: 7 December 2010

STATE OF NORTH CAROLINA

v. Duplin County
No. 08 CRS 50531

ALEXANDER MCKENZIE NEWKIRK,
Defendant.

Appeal by defendant from judgments entered 3 September 2009 by Judge Russell J. Lanier, Jr., in Duplin County Superior Court. Heard in the Court of Appeals 16 September 2010.

Attorney General Roy Cooper, by Special Deputy Attorney General Kathleen M. Waylett, for the State.

Geoffrey W. Hosford for defendant.

ELMORE, Judge.

Alexander McKenzie Newkirk (defendant) appeals from his convictions for second degree rape and first degree burglary. After careful review, we find no error.

I. Background

In March 2008, Mary Smith[1] and two of her daughters were living in three separate mobile homes on the same property in Duplin County. Ms. Smith, age 67, lived alone in the home she had shared with her husband before his death. Her daughter Alice lived

[1]In order to protect the identity of the victim, we use pseudonyms for her and her family throughout.

in one with her husband and four children. Alice's mobile home was seventy-four feet from her mother's home. From her living room and kitchen window, Alice could see the back door of her mother's home. There were no area lights on the property, and it was very dark at night. Ms. Smith's other daughter, Barbara, lived in a mobile home with her son Chris and her fiance Daniel. Barbara had two other sons, Ernie and Frank.

Defendant knew Ms. Smith, her daughters, and her grandchildren. He had known Alice for approximately eighteen years and had known Ernie and Frank for some time. Defendant had been in Ms. Smith's home while with her grandsons, but had never been in Ms. Smith's bedroom. Ms. Smith had not seen defendant for a couple of months prior to March 2008.

Ms. Smith suffered from deterioration of the spine and had back surgery in 1999. In 2007, she blacked out and fell, and suffered a brain injury that limited her ability to use her hands and her feet. Thereafter, she used a wheelchair and could not walk without holding onto a walker. At the time of the rape, Ms. Smith had not left her mobile home since a doctor's visit in January 2008.

By the nature of her disability, Ms. Smith needed help getting in and out of bed, bathing, dressing, cleaning, and cooking. Each morning, her daughter Barbara would help her out of bed, remove the bed pads she used because of incontinence, give her a bath, dress her, and help her get to her chair. Each night, her daughter Alice would put her to bed. Alice would pull the sheets back, put new incontinence pads on the bed, help her mother get from the living

room to the bedroom, help her onto a stool, and then help her into bed by sliding her back on the bed and lifting her feet onto the bed. Once her mother was in bed, Alice would turn off all of the lights, go out the back door and lock it.

On the night of 3 March 2008, Alice helped her mother to bed between 10:00 to 10:15 p.m. She put new incontinence pads on the bed. She testified at trial that she was sure they were new and clean, because she used new pads that she had just removed from the pack. Alice helped her mother into bed and turned off all of the lights. She went out the back door and locked it. Alice then returned to her own home, put her children to bed, and went to bed herself. Alice woke up at 12:33 a.m. when she heard a knock at her door. She looked at the clock to see what time it was and grabbed her baseball bat, since she was home alone with her children. From her living room window, Alice could see someone in a white hat and black coat walking away from her home and towards her sister's home. It was dark and she could not see who the person was. Alice heard a car start up and leave. The car had been in Barbara's driveway.

Alice then tried to call her sister. When her sister did not answer, Alice called the police. She asked if Barbara's son Frank was still in jail. Frank had been arrested earlier that day for a failure to appear in court. When she was told that he was still in jail, Alice asked the police to send someone, since they had a prowler. Alice was concerned because she was alone and her mother was home alone and could not protect herself. Alice went to change clothes. When she returned she looked out the window and saw that

the back door to her mother's home was open. She looked again and the door was closed. Alice called the police again and was told that officers were on their way.

At trial, Ms. Smith gave the following account of what occurred. Sometime after midnight, Ms. Smith heard the back door to her mobile home slap open. It was a windy night, so she thought it had blown open; since was not able to get up to shut it, she remained in bed. Ms. Smith then looked up and saw someone standing at her bedroom door. She did not recognize him. Ms. Smith asked who was there and a male voice said, "You don't need to know." Then the male intruder went away for a few minutes, and Ms. Smith concluded that the intruder was there to steal something. When he came back, she asked him what he wanted. He said, "Just let me do what I have to do." He pushed the walker out of the way and got on her bed. Ms. Smith thought she was going to die. Ms. Smith described him as large, with a quiet voice, and wearing a white cap. She could not tell his race. He tore off her underwear, took her legs and put them on top of his legs, and put his penis in her vagina. She told him he was hurting her, but otherwise stayed quiet, thinking that she was better off not fighting as she was afraid and she thought no one would hear her. When he was through, he got up and left. She could not tell whether he had ejaculated.

Ms. Smith continued to lay there for a few minutes because she had not heard him go out, and she did not know if he was still in her home. Eventually, she worked herself towards the foot of the bed where she could pull herself down off of the bed, got a grip on

her walker, made it to the living room, and got her phone. She went into the bathroom and called her daughter Alice.

Alice was on the phone with her sister Barbara at that time; she looked out her window and saw someone coming out of the back door of her mother's mobile home closing the door slowly. Alice then saw that her mother was trying to call and switched to her, and Ms. Smith told her someone had broken in and raped her. When an officer arrived, the three of them opened the back door to Ms. Smith's home. She told them that someone had broken in, raped her, and hurt her. Alice could see blood on Ms. Smith's nightgown. Paramedics came to take Ms. Smith to the hospital. The police told Alice and Barbara they could not stay in their mother's home, since they needed to secure the scene.

Ms. Smith was transported to the hospital. The nurse who examined Ms. Smith in the hospital recalled that Ms. Smith was upset. She said she had been sexually assaulted, but did not know by whom; she was bleeding and reported pain in her vagina. Ms. Smith told the nurse the rapist had performed vaginal intercourse but not anal or oral intercourse, that no foreign objects were used, and that the rapist ejaculated. The nurse noted there were no outward signs of trauma and collected samples from the victim using a sexual assault kit. The samples were picked up by the Duplin County Sheriff's Office.

Ms. Smith was next examined by Dr. Yousef Naji. She told the doctor that she was having vaginal pain, and the doctor observed some bleeding from the vagina. Dr. Naji testified that because of her age, low hormone levels, and lack of sexual activity, her

vagina was very thin, dry, and rigid. He found a tear in her vagina that was approximately one and one half centimeters long. In Dr. Naji's opinion, the tear in the vagina was consistent with forcible trauma to the vagina.

Officers with the Duplin County Sheriff's Office secured the crime scene. Detective Andrew Hanchey was in charge of the crime scene investigation. Using an ultraviolet light, he located a stain on one of the bed incontinence pads that he suspected was semen. He also found a ripped adult Depend's-style diaper in the victim's bedroom between the bed and the wall near the window.

The back door to the victim's home appeared to have been pried open; the door also bore a fingerprint from the back door. The fingerprint was of insufficient detail for the State Bureau of Investigation lab to use it or to make comparisons to it.

Detective Forster contacted defendant and told him that he needed to speak with him. Defendant said that he was in Wilmington at his sister's house, but Detectives Forster and Wood found him at his grandmother's house in Rose Hill, approximately ten minutes away from the victim's home. They met with defendant on 4 March 2008. Defendant was read his Miranda rights, but Defendant told them that he wanted to talk to them. Defendant told the detectives that he had been at his friend Owen's house all night playing pool and drinking vodka. Defendant recounted that a man named Michael arrived at Owen's house, driving a white car. Defendant went with Michael to the Scotchman Store, and then they returned to Owen's house after stopping by Frank's home at around 7:30 p.m. He went to Frank's home to make contact with Frank's girlfriend. Defendant

spoke to Chris, who told defendant that Frank was in jail; defendant and Michael then drove back to Owen's house. Defendant stayed there until he called his mother to come get him, and she took him to his grandmother's house around 5:30 a.m. He had been drinking, but not all day.

Defendant told the detectives that he would never do anything to hurt Ms. Smith, and he would give his DNA to prove it. He stated that he had only been in her house two times, and that he knew she was bedridden and could not get up. Defendant said that Ms. Smith was his grandmother's age, and he could not think of anyone who would hurt her. When asked if he wore a ball cap, he said that he had not worn a ball cap since he got out of prison. Detective Hanchey collected DNA cheek swabs from defendant, as well as the clothes defendant said he had worn all night.

Detectives Forster and Wood went to Owen's house to conduct additional interviews. Michael was interviewed by the detectives and testified at trial to the following: He was at Owen's house with defendant on 3 March 2008. Sometime late that night, defendant rode with Michael to take another person home, then told Michael he wanted to go to Frank's house; Michael drove him there. Defendant knocked on the door of one trailer, then returned to the car and told Michael to wait while he ran next door, saying he would be right back. Michael did not see which way defendant went. Defendant returned a short time later, and they drove back to Owen's house. Defendant was wearing a cap but Michael could not recall the color. While the detectives were conducting interviews at Owen's house, defendant stopped by with his mother. Defendant

gave Detective Forster a white ball cap and a camouflage-style coat.

Later in the afternoon of 4 March 2008, defendant was arrested and transported to the Duplin County Jail for processing. The bed pad, the cheek swabs taken from defendant, and the sexual assault kit were sent to the SBI lab for testing. Sperm was not found on the sexual assault kit, but was found on the bed pad; the DNA from the sperm on the bed pad matched the DNA profile obtained from the known cheek swabbing from the defendant and did not match the victim's DNA. There was no DNA in the sample other than defendant's.

At trial, defendant called no witnesses, but submitted into evidence exhibits consisting of worksheets concerning the DNA analysis.

II. Lesser included offense

Defendant first argues that an instruction on the lesser included offense of attempted second degree rape should have been given. We disagree.

> 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(a) (2009). As to the requirement that intercourse occurred, "[t]he slightest penetration of the female sex organ by the male sex organ is sufficient to constitute vaginal intercourse within the meaning of the statute." *State v. Bruno*, 108 N.C. App. 401, 414, 424 S.E.2d 440, 448 (1993) (quotations and citations omitted).

"An instruction on a lesser-included offense must be given only if the evidence would permit the jury rationally to find defendant guilty of the lesser offense and to acquit him of the greater." *State v. Millsaps*, 356 N.C. 556, 561, 572 S.E.2d 767, 771 (2002). "When determining whether there is sufficient evidence for submission of a lesser included offense to the jury, we view the evidence in the light most favorable to the defendant." *State v. Clark*, ___ N.C. App.___, ___, 689 S.E.2d 553, 557 (2009) (quotations and citation omitted).

In the case at bar, the State put forth two theories on which to find defendant guilty of second degree rape. First, the State contended that defendant engaged in vaginal intercourse with the victim by force against her will. N.C. Gen. Stat. § 14.27.3(a)(1) (2009). Second, the State contended that defendant engaged in vaginal intercourse with the victim while she was physically helpless. N.C. Gen. Stat. § 14-27.3(a)(2) (2009). As a common element to both theories of second degree rape, the State had to prove that defendant engaged in vaginal intercourse with the victim. Vaginal intercourse is defined as penetration, however

slight, of the female sex organ by the male sex organ. *Bruno*, 108 N.C. App. at 414, 424 S.E.2d at 448 (stating that "the entering of the vulva or labia is sufficient" to support this element) (quotation and citation omitted).

The elements of attempted second degree rape are that "(1) the accused had the specific intent to commit rape; and (2) the accused committed an overt act for the purpose, which goes beyond mere preparation, but falls short of the complete offense." *State v. Farmer*, 158 N.C. App. 699, 702, 582 S.E.2d 352, 354 (2003). "[W]hen the State's evidence is clear and positive with respect to each element of the offense charged and there is no evidence showing the commission of a lesser included offense, it is not error for the trial judge to refuse to instruct on the lesser offense." *State v. Hardy*, 299 N.C. 445, 456, 263 S.E.2d 711, 718-19 (1980) (citation omitted).

Defendant argues that the trial court erred when it refused to submit to the jury the lesser included offense of attempted second degree rape – specifically, he argues that the evidence was not clear and positive that penetration occurred because semen was found at the scene on the victim's bed pad, but not in the rape kit. Defendant's argument is misplaced.

In *State v. Ashley*, this Court considered a very similar argument: there, the defendant argued that the lesser included offense of attempt to commit second degree rape should have been submitted to the jury on the basis that the State presented insufficient evidence of penetration. 54 N.C. App. 386, 391, 283 S.E.2d 805, 808-09 (1981), *overruled on other grounds by State v.*

McGaha, 306 N.C. 699, 295 S.E.2d 449 (1982). The evidence there showed that an initial hospital examination of the victim revealed the presence of sperm, but the rape kit swabs revealed none. *Id.* at 391, 283 S.E.2d at 809. This Court held that "the absence of sperm would not be evidence of an attempted rape since ejaculation is not an element of the offense of rape." *Id.*

Here, the State's evidence included the doctor's testimony that the victim's vagina had a 1.5 centimeter tear after the incident. "Where there is evidence of some penetration sufficient to support a conviction of rape and the defendant denies having any sexual relations with the victim, the defendant is not entitled to a charge of attempted rape." *State v. Smith*, 315 N.C. 76, 102, 337 S.E.2d 833, 850 (1985) (citations omitted). The absence of sperm does not equate to lack of penetration under the statute, and thus this argument fails.

We note further that no evidence of attempt to penetrate was presented. Without some evidence that defendant attempted to penetrate but did not complete the act, the trial court could not submit the charge of attempted second degree rape to the jury. *State v. Green*, 95 N.C. App. 558, 563, 383 S.E.2d 419, 422 (1989) (holding that no instruction on attempt was warranted when all the evidence presented tended to show that penetration had occurred, and the only evidence of attempt was the defendant's denial of any sexual contact with the victim); *see also State v. Graham*, 118 N.C. App. 231, 239, 454 S.E.2d 878, 883 (1995) (holding that, where the evidence "unequivocally showed an act of penetration by [the] defendant[,]" an instruction on attempt was not warranted).

Defendant in the case at bar conceded that was some evidence of penetration, but contended he had presented evidence to dispute it. Defense counsel stated at the charge conference when instructions on attempt were being discussed, "I don't deny that the State has presented evidence of that [the slightest penetration], Your Honor, but I also think we have presented evidence or evidence has also been presented that would dispute that."

However, after a careful review of the record, we find no evidence of attempt. At most, defendant merely questioned the statistics of the DNA match, highlighted the location of the semen found at the scene, and emphasized his statement to law enforcement officers denying that he was at the scene at the time of the rape and stating that he would never do anything to hurt the victim. As a result, the evidence was sufficient for the trial court to deny the jury instruction on attempt.

Defendant further contends that, because of "the victim's physical infirmities, including incontinence and an inability to recognize feeling in certain parts of her body," he was entitled to a jury instruction on attempted rape. Defendant's argument is without merit. The record is clear and without contradiction: the victim testified unequivocally that the complete act of rape as defined in N.C. Gen. Stat. § 27.3 occurred, and the medical evidence showed that the victim's vagina was torn during the incident.

III. Prosecutor's statements during closing argument

Defendant contends that the trial court erred by failing to intervene *ex mero motu* during the prosecutor's closing arguments

when the prosecutor commented on the victim's loss of dignity first by rape, and then by having to talk about it during the trial. Specifically, defendant contends that the prosecutor's remark was an improper comment criticizing defendant for exercising his constitutional right to a trial. Because defense counsel did not object to the prosecutor's statement during trial, no error will be found unless "the remarks were so grossly improper they rendered the trial and conviction fundamentally unfair." *State v. Garcell*, 363 N.C. 10, 42, 678 S.E.2d 618, 638 (2009) (quotations and citation omitted).

The defendant's argument that the prosecutor improperly commented upon the defendant's exercise of his constitutional right to a jury trial necessarily invokes a constitutional analysis under the Sixth Amendment to the U.S. Constitution and the North Carolina Constitution. In North Carolina, the Sixth Amendment right to plead not guilty is buttressed by a state constitutional right to a jury trial which further provides that any criminal defendant who pleads not guilty cannot waive a jury trial. N.C. Const. art. I, § 24.

The prosecutor's closing argument included the following:

> The defendant's actions in this case are despicable. He broke into Ms. [Smith]'s house in the middle of the night as she lay helpless, wondering if someone was in her house. She then saw him in her doorway and she told you this is what she thought: I'm dead.
>
> He left, came back, ripped off her adult diaper, raped a helpless 67-year-old woman. He tore her vagina and caused it to bleed. He stole her dignity. Her dignity has been taken again during this trial. She's had to tell 14 complete strangers about someone violating her

> in the most intimate way. She's had to sit here and listen to a doctor talk about her vagina. She's had to talk about her past sexual history and hear it discussed by Dr. Naji.
>
> The defendant has stolen from Ms. [Smith] her sense of safety, security, and dignity; stolen it without her having any real chance at all to defend it. Now it's time to take something from the defendant. Although, unlike Ms. [Smith], he's had an opportunity to defend it, and that something is his freedom. He needs to be sent to prison, both to punish him for violating Ms. [Smith] and to make sure that no other woman in Duplin County hears a door snatch open in the middle of the night and then gets raped.

To determine whether the prosecutor's comments infringed upon defendant's constitutional rights, we must first determine whether the State did, in actuality, comment improperly upon the defendant's exercise of a constitutional right. *State v. Thompson*, 118 N.C. App. 33, 42, 454 S.E.2d 271, 276 (1995). We conclude that the remarks in question were within the proper bounds of argument.

Counsel enjoys wide latitude in making closing arguments to the jury. *Garcell*, 363 N.C. at 42, 678 S.E.2d at 638; *State v. Huffstetler*, 312 N.C. 92, 112, 322 S.E.2d 110, 123 (1984). N.C. Gen. Stat. § 15A-1230 provides that:

> During a closing argument to the jury, an attorney may not become abusive, inject his personal experiences, express his personal belief as to the truth or falsity of the evidence or as to the guilt or innocence of the defendant, or make arguments on the basis of matters outside the record except for matters concerning which the court may take judicial notice. An attorney may, however, on the basis of his analysis of the evidence, argue any position or conclusion with respect to a matter in issue.

N.C. Gen. Stat. § 15A-1230 (2009); *see also State v. Jones*, 355 N.C. 117, 127, 558 S.E.2d 97, 104 (2002). Statements made during closing argument should not be read "in isolation or taken out of context on appeal"; the reviewing court must "give consideration to the context in which the remarks were made and the overall factual circumstances to which they referred." *State v. Thompson*, 359 N.C. 77, 110, 604 S.E.2d 850, 873 (2004) (quotations and citation omitted).

The prosecutor in this case did not deviate from the proper bounds of argument. His statement that the victim had been violated was simply an extrapolation from the evidence admitted at trial. The prosecutor did urge the jury to send the defendant to jail when he commented, "Now it's time to take something from the defendant. Although, unlike Ms. [Smith], he's had an opportunity to defend it, and that something is his freedom." The mere reference to defendant's right to "defend" his liberty rights is not improper.

IV. Failure to strike testimony upon cross-examination

Finally, defendant contends that the trial court committed plain error when it failed to strike the testimony of Detective Wood given in response to a question asked by defense counsel on cross-examination. We disagree. The following exchange took place during defendant's cross-examination of Detective Wood:

> [Q.] Now the Miranda rights that you were giving him, you read them to him or did he read them?
>
> [A.] Randy Forster did.
>
> [Q.] Did he read them?

> [A.] Yes, sir.
>
> [Q.] Did he tell you he was illiterate?
>
> [PROSECUTOR:] Objection; statements from the defendant.
>
> THE COURT: Overruled. Move on.
>
> [Q.] He didn't tell you he was illiterate?
>
> [A.] No.
>
> Q. So you don't know, of your own knowledge, whether he can read or write or not?
>
> A. I can tell you on my past experience and I have got 14 years of dealing with Alex Newkirk --
>
> [DEFENSE COUNSEL:] Objection, Your Honor, nonresponsive.
>
> THE COURT: Sustained. But you sort of asked for it.

"Under the plain error standard of review, defendant has the burden of showing: '(i) that a different result probably would have been reached but for the error or (ii) that the error was so fundamental as to result in a miscarriage of justice or denial of a fair trial.'" *State v. Fraley*, ___ N.C. App. ___, ___, 688 S.E.2d 778, 785 (2010) (quoting *State v. McNeil*, 165 N.C. App. 777, 784, 600 S.E.2d 31, 36 (2004)) (further citations omitted). "Statements elicited by a defendant on cross-examination are, even if error, invited error, by which a defendant cannot be prejudiced as a matter of law." *Id.* (citations omitted); N.C. Gen. Stat. § 15A-1443(c) (2009) ("A defendant is not prejudiced by the granting of relief which he has sought or by error resulting from his own conduct."); *see also State v. Chatman*, 308 N.C. 169, 177, 301

S.E.2d 71, 76 (1983) (holding that the defendant could not assign error to testimony elicited by his counsel during a cross-examination of the State's witness).

Defendant contends that the trial court was required to strike the statement, "I can tell you on my past experience and I have got 14 years of dealing with [defendant]," on the grounds that it was non-responsive and elicited the prejudicial inference that the defendant had been arrested on previous occasions. As the trial court noted at the time, defense counsel had elicited the response when pressing the witness for knowledge about defendant's literacy. The error, if any, was invited by defendant and cannot therefore be prejudicial.

V. Conclusion

Defendant's remaining assignments of error not argued in his brief are thus deemed abandoned. N.C.R. App. P. 28(b)(6) (2010).

No error.

Judges JACKSON and STEPHENS concur.

Report per Rule 30(e).