

NO. COA14-458

NORTH CAROLINA COURT OF APPEALS

Filed: 4 November 2014

STATE OF NORTH CAROLINA

v.

Alamance County
Nos. 11CRS054104-06

DERICK JOHNELLE MILES,
Defendant.

Appeal by defendant from judgments entered on or about 7 June 2013 by Judge Thomas H. Lock in Superior Court, Alamance County. Heard in the Court of Appeals 25 September 2014.

Attorney General Roy A. Cooper, III by Assistant Attorney General Anne M. Middleton, for the State.

Glover & Petersen, P.A. by James R. Glover, for defendant-appellant.

STROUD, Judge.

Derick Johnelle Miles ("defendant") appeals from a conviction for an attempted second-degree sexual offense. Defendant contends that insufficient evidence supports his conviction. We find no error.

I. Background

In 2010, M.G. met defendant while working at a car wash. M.G. and defendant talked on the phone and went on one date. In

2010, they had sexual relations twice. After hearing a rumor about defendant, M.G. ended their relationship.

In early 2011, M.G. and her daughter moved to an apartment in Mebane. In February 2011, while picking up her daughter from day care, M.G. saw defendant. They agreed to meet again. Defendant wanted a romantic relationship, but M.G. wanted a friendship only. Between February and May 2011, defendant and M.G. had sexual relations five times. In May 2011, after defendant threatened M.G., M.G. ended their relationship and attempted to cut off contact with defendant. In response, defendant called M.G.'s phone numerous times, knocked on M.G.'s door for an hour, attempted to evict M.G., and threatened to damage M.G.'s car. M.G. sometimes answered his phone calls and told him that she did not want a relationship.

Sometime after 8:00 p.m. on 3 July 2011, while M.G. was cleaning her apartment, she heard a knock on her door. M.G. looked through her peephole and saw one of her neighbors. She did not see anyone else, so she opened the door. After she opened it, defendant appeared, ran into her apartment, slammed the door behind him, and took his clothes off. Defendant had asked M.G.'s neighbor to knock on her door, so that defendant could "surprise" her. M.G. attempted to run toward the back of

the apartment, but defendant grabbed her by her shoulder. Defendant threw M.G. on the couch, and M.G. cried, screamed, and yelled. M.G. tried to fight off defendant, but defendant overpowered her. Defendant took M.G.'s clothes off and raped her. M.G. tried to escape through the front door, but defendant grabbed M.G. by her hair, ripping out some of her hair extensions, and pulled her back into the apartment. Defendant then choked M.G. with his hand, impeding M.G.'s ability to breathe. Defendant flipped M.G. upside down, yelled at her, grabbed a screwdriver, and jabbed it at her in a threatening manner. M.G. told defendant that she needed to pick up her daughter. Defendant demanded that M.G. first drive him to his apartment in Burlington.

After M.G. drove defendant to his apartment, defendant grabbed her car keys. Defendant grabbed M.G. by her waist and dragged her out of her car and into his apartment. Defendant yelled and slapped M.G.'s face so hard that her braces cut the inside of her mouth. Defendant then acted as if he would let her leave and allowed her to go back to her car. But then defendant grabbed her and dragged her back into his apartment. Defendant grabbed a pointed kitchen knife and tried to hand it to M.G. He told her that she would escape only if she used it

against him. She refused to take it. Defendant then asked her to perform fellatio and showed her his penis. M.G. begged him to not make her do it. Defendant then took M.G.'s clothes off and attempted to perform anal intercourse on her. After M.G. screamed and jumped in pain, defendant turned M.G. over and raped her. After unsuccessfully trying to fight off defendant, M.G. decided to feign love for defendant in order to get him to stop his abuse. Defendant gave M.G. some of his clothes and let her leave around 1:00 a.m.

On or about 13 February 2012, a grand jury indicted defendant for two counts of first-degree rape, two counts of first-degree kidnapping, first-degree burglary, assault by strangulation, a first-degree sexual offense, and an attempted first-degree sexual offense. At the conclusion of all the evidence at trial, defendant moved to dismiss all the charges. The trial court denied the motion. On or about 7 June 2013, a jury found defendant guilty of second-degree rape, non-felonious breaking or entering, and two counts of attempted second-degree sexual offense and not guilty of all other charges. One of the attempted second-degree sexual offense convictions arose from defendant's request for fellatio. The trial court sentenced defendant to 146 to 236 months' imprisonment for second-degree

rape, 128 to 214 months' imprisonment for an attempted second-degree sexual offense, and 128 to 214 months' imprisonment for an attempted second-degree sexual offense and non-felonious breaking or entering. The sentences were to be served consecutively. Defendant gave notice of appeal in open court.

II. Motion to Dismiss

A. Standard of Review

When reviewing a defendant's motion to dismiss a charge on the basis of insufficiency of the evidence, this Court determines whether the State presented substantial evidence in support of each element of the charged offense. Substantial evidence is relevant evidence that a reasonable person might accept as adequate, or would consider necessary to support a particular conclusion. In this determination, all evidence is considered in the light most favorable to the State, and the State receives the benefit of every reasonable inference supported by that evidence. The defendant's evidence, unless favorable to the State, is not to be taken into consideration, except when it is consistent with the State's evidence, the defendant's evidence may be used to explain or clarify that offered by the State. Additionally, a substantial evidence inquiry examines the sufficiency of the evidence presented *but not its weight*, which is a matter for the jury. Thus, if there is substantial evidence—whether direct, circumstantial, or both—to support a finding that the offense charged has been committed and that the defendant committed it, the case is for the jury and the motion to dismiss should be denied.

State v. Hunt, 365 N.C. 432, 436, 722 S.E.2d 484, 488 (2012).

B. Analysis

Defendant contends that the trial court erred in denying his motion to dismiss the attempted second-degree sexual offense charge arising from defendant's request for fellatio. A person is guilty of this offense if the person engages in a sexual act with another person by force and against the will of the other person. N.C. Gen. Stat. § 14-27.5(a)(1) (2011). Fellatio is a sexual act within the meaning of the statute. *State v. Jacobs*, 128 N.C. App. 559, 563, 495 S.E.2d 757, 760, *disc. rev. denied*, 348 N.C. 506, 510 S.E.2d 665 (1998). The force required need not be physical force; fear, fright, or coercion may take the place of force. *Id.*, 495 S.E.2d at 760. "Fear of serious bodily harm reasonably engendered by threats or other actions of a defendant and which causes the victim to consent to the sexual act takes the place of force and negates the consent." *State v. Locklear*, 304 N.C. 534, 540, 284 S.E.2d 500, 503 (1981).

The elements of an attempt to commit any crime are: (1) the intent to commit the substantive offense, and (2) an overt act done for that purpose which goes beyond mere preparation, but (3) falls short of the completed offense. *State v. Henderson*, 182 N.C. App. 406, 412, 642 S.E.2d 509, 513 (2007).

"[W]henEVER the design of a person to commit a crime is clearly shown, *slight acts* in furtherance of the design will constitute an attempt." *Id.* at 413, 642 S.E.2d at 514.

Defendant contends that requesting a sexual act from an adult cannot constitute an attempted sexual offense, because such a request does not show an intention to commit a sexual act "[b]y force and against the will of the other person." See N.C. Gen. Stat. § 14-27.5(a)(1). In this way, this case differs from cases involving attempted statutory sex offenses where a defendant requests a sexual act from a victim who legally cannot give consent. See, e.g., *State v. Sines*, 158 N.C. App. 79, 579 S.E.2d 895, *cert. denied*, 357 N.C. 468, 587 S.E.2d 69 (2003); *Henderson*, 182 N.C. App. 406, 642 S.E.2d 509. Defendant is correct that requesting fellatio from an adult who is legally capable of consent in a non-threatening manner generally would not constitute an attempted sexual offense. But where the request for fellatio is immediately preceded by defendant tricking the victim into letting him into her apartment, raping her, pulling her hair, choking her, flipping her upside down, jabbing at her with a screwdriver, refusing to allow her to leave, pulling her out of her car, taking her car keys, dragging her to his apartment, slapping her so hard that her braces cut

the inside of her mouth, screaming at her, and immediately after her denial of his request, raping her again, we hold that this request is accompanied by a threat and a show of force and thus amounts to an attempt. Had M.G. complied with defendant's request, thus completing the sexual act, we cannot imagine that the jury would have found that she had consented to perform fellatio. Given the violent, threatening context, defendant's request and presentation of his penis to M.G. amounted to an attempt to engage M.G. in a sexual act by force and against her will. See N.C. Gen. Stat. § 14-27.5(a)(1); *Jacobs*, 128 N.C. App. at 563, 495 S.E.2d at 760; *Locklear*, 304 N.C. at 540, 284 S.E.2d at 503. We thus hold that sufficient evidence supports defendant's conviction for an attempted second-degree sexual offense arising from defendant's request for fellatio.

III. Conclusion

Because sufficient evidence supports defendant's conviction for an attempted second-degree sexual offense, we hold that the trial court committed no error.

NO ERROR.

Chief Judge MCGEE and Judge GEER concur.