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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA25-412

Filed 7 October 2026

Johnston County, No. 21CR053908-500

STATE OF NORTH CAROLINA

v.

AGUSTIN RAMOS PICHATARO

Appeal by defendant from judgment entered 1 December 2023 by Judge Rebecca W. Holt in Johnston County Superior Court. Heard in the Court of Appeals 20 November 2025.

Attorney General Jeff Jackson, by Special Deputy Attorney General Juliane L. Bradshaw, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender John F. Carella, for defendant.

FREEMAN, Judge.

Defendant appeals from judgment entered upon a jury verdict of guilty of second-degree forcible sexual offense. On appeal, defendant argues the trial court erred by denying defendant's request to charge the jury on sexual battery as a lesser included offense and by adding the State's proposed instruction to the jury charge for

second-degree sexual offense. After careful review, we conclude that defendant received a fair trial free from error.

I. Factual and Procedural Background

Augustine Ramos Pichataro (defendant) and his family moved into the Victim's family home in February of 2021. On 12 September 2021, the Victim's family and defendant's family ate dinner together. The Victim took a Tylenol PM around 10:30 P.M. and went to sleep. When the Victim went to sleep, the Victim's husband and defendant were in the kitchen drinking alcohol. The Victim woke up around 1:00 A.M. to use the restroom and noticed her husband and defendant were still awake drinking alcohol. She told her husband that "it was time to come inside to sleep." The Victim then went back to sleep.

The Victim testified as follows: Sometime later, the Victim was woken up because she "felt a weight on [her] legs" and "felt pain in [her] vagina." Defendant was putting his fingers inside of the Victim's vagina. She further testified that, at first, she believed it was her husband and just gestured with her arm for him to stop. The Victim felt the fingers come out, but a "little while later," the Victim felt the fingers inside of her again. The Victim finally realized that it was defendant, and not her husband, when the Victim touched his hair. When the Victim looked at defendant, he put his fingers in his mouth. The Victim began hitting defendant and yelling. Defendant "begged [the Victim] not to tell his wife."

On 1 November 2021, defendant was indicted with one count of second-degree

forcible sexual offense. On 13 November 2023, the matter came on for trial in front of a jury. On 17 November 2023, the jury found defendant guilty of second-degree forcible sexual offense. Defendant gave oral notice of appeal.

II. Jurisdiction

This Court has jurisdiction to hear an appeal from a final judgment of a superior court pursuant to N.C.G.S. §§ 7A-27(b)(1) and 15A-1444(a) (2025). Accordingly, we have jurisdiction to hear defendant's appeal.

III. Discussion

On appeal, defendant argues that the trial court erred in its jury instructions (1) by denying defendant's request to charge the jury on sexual battery as a lesser included offense and (2) by adding the State's proposed instruction to the jury charge for second-degree sexual offense. We address each argument in turn.

A. LESSER INCLUDED OFFENSE

Defendant first argues that the trial court erred by denying defendant's request to charge the jury on sexual battery as a lesser included offense when defendant's evidence supported the instruction.

This Court reviews a trial court's sufficiency of the evidence to support jury instructions de novo. *State v. Cruz*, 203 N.C. App. 230, 235, *aff'd*, 364 N.C. 417 (2010). Therefore, we review a trial court's decision not to give a requested lesser included offense instruction de novo. *State v. Matsoake*, 243 N.C. App. 651, 657 (2015).

"[A] defendant is entitled to have all lesser degrees of offenses supported by

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the evidence submitted to the jury as possible alternate verdicts.” *State v. Brichikov*, 383 N.C. 543, 554 (2022) (quoting *State v. Drumgold*, 297 N.C. 267, 271 (1979)). However, “the trial court need not submit lesser degrees of a crime to the jury when the State’s evidence is positive as to each and every element of the crime charged and there is no conflicting evidence relating to any element of the charged crime.” *Id.* (emphasis omitted) (quoting *Drumgold*, 297 N.C. at 271).

“The determination of whether one offense is a lesser included offense of another is made on a definitional as opposed to a factual basis.” *State v. Westbrook*, 345 N.C. 43, 55 (1996). An offense is a lesser included offense if all the essential elements “are also elements of the greater offense” and “requires no proof beyond that required for the greater offense” *State v. Corbett*, 196 N.C. App. 508, 510 (2009) (quoting *State v. Martin*, 195 N.C. App. 43, 54 (2009)). “If the lesser crime has an essential element which is not completely covered by the greater crime, it is not a lesser included offense.” *State v. Westbrook*, 345 N.C. 43, 55 (1996) (quoting *State v. Weaver*, 306 N.C. 629, 635 (1982), *overruled on other grounds by State v. Collins*, 334 N.C. 54 (1993)). A defendant is “not entitled to an instruction on an offense which is not a lesser included offense and with which he [is] not charged.” *State v. Uvalle*, 151 N.C. App. 446, 453 (2002).

Defendant argues that sexual battery is a lesser included offense of second-degree forcible sexual offense in which the trial court should have charged the jury. Section 14-27.27(a) of the North Carolina General Statutes, which defines the

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elements of second-degree forcible sexual offense, reads as follows:

(a) A person is guilty of second degree forcible sexual offense 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 has a mental disability or who is mentally incapacitated or physically helpless, and the person performing the act knows or should reasonably know that the other person has a mental disability or is mentally incapacitated or physically helpless.

N.C.G.S. § 14-27.27. Section 14-27.33 of the North Carolina General Statutes, which defines sexual battery, requires the following elements:

(a) A person is guilty of sexual battery if the person, *for the purpose of sexual arousal*, sexual gratification, or sexual abuse, engages in sexual contact with another person:

(1) By force and against the will of the other person; or

(2) Who has a mental disability or who is mentally incapacitated or physically helpless, and the person performing the act knows or should reasonably know that the other person has a mental disability or is mentally incapacitated or physically helpless.

N.C.G.S. § 14-27.33 (emphasis added).

Sexual battery “has a purpose element, requiring the act be completed for the purpose of sexual arousal, sexual gratification, or sexual abuse” that is not an element of second-degree forcible sexual offense. *State v. Pettis*, 186 N.C. App. 116, 120 (2007). Because sexual battery requires “proof beyond that required for the greater offense” of second-degree forcible sexual offense, sexual battery is not a lesser included

offense. *See Corbett*, 196 N.C. App at 10; *see also Pettis*, 186 N.C. App. at 120 (holding that sexual battery is not a lesser included offense of second-degree rape).

Because sexual battery is not a lesser included offense of second-degree forcible sex offense and defendant was not charged with sexual battery, defendant had no right for the sexual battery charge to be presented to the jury. Therefore, the trial court did not err by denying defendant's request to charge the jury on sexual battery.

B. Proposed Instruction

Defendant next argues that the trial court erred by adding the State's proposed instruction to the jury charge for second-degree sexual offense over defendant's objection. Specifically, defendant argues that, by adding the State's proposed instructions, the trial court "inject[ed] elements not charged into the instruction, confusing the jury, and undermining the reliability of the verdict."

This Court reviews a trial court's sufficiency of the evidence to support jury instructions de novo. *Cruz*, 203 N.C. at 235. Further, whether a jury instruction correctly explains the law is reviewed by this Court de novo. *State v. Barron*, 202 N.C. App. 686, 694 (2010).

"Trial courts have a duty to instruct the jury on all substantial features of the case arising from the evidence and must properly instruct the jury as to all essential elements of the offense charged." *State v. Greenfield*, 297 N.C. App. 832, 839, *disc. review denied*, 388 N.C. 740 (2025) (quoting *State v. Harper*, 285 N.C. App. 507, 518 (2022)). "If a request is made for a jury instruction which is correct in itself and

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supported by evidence, the trial court must give the instruction at least in substance.” *State v. Harvell*, 334 N.C. 356, 364 (1993).

Here, the trial court instructed the jury in accordance with the pattern jury instructions for second-degree forcible sexual offense under N.C.P.I.—Crim. 207.65A. Upon the State’s request, the trial court added the following language: “When a sexual act is committed upon a sleeping, helpless, or incapacitated victim[,] force and lack of consent are implied in law.”

Our Supreme Court has concluded that force and lack of consent are “implied in law ‘upon the mere showing of sexual intercourse with a person who is asleep, unconscious, or otherwise incapacitated and therefore could not resist or give consent.’” *State v. Brown*, 332 N.C. 262, 274–75 (1992) (Frye, J., concurring) (quoting *State v. Moorman*, 320 N.C. 387, 392 (1987)). Therefore, in the present case, the trial court’s instruction is a correct reflection of the law. Further, at trial, the Victim testified that she was asleep in bed and then woke up to “a weight on [her] legs” and “pain in [her] vagina” from defendant’s fingers inside of her. Thus, the State presented sufficient evidence that the Victim was unconscious to support the jury instruction.

Defendant argues that because the State charged defendant “with second-degree sexual offense solely under the theory that the Victim was ‘mentally disabled, mentally incapacitated, or physically helpless,’” the trial court including the additional “lack of consent” element in the jury instructions was error. However,

defendant's argument is without merit because this Court has held, "It makes no difference in the case of a sleeping or similarly incapacitated victim whether the State proceeds on the theory of a sexual act committed by force and against the victim's will or whether it alleges an incapacitated victim." *State v. Dillard*, 90 N.C. App. 318, 322 (1988) (citing *Moorman*, 320 N.C. at 392).

The State presented sufficient evidence to support the additional jury instruction, and the jury instruction was a correct reflection of the law. Accordingly, we hold that the trial court did not err by adding the State's proposed instruction to the jury charge for second-degree sexual offense.

IV. Conclusion

We hold that the trial court did not err by denying defendant's request to charge the jury on sexual battery as a lesser-included offense or by adding the State's proposed instruction to the jury charge for second-degree sexual offense.

NO ERROR.

Judges GRIFFIN and MURRY concur.

Report per Rule 30(e).