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State v. Moorman: Can Sex with a Sleeping Woman Constitute Forcible Rape

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State v. Moorman: Can Sex With a Sleeping Woman Constitute Forcible Rape?

> While a married woman was asleep in bed with her husband, the prisoner got into the bed and proceeded to have connection with her, she then being asleep. When she awoke, she at first thought he was her husband, but on hearing him speak, and seeing her husband at her side, she flung the prisoner off, and called out to her husband, when the prisoner ran away.
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> Held the prisoner was guilty of the crime of rape.[1]

One summer night, a college student came home from a date and went to bed, falling asleep to the music from her radio. In the hazy period between sleep and wakefulness she dreamed of having sexual intercourse. The dream, however, became a nightmarish reality when the woman awoke to find a man, a slight acquaintance, *flagrante delicto*.[2] By the end of the evening, she had not only been assaulted vaginally, but also anally, by a man who later claimed to have mistaken her for her roommate.[3]

Can an act of sexual intercourse with a sleeping woman be grounds for a charge of forcible rape? These facts, although bizarre,[4] were the basis for a recent North Carolina Court of Appeals decision. In *State v. Moorman*,[5] defendant was found guilty of engaging in acts of vaginal and anal intercourse with the victim by force and against her will, and was convicted of second degree rape and second degree sexual offense.[6] On appeal, defendant raised the issue of whether the State had issued a proper indictment for second degree rape.[7] In holding that a fatal variance existed "between the indictment's allegations that the defendant carnally knew the prosecutrix by force and against her will and the proof the State presented at trial,"[8] the court of appeals gave a new twist to the elements of force and consent in second degree rape cases. This Note explores the development of rape law in North Carolina, examines persuasive authority in other jurisdictions, and concludes that an act of sexual intercourse

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1. Reg. v. Young, 14 Cox Crim. Cas. 114, 114 (1878).

2. "In the very act of committing the crime." BLACK'S LAW DICTIONARY 575 (5th ed. 1979).

3. *See infra* note 18.

4. Some readers may consider it beyond the realm of credibility to believe that a man could engage in sexual intercourse with a woman before she awakens. Although rare, such occurrences have been reported in other cases. In State v. Stroud, 362 Mo. 124, 127, 240 S.W.2d 111, 112 (1951), the Missouri Supreme Court noted that "[a]ccording to the prosecutrix, the initial penetration was accomplished while she was asleep. This is unusual, but we cannot say it is contrary to physical possibility." *See also In re* Childers, 310 P.2d 776, 777 (Okla. Crim. App. 1957) (noting that "petitioner is not the originator of this method of committing rape").

5. 82 N.C. App. 594, 347 S.E.2d 857 (1986), *rev'd*, 358 S.E.2d 502 (1987).

6. *Id.* at 595, 347 S.E.2d at 858. A second degree rape conviction requires the defendant to have engaged in an act of vaginal intercourse with the victim, while a conviction for second degree sexual offense requires the commission of a "sexual act" other than vaginal intercourse. N.C. GEN. STAT. §§ 14-27.3, -27.5 (1986). Anal intercourse is a sexual act included within the purview of the statute. *See id.* § 14-27.1(4).

7. *Moorman*, 82 N.C. App. at 598, 347 S.E.2d at 859.

8. *Id.*

with a sleeping person can be sufficient to meet the requirements of force and lack of consent. It further concludes that the *Moorman* court, by incorrectly defining sleeping persons as physically helpless under the North Carolina second degree rape statute,[9] set a dangerous legal precedent with disturbing ramifications for the future.

In *Moorman* the State's evidence showed that the victim, Patricia Noble, a freshman at North Carolina State University,[10] had met with friends on the evening of August 31, 1984, during which time she consumed two beers.[11] At approximately 1:00 a.m. on September 1, 1984, she returned to her dormitory room, closing the door behind her. After turning her radio on to a low volume, Noble lay down on her bed and promptly fell asleep, fully clothed.[12] Her next memory was a dream in which she was having sexual intercourse.[13] When she awoke, she found a man astride her, who had already penetrated her vagina with his penis and was currently engaged in the act of vaginal intercourse.[14] When she attempted to sit up, the man grabbed her and forced her back down on the bed, causing multiple scratches about her neck.[15] By now fully conscious and afraid for her life, Noble did not resist.[16] After ejaculating in her vagina, the male engaged in anal intercourse with Noble, causing a one-half inch tear in her rectum.[17] Noble turned on the light after the male completed these acts. Although she recognized defendant, Noble could not recall his name.[18]

The State's indictment charged defendant with first degree burglary, second degree rape, and second degree sexual offense.[19] The trial court found him guilty of misdemeanor breaking or entering, second degree rape, and second degree sexual offense, and entered judgments sentencing him to twelve years imprisonment.[20] Defendant then filed a motion, which the court heard and denied,

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9. N.C. GEN. STAT. § 14-27.3 (1986). For the pertinent statutory language, see *infra* text accompanying note 72.

10. Brief for the State at 19, State v. Moorman, 82 N.C. App. 594, 347 S.E.2d 857 (1986) (No. 86105C1).

11. *Moorman*, 82 N.C. App. at 597, 347 S.E.2d at 859. Although Noble consumed alcohol during the course of the evening, she did not become intoxicated to the point of unconsciousness. *See infra* note 146.

12. *Moorman*, 82 N.C. App. at 597, 347 S.E.2d at 859.

13. *Id.*

14. *Id.*

15. *Id.*

16. *Id.*

17. *Id.* Defendant's act of pushing Noble back down on the bed served as force sufficient to achieve the anal intercourse. *See infra* note 25 and accompanying text. This showing of force did not, however, apply to defendant's commission of the vaginal intercourse, because force in a second degree rape case must be used to "achieve the intercourse, not to prevent its interruption." *See infra* note 155.

18. *Moorman*, 82 N.C. App. at 597, 347 S.E.2d at 859. After Noble turned on the light, Moorman identified himself as "[Noble's] roommate's friend Percy" and told her that he had mistakenly "thought she was the roommate, and . . . would not have done what he did if he had known she was not the roommate." *Id.* The court did not discuss in its opinion whether mistaken identity is a viable defense to a charge of rape, nor whether defendant asserted such a defense.

19. *Id.* at 595, 347 S.E.2d at 858.

20. *Id.* Defendant was sentenced to two years imprisonment for breaking or entering, twelve years for second degree rape, and twelve years for second degree sexual offense, all to be served concurrently as a youthful offender. *Id.*

for a new trial on the grounds of ineffective assistance of counsel.[21] Defendant appealed both the judgments and the order.[22]

This Note focuses on defendant's claim that the State did not present sufficient evidence to support his convictions for second degree rape and second degree sexual offense. The State's indictment for second degree rape alleged that "the defendant . . . unlawfully, willfully, and feloniously did ravish and carnally know [the prosecutrix], *by force and against her will*, in violation of N.C.G.S. 14-72.3 [sic]."[23] The indictment for second degree sexual offense charged defendant with engaging in a sexual act with the victim against her will, using force

21. *Id.*

22. *Id.* Defendant's main contentions on appeal were (1) that the trial court erred by refusing to impanel a new jury following the State's removal of all blacks from the jury through the use of peremptory challenges, *id.* at 601, 347 S.E.2d at 861; (2) that he was deprived of his sixth amendment right to effective assistance of counsel, *id.* at 602, 347 S.E.2d at 861; and (3) that there was insufficient evidence to support his convictions for second degree rape and second degree sexual offense. *Id.* at 596, 347 S.E.2d at 858.

The court of appeals dismissed defendant's peremptory challenge argument, holding that defendant had failed " 'to establish that the prosecutor had engaged in case after case in a pattern of systematic use of peremptory challenges to exclude blacks from the petit jury.' " *Moorman*, 82 N.C. App. at 601, 347 S.E.2d at 861 (quoting State v. Jackson, 317 N.C 1, 10, 343 S.E.2d 814, 820 (1986)). This evidentiary standard was enunciated in the United States Supreme Court decision, Swain v. Alabama, 380 U.S. 202 (1965).

While the *Moorman* case was under direct review, the Supreme Court decided Batson v. Kentucky, 106 S. Ct. 1712 (1986), which effectively overruled the *Swain* standard. Under *Batson* a defendant need only present "evidence concerning the prosecutor's exercise of peremptory challenges at the defendant's trial" to establish a prima facie case of purposeful discrimination in petit jury selection. *Id.* at 1722-23. The new standard merely requires defendant to show (1) that he belongs to a racially cognizable group; (2) that the prosecutor has removed members of the defendant's race from the venire through the exercise of peremptory challenges; and (3) that the relevant circumstances give rise to an inference that the prosecutor, by using peremptory challenges, purposefully excluded potential members of the venire on the basis of race. *Id.* at 1723. In addition, the Supreme Court emphasized that "defendant is entitled to rely on the fact . . . that peremptory challenges constitute a jury selection practice that permits 'those to discriminate who are of a mind to discriminate.' " *Id.* (quoting Avery v. Georgia, 345 U.S. 559, 562 (1953)).

The North Carolina Court of Appeals held in *Moorman* that *Batson* was to be "given prospective application only to cases where the jury selection occurred after the *Batson* decision." *Moorman*, 82 N.C. App. at 601, 347 S.E.2d at 861. Recently, however, the Supreme Court held in Griffith v. Kentucky, 107 S. Ct. 708 (1987), that *Batson* applies retroactively to all state or federal cases "pending on direct review or not yet final, with no exception for cases in which the new rule constitutes a 'clear break' with the past." *Id.* at 716. Defendant, should he establish a prima facie case of discrimination under the standard set forth in *Batson*, will be entitled to a new trial. *See id.* Two other North Carolina cases may be affected by the *Griffith* ruling. *See* State v. Belton, 318 N.C. 141, 347 S.E.2d 755 (1986); State v. Jackson, 317 N.C. 1, 343 S.E.2d 814 (1986).

The *Moorman* court also rejected defendant's claim that he was prejudiced by ineffective assistance of counsel. Although the court found that defense counsel's performance was substandard in various respects, the defendant also carried the burden of establishing "that the deficiencies of his attorney were so substantial that they undermined the adversarial process to the extent that the jury verdict was unreliable," a burden he failed to meet. *Moorman*, 82 N.C. App. at 603, 605, 347 S.E.2d at 862-63.

Defendant further claimed on appeal that the trial judge's gratuitous statements were prejudicial, thus requiring a new trial, and that the court's denial of defense counsel's request to conduct a re-cross-examination "violated his right to confront adversarial witnesses guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution." *Id.* at 599-600, 347 S.E.2d at 860. The court of appeals rejected these arguments, holding that the judge's statements, although improper, were not prejudicial to defendant, and that when the prosecutor's redirect examination included no new matter, defense counsel was not entitled to a second cross-examination as a matter of right. *Id.* at 600, 347 S.E.2d at 860.

23. *Id.* at 596, 347 S.E.2d at 858 (emphasis added). The State's reference to N.C. GEN. STAT. § 14-72.3, rather than § 14-27.3, was a typographical error. The court noted, however, that "refer-

sufficient to overcome her resistance.[24]

The court of appeals affirmed the judgment against defendant for second degree sexual offense, holding that defendant's act of grabbing Noble's neck and pushing her back down onto the bed constituted sufficient force to sustain a conviction.[25] Moreover, the court held the evidence established that the act of anal intercourse was against Noble's will, presumably because she was completely awake by that time and had tried to resist by sitting up prior to defendant's initiation of anal intercourse.[26]

As to defendant's conviction of second degree rape, however, the court held that a fatal variance existed between the indictment and the proof presented at trial.[27] Unlike the act of anal intercourse, which was preceded by an act of physical force[28] that compelled the victim to acquiesce out of fear for her life, defendant's "initiation of [vaginal] intercourse occurred while the prosecutrix was asleep."[29] The court reasoned that the State had failed to prove the essential elements of force and lack of consent in accordance with its indictment because "penetration and the initiation of sexual intercourse was achieved while the prosecutrix was asleep and unable to communicate an unwillingness to submit to the act."[30] Although neither party raised the issue at trial, the court concluded that the sleeping victim was "physically helpless" at the time of the attack.[31] Intercourse with a physically helpless person is an offense under the second subsection of the second degree rape statute,[32] and neither force nor lack of consent are elements of that offense.[33] Therefore, the court indicated that

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ence to an inapposite statute will not vitiate such an indictment." *Moorman*, 82 N.C. App. at 596, 347 S.E.2d at 858.

24. *Id.* at 599, 347 S.E.2d at 860. For the distinction between second degree rape and second degree sexual offense, see *supra* note 6.

25. *Moorman*, 82 N.C. App. at 599, 347 S.E.2d at 860. The one-half inch tear in the victim's rectum as a result of the anal intercourse was further proof that defendant used force to accomplish the sexual act. *Id.*

26. *Id.* Although the court did not clearly articulate its reasons for holding that the act of anal intercourse was against Noble's will, it noted that "[a]fter defendant's use of force, the prosecutrix was scared that defendant might injure her further, and thus offered no other resistance." *Id.*

27. *Id.* at 598, 347 S.E.2d at 859. In North Carolina "an indictment will not support a conviction for a crime, all the elements of which are not accurately and clearly alleged in the indictment." *Id.* at 597-98, 347 S.E.2d at 859 (citing State v. Perry, 291 N.C. 586, 231 S.E.2d 262 (1977)). The purpose behind requiring conformity between the indictment and the proof is to avoid convicting the defendant of a crime with which he was not charged. State v. Loudner, 77 N.C. App. 453, 453, 335 S.E.2d 78, 79 (1985).

28. The force required to sustain a conviction for rape or second degree sexual offense need not be actual physical force. It can also be constructive. *See infra* text accompanying notes 76-80.

29. *Moorman*, 82 N.C. App. at 597, 347 S.E.2d at 859.

30. *Id.* at 598, 347 S.E.2d at 859.

31. *Id.*

32. *Id.*; *see infra* note 72 and accompanying text.

33. *Moorman*, 82 N.C. App. at 597, 347 S.E.2d at 859. The court noted that subsections (1) and (2) of N.C. GEN. STAT. § 14-27.3(a) are "two distinct and separate offenses of second degree rape" within the statute. *Moorman*, 82 N.C. App. at 597, 347 S.E.2d at 859. The language of the statute supports this distinction in that rape may be accomplished either by force and against the will of the person, *or* by engaging in sexual intercourse with a person who is mentally defective, mentally incapacitated, or physically helpless. *See infra* note 72 and accompanying text; *see also* State v. Aiken, 73 N.C. App. 487, 498, 326 S.E.2d 919, 926 (1985) (emphasizing dual nature of second degree rape statute).

defendant would have been guilty under the statute's second subsection. Nonetheless, the court held the State's failure to allege in its indictment that defendant violated the second degree rape statute's *second* subsection rendered the proof deficient to establish the offense. Consequently, the court arrested the judgment.[34]

The North Carolina Supreme Court granted the State's petition for discretionary review on November 18, 1986.[35] In its brief before the supreme court,[36] the State has contended that a sleeping person is not "physically helpless" within the meaning of the second degree rape statute and that its use of the phrase "by force and against the will" in the indictment was correct.[37] Defendant's brief concedes these points, but maintains that sex with a sleeping person can be neither forcible, nor without her consent.[38]

A number of cases have arisen in other jurisdictions dealing with the same critical facts. Contrary to the *Moorman* court's holding, these jurisdictions have held without exception that an act of sexual intercourse with a sleeping woman constitutes sufficient force and is presumed to be against her will so as to support a charge of rape. A group of British cases decided in the latter half of the nineteenth century squarely faced this issue. Two court of criminal appeal decisions, *Reg. v. Clarke*[39] and *Reg. v. Barrow*,[40] revolved around the issue of consent. Both cases involved a situation in which a married woman, awakened by a man engaged in sexual intercourse with her, succumbed in the mistaken belief that the man was her husband. The court quashed both defendants' convictions on the grounds that the women's consent, although fraudulently obtained, negated the charge of rape.[41] Several years later, however, the same court criticized the results in *Clarke* and *Barrow* and affirmed a defendant's conviction under similar circumstances. In *Reg. v. Young*[42] a defendant engaged in an act of sexual intercourse with a sleeping woman who then awoke. The court held that even if she initially mistook defendant for her husband, "the prosecutrix did not consent before, after, or at the time of the prisoner's having connection with her, that it was against her will, and that the conduct of the prosecutrix did not lead the prisoner in the belief that she did consent."[43] Similarly, in *Reg. v. Mayers*[44] the court noted that when defendant proceeded to have carnal knowledge of his

34. *Moorman*, 82 N.C. App. at 598, 347 S.E.2d at 859.

35. State v. Moorman, 318 N.C. 699, 350 S.E.2d 861 (1986). The court dismissed defendant's appeal for lack of a substantial constitutional question and denied his petition for discretionary review. *Id.*

36. The North Carolina Supreme Court has not yet heard the case. Relevant points in the State's and defendant's arguments before this court were taken from their respective briefs.

37. Brief for the State at 5-14, *Moorman* (No. 577PA86).

38. New Brief for the Defendant at 9-16.

39. 6 Cox Crim. Cas. 412 (1854).

40. 11 Cox Crim. Cas. 191 (1868).

41. Consent, however, must be to the act of sexual intercourse. *See, e.g.*, Reg. v. Flattery, 2 Q.B. Div. 410, 413, 13 Cox Crim. Cas. 388, 391 (1877) (affirming defendant's rape conviction when victim had consented not to act of sexual intercourse, but to medical operation).

42. 14 Cox Crim. Cas. 114 (1878).

43. *Id.* at 115.

44. 12 Cox Crim. Cas. 311 (1872).

victim, "if she [is] asleep, she is incapable of consent, and therefore it would be a rape."[45] Thus, a presumption arose in the English cases that sexual intercourse was against a woman's will and therefore rape if she was asleep at the time penetration occurred.

American cases addressing the issue have adopted this view.[46] In *Commonwealth v. Burke*,[47] a leading consent case involving a victim who was sexually assaulted while unconscious from alcohol intoxication, the Supreme Judicial Court of Massachusetts noted that "it might be considered against the general presumable will of a woman that a man should have unlawful connection with her. . . . [U]nlawful and forcible connection with a woman in a state of unconsciousness at the time . . . is presumed to be without her consent, and is rape."[48] Whether the victim was unconscious from drink, as in *Burke*, or merely sleeping, was not a controlling distinction. The common premise in either situation was that when a woman was in no position to give consent to sexual intercourse, her body was considered inviolate and consent would not be presumed. Cases discussing the consent issue in the rape of a sleeping woman have emphasized that "[i]t is easily understood, and universally recognized, that a person who is unconscious by reason of intoxication, drugs, or sleep, is incapable of exercising any judgment in any matter whatsoever."[49]

Even though a presumption of rape has been held to exist when a man has sex with a sleeping woman, the presumption is rebuttable. In *Brown v. State*[50] the Georgia Supreme Court noted:

> Carnal knowledge of a woman while she is asleep and unconscious of the act, and her body being penetrated before she awakens, would be against her will and without her consent, and would constitute the offense of rape, unless she had given the party charged with

45. *Id.* at 312.

46. *See* Territory v. Noguchi, 38 Haw. 350 (1949) (dictum); State v. Stroud, 362 Mo. 124, 240 S.W.2d 111 (1951); State v. Welch, 191 Mo. 179, 89 S.W. 945 (1905); State v. Shroyer, 104 Mo. 441, 16 S.W. 286 (1891) (dictum); *In re* Childers, 310 P.2d 776 (Okla. Crim. 1957); Payne v. State, 40 Tex. Crim. 202, 49 S.W. 604 (1899).

47. 105 Mass. 376 (1870).

48. *Id.* at 379. *But see* Pollard v. State, 2 Iowa 567 (1856) (holding that no such presumption existed). In *Pollard*, defendant was accused of engaging in sexual intercourse with his twelve-year old sister-in-law while she was asleep. The court reversed defendant's conviction, stating that

> [t]he fact of the girl being asleep, if believed to be a fact, is a circumstance, it is true, but one of very little or no moment, unless there were some manifestations of dissent, when she awoke. It is just as consistent with willingness, as with unwillingness, and takes its character from the subsequent events.

Id. at 570. The *Pollard* case, however, turned on the fact that the victim had offered no physical resistance. Because most jurisdictions have, by and large, dispensed with the requirement of physical resistance to show lack of consent, *Pollard* is somewhat of an anachronism. *See infra* note 103 and accompanying text.

49. *In re* Childers, 310 P.2d 776, 778 (Okla. Crim. 1957); *see also* State v. Welch, 191 Mo. 179, 186, 89 S.W. 945, 947 (1905) ("if the prosecutrix in the case at bar was asleep at the time . . . she was . . . incapable of giving assent"); State v. Shroyer, 104 Mo. 441, 446 (1891) (in dictum, stating there could be "no consent while the intended victim slept"). Contrary to the language in *Childers*, however, a sleeping person arguably is *not* unconscious for the purposes of a rape charge. *See infra* text accompanying notes 149-51; *cf.* Rahke v. State, 168 Ind. 615, 619, 81 N.E. 584, 585 (1907) (unlawful carnal knowledge committed upon woman "mentally unconscious from drink or sleep . . . is rape").

50. 138 Ga. 814, 76 S.E. 379 (1912).

the rape some reason to believe that she consented to the act.[51]

Thus, if a man and his wife had established a habit of this sort of sexual practice, or if a man began an act of sexual intercourse with a sleeping woman who then awakened and welcomed his advances, consent might be shown.[52]

A cursory examination of the case law in other jurisdictions seems at first glance to indicate that the element of force, the counterpart to lack of consent, is not required when the victim is asleep. The Missouri Supreme Court, for example, indicated that sexual intercourse with a sleeping woman is automatically presumed to be rape because the act is without her consent.[53] A closer analysis of this type of case, however, reveals that force was indeed present. In the case of a sleeping victim, courts outside North Carolina have held that the sexual act itself becomes the force used to effectuate the crime of rape.[54] Thus, a different standard of force exists when the victim is asleep, a possibility the *Moorman* court did not address. In *State v. Dighera*[55] the Missouri Court of Appeals commented that force and lack of consent are contemporaneous when the victim is so disabled:

> [S]exual intercourse upon a female induced into intoxication was rape. . . . It was also rape . . . for a male to impose sexual intercourse upon a female who was then asleep . . . or too weak of intellect to know the consequence of the act. . . . The rationale . . . was that the disability, in each case, vitiated capacity for consent, so that the mere physical entry attendant to penetration of the female organ was force sufficient to constitute rape. That rationale treats force and consent as correlatives. If there is force, there is no consent. If there is consent, there is no force.[56]

In the case of a sleeping person, force and lack of consent are also correlatives by analogy: if there is no consent, there is force by implication.[57]

Courts have accepted with unanimity the view that the act of sexual intercourse constitutes sufficient force to support a charge of rape when the victim is

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51. *Id. see also* Pollard v. State, 2 Iowa 567, 568 (1856) (consent or lack thereof to be determined from subsequent events).

52. In Pollard v. State, 2 Iowa 567 (1856), the court implied that if "[defendant] was in the act of sexual intercourse with [prosecutrix]; that she was awakened by the pleasure of sexual enjoyment, and suffered no pain," nor offered further resistance, that adultery or seduction would be more appropriate than a charge of rape. *Id.* at 568, 570.

53. *See* State v. Stroud, 362 Mo. 124, 127, 240 S.W.2d 111, 112 (1951) ("Carnal connection with a woman asleep is rape, because the act is without her consent."); State v. Welch, 191 Mo. 179, 187, 89 S.W. 945, 947 (1905) ("The general, if not universal, rule is that, if a man have connection with a woman while she is asleep, he is guilty of rape, because the act is without her consent."); Perkins, *Non-Homicide Offenses Against the Person*, 26 B.U.L. REV. 119, 177 (1946); Richardson, *Sexual Offenses Under the Proposed Missouri Criminal Code*, 38 MO. L. REV. 371, 389 (1973); Comment, *Consent in the Criminal Law*, 8 HARV. L. REV. 317, 321 (1895).

54. *See* cases cited *infra* note 58.

55. 617 S.W.2d 524 (Mo. Ct. App. 1981).

56. *Id.* at 533 n.8.

57. One commentator has advocated the position that when there is no consent, there is force, presumably regardless of the woman's mental faculties at the time of the sexual act. *See* Estrich, *Rape*, 95 YALE L.J. 1087, 1111 (1986); *cf. infra* notes 97-99 and accompanying text (discussing relationship between force and consent when victim is awake).

asleep.[58] In *Rahke v. State*[59] the Indiana Supreme Court noted in dictum that

> [f]orce is an essential element of the crime of rape. It is held that the element of force need not be actual, but may be constructive or implied. If the woman is mentally unconscious from drink or sleep . . . so that the act of unlawful carnal knowledge on the part of the man was committed without her conscious and voluntary permission, the idea of force is necessarily involved in the wrongful act itself. The act of penetration and such carnal intercourse is rape.[60]

The force in such cases is not constructive,[61] because the victim never "submits," nor is it actual force in the sense of physical violence that overcomes the victim's resistance, for the very same reason. It is, however, actual physical force in its most rudimentary sense: the sexual act itself. In North Carolina the court of appeals previously held in *State v. Aiken*[62] that the force sufficient to accomplish the act of intercourse constitutes sufficient force to support a conviction for rape, when the victim of the rape is physically helpless.[63] It did not comment on the applicability of such a rule when the victim was merely asleep, although in *State v. Raines*[64] the same court declined to expand the "physical force" doctrine[65] to include the sexual act itself in situations in which the victim was not physically helpless.[66]

Moorman was a case of first impression in North Carolina. Prior to *Moorman*, no other rape case had considered whether an act of sexual intercourse with a sleeping woman supplied the requisite elements of force and lack of consent for a rape conviction. These two elements are firmly entrenched in North Carolina common and statutory law. Older cases traditionally defined rape as "the carnal knowledge of a female, forcibly and against her will,"[67] a definition

58. *See, e.g.*, Territory v. Noguchi, 38 Haw. 350, 353 (1949) (no other force required to constitute rape than that necessary to effect penetration); Commonwealth v. Burke, 105 Mass. 376, 380-81 (1870) ("such force as was necessary to accomplish the [sexual intercourse] was rape"); State v. Welch, 191 Mo. 179, 188, 89 S.W. 945, 947 (1905) (quoting *Burke*, 105 Mass. at 380-81); *In re* Childers, 310 P.2d 776, 777 (Okla. Crim. 1957) (force used may be "only such as is necessary to the mere act of copulation"); Payne v. State, 40 Tex. Crim. 202, 203-04, 49 S.W. 604, 605 (1899) ("force used is only such force as may be used in the act of copulation").

59. 168 Ind. 615, 81 N.E. 584 (1907).

60. *Id.* at 619, 81 N.E. at 585.

61. For a discussion of constructive force, see *infra* text accompanying notes 76-80.

62. 73 N.C. App. 487, 326 S.E.2d 919 (1985). For a discussion of *Aiken*, see *infra* text accompanying notes 117-28.

63. *Aiken*, 73 N.C. App. at 499, 326 S.E.2d at 926; *see also* State v. Wortham, 80 N.C. App. 54, 58, 341 S.E.2d 76, 79 (1986) (in dictum, noting that "[f]orce sufficient to accomplish the act of intercourse can constitute sufficient force to support a [rape] conviction"), *rev'd in part*, 318 N.C. 669, 351 S.E.2d 294 (1987).

64. 72 N.C. App. 300, 324 S.E.2d 279 (1985). For a discussion of *Raines*, see *infra* text accompanying notes 129-43.

65. Physical force in the context of rape is the same as actual force: the use of physical means to achieve the sexual intercourse. Constructive force may also serve as force sufficient to support a charge of rape. *See infra* text accompanying notes 76-80.

66. *Raines*, 72 N.C. App. at 303, 324 S.E.2d at 281.

67. State v. Johnston, 76 N.C. 209, 210 (1877); State v. Jim, 12 N.C. 142, 143 (1826); *see also* State v. Dick, 6 N.C. 388, 388 (1818) (defendant "violently and against [prosecutrix'] will, feloniously did ravish and carnally know [her] . . ."). At common law rape was regarded as a felony, but it was later changed to a misdemeanor under the statute of Westminster 1. *Dick*, 6 N.C. at 388. The statute of Westminster 2, however, reconverted the offense to a felony. *Id.*

that has endured.[68] Prior to its modern codification, the rape statute also included these two prerequisites.[69]

The current statutes divide the crime into two separate offenses.[70] First degree rape differs from second degree rape in that it involves either a victim under the age of thirteen years, the use of a deadly weapon, aiding or abetting defendant in the commission of the crime, or infliction of serious bodily injury.[71] Alternatively,

> [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 defective, mentally incapacitated, or physically helpless, and the person performing the act knows or should reasonably know the other person is mentally defective, mentally incapacitated, or physically helpless.[72]

The phrase "by force and against the will" in North Carolina's current rape statutes[73] means what it did at common law: "that the sexual act of vaginal intercourse be forcible and without the consent of the woman."[74] Under the second degree rape statute, unless the victim is mentally defective, mentally in-

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68. *E.g.*, State v. Pearce, 296 N.C. 281, 293, 250 S.E.2d 640, 649 (1979); State v. Yancey, 291 N.C. 656, 662, 231 S.E.2d 637, 641 (1977); State v. Armstrong, 287 N.C. 60, 64, 212 S.E.2d 894, 896 (1975), *vacated in part*, 428 U.S. 902 (1976); State v. Hines, 286 N.C. 377, 380, 211 S.E.2d 201, 203 (1975); State v. Cross, 284 N.C. 174, 176, 200 S.E.2d 27, 29 (1973); State v. Arnold, 284 N.C. 41, 50, 199 S.E.2d 423, 429 (1973); State v. Flippin, 280 N.C. 682, 684, 186 S.E.2d 917, 919 (1972); State v. Primes, 275 N.C. 61, 67, 165 S.E.2d 225, 229 (1969); State v. Sneeden, 274 N.C. 498, 501, 164 S.E.2d 190, 193 (1968); State v. Crawford, 260 N.C. 548, 555, 133 S.E.2d 232, 237 (1963); State v. Primus, 226 N.C. 671, 673, 40 S.E.2d 113, 114 (1946); State v. Williams, 51 N.C. App. 397, 399, 276 S.E.2d 715, 717, *disc. rev. denied*, 303 N.C. 319, 281 S.E.2d 658 (1981); State v. Young, 16 N.C. App. 101, 106, 191 S.E.2d 369, 373 (1972).

69. Section 14-21, the precursor of sections 14-27 and -28 of the North Carolina General Statutes, read: "Every person who is convicted of ravishing and carnally knowing any female of the age of twelve years or more by force and against her will, or who is convicted of unlawfully and carnally knowing and abusing any female under the age of twelve years, shall suffer death." N.C. GEN. STAT. § 14-21 (1943). In 1949 the statute was amended to include the proviso that the jury could recommend a sentence of life imprisonment rather than the death penalty. Act of Mar. 11, 1949, ch. 299, 1949 N.C. Sess. Laws 262 (repealed by Act of May 29, 1979, ch. 683, 1979 N.C. Sess. Laws 729). Today, the crime is no longer punishable by death. First degree rape is a Class B felony punishable by life imprisonment, while second degree rape, a Class D felony, carries a maximum sentence of 40 years. N.C. GEN. STAT. §§ 14-1.1(a)(2), (4), 14-27.2(b), -27.3(b) (1986).

70. In 1973 the general assembly provided for a division between first degree rape and second degree rape. *See* Act of Apr. 8, 1974, ch. 1201, 1973 N.C. Sess. Laws 323 (repealed and recodified as amended at N.C. GEN. STAT. §§ 14-27.2, .3 (1986)).

71. N.C GEN. STAT. § 14-27.2 (1986). *See* State v. Corbett, 309 N.C. 382, 307 S.E.2d 139 (1983); State v. Barnette, 304 N.C. 447, 284 S.E.2d 298 (1981). Neither force nor lack of consent are essential elements for the rape of a female under the age of 13 (formerly 12). *See, e.g.*, State v. Cobb, 295 N.C. 1, 243 S.E.2d 759 (1978) (force not required); State v. Cox, 280 N.C. 689, 187 S.E.2d 1 (1972) (lack of consent not required).

72. N.C. GEN. STAT. § 14-27.3(a) (1986). In 1979 the general assembly rewrote the rape and sexual offense statutes to include a provision for mentally defective, mentally incapacitated, and physically helpless victims. *See* Act of May 29, 1979, ch. 682, 1979 N.C. Sess. Laws 725 (codified at N.C. GEN. STAT. §§ 14-27.2, -27.3 (1986)). For definitions of these types of persons, see *infra* notes 106-07, and text accompanying note 112.

73. N.C. GEN. STAT. §§ 14-27.2, -27.3 (1986). A conviction for first degree sexual offense under § 14-27.4 or for second degree sexual offense under § 14-27.5 employs the same "by force and against the will" language appearing in the rape statutes.

74. State v. Locklear, 304 N.C. 534, 539, 284 S.E.2d 500, 503 (1981); *see also* State v. Perry,

capacitated, or physically helpless during the commission of the vaginal intercourse, force and lack of consent must be shown.[75]

It is well established in the law of rape that force as an element of the offense need not be actual physical force.[76] North Carolina has long recognized that the female's submission through fear or coercion serves as constructive force sufficient to meet the "by force" requirement.[77] In 1946 the North Carolina Supreme Court noted in *State v. Johnson*[78] that "[f]ear, fright, or duress, may take the place of force" and that the defendant's "threat[s] to kill [the victim] or do her great bodily harm" provided the requisite evidence of force to carry the case to the jury.[79] Recent cases have acknowledged the continuing vitality of the constructive force doctrine.[80]

The North Carolina courts' acceptance of the constructive force doctrine does not mean, however, that the doctrine has been liberally applied. The state's rigid application of the force requirement in rape cases is illustrated most pointedly by its adoption of the "general fear" theory. Under this theory, the fear engendered by the defendant must be that which compels the victim to submit to the sexual intercourse or sexual act. A generalized fear of the defendant does not constitute sufficient constructive force.[81] The general fear theory was most recently propounded in *State v. Alston*.[82] In *Alston* defendant and the complainant, Brown, had been involved in a consensual sexual relationship occasionally marked by violence on the part of the defendant.[83] Brown testified that prior to the alleged rape, she had wanted to end the relationship but did not do so for fear of defendant's anger.[84] One day defendant accosted Brown as she was walking to school, eventually blocking her entrance to the school door. When Brown refused to answer his questions, defendant grabbed her arm and released it only upon her promise that she would walk with him.[85] According to

291 N.C. 586, 591, 231 S.E.2d 262, 265-66 (1976) (1973 Act, dividing crime of rape into two separate offenses, did not change common law definition of rape).

75. *See supra* note 33 and accompanying text.

76. *See, e.g.*, 65 AM. JUR. 2D *Rape* § 4 (1972); 75 C.J.S. *Rape* § 12 (1952); cases cited *supra* note 58.

77. *E.g.*, State v. Roberts, 293 N.C. 1, 13, 235 S.E.2d 203, 211 (1977); State v. Yancey, 291 N.C. 656, 663, 231 S.E.2d 637, 642 (1977); State v. Burns, 287 N.C. 102, 116, 214 S.E.2d 56, 65, *cert. denied*, 423 U.S. 933 (1975); State v. Armstrong, 287 N.C. 60, 64, 212 S.E.2d 894, 896 (1975), *vacated in part*, 428 U.S. 902 (1976); State v. Hines, 286 N.C. 377, 380, 211 S.E.2d 201, 203 (1975); State v. Carthens, 284 N.C. 111, 115, 199 S.E.2d 456, 458, *cert. denied*, 415 U.S. 979 (1973); State v. Thompson, 227 N.C. 19, 23, 40 S.E.2d 620, 623 (1946); State v. Primus, 226 N.C. 671, 674, 40 S.E.2d 113, 114 (1946); State v. Harvell, 45 N.C. App. 243, 248, 262 S.E.2d 850, 853, *appeal dismissed*, 300 N.C. 200, 269 S.E.2d 626 (1980).

78. 226 N.C. 671, 40 S.E.2d 113 (1946).

79. *Id.* at 674, 40 S.E.2d at 114.

80. *E.g.*, State v. Strickland, 318 N.C. 653, 654, 351 S.E.2d 281, 282 (1987); State v. Alston, 310 N.C. 399, 408, 312 S.E.2d 470, 476 (1984); State v. Hosey, 79 N.C. App. 196, 200, 339 S.E.2d 414, 416, *modified and aff'd*, 318 N.C. 330, 348 S.E.2d 805 (1986); State v. Stanley, 74 N.C. App. 178, 183, 327 S.E.2d 902, 905, *disc. rev. denied*, 314 N.C. 546, 335 S.E.2d 318 (1985).

81. State v. Alston, 310 N.C. 399, 409, 312 S.E.2d 470, 476 (1984). This approach has drawn sharp criticism. *See* Estrich, *supra* note 57, at 1107-12.

82. 310 N.C. 399, 312 S.E.2d 470 (1984).

83. *Id.* at 401, 312 S.E.2d at 471.

84. *Id.*

85. *Id.* at 401, 312 S.E.2d at 472.

Brown's testimony, defendant threatened to "fix" her face.[86] She then accompanied defendant to the house of defendant's friend.[87] Once inside the house, defendant engaged in sexual intercourse with Brown, although she told defendant he could not have sex with her and she cried throughout the encounter.[88]

The North Carolina Supreme Court held the trial court erred when it denied defendant's post-trial motion to dismiss.[89] Although the supreme court agreed with the court of appeals that the State's evidence was sufficient to show the intercourse was against Brown's will,[90] it held that

> there was no substantial evidence that threats or force by the defendant . . . were sufficiently related to sexual conduct to cause Brown to believe that she had to submit to sexual intercourse with him or suffer harm. Although Brown's general fear of the defendant may have been justified by his conduct on prior occasions, absent evidence that the defendant used force or threats to overcome the will of the victim *to resist the sexual intercourse alleged to have been rape*, such general fear was not sufficient to show that the defendant used the force required to support a conviction of rape.[91]

The court's reluctance to find constructive force in *Alston* may have been grounded in the consensual, adult sexual relationship that had existed between the parties prior to the alleged rape. Requiring that the acts of force or threats of force directly trigger submission to the sexual act presumably would act as a safeguard to protect defendants from improper allegations of rape when the parties are involved in a consensual sexual relationship.

The North Carolina Court of Appeals, however, has expanded the "general fear" theory to include nonconsensual sexual relationships. In *State v. Lester*[92] defendant was charged with the second degree rape of his fifteen-year-old daughter. She had submitted to her father on several occasions because, based on prior incidents of violence, she feared his retribution if she did not acquiesce.[93] The court of appeals found sufficient evidence to show the acts of sexual intercourse between defendant and his daughter were against her will.[94] Relying on *Alston*, however, the court noted that there was "no evidence . . . that defendant used either actual or constructive force to accomplish the acts. . . . [T]he victim's fear of defendant, however justified by his previous conduct, is insufficient to show that defendant *forcibly* raped his daughter . . . ."[95] Although the victim in *Lester* was the defendant's daughter and, unlike the victim in *Alston*,

86. *Id.* at 402, 312 S.E.2d at 472.

87. Brown later testified that she did not run away because there was "nowhere to go." *Id.*

88. *Id.* at 403, 312 S.E.2d at 472-73.

89. *Id.* at 409-10, 312 S.E.2d at 476.

90. *Id.* at 408, 312 S.E.2d at 475.

91. *Id.* at 409, 312 S.E.2d at 476.

92. 70 N.C. App. 757, 321 S.E.2d 166 (1984), *aff'd*, 313 N.C. 595, 330 S.E.2d 205 (1985).

93. Prior to the alleged rapes, defendant had beaten his wife, his girlfriend, and his son. On one occasion he had pointed a gun at his children. *Id.* at 758-59, 321 S.E.2d at 167.

94. *Id.* at 761, 321 S.E.2d at 168.

95. *Id.*

"under defendant's constant and continuing control and dominion,"[96] this distinction was not enough to persuade the court to rule differently. Read together, *Alston* and *Lester* illustrate the courts' conservative approach toward the force requirement and foreshadow the result in *Moorman*.

Alston and *Lester* also make clear that force and lack of consent are not always correlative, in the sense that an act of sexual intercourse may be against a person's will, yet, under certain circumstances, not forcible.[97] On the other hand, *Alston*'s "general fear" doctrine requires that a defendant's use of actual or constructive force "overcome the will of the victim to resist the sexual intercourse."[98] Thus, although force necessarily implies lack of consent, the reverse is not always true.[99]

Compared to the standard of force required to sustain a rape conviction, the "against the will" requirement is generally more flexible, although it does not obviate the necessity of an independent showing of force. One illustration is the courts' refusal to draw a distinction between the words "against the will" and "without consent."[100] A defendant accused of engaging in a sexual act with a woman "by force and against her will" might emphasize the woman's failure to object verbally or resist physically, and thus argue that the act, although done without her consent, was not demonstrably against her will. Such an argument is not compelling.[101] North Carolina has long acknowledged that " 'the phrases "against the will of the female" and "without her consent" mean the same thing. Any attempted distinction would be meaningless and could only confuse a jury if it were attempted.' "[102] The rationale is that submission is not synonymous with consent. In North Carolina evidence of physical resistance is not required to prove lack of consent.[103] Although consent is a complete defense to a charge

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96. *Id.* at 762, 321 S.E.2d at 169 (Phillips, J., dissenting).

97. Professor Estrich has criticized the result in *Alston* and *Lester*. Discussing the paradox in the law of rape—that sex can be without a woman's consent, yet involve no force—she noted:

> To say that there is no "force" in such a situation is to create a gulf between power and force, and to define the latter solely in schoolboy terms. . . .
>
> That the law prohibiting forced sex understands force in such narrow terms is frustrating enough for its women victims. Worse, however, is the fact that the conclusion that no force is present may emerge as a judgment not that the man did not act unreasonably, but as a judgment that the woman victim did.

Estrich, *supra* note 57, at 1112.

98. *Alston*, 310 N.C. at 409, 312 S.E.2d at 476.

99. In the case of a sleeping victim, however, the relationship between force and consent changes, so that lack of consent *does* imply force. *See supra* notes 55-57 and accompanying text.

100. Other jurisdictions, in determining whether an act of sexual intercourse with a sleeping woman can constitute forcible rape, have agreed that the phrases "without consent" and "against the will" are synonymous. *See, e.g.*, Brown v. State, 138 Ga. 814, 814, 76 S.E. 379, 379 (1912); Territory v. Noguchi, 38 Haw. 350, 353 (1949); Commonwealth v. Burke, 105 Mass. 376, 377 (1870); State v. Welch, 191 Mo. 179, 186, 89 S.W. 945, 947 (1905); Payne v. State, 40 Tex. Crim. 202, 203-04, 49 S.W. 604, 605 (1899).

101. *See* Perkins, *supra* note 53, at 177.

102. State v. Carter, 265 N.C. 626, 630, 144 S.E.2d 826, 829 (1965) (quoting Wilson v. State, 49 Del. 37, 57-58, 109 A.2d 381, 392 (1954), *cert. denied*, 348 U.S. 983 (1955)).

103. *Alston*, 310 N.C. at 408, 312 S.E.2d at 475 (citing State v. Hall, 293 N.C. 559, 563, 238 S.E.2d 473, 476 (1977)). North Carolina follows the majority rule. At least one jurisdiction, however, requires that the victim " 'resist to the utmost with the most vehement exercise of every physical means or faculty naturally within her power to prevent carnal knowledge.' " Prokop v. State,

of rape, it is void when induced by fear of bodily harm or other such violence, either through threats of violence or actual physical force.[104]

A conviction for second degree rape does not require proof of force and lack of consent when the defendant engages in sexual intercourse[105] with a mentally defective,[106] mentally incapacitated,[107] or physically helpless[108] person. Mentally defective and mentally incapacitated persons receive special protection under the statute because they may lack the requisite mental capacity to oppose the sexual intercourse or some other sexual act.[109] Accordingly, a defendant may not claim that a person consented to sex when that person was "substantially incapable of appraising the nature of his or her conduct," of resisting the sexual act, or of communicating an unwillingness to submit to such an act.[110] Force and lack of consent in this situation are presumed. As a result, the elements are seldom, if ever, disputed in these cases.[111]

A "physically helpless" person under both the rape and sex offense statutes is defined as "(i) a victim who is unconscious; or (ii) a victim who is physically unable to resist an act of vaginal intercourse or a sexual act or communicate unwillingness to submit to an act of vaginal intercourse or a sexual act."[112] The second subsection of the second degree rape statute thus protects the physically

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148 Neb. 582, 587, 28 N.W.2d 200, 203 (1947) (quoting Casio v. State, 147 Neb. 1075, 1078-79, 25 N.W.2d 897, 900 (1947)); *cf.* State v. Schmear, 28 Wis. 2d 126, 130, 135 N.W.2d 842, 846 (1965) ("utmost resistance" required to show lack of consent, but "the law does not require the useless or the impossible"). Other courts have replaced the "utmost resistance" standard with the "reasonable resistance" standard. *See generally* Estrich, *supra* note 57, at 1131 (criticizing the requirement of any form of resistance and suggesting that lack of consent alone is sufficient).

104. *E.g.*, State v. Locklear, 304 N.C. 534, 540, 284 S.E.2d 500, 503 (1981); State v. Hall, 293 N.C. 559, 563, 238 S.E.2d 473, 476 (1977); State v. Primes, 275 N.C. 61, 67, 165 S.E.2d 225, 229 (1969); State v. Carter, 265 N.C. 626, 631, 144 S.E.2d 826, 829 (1965); State v. Britt, 80 N.C. App. 147, 148, 341 S.E.2d 51, 51, *disc. rev. denied*, 317 N.C. 337, 346 S.E.2d 141 (1986); State v. Ricks, 34 N.C. App. 734, 735, 239 S.E.2d 602, 603, *cert. denied*, 294 N.C. 363, 242 S.E.2d 633 (1977). Consent is also nullified when given by a person under the age of 13. *See supra* note 71.

105. Likewise, neither force nor lack of consent are required elements of proof for a second degree sexual offense when a defendant engages in a sexual act—other than vaginal intercourse—with a mentally defective, mentally incapacitated, or physically helpless person. *See* N.C. GEN. STAT. § 14-27.5 (1986).

106. "Mentally defective" as it is used within the rape and sexual offense statutes means

> (i) a victim who suffers from mental retardation, or (ii) a victim who suffers from a mental disorder, either of which temporarily or permanently renders the victim substantially incapable of appraising the nature of his or her conduct, or of resisting the act of vaginal intercourse or a sexual act, or of communicating unwillingness to submit to the act of vaginal intercourse or a sexual act.

Id. § 14-27.1(1).

107. A "mentally incapacitated" person is defined under the statute as "a victim who due to any act committed upon the victim is rendered substantially incapable of either appraising the nature of his or her conduct, or resisting the act of vaginal intercourse or a sexual act." *Id.* § 14-27.1(2).

108. *See infra* text accompanying note 112.

109. *See supra* notes 106-07.

110. N.C. GEN. STAT. § 14-27.1 (1986).

111. *See, e.g.*, State v. Clontz, 51 N.C. App. 639, 277 S.E.2d 580 (1981), *aff'd*, 305 N.C. 116, 286 S.E.2d 793 (1982). In *Clontz* the defendant was charged with the second degree rape of a 20-year-old, mentally retarded woman who also was afflicted with cerebral palsy. *Id.* at 639, 277 S.E.2d at 580. Defendant challenged his conviction on the grounds that the trial judge had erred in refusing to order the prosecuting witness to undergo a psychiatric examination. *Id.* The court did not consider whether force or lack of consent was established.

112. N.C. GEN. STAT. § 14-27.1(3) (1986).

disabled as well as the mentally disabled.[113] The few North Carolina cases brought under the "physically helpless" portion of the statute have involved persons who were alleged to be physically unable to resist or to convey unwillingness because of physical illness,[114] congenital disease,[115] or alcoholic intoxication.[116]

In two recent decisions, the North Carolina Court of Appeals considered the issues of force and consent in rape cases in which the victim was alleged to be physically helpless. In *Aiken* defendant was convicted of two counts of second degree rape. Both he and the victim were students at Catawba College.[117] During a springtime event at which many students drank beer to the point of intoxication, the victim "passed out" and eventually had to be carried back to her tent by her friends, who then left her to go to a bonfire.[118] Evidence tended to show that shortly thereafter defendant entered the tent and had sexual intercourse twice with his unresponsive victim.[119] The victim had remained unconscious during both encounters and was not aware of defendant's conduct until her friends later informed her of what had transpired.[120] Defendant confessed to engaging in two acts of sexual intercourse with the victim, but claimed that she had consented both times.[121] The jury convicted defendant on both counts of second degree rape, and he appealed. Defendant argued the trial court erred in instructing the jury that it could find defendant guilty "if it found, among other facts, that the victim was 'drunk and, as a result, was so physically unable to resist an act of vaginal intercourse as to be physically helpless.' "[122] Defendant argued that the jury also should have considered whether he had used force against the victim, relying on the language in *State v. Johnston*[123] that " '[r]ape is the carnal knowledge of a female forcibly and against her will.' "[124]

The court of appeals held no error, implying that an independent showing of force was not required when the victim was physically helpless:

> G.S. 14-27.3 contemplates that the crime of second degree rape can occur if there is vaginal intercourse by the use of force *or* with one who

113. A physically helpless victim might also be mentally disabled. *See, e.g.*, State v. Clontz, 51 N.C. App. 639, 639, 277 S.E.2d 580, 580 (1981) (indictment charged defendant with second degree rape of "mentally defective, mentally incapacitated and physically helpless" person), *aff'd*, 305 N.C. 116, 286 S.E.2d 793 (1982).

114. *See* State v. Raines, 72 N.C. App. 300, 301, 324 S.E.2d 279, 280 (1985) (hospital patient suffering from migraine headaches, nausea, and seizures); *see infra* text accompanying notes 129-43.

115. *See* State v. Joines, 66 N.C. App. 459, 311 S.E.2d 49 (multiple sclerosis), *rev'd on other grounds*, 311 N.C. 405, 319 S.E.2d 282 (1984); State v. Clontz, 51 N.C. App. 639, 277 S.E.2d 580 (cerebral palsy), *aff'd*, 305 N.C. 116, 286 S.E.2d 793 (1982).

116. *See* State v. Aiken, 73 N.C. App. 487, 490, 326 S.E.2d 919, 921 (1985); *see infra* text accompanying notes 117-128.

117. Although defendant and the victim knew each other casually, they were not dating. *Aiken*, 73 N.C. App. at 490, 326 S.E.2d at 921.

118. *Id.*

119. *Id.*

120. *Id.*

121. *Id.* at 491, 326 S.E.2d at 922.

122. *Id.* at 498, 326 S.E.2d at 925 (quoting the trial court's instruction to the jury).

123. 76 N.C. 209 (1877).

124. *Aiken*, 73 N.C. App. at 498, 326 S.E.2d at 925 (quoting *Johnston*, 76 N.C. at 210).

> is, among other things, physically helpless. . . . [The statute] also does not require that defendant be the one who made the victim mentally incapacitated or physically helpless.[125]

At the same time, the court implied that the elements of force and lack of consent were established automatically when a person engaged in an act of sexual intercourse with a physically helpless victim.[126] The court noted that "even at common law . . . an unconscious or insensibly drunk victim could not consent to intercourse" and furthermore "[t]he physical act of vaginal intercourse with the victim while she is physically helpless is sufficient 'force' for the purpose of second degree rape under G.S. 14-27.3."[127] As in those situations involving an act of sexual intercourse with a mentally defective or mentally incapacitated individual, a presumption arises in the case of a physically helpless person that the act was accomplished by force and against the person's will.[128]

In another recent decision, the court of appeals confronted a question significant to the outcome in *Moorman*: under what circumstances does the sexual act itself constitute sufficient "force" for a charge of second degree rape? In *Raines* the court of appeals suggested that when the victim in an alleged rape is not physically helpless within the meaning of the statute, the act of sexual intercourse does not supply the necessary force to sustain a conviction.[129] The prosecuting witness in *Raines* was a patient at Memorial Mission Hospital in Asheville, North Carolina. She had been admitted to the hospital's intensive care unit with complaints of migraine headaches, extreme nausea, and seizures.[130] During the time of the alleged rape, the patient was connected to intravenous (I.V.) and heart monitoring equipment.[131] She testified that twice during the evening, defendant, a charge nurse at the hospital, put something in her I.V., causing a "burning sensation."[132] After each incident defendant placed his hand in her vagina and then tried to rape her, succeeding in the second attempt.[133]

The State's indictment charged defendant with second degree rape and second degree sexual offense, and the case was submitted to the jury on the alternative theories that he committed the offenses (1) "by force and against her will"; or (2) while she was "physically helpless." The jury acquitted defendant on the rape charge but convicted him of a second degree sexual offense "by force and against [the] will" of the victim.[134]

It is notable that the *Raines* jury found in a special verdict that the complainant was not physically helpless.[135] The complainant, a hospital patient in

125. *Id.* at 498-99, 326 S.E.2d at 926.
126. *Id.* at 499, 326 S.E.2d at 926.
127. *Id.*
128. *Id.*
129. *Raines*, 72 N.C. App. at 304-05, 324 S.E.2d at 282.
130. *Id.* at 307, 324 S.E.2d at 280.
131. *Id.*
132. *Id.*
133. *Id.*
134. *Id.* at 300, 324 S.E.2d at 280.
135. *Id.* at 305, 324 S.E.2d at 282. The *Raines* opinion did not elaborate on the jury's findings.

the intensive care unit, was conscious at the time of the incidents, even though she was extremely weakened physically and dependent on an I.V. and a heart monitor. The rape and sex offense statutes make clear, however, that a physically helpless person need not be unconscious to fall within their coverage.[136] The finding in *Raines* suggests that North Carolina courts apply a very stringent standard in determining whether a person is physically unable to resist or convey lack of consent to a sexual act.[137]

On appeal defendant contended that the State had failed to show sufficient evidence of actual or constructive force, and requested a reversal of his conviction for second degree sexual offense.[138] Because the complainant was not deemed physically helpless, a separate showing of force was required. The court of appeals agreed with defendant's argument, holding that

> *[p]hysical force*, as that phrase is generally understood in sexual offense and kindred cases, was absent in this case. And, we decline to accept the State's invitation to expand the "physical force" doctrine and bring within its ambit the conduct—the physical touching—that constitutes the "sexual act" itself in this case. . . . [W]e reject the argument set forth in the State's brief that . . . "the assailant had used the necessary force to complete the act before his victim had an opportunity to resist or even to become frightened . . . [and] should not be heard to say that because he deliberately surprised his victim and attacked her completely without warning" that he is not guilty.[139]

The court also rejected the State's constructive force[140] argument, noting that the State in its brief had avoided characterizing the case as one involving constructive force.[141] Holding that there was no evidence of any such force "which could reasonably and understandably generate fear in the prosecuting witness," nor any evidence of actual physical force,[142] the court reversed defendant's conviction.[143]

Although *Aiken* and *Raines* are peripheral to the issue in *Moorman*, the decisions reflect the legal milieu in which *Moorman* was decided. These decisions also indicate the difficulty courts have had with the force requirement in situations not falling neatly within the traditional rape pattern. They differ significantly from *Moorman*, however, in that physical helplessness was not questioned on appeal. In *Aiken* the victim was unconscious from alcohol intoxication, rendering her physically helpless under the statute.[144] On the other hand, the jury in *Raines* found that the victim, who was awake at the time

136. *See supra* text accompanying note 112.

137. *See infra* text accompanying note 175.

138. *Raines*, 72 N.C. App. at 302, 324 S.E.2d at 281.

139. *Id.* at 303, 324 S.E.2d at 281.

140. *See supra* text accompanying notes 76-80.

141. *Raines*, 72 N.C. App. at 304, 324 S.E.2d at 282.

142. *Id.* at 305, 324 S.E.2d at 283.

143. *Id.* Defendant was later tried and convicted of two violations under N.C. GEN. STAT. § 14-27.7 (1986) for engaging in sexual acts "with a person over whom his employer had custody." *See* State v. Raines, 81 N.C. App. 299, 301-03, 344 S.E.2d 138, 139 (1986). Consent is not a defense to a charge under this statute.

144. *See supra* text accompanying notes 122-25.

of the attack and apparently able to resist physically, was not physically helpless.[145] *Moorman* dealt instead with the unusual case of a sleeping victim.[146]

Normal sleep is a state between consciousness and unconsciousness. It is not the same as drugged or intoxicated sleep in which the person is so incapacitated that he or she cannot be revived, nor is it the type of unconsciousness produced by physical injury. Conversely, sleep is temporarily disabling, initially preventing a person from resisting physically or conveying a lack of consent as she might if she were fully awake. The phenomenon of sleep is unique because the sleeping person may, unlike the victim in *Aiken*, instantly awaken and regain the faculties of a fully conscious person. In this regard, the sleeping person does not automatically fall within the "physically helpless" provision of the second degree rape statute, contrary to the court of appeals' holding in *Moorman*.

In its brief before the North Carolina Supreme Court, the State has presented a persuasive argument that normal sleep does not constitute physical helplessness under the statute. It first noted that "[t]he statute never utilizes the word 'sleep.' "[147] The State next argued that as a matter of statutory interpretation a sleeping person was not intended to be included within the statute's "physically helpless" provision.[148] The language in the original bill, part of which later became codified in the second degree rape statute, defined a physically helpless victim as "(1) a victim who is unconscious; or (2) a victim who does not consent to . . . [certain acts] . . . or communicate unwillingness to . . . [certain acts]."[149] The House Judiciary Committee then replaced this language with "*physically unable* to resist . . . or communicate unwillingness," the language of the present statute.[150] From this history the State has concluded that adoption of the current language "narrows the statutory scope and removes a merely sleeping victim from this statutory provision, because sleep alone would not render a person physically unable to consent or communicate unwillingness."[151] Defendant's brief is in agreement, noting that the general assembly, if it had intended to include sleep within the statute, easily could have done so.[152]

Assuming the supreme court accepts the State's argument that a sleeping person is not physically helpless, the question of whether force and lack of consent were established in *Moorman* remains.[153] The State admitted that "[t]he

145. *See supra* text accompanying notes 135-37.

146. Normal sleep should be distinguished from the type of sleep induced by heavy alcohol or drug ingestion. In the latter situation in which the victim is unresponsive, she is unconscious and therefore physically helpless. *See* Brief for the State at 14, *Moorman* (No. 577PA86) (citing other jurisdictions in which ordinary sleep is excluded from physically helpless provision of statute).

147. *Id.* at 12.

148. *Id.*

149. *Id.* (citing Minutes of the House Judiciary III Committee, 1979 Session).

150. *Id.* (emphasis added).

151. *Id.*

152. New Brief for the Defendant at 10, *Moorman* (No. 577PA86).

153. The court of appeals' holding in *Moorman* that a sleeping person is physically helpless for the purpose of a charge under the second degree rape statute precluded consideration of the elements of force and consent, even though the court summarily held that force and lack of consent cannot be proven when the victim is asleep. *See supra* text accompanying note 30. The supreme court's examination of these issues accordingly will be *ab initio*.

actual force necessary to achieve vaginal penetration of a sleeping victim is minimal at best," but argued that the requisite amount of force need only be sufficient to overcome the resistance of the victim.[154] Thus, according to the State, defendant's act of "pushing up the victim's dress, removing her panties and physical [sic] penetrating her vagina" constituted sufficient force to overcome the sleeping victim's resistance.[155] The State has also argued on appeal that there was no consent because it was impossible for the sleeping victim to convey willingness to submit to the sexual intercourse; moreover, she tried to resist "[f]rom the instant she could comprehend her plight."[156]

Defendant, in his brief before the supreme court, has contended that neither force nor lack of consent is established when an act of sexual intercourse is performed on a sleeping person. Constructive force, according to defendant, is not present when one engages in sexual intercourse with a sleeping person because the person, by virtue of sleep, cannot submit to her attacker out of fear engendered by the attacker's threats.[157] Moreover, it is unlikely that a rapist would have to threaten his victim to obtain her acquiescence, because a sleeping person offers no resistance. Actual force was not established either, defendant has argued, because an act of sexual intercourse alone is insufficient to satisfy the force requirement.[158] Rejecting the State's theory that Moorman's act of lifting up Noble's dress, removing her panties, and achieving penile penetration met the force requirement, defendant claims that

> [f]ar from constituting force, these actions are necessary prerequisites to consensual sexual activity. Penetration is the act of intercourse itself, and not an act of violence. To hold that such action constitutes "force" would be to hold that all sexual intercourse is violent and would eradicate a fundamental element of the rape statute.[159]

Defendant has also challenged the State's presumption that an act of sexual intercourse with a sleeping woman is without her consent. Relying on cases in

154. Brief for the State at 20, *Moorman* (No. 577PA86).

155. *Id.* The State has made the additional argument that defendant's act of pushing the prosecutrix back down on the bed *after* penetration met the force requirement. The State has analogized its case to State v. Blackstock, 314 N.C. 232, 333 S.E.2d 245 (1985), a first degree rape case resulting in serious bodily injury, in which defendant argued that injury after the fact of nonconsensual intercourse could not be said to overcome the victim's resistance. The supreme court held that postcoitus injury was nonetheless part of a " 'series of incidents forming one continuous transaction between the rape or sexual offense and the infliction [on the victim] of the serious personal injury.' " Brief for the State at 21, *Moorman* (No. 577PA86) (quoting *Blackstock*, 314 N.C. at 242, 333 S.E.2d at 252). According to the State, the timing of the push under the "continuous transaction" test thus becomes irrelevant. The analogy, however, is misplaced. *Blackstock* was a first degree rape case, and, as defendant in *Moorman* correctly noted, "the first degree rape statute was amended specifically to delete the requirement that the serious bodily injury be inflicted in the effort to achieve intercourse. No such amendment has been made to the second degree rape statute." New Brief for the Defendant at 13-14, *Moorman* (No. 577PA86). The requirement that the force be used to "*achieve* intercourse, not to prevent its interruption" therefore remains under the second degree rape statute. *Id.* at 12 (emphasis in original) (citing State v. Hall, 293 N.C. 559, 238 S.E.2d 473 (1977); State v. Smith, 45 N.C. App. 501, 263 S.E.2d 371 (1980)); *but see infra* text accompanying notes 171-72 (arguing that force need not be used to achieve intercourse when victim is asleep).

156. Brief for the State at 21, *Moorman* (No. 577PA86).

157. New Brief for the Defendant at 10-11, *Moorman* (No. 577PA86).

158. *Id.* at 11-12.

159. *Id.* at 12.

which the alleged victims were fully awake, defendant maintained that the victim's "lack of consent must be communicated to the defendant" and that "the lack of consent issue will not be determined by the unannounced subjective feelings of the prosecutrix."[160] Although Noble was asleep when initiation of the sexual intercourse occurred, defendant relied on her failure to verbally express her lack of consent either before or during the intercourse.[161] Also, defendant stressed that Noble's subsequent attempt to sit up during the act was not sufficient to convey lack of consent, because she was required to convey such unwillingness prior to the act. Thus, if she acted "in such a way that it [appeared] that she [did] not disapprove of intercourse," her lack of consent after the fact of penetration would have been unavailing.[162]

Curiously, neither the State nor defendant, in either the appellate opinion or argument prepared for the supreme court, acknowledged the wealth of cases in other courts holding that sexual intercourse with a sleeping victim is presumed to be forcible and without her consent.[163] In *Moorman* the court of appeals held that because the victim "was asleep and unable to communicate an unwillingness to submit to the act," she could not show the act was against her will.[164] Such logic contradicts time-honored precedent in other jurisdictions and, if taken to its extreme, leads to the conclusion that a man is entitled to have sexual intercourse with a sleeping woman because she did not say he could not.[165]

Defendant, moreover, cannot reasonably claim that he believed the victim consented. As other courts have indicated, a presumption exists in the case of a sleeping woman that an act of sexual intercourse is against her will.[166] The evidence in *Moorman* does not rebut this presumption: defendant and the victim were barely acquainted and were not involved in the type of relationship which might entitle him to believe that having sex with her while she was asleep was acceptable. Moreover, defendant demonstrated that he knew the act was against the victim's will when, in his effort to continue the ongoing sexual intercourse, he forced her back down on the bed when she awoke and tried to resist.[167] *Moorman* was clearly not a situation in which the victim gave defendant tacit license to engage in sexual intercourse with her.

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160. *Id.* at 14 (citing State v. Ricks, 34 N.C. App. 734, 239 S.E.2d 602 (1977), *cert. denied*, 294 N.C. 363, 242 S.E.2d 633 (1978)).

161. *Id.* at 15.

162. *Id.* at 14. Defendant argued that because Noble dreamed she was having sexual intercourse and thus "appeared to be cooperating," he was entitled to believe she consented to the intercourse. *Id.* at 15.

163. *See* cases cited *supra* note 58.

164. *Moorman*, 82 N.C. App. at 598, 347 S.E.2d at 859.

165. Professor Estrich, although not addressing the issue of the rape of a sleeping woman, noted that much of the confusion over consent in rape cases stems from the male's traditional dominance over the female: "Rape is unique . . . in the definition which has been accorded to consent. That definition makes all too plain that the purpose of the consent rule is not to protect female autonomy and freedom of choice, but to assure men the broadest sexual access to women." Estrich, *supra* note 57, at 1122.

166. *See* cases cited *supra* note 46.

167. *Moorman*, 82 N.C. App. at 597, 347 S.E.2d at 859.

The relationship between force and consent changes substantially when the victim is asleep. In *Alston* and *Lester*, the two cases involving the "general fear" theory,[168] the North Carolina Supreme Court and Court of Appeals noted that lack of consent alone, without a showing of force directly used to overcome the will of the victim, could not sustain a charge of rape.[169] What both courts failed to realize, however, is that sleep "vitiate[s] capacity for consent, so that the mere physical entry attendant to penetration of the female organ [is] force sufficient to constitute rape."[170] The *Moorman* court's requirement that the force used to constitute rape be "actual or constructive force used to achieve or accomplish the sexual intercourse"[171] is simply inapplicable in a situation in which a victim is asleep and not in a position to resist or to convey unwillingness to submit to the act. To hold otherwise would rob women of their autonomy in sexual relations and frustrate the supposed goal of rape laws: to protect the "woman's discretion by proscribing coitus contrary to her wishes."[172]

The *Raines* case, although somewhat contrary to the argument supporting the existence of force/lack of consent in these cases, is readily distinguishable from *Moorman* in the level of resistance necessary to meet the "against the will" requirement. In *Raines* the complainant was awake at the time of the incident and allegedly able to offer some measure of resistance, however weak. Accordingly, the court required some showing of force as proof that she did not tacitly allow the rape to occur.[173] In *Moorman* the victim, not being awake at the time of initial penetration, did not have a similar opportunity to oppose the sexual intercourse. Defendant, moreover, could not reasonably assume that his victim acquiesced while she slept.[174] For these reasons, the traditional standard of force should be relaxed and the sexual act itself should assume all the force that the law requires to sustain a rape conviction.

Including sleeping persons under the rubric of "physically helpless" presents internal problems of classification. The intoxicated victim, the comatose patient, and the paralytic obviously meet the requirements of physically helpless persons. But what of the sleeper whose consciousness fluctuates back and forth from light slumber to the brink of wakefulness? Might not courts,

168. *See supra* note 81 and accompanying text.

169. *See supra* notes 97-99 and accompanying text.

170. State v. Dighera, 617 S.W.2d 524, 533 n.8 (Mo. Ct. App. 1981).

171. *Moorman*, 82 N.C App. at 598, 347 S.E.2d at 859.

172. Note, *Forcible and Statutory Rape: An Exploration of the Operation and Objectives of the Consent Standard*, 62 YALE L.J. 55, 71 (1952). In situations in which the victim is awake, however, "the law does *not* protect the woman from 'coitus contrary to her wishes' when there is no 'force.'" Estrich, *supra* note 57, at 1122 (emphasis added); *see supra* text accompanying note 91.

173. Some jurisdictions have held that force is present in the sexual act itself when the act is accomplished through surprise. In State v. Atkins, 292 S.W. 422, 426 (Mo. 1926), defendant, an eye specialist, had engaged in sexual intercourse with his patient, who believed he was fitting her with bifocals. The Missouri Supreme Court held that

> [it is] rape for a man to have improper sexual connection with a woman by accomplishing penetration through surprise, when she is awake, but utterly unaware of his intention in that regard. . . . [T]he force merely incident to penetration should be deemed sufficient force within the meaning of [the] rape statute.

Id.

174. *See supra* text accompanying notes 166-67.

strictly construing the definition of physically helpless persons, hold that this person is not "physically unable to resist an act of vaginal intercourse" or communicate an unwillingness to submit to such an act?[175]

The undefinable nature of sleep makes it an unruly candidate for inclusion under the "physically helpless" provision of the second degree rape statute. Therefore, the North Carolina General Assembly should consider creating a separate category for sleeping victims as another exception to the force/consent requirement, along with mentally defective, mentally incapacitated, and physically helpless victims. Until the general assembly acts, courts should accept the allegation "by force and against the will" as a proper part of the rape indictment. To hold that force and lack of consent cannot by their nature be proved when the victim is asleep frustrates the purpose of the current rape statutes and perpetuates the notion that women are sexual chattels.

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175. N.C. GEN. STAT. § 14-27.1(3) (1986). For pertinent statutory language, see *supra* text accompanying note 112.

ADDENDUM

The North Carolina Supreme Court reversed the court of appeals decision in *Moorman* on July 28, 1987. *State v. Moorman*, 358 S.E.2d 502 (1987). The supreme court held, contrary to the appellate court decision arresting judgment on defendant's second-degree rape conviction, that there was no fatal variance between the State's indictment alleging that defendant carnally knew the victim "by force and against her will," and evidence that defendant engaged in sexual intercourse with the victim while she was asleep. Although the State might have elected to proceed under the "physically helpless" provision of the second-degree rape statute, the court noted, force and lack of consent also were implied when defendant initiated sexual intercourse with a sleeping victim, thus supporting an indictment under the "force and lack of consent" provision of the statute.

The court, however, has granted defendant a new trial on the ground that defendant was denied his sixth amendment right to effective assistance of counsel. Justice Meyer concurred as to the reversal of the court of appeals decision, but dissented as to the court's remand, noting that he would have affirmed the trial court's conclusion that the trial was unaffected by any deficiencies on the part of the defendant's counsel.