No. _____

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

JONATHAN TERRY,

Appellant.

PETITION FOR REVIEW

RESPONDENT'S BRIEF

Respectfully submitted:

by: Teresa Chen, WSBA 31762
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TABLE OF CONTENTS

TABLE OF AUTHORITIES

State Cases

Page No.

United States Supreme Court Cases

Statutes

Page No.

Secondary Authority

I. IDENTITY OF RESPONDENT

The State of Washington, represented by the Walla Walla County Prosecutor, is the Respondent herein.

II. RELIEF REQUESTED

Respondent asserts no error occurred in the trial and conviction of the Appellant.

III. ISSUES

Is there sufficient evidence that the victim did not consent to sex where she said, "don't touch me. I don't want to have sex with you"?

IV. STATEMENT OF THE CASE

The Appellant/Respondent Jonathan Terry has been convicted of Rape in the Third Degree, Attempted Rape in the Third Degree, and two counts of Assault in the Fourth Degree with Sexual Motivation. CP 21-23, 44-60, 66-83. At trial, several victims testified to the indecent liberties Mr. Terry took with them. CP 21-23, 87-89. On appeal, he has only challenged the sufficiency of the evidence for count II, the third degree rape regarding J.M..

In 2012, there was a summer sleepover with 10-12 boys. RP 21,

23. C.Z. had just finished 8th grade and was 14. RP 23-24. Although they were on the basketball team together, Mr. Terry and C.Z. had never spent time alone. RP 25-26. Prior to retiring, Mr. Terry inquired whether C.Z. was a light sleeper. RP 22-23. C.Z. woke to find Mr. Terry fondling C.Z.'s penis inside his pants. RP 21-25. This count would be dismissed as being outside the statute of limitations. RP 88-89.

S.C. was assaulted in the same way as he was sleeping at a different group sleepover in the summer of 2014. RP 44-47, 58. Before the assault, S.C. considered Mr. Terry to be a good friend. RP 47, 52-53. S.C. reached out to talk to Mr. Terry about it afterward, planning to forgive him, but Mr. Terry acted as if nothing had happened. RP 52.

Also in the summer of 2014, Mr. Terry's brother had a class party sleepover which M.A. attended. RP 27-29, 32-33, 199. M.A. was fifteen. RP 33-36, 199. M.A. also woke to find his clothes displaced and Mr. Terry fondling his penis. RP 29-30. M.A. rolled over and covered his crotch. RP 41. Mr. Terry then digitally penetrated M.A.'s anus. RP 31, 41-42. M.A. had considered Mr. Terry to be a friend. RP 27, 31.

M.A. informed the detective that there was a female victim J.M., whom the police then interviewed. RP 13.

In the summer of 2013, two high school volleyball teammates N.R.

and J.M. were hanging out at N.R.'s house while her father was working the night shift. RP 61-62, 92, 117, 170. N.R.'s boyfriend D.R. was also there. RP 61, 116-17. And Mr. Terry, the assistant coach for the team and a custodian that summer, brought alcohol. RP 61, 108, 116, 170-71, 179.

Mr. Terry was eager to hang out. RP 117, 170. But J.M. was not eager for him to join the party. RP 170. She knew he was attracted to her. RP 124, 177. She, on the other hand, had a boyfriend and had no romantic interest in Mr. Terry. RP 65, 77, 117, 124.

J.M. was small of stature and a novice[1] to drinking. RP 78, 87-88, 101, 109-10, 142-43, 170-71, 219. She thought the blue and green alcohols that Mr. Terry brought tasted like juice. RP 170-71, 179. She drank a lot that night on an empty stomach, at one point, drinking eight shots at once. RP 62, 76-78.

She became loud and "hyper" with intoxication, recording multiple video messages which she sent to her boyfriend and to N.R.. RP 64, 71, 94. J.M. does not recall making or sending videos or the content of them. RP 81. N.R., who is a taller girl, had seven shots of alcohol that night. RP 100, 108. Her memories seem to rely in part on her review of those

[1] J.M. testified that she believed this may have been the first time she drank liquor. RP 78. N.R. testified that she believed J.M. may have had her first alcoholic beverage only about a month earlier at weekend parties. RP 100-01.

videos. RP 71, 94, 96, 113-14.

At one point, N.R. and D.R. went upstairs together. RP 64, 96. J.M. recorded herself sitting at the bottom of the stairs, begging N.R. not to leave her. RP 96, 121. N.R. heard J.M. say, "don't touch me. I don't want to have sex with you." RP 64, 71 (also captured on video). Hearing moans, N.R. got up to investigate and saw Mr. Terry performing oral sex on a disrobed J.M. on the floor. RP 64, 97-98.

Later, when N.R. talked to J.M. about what had taken place, J.M. did not recall the assault or how she got home. RP 72, 77, 171-72, 180. N.R. claimed both she and D.R. had tried to stop Mr. Terry. RP 177-78. N.R. had drunkenly called out, "No, Jon, no." RP 177. And D.R. had said, "Stop, she has a boyfriend." RP 178.

J.M. had little memory of the events of that night, other than drinking alcohol and listening to music. RP 77, 171-72. She did not recall consenting to sex. RP 78, 171-72. But she knew she had not wanted to have sexual contact with anybody that night. RP 174. And Mr. Terry in particular made her uncomfortable. RP 177. "I don't know how to make it not sound mean." RP 177. She knew he liked her, which she felt was weird, and so she never really talked to him and was never really his friend. RP 177. J.M. learned that people believed Mr. Terry to be gay, so

when N.R. told her what had happened, J.M. found the whole event just "weird." RP 171, 176. Afterward J.M. was upset with Mr. Terry. RP 82. They are not friends. RP 82.

In the fall of 2014, Mr. Terry was suspended from school for sexual misconduct. RP 3-4. He came with his mother to the police department. RP 3-4. When the detective disclosed that a boy had alleged sexual contact at a sleepover, Mr. Terry volunteered the names of multiple possible accusers. RP 6. He admitted fondling the penises of M.A., S.C., and C.Z. while they were asleep at sleepovers. RP 7-8, 12-13, 21. Mr. Terry confessed to sexually assaulting a fourth male victim on two occasions, but police were unable to identify him. RP 12-13. Mr. Terry acknowledged that all sexual contact had been without the victims' consent. RP 9, 204.

When the detective inquired about J.M., Mr. Terry stated that he had performed oral sex on her when she was intoxicated. RP 8, 163.

At trial, Mr. Terry testified that, as everyone was "getting ready to be done with the party" and things were "wrapping up," J.M. took off her pants and instructed him to perform oral sex on her. RP 120-23. He claimed he did not believe the alcohol affected J.M.'s choices or abilities, although she was significantly smaller than him. RP 124-25, 142. Mr.

Terry testified he drank between 8-10 shots through the course of the night and only caught a buzz. RP 118-19.

At trial, for the first time, Mr. Terry claimed the boys must have been awake when he touched them, because they became erect. RP 157-58. He claimed, he "did not think he could do all that and not have him be awake." RP 152.

V. ARGUMENT

A. THE PETITION DOES NOT PRESENT ANY ISSUE DESERVING OF DISCRETIONARY REVIEW.

The Defendant/Petitioner claims the Court of Appeals applied an incorrect standard of review. Petition for Review at 1, citing RAP 13.4(b). In fact, the Court of Appeals applied the correct standard of review. These standards are well established in both state and federal law.

"A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom." *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992) (emphasis added). "[A]ll reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant." *Id.* (emphasis added). After viewing the evidence in the light most favorable to the State, interpreting all inferences in favor of the State and most

strongly against the Defendant, the Court must determine whether any rational trier of fact could have found the essential elements beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979); *State v. Salinas*, 119 Wn.2d at 201.

The Defendant complains that the court of appeals stated that it could not find the facts differently from the trial court. Petition for Review at 1. This is the correct standard. In a juvenile trial, a bench trial, the trial court is the finder of fact. A reviewing court defers to the trier of fact on issues of conflicting testimony, witness credibility, and persuasiveness of the evidence. *State v. Thomas,* 150 Wn.2d 821, 874–75, 83 P.3d 970 (2004). *See also Jackson v. Virginia*, 443 U.S. at 319 ("Once a defendant has been found guilty of the crime charged, the factfinder's role as weigher of the evidence is preserved through a legal conclusion that upon judicial review *all of the evidence* is to be considered in the light most favorable to the prosecution."); *Wright v. Florida*, 474 U.S. 1094, 1096, 106 S.Ct. 870, 88 L.Ed.2d 909 (1986) (questions of witness credibility are the special province of the factfinder).

Insofar as Mr. Terry testified that J.M. changed her mind and consented to sex, the trial judge disbelieved him. Unpub. Op. at 7. There are many good reasons in the record to find Mr. Terry not a credible

witness.

There was his pattern of taking advantage of vulnerable people. He assaulted S.C., C.Z., and M.A. in group settings without requesting consent and when they were vulnerable – asleep in close quarters. He assaulted J.M. after she had consumed an enormous amount of alcohol in a short period of time. She was sitting on the floor at the foot of the stairs, begging N.R. not to leave her behind with the Defendant. RP 96.

There was his refusal to apologize to any victim or express any remorse. He does not appear to have ever addressed the encounters after the fact, whether to apologize or to attempt to kindle a sexual or romantic relationship with them. He acted as if nothing had happened. He was an opportunist with a preference for the unconscious or otherwise incapacitated.

It was not credible that J.M. would have requested sex from him when she was profoundly uncomfortable around him and consistently expressed the lack of any attraction to him. He lacked credibility by refusing to acknowledge the effect of an enormous amount of alcohol on himself or even J.M. who was significantly smaller. RP 142.

Initially the Defendant acknowledged that none of his victims consented. His subsequent, self-serving, conflicting testimony that a

physical response in a sleeping person was equivalent to acquiescence and consent to sexual contact is a harmful myth and not convincing.

The trial judge's credibility decision is unreviewable. The Court of Appeals made no error in applying this legal standard.

B. SUFFICIENT EVIDENCE SUPPORTS THE CONVICTION OF RAPE WHERE THE EVIDENCE OF LACK OF CONSENT WAS THE VICTIM'S CONTEMPORANEOUS RECORDED STATEMENT: "DON'T TOUCH ME. I DON'T WANT TO HAVE SEX WITH YOU."

For a conviction of rape in the third degree, the State must prove that the victim did not consent (by actual and contemporaneous words or conduct indicating freely given agreement). RCW 9A.44.010 (7); RCW 9A.44.060. It is the sufficiency of the evidence for this element which Mr. Terry contests.

A sexual assault victim can express lack of consent at any time. "Textually, RCW 9A.44.060 ties only 'consent,' not 'lack of consent,' to the temporally-qualified definition in RCW 9A.44.010(7)." *State v. Mares*, 190 Wn. App. 343, 354, 361 P.3d 158, 163 (2015).

> ... it is clear that the substance of the expression can be more important than its timing. Some expressions of lack of consent, if not recanted, are timeless: "Don't ever touch me again;" "If you lay a hand on me, I'm calling the cops;" "I wouldn't have sex with you if you were the last person on

> Earth." And a statement three weeks ago that "We are cousins; what you are doing is wrong; it is not okay" says more about a person's attitude than does a statement a few moments ago that "I don't know; I'm tired."

State v. Mares, 190 Wn. App. at 354–55.

The standard requires that on review we accept that J.M. was credible, which is a finding implicit in the verdict. In J.M.'s recorded, sworn statement, she asserted that she had no sexual interest in Mr. Terry. RP 168, 171, 174, 177, 180. The idea of anything romantic between them she found weird. She did not even want to party with him. RP 170. She thought he was odd, and he made her uncomfortable. RP 177. She did not want a sexual encounter with him. RP 174. A victim's testimony that she did not want the defendant to touch her and she felt that he did something he should not have can be evidence supportive of her lack of consent. *State v. Bucknell*, 144 Wn. App. 524, 530, 183 P.3d 1078, 1081 (2008).

J.M. expressed her non-attraction in her conduct. At the party, she followed N.R. around and asked N.R. not to leave her alone with Mr. Terry. She also spent the party engaged in cell phone communications with her boyfriend. RP 71, 93. This conduct was a clear signal to Mr. Terry that her interest was elsewhere engaged. Responding to advances by expressing that one is in a relationship with someone else is evidence

of lack of consent to have sex. *State v. Corey*, 181 Wn. App. 272, 278, 325 P.3d 250, *review denied* 181 Wn.2d 1008, 335 P.3d 941 (2014).

The substance of her expression was unequivocal. She did not want Mr. Terry to have sex with her or to even touch her. And for emphasis, she even recorded herself saying that. RP 71. Her recording is a communication to those immediately present that her refusal is emphatic and recorded as a safeguard against any future misconduct. As she slipped deeper and deeper into intoxication and incapacitation, while she still had the ability to express herself, J.M. taped her statement as a threat should the unwanted attentions continue. She wanted Mr. Terry to know that her refusal was on the record.

After Mr. Terry began to have sex with her, her friends attempted to intervene. N.R. told Mr. Terry to stop. RP 177. And D.R. told Mr. Terry to stop. RP 177-78. They had been present during the recording of her refusal. From their reaction, we can infer that they interpreted that J.M. did not want this and that it was Mr. Terry, not J.M., who was in control and who needed to be told to stop.

J.M. had imbibed an enormous amount of alcohol very quickly, which prevented her from encoding or retaining memories of the event. But that very night "she had been saying things, like, don't touch me. I

don't want to have sex with you." RP 64. No extra inference need be drawn here. Her expression is clear. She did not consent.

The court of appeals concluded "J.M. did not consent and communicated that lack of consent to Mr. Terry." Unpub. Op. at 7.

> Where lack of consent is clearly expressed by a victim's words or conduct, any asserted "misunderstanding" by a perpetrator is unreasonable and justifies punishment. *State v. Higgins,* 168 Wash.App. 845, 854, 278 P.3d 693 (2012) ("Our focus, and certainly the jury's focus, is more properly on the victim's words and actions rather than [the perpetrator's] subjective assessment of what is being communicated.").

State v. Mares, 190 Wn. App. at 353–54. *See also State v. Bray*, 23 Wn. App. 117, 120–21, 594 P.2d 1363, 1367 (1979) (victim clearly expressed her lack of consent where she repeatedly asked to be allowed to leave, where she did not have a prior romantic relationship with her neighbor, and where the defendant was much bigger than the victim).

The Defendant's entire claim rests on a reviewing court believing his testimony. But the lower court at the bench trial did not believe him. That credibility determination cannot be reversed by a court of review that did not view the witnesses during testimony.

> There was a direct conflict in the evidence upon the principal issues, and we have held that in such cases, where the trial court might have decided either way upon the conflicting testimony, even though a greater number of

> witnesses may have testified one way than the other, the trial court, having an opportunity of viewing the witnesses and their demeanor and credibility, has a better opportunity to judge of their credibility and of the weight to be given their testimony, and, where the evidence does not preponderate against the findings of the trial court, we will not disturb its findings.

Dunagan v. Sch. Dist. No. 4 of Snohomish Cty., 118 Wash. 160, 162, 203 P. 15, 15 (1922). A court of review cannot hear tone and pauses in the testimony. It cannot see body posture and movement. It cannot catch micro-expressions leaking true emotion. It does not catch shared glances. It cannot reverse findings of credibility.

The Defendant relies upon the dissenting opinion which disregarded the constitutional mandate that a reviewing court view the evidence in the light most favorable to the State, interpreting all inferences in favor of the State and most strongly against the Defendant. The dissent believes the Defendant's testimony. Unpub. Op. at 2 (Lawrence-Berrey, J., dissenting) (crediting the Defendant's testimony "concerning J.M.'s words and conduct during the sexual contact"). The Defendant testified that J.M. actually requested sex. RP 121-22. His was the only testimony for this claim. In convicting the Defendant, the judge did not believe the Defendant's testimony that J.M. had requested sex. The reviewing court may not render a different credibility assessment.

The Defendant tries to distinguish *State v. Mares*, 190 Wn. App. 343, 361 P.3d 158, 163 (2015). The cases are not distinguishable. There the rape victim C.D. "consistently rebuffed Mares' romantic advances." Petition at 9, citing *State v. Mares*, 190 Wn. App. at 347-48. In the same way, J.M. has never expressed any interest in Mr. Terry. She avoided him both before and after the assault. She recorded her rejection of him. C.D. had been drinking. Petition at 9. J.M. had been drinking. When C.D. became aware of the assault, she resisted. Petition at 9, citing *State v. Mares*, 190 Wn. App. at 348-49. J.M. was in a state of blackout through the entire assault, but when she became aware of the assault, she resisted by cooperating with police and by testifying. Both victims expressed no desire for sexual intercourse. C.D. expressed this in the months preceding the attack. J.M. expressed her refusal to have sex that very night, mere hours or minutes before the assault.

The Defendant argues that his case is different because of his testimony. Petition at 10-11. His case is not different. Both the Defendant and Mr. Mares testified at their trials. Mr. Mares testified that C.D. never asked him to leave and had engaged in consensual intercourse on two other occasions. *State v. Mares*, 190 Wn. App. at 350. "The jury did not believe him and returned a guilty verdict." *Id.* The Defendant

Terry testified that his victim consented. His testimony was discounted as not credible. Because the factfinders found both defendants not credible, their testimony does not enter into the equation in a sufficiency claim.

The Defendant argues that he reasonably believed J.M. consented. Petition at 11. That is not what the factfinder found. Nor is it reasonable to believe that person who consistently demonstrates zero attraction to the Defendant, who repeatedly and publicly says she does not want to have sex, has changed her mind because in a drunken stupor in the midst of an assault she moans and touches the offending part of her assailant.

The Defendant relies on the dissenting opinion which distressingly believes that J.M.'s physical response to sexual contact was "uncontroverted evidence of consent." Petition at 5. This is the kind of opinion that can and should result in censure.

Canadian Justice Robin Camp resigned just this year after the Judicial Council recommended his removal for similar misconduct during a rape trial. *In re Robin Camp*, Report and Recommendation of the Inquiry Committee, Canadian Judicial Council (2016-11-29)[2]; *In re Robin Camp*, Report to the Minister of Justice, Canadian Judicial Council (2017-

[2]https://www.cjc-ccm.gc.ca/cmslib/general/Camp_Docs/2017-03-08%20Report%20to%20Minister.pdf

03-08)[3]. In that trial, after commenting that the rape victim was obligated to put up more of a struggle, the judge acquitted the defendant. Mallory Hendry, Justice Robin Camp resigns following CJC report, Canadian Lawyer (March 9, 2017).[4] He reasoned, "Young wom[e]n want to have sex, particularly if they're drunk" and "sex and pain sometimes go together ... that's not necessarily a bad thing." Report and Recommendation at 23, 52.

The CJC found Justice Camp's conduct "so manifestly and profoundly destructive of the concept of the impartiality, integrity and independence of the judicial role that public confidence is sufficiently undermined to render the Judge incapable of executing the judicial office." Report and Recommendation at 3, 101.

In our case, the majority opinion stated the obvious:

> Even if the victim did respond physically and verbally to Mr. Terry's ministrations, her physical response is not evidence that she consented to the action. Whether or not she consciously enjoyed the activity is a different question than whether she agreed to it.

Unpub. Op. at 8.

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[3] https://www.cjc-ccm.gc.ca/cmslib/general/Camp_Docs/2016-11-29%20CJC%20Camp%20Inquiry%20Committee%20Report.pdf .

[4] http://www.canadianlawyermag.com/legalfeeds/author/mallory-hendry/justice-robin-camp-resigns-following-cjc-report-7337/

The dissent discusses J.M.'s *responsive* conduct during the sexual contact. Unpub. Op. at 3. C.Z., S.C., and M.A. also had a physical response to the sexual contact. Coming *after* the fact of the assault, their responses to the assaults could not have provided consent.

Nor does a physical response necessarily indicate enjoyment. First, a physical response is open to interpretation. It is hardly unusual for a soused person to moan while collapsed on the floor. A moan could express pain, disgust, or nausea. Nor would be unusual for a victim to make contact with her assailant during the assault. RP 64 (holding onto his head). An intoxicated person's feckless tug on her assailant's hair may be a vain attempt at resistance. To interpret this evidence in the Defendant's favor and against the State (BOA at 8) is antithetical to the standard of review.

And second, a physical response can be automatic and unwanted. For example, a male can be forced into an erection that he neither wants nor enjoys. This was the case for C.Z., S.C., and M.A.. For a judge to find that a rape victim's erection was "uncontroverted" proof of consent would be reprehensible and ignorant. Interpretation of a physical response as proof of consent is as harmful to victims as false claims that a pregnancy cannot result from "legitimate rape."

> … we live in an era where sexual assaults are under-reported, a phenomenon that is correlated to the persistence of rape myths in the criminal justice system. The confidence of women in the judicial system is presently undermined by indications that justice system participants accept these kinds of discredited myths and biases. In this context, the resounding rejection of this type of thinking and its expression in the courtroom reinforces public confidence in the justice system.

Report and Recommendation at 74.

Under the standard of review, the court's verdict is supported by sufficient evidence that the victim, who recorded herself loudly and repeatedly asserting that she did not want Mr. Terry to touch her or have sex with her, did not consent to sex.

The court of appeals applied the correct and long-held standard. There is no consideration permitting discretionary review.

VI. CONCLUSION

Based upon the forgoing, the State respectfully requests this Court affirm the Appellant's conviction.

DATED: October 5, 2017.

Respectfully submitted:

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Jared Steed <steedj@nwattorney.net> <sloanej@nwattorney.net>	A copy of this brief was sent via U.S. Mail or via this Court's e-service by prior agreement under GR 30(b)(4), as noted at left. I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. DATED October 5, 2017, Pasco, WA _____ **Original filed at the Court of Appeals, 500 N. Cedar Street, Spokane, WA 99201**

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