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JAN 20, 2017

Court of Appeals
Division III
State of Washington

NO. 34333-2-III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

STATE OF WASHINGTON,

Respondent,

v.

JONATHAN TERRY,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR WALLA WALLA COUNTY

The Honorable M. Scott Wolfram, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The State presented insufficient evidence to sustain appellant's conviction for third degree rape.

2. The trial court erred in entering findings of fact 9 and 10. CP 88.

3. The trial court erred in entering conclusion of law 2. CP 90.

Issue Pertaining to Assignments of Error

To support appellant's charge of third degree rape, the State was required to prove beyond a reasonable doubt that the complaining witness did not freely agree to the sexual contact and that the lack of consent was clearly expressed by words or conduct. Where the complaining witness could not recall whether the sexual contact was consensual, and her conduct was consistent with someone freely consenting, was the State's evidence insufficient to support appellant's conviction for third degree rape?

B. STATEMENT OF THE CASE

1. Procedural History.

The Walla Walla County prosecutor charged appellant Jonathan Terry by amended information with one count each of second degree rape,

third degree rape, attempted third degree rape, and three counts of fourth degree assault with sexual motivation. CP 21-23.

Terry was convicted of third degree rape, attempted third degree rape, and two counts of fourth degree assault with sexual motivation following a bench trial. CP 44-60; RP 245. The trial court found Terry not guilty of second degree rape. CP 44-60, 89 (conclusion of law 1); RP 245-46. The State dismissed one count of fourth degree assault with sexual motivation before sentencing because it was beyond the statute of limitations. RP 240, 245; CP 44-60, 89 (conclusion of law 5).

Based on an offender score of zero, the trial court sentenced Terry to standard range dispositions of 22.5 days confinement and 20 hours of community service on each count, for a total of 90 days confinement and 80 hours of community service. The court also imposed 12 months community supervision on the third degree rape conviction. CP 44-60; RP 276-77, 280. Terry timely appeals. CP 6-83.

2. Trial Testimony.

In the fall of 2014, Walla Walla police began investigating several incidents involving Terry that had allegedly occurred between 2011 and 2014. The first incident occurred in 2011 and involved C.Z. RP 23. C.Z. and Terry spent the night at a mutual friend's house. RP 20-21. C.Z. woke during the night to find his pants and underwear were pulled down slightly.

RP 25. Terry was stroking his erect penis. RP 21, 24-25. When C.Z. pretended to wake up Terry stopped and went back to his bed. RP 21. C.Z. denied giving Terry permission to touch his penis. RP 26.

In 2013, N.G. hosted a party at her father's house. Her boyfriend, D., Terry, and J.M. all attended. RP 61, 73, 91-92. Everyone was drinking alcohol. RP 65-66, 71-72, 76, 79-80, 117-19. J.M. consumed eight shots of liquor. RP 62. It was not the first time J.M. consumed alcohol. RP 100. N.G. believed J.M. was drunk but she never saw J.M. passed out or behaving like she did not know what she was doing. RP 63, 101-02. During the party, J.M. kissed N.G. RP 95-96, 113, 120.

At some point during the evening, J.M. remarked to Terry "don't touch me. I don't want to have sex with you." RP 64. N.G. did not see Terry ever try and actually touch J.M. however. RP 64. Later that evening, N.G. saw Terry performing oral sex on J.M. RP 64, 97-98. N.G. was uncertain who initiated the sexual contact. RP 99. N.G. was surprised because J.M. had a boyfriend and she never knew Terry and J.M. to be romantically interested in each other. RP 65. N.G. did not believe that J.M. was in danger or that the sexual contact was against her will. RP 67-68, 70, 99. Indeed, N.G. heard J.M. moaning in pleasure during the sexual contact and observed her pulling Terry's head closer to her genitals. RP 70, 97.

J.M. could not recall most of the events of the party. RP 76-77. J.M. was surprised when N.G. told her about her sexual contact with Terry. J.M. did not recall consenting to, or refusing, the sexual contact. RP 77-78. When interviewed by police later, J.M. denied any sexual contact between her and Terry occurred. RP 14. She also told police that she consumed alcohol for the first time at N.G.'s party. RP 17, 87.

A different incident involved M.C. In September 2014, M.C. spent the night at Terry's house. RP 29, 32-36. M.C. woke up to find Terry touching his penis beneath his clothing. RP 30. M.C. also felt Terry's finger in his anus over his underwear. RP 30-31, 42. M.C. clinched his buttocks in response. RP 41-42. M.C. did not say anything to Terry and instead pretended to be asleep. RP 30-31, 42-43.

S.C. also awoke to Terry touching his penis. RP 44-45. In response, S.C. pretended to wake up and rolled on his stomach. Terry pulled his hand out S.C.'s pants and pretended to be asleep. RP 46. Terry left the room about 15 minutes later. RP 47. S.C. denied giving Terry permission to touch his penis. RP 58-59. S.C. could not specifically recall when the alleged incident occurred. RP 46-47.

Walla Walla detective, Marcus Goodwater, interviewed Terry in October 2014, regarding all the allegations. RP 3. Terry initially denied the allegations. RP 6. Terry later acknowledged touching each of the boy's

penises. RP 6-8, 13, 203-04. Terry explained that he did not have consent from any of the boys. RP 9, 204. Terry acknowledged engaging in oral sex with J.M. at the party. RP 8.

During his trial testimony, Terry acknowledged touching the penises of both M.C. and S.C. RP 152, 157. M.C. never told Terry to stop. When M.C. rolled onto his stomach, Terry ceased the contact. RP 152-53. Terry denied telling police that he touched C.Z.'s penis. RP 157. Terry also denied placing his finger in M.C.'s anus. RP 153-55.

Terry acknowledged the sexual contact with J.M. RP 121. Terry explained however, that he did not do anything against J.M.'s will. RP 124. Everyone was drinking the night of the incident. RP 118-19. Terry saw J.M. and N.R. kissing. RP 120. At some point, J.M. handed Terry a condom. RP 118. J.M. then took off her pants and told Terry to "eat my pussy. Lick my pussy." RP 121-22. When Terry began performing oral sex, J.M.'s placed her hands on the back of his head and squeezed his hair. J.M. pulled Terry's head closer to her genitals and she began moaning. RP 122. J.M. continued to tell Terry to perform oral sex on her. Terry believed the contact was consensual based on J.M.'s statements to him. At no time did J.M. push Terry's head away. RP 122. The contact stopped after a few minutes when Terry heard N.R. coming back into the room. RP 123.

Terry and J.M. remained friends after the incident. No further sexual contact occurred between the two of them. RP 125-26.

C. ARGUMENT

THE EVIDENCE IS INSUFFICIENT TO PROVE THIRD DEGREE RAPE BECAUSE THE STATE FAILED TO PROVE THAT J.M. DID NOT FREELY CONSENT TO THE SEXUAL CONTACT

The State bears the burden of proving all elements of a charged offense beyond a reasonable doubt as a matter of due process. In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970); State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980). A conviction must be reversed where, viewing the evidence in the light most favorable to the State, no rational trier of fact could find all elements of the charged crime beyond a reasonable doubt. State v. Vasquez, 178 Wn.2d 1, 6, 309 P.3d 318 (2013).

Following a bench trial, appellate courts review findings of fact for substantial supporting evidence and review conclusions of law to determine whether the findings support them. State v. Homan, 181 Wn.2d 102, 105-06, 330 P.3d 182 (2014). When there is insufficient evidence to support a conviction, the remedy is to reverse the conviction and dismiss the charge with prejudice. State v. Hickman, 135 Wn.2d 97, 103, 954 P.2d 900 (1998).

This court should hold the State to its burden and hold that the State did not present sufficient evidence to sustain the third degree rape conviction because the evidence showed the alleged sexual contact was consensual.

Terry was charged with third degree rape under RCW 9A.44.060(1)(a) which provides:

(1) A person is guilty of rape in the third degree when, under circumstances not constituting rape in the first or second degrees, such person engages in sexual intercourse with another person, not married to the perpetrator:

(a) Where the victim did not consent as defined in RCW 9A.4.010(7), to sexual intercourse with the perpetrator and such lack of consent was clearly expressed by the victim's words or conduct[.]

CP 21-23.

To prove Terry committed third degree rape, the State therefore had to prove beyond a reasonable doubt that (1) J.M. did not freely agree to sexual contact with Terry, and that (2) the lack of consent was clearly expressed to Terry by words or conduct. State v. Guzman, 119 Wn. App. 176, 185, 79 P.3d 990 (2003), rev. denied, 151 Wn.2d 1036, 95 P.3d 758 (2004). “‘Consent’ means that at the time of the act of sexual intercourse or sexual contact there are actual words or conduct indicating freely given agreement to have sexual intercourse or sexual contact.” RCW 9A.44.010(7). The focus is on the complaining witnesses’ words and actions rather than the accused’s subjective assessment thereof. State v.

Higgins, 168 Wn. App. 845, 854, 278 P.3d 693 (2012) (citing State v. Walden, 67 Wn. App. 891, 895 n.2, 841 P.2d 81 (1992)), rev. denied, 176 Wn.2d 1012, 297 P.3d 708 (2013). The complaining witnesses' lack of consent must be 'clearly manifested.' State v. Ritola, 63 Wn. App. 252, 256, 817 P.2d 1390 (1991).

Even when viewed in the light most favorable to the prosecution, the State failed to prove that J.M. did not freely agree to consensual sexual contact with Terry. In its failed attempt to meet its burden, the State put on the testimony of N.R. and J.M.

N.R. testified that earlier in the evening J.M. had taken eight shots of alcohol and told Terry "don't touch me" and "I don't want to have sex with you." RP 62, 64. As N.R. explained however, "[Terry] had never at one point tried to actually touch her or do anything with her, she was just saying that." RP 64. N.R. never saw J.M. passed out or behaving like she did not know what she was doing. RP 101-02. Indeed, J.M. was very "touchy-feely" that evening and even kissed N.R. RP 95-96, 112-13.

When N.R. saw Terry and J.M. engaged in oral sex sometime later, J.M. was moaning in pleasure and pulling Terry's head closer to her genitals. RP 64, 70, 97-98. N.R. did not believe that J.M. was in danger or that the sexual contact was against J.M.'s will. RP 67-68, 70, 98-99. N.R. did not even know if Terry initiated the sexual contact. RP 99.

J.M. testified that she could not remember much about the night of the incident. RP 72, 76-78. J.M. was surprised when N.R. later told her of the incident with Terry. J.M. acknowledged however that she could not say that she did not consent to the sexual contact with Terry. RP 77-78.

This was the sole extent of the evidence put forth by the State to prove the elements of third degree rape. Thus, the State's evidence showed only that sometime prior to the sexual contact J.M. remarked that she did not want to have sex with Terry. Significantly, the evidence did not show that when the sexual contact actually occurred, J.M. was not freely consenting. J.M.'s act of moaning in pleasure and pulling Terry's head closer to her genitals, together with her inability to say that the sexual contact was not consensual, demonstrates that "at the time of the act..." J.M.'s conduct indicated a "freely given agreement to have sexual contact." RCW 9A.44.010(7); Compare State v. Mares, 190 Wn. App. 343, 361 P.3d 158 (2015) (Sufficient evidence supported conviction for third degree rape, despite victim refusing sexual intercourse on night of incident until act was already in progress, at which point defendant stopped; jury could have found that victim's lack of consent was clearly expressed, as she had responded to defendant's advances during their entire acquaintance consistently, by pushing away his hands, telling him what he was doing was wrong,

threatening to take him home and report his conduct, telling him to leave her room, and yelling at him).

Terry also testified. He acknowledged that he and J.M. engaged in oral sex but explained that he did not force J.M. to do anything that she did not want to do. RP 122-24. Terry testified that J.M. initiated the sexual contact and affirmatively told him to engage in oral sex with her. After the contact began, J.M. pulled his head closer to her genitals. At no time did J.M. try and push Terry's head away. RP 122.

Terry's testimony also did not establish that the sexual contact occurred without J.M.'s consent. Because the State failed to meet its burden of proof, this court must reverse the third degree rape conviction and remand for dismissal of the charge with prejudice. Hickman, 135 Wn.2d at 99.

D. CONCLUSION

The State did not produce sufficient evidence to sustain Terry's conviction for third degree rape. Accordingly, Terry asks this court to reverse his third degree rape conviction and remand for dismissal of that charge with prejudice.

DATED this 19th day of January, 2017

Respectfully submitted,

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Re Terry.

Cause No. 34333-2-III, in the Court of Appeals, Division III, for the state of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.



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Done in Seattle, Washington