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Court of Appeals
Division III
State of Washington

34333-2-III

COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

JONATHAN TERRY,

Appellant.

DIRECT APPEAL
FROM THE SUPERIOR COURT
OF WALLA WALLA COUNTY

RESPONDENT'S BRIEF

Respectfully submitted:

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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 appeals from adjudications 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. He challenges only the sufficiency of the evidence for the third degree rape charge against J.M..

At trial, several victims testified to the indecent liberties Mr. Terry took with them. CP 21-23, 87-89.

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 after a volleyball game, N.R. invited some

friends to spend the night at her house playing music and drinking alcohol while her father was working the night shift. RP 61-62, 92, 117, 170. N.R. invited her boyfriend D.R., her good friend J.M., and Mr. Terry. RP 61, 116-17. N.R. and J.M. were teammates in a summer volleyball league, and Mr. Terry was the assistant coach for the team and a custodian that summer. RP 61, 108, 116.

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.

The party began at about 9pm and went until the early morning. RP 92, 117. Mr. Terry brought some blue and green alcohols that tasted like juice to J.M. RP 170-71, 179. J.M. was small of stature and a novice to drinking. RP 78, 87-88, 101, 109-10, 142-43, 170-71, 219. 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. deleted the videos, but N.R. retained them. RP 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 videos. RP 71, 94, 96, 113-14.

At one point, N.R. and D.R. went upstairs to spend time together on a couch. 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. 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.

J.M. also became upset with N.R. over this incident, and their friendship has suffered. RP 82, 103. Since the incident, N.R. has become good friends with Mr. Terry and his brother. RP 105.

Although N.R. had previously said that she and her boyfriend had tried to stop the assault, when called by defense at trial she testified that D.R. prevented her from interfering. RP 98-99, 177-78. She testified that J.M. had "at least a month" of previous weekend drinking experience. RP 67, 100. Defense also tried to offer the victim's sexual history through N.R. in violation of the rape shield act, but this was stricken. RP 68. And she claimed that J.M. kissed her in front of Mr. Terry. RP 81, 95, 120.

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 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 the oral sex occurred as everyone was "getting ready to be done with the party," it was "wrapping up." RP 120, 123. He claimed that J.M. took off her pants and instructed him to perform oral sex on her. RP 122. He claimed he did not believe the alcohol affected J.M.'s choices or abilities. RP 124-25. 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

SUFFICIENT EVIDENCE SUPPORTS THE CONVICTION OF RAPE.

"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). 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). 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.

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 this element which Mr. Terry contests.

In J.M.'s recorded, sworn statement, she asserted that she had no sexual interest in Mr. Terry. RP 168, 171, 174, 177, 180. She did not want a sexual encounter with him. RP 174. She did not even want to party with him. RP 170. She thought he was odd, and he made her uncomfortable. RP 177. At the party, she followed N.R. around and asked not to be left alone with Mr. Terry.

She had imbibed an enormous amount of alcohol very quickly, which prevented her from encoding or retaining memories of the event. But that 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.

> 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. 343, 353–54, 361 P.3d 158, 163 (2015). *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 argues that J.M. only expressed this lack of consent "earlier in the evening" or "some time prior to the sexual contact," suggesting the expression was not contemporaneously made. BOA at 8, 9. First, the expression occurred during the same party when the sex occurred. This is a contemporaneous expression. Second, the significance of the *Mares* opinion is that 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. at 354.

In *State v. Mares*, 190 Wn. App. at 348, the defendant began to have sex with the victim while she was asleep. When the victim woke and pointed a rifle at him, he stopped. *Id.* He was convicted of third degree rape. *State v. Mares*, 190 Wn. App. at 346. On appeal, he argued that the victim did not express her lack of consent until after the sex had begun and she woke up. He claimed that the statute was unconstitutionally vague as to when lack of consent must be expressed. This Court disagreed.

> … 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.

J.M. was not attracted to Mr. Terry. The idea of anything romantic between them she found weird. 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, by spending the party engaged in communications with her boyfriend whom she sent multiple videos. 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 even touch her. She did not want to have sex with him. 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.

The standard requires that on review we accept that J.M. was credible, which is a finding implicit in the verdict. The record supports her credibility. The rape happened in the summer of 2013. RP 78-79. J.M. reported it to police a year and a half later in November 2014. RP 168. And the trial occurred in March 2016. CP 77. Years after the offense, J.M. decided to come forward and then participate in the prosecution of this case. This would have been a difficult choice that she could have opted out of at any time. There is no evidence that she had any

motive to lie. It would have been easier to let sleeping dogs lie than to force N.R. to testify against her friend Mr. Terry. J.M.'s costly choice demonstrates her confidence in the criminality of Mr. Terry's actions.

The Defendant argues that the following evidence indicates J.M. consented to have sex with him: J.M. kissed N.R.; N.R. did not see the event which precipitated J.M.'s rejection of Mr. Terry; N.R. testified that J.M. moaned and had her hands on Mr. Terry's head during the assault; N.R. testified that J.M. did not appear to be in danger. BOA at 8. None of this indicates consent. The Defendant's argument perverts the appellate standard which requires inferences be interpreted in support of the verdict, not for the Defendant.

If J.M. kissed N.R., it would in no way demonstrate her consent to kiss *someone else*. And it certainly does not show her consent *to have sex* with someone else after she explicitly told him she would not.

There is no reason to believe that N.R. saw everything that was happening between Mr. Terry and J.M.. This would be impossible for any person to do for the duration of an overnight party that spanned many hours, two floors, and several rooms. N.R. had imbibed a large amount of alcohol so as to be significantly impaired. She tended to rely upon the videos to assist her recollection of events. And she was additionally

distracted with her boyfriend D.R. during the party. Under the proper standard, the inference we draw from J.M.'s words is that Mr. Terry had tried to touch her and had made sexual advances on her, and she had rebuffed him.

The court noted that *to N.R. it appeared* that J.M. may have been conscious or participating in the sex. CP 88 (FF 10). But the verdict indicates that the court believed N.R. had misinterpreted this. This is a proper inference from the evidence.

This Court has rejected a defendant's claim that "what counts is not the victim's protestations to stop but his subjective perception of her response as expressed by her words and conduct." *State v. Higgins,* 168 Wn. App. 845, 853, 278 P.3d 693 (2012). N.R.'s perception or interpretation was subjective. Additionally, it had become biased. After her relationship with J.M. became strained, N.R. had grown closer to the Defendant. As her loyalties changed, so did her statement. What she told J.M. in 2013 was different from what she testified to in 2016. *Cf.* RP 98-99, 177-78. Implausibly, N.R. asserted three years after the fact that was better able to remember the exact month when J.M. began to drink alcohol than J.M. herself.

N.R. ultimately failed to protect her incapacitated friend. Cognitive dissonance would cause her to interpret what she had seen in a way that justified her inaction. Part of that reinterpretation criticized and maligned the victim after their friendship deteriorated. However, what she actually described, a moan and a touch, does not establish consent. It is hardly unusual for a soused person to moan while collapsed on the floor. Nor would be unusual for a victim to make contact with her assailant during the assault. RP 64 (holding onto his head). To interpret this evidence in the Defendant's favor and against the State (BOA at 8) is antithetical to the standard of review.

The Defendant asks this Court to rely on his testimony. BOA at 10. But the factfinder rejected Mr. Terry's testimony, making no findings that J.M. had initiated the sex. CP 87-89. The lower court implicitly found him not credible by returning a verdict of guilty.

This credibility determination is supported in the record. The Defendant's assertion that his memory was trustworthy and that he was not affected by 8-10 shots of alcohol was implausible. He went further, claiming that J.M., who was so much smaller than him that he could lift her over his head (RP 142), was not affected by an even greater amount of alcohol such that sex could only have occurred with her consent. And he

claimed that, as it became apparent that the party was winding down, he decided to cap it off with oral sex on his way out the door. His testimony was not credible.

There was a pattern to Mr. Terry's sexual assaults that was consistent with J.M.. He took indecent liberties with persons in a group setting without requesting consent and when they were vulnerable. S.C, C.Z., and M.A. were asleep in close quarters. J.M. 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 not to be left behind. RP 96.

Mr. Terry also never apologized to his victims or displayed any remorse. In fact, it does not appear he 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.

When confronted, he would claim that something his victims did *after* he had begun the assault was proof of consent. He asserted that the boys' erections were an indication of consent. They were not. They were inadvertent and unconscious physical responses. In the same way, J.M.'s drunken moaning was not consent in the face of her statement that she did not want to have sex with him.

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.

VI. CONCLUSION

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

DATED: March 8, 2017.

Respectfully submitted:

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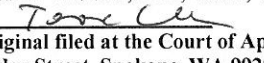
Jared Steed <steedj@nwattorney.net> <sloanej@nwattorney.net>	A copy of this brief was sent via U.S. Mail or via this Court's e-service by prior agreement under GR 30(b)(4), as noted at left. I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. DATED March 8, 2017, Pasco, WA  **Original filed at the Court of Appeals, 500 N. Cedar Street, Spokane, WA 99201**