

No. 332080-III

FILED
DEC 14, 2015
Court of Appeals
Division III
State of Washington

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

STATE OF WASHINGTON, Respondent

v.

MICHAEL PHILLIPS, Appellant

APPEAL FROM THE SUPERIOR COURT
OF SPOKANE COUNTY

BRIEF OF APPELLANT

Marie J. Trombley, WSBA 41410
PO Box 829
Graham, WA
253-445-7920

TABLE OF CONTENTS

I. ASSIGNMENT OF ERROR.....	1
II. STATEMENT OF FACTS	1
III. ARGUMENT	
A. The Evidence Was Insufficient To Sustain A Conviction For Rape In The First Degree.	8
IV. CONCLUSION	12

TABLE OF AUTHORITIES

Washington Cases

State v. Baeza, 100 Wn.2d 487, 670 P.2d (1983) _____ 9

State v. Bright, 129 Wn.2d 257, 916 P.2d 922 (1996) _____ 10

State v. Hickman, 135 Wn.2d 97, 954 P.2d 900 (1998) _____ 13

State v. Salinas, 119 Wn.2d 192, 829 P.2d 1068 (1992) _____ 9

State v. W.R., Jr., 181 Wn.2d 757, 336 P.3d 1134 (2014) _____ 10

U.S. Supreme Court Cases

In re Winship, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970) 9

Statutes

RCW 9A.44.040(1)(a) _____ 10

I. ASSIGNMENTS OF ERROR

A. The evidence was insufficient to sustain a conviction for rape in the first degree.

ISSUE PERTAINING TO ASSIGNMENT OF ERROR

Was the evidence insufficient to sustain a conviction for rape in the first degree, where the State did not meet its burden of proving lack of consent as part of its proof of the element of forcible compulsion?

II. STATEMENT OF FACTS

On October 10, 2013, Spokane County Prosecutors charged 33 year old Michael Phillips with one count of first degree rape, based on events that occurred on May 13, 2008. (CP 1).

Michael Phillips spent the evening of May 12, 2008 drinking beer at his home. (12/18/14 RP 39;49). He took a cab from Monroe and Broadway in Spokane to the Rainbow Bar on Sprague Ave . (12/18/14 RP 28). He carried an unloaded BB gun so, if necessary, he could at least look like he could protect himself. (12/18/14 RP 36).

When he arrived, the bar was closed. (Id). He walked to Sprague and Altamont and noticed R.N. standing on the corner. (Id). He approached her and asked her how much she charged for

oral sex. She initially said \$50, but agreed to \$30 after commenting that it had been a slow night. (12/18/14 RP 32). He only had \$12 and planned on short changing her by putting the \$10 bill on top of two ones. (12/18/14 RP 33).

She asked for the money and he reported that when he reached into his pocket she said, "What are you doing?... You can't reach in your back pocket and pull out your wallet down on the street corner. Are you trying to get us arrested?" (12/18/14 RP 33). At her direction, they walked east for approximately seven blocks and stopped in a parking lot area. (12/18/14 RP 34-35). There, she wanted the money upfront, but he said no. (Id.)

He testified that as he undid his jeans the BB gun he carried in the small of his back started to fall. (12/18/14 RP 37). He reached back, grabbed it with his left hand, and moved the slide back into the normal position. He put the gun in his left coat pocket. (12/18/14 RP 37).

He said R.N. looked frightened, so he told her he had not mean to scare her and did not want to rob or hurt her. (12/18/14 RP 37). He testified that she remarked, 'what the hell' and 'guns scare me.' (12/18/14 RP 37). She put a condom on him. (12/18/14 RP 38). She stopped performing oral sex on him after about five

minutes, as it became obvious it was not working. He said he would not pay her. (12/18/14 RP 40). She got upset and offered to have “straight sex” with him for the money. (12/18/14 RP 40). He laid on the ground and they unsuccessfully attempted to have intercourse. (12/18/14 RP 41). He testified the gun remained in his jacket pocket. (12/18/14 RP 40). After approximately five minutes she stopped, got off of him, and said, “This ain’t working. I’m done. Pay me.” (12/18/14 RP 73).

He threw the condom to the ground, and pulled up his pants. (12/18/14 RP 41). He told her he was not going to pay her. (12/18/14 RP 41). She said, “I knew you weren’t going to pay me. I’m desperate for this money, and you set me up.” (12/18/14 RP 41).

Mr. Phillips walked away from her, rolled a cigarette, and kept walking. (12/18/14 RP 42). After he was about 30 feet away, she asked him for a cigarette. He stopped, waited until she caught up with him and gave her a cigarette. (12/18/14 RP 42). She asked him again for the money, and when he refused, she was angry. (12/18/14 RP 42-43). He headed toward the downtown area of Spokane, and she walked east. (12/18/14 RP 43).

Approximately 7 blocks later, a police officer drove by, turned on the patrol lights, and turned back around. (12/18/14 RP 44).

The officer drew his gun, and ordered Mr. Phillips to get on his knees. He complied, was handcuffed, and subjected to a protective search. (12/18/14 RP 45). Mr. Phillips initially gave the officer a false name, because he was in violation of his probation for drinking and being out past curfew. (12/18/14 RP 45).

He asked the officer why he was being detained, and was told it was suspicion of rape. (12/18/14 RP 46). Mr. Phillips told the officer, "I had oral sex with a prostitute. And I ripped her off for \$30; I didn't pay her." (12/18/14 RP 46). He testified he did not point the BB gun at her, and did not threaten her with the gun. (12/18/14 RP 48). He told police officers that night that the "only reason she knew about the gun is because she was able to feel it through his coat." (12/16/14 RP 61). At trial, an officer testified that when he searched Mr. Phillips he found and removed a BB gun inside of his coat pocket. (12/ 16/14 100-101).

After an on scene identification, officers arrested Mr. Philips. (12/16/14 RP 64). He said several times, "If I just paid her, this would not have happened" and indicated to the officers that he

wanted a DNA test to prove that he had not raped her. (12/16/14 RP 62;68).

Later testing of the condom indicated the outside had three different profiles, R.N., Mr. Phillips, and a trace component to a male to which no meaningful conclusions could be drawn. (12/16/14 RP 164). On the inside of the condom was a profile consistent with R.N., Mr. Phillips, and a female to which no meaningful conclusion could be drawn. (12/16/14 RP 166).

R.N. testified that in May 2008 she struggled with heroin and cocaine addiction and worked as a prostitute. (12/17/14 RP 184). Defense investigator Ted Pulver testified that R.N. told him that she had been suffering from heroin withdrawals that night and needed money. (12/17/14 RP 316). She said did not want to go home empty handed. (12/17/14 RP 316). She told investigators that she had suffered from depression and mental illness. (12/17/14 RP 318).

On the night of May 12, 2008, she had been prostituting all day and evening, but had not had any business. She had given up and was walking home when a man approached her. (12/17/14 TP 187-88). They agreed on \$30 for oral sex (12/17/14 RP 188). She said, "he looked to me to find a spot, a safe spot that we'd be

okay and so I led him a few blocks away, around the corner from the pawnshop, a block off Sprague, to a newly paved parking lot. There were no houses. The only thing that was in sight was a school ...no residences, no businesses.” (12/17/14 RP 188).

In contrast to Mr. Phillips’ testimony, she said that she asked for the money upfront and he reached into his left front pocket. She searched her purse for a condom. He began to undo his pants and she insisted on being paid first. (12/17/14 RP 194).

Her testimony was that instead of pulling out the money, he drew out a pistol and cocked it. (12/17/14 RP 193-94). She later told police officers that he said, “I’m not going to hurt you or beat you”. (12/17/14 RP 218-19). She reported he said she “was going to do it or he was going to put a bullet” in her head. (12/17/14 RP 195). She said she told him “ I would agree to do it but I wasn’t going to do it while he was showing that weapon...” and she would do whatever he wanted if he would put the gun away. She said he put the gun in the back of his pants and lay down on the ground. (12/17/14 RP 196-97; 219;228).

She tried to perform oral sex on him for approximately 10-20 minutes but he was not aroused. (12/17/14 RP 197). She testified he then said, “Take your panties off” because he wanted to have

intercourse, and she became angry. (12/17/14 RP 198). She said, "I'm not wearing any f-ing underwear." (12/17/14 RP 199). He did not want to use a condom, but she insisted, saying, "I told him at that point you don't have a choice. You're going to wear it, you're going to wear it or you can just shoot me because I'm not going to do that [expose to HIV] to my husband." (17/17/14 RP 198). She used the condom. She said it took another 10-15 minutes, but he again was not aroused. (12/17/14 RP 198).

She testified, "...so I stopped and began offering him oral sex again to see if I could get this done." (12/17/14 RP 199). She said she "went from getting off straddling him back onto my knees". (12/17/14 RP 198). It was again unsuccessful, and she said he attributed it to his use of methamphetamines.

She told him, "I just can't keep doing this so whatever you're going to do, do it to me, but I'm quitting..." (12/17/14 RP 200). She said, "He didn't say a thing. He grabbed his – the button on his jean to button his pants and zip it up, no argument, no threats, no nothing. He just got his pants back on." (12/17/14 RP 200-201). She asked him for a cigarette and they went their separate ways. (12/17/14 RP 228-29).

R.N. said she headed toward the nearest payphone to report an assault. (12/17/14 RP 202). She walked up Sprague and a red station wagon, driven by a male, stopped and gave her a ride to the gas station. (12/17/14 RP 203). She made a 9-1-1 call and officers arrived within minutes. (12/17/14 RP 204-05). After identifying Mr. Phillips at a “show up”, she was taken to Sacred Heart Medical Center. (12/17/14 RP 209; 275). Hospital personnel conducted an exam and rape kit, noting R.N. had no injuries, but did have track marks from needle use. (12/18/14 RP 9).

Assigned to follow-up on the case, Detective Kendall attempted to contact R.N. at various phone numbers and addresses, but she did not respond. (12/17/14 RP 298-99). He also left his name and number with the Spokane Regional Health district’s needle exchange coordinator, who conducted outreach to prostituted women. (12/17/14 RP 244;251). R.N. did not respond. (12/17/14 RP 300).

In 2013, at the request of the attorney general’s office, Detective Hensley of the Spokane Police Department was assigned to follow up on the case. (12/16/14 RP 139). The jury convicted Mr. Phillips. (CP 402). He makes this timely appeal. (188-204).

III. ARGUMENT

The Evidence Was Insufficient To Sustain A Conviction for Rape In The First Degree.

The Fourteenth Amendment due process clause requires the State to prove each essential element of the crime charged beyond a reasonable doubt. *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). Sufficiency of the evidence is a question of constitutional magnitude and may be raised for the first time on appeal. *State v. Baeza*, 100 Wn.2d 487, 488, 670 P.2d (1983). The standard for determining the sufficiency of the evidence is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact would have found the essential elements of a crime beyond a reasonable doubt. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). All reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant. *Id.*

To convict Mr. Phillips of first degree rape, the State was required to prove beyond a reasonable doubt that R.N. (1) engaged in sexual intercourse (2) by forcible compulsion and (3) that Mr. Phillips used or threatened to use what appeared to be a deadly

weapon. RCW 9A.44.040(1)(a). Forcible compulsion was defined for the jury in instruction no. 10:

Forcible compulsion means physical force that overcomes resistance, or a threat, express or implied, that places a person in fear of death or physical injury.

(CP 397).

Washington courts define “threat”, as used in RCW 9A.44.040(1)(a), as “the expression of an intention to inflict injury.” *State v. Bright*, 129 Wn.2d 257, 266, 916 P.2d 922 (1996).

Whether the evidence establishes the element of resistance is a fact sensitive determination based on the totality of the circumstances, *including the victim’s words and conduct*. *State v. McKnight*, 54 Wn.App. 521, 526, 774 P.2d 532 (1989)(emphasis added).

Mr. Phillips asserted a consent defense at trial. Where a defendant asserts a consent defense to a charge for rape involving forcible compulsion and provides sufficient evidence to support the defense, the State bears the burden of proving lack of consent as part of its proof of the element of forcible compulsion. *State v. W.R., Jr.*, 181 Wn.2d 757, 764, 336 P.3d 1134 (2014).

In her testimony, R.N. said it was she who chose the isolated area for their transaction. She reported that Mr. Phillips said she “was going to do it or he was going to put a bullet” in her head, but also told police he said he was not going to hurt her. (12/17/14 RP 195; 219).

She testified, “I told him I would agree to do it... I told him I’d do whatever he wanted if he just put it [gun] away.” (12/17/14 RP 196). She conditioned her consent on him putting the gun away. According to her, Mr. Phillips followed her directive: he put it in the small of his back and never removed it. There was no testimony that he ever pointed a gun *at* her, or waved it around, or held it to her.

When he failed to become aroused and instead wanted sexual intercourse, she said, “I told him at that point *you don’t have a choice*. You’re going to wear it, you’re going to wear it or you can just shoot me because I’m not going to do that [expose to HIV] to my husband.” (12/17/14 RP 198). R.N. agreed to sex on the condition he wear a condom. Again, he followed her directive and wore the condom. She climbed on top of him. (12/17/14 RP 199). He did not show the gun, did not threaten or physically injure or restrain her.

He again failed to become aroused. She testified,

“...so I stopped and began offering him oral sex again to see if I could get this done.”

(12/1/714 RP 199).

According to her own testimony, R.N. offered oral sex a second time. When that was unsuccessful, R.N. testified she said,

“I just can’t keep doing this so whatever you’re going to do, do it to me but I’m quitting....” (12/17/14 RP 200).

Once R.N. was no longer consenting, the encounter ended. Mr. Phillips got up, buttoned his pants, did not threaten or argue or hurt her. He rolled a cigarette, gave one to her and they went their separate ways.

The State’s burden to prove lack of consent as part of its proof of the element of forcible compulsion has not been met. Even after viewing the evidence in the light most favorable to the State, no rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Salinas*, 119 Wn.2d at 201.

Where the reviewing court finds insufficient evidence to prove an element of a crime, reversal is required. Because retrial following reversal for insufficient evidence is prohibited, dismissal is

the remedy. *State v. Hickman*, 135 Wn.2d 97, 103, 954 P.2d 900 (1998).

IV. CONCLUSION

Based on the foregoing facts and authorities, Mr. Phillips respectfully asks the Court to reverse his conviction and dismiss with prejudice.

Respectfully submitted this 14th day of December 2015.

/s/ Marie Trombley, WSBA 41410
Attorney for Michael Phillips
P.O. Box 829
Graham, WA 98338
253-445-7920
marietrombley@comcast.net

CERTIFICATE OF SERVICE

I, Marie Trombley, do hereby certify under penalty of perjury under the laws of the State of Washington that on December 14, 2015, I served by mailing first class mail, USPS, postage prepaid, a true and correct copy of the appellants opening brief to the following:

Michael Smith, DOC # 83327-1
Coyote Ridge Corrections Center
PO Box 769
Connell, WA 99326

Thomas Howe
Washington Attorney General's Office
800 5th Ave Ste 2000
Seattle, WA 98104-3188

/s/ Marie Trombley, WSBA 41410
Attorney for Michael Phillips
P.O. Box 829
Graham, WA 98338
253-445-7920
marietrombley@comcast.net