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Division III
State of Washington

NO. 33208-0

**COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON**

State of Washington,

Respondent.

v.

Michael Phillips,

Appellant,

BRIEF OF RESPONDENT

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I. INTRODUCTION

A jury convicted appellant Michael Phillips of rape in the first degree. The State proved beyond a reasonable doubt: (1) That on or about May 13, 2008, Phillips engaged in sexual intercourse with R.N.; (2) That the sexual intercourse was by forcible compulsion; (3) That Phillips used or threatened to use a deadly weapon or what appeared to be a deadly weapon; and (4) That any of these acts occurred in the State of Washington. Phillips displayed a realistic-looking BB gun, cocked it, and threatened to put a bullet in the victim's head if she did not comply with his demands for sexual intercourse. Fearing for her life, the victim complied. The State presented overwhelming evidence of Phillips' guilt and the jury rightly convicted him. This Court should affirm his conviction for rape in the first degree.

II. RESTATEMENT OF THE ISSUE

- A. **Should Phillips' conviction for rape in the first degree be affirmed where the evidence was sufficient for the jury to find beyond a reasonable doubt that Phillips engaged in sexual intercourse with the victim by forcible compulsion?**

III. STATEMENT OF THE CASE

A. Procedural History

On October 10, 2013, the State filed an Information in Spokane County Superior Court charging appellant Michael Phillips with one count

of rape in the first degree. CP 1-4. The information alleged that on or about May 13, 2008, Phillips engaged in sexual intercourse by forcible compulsion with R.N. and used or threatened to use a deadly weapon, or what appeared to be a deadly weapon. CP 1. A jury trial was held in December 2014. *See* CP 464. On December 19, 2014, the jury found Phillips guilty of rape in the first degree. CP 402, 405-06; 3RP 2.¹

B. Testimony from R.N.

During the early morning hours of May 13, 2008, R.N. was working as a prostitute when Phillips approached her on foot. 1RP 184-92, 263. The two agreed on a price of thirty dollars for oral sex. 1RP 188. They went to a dark, secluded parking lot several blocks away where R.N. asked Phillips for the money. 1RP 188-93. R.N. testified that prostitutes “always get paid up front so we don’t get ripped off[.]” 1RP 193.² R.N. always requires condoms for any type of sexual encounter that involves an exchange of bodily fluid, including oral sex.³

¹ The State is using the following citation system for the Verbatim Report of Proceedings: 1RP refers to testimony from December 15, 2014 through December 17, 2014; 2RP refers to testimony from December 18, 2014; 3RP refers to testimony from December 19, 2014.

² When asked whether she has ever known anyone who did not get paid up front, R.N. responded, “Just the dumb ones.” 1RP 193.

³ When asked if condoms were optional, R.N. testified, “You have to – if it’s with me, you’re going to wear one, period.” 1RP 193.

As R.N. pulled out a condom, Phillips started to undo his pants. 1RP 194. R.N. told Phillips, “No, I’m not going to start until you pay me first. You have to pay me first.” *Id.* Phillips then reached into the breast pocket of his jacket and pulled out a gun. *Id.* Phillips cocked the gun, which made a “click-click” sound. 1RP 194-95.⁴ R.N. testified, “I know that’s what you do right before you fire a gun to put it in the chamber – the bullet in the chamber.” 1RP 195. Phillips racked the slide and told R.N. he wanted to “get off”⁵ and would “put a bullet in [her] head” if she did not comply. *Id.* R.N. testified that she was “terrified” and would comply with his demands if he would put the gun away:

I told him I would agree to do it but I wasn’t going to do it while he was showing that weapon because I couldn’t get my eyes off of it. I was terrified. I told him I’d do whatever he wanted if he just put it away.

1RP 196. Phillips then put the gun away. *Id.*

R.N. testified that during their encounter, Phillips displayed the gun for “a couple minutes.” 1RP 231. Although Phillips put the gun back in his breast pocket, he kept his hand inside the pocket. 1RP 270. R.N. got out a condom, but Phillips refused to wear it. 1RP 196. R.N. then performed oral sex on Phillips. 1RP 196-97. After ten to twenty minutes of oral sex, Phillips told R.N. to remove her underwear so he could have

⁴ R.N. demonstrated in court how Phillips racked the slide of the gun. *See Id.*

⁵ R.N. testified that she took “get off” to mean have an ejaculation. *Id.*

vaginal sex with her. 1RP 198. R.N. testified that she was “very angry” at this point and she took another condom out of her purse. *Id.* Phillips did not want to use the condom. *Id.* R.N. told him that she would not expose her husband to HIV and that he could just shoot her if he would not wear a condom. *Id.* Phillips allowed R.N. to put a condom on him and they had vaginal sex for approximately ten to fifteen minutes. 1RP 199. Phillips was not getting a full erection so R.N. performed oral sex on him again in hopes of ending the sexual assault. *See id.*

After approximately fifteen minutes, Phillips still did not have a full erection so she asked if he was under the influence of anything. 1RP 200. Phillips admitted being on methamphetamines. *Id.* R.N. realized that he was not going to ejaculate due to his drug usage, and told Phillips, “...I just can’t keep doing this so whatever you’re going to do, do it to me but I’m quitting because my jaw was hurting [sic] and I was getting nowhere.” *Id.* Phillips said nothing and zipped up his pants. 1RP 200-01. He rolled a cigarette for himself and R.N. asked if she could have one. 1RP 201, 229. Phillips gave her a cigarette and walked away. 1RP 201. R.N. testified that she asked for the cigarette because she wanted to gauge his demeanor and feared he still might shoot her. 1RP 231-32, 229. R.N. went to the nearest payphone and called 911. 1RP 202-05. Shortly after calling 911, R.N. identified Phillips to law enforcement officers.

1RP 63-64, 207-09, 273.⁶ Phillips was arrested and transported to jail.
1RP 64.

C. Testimony from Officer Eric Specht

Officer Eric Specht was dispatched to the scene and arrived within minutes of the 911 call. *See* 1RP 204-05, 263. Officer Specht contacted R.N., who was shaking, crying, very emotional, and upset. 1RP 113-14, 205, 264-66. Officer Specht testified in detail about the statements R.N. made to him immediately following the sexual assault. *See* 1RP 266-75.

R.N. told Officer Specht that she agreed to perform oral sex on Phillips for thirty dollars. 1RN 267. When R.N. asked for the money, Phillips pulled out a gun and said, "Here it is." 1RP 267-68. R.N. described the gun as an eight-inch black handgun-style firearm. 1RP 268. Phillips cocked back the action of the gun and said, "I'm not going to hurt ya or beat ya. I just want a blowjob. You're going to do it or I'll put a bullet in you." 1RP 268-69. Phillips then told her "to do it and get it done." 1RP 270.

Officer Specht testified that R.N. reported Phillips then put the gun inside his jacket pocket, but kept his hand inside the pocket. *Id.* She told Officer Specht that Phillips refused to wear a condom during the first act

⁶ At trial, R.N. also identified Phillips as the man who sexually assaulted her. 1RP 211-12.

of oral sex. *Id.* R.N. reported that she performed oral sex on Phillips, then vaginal sex, followed by oral sex again. 1RP 270-71. During the oral sex, Phillips grabbed the back of her head and applied force, causing his penis to go deeper into her mouth. 1RP 272.

Officer Specht testified that R.N. said she engaged in these sexual acts “because she feared for her life.” *Id.* She feared for her life due to the size of Phillips⁷ and because he displayed the gun and she feared he would use it on her. 1RP 272. R.N. told Officer Specht that she did not want to risk getting hurt. *Id.* At the conclusion of the interview, R.N. agreed to undergo a sexual assault examination and Officer Specht transported her to the hospital. 1RP 209, 274-75.

D. Testimony from Officer Ronald Van Tassel

Officer Ronald Van Tassel testified that he was dispatched at 3:14 a.m. in response to a 911 call from a victim who reported being raped at gunpoint. 1RP 44. Dispatch reported that the suspect threatened the victim with a firearm, which may be located inside his jacket pocket. 1RP 98. Two minutes later, Officer Van Tassel contacted Phillips who reported having a “BB gun.” 1RP 50. Officers located the gun inside his jacket pocket. 1RP 100-01. Officer Van Tassel testified that it was a “very realistic-looking BB gun[.]” 1RP 51. He testified that it was all black in

⁷ R.N. described Phillips as approximately “six-foot-three” in height. 1RP 273.

color and “unless you actually manipulated it yourself, you wouldn’t be able to just look at it and tell right away if it was real or fake.” *Id.*

When initially contacted by the police, Phillips gave the officers a fake name of “Nicholas Smith”. 1RP 51-53, 107. Phillips continued to claim this was his name for approximately twenty minutes. 1RP 51-53. Eventually, Phillips gave his real name and said that he had a curfew and was drunk and was not supposed to be drinking alcohol. 1RP 53-54. Officer Van Tassel could smell an odor of intoxicants coming from Phillips. 1RP 55. Officer Van Tassel asked Phillips what he was doing. 1RP 57. Phillips initially stated that he was “just walking around.” 1RP 57. When specifically asked if anything happened with a female down the street ten minutes ago, Phillips replied “No.” *Id.*

Officer Van Tassel detained Phillips while waiting for additional information from the victim. 1RP 57-58. After approximately ten minutes, Phillips asked Officer Van Tassel what he was being charged with. 1RP 57-59. When Phillips was informed that it could probably be some sort of rape charge, Phillips was quiet for several minutes. 1RP 59. Phillips then claimed that he never raped anybody. *Id.* Phillips said he had not sex since he was nineteen years old and was “hard up to get some sex.” *Id.* He told Officer Van Tassel that he was drunk and wanted “unattached sex, no dating or anything.” 1RP 59-60.

Officer Van Tassel testified that Phillips reported that he and R.N. agreed on a “blow job” for thirty dollars. 1RP 60. Phillips reported, “She was sucking my dick but doing a shitty job. She sucked for almost five minutes and could not even get me hard.” 1RP 60; 2RP 82-83. Based on her performance, he “stuffed her the 30 bucks.” *See* 1RP 61. Phillips claimed that the only reason R.N. knew about the gun was because she felt it through his jacket. 1RP 61. He claimed that he never took the gun out and never threatened her with it. *Id.* Phillips kept sighing and saying, “If I had just paid her, none of this would have happened.” 1RP 62. Phillips told Officer Van Tassel that he “never even had sex with her. I just rubbed her pussy for a while while she was sucking my dick.” *Id.* After R.N. identified Phillips at a show-up, Officer Van Tassel arrested Phillips and transported him to jail. 1RP 64.

E. Testimony from Officer Arthur Dollard

Officer Arthur Dollard is a member of the Spokane Police Department and trains new recruits in patrol tactics and safety procedures. 1RP 88-90. He is also a member of the SWAT team, which specializes in weapons and tactics. 1RP 91-92. Officer Dollard testified that SWAT team members “handle weapons a lot” and are “very proficient in different types of firearms[.]” 1RP 92.

Officer Dollard testified that he arrived at the scene shortly after Officer Van Tassel and removed the gun from Phillips' jacket. *See* 1RP 99-101. The gun was all black in color and upon closer inspection, Officer Dollard identified it as an "air-propelled type of pistol like a BB or pellet-type pistol." 1RP 101-02. Officer Dollard did not know it was a BB gun until he was able to physically manipulate the gun and inspect it more closely. *See* 1RP 101. He testified that it is very difficult to tell an air soft or BB-type pistol from a real gun without manipulating the gun itself:

...I handle a lot of different weapon systems, pistols, rifles, all kinds of different weapons. You know, given the perfect situation where you have time to look at something for quite a bit of time, perfect lighting conditions, all those things, certainly could probably tell you whether something is real or not, but in 18 years of law enforcement, at a quick glance or lighting conditions, all these things, I really couldn't tell you. If I was laying them out on a table, I may pick out the wrong ones. I may say that looks real and it, in fact, is a replica or a toy type of handgun. So in my experience, a lot of these guns look very, very real...

1 RP 101-03. The gun used by Phillips was admitted into evidence at trial.

1RP 104-06; 2RP 57-58; CP 407.

F. Testimony from Sacred Heart Medical Center Staff

At trial, several nurses from Sacred Heart Medical Center testified about their involvement with R.N. during the sexual assault examination at the hospital. *See* 1RP 233-43, 255-59; 2RP 3-17. Victoria Sattler was

working as the triage nurse and checked R.N. in to the hospital at approximately 4:44 a.m. 1RP 237-39, 243. Ms. Sattler testified that R.N. told her that she was sexually assaulted by an unknown male and forced to perform oral sex and have vaginal intercourse with him. 1RP 240-42.

Daveena Loera, a registered nurse, testified that she was assigned as R.N.'s primary nurse. 2RP 7-8. She described R.N. as tearful during the examination. 2RP 9. They collected fingernail scrapings and oral, vaginal, and anal swabs. 2RP 10; *see also* 1RP 211. No injuries were noted during the genital examination. 2RP 10. Ms. Loera testified that R.N. did not appear under the influence of any alcohol or drugs. 2RP 10-11.

Ms. Loera testified about the statements R.N. made at the hospital following the sexual assault. *See* 2RP 11-14. R.N. reported that the suspect used a gun and threatened to put a bullet in her head if she did not do what he wanted. 2RP 12. R.N. reported that Phillips pulled out a gun, cocked it, and told her to give him a blow job. 2RP 13. She told the nurse that he refused to wear a condom during the oral sex and then demanded vaginal intercourse. *Id.* Ms. Loera testified that R.N. told the suspect he had to wear a condom during the vaginal intercourse because she was married; otherwise, he would just have to shoot her. *Id.* R.N. reported that Phillips wore a condom for the vaginal sex and then demanded oral sex again. *Id.*

R.N. was discharged from the hospital at approximately 8:00 a.m. 1RP 258; 2RP 14.

G. Other Relevant Trial Testimony

Lynn Everson is the needle exchange coordinator for the HIV/AIDS program at Spokane Regional Health District. 1RP 244. She has been doing outreach to prostitutes for the past twenty five years. *Id.* Ms. Everson testified that prostitutes routinely get the money up front before any sexual act takes place. 1RP 248-49.

Allison Pierce-Walker, a DNA forensic scientist from the Washington State Patrol Crime Lab, testified about DNA results from a condom located at the scene of the crime. *See* 1RP 116-18, 133, 152, 160-61. Ms. Pierce-Walker testified that the DNA from the condom matched both R.N. and Phillips. *See* 1RP 164-67, 172. Testing of the genital swab taken from Phillips at the jail matched R.N. 1RP 169.⁸

H. Testimony from Phillips

At trial, Phillips testified that he approached R.N. because she looked like a working girl and negotiated a price of thirty dollars for oral sex. 2RP 28, 32. He testified that he knew he only had twelve dollars and

⁸ Ms. Pierce-Walker testified that the estimated probability of selecting an unrelated individual at random from the United States population with a matching profile is one in forty-four quintillion. *Id.*

that his plan was to not give her the money up front and “short change” her. 2RP 32-34, 68-70.

Contrary to what Phillips told Officer Van Tassel the night of the incident, Phillips testified that he did display the gun because it fell out of his pants and he had to cock it to release the locked slide before returning it to his pocket. *See* 2RP 36-37, 59-60. Phillips testified that R.N. saw the BB gun when it fell out of his pants. 2RP 36-37. He testified that the gun was unloaded and he was carrying it as a “bluff security thing” because he was going to a “bad part of town.” 2RP 36. When R.N. saw the gun, her “eyes got big as saucers” and she told him that guns scare her. 2RP 37. He told R.N. he was only carrying it for protection and that he did not mean to scare her. *Id.* Phillips admitted that he told the officer at the scene that he never took the gun out of his pocket and that R.N. just felt it in his jacket while performing oral sex on him. *See* 2RP 61-62. Phillips testified that you cock the gun by racking the slide back to release it, just like one would do with a regular semi-automatic pistol. *See* 2RP 58. He admitted that he carried the gun because it looked real. 2RP 58-59.

Phillips testified that R.N. then performed oral sex on him for approximately five to six minutes before asking if he was high on meth or drunk. 2RP 38-39. Phillips denied being high, but testified that he was “buzzed” from drinking alcohol. 2RP 39, 51-54. He testified that after he

refused to pay R.N. for oral sex, she offered him “straight sex” and told him to lie down on the ground. 2RP 40, 72. He did not want to lie down on the ground, but he complied. 2RP 40. He testified that the gun was still in his jacket pocket and he guided his penis into her. 2RP 40-41. Phillips then said it was more like “an attempt at intercourse” because he was not completely hard and it was more “rubbing my penis against her than anything.” 2RP 41, 83. After approximately five to ten minutes of vaginal intercourse, R.N. stopped and wanted payment. *See* 2RP 41, 73. Phillips still refused to pay her because he “didn’t get off.” 2RP 41, 73.

Phillips testified that R.N. got “very, very, very mad” and told him that she knew he was not going to pay her. 2RP 41, 75-76. Phillips admitted having sexual relations with R.N., but denied raping her. 2RP 42, 48. Phillips testified that he never pointed the gun at her and never threatened her; he just refused to pay her. *Id.*

After Phillips was arrested for raping R.N., he was booked into jail. *See* 1RP 142-44. At the jail, Phillips consented to a male rape kit involving a swab of his penis for evidence collection. 1RP 119-20; 2RP 47-48. Jail booking records indicated that Phillips only had twelve dollars in cash. 1RP 148-49.

IV. ARGUMENT

Phillips argues on appeal that the State presented insufficient evidence at trial to support a conviction of rape in the first degree. He argues that the State failed to prove lack of consent as part of its proof of the element of forcible compulsion. *See* Brief of Appellant at 12. His argument is without merit as there was substantial evidence presented at trial for the jury to find that Phillips was guilty of rape in the first degree. Because of the overwhelming evidence at trial that Phillips was guilty, this Court should affirm the conviction.

“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). The Court must view the evidence in the light most favorable to the State and determine whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *State v. Green*, 94 Wn.2d 216, 221-22, 616 P.2d 628 (1980); *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L.Ed.2d 560 (1979). A reviewing court does not ask whether *it* believes the evidence at trial established guilt beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. at 318-19; *State v. Baeza*, 100 Wn.2d 487, 490, 670 P.2d 646 (1983). The critical

inquiry is whether the evidence could reasonably support a finding of guilt. *Jackson v. Virginia*, 443 U.S. at 318.

“When the sufficiency of the evidence is challenged in a criminal case, all reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant.” *Salinas*, 119 Wn.2d at 201. Once the defendant is found guilty, the factfinder’s role in weighing 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.” *Jackson v. Virginia*, 443 U.S. at 319 (emphasis in original). Circumstantial evidence is not considered any less reliable than direct evidence. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). A jury may infer criminal intent from a defendant’s conduct where it is “plainly indicated as a matter of logical probability.” *State v. Bright*, 129 Wn.2d 257, 270, 916 P.2d 922 (1996).

A. Viewing the Evidence in the Light Most Favorable to the State, a Rational Trier of Fact Could Have Found Phillips Guilty of Rape in the First Degree.

The State charged Phillips with rape in the first degree and alleged that on or about May 13, 2008, Phillips engaged in sexual intercourse by forcible compulsion with R.N. and used or threatened to use a deadly weapon, or what appeared to be a deadly weapon. CP 1. Thus, rape in the first degree requires the State to prove beyond a reasonable doubt that the

defendant engaged in sexual intercourse with another person by “forcible compulsion.” RCW 9A.44.040(1); CP 394-95. “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. RCW 9A.44.010(6); CP 397.

Phillips argues that there was insufficient evidence to convict him of rape in the first degree because the State did not meet its burden of proving “lack of consent as part of its proof of the element of forcible compulsion[.]” Brief of Appellant at 12. Phillips’ argument is not supported by the record. Viewing the evidence in the light most favorable to the State, a rational trier of fact could have found Phillips guilty of rape in the first degree.

R.N. testified that she “always” gets paid up front for acts of prostitution so she does not “get ripped off”. 1RP 193. R.N. and Phillips walked to a dark, secluded parking lot and when R.N. asked for the money, Phillips pulled out a realistic-looking gun, cocked it by racking the slide back, and demanded that she perform oral sex on him or he would “put a bullet in [her] head.” 1RP 188-95. Phillips demanded that she “do it and get it done.” 1RP 270. R.N. testified that when she heard Phillips cock the gun, she knew that is what happens right before a person actually fires the gun. 1RP 195. R.N. testified that she was “terrified” and complied with

his demands out of fear. *See* 1RP 196. During the encounter, Phillips displayed the gun for “a couple minutes” and R.N. was so terrified she could not take her eyes off the gun. *See* 1RP 196.

Phillips refused to wear a condom as he forced her to perform oral sex on him. 1RP 196-98, 270. The gun remained on his body and he kept his hand in his pocket with the gun. *See* 1RP 270. Phillips then forced R.N. to have vaginal intercourse with him followed by oral sex. 1RP 198-200. R.N. only complied with these demands because Phillips had a gun and threatened to shoot her. *See* 1RP 196. R.N. feared he was going to shoot her. *See* 1RP 219. After being sexually assaulted for approximately thirty-five to fifty minutes, R.N. realized Phillips was not going to ejaculate due to his drug usage and told him she could not continue because she was in pain. 1RP 198-200. She told him, “Whatever you’re going to do, do it to me but I’m quitting...” 1RP 200. Even at the end of the sexual assault, R.N. still feared that Phillips was going to shoot her with the gun, so she asked him for a cigarette:

Because I was afraid, I was afraid to turn my back on him. I didn’t know if he was going to be mad at me because I didn’t get the job done, so I just kind of wanted to see what his demeanor was. If I asked him and he was nice enough to give it to me, maybe he wasn’t going to turn around and shoot me when I turned to walk away from him.

1 RP 229-32.

Viewing the evidence in the light most favorable to the State, R.N.'s testimony alone is sufficient to support a finding of guilt for the charge of rape in the first degree. However, the State produced additional evidence in its case in chief. After the rape, R.N. immediately called 911. 1RP 202-05. An officer responded and observed that R.N. was shaking, crying, and upset. 1RP 266. R.N. gave a detailed statement to the officer about the rape, which was consistent with her testimony at trial. *See* 1RP 267-75. Officer Specht testified that R.N. described the gun in detail and described how Phillips cocked back the action of the gun. 1RP 268-69. He testified that R.N. told him that she only engaged in the sexual acts "because she feared for her life." 1RP 272. He testified that she said she feared for her life due to Phillips' large size and because he displayed a gun and threatened to shoot her with it. 1RP 195, 272. Officer Specht testified that R.N. said she complied with his demands because she did not want to risk getting shot. *See* 1RP 272. Viewing these statements in the light most favorable to the State, a reasonable jury could certainly find that R.N. did not consent and was forced to engage in the sexual acts against her will.

At trial, police officers testified that Phillips' gun looked like a real gun. *See* 1RP 51, 101-03. Officer Van Tassel testified that the BB gun was all black in color and "very realistic-looking". 1RP 51. He testified that

“unless you actually manipulated it yourself, you wouldn’t be able to just look at it and tell right away if it was real or fake.” 1RP 51. Officer Dollard, a member of the SWAT team who specializes in weapons, testified that he did not know it was a BB gun until he was actually able to physically manipulate the gun and inspect it more closely. 1RP 91-92, 101-103. The jury was able to view gun used by Phillips, which was admitted as evidence at trial. *See* 1RP 104-06; 2RP 57-58; CP 407.

After the sexual assault, R.N. voluntarily spent more than three hours at the hospital undergoing an invasive sexual assault examination. *See* 1RP 243, 258; 2RP 9-10, 14. R.N. gave a detailed statement to hospital staff about the rape, which was also consistent with her testimony at trial. *See* 2RP 12-13. These statements were admitted as evidence at trial. *See* 2RP 11-14. On the contrary, Phillips gave varying versions of events.

Phillips initially gave the officers a false name and claimed he was “just walking around.” 1RP 51-53, 57. When asked if anything just happened with female down the street, Phillips said, “No.” 1RP 57. After learning of potential rape charges, Phillips admitted having oral sex with R.N., but claimed that he decided to “stiff her the 30 bucks” because she was “doing a shitty job” and could not get him hard. 1RP 57-61.

He denied having sexual intercourse with her and claimed that he “just rubbed her pussy for a while while she was sucking my dick.” 1RP 62. He claimed the only reason she knew about the gun was because she felt it through his jacket. 1RP 61. Phillips claimed he never took the gun out. 1RP 61.

Phillips told a different version of events at trial. Phillips’ initial version of events did not explain how R.N. was able to describe the gun in detail if she supposedly never saw it. Further, he could not pay a prostitute thirty dollars for a sexual act when he only had twelve dollars. At trial, Phillips changed his story and now claimed that the gun fell out of his pants and he had to cock the locked slide to release it before putting it away. *See* 2RP 36-37. He testified that this scared R.N. and her “eyes got big as saucers.” 2RP 37. He also changed his story and testified that his plan all along was to “short change” R.N. and only pay her twelve dollars. *See* 2RP 32-33, 68-70. After DNA testing from both the condom and Phillips’ genitals matched R.N., Phillips then admitted to also having vaginal intercourse with R.N. *See* 2RP 40-41, 72-73; *see also* 1RP 164-72.

The jury found R.N.’s version credible and found Phillips guilty of rape. The jury was free to believe the victim and disbelieve the defendant. *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990); *see Bright*, 129 Wn.2d at 272 (“It is the role of the jury to weigh the credibility of this

testimony, along with any surrounding facts and circumstances tending to support or discount the two conflicting accounts.”). Credibility determinations are for the trier of fact and cannot be reviewed on appeal. *Camarillo*, 115 Wn.2d at 71. If the jury believed the victim, there is sufficient evidence under the test stated in *State v. Green*, upon which the jury as a rational trier of fact could have found the elements of rape in the first degree beyond a reasonable doubt. *See State v. Byrd*, 30 Wn. App. 794, 796, 638 P.2d 601 (1981); *see also Green*, 94 Wn.2d at 221-22.

B. Phillips’ Argument Fails to Apply the Appropriate Standard of Review and Ignores Key Witness Testimony Favorable to the State.

A claim of insufficiency admits the truth of the State’s evidence and all reasonable inferences. *Salinas*, 119 Wn.2d at 201. The Court *must* view the evidence in the light most favorable to the State. *Green*, 94 Wn.2d at 221-22. Phillips’ argument fails to take this standard into consideration. *See* Brief of Appellant at 11-12.

Phillips ignores critical portions of the victim’s testimony at trial, including the fact that R.N. was “terrified” and only complied with his demands out of fear of getting shot with the gun Phillips threatened her with. *See* 1RP 196, 272. This statement alone provides sufficient evidence required to meet the State’s burden on appeal. Nonetheless, there is

overwhelming additional evidence. Phillips displayed the gun for “a couple minutes” during the encounter. 1RP 231. R.N.’s corroborated testimony was that she only engaged in the sexual acts out of fear for her life. *See* 1RP 272. She testified that even after being forced to engage in various sexual acts with Phillips, she still feared he would shoot her. 1RP 229-32. Phillips threatened R.N. with a gun that looked so realistic, even trained officers did not know it was a BB gun until they were actually able to handle the weapon. *See* 1RP 51, 91-92, 101-03.

Further, in his appeal, Phillips recites an incomplete version of key witness testimony, which leaves out significant evidence favorable to the State. In Phillips’ rendition of the facts, he states:

[R.N.] 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)

See Brief of Appellant at 11. Phillips fails to mention that as he was threatening to put a bullet in her head, he cocked the gun to make the sound of a bullet going into the chamber. *See* 1RP 194-95. Phillips also conveniently leaves out the middle of the sentence where R.N. talks about how terrified she was when he pulled the gun on her. When asked what she did right after Phillips threatened to put a bullet in her, R.N. testified:

I told him I would agree to do it but I wasn't going to do it while he was showing that weapon **because I couldn't get my eyes off of it. I was terrified.** I told him I'd do whatever he wanted if he just put it away.

1RP 196 (emphasis added).

Phillips also fails to mention that his statement about not hurting R.N. was made *at the same time* he cocked the gun and threatened to shoot her. Moreover, his claim that he would not hurt her was conditional on her agreeing to do what he demanded. Officer Specht testified that R.N. reported Phillips cocked back the action of the gun and said, "I'm not going to hurt ya or beat ya. I just want a blow job. You're going to do it or I'll put a bullet in you." 1RP 268-69.⁹ Thus, although Phillips said that he would not "hurt or beat" R.N., he immediately followed that statement with an explicit threat to shoot her with a gun if she refused to perform oral sex on him. This latter threat makes his first statement moot.

C. An Implied Threat to Use a Deadly Weapon, or What Appears to be a Deadly Weapon, is Sufficient to Support a Conviction for Rape in the First Degree.

Washington courts have long recognized that a threat may be implied in a rape case. *See e.g. State v. Hertz*, 99 Wn.2d 538,

⁹ At trial, R.N. could not recall whether she told the officer that Phillips said he was not going to hurt her or beat her. 1RP 218-19. She testified, "I was more worried about getting shot, I wasn't worried about getting beat up." 1RP 219.

663 P.2d 476 (1983);¹⁰ *State v. Eker*, 40 Wn. App. 134, 697 P.2d 273 (1985); *State v. Coe*, 109 Wn.2d 832, 750 P.2d 208 (1988). “First-degree rape does not require use or display of the deadly weapon. Threat of such use is sufficient.” *State v. Ingham*, 26 Wn. App. 45, 52, 612 P.2d 801 (1980). In *Ingham*, the defendant and accomplice temporarily blinded the rape victim with mace. *Id.* at 46. When the victim began to scream, the defendant told his accomplice, “You have that knife, use it.” *Id.* at 47. This threat silenced the victim even though she never saw the knife, and there was no evidence at trial that the assailants were actually armed with a knife. *Id.* at 47, 51-52. The Court held that the defendant’s threatened use of a knife in order to silence the victim’s screams carried with it an implication of death or serious bodily harm even though she did not see the knife. *Id.* at 51-52. The Court concluded that this threat was sufficient to prove first-degree rape. *Id.*

In *Hentz*, the defendant displayed a realistic-looking plastic cap pistol and threatened to shoot the victim if she refused to have sexual intercourse with him. *Hentz*, 99 Wn.2d at 539-41. The Court rejected

¹⁰ In 1983, the Legislature amended the definition of rape in the first degree to include use or threat to use a deadly weapon “*or what appears to be a deadly weapon.*” *State v. Coe*, 109 Wn.2d 832, 846, 750 P.2d 208 (1988) (emphasis added). The Legislature made this amendment after the Court of Appeals published the 1982 *Hentz* decision which had held that evidence of a toy gun would not support a conviction for rape in the first degree. *Id.* The Supreme Court reversed this decision in *State v. Hentz*, 99 Wn.2d 538.

Hentz's argument that a threat to use a deadly weapon exists only when a defendant points an actual gun at someone. *Id.* at 541.¹¹ The four-justice lead opinion concluded that this credible threat to use a deadly weapon in order to force the victim into submission implied that the defendant had the means to kill or seriously injure the victim and was sufficient to support a conviction for rape in the first degree. *See id.* The Supreme Court resolved this issue in *State v. Coe*. *See Coe*, 109 Wn.2d at 844-47.

In *Coe*, the defendant told his victims that he had a knife before raping them. *Id.* at 835-36. The State presented no evidence at trial of the actual presence of a knife or other deadly weapon. *Id.* at 844. The Court held that, "The element of first degree rape requiring use or threat of use of a deadly weapon is satisfied by the threat itself, without evidence of the actual existence of a deadly weapon." *Id.*¹²

Phillips argues that R.N. consented to the sexual acts because he put the gun away and did not show it during the sexual acts and there was no testimony "that he pointed a gun *at* her, or waved it around, or held it to

¹¹ The Court explained: "Hentz would have us hold that a threat to use a deadly weapon exists only when a defendant points an actual gun at the victim or holds a knife at her throat. He of necessity argues that use of a deadly weapon exists only if a defendant actually shoots, cuts or otherwise injures his victim. Such a proposition is untenable." *Id.*

¹² At the time of crimes in *Coe*, first degree rape was defined as occurring when the attacker "uses or threatens to use a deadly weapon." *Id.*

her.” See Brief of Appellant at 11-12 (emphasis in original). This argument has no merit and ignores established case law.

Implied threats to use a deadly weapon, or what appears to be a deadly weapon, are sufficient to support a conviction for rape in the first degree. See *State v. Bright*, 129 Wn.2d at 270-73; see also *Hentz*, 99 Wn.2d 538. In *Bright*, a police officer placed Ms. L under arrest and raped her in his patrol car while wearing a handgun strapped to his waist. *Bright*, 129 Wn.2d at 263-64. Ms. L was aware of the gun on his waist and the rifle in the back of the patrol car and engaged in the sexual acts out of fear for her safety. *Id.* It was undisputed that the officer did not actually use a weapon or expressly threaten to use a weapon to gain her compliance. *Id.* at 263-64, 266. The Court held that this was sufficient evidence of an implied threat by the officer to use a deadly weapon to support a conviction of rape in the first degree. *Id.* at 270-73.¹³ “By his knowing decision to remain armed while he assaulted and raped Ms. L, [the officer] communicated to his victim his intent to use his weapon if she resisted.” *Id.* at 272.

¹³ In reaching a decision, the Court considered the totality of circumstances, including Bright’s authority as a police officer, the presence of weapons on his person and in his patrol car, his greater size, the use of force, and his choice of a remote location for the sexual acts. *Id.* at 270-72.

Similar to the defendant in *Bright*, Phillips remained armed with a very realistic-looking gun the entire time he sexually assaulted R.N. See 1RP 196; 2RP 40-41. He not only displayed the gun, but *cocked* it, clearly signaling to the victim that the gun was ready to be fired at any moment. See 1RP 194-96. R.N. testified that she knew the “click-click” sound meant a bullet was now in the chamber and the trigger was ready to be pulled. See 1RP 195. This was a clear threat. To make his intentions even more clear, Phillips then verbally threatened to “put a bullet in [her] head” if she refused to give him a “blowjob.” See 1RP 195, 267-70. These express threats placed R.N. in fear for life and she complied with his demands out of fear. See 1RP 196, 272. Thus, there was not only an express threat communicated to R.N., but also an implied threat that he would use the gun if she resisted.

Our Supreme Court has recognized that there is a legitimate concern with a perpetrator of a rape *threatening* to use a deadly weapon:

The believable or credible threat to use a deadly weapon will likely instill a greater fear in the victim than any other type of threat. If the defendant threatens to strangle his victim, she has at least an opportunity to defend herself; but the same does not apply to the threat to use a gun, knife or other deadly weapon. There is very little opportunity, if any, for a victim to defend against a threatened attack with a deadly weapon, especially a gun.

Hentz, 99 Wn.2d at 544. In both *Hentz* and *Coe*, the Court was concerned that a credible threat to use a deadly weapon in a rape could just as likely render the victim unable to defend herself as it would if the perpetrator actually possessed a deadly weapon:

It follows from that reasoning that a perpetrator could also satisfy RCW 9A.44.040(1)(a) by suggestively looking at or referring to a weapon actually in the perpetrator's possession, or doing anything else which *implied* the perpetrator would use it to gain compliance by the victim. Such a credible threat, although not expressly made, would similarly place a victim at a severe disadvantage in defending against the rape.

Bright, 129 Wn.2d at 267-68 (emphasis in original).

In *State v. Eker*, an accomplice emerged from a trailer with a pistol and ordered the victim inside. *Eker*, 40 Wn. App. at 136. The accomplice stood guard outside the trailer while the defendant and a third man took turns raping the victim. *Id.* The Court held that there was ample evidence to support a finding that the defendant forcibly compelled the victim to engage in sexual intercourse under an implied threat that the gun would be used if she did not comply. *Id.* at 139. The Court noted that the victim knew the gun was "somewhere close by." *Id.* "The perpetrator of a crime need not be armed with a weapon in order to threaten to use one, if the victim knows that the weapon is available because it is in possession of the perpetrator or an accomplice." *Id.*

Under the Court's reasoning in *Bright* and *Eker*, Phillips is no less culpable of raping R.N. just because he put the gun in his pocket as he repeatedly raped her. He displayed the gun, cocked it, and threatened to shoot her if she did not comply. 1RP 194-96. He then maintained possession of the gun on his body throughout the entire rape. 1RP 196; 2RP 40-41. Clearly, this was an implied credible threat that he would use the gun to get his demands met. *See Bright*, 129 Wn.2d at 267-68.

D. A Victim's Lack of Physical Resistance Does Not Equate to Consent to Rape.

For nearly one hundred years, our Supreme Court has recognized that a lack of physical resistance does not equate to consent to being raped. *See State v. Miller*, 100 Wn. 586, 171 P. 524 (1918). "But submission, due to a yielding to fear, does not constitute consent." *Id.* at 587. The Court explained:

The force necessary to be used to constitute the crime of rape need not be actual, but may be constructive or implied. An acquiescence in the act, obtained through duress or fear of personal violence, is constructive force, and the consummation of unlawful intercourse by the man thus obtained would be rape.

Id. at 587-88; *see also State v. Thomas*, 9 Wn. App. 160, 163, 510 P.2d 1137 (1973) ("Reluctant submission does not imply consent").

Recognizing the fact that a victim's resistance increases the likelihood of the attacker's use of violence, our Supreme Court has

explicitly declined to hold that forcible compulsion always requires a showing that the victim offered physical resistance to being raped. *See State v. McKnight*, 54 Wn. App. 521, 525, 774 P.2d 532 (1989); *see also State v. Lynch*, 178 Wn.2d 487, 511, 309 P.3d 482 (2013) (“Consent should not be so qualified as to make additional injury to the victim a necessity for conviction.”). Thus, it is well established that a rape victim is not required to attempt to physically fight off an assailant and risk being killed. R.N. in no way, shape, or form consented to the sexual assaults because she chose not to try and physically fight off her six-foot-three-inch assailant who was armed with a cocked gun and threatening to shoot her with it. She need not risk death to obtain a conviction. *See Lynch*, 178 Wn.2d at 511. Viewing the evidence in the light most favorable to the State, as this Court must, a rational trier of fact could have found that R.N. did not consent to the sexual assaults.

E. The Authority Cited by Phillips is Inapposite.

Phillips cites *State v. W.R.*, 181 Wn.2d 757, 336 P.3d 1134 (2014) and argues that the State failed to meet its burden of proving lack of consent as part of the forcible compulsion element. *See* Brief of Appellant at 10-12. *State v. W.R.* is not on point. The issue in *W.R.* was whether it violates due process to place the burden of proof on a defendant to prove a defense that negates an element of the crime. *State v. W.R.*, 181 Wn.2d

at 765. The Court held that once a defendant asserts a consent defense to rape 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. *Id.* at 763.

First, Phillips did not affirmatively assert a consent defense at trial.¹⁴ Rather, he provided testimony that attempted to dispute two of the four elements the State was required to prove at trial. *See* 2RP 26-88. Second, the issue before the court in *State v. W.R.* is not at issue in this case. In *State v. W.R.*, the trial court required W.R. to prove the defense of consent by a preponderance of the evidence. *State v. W.R.*, 181 Wn.2d at 761. The Court held that because the defense of consent negates the element of forcible compulsion, due process prohibits shifting the burden to the defendant to prove consent by a preponderance of the evidence. *Id.* at 765-68.

Unlike the defendant in *State v. W.R.*, the State did not shift the burden to Phillips to prove a defense at trial. The jury was properly instructed on the four elements the State was required to prove beyond a reasonable doubt. *See* CP 395.¹⁵ The jury was also properly instructed that

¹⁴ The court record is silent as to any defense affirmatively asserted by Phillips.

¹⁵ The jury was instructed that each of the following four elements must be proved beyond a reasonable doubt: (1) That on or about May 13, 2008, the defendant engaged in sexual intercourse with R.N.; (2) That the sexual intercourse was by forcible compulsion; (3) That the defendant used or threatened to use a deadly weapon or what

“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. The jury heard testimony that R.N. complied with Phillips’ sexual demands because he pulled out a gun, cocked it, and threatened to shoot her if she did not comply. The jury was free to believe the victim and obviously did. *See State v. Camarillo*, 115 Wn.2d at 71; *see also Bright*, 129 Wn.2d at 273. Taking the evidence in the light most favorable to the State, as this Court must, there was overwhelming evidence presented at trial for the jury to find Phillips guilty of rape in the first degree.

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appeared to be a deadly weapon; and (4) That any of these acts occurred in the State of Washington. *Id.*

V. CONCLUSION

For the foregoing reasons, the State respectfully requests that the Court affirm Phillips' conviction of rape in the first degree.

RESPECTFULLY SUBMITTED this 17th day of March, 2016.

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NO. 33208-0-III

WASHINGTON STATE COURT OF APPEALS, DIVISION III

STATE OF WASHINGTON

v.

MICHAEL PHILLIPS

DECLARATION OF
SERVICE

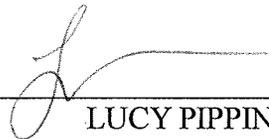
I, Lucy Pippin, declare as follows:

On March 17, 2016, I sent via electronic mail per service agreement a true and correct copy of Brief of Respondent and Declaration of Service addressed as follows:

Marie Trombley
marietrombley@comcast.net

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

DATED this 17th day of March, 2016, at Seattle, Washington.


LUCY PIPPIN