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NO. 62896-8-I

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

REC'D

DEC 21 2009

KING COUNTY PROSECUTOR
APPELLATE UNIT

STATE OF WASHINGTON,

Respondent,

v.

OLEKSANDIR YUSIPOVICH,

Appellant.

2009 DEC 21 PM 4:24

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

The Honorable Deborah Fleck, Judge

OPENING BRIEF OF APPELLANT

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A. ASSIGNMENT OF ERROR

Insufficient evidence supports appellant's conviction for indecent liberties by forcible compulsion.

Issue Pertaining to Assignment of Error

Where no rational trier of fact could find the elements of the crime beyond a reasonable doubt, must appellant's conviction be reversed, and the charge dismissed with prejudice?

B. STATEMENT OF THE CASE¹

1. Charge, Conviction, and Sentence

The King County prosecutor charged appellant Oleksandir Yusipovich with indecent liberties by forcible compulsion.² CP 104, 123. A jury convicted Yusipovich as charged. CP 122. The court sentenced him within the standard range to a minimum term of 60 months and a maximum term of life imprisonment. CP 124-34; former RCW 9.94A.712 (2005).

¹ This brief refers to the verbatim report of proceedings as follows: 1RP – 8/11/08; 2RP – 9/4/08; 3RP – 10/14/08; 4RP – 10/16 and 10/20/08; 5RP – 12/19/08; and 6RP – 12/16/08.

² Yusipovich successfully moved to withdraw a guilty plea to second degree assault (assault with intent to commit a felony, indecent liberties) based on the same incident. CP 1-4, 91-99.

2. Trial Testimony

During an evening of shopping, K.F. made eye contact with a man while she looked at animals at a pet store. 4RP 76. After K.F. returned to her car, the man from the pet store approached and asked her if she liked animals. 4RP 80. K.F. responded she did and described her many pets. 4RP 80. The man then hugged K.F. 4RP 80.

Surprised by the interaction, K.F. sat down in her car but soon noticed the man was still there. 4RP 81, 117. He suddenly grabbed her by the shoulders and pulled her out of the car. 4RP 82. In the process, K.F. bumped her hip against the steering wheel. 4RP 82-83.

The man grabbed K.F.'s face and began to kiss and lick it. 4RP 83. Moving downward, he pulled down K.F.'s shirt and bra and kissed and licked K.F.'s exposed chest. 4RP 83, 104-05.

K.F. testified the man released her from his grip after he began to kiss her face. 4RP 105. However, K.F. did not resist as the kissing and licking continued downward because she was in shock and simply froze. 4RP 110-11.

Recovering her faculties, K.F. pushed the man away, retreated into her car, and locked the door. 4RP 83. She called her mother but was hysterical and unable to articulate what occurred. 4RP 68, 84.

Donald Delaney was sitting in an SUV parked to the left of K.F.'s sedan. 4RP 6-9, 12. He noticed K.F. approach her car because he was nervous she would "ding" his SUV with her car door. 4RP 6-9.

Delaney observed a man approach K.F. and heard them converse about pets. 4RP 11. The man then kissed K.F., which Delaney found odd under the circumstances. 4RP 11-12. After the man left, K.F. got into her car and began to cry. 4RP 12, 41. Delaney approached K.F. and, confirming the man was unknown to K.F., suggested she call 911. 4RP 16, 85; Ex. 2. K.F. and Delaney obtained the man's license plate number as he drove out of the parking lot. 4RP 16, 90.

The man, Yusipovich, eventually returned. He fell to his knees before K.F., pleading in accented English, "Excuse me, excuse me, I'm sorry, I have a family, I've never done this before." 4RP 47, 94.

Yusipovich followed when K.F. and Delaney retreated to a nearby store. 4RP 24, 95, 144-45, 155-56. Yusipovich's family and the police soon arrived and Yusipovich was arrested. 4RP 148, 160, 171.

C. ARGUMENT

THE STATE FAILED TO PROVE BEYOND A REASONABLE DOUBT EACH ELEMENT OF INDECENT LIBERTIES BY FORCIBLE COMPULSION.

The State must prove every element of the crime charged beyond a reasonable doubt. U.S. Const., amend. 14; Const. art. I, § 3; In re

Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970). A reviewing court must reverse a conviction for insufficient evidence and dismiss with prejudice where no rational trier of fact could find all elements of the crime proven beyond a reasonable doubt. State v. Smith, 155 Wn.2d 496, 504-05, 120 P.3d 559 (2005); State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980).

The elements of indecent liberties by forcible compulsion are (1) knowingly causing another person, (2) who is not a spouse, (3) to have sexual contact (4) by forcible compulsion. RCW 9A.44.100; CP 114 (Instruction 6). Sexual contact is “any touching of the sexual or other intimate parts of a person done for the purpose of gratifying sexual desire of either party or a third party.” RCW 9A.44.010(2); CP 117 (Instruction 9). Forcible compulsion is physical force that overcomes resistance. RCW 9A.44.010(6); CP 118 (Instruction 10).

Here, taken in the light most favorable to the State, the evidence showed sexual contact occurred: the kissing and licking of K.F.’s breasts. But the evidence did not establish that this act, unlike the initial kiss, was accompanied by forcible compulsion. 4RP 83. Instead, K.F. testified after Yusipovich released her face she simply froze. 4RP 105, 110-11.

State v. Ritola is instructive. Ritola, a juvenile resident at a boys’ group home, approached a female counselor from behind and suddenly

grabbed her right breast, squeezed it, and quickly let go. The counselor was shocked and told Ritola his behavior was inappropriate. Ritola, 63 Wn. App. 252, 253, 817 P.2d 1390 (1991). The Court held there was insufficient evidence to “support a reasonable inference that the force used . . . was directed at overcoming resistance, or that such force was more than that needed to accomplish sexual touching.” Ritola, 63 Wn. App. at 255-56. Because there was no resistance to overcome, Ritola did not accomplish the sexual touching by “forcible compulsion.”

The same is true in the present case. Absent evidence that forcible compulsion accompanied Yusipovich's sexual contact, no rational juror could have found the State proved the elements of the charged crime beyond a reasonable doubt. Accordingly, Yusipovich's conviction should be reversed and dismissed with prejudice. Smith, 155 Wn.2d at 504-05.

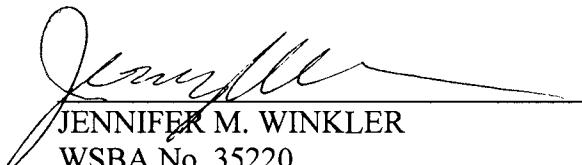
D. CONCLUSION

The evidence was insufficient to convict Yusipovich of indecent liberties by forcible compulsion. His conviction should therefore be reversed and the charge dismissed with prejudice.

DATED this 21ST day of December, 2009.

Respectfully submitted,

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DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 21ST DAY OF DECEMBER, 2009, I CAUSED A TRUE AND CORRECT COPY OF THE OPENING BRIEF OF APPELLANT TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

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SIGNED IN SEATTLE WASHINGTON, THIS 21ST DAY OF DECEMBER, 2009.

x Patrick Mayovsky