Supreme Court No. 97632-5
Division III, No. 35611-6-III

IN THE
SUPREME COURT
OF THE
STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

JONATHAN ANDREW BENSON,

Petitioner

PETITION FOR REVIEW FOLLOWING
APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR YAKIMA COUNTY

The Honorable Judge Doug L. Federspiel

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Petitioner Jonathan Benson asks this Court to accept review of the Court of Appeals' decision that affirmed his conviction for indecent liberties with forcible compulsion.

B. DECISION FOR WHICH REVIEW IS SOUGHT

The Court of Appeals, Division III, unpublished opinion, filed on August 6, 2019. A copy of this opinion is attached as Appendix A.

C. ISSUES PRESENTED FOR REVIEW

Issue 1: Whether this Court should accept review under RAP 13.4(b)(1), (2) or (3), because the trial court erred in finding Mr. Benson guilty of indecent liberties by forcible compulsion, where the evidence was insufficient.

Issue 2: Whether this Court should accept review under RAP 13.4(b)(1), (2) or (3), because the State committed misconduct in its closing argument that was prejudicial and incurable, by vouching for J.A. and by appealing to the passion and prejudice of the jury.

D. STATEMENT OF THE CASE

Around 5:00 p.m. on August 15, 2016, Yakima Valley College Campus Security Officer Jeffrey Cornwell was informed there was a male in a nearby park with alcohol, and he was planning to observe the male's activity to make sure he did not come onto campus, where drinking alcohol was prohibited. (RP 186-190). Officer Cornwell later observed the male drinking alcohol on campus. (RP 190-191).

Officer Cornwell also observed a female, who was not a student of the college, charging her cell phone on campus. (RP 188, 220). Because the college did not allow non-students to charge their cell phones on campus, Officer

Cornwell was planning to contact the female, inform her of the policy, and make sure she did not come into campus. (RP 188, 220).

Officer Cornwell observed the male and female together in the alcove of a campus building, making chest to chest contact, with the male's hands on the female's posterior. (RP 189-191, 221-222, 229). After Officer Cornwell identified himself, the male and female separated. (RP 189-190). Officer Cornwell explained to the male and female the campus policies they were violating, to get them to leave the campus. (RP 189, 220-221). Both individuals were cooperative. (RP 191-192, 220-221).

Officer Cornwell went into a building on campus to lock up. (RP 193). The female then entered the building, asked Officer Cornwell if she could leave out another exit, and to make sure the male did not follow her. (RP 150, 193).

Officer Cornwell proceeded to watch the male, who proceeded to walk off the campus. (RP 194-196). Officer Cornwell made no further observations of the male. (RP 197).

Yakima Valley College Campus Security Officer Correy Olson tracked the female as she walked off the campus. (RP 144-145, 151-152). He later encountered the female, and she voiced concerns about a male. (RP 152-153). Officer Olson spoke with Yakima Police Officer Bradley Althauser, who was on the campus at the time. (RP 153, 240-243). Officer Olson told Officer Althauser where the male had walked, and Officer Althauser made contact with the male. (RP 153-154, 160, 243-244). Officer Olson then brought the female to meet with Officer Althauser at this location. (RP 154, 246-247, 259).

The female involved in this incident was identified as J.A., and the male was identified as Jonathon A. Benson. (RP 121-122, 124, 149-150, 243-244, 246). J.A. was 24 years old at the time of these events. (CP 8-9, 259-260; RP 112).

According to J.A., Mr. Benson, while fully clothed, made the following contact with her on campus that day: gave her a friendly hug and kissed her on the neck; hugged her and put his erect penis against her body and moved it back and forth; and touched her butt. (RP 113-119, 121, 125-126, 129, 133-139).

Based on these events, the State charged Mr. Benson with one count of indecent liberties by forcible compulsion. (CP 6).

The case proceeded to a jury trial. (RP 111-380). Witnesses testified consistent with the facts stated above. (RP 112-262).

In addition, J.A. testified she did not know Mr. Benson. (RP 113). She testified Mr. Benson initially gave her a friendly hug, and she was okay with it. (RP 113-114, 129). J.A. testified Mr. Benson kissed her on the neck, and although she was not okay with that, she did not say anything. (RP 113-115, 129). She testified Mr. Benson did not touch her skin in any other place when he kissed her neck. (RP 129). J.A. also testified Mr. Benson touched her butt. (RP 125, 133-136).

J.A. testified that Mr. Benson put his penis on her body as follows:

> [H]e was like grabbing me. And then I felt his dick on me. And then he turned and gave me a big old hug and I tried to - - and then I tried to move it away.
> . . . .

> [T]hen after that, so I tried to push him back away and then because I, I don't feel comfortable with that. And then after that, then he - - so I walk away, take my charger with me to walk away.

(RP 116).

J.A. testified that Mr. Benson's penis rubbed her body on the front side, "[l]ike on the girl's uppers . . . [o]n the pussy." (RP 137). She testified she was not able to push Mr. Benson away very well. (RP 126).

J.A. further testified:

> [The State:] . . . How did he grab you?
> [J.A.:] Like a big old hug.
> [The State:] Okay. And were you comfortable with that?
> [J.A.:] No.
> [The State:] Did you say or do anything?
> [J.A.:] No. Like, I, like I wanted to say something, but I just got too scared.
> [The State:] Okay. And you said you felt something?
> [J.A.:] Yes.
> [The State:] What did you feel?
> [J.A.:] Like a dick, like his hard dick.
> [The State:] Okay. And just to clarify, a penis?
> [J.A.:] Yeah, like a penis.
> [The State:] Okay. And did you notice anything about this dick?
> [J.A.:] Well, he got like a boner . . . .
> . . . .
> [The State:] Is that the same thing as an erection?
> [J.A.:] Right.
> [The State:] Okay. So, and then what was he doing when you felt the boner?
> [J.A.:] Like, he was moving it back and forth.
> [The State:] And was he still hugging you?
> [J.A.:] And he was still hugging me.
> [The State:] And what were you doing during the time he was doing that . . . what were you during the time that he was hugging you and he had his boner on you?
> [J.A.:] I was like pushing him away and walking back away.
> [The State:] Okay. You were pushing him away?
> [J.A.:] Yeah.
> [The State:] How did that go?
> [J.A.:] Not good.
> . . . .

> [The State:] Right. But it sounds like you were trying to push him away. Was it easy to push him away?
> [J.A.:] No.
> [The State:] Okay. Were you - - did he eventually stop?
> [J.A.:] Yes.
> [The State:] What made him stop?
> [J.A.:] Then he was stopping when, like, that I was walking away. Because he was dropping the bottle on the ground and then that's why, that's the day - - that's the time that he - - that I walked away.
> . . . .
> [The State:] Okay. So, he was hugging you and he dropped his bottle, so you walked away.
> [J.A.:] Right.

(RP 117-119).

On cross-examination, J.A. testified that she did not use the word pussy to anyone prior to her trial testimony. (RP 138). She testified she did not tell the security officers about "touching your pussy or touching your butt[.]" (RP 138). J.A. testified that when she spoke to Officer Althauser, he asked her about those things, and she agreed. (RP 138-139). She testified that Officer Althauser asked her about "dry humping" and she agreed. (RP 139).

Officer Olson testified that when he spoke to J.A., she did not use the word pussy, dick, or boner, but she did use the word butt. (RP 156). Officer Olson testified he wrote a report for this incident, and the only contact he mentioned between J.A. and Mr. Benson was Mr. Benson touching J.A.'s butt. (RP 160-161; Pl.'s Ex. 5).

Officer Althauser testified he questioned Mr. Benson following his arrest on this charge, and a recording of this interview was admitted at trial. (RP 247-257, 260-261; Pl.'s Ex. 3). In this interview, Mr. Benson stated he "probably"

touched J.A.'s butt once, and that he kissed her neck. (RP 254-255; Pl.'s Ex. 3).

The interview also included the following statements:

> [Officer Althauser:] . . . Did you hump the front of her leg - - like dry hump her?
> [Mr. Benson:] Maybe, I don't know.
> [Officer Althauser:] Maybe? Do you remember if you did?
> [Mr. Benson:] Maybe.
> [Officer Althauser:] Maybe? Do you remember doing it at all?
> [Mr. Benson:] No. (Indiscernible), no.
> [Officer Althauser:] Oh, really? But you think maybe you did?
> [Mr. Benson:] If I did, I'm sorry. I apologize to her.

(RP 255-256; Pl.'s Ex. 3)

The trial court instructed the jury that in order to find Mr. Benson guilty of indecent liberties, it had to find the following elements were proved beyond a reasonable doubt:

> (1) That on or about August, 15, 2016 the defendant knowingly caused J.A. to have sexual contact with the defendant;
> (2) That this sexual contact occurred by forcible compulsion;
> (3) That any of these acts occurred in the State of Washington.

(CP 233; RP 331-332).

The jury was instructed that "[f]orcible compulsion means physical force that overcomes resistance." (CP 235; RP 332).

In its closing argument, the State argued:

> [J.A.] was able to and had the courage to take the stand, swear an oath to tell the truth in front of all these people that she's never met before with the person that she says did all this in the room and tell you that that was something that happened.

(RP 343).

Defense counsel did not object to this argument. (RP 343).

The jury found Mr. Benson guilty as charged. (CP 241, 247-258).

Mr. Benson appealed. (CP 262-272). On appeal, Mr. Benson argued the evidence presented at trial was insufficient to support a guilty verdict, and the State committed misconduct in its closing argument.[1] The Court of Appeals rejected these arguments and affirmed Mr. Benson's conviction. *See* Appendix A. Mr. Benson now seeks review by this Court.

E. ARGUMENT

A petition for review will be accepted by the Supreme Court only:

> (1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or
>
> (2) If the decision of the Court of Appeals is in conflict with another decision of the Court of Appeals; or
>
> (3) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or
>
> (4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

RAP 13.4(b).

Issue 1: Whether this Court should accept review under RAP 13.4(b)(1), (2) or (3), because the trial court erred in finding Mr. Benson guilty of indecent liberties by forcible compulsion, where the evidence was insufficient.

Review by this Court is merited because the Court of Appeals' decision conflicts with decisions of this Court addressing the evidence required to uphold a conviction when it is challenged for sufficiency of the evidence. *See State v. Salinas*, 119 Wn.2d 192, 829 P.2d 1068 (1992); *State v. Green*, 94 Wn.2d 216,

[1] Mr. Benson also challenged the imposition of certain costs and conditions of community custody, but those issues are not being raised here.

616 P.2d 628 (1980); RAP 13.4(b)(1). Review by this Court is also merited because the Court of Appeals' decision conflicts with another decision of the Court of Appeals finding insufficient evidence to support a finding of forcible compulsion. *See State v. Ritola*, 63 Wn. App. 252, 253-56, 817 P.2d 1390 (1991); RAP 13.4(b)(2). Finally, review is merited because the issue raises a significant question of law under the Washington Constitution and the United States Constitution, a defendant's right under the due process clause, which allows for a conviction only upon proof beyond a reasonable doubt. *See State v. Berg*, 181 Wn.2d 857, 867, 337 P.3d 310 (2014); Wash. Const. art. I, § 3; U.S. Const. amend. XIV; RAP 13.4(b)(3).

There was insufficient evidence to support Mr. Benson's conviction of indecent liberties by forcible compulsion, because the evidence presented at trial did not establish that Mr. Benson caused J.A. to have sexual contact with him by forcible compulsion. A rational jury could not have found Mr. Benson guilty of indecent liberties as charged. Therefore, the evidence is insufficient to support Mr. Benson's conviction of indecent liberties by forcible compulsion.

In every criminal prosecution, due process requires that the State prove, beyond a reasonable doubt, every fact necessary to constitute the charged crime. *In re Winship*, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970). Where a defendant challenges the sufficiency of the evidence, the proper inquiry is "whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found guilt beyond a reasonable doubt." *Salinas*, 119 Wn.2d at 201 (citing *Green*, 94 Wn.2d at 220-22). "[A]ll reasonable

inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant." *Id*. (citing *State v. Partin*, 88 Wn.2d 899, 906-07, 567 P.2d 1136 (1977)). Furthermore, "[a] claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom." *Id*. (citing *State v. Theroff*, 25 Wn. App. 590, 593, 608 P.2d 1254 (1980)).

"Circumstantial evidence and direct evidence are equally reliable." *State v. Thomas*, 150 Wn.2d 821, 874, 83 P.3d 970 (2004). Circumstantial evidence "is sufficient if it permits the fact finder to infer the finding beyond a reasonable doubt." *State v. Askham*, 120 Wn. App. 872, 880, 86 P.3d 1224 (2004) (citing *State v. King*, 113 Wn. App. 243, 270, 54 P.3d 1218 (2002)). The appellate court "defer[s] to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence." *Thomas*, 150 Wn.2d at 874-875.

"[A] criminal defendant may always challenge the sufficiency of the evidence supporting a conviction for the first time on appeal." *State v. Sweany*, 162 Wn. App. 223, 228, 256 P.3d 1230 (2011), *aff'd*, 174 Wn.2d 909, 281 P.3d 305 (2012) (citing *State v. Hickman*, 135 Wn.2d 97, 103 n. 3, 954 P.2d 900 (1998)); *see also* RAP 2.5(a)(2) (stating "a party may raise the following claimed errors for the first time in the appellate court . . . failure to establish facts upon which relief can be granted. . . ."). "A defendant challenging the sufficiency of the evidence is not obliged to demonstrate that the due process violation is 'manifest.'" *Id*.

The remedy for insufficient evidence to prove a crime is reversal, and retrial is prohibited. *State v. Smith*, 155 Wn.2d 496, 505, 120 P.3d 559 (2005).

To find Mr. Benson guilty of indecent liberties by forcible compulsion, the jury had to find:

> (1) That on or about August, 15, 2016 the defendant knowingly caused J.A. to have sexual contact with the defendant;
> (2) That this sexual contact occurred by *forcible compulsion*;
> (3) That any of these acts occurred in the State of Washington.

(CP 233; RP 331-332) (emphasis added); *see also* RCW 9A.44.100(1)(a) (indecent liberties by forcible compulsion).

Forcible compulsion is defined as "physical force which overcomes resistance, or a threat, express or implied, that places a person in fear of death or physical injury to herself or himself or another person, or in fear that she or he or another person will be kidnapped." RCW 9A.44.010(6). Here, the jury was instructed on the first definition part of the definition only, "[f]orcible compulsion means physical force that overcomes resistance." (CP 235; RP 332).

"[W]hether 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)). "Forcible compulsion requires more force than the force normally used to achieve sexual intercourse or sexual contact." *Ritola*, 63 Wn. App. at 254. "[F]orcible compulsion is not the force inherent in any act of sexual touching, but rather is that 'used or threatened to overcome or prevent resistance by the female.'" *Id*. at 254-55 (quoting *McKnight*, 54 Wn. App. at 527).

In *Ritola*, the defendant, while standing behind and a little to the right of a female juvenile detention counselor, "grabbed her right breast, squeezed it, then 'instantaneously' removed his hand." *Id*. at 253. Based on these facts, the defendant was convicted of indecent liberties by forcible compulsion. *Id*. On appeal, the court found insufficient evidence to support the finding of forcible compulsion. *Id*. at 254-256. The court reasoned:

> It is undisputed that [the defendant] used the force necessary to touch the counselor's breast, but as noted, that is not enough for forcible compulsion. There is no evidence that the force he used overcame resistance, for he caught the counselor so much by surprise that she has no time to resist.

Id. at 255.

The court further reasoned "the evidence does not support a reasonable inference that the force used by [the defendant] was directed at overcoming resistance, or that such force was more than that needed to accomplish sexual touching." *Id*. at 255-56.

Here, there was insufficient evidence that Mr. Benson had sexual contact with J.A. by forcible compulsion. The case is analogous to *Ritola*. *See Ritola*, 63 Wn. App. at 253-56. The force used by Mr. Benson was no more than that needed to accomplish the sexual contact. The force used by Mr. Benson was not directed at overcoming resistance from J.A., but rather, it was used to make sexual contact with her.

Assuming the jury could have determined that Mr. Benson touching J.A.'s butt was sexual contact, no physical force was used during this act, beyond what was needed to accomplish the sexual contact. (RP 125, 133-136, 189-191, 221-

222, 229, 254-255; Pl.'s Ex. 3); *see* RCW 9A.44.010(2) ("'Sexual contact' means 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."); *In re Matter of Welfare of Adams*, 24 Wn. App. 517, 520, 601 P.2d 995 (1979) ("The determination of which anatomical areas apart from the genitalia and breasts are intimate is a question to be resolved by the trier of the facts."). The only physical contact during this incident by Mr. Benson was the placing of his hands on J.A.'s buttocks. (RP 125, 133-136, 189-191, 221-222, 229).

Mr. Benson's act of putting his penis against J.A.'s body was also done with only the level of force needed to accomplish this sexual contact. (RP 116-119, 126, 137). Mr. Benson hugged J.A. in order to contact her body with his penis, but no other force was used by Mr. Benson. (RP 117-119); *cf. State v. Wright*, No. 49106-1-II, 2017 WL 3142586, at *5 (Wash. Ct. App. July 25, 2017) (finding sufficient evidence of forcible compulsion, where the defendant pushed into the victim while she was bent over a counter, placed his knee between her legs, placed his arms around her, pulled her in, and grabbed her crotch); *see also* GR 14.1(a) (authorizing citation to unpublished opinions of the Court of Appeals filed on or after March 1, 2013, as nonbinding authority).

In addition, Mr. Benson did not overcome resistance from J.A. J.A. did not say anything to Mr. Benson during the sexual contact, and according to her testimony, he stopped the contact. (RP 117-119). Mr. Benson did not overcome her resistance, but rather, ceased the sexual contact with J.A. (RP 117-119).

A rational jury could not have found Mr. Benson guilty of indecent liberties by forcible compulsion. *See Salinas*, 119 Wn.2d at 201 (citing *Green*, 94 Wn.2d at 220-22). The evidence presented at trial did not establish that Mr. Benson used forcible compulsion when causing J.A. to have sexual contact with him. His conviction for indecent liberties by forcible compulsion should be reversed and dismissed with prejudice. *See Smith*, 155 Wn.2d at 505 (stating this remedy).

Issue 2: Whether this Court should accept review under RAP 13.4(b)(1), (2) or (3), because the State committed misconduct in its closing argument that was prejudicial and incurable, by vouching for J.A. and by appealing to the passion and prejudice of the jury.

Review by this Court is merited because the Court of Appeals' decision finding Mr. Benson did not prove the State committed misconduct conflicts with decisions of the Supreme Court addressing prosecutorial misconduct. *See State v. Emery*, 174 Wn.2d 741, 759, 761-62, 278 P.3d 653 (2012); *State v. Thorgerson*, 172 Wn.2d 438, 442-43, 258 P.3d 43 (2011); *State v. Belgarde*, 110 Wn.2d 504, 507, 755 P.2d 174 (1988); *State v. Dhaliwal*, 150 Wn.2d 559, 577, 79 P.3d 432 (2003); *State v. Fisher*, 165 Wn.2d 727, 747, 202 P.3d 937 (2009); RAP 13.4(b)(1). Review by this Court is also merited because the Court of Appeals' decision conflicts with other decisions of the Court of Appeals addressing prosecutorial misconduct. *See State v. Claflin*, 38 Wn. App. 847, 849-50, 690 P.2d 1186 (1984); *State v. Robinson*, 189 Wn. App. 877, 892, 359 P.3d 874 (2015); RAP 13.4(b)(2). In addition, review by this Court is merited because the issue raises a significant question of law under the United States Constitution and the Washington Constitution, a defendant's right to a fair trial. *See* U.S. Const.,

amends. VI, XIV; WA Const. Art. 1, § 22; *State v. Davenport*, 100 Wn.2d 757, 762, 675 P.2d 1213 (1984); *In re Pers. Restraint of Glasmann*, 175 Wn.2d 696, 703–04, 286 P.3d 673 (2012); *State v. Hecht*, 179 Wn. App. 497, 503, 319 P.3d 836, 840 (2014); RAP 13.4(b)(3).

The State committed misconduct in its closing argument that was prejudicial and incurable, by vouching for J.A. and appealing to the passion and prejudice of the jury. This Court should reverse Mr. Benson's conviction and remand for a new trial.

"Prosecutorial misconduct may deprive a defendant of his constitutional right to a fair trial." *Glasmann*, 175 Wn.2d at 703-04 (citing *Davenport*, 100 Wn.2d at 762); *see also Hecht*, 179 Wn. App. at 503. "To prevail on a claim of prosecutorial misconduct, the defendant must establish that the prosecutor's conduct was both improper and prejudicial in the context of the entire record and the circumstances at trial." *Thorgerson*, 172 Wn.2d at 442 (2011) (internal quotation marks omitted) (*quoting State v. Magers*, 164 Wn.2d 174, 191, 189 P.3d 126 (2008)); *see also Emery*, 174 Wn.2d at 759 (when raising prosecutorial misconduct, the appellant "must first show that the prosecutor's statements are improper.").

If the defendant fails to properly object to the misconduct, "a defendant cannot raise the issue of prosecutorial misconduct on appeal unless the misconduct was so flagrant and ill intentioned that no curative instruction would have obviated the prejudice it engendered." *State v. O'Donnell*, 142 Wn. App. 314, 328, 174 P.3d 1205 (2007) (internal quotation marks omitted) (*quoting State*

v. Munguia, 107 Wn. App. 328, 336, 26 P.3d 1017 (2001)). "Under this heightened standard, the defendant must show that (1) 'no curative instruction would have obviated any prejudicial effect on the jury' and (2) the misconduct resulted in prejudice that 'had a substantial likelihood of affecting the jury verdict.'" *Emery*, 174 Wn.2d at 761 (quoting *Thorgerson*, 172 Wn.2d at 455). "Reviewing courts should focus less on whether the prosecutor's misconduct was flagrant or ill intentioned and more on whether the resulting prejudice could have been cured." *Id*. at 762.

A prosecutor's arguments calculated to appeal to the jurors' passion and prejudice and encourage them to render a verdict on facts not in evidence are improper. *Belgarde*, 110 Wn.2d at 507; *see also Dhaliwal*, 150 Wn.2d at 577 (counsel may not "make prejudicial statements that are not sustained by the record."). "[B]ald appeals to passion and prejudice constitute misconduct." *Fisher*, 165 Wn.2d at 747 (citing *Belgarde*, 110 Wn.2d at 507–08). "[T]he prosecutor's duty is to ensure a verdict free of prejudice and based on reason." *Claflin*, 38 Wn. App. at 849-50 (internal citations omitted) (citing *State v. Huson*, 73 Wn.2d 660, 662, 440 P.2d 192 (1968)).

In addition, "[a] prosecutor commits misconduct by vouching for a witness's credibility." *Robinson*, 189 Wn. App. at 892. "'Vouching may occur in two ways: the prosecution may place the prestige of the government behind the witness or may indicate that information not presented to the jury supports the witness's testimony.'" *Id*. at 892-93 (quoting *State v. Coleman*, 155 Wn. App. 951, 957, 231 P.3d 212 (2010)).

Here, in its closing argument, the State argued:

> *[J.A.] was able to and had the courage to take the stand*, swear an oath to tell the truth in front of all these people that she's never met before with the person that she says did all this in the room and tell you that that was something that happened.

(RP 343) (emphasis added).

The State committed misconduct by appealing to the passion and prejudice of the jury, by arguing that J.A. had "the courage to take the stand" and testify at trial. (RP 343); *see also Belgarde*, 110 Wn.2d at 507; *Fisher*, 165 Wn.2d at 747 (citing *Belgarde*, 110 Wn.2d at 507-08); *Claflin*, 38 Wn. App. at 849-50 (citing *Huson*, 73 Wn.2d at 662). By characterizing J.A. as courageous for testifying at trial, the State encouraged the jury to render a verdict based on sympathy for J.A., rather than based upon the facts admitted into evidence at trial. The State's argument appealed to the passion and prejudice of the jury by encouraging them to render a verdict based on their support for J.A.'s willingness to testify, rather than based upon the facts presented.

The State's argument also constituted improper vouching for J.A.'s testimony. *See Robinson*, 189 Wn. App. at 892-93. By arguing J.A. had the courage to take the stand, the State placed the prestige of the government behind J.A. as a witness. The State personally endorsed J.A. as a witness by characterizing her as courageous. *Cf. Robinson*, 189 Wn. App. at 894 (finding the State did not place the prestige of the government behind the witness, because the prosecutor's statements did not personally endorse the witness).

The State's argument prejudiced Mr. Benson. *See Emery*, 174 Wn.2d at 761 (quoting *Thorgerson*, 172 Wn.2d at 455). The case turned on the whether the

jury believed the testimony of J.A., because J.A. was the only witness to testify that Mr. Benson put his penis against her body. (RP 116-119, 137). In the statements from Officer Althauser's interview of Mr. Benson admitted at trial, Mr. Benson did not unequivocally admit to this conduct. (RP 255-256; Pl.'s Ex. 3).

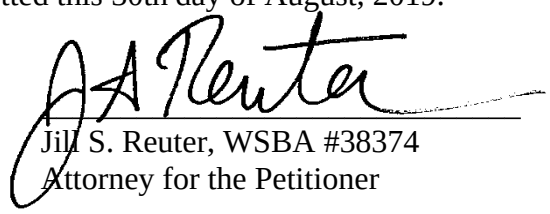
The State's misconduct "'was so flagrant and ill intentioned that no curative instruction would have obviated the prejudice it engendered.'" *O'Donnell*, 142 Wn. App. at 328 (*quoting Munguia*, 107 Wn. App. at 336); *see also Emery*, 174 Wn.2d at 761 (quoting *Thorgerson*, 172 Wn.2d at 455). The question for the jury was whether to believe the testimony J.A. Where the case turned on whether the jury believed this singular witness, no curative instruction would have removed the prejudice created by the State characterizing the witness as courageous.

The State committed misconduct in its closing argument that was prejudicial and incurable, by vouching for J.A. and appealing to the passion and prejudice of the jury. This Court should reverse Mr. Benson's conviction and remand for a new trial.

F. CONCLUSION

For the reasons stated herein, Mr. Benson respectfully requests that this Court grant review pursuant to 13.4(b).

Respectfully submitted this 30th day of August, 2019.



Jill S. Reuter, WSBA #38374
Attorney for the Petitioner

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

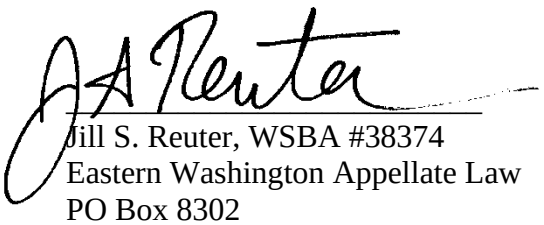
STATE OF WASHINGTON	)	
Plaintiff/Respondent	)	COA No. 35611-6-III
vs.	)	
	)	
JONATHAN ANDREW BENSON	)	PROOF OF SERVICE
	)	
Defendant/Appellant	)	
	)	

I, Jill S. Reuter, assigned counsel for the Appellant herein, do hereby certify under penalty of perjury that on August 30, 2019, I deposited for mailing by U.S. Postal Service first class mail, postage prepaid, a true and correct copy of the attached Petition for Review to:

Jonathan A. Benson, DOC #400173
Coyote Ridge Corrections Center
PO Box 769
Connell, WA 99326

Having obtained prior permission from the Yakima County Prosecutor's Office, I also served the Respondent State of Washington at David.Trefry@co.yakima.wa.us and appeals@co.yakima.wa.us using the Washington State Appellate Courts' Portal.

Dated this 30th day of August, 2019.



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APPENDIX A

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

STATE OF WASHINGTON,	)	
	)	No. 35611-6-III
Respondent,	)	
	)	
v.	)	
	)	
JONATHAN ANDREW BENSON,	)	UNPUBLISHED OPINION
	)	
Appellant.	)	

SIDDOWAY, J. — Jonathon Benson appeals his conviction for indecent liberties, challenging the sufficiency of the evidence to prove the element of forcible compulsion. He also contends that the prosecutor committed misconduct in closing argument by telling jurors that the victim was courageous for taking the stand and swearing an oath to tell the truth to people she had not met before.

The evidence established that the victim verbally objected to Mr. Benson's advances and then attempted without success to pull away from and push Mr. Benson away. That is sufficient. And while the prosecutor's unobjected-to statement about the victim's courage arguably appealed to jurors' sympathy and bordered on vouching, it was not so flagrant or ill-intentioned that it could not have been addressed by an admonition to the jury. We affirm the conviction.

We compliment and thank both appellate counsel for their initiative in resolving Mr. Benson's remaining assignments of error without the need for decision by this court.

FACTS AND PROCEDURAL BACKGROUND

On a late afternoon in mid-August 2016, Jonathan Benson and Julia Avon[1] crossed paths on the Yakima Valley College Campus. Neither was a student. The presence of both was noted and monitored by campus security officers. The security officers wanted to make sure that Mr. Benson, who was seen drinking alcohol in an adjacent park, did not enter the campus with alcohol. Ms. Avon was apparently using an outlet in a campus building to charge her cell phone, which—when done by a nonstudent—violated policy.

The interaction between the two, little of which was witnessed by the campus security officers, resulted in Mr. Benson being charged with indecent liberties by forcible compulsion. At trial, the State relied largely on the testimony of Ms. Avon, although it offered as corroboration evidence from the campus security officers, a responding police officer, surveillance video, and Mr. Benson's statement following arrest.

Ms. Avon is evidently developmentally delayed, a matter we point out, as the State did at trial,[2] because her communication was different from what one would ordinarily

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[1] "Julia Avon" is a pseudonym.

[2] The State elicited her testimony that Ms. Avon had been a special education student and that her soccer team had participated in the Special Olympics. Apart from establishing that she had been a forward on her soccer team, it did not delve further into her abilities or any deficits.

expect from a 25-year-old woman—her age at the time of trial. She testified at trial that Mr. Benson, whom she did not know, approached her in the campus building where she was charging her phone. She recalled him saying that he wanted to give her a hug, and she told him it would be okay. She did not have an objection to the hug. After that, however, he kissed her on the neck, which she said was not okay, although she admits she said nothing at the time because, as she put it, "I got scared inside my body." Report of Proceedings (RP) at 115. She "told him, like, like why are you kissing me, you know?" *Id*. at 113.

She testified that he went outside and he was "going crazy, like drinking." *Id*. at 116. She testified that Mr. Benson told her to come over to him by a tree in a park on campus and she went over to him, "[a]nd then he—and then he was like grabbing me. And then I felt his dick on me. And then he turned and gave me a big old hug and I tried to—and then I tried to move it away." *Id.* Questioned in more detail about what the State would rely on as Mr. Benson's criminal conduct, Ms. Avon testified:

> Q What did you feel?
>
> A Like a dick, like his hard dick.
>
> Q Okay. And just to clarify, a penis?
>
> A Yeah, like a penis.
>
> Q Okay. And did you notice anything about this dick?
>
> A Well, he got like a boner and like when he got drunk, you know how guys get drunk and then and you know how they've got like a burner? Like they want to have sex.

Q Do you mean a boner?

A Yeah.

Q Is that the same thing as an erection?

A Right.

Q Okay. So, and then what was he doing when you felt the boner?

A Like, he was moving it back and forth.

Q And was he still hugging you?

A And he was still hugging me.

Q And what were you doing during the time that he was doing that?

A He was—

Q What were you doing during the time that he was hugging you and he had his boner on you?

A I was like pushing him away and walking back away.

Q Okay. You were pushing him away?

A Yeah.

Q How did that go?

A Not good.

Q Why do you say that?

A Because I have (indiscernible).

Q I'm sorry?

A I have (indiscernible).

Q Right. But it sounds like you were trying to push him away. Was it easy to push him away?

A No.

Q Okay. Were you—did he eventually stop?

A Yes.

Q What made him stop?

> A Then he was stopping when, like, that I was walking away. Because he was dropping the bottle on the ground and then that's why, that's the day—that's the time that he—that I walked away.
>
> Q He was dropping the bottle on the ground?
>
> A Yeah.
>
> Q What kind of bottle?
>
> A I don't know, like vodka. Like alcohol, like lemonade.

Id. at 117-19. Ms. Avon testified a half dozen times to trying to push Mr. Benson away or move away from him as he rubbed his erection against her.

Ms. Avon testified that Mr. Benson was "a lot taller" than she was. *Id.* at 137. Although she described herself as "like 5' 4"," *id.*, both lawyers described her in closing argument as even more petite. The prosecutor suggested she was perhaps "well under 5 feet, actually." *Id.* at 343. And defense counsel observed, "as [the prosecutor] points out, she's not 5' 4"." *Id.* at 363.

Two campus security officers testified at trial. One, Jeffrey Cornwell, had approached Mr. Benson and Ms. Avon during their first encounter in the campus building, and told them they both needed to move on. He testified that as he approached Mr. Benson and Ms. Avon, they stood "chest to chest, face past ears, hands on [Ms. Avon's] posterior, a look of surprise on the female with her hands to her sides." *Id.* at 189. He testified that Ms. Avon was not hugging Mr. Benson. Security officer Cornwell said Mr. Benson was slurring his words and was a "little wobbly on his feet"; he opined that Mr. Benson was "definitely over the legal limit if he was operating a motor vehicle."

Id. at 192-93. Security officer Cornwell testified that both Mr. Benson and Ms. Avon were cooperative and left the campus building, but that Ms. Avon returned and asked "if she could leave out another exit and to please make sure [Mr. Benson] did not follow her." *Id.* at 193.

A second campus security officer testified that having learned that Ms. Avon was trying to get off campus and avoid Mr. Benson, he allowed her to use a phone. He also approached a Yakima police officer who was near the campus and later escorted Ms. Avon to where the officer, Bradley Althauser, had detained Mr. Benson, so that she could make an identification and tell the officer what had happened.

Officer Althauser arrested Mr. Benson for indecent liberties and took him to the Yakima police station, where he questioned him after reading him his *Miranda*[3] rights. Mr. Benson admitted hugging Ms. Avon and "maybe" touching her butt. *Id.* at 254. Asked why, he answered, "I was pretty buzzing." *Id.* Further interrogation addressed Ms. Avon's allegation that he had rubbed his erect penis against her:

> OFFICER ALTHAUSER: . . . Did you hump the front of her leg—like dry hump her?
>
> MR. BENSON: Maybe, I don't know.
>
> OFFICER ALTHAUSER: Maybe? Do you remember if you did?
>
> MR. BENSON: Maybe.

[3] *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

> OFFICER ALTHAUSER: Maybe? Do you remember doing it at all?
>
> MR. BENSON: No. (Indiscernible), no.
>
> OFFICER ALTHAUSER: Oh, really? But you think maybe you did?
>
> MR. BENSON: If I did, I'm sorry. I apologize to her.

Id. at 255-56.

The jury was instructed that, to convict Mr. Benson of the crime of indecent liberties, the State must prove beyond a reasonable doubt, among other things,

> (1) That on or about August[ ] 15, 2016 the defendant knowingly caused J.A. to have sexual contact with the defendant[, and]
> (2) That this sexual contact occurred by forcible compulsion.

Clerk's Papers (CP) at 233. It was instructed that "[f]orcible compulsion means physical force that overcomes resistance."[4] *Id*. at 235.

In closing argument, the prosecutor addressed, without objection by the defense, the fact that Ms. Avon "is a little different than the rest of us." *Id*. at 336. After discussing why jurors should not discount her testimony because of those differences, he stated:

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[4] RCW 9A.44.010(6) has a longer definition of forcible compulsion: "'Forcible compulsion' means physical force which overcomes resistance, or a threat, express or implied, that places a person in fear of death or physical injury to herself or himself or another person, or in fear that she or he or another person will be kidnapped."

Mr. Benson points out in his briefing that the instruction at trial provided jurors with only the first meaning but he does not assign error to the instruction, nor could he, having failed to object to the instruction at trial.

> But, you know, she did—was able to and had the courage to take the stand, swear an oath to tell the truth in front of all these people that she's never met before with the person that she says did all this in the room and tell you that that was something that happened.

Id. at 343.

The jury found Mr. Benson guilty as charged. He appeals.

ANALYSIS

Mr. Benson challenges the sufficiency of the evidence to prove the element of forcible compulsion and argues that the prosecutor's closing argument about Ms. Avon's courage was improper, as vouching or as appealing to the passion of the jury.

I. SUFFICIENCY OF THE EVIDENCE

In reviewing a challenge to the sufficiency of the evidence to convict, we view the evidence in the light most favorable to the State and determine whether any rational trier of fact could have found the elements of the charged crime beyond a reasonable doubt. *State v. Brown*, 162 Wn.2d 422, 428, 173 P.3d 245 (2007); *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). A claim of insufficiency admits the truth of the State's evidence and all reasonable inferences from it. *Salinas*, 119 Wn.2d at 201. We defer to the trier of fact "on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence." *State v. Thomas*, 150 Wn. 2d 821, 874-75, 83 P.3d 970 (2004), *aff'd*, 166 Wn.2d 380, 208 P.3d 1107 (2009).

Forcible compulsion, being "'physical force which overcomes resistance,'" requires more physical impact than the impact inherent in the sexual contact. *State v. Ritola*, 63 Wn. App. 252, 254, 817 P.2d 1390 (1991) (quoting RCW 9A.44.010(6)). Mr. Benson likens his case to that in *Ritola*, in which this court held that indecent liberties was not proved when the defendant reached out and squeezed the breast of a female juvenile detention counselor. But in that case there *was* no resistance—the counselor "had no time to resist." *Id.* at 255.

In this case, Ms. Avon testified that she resisted by trying to push Mr. Benson away or pull away, but he continued to hug her. The evidence was sufficient for reasonable jurors to find that his continuing to hold her close constituted forcible compulsion.

II. PROSECUTORIAL MISCONDUCT

Mr. Benson argues it was prosecutorial misconduct for the prosecutor to tell the jury in his closing argument that Ms. Avon was courageous to testify. Mr. Benson argues the prosecutor's statement amounted to improper vouching and that the State encouraged the jury to render a verdict based on sympathy rather than on the evidence at trial.

Prosecutorial misconduct is not attorney misconduct in the sense of violating rules of professional conduct. *State v. Fisher*, 165 Wn.2d 727, 740 n.1, 202 P.3d 937 (2009). It is, instead, a term of art that refers to "prosecutorial mistakes or actions [that] are not harmless and deny a defendant [a] fair trial." *Id*. To succeed on a prosecutorial

misconduct claim, an appellant has the burden of establishing that the prosecutor's conduct was improper (as being at least mistaken) and was prejudicial. *State v. Stenson*, 132 Wn.2d 668, 718-19, 940 P.2d 1239 (1997). Where, as here, a defendant fails to object in the trial court to a prosecutor's statements, he waives his right to raise a challenge on appeal unless the remark was so flagrant and ill-intentioned that it evinced an enduring and resulting prejudice that could not have been neutralized by an admonition to the jury. *Id*. at 719.

It is improper for a prosecutor to personally vouch for or against a witness's credibility. *State v. Brett*, 126 Wn.2d 136, 175, 892 P.2d 29 (1995). In addition, a prosecutor must seek convictions based on probative evidence and sound reason; he or she may not use arguments calculated to inflame the passions or prejudices of the jury. *In re Pers. Restraint of Glasmann*, 175 Wn.2d 696, 704, 286 P.3d 673 (2012).

The State argues that read in context the prosecutor was merely trying to ask jurors not to "look down on the facts [Ms. Avon] was imparting" simply because she expressed them differently than other 25-year-old women would. Br. of Resp't at 19. But the prosecutor was able to address that legitimate issue in closing before he spoke of her as courageous and as having taken an oath to tell the truth. Before the argument that is challenged, the prosecutor had already told jurors that [Ms. Avon's] differences were

> important for me to deal with because of the fact that when someone communicates with you, they send you all kinds of little messages on a subconscious basis, right? . . .

> And we also talked about the fact that we have to be careful about these cues though because sometimes they can mean different things. Someone could be nervous just because they're shy and they're talking in a big courtroom or they could be nervous because they're not telling the truth. You know, they might look you in the eyes because they know that the best way to make someone believe them, whether they're telling the truth or not, is to look someone straight in the eyes. On the other hand, someone might look down because they're shy, it's a cultural thing, a variety of different things.
>
> But, you know, [Julia] says some of her words kind of differently and we'll talk about that. She just communicates a little bit differently and evaluating her testimony is going to be important . . . .

RP at 337.

Later, talking to jurors about the way Ms. Avon said the word "hard," the prosecutor said,

> There was a vowel missing there and another consonant that's not in when most people say it, but that's [Julia] and her style of communication. Does it mean she's not telling the truth? No, it just means—I would argue to you that she communicates a little differently than most of us do.

Id. at 343.

At issue is whether it was misconduct for the prosecutor to go further, and say:

> But, you know, she did—was able to and had the courage to take the stand, swear an oath to tell the truth in front of all these people that she's never met before with the person that she says did all this in the room and tell you that that was something that happened.

Id.

Mr. Benson makes a legitimate argument that singling out a single witness in this fashion—the victim, a developmentally delayed witness—was an appeal to the jury's sympathy and bordered on vouching. But it was a single statement, and in context cannot

reasonably be construed as flagrant or ill-intentioned. It could easily have been addressed by an admonition to the jury.

Affirmed.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

Siddoway, J.

WE CONCUR:

Fearing, J.

Korsmo, J.

NICHOLS AND REUTER, PLLC / EASTERN WASHINGTON APPELLATE LAW

August 30, 2019 - 11:35 AM

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