

FILED

DEC 28 2010

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

No. 29246-1-III

COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

JESUS A. SOTO,

Appellant.

REPLY BRIEF OF APPELLANT

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I. ARGUMENT IN REPLY

The respondent makes two points in its brief that should be touched on. The respondent claims that Mr. Soto is putting forth an argument that the crime of indecent liberties by forcible compulsion requires evidence of brutality or physical injury. (Br. of Respondent 7). Nowhere does Mr. Soto make this argument. However, the crime does require more than mere force, it requires that force be used to overcome resistance. State v. Ritola, 63 Wn. App. 252, 254-55, 817 P.2d 1390 (1991).

The respondent then makes the statement that "The testimony of the victim, Ms. Murray, is sufficient evidence for a reasonable trier of fact to find beyond a reasonable doubt that defendant is guilty of indecent liberties by forcible compulsion since defendant essentially committed an assault when he continued touching the victim after she twice indicated that his touching was unwarranted." (Br. of Respondent 7).

That comment highlights the problem with the proof in this case. Proof of an assault is not the same as proof of forcible compulsion. See, Ritola at 256. The testimony from Ms. Murray showed that Mr. Soto had put his hands on her waist (RP 32), was touching her breasts (RP 33), and kissing her (RP 34). At some point during this make-out session Ms.

Murray told Mr. Soto that she wanted to do this another time. (RP 34). She also testified that she told him to stop (RP 35) and gave him a push which was described as not "a hard push" like she wanted him to get off of her, but was more like "hey, I don't want to do this". (RP 36). After this light push back, Mr. Soto had maintained his hold on her waist, with Mr. Soto sometimes kissing Ms. Murray and she sometimes kissing him back. (RP 36-37).

What is important to remember is that much of the testimony from Ms. Murray concerned what was going through her mind, not necessarily what she was communicating to Mr. Soto. After the point of the kissing and groping when Ms. Murray testified she said she did not want to do this at this time, Mr. Soto did not do anything different. He simply maintained the same placement of his hand on her waist, and still kissed her and was kissed back.

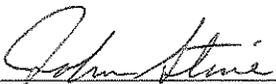
While it may be that the continued touching was unwanted, and possibly a fourth degree assault, the touching was not used to overcome resistance. Mr. Soto was merely maintaining the same degree of contact throughout the entire make-out session. At no point does the evidence suggest that the force used to accomplish the touching in the first place was later used to overcome any resistance on the part of Ms. Murray. As

in Ritola, evidence of an unwanted touching does transform every action into forcible compulsion.

II. CONCLUSION

While the evidence may or may not present a case of fourth degree assault, it does not rise to the level of establishing forcible compulsion to overcome resistance to the contact in question. Mr. Soto respectfully requests the Court to find that insufficient evidence supports the finding of forcible compulsion, and to remand his case for dismissal.

Respectfully submitted the 28th day of December, 2010.


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