

31139-2-III

COURT OF APPEALS

DIVISION III

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

JOHN L. SANDERS, APPELLANT

APPEAL FROM THE SUPERIOR COURT

OF SPOKANE COUNTY

BRIEF OF RESPONDENT

STEVEN J. TUCKER
Prosecuting Attorney

Andrew J. Metts
Deputy Prosecuting Attorney
Attorneys for Respondent

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(509) 477-3662

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I.

ASSIGNMENTS OF ERROR

- A. The evidence was insufficient to support the conviction for attempted indecent liberties.
- B. The trial court erred in denying Mr. Sander's request for a jury instruction on voluntary intoxication.

II.

ISSUES PRESENTED

- A. WAS THERE SUFFICIENT EVIDENCE TO SUPPORT THE DEFENDANT'S CONVICTION?
- B. DID THE TRIAL COURT ERR IN REFUSING TO GIVE A VOLUNTARY INTOXICATION DEFENSE?

III.

STATEMENT OF THE CASE

For the purposes of this appeal only, the State accepts the defendant's version of the Statement of the Case.

IV.

ARGUMENT

A. THERE WAS SUFFICIENT EVIDENCE TO SUPPORT THE DEFENDANT'S CONVICTION.

“There is sufficient proof of an element of a crime to support a jury’s verdict when, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found that element beyond a reasonable doubt.” *State v. Bright*, 129 Wn.2d 257, 266 n.30, 916 P.2d 922 (1996). “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 relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, 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, 616 P.2d 628 (1980); *State v. Smith*, 106 Wn.2d 772, 725 P.2d 951 (1988); *State v. Myles*, 127 Wn.2d 807, 816, 903 P.2d 979 (1995). The defendant admits to the truth of the State’s evidence and the viewing of the State’s evidence in a light most favorable to the prosecution.

Circumstantial evidence and direct evidence are equally reliable. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980).

The jury was instructed that the defendant caused the victim to have sexual contact with the defendant. This sexual contact was by means of forcible compulsion. CP 15. “Forcible compulsion” is further 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 oneself or another person or in fear of being kidnapped or that other person will be kidnapped. CP 21. The defendant sidesteps this issue by simply ignoring the first words of the instruction defining “forcible compulsion.” As noted above, the definition of forcible compulsion states that it is: physical force which overcomes resistance, or a threat... . The defendant skips those first few words and concludes there was insufficient evidence because there was no fear of death or physical injury on the part of the victim. What the State needed to prove was that the defendant took a substantial step towards overcoming the victim’s resistance.

According to the victim, Ms. Feltes, the defendant touched her breast. RP 54. Then the defendant grabbed the victim’s wrist. RP 54. The defendant kissed the victim on the lips. RP 55. The defendant touched Ms. Feltes on the hips and on her buttocks. RP 58. These actions occurred in Mission Park. RP 48. Eventually, Ms. Feltes was able to remove herself from the situation.

Viewed in the light of the complete jury instruction, the only way for the defendant to prevail would be to prove that the victim *wanted* to be kissed, wanted to have her buttocks fondled and her breast manhandled. She testified that the actions of the defendant were against her wishes.

Viewing the State's evidence as a whole, there was ample evidence that the defendant took more than one substantial step towards the committing of the act of indecent liberties. Even if one uses the defendant's arguments on appeal, if the complete language of the definitional instruction for "forcible compulsion" is properly included, the State's evidence is adequate to support the jury's verdict.

**B. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION
IN REFUSING TO GIVE A VOLUNTARY INTOXICATION
DEFENSE.**

One of the lesser arguments used by the defendant is that if he was not intoxicated, he would not have done what he did. The defendant asked for an intoxication instruction but the trial court refused to give one. "We review a trial court's decision to reject a party's jury instruction for an abuse of discretion." *State v. Picard*, 90 Wn. App. 890, 902, 954 P.2d 336 *review denied*, 136 Wn.2d 1021, 969 P.2d 1065 (1998). The defendant presented testimony from one witness, aside from the defendant, bearing on the question of intoxication.

Mr. David Fisher testified that he was with the defendant up until the police arrived. When asked by trial defense counsel, “How much would you say that Mr. Sanders was drinking that day?” Mr. Fisher replied, “I don’t know.” RP 103. The trial defense counsel tried once more by asking: “What was he like that day, say around 12:00 to 1:00?” Mr. Fisher again was less than helpful to the defense, stating: “He looked fine to me.” RP103. Finally, trial defense counsel asked Mr. Fisher if they were intoxicated. He replied: “With beer yes.” “I couldn’t really tell you how many he had.” RP 111.

The defendant’s testimony tended to wander a bit but he was certain that he never kissed the victim, touched her breast, put his fingers on her butt, etc. The amount of alcohol consumed by the defendant increased during his testimony from 1.5 beers initially, to “3 or 4 beers.” RP 119, 133. The defendant also indicated he had smoked some marijuana and the effect of the marijuana changed from a “small buzz” to “...buzzing pretty good.” RP 134.

The defendant did not clearly testify to the effect of whatever amount of alcohol he actually consumed. There is no doubt he drank some alcoholic beverage. However, that is not enough to justify the giving of an intoxication defense instruction. To obtain a voluntary intoxication instruction, a defendant must show (1) the crime for which he faces conviction includes “an element [of] a

particular mental state,” (2) substantial evidence shows that he or she was drinking an intoxicating beverage, and (3) evidence that the intoxication affected his or her ability to acquire the particular mental state. *State v. Gabryschak*, 83 Wn. App. 249, 252, 921 P.2d 549 (1996). Clearly, the crime of attempted indecent liberties contains a “mental state” element. As for No. 2., the State agrees that there was substantial evidence that the defendant was drinking an intoxicating beverage. It is the last element that is problematic for the defense. There was little, or no, evidence that the defendant’s level of intoxication affected the defendant’s mental state. The defendant’s testimony was “all over the place.” The single defense witness did not testify that the defendant was too intoxicated to form the requisite mental state.

“Because a person can be intoxicated and still be able to form the requisite mental state, “[t]he evidence ‘must reasonably and logically connect the defendant’s intoxication with the asserted inability to form the required level of culpability to commit the crime charged.’ ” *State v. Gabryschak*, 83 Wn. App. at 252-53. The trial court did not think the evidence was sufficient to support an intoxication instruction. 7/31 RP 4. Given the lack of direct testimony regarding the defendant’s level of intoxication, as opposed to what quantity of intoxicants the defendant had consumed, it cannot be said that the trial court abused its discretion in refusing to give an involuntary intoxication instruction.

V.

CONCLUSION

For the reasons stated, the conviction of the defendant should be affirmed.

Dated this 21st day of May, 2013.

STEVEN J. TUCKER
Prosecuting Attorney

A handwritten signature in black ink, appearing to read "Andrew J. Metts", written over a horizontal line.

Andrew J. Metts #19578
Deputy Prosecuting Attorney
Attorney for Respondent

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION III

STATE OF WASHINGTON,)	
)	
Respondent,)	NO. 31139-2-III
v.)	
)	CERTIFICATE OF MAILING
JOHN L. SANDERS,)	
)	
Appellant,)	

I certify under penalty of perjury under the laws of the State of Washington, that on May 21, 2013, I e-mailed a copy of the Respondent's Brief in this matter, pursuant to the parties' agreement, to:

David N. Gasch
gaschlaw@msn.com

and mailed a copy to:

John L. Sanders
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PO Box 769
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5/21/2013
(Date)

Spokane, WA
(Place)

(Signature)