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STATE OF WASHINGTON
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NO. 64067-4-I

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

STATE OF WASHINGTON,

Respondent,

v.

JOSE ISIORDIA PEREZ,

Appellant.

RECEIVED
JAN 21 2010
COURT OF APPEALS DIVISION ONE
SEATTLE, WASHINGTON

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

The Honorable Laura Gene Middaugh, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENT OF ERROR

There was insufficient evidence to support the conviction for attempted indecent liberties.

Issue Pertaining to Assignment of Error

Appellant was charged with and convicted of committing attempted indecent liberties by forcible compulsion. Was there sufficient evidence to support the conviction where the state did not show forcible compulsion, a necessary element as charged?

B. STATEMENT OF THE CASE¹

1. Procedural History

Jose Isiordia Perez was charged with attempted indecent liberties by forcible compulsion. CP 1-4. A jury found Isiordia-Perez guilty. CP 30. Isiordia-Perez was sentenced to an indeterminate sentence of 38.25 months to life. CP 51-60. Isiordia-Perez is also required to register as a sex-offender. Id. Notice of appeal was timely filed on August 27, 2009. CP 61-62.

2. Substantive Facts

Rafael Mendez and Cesilia Guijarro had been dating since 2007. 2RP 24. Isiordia-Perez was good friends with both of them. 2RP 27. On

¹ The hearing on August 6, 2009 is referred to as 1RP; the hearing on August 11, 2009 is referred to as 2RP; the hearing on August 12, 2009 is referred to as 3RP and 4RP, the hearing on August 13, 2009 is referred to as 5RP.

the evening of August 23, 2008, Guijarro and Mendez had an argument at a friend's house. 2RP 31. As Guijarro was leaving, Isiordia-Perez arrived. 2RP 32. Guijarro greeted him and went home. 2RP 32. At approximately 2:30 a.m. Isiordia-Perez called to see if Guijarro would pick up Mendez or if he should bring Mendez to Guijarro's apartment. 2RP 35. Isiordia-Perez also told Guijarro that Mendez did not love her. 2RP 37. Isiordia-Perez spoke with Guijarro several times and attempted to convince her to end the relationship. 2RP 40.

At approximately 4:00 a.m. Isiordia-Perez drove Mendez to Guijarro's apartment. 2RP 36. He had difficulty entering the apartment complex so Guijarro met him at a gas station and he followed her back through the main gate of the complex. 2RP 43-45. While Mendez slept in the car, Isiordia-Perez and Guijarro talked for about an hour about Mendez and Guijarro ending their relationship. Guijarro then went back into her apartment and Isiordia-Perez said he would go and get the sleeping Mendez from the car. 2RP 47-51. Guijarro left the door unlocked and laid down in her bed. 2RP 54.

At some point Guijarro felt someone hugging her. 2RP 54-55. She realized it was Isiordia-Perez and jumped out of the bed. 2RP 55. Isiordia-Perez stood between Guijarro and the door and told her he wanted to be intimate with her. 2RP 58-60. Guijarro said Isiordia-Perez then grabbed her

in a “bear hug” they fell on the bed with Isiordia-Perez on top of Guijarro. According to Guijarro, Isiordia-Perez started touching and grabbing her and she repeatedly asked him to stop. 2RP 61-66. Guijarro made no attempt to physically stop the touching other than “putting his hand off.” 2RP 63. Guijarro testified that she did not consider hitting or scratching him. 2RP 65. Guijarro’s main concern was trying to stay calm and have him trust her and listen to her. 2RP 66. Guijarro was able to free herself and move toward the door but Isiordia-Perez grabbed her again and attempted to pull her pants down. 2RP 66-68. Isiordia-Perez then kissed Guijarro and left, slamming the door. 2RP 68.

Guijarro later went down to the car and both Isiordia-Perez and Mendez, who was now awake, were there. 2RP 71-72. The all went up to the apartment and while Isiordia-Perez was in another room, Guijarro told Mendez what had happened. 2RP 72-73. When Isiordia-Perez came back into the room, the three argued briefly and Isiordia-Perez left. 2 RP 75-76. Guijarro called the police. 2RP 76. Isiordia-Perez returned a short time later and asked for forgiveness but instead he and Mendez ended up outside fighting. 2RP 76. The police arrived a short time later and took Isiordia-Perez into custody. 2RP 77, 3RP 72.

3. Defense Case

Isiordia-Perez testified that when he initially went into Guijarro's apartment he knocked on the bedroom door, Guijarro got up, and he spoke to her about Mendez. 4RP 19. He repeatedly told her she should leave Mendez and become intimate with him. 4RP 20. The only time he touched Guijarro was to apologize for saying the things he had said. 4RP 21. He said he touched her shoulder and tried to give her a kiss on the cheek. Id.

C. ARGUMENT

THERE WAS INSUFFICIENT EVIDENCE TO SUPPORT THE CONVICTION FOR ATTEMPTED INDECENT LIBERTIES.

Under the state and federal constitutions, the prosecution is required to prove all of the essential elements of the crime charged, beyond a reasonable doubt. Sandstrom v. Montana, 442 U.S. 510, 61 L.Ed, 2d 39, 99 S. Ct. 50 (1979); State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980). Where the prosecution fails to present sufficient evidence on any essential element, reversal and dismissal of the conviction is required. State v. Spruell, 57 Wn.App. 383, 389, 788 P.2d 21 (1990). In this case, this Court should reverse and dismiss Isiordia-Perez's conviction for attempted indecent liberties because there was insufficient evidence to prove an essential element of that crime as it was charged.

The information charged Isiordia-Perez with the attempt to commit indecent liberties “by forcible compulsion.” CP 1. The jury was instructed to find Isiordia-Perez guilty of attempted indecent liberties if he had to find he took a substantial step toward the commission of indecent liberties. CP 45 (Instruction no. 12). The jury was instructed that “[a] person commits the crime of indecent liberties when he knowingly causes another person who is not his spouse to have sexual contact with him or another by forcible compulsion.” CP 39 (Instruction no. 6). The jury was further instructed that “[f]orcible 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 oneself or another person or in fear of being kidnapped or that another person will be kidnapped. CP 43 (Instruction no. 10). Thus, in order to find Isiordia-Perez guilty of attempted indecent liberties, the jury had to find forcible compulsion occurred.

Whether evidence establishes the requisite 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). In State v. Ritola, 63 Wn.App. 252, 256, 817 P.2d 1390 (1991), the court held that there was insufficient evidence to support Ritola's conviction for indecent liberties by forcible

compulsion. There, Ritola was a juvenile resident at a boys group home. After dinner one evening, he approached a female counselor from behind and suddenly grabbed her right breast, squeezed it, and immediately let go. The counselor was shocked, and told Ritola that his behavior was inappropriate. Id. at 253. On these facts, the court held that there was insufficient evidence to “support a reasonable inference that the force used by Ritola was directed at overcoming resistance, or that such force was more than that needed to accomplish sexual touching.” Id. at 255-56. The court emphasized that the act happened so suddenly that Ritola caught the counselor completely by surprise, so she had no time to resist. Id. Because there was no resistance to overcome, Ritola did not accomplish the sexual touching by “forcible compulsion.”

Similarly, the force used by Isiordia-Perez was not directed at overcoming resistance because Guijarro was not physically resisting. 2RP 61-68. Guijarro was repeatedly asked Isiordia-Perez to stop what he was doing. 2RP 66. Guijarro made little attempt to physically stop the touching other than “putting his hand off.” 2RP 63. Guijarro testified that she did not consider hitting or scratching him. 2RP 65. Guijarro’s main concern was trying to stay calm and have him trust her and listen to her. 2RP 63, 66. There was no evidence offered to show the force used

by Isiordia-Perez was more than needed to accomplish the sexual touching.

Because there was no resistance to overcome, and because there was no evidence that the force used was more than needed to accomplish the sexual touching, no rational trier of fact could have found the “forcible compulsion” element. Thus, there was insufficient evidence to support the attempted indecent liberties verdict. This Court should therefore reverse and dismiss Isiordia-Perez’s conviction for that offense.

D. CONCLUSION

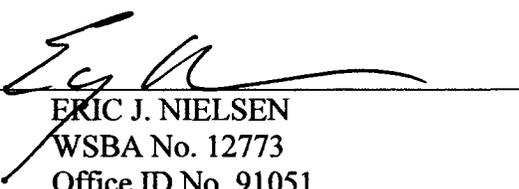
For the above reasons Isiordia-Perez requests this Court reverse and dismiss his conviction for attempted indecent liberties.

DATED this 4 day of January, 2010.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC

By:


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DIVISION I**

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Respondent,)	
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v.)	COA NO. 64067-4-I
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JOSE ISIORDIA PEREZ,)	
)	
Appellant.)	

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 JANUARY, 2010, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] JOSE ISIORDIA PEREZ
DOC NO. 333759
WASHINGTON STATE PENITENTIARY
1313 N. 13TH AVENUE
WALLA WALLA, WA 99362

SIGNED IN SEATTLE WASHINGTON, THIS 21ST DAY OF JANUARY, 2010.

x *Patrick Mayovsky*