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Court of Appeals
Division III
State of Washington

32718-3-III

COURT OF APPEALS

DIVISION III

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

ADRIAN ANGUIANO, APPELLANT

APPEAL FROM THE SUPERIOR COURT

OF BENTON COUNTY

APPELLANT'S BRIEF

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A. ASSIGNMENTS OF ERROR

1. The court erred in finding:

The respondent and co-respondent, George Thacker, worked in concert in the commission of this crime.

(CP 42)

2. The court erred in finding:

David Tyner used his free hand to prevent the respondent from having sexual contact with him.

(CP 43)

3. The court erred in concluding:

The court finds beyond a reasonable doubt that the respondent in conjunction with the co-respondent, George Thacker, took a substantial step toward forcing David Tyner to have sexual contact with the respondent through forcible compulsion.

(CP 43)

4. The court erred in concluding:

The state does not have to establish that the respondent alone provided the forcible compulsion.

(CP 43)

5. The court erred in concluding Mr. Anguiano was guilty of attempted indecent liberties by forcible compulsion.

B. ISSUE

1. Evidence of an intent to cause a victim to have sexual contact with someone by force is an essential element of attempted indecent liberties by forcible compulsion. Under the Due Process clause, when a conviction is predicated on the defendant's act tending to evidence an intent to have sexual contact with the victim, and the only evidence of forcible compulsion is provided by evidence of the act of an alleged accomplice, is the evidence sufficient to support the conviction absent any evidence the defendant intended to employ force or that the accomplice knew the defendant intended to have sexual contact by forcible compulsion?

C. STATEMENT OF THE CASE

The events giving rise to the charge against Mr. Anguiano involved him and two other residents at Twin Rivers Community Facility, a minimum security facility for juveniles. (RP 4-5, 7) Mr. Anguiano was fourteen years old, about five feet four inches tall, and weighed about 130 pounds. (CP 1; RP 36) His roommate, George Thacker, was sixteen or seventeen years old and about five feet six inches tall. (RP 8, 35) David

Tyner was fifteen years old, six feet tall, and weighed 200 pounds. (RP 34)

William Chapin is a residential counselor at Twin Rivers. (RP 4-5) Following lunch he was looking for Mr. Thacker. (RP 8) He looked through the window in the door to Mr. Anguiano's room and saw Mr. Anguiano with his pants down and his penis in his hand. (RP 8) When Mr. Anguiano saw Mr. Chapin, he pulled his pants up. (RP 8) Entering the room, Mr. Chapin saw Mr. Thacker had Mr. Tyner in a hold with their backs against the wall. (RP 8) Prior to this incident, Mr. Thacker and Mr. Tyner had previously been roommates. (RP 21)

According to Mr. Chapin, Mr. Anguiano was in front of Mr. Tyner "kind of dancing around." (RP 8) It appeared to Mr. Chapin that Mr. Tyner "didn't want to be there." (RP 9) Mr. Chapin instructed Mr. Thacker to return to his duties. (RP 12)

During lunch, Mr. Tyner had told Mr. Anguinao he was planning to get some lotion from the front desk. (RP 22) Mr. Anguiano offered to give him some, and after lunch they went to Mr. Anguiano's room. (RP 22, 30-31)

According to Mr. Tyner, after they were in Mr. Anguiano's room Mr. Anguiano asked him "to suck him up" and Mr. Tyner said "no dude I ain't like that" (RP 32) As Mr. Thacker came into the room Mr.

Anguiano was saying “oh come on man just suck me up.” (RP 31) Then Mr. Thacker tried to grab Mr. Tyner, they ended up wrestling, Mr. Thacker put Mr. Tyner in a choke hold and had him on the ground against the wall. (RP 31-32) Mr. Anguiano was about five feet away and Mr. Tyner was swinging his free arm to keep him away. (RP 33) Mr. Anguiano had his penis out and was saying something like “oh it ain’t gay.” (RP 33)

The State charged Mr. Anguiano with one count of indecent liberties by forcible compulsion, RCW 9A.44.100(1)(a). He was found guilty following a bench trial.

The court found:

1. The respondent was charged with Attempted Indecent Liberties.
2. The respondent and co-respondent, George Thacker, worked in concert in the commission of this crime.
3. Mr. Thacker held the victim, David Tyner, on a hold on the floor. This was observed by Mr. Chapin.
4. It appeared to Mr. Chapin that David Tyner did not want to be in the situation regardless of the fact of whether or not he was laughing.
5. The respondent was four to five feet away from Mr. Tyner with his penis exposed while Mr. Thacker held David Tyner down. The respondent was facing David Tyner with his penis in his hand.
6. David Tyner used his free hand to prevent the respondent from having sexual contact with him.

(CP 42-43)

The court concluded:

1. The court finds beyond a reasonable doubt that the respondent in conjunction with the co-respondent, George Thacker, took a substantial step toward forcing David Tyner to have sexual contact with the respondent through forcible compulsion.
2. The state does not have to establish that the respondent alone provided the forcible compulsion.
3. The respondent is guilty of the crime of Attempted Indecent Liberties by forcible compulsion.

(CP 43)

D. ARGUMENT

In every criminal prosecution, the State must prove the elements of the crime charged beyond a reasonable doubt. U.S. Const. amend. XIV; Const. art. I, § 3; *In re Winship*, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970). In a case that is appealed, the rules for juvenile court require the court to enter written findings stating the ultimate facts as to each element of the crime and identify the evidence supporting its decision. JuCR 7.11(d); *Alvarez*, 128 Wn.2d at 16, 904 P.2d 754 (1995). The prosecution must prove the charged offense beyond a reasonable doubt. JuCR 7.11(a).

The essential elements of indecent liberties by forcible compulsion include knowingly causing another person to have sexual contact with the

offender or another person by forcible compulsion. RCW 9A.44.100(1)(a). “ ‘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.” *State v. Gower*, 172 Wn. App. 31, 41-42, 288 P.3d 665 (2012), reversed on other grounds, 179 Wn.2d 851, 321 P.3d 1178 (2014); RCW 9A.44.010(6). RCW 9A.44.100(1)(a) does not purport to criminalize voluntary sexual contact involving an otherwise willing and competent person.

Although the mental element of indecent liberties by forcible compulsion is knowledge, “[w]here . . . the crime is defined in terms of acts causing a particular result, a defendant charged with attempt must have specifically intended to accomplish that criminal result.” *State v. DeRyke*, 149 Wn.2d 906, 913, 73 P.3d 1000 (2003).

DeRyke involved a charge of attempted first degree rape. *Id.* Because proof of that offense requires proof of forcible compulsion, the court concluded that the intent element of first degree rape required the State to prove “the defendant’s intent to have *forcible* sexual intercourse.” 149 Wn.2d at 913. Similarly, because proof of indecent liberties by forcible compulsion requires proof of forcible compulsion, the intent

element of the attempted commission of that offense requires proof of an intent to use force.

The court did not find that Mr. Anguiano intended to employ force to cause Mr. Tyner to have sexual contact with him (or Mr. Thacker), nor would the act of exposing his genitals be strongly corroborative of such an intent.

The court found Mr. Anguiano committed a single act: he stood four to five feet away facing Mr. Tyner with his exposed penis in his hand. The court did not find that Mr. Anguiano intended to cause Mr. Tyner to have sexual contact with him. The court found that “David Tyner used his free hand to prevent the respondent from having sexual contact with him.” (CP 43) This finding however, merely assumes the thing to be proved. Mr. Tyner testified: “Yeah, I had one arm free and I was swinging with it to keep Adrian away.” (RP 33) The evidence does not support the inference Mr. Anguiano intended to have sexual contact, nor even that Mr. Tyner believed that to be the case. The evidence is insufficient to support the court’s finding or the inference that Mr. Anguiano intended to cause Mr. Tyner to have sexual contact with him by use of force.

The court’s conclusion that Mr. Anguiano attempted to commit indecent liberties by forcible compulsion is predicated on the findings that Mr. Anguiano was working in concert with Mr. Thacker and Mr. Thacker

“held the victim, David Tyner in a hold on the floor” and on the conclusion that Mr. Anguiano acted in conjunction with Mr. Thacker. (CP 42)

The court did not articulate any facts or legal theory that would establish that Mr. Anguiano was legally accountable for Mr. Thatcher’s conduct. The court’s determination that Mr. Anguiano’s conviction could be predicated on Mr. Thatcher’s conduct implies a determination that Mr. Anguiano is accountable for Mr. Thacker’s conduct based on accomplice liability:

(1) A person is guilty of a crime if it is committed by the conduct of another person for which he or she is legally accountable.

(2) A person is legally accountable for the conduct of another person when:

...

(c) He or she is an accomplice of such other person in the commission of the crime.

RCW 9A.08.020; *State v. Trout*, 125 Wn. App. 403, 409, 105 P.3d 69 (2005).

In order to find an individual guilty as an accomplice, the defendant must associate and participate in the venture “as something he wished to happen and which he sought by his acts to make succeed.” *State v. Luna*, 71 Wn. App. 755, 759, 862 P.2d 620 (1993) (citing *State v. J–R Distributions, Inc.*, 82 Wn.2d 584, 593, 512 P.2d 1049 (1973), cert. denied,

418 U.S. 949 (1974); *State v. Castro*, 32 Wn. App. 559, 563, 648 P.2d 485, review denied, 98 Wn.2d 1007 (1982)). Mere presence at the scene of the crime is not enough. *In re Wilson*, 91 Wn.2d 487, 491, 588 P.2d 1161 (1979).

“The law holds an accomplice equally culpable as the principal, regardless of which one actually performed the harmful act.” *State v. McDonald*, 90 Wn. App. 604, 611, 953 P.2d 470 (1998). Rather, the defendant, “[w]ith knowledge that it will promote or facilitate the commission of the crime,” must solicit, command, encourage, or request another to commit the crime or aid or agree to aid another in planning or committing the crime. RCW 9A.08.020(3). “Knowledge of the particular crime committed is an essential element of accomplice liability.” *State v. Stein*, 144 Wn.2d 236, 248, 27 P.3d 184 (2001).

The court made no findings as to any of the elements of accomplice liability.

The evidence would support the inference that by holding Mr. Tyner on the ground, Mr. Thacker facilitated or aided in the commission of a crime. But the court did not find, nor did the State present any evidence, that Mr. Thacker knew Mr. Anguiano was attempting to commit indecent liberties by force. The only evidence Mr. Anguiano contemplated causing Mr. Tyner to have sexual contact with him was Mr.

Tyner's testimony that Mr. Anguiano had asked him to perform oral sex. The court made no finding that Mr. Anguiano actually made such a request and, in any event, there is no evidence Mr. Thacker heard such a statement being made.

Even if Mr. Thacker had overheard this request, there is neither evidence nor finding that Mr. Thacker knew Mr. Anguiano intended to accomplish the proposed sexual contact by the use of force. There is no basis for finding that Mr. Thatcher acted with knowledge that his action would facilitate the crime of attempted indecent liberties by force.

The evidence was insufficient to support the conviction beyond a reasonable doubt. The court erred in predicating its conclusion that Mr. Anguiano was guilty of attempted indecent liberties by force on a theory of accomplice liability for which there is no support in the record or the court's own findings. Insufficient evidence to support the conviction bars retrial on the same offense. *State v. Scott*, 145 Wn. App. 884, 891, 189 P.3d 209 (2008).

E. CONCLUSION

Mr. Anguiano's conviction should be reversed and the charge against him should be dismissed.

Dated this 20th day of January, 2015.

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON,

DIVISION III

STATE OF WASHINGTON,)	
)	
Respondent,)	No. 32718-3-III
)	
vs.)	CERTIFICATE
)	OF MAILING
ADRIAN ANGUIANO,)	
)	
Appellant.)	

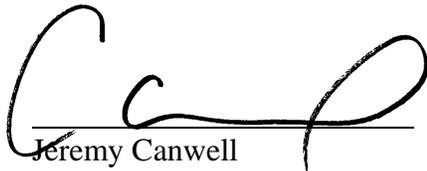
I certify under penalty of perjury under the laws of the State of Washington that on January 20, 2015, I served a copy of the Appellant's Brief in this matter by email on the following party, receipt confirmed, pursuant to the parties' agreement:

Andrew Miller
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I certify under penalty of perjury under the laws of the State of Washington that on January 20, 2015, I mailed a copy of the Appellant's Brief in this matter to:

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Signed at Spokane, Washington on January 20, 2015.



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