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COURT OF APPEALS

06 OCT 20 PM 2:09

STATE OF WASHINGTON

BY MM  
DEPUTY

NO. 34348-7-II

COURT OF APPEALS, DIVISION TWO  
STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT,

v.

JOSHUA BARTOLOME. APPELLANT.

OPENING BRIEF OF APPELLANT

Appeal from the Superior Court of Kitsap County  
The Honorable Anna Laurie

No. 04-1-01574-8

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**ORIGINAL**

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A. ASSIGNMENTS OF ERROR:

1. Did the stipulated record contain sufficient evidence to convict the defendant of the crime of indecent liberties with forcible compulsion?
2. Did the trial court err in entering findings of fact 3, 4, 5, 6?
3. Did the trial court err in entering conclusions of law 1, 2, 3, 6, 7?
2. Did the trial court err in considering without an evidentiary hearing matters in the presentence report to which the defendant timely and specifically objected?
3. Is the defendant entitled to a new sentencing hearing before a different judge because the sentencing judge considered improper and highly prejudicial material?
4. Did the court err when it refused to credit the defendant with 343 days of time served for pretrial electronic home monitoring confinement?

B. STATEMENT OF THE CASE:

1. Procedural Facts:

The State of Washington charged JOSHUA BARTOLOME, hereinafter the defendant, with the crimes of indecent liberties by forcible compulsion. CP 1-8. The State charged the defendant with a single count for alleged sexually assaults against two young women: AMH and RAE. **Id.**

After several waivers of speedy trial time, pretrial motions, and a stipulation of the parties, the matter was submitted on an agreed record to the Honorable Anna Laurie for determination on the merits. CP 10, 11, 27-30; RP

11/28/05 6-7. The court was provided with Exhibit 1<sup>1</sup>, a compilation of the reports and interview transcripts regarding the charged crimes. RP 11/28/05 8.

The trial court acquitted the defendant on the count with alleged victim RAE<sup>2</sup>. CP 36-40. The trial court convicted the defendant of the crime of indecent liberties by forcible compulsion against victim AH. Id.

The trial court entered findings of fact and conclusions of law in support of its finding. 36-30..

The trial court set a sentencing date and ordered a presentence report. CP 31.

Prior to sentencing, the defendant and counsel tried to meet with the presentence report writer but that person was ill and unable to meet. CP 60 As a result, the defendant did not speak to that person and the official presentence report was written without his participation. Id.

The presentence report writer included in the presentence report many “facts” regarding the defendant’s prior convictions. CP 61-62.

The defense objected to the content of the presentence report and submitted a redacted presentence report. CP 69-80, 117-129 The court declined to consider the redacted report. RP 1/20/06 4/ The defendant contended that the “real facts doctrine” of RCW 9.94A.530 requires the State to prove facts by a preponderance at the sentencing hearing and also that if the defendant disputes certain 1/20/06 27. With regard to the defendant’s prior guilty pleas, the

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<sup>1</sup> Exhibit 1 has been transmitted to this court.

<sup>2</sup> Because the trial court acquitted the defendant of the allegation against RAE, the defendant has not included any “facts” relevant to that charge. The State did *not* argue not did the court find that the allegation regarding RAE was admissible pursuant to ER 404(b) regarding the allegation involving AMH.

defendant argued that the court's consideration of those convictions was limited to his statements on plea of guilty<sup>3</sup>. RP 1/20/06 28. The defendant noted that neither of the two misdemeanor convictions were pleas with "sexual motivation." Id.

The State argued that the "real facts doctrine" of RCW 9.94A.530 applies only to the facts of the instant case and not to other material, such as "facts or information from the person's criminal history." RP 1/28/06<sup>4</sup> 7. The State argued that it was appropriate for the court to consider information about "prior incidents that had a sexual component." Id.

The State urged the court to consider defendant's juvenile convictions for rape of a child in the first degree from October 2000 as well as criminal trespass in the first degree with sexual motivation and assault in the fourth degree with sexual motivation, both from December 2000. RP 1/25/06 8.

The court rejected the defendant's argument regarding the application of the "real facts doctrine" of the Sentencing Reform Act and held that it would consider the criminal history and the convictions themselves. RP 1/20/06 45.

The court noted that the defendant's criminal history was "damaging." RP 1/20/06 46. And, indeed, the impermissible information that the court considered *was* damaging to the defendant. Although the defendant acknowledged that he had pleaded guilty to the crime of child rape in the first degree, he did not acknowledge any of the alleged facts of the incident as set forth by the

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<sup>3</sup> The defendant's prior guilty pleas were straight pleas wherein he admitted guilt. The pleas were not Newton pleas. CP 39.

<sup>4</sup> The verbatim report of proceedings is dated January 15, 2005. The sentencing occurred in 2006, following the conviction in November of 2005.

presentence report writer. Likewise, the alleged facts of the 12/13/00 incident with KJG were not acknowledged by the defendant. CP 76. In his guilty plea statement<sup>5</sup>, the defendant admitted simply that he had touched KJG's breast without her permission. CP 139. Although the court accepted that statement as sufficient to support a finding of sexual motivation, the court should not have done so. In addition, the details of the incident as set forth by the presentence writer far exceed the facts to which the defendant pleaded guilty. The "facts" reported by the presentence report writer were not acknowledged by the defendant, but beyond that were highly damaging to him.

In addition, the presentence report writer provided details that concerned a shoplifting charge which was dismissed by the State. CP 61-62. None of these facts were acknowledged by the defendant. CP 76.

The defendant had completed 343 days of electronic home monitoring prior to his conviction. RP 1/20/06 48. The court declined to award the defendant credit for that time. Id. Although the court invited defense counsel to make a motion to reconsider that ruling and defense counsel initially stated that such a motion would be made, defense counsel did not make that motion. Id. The court's ruling denying the credit for time served therefore stands. Id.

The court sentenced the defendant in the mid-range, 72 months, of the standard range of 67 to 89 months. CP 141-148.

The defendant thereafter timely filed this appeal. CP150.

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<sup>5</sup> In his statement on plea of guilty, the defendant wrote: "In Kitsap County: Ct :: In October 2000, I stuck my finger in CC's vagina. She was under 12 and more than 24 months younger than me. Ct II: On December 8, 2000, I touched Kara Glass on the breast and she didn't want to be touched. Ct III: On December 8, 2000, I stayed in Kara's house after she asked me to leave." CP 139.

## 2. Facts of the Offense:

The materials in Exhibit 1 related the following:

In late May or early June 2004, Kaelah Chavez hosted a sleep-over for AMH, age 14, and another friend Zanaeia Thomas. Exhibit 1, tab 11, pages 7-8. The three girls wanted to go over to the home of Scott Ureta, a 16 year old boy who lived about twenty minutes away by car. Exhibit 1, tab 11, page 9.

Because the girls needed a ride to Scott's house and AMH knew someone who could drive, AMH was in charge of obtaining a ride to Scott's house. Exhibit 1, tab 11, page 10, 11. AMH had the defendant's phone number saved in her cell phone. Exhibit 1, tab 11, page 13. The defendant agreed to drive the girls to Scott's house. Exhibit 1, tab 11, page 13-14. When the group arrived at Scott's house, AMH told her friends that she was going to drive around with Josh. Exhibit 1, tab 11, page 15.

After several hours, AMH called Kaeleh and whispered to Kaeleh to "come get me, come get me." Exhibit 1, tab 11, page 19. AMH said she was near a watertower. Id. The group walked to the watertower and found AMH. Exhibit 1, tab 11, page 22. AMH's clothing appeared to be okay. Id. Kaeleh did not notice if AMH had been drinking alcohol. Exhibit 1, tab 11, page 35. AMH was crying when Kaeleh met her at the watertower. Exhibit 1, tab 11, page 2. AMH stated that the defendant "tried to do sexual stuff" with her. Id.; Exhibit 1, tab 11, page 24. AMH stated that the defendant *tried* to unbuckle her pants but that he was unable to do so. Id. AMH reported that the defendant *tried* to force her head towards him, but that she pulled away from that. Exhibit 1, tab 11, page 25.

AMH did not report that the defendant did anything else to her. Id. AMH stated that when the defendant did these things to her, she told him “no.” Exhibit 1, tab 3, page 2

Zanaeia observed that AMH was “hysterical” and that when someone asked her if the defendant had tried “to rape her or something”, she said yes. Exhibit 1, tab 3, page 6. AMH stated that the defendant wanted her to drink alcohol but that she refused. Id. AMH stated that the defendant wanted her to “cuddle” but that she refused. Exhibit 1, tab 3, page 4. AMH said that the defendant held her down and tried to unbutton his pants. Id. AMH said that the defendant played with his penis and asked her to touch it. Id. AMH did *not* say that she had touched the defendant’s penis. Passim. AMH stated that the defendant tried to undo her pants, that she tried to push him off, and then eventually he moved enough to allow her to get out from underneath him. Id.

The girls returned to Kaeleh’s house at about 4 a.m. after getting a ride from “Johngy”, a male friend of Kaeleh’s sister. Exhibit 1, tab 11, page 28. Neither AMH nor anyone else told “Johngy” about what had happened to AMH. Exhibit 1, tab 11, page 30.

The girls returned to Kaeleh’s house at 4 a.m. Exhibit 1, tab 12, page 7. Kaeleh’s mother Lory Deane let the girls back into the house and sent them to bed. Exhibit 1, tab 12, page 9. No one said anything about the alleged attack at that time, although Kaeleh later told her mother that “somebody tried to attack [AMH].” Exhibit 1, tab 12, page 10.

After the girls were back at Kaeleh's house, Kaeleh asked AMH what had happened. Exhibit 1, tab 11, pages 31-32. AMH stated that "he [the defendant] didn't *try* very much." Exhibit 1, tab 11, page 32.

Several months later AMH told Kaeleh that she had reported the matter to police at the urging of the sister of her friend "Keoni". Exhibit 1, tab 11, page 34.

In late September 2004, AMH reported the matter to police. In the initial police report made on 9/27/04, AMH alleged that sometime in May or June of 2004, AMH called the defendant and asked him to drive some girlfriends and her over a boy's house. Exhibit 1, tab 1, page 2. After the defendant dropped off the other girls, AMH agreed to go for a ride with the defendant "because she felt guilty about using him for a ride." *Id.* During that ride, AMH consumed alcohol, probably Corona beer. *Id.* After the defendant parked the car, he touched her on the inner thigh, the outside of her jeans, and also rubbed her. *Id.* AMH stated that the defendant "humped" her while they both were closed. Exhibit 1, tab 1, page 3. AMH stated that she cried, screamed, and told the defendant that she was only 14 years old and that he was 19 years old. *Id.* AMH told police that the defendant then took out his penis and asked her to touch it. *Id.* AMH refused to touch the defendant's penis and did not do so. *Id.* AMH escaped from the defendant's car. *Id.*

AMH was interviewed at the prosecutor's office on 9/29/04. Exhibit 1, tab 7, page 1. At that time, AMH claimed that during the encounter with the defendant, he grabbed her hand and that her picky touched the defendant's exposed penis. Exhibit 1, tab 7, pages 1, 5.

On 1/28/05, AH was interviewed by the defense. Exhibit 1, tab 10, page 1. AMH stated that on the day of the incident she called the defendant for a ride because he was the only person she knew who could drive besides her parents. Exhibit 1, tab 10, page 17. When AMH called the defendant, she knew that he wanted to “hang out” with her because he had told her so when they talked online. Exhibit 1, tab 10, pages 24-25. At that time, AMH was spending the night at her friend Kayla’s house; AMH could not remember the name of the other girl who also spent the night. Exhibit 1, tab 10, page 21. AMH drove around with the defendant after they dropped the other girls off at Scott’s house. Exhibit 1, tab 10, 21. They drove to the waterfront where the defendant tried to kiss AMH. Exhibit 1, tab 10, page 31. She pulled away and the defendant said that he was “just kidding or just joking” and did not kiss her. Exhibit 1, tab 10, page 31. AMH stated that after the defendant parked the car near the watertower, he told her he would not take her home unless she drank some beer. Exhibit 1, tab 10, page 29. AMH told police that the defendant had rubbed her thigh, tried to straddle her, humped her legs. Exhibit 1, tab 10, pages 32-33. AMH stated that she asked the defendant to stop. Exhibit 1, tab 10, page 33. AMH stated that the defendant “was going for my pants” but that she would not let him. Id. AMH stated that she tried to push the defendant off but that he persisted. Exhibit 1, tab 10, pages 33-34. AMH stated that the defendant took out his penis and that he took her had to touch it. Exhibit 1, tab 10, page 37. AMH stated that her hand may have “swiped” his penis. Id. AMH stated that the defendant ceased his advances and then went to sit in the back seat. Id. As a ruse to leave the car, AMH told the

defendant that she thought she was going to vomit. Exhibit 1, tab 10, page 38. The defendant told her not to “puke” in his parents’ car and to go outside. Exhibit 1, tab 10, page 39. AMH left and then called her friend to come to her. Exhibit 1, tab 10, pages 40-41.

After AMH made her statements to the police, they arrested the defendant. Exhibit 1, tab 4, page 1. The defendant agreed to talk to police. Id. The defendant initially denied knowing AMH. Exhibit 1, tab 5, page 1. He later admitted that he knew her. Id. He explained that he had taken AMH and some friends to Scott’s house and that he and AMH then drove around. Exhibit 1, tab 5, page 2. The defendant stated that AMH hit him for alcohol and that he drove to his parents’ house to get some from a cooler that had been left in the backyard after a party. Id. The defendant stated that AMH did not want a Corona beer and so she drank a Heineken. Id. She consumed one Heineken and later drank half of a Corona. Id.

The defendant stated that he had parked the car and that they had started kissing. Id. The defendant related that he and AMH had engaged in mutual fondling activities. Exhibit 1, tab 5, pages 2-3. The defendant told police that he hoped that AMH might take her top off and then give him a “hand job.” Exhibit 1, tab 5, page 3. The defendant stated that AMH was mad at him twice and that she appeared to be intoxicated. Id. AMH screamed at him when she was angry. Id. The defendant stated that AMH kept threatening to hit him. Id. The defendant stated that he held AMH’s arms down by her side and told her to calm down. Id. The defendant stated that AMH repeatedly asked to be taken back to

Scott's house and then he delayed taking her there because she had been drinking. Id. He stated that AMH again asked him to be driven back to Scott's house and he asked for a kiss first. Id. The defendant reported that AMH became upset and exited the car, leaving her cell phone behind. Id.

The defendant stated that he had asked AMH to rub his penis but that he had never removed his penis from his pants. Id. The defendant stated that he had rubbed AMH's crotch. Id. The defendant related that he asked AMH to put her hand in his pocket and rub his penis and that she did so. Id. The defendant stated that because AMH appeared drunk, he stopped the touching because he felt that he might be taking advantage of her. Id.

### C. LAW AND ARGUMENT:

#### 1. There was insufficient evidence to support the trial court's determination that the defendant committed the crime of indecent liberties by forcible compulsion against AH

This case requires this court to determine the correct standard of review for a judgment issued *in a criminal case* upon a stipulated record containing disputed facts.

Ordinarily when the trial court has weighed the evidence and determined the relevant facts, the appellate court reviews the record for substantial evidence to support the trial court's findings. When the trial court hears *live* testimony at a bench trial and enters findings of fact, the appellate court considers challenges to

those findings under a substantial evidence test. “Substantial evidence exists where there is a sufficient quantity of evidence in the record to persuade a fair-minded, rational person of the truth of the finding.” State v. Hill, 123 Wn.2d 641, 644, 870 P.2d 313 (1994). Where findings of fact are supported by substantial but disputed evidence, the appellate court will not disturb the trial court’s ruling out of deference to the trial court’s superior ability to evaluate live testimony. State v. Smith, 84 Wn.2d 498, 505, 527 P.2d 674 (1974). This deference is warranted because the trial court is uniquely able to see the witnesses and to assess their demeanors and credibility. From this vantage point, the trial court is better able to resolve issues of conflicting testimony and the persuasiveness of the evidence. State v. Camarillo, 115 Wn.2d 60, 71, 794 P.2d 850 (1990); State v. Walton, 64 Wn.App. 410, 415-16, 824 P.2d 533, *review denied*, 119 Wn.2d 1011, 833 P.2d 386 (1992).

However, in the absence of live testimony, this court should conduct a de novo review. This is so because when a trial court considers only documents, such as parties’ declarations, the appellate court need not defer to the trial court because it has the same opportunity to review the record as the trial court. The appellate court has before it the identical record as the trial court, the appellate court is as competent as the superior court to weigh and consider the evidence. Smith v. Skagit County, 75 Wn.2d 715, 718-19, 453 P.2d 832 (1969); Danielson v. City of Seattle, 45 Wn.App. 235, 240, 724 P.2d 1115 (1986).

Under either a substantial evidence test or a de novo review, this court should find that there is insufficient evidence to support the trial court’s verdict

that the defendant committed the crime of indecent liberties by forcible compulsion. Although the appellate court in criminal cases historically has applied the substantial evidence to the review of challenged trial court findings of fact in cases where live testimony has been adduced, there is no established standard for such review in cases which are submitted to the court on a stipulated and unsworn record.

For the reasons set forth herein, the defendant urges this court to adopt the standard of de novo review for both the findings of fact and conclusions of law. The obvious rationale for this is that this court possesses exactly the same ability to weigh the evidence supporting the findings of fact as does a trial court.

Under the de novo review standard, the defendant's conviction must be reversed and the case dismissed for insufficient evidence. In this case, the trial court considered all of the materials in Exhibit 1 and the arguments of counsel which have been provided to this court.

However, as noted herein, under either standard of review, the defendant's conviction must be reversed for insufficient evidence. To convict the defendant of the crime of indecent liberties by forcible compulsion, the trial court needed to find beyond a reasonable doubt that the defendant knowingly caused AMH, a person who is not his spouse, to have sexual contact with him by forcible compulsion. RCW 9A.44.100(1)(a)<sup>6</sup>.

RCW 9A.44.010(6)<sup>7</sup> defines "forcible compulsion" as "physical force which overcomes resistance, or a threat, express or implied, that places a person

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<sup>6</sup> Appendix A.

<sup>7</sup> Appendix B.

in fear of death or physical injury to herself or himself, or in fear that she or he or another person will be kidnapped.” Forcible compulsion requires more than the force normally used to achieve sexual contact. State v. Ritola, 63 Wn.App. 252, 817 P.2d 1390 (1991). The force must be “used or threatened to overcome or prevent resistance by the victim” Ritola, 63 Wn.App. at 254-55 (quoting State v. McKnight, 54 Wn.App. 521, 527, 774 P.2d 532 (1989); State v. Soderquist, 63 Wn.App. 144, 147, 816 P.2d 1264 (1991); State v. Weisberg, 65 Wn.App. 721, 726, 829 P.2d 252 (1992). In McKnight, the court found that the evidence was sufficient to establish “forcible compulsion” where the defendant pushed the victim to the couch and took her clothes off while she told him to stop, even though the victim offered no physical resistance. McKnight, 54 Wn.App. at 526-27. The court held that “whether the evidence establishes the elements of resistance is a fact sensitive determination based on the totality of the circumstances, including the victim’s words and conduct.” McKnight, 54 Wn.App. at 526.

Further, in order to convict the defendant of the crime of indecent liberties by forcible compulsion, the trial court had to make credibility determinations regarding AMH. The trial court had to discount AMH’s “excited utterances” made immediately after the event, when she was noted to be upset by what had just happened to her. ER 803(a)(2)<sup>8</sup> ascribes credibility to such statements because they are more likely to be a spontaneous response and therefore more likely to be sincere and not based on reflection or self-interest. State v. Brown, 127 Wn.2d 749, 758, 903 P.2d 459 (1995). The trial disregarded these

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<sup>8</sup> Appendix C.

presumptively trustworthy statements and instead relied upon statements made by AMH after she had a conversation (details unknown) with the friend of a friend and then reflected and considered what she would say to the police. This court should find, in the absence of specific findings explaining the trial court's decision to discount presumptively trustworthy statements for inexplicably delayed reports about what had happened, that the trial court erred in findings sufficient evidence for the conviction. The trial court thus ignored the reliable and trustworthy statements from AMH wherein she denied that much had happened and then failed to reconcile the substantial discrepancies in AMH's statements and also failed to make any findings of fact (FOF) regarding credibility. Because the trial court did not have the opportunity to assess the credibility of witnesses by observing their demeanor, etc., the trial court should have articulated some basis for relying on some of MH's statements and discounting other portions of her statements.

For example. In FOF 3, the trial court found that the defendant kept AMH's cell phone after her friend Kaeleh called and spoke to both AMH and the defendant. In her first statements to Kaeleh and Zanaeia, AMH said absolutely nothing about the defendant taking her cell phone. Only several months later, did AMH tell the police that the defendant had her cell phone at one point in the encounter and then she had retrieved it from the front driver's side door. Exhibit 1, tab 1, page 3. In the defense interview, AMH stated that the defendant turned her cell phone after parking the car near the watertower. Exhibit 1, tab 10, page 29. She stated that he put the cell phone in the side pocket of the car door.

Exhibit 1, tab 10, pages 38-39. The trial court's finding of fact is erroneous because AMH did not timely mention anything about her cell phone, did not connect the defendant's act of turning off her cell phone to any phone call from Kaeleh, and the defendant did not hide the cell phone so as to make it inaccessible to AMH.

FOF's 4 and 5 also are not supported by substantial evidence. Immediately after she left the defendant's company, AMH was upset and told her friend only that the defendant had "tried" to do things to her. She described only minimal contact with him and in fact told Kaeleh that the defendant had not tried very much. Exhibit 1, tab 11, page 35, 32. She related that the defendant had "tried to unbuckle her pants but that he wasn't able to." Exhibit 1, tab 11, page 24. She also stated that the defendant tried "to force her head towards him, but she pulled away." Exhibit 1, tab 11, page 25. AMH at time stated that the defendant had overcome any resistance that she offered. To the contrary, AMH described a situation where a teen-age boy tried to make sexual advances toward her and she successfully rebuffed him. The most reliable and trustworthy evidence was contained in the initial disclosure. The belated disclosure, especially in the absence of any credible reason for the lengthy delay in contacting police, is simply not credible.

The defendant assigns error to FOF 6 for the reason that it is incomplete and contrary to the other FOF. The trial court acknowledged that AMH was "shaken and hysterical" when she met up with her friends after leaving the defendant. The trial court then goes on to say that "AMH told them what

happened.” In this FOF, the trial court appears to accept that the State has laid a foundation for “excited utterances” from AMH. But in those “excited utterances” AMH only described attempted acts by the defendant. AMH did not disclose any action by the defendant where used or threatened to use force to overcome or prevent resistance by AMH. Thus, although the trial court appears to have accepted that AMH was under the stress of the event and therefore unable to fabricate what had happened, the trial court thereafter disregarded AMH’s spontaneous statements about what had happened. AMH also affirmed those statements within a very short time, when she told Kaeleh that the defendant had not tried very much. Exhibit 1, tab 11, page 32.

In order to make sustainable findings of fact, the trial court should have made findings of fact regarding credibility and attempted reconciliation of the wildly inconsistent statements of AMH. The defendant submits that when this court reviews the identical record that the trial court reviewed, this court will not determine that the belated statements are more accurate than the excited utterances made immediately after the event.

Based upon a review of AMH’S wildly contradictory statements, this court should find that there was not a sufficient quantity of evidence in the record to persuade a fair-minded, rational person of the truth of the finding. As noted above, although upset when she left the defendant’s company, AMH did not relate facts sufficient to support a conviction for indecent liberties by forcible compulsion. Rather, AMH told Kaeleh Chavez that the defendant had “tried” to do things with her, but that she had resisted and he ha not been successful in

unbuckling her pants or forcing her head toward his crotch. Further, when she left the defendant's company, AMH's clothing was orderly and she did not appear to have been drinking alcohol. Based on these statements from AMH, the trial court could not have concluded beyond a reasonable doubt that the defendant used force or threats to overcome resistance from AMH. *E.g., Ritola*, 63 Wn.App. at 254-55. In fact, AMH in essence told her girlfriends that the defendant did *not* use force to overcome her resistance. Rather, the defendant stopped his sexual advances in response to AMH's resistance.

Only after talking with a friend of a friend did AMH decide to report a version of what had happened. AMH's belated disclosure differed markedly and dramatically from her *res gestae* statements to her friends. Further, there was no excuse offered for her delayed reporting --- she was apparently persuaded by the friend of a friend to do so. Although the deputy prosecutor attempted to explain the discrepancy by invoking the delayed reporting syndrome, there is no credible evidence to suggest that so called "delayed reporting syndrome" was present in this case. In *State v. Petrich*, 101 Wn.2d 566, 574, 683 P.2d 173 (1984), the court recognized that young children sometimes delayed reporting sexual abuse when the offender was someone with whom they had a close relationship.

Thus, in order to convict the defendant of the crime of indecent liberties by forcible compulsion, the trial court had to make credibility determinations regarding AH. In those statements made immediately after the event, AMH told Chavez that the defendant "tried to do stuff with her." Exhibit 1, tab 11. page 24. AMH stated that "he [the defendant] tried to unbuckle her pants but he wasn't to."

Id. AMH also stated that the defendant tried to force her head towards him, but that she pulled away from that. Supra, at 25. Shortly thereafter, AMH stated that the defendant had not tried very much. Exhibit 1, tab 11, page 32.

Based on these presumptively credible statements, there is insufficient evidence to convict the defendant of indecent liberties by forcible compulsion. By her own account of events, AMH was able to effectively resist the defendant's unwanted advances. By her own account of events, AMH was more than able to act to prevent the defendant from engaging in unwanted sexual contact with her.

This court reviews conclusions of law (COL) de novo. State v. Mendez, 137 Wn.2d 208, 214, 970 P.2d 722 (1999). In this case, the trial court's COL 3 is not supported by factual findings, because the factual findings are not supported by substantial evidence. Simply put, there was no trustworthy evidence that the defendant used forcible compulsion, either by physical force or threats, to overcome any resistance by AMH.

For these reasons, this court should reverse the defendant's conviction for indecent liberties by forcible compulsion.

2. The trial court erred in considering without an evidentiary hearing matters in the presentence report to which the defendant timely objected

RCW 9.94A.500<sup>9</sup> sets forth the procedures to be followed at sentencing.

In pertinent part, this statute provides:

The court shall consider the risk assessment report and presentence reports, if any, including any victim impact statement and criminal history, and allow arguments from the prosecutor, the defense counsel, the offender, the victim . . . or a representative of the victim.....

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<sup>9</sup> Appendix D..

If the court is satisfied by a preponderance of the evidence that the defendant has a criminal history, the court shall specify the convictions it has found to exist. All of this information shall be part of the record.

In addition, RCW 9.94A.530(2)<sup>10</sup> limits the information that the court can consider “in determining any sentence other than a sentence above the standard range” to no more than is admitted by the plea agreement, or admitted, acknowledged, or proved in a trial or at the time of sentencing.. Acknowledgement includes not objecting to information stated in the presentence reports. Where the defendant disputes material facts, the court must either not consider the fact or grant an evidentiary hearing on the point. The contested facts must be proved at the hearing by a preponderance of the evidence.

In order to dispute any of the information presented for consideration at a sentencing hearing, the defendant must make a timely and specific objection. State v. Garza, 123 Wn.2d 885, 890, 872 P.2d 1087 (1994).

This doctrine, called the “real facts” doctrine, reflects the principle that a sentence should be based only on “the actual crime of which the defendant was convicted, his or her criminal history, and the circumstances surrounding the crime.” State v. Tierney, 74 Wn.App. 346, 350, 872 P.2d 1145 (1994), quoting State v. Houf, 120 Wn.2d 327, 333, 841 P.2d 42 (1992). The doctrine does not preclude reliance on facts that establish the elements of additional uncharged crimes to enhance a sentence when those facts are part and parcel of the current offense. Tierney, 74 Wn.App. at 352. However, the doctrine bars reliance on facts that are “wholly unrelated” to the current offense. Id.

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<sup>10</sup> Appendix E.

In this case, the trial court impermissibly considered the presentence report writer's rendition of the facts of the defendant's juvenile convictions, despite the fact that the defendant admitted the convictions.

In this case, the defendant submitted his 2000 statement on plea of guilty as acknowledgement of his criminal history. CP 73-74, 75-76. His statement on plea of guilty does not acknowledge that he committed the misdemeanor crimes with sexual motivation. Pursuant to RCW 9.94A.030(39)<sup>11</sup>, sexual motivation means that one of the purposes for which the defendant committed the crime was for the purpose of his sexual gratification. Regarding the crime of assault in the fourth degree, the defendant wrote, "I touched Kara's breast and she did not like it". CP 139. Regarding the crime of criminal trespass, the defendant wrote that he had stayed at her house after she asked him to leave. CP 139. Neither of these acknowledgements included any reference to sexual motivation and the trial court necessarily determined that the defendant's acts were sexually motivated from reading the objected to portions of the presentence report.

A certified judgment and sentence is the best evidence of a prior conviction. State v. Labarbera, 128 Wn.App. 343, 347-48, 115 P.3d 1038 (2005). In the instant case, the defendant's prior convictions were from Kitsap County courts. The defendant did not dispute the fact of the first degree child rape conviction, although, having not ever been advised of his right to collateral attack on any of the convictions, he will challenge the validity of the misdemeanor convictions. That challenge is based upon the content of the statement of

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<sup>11</sup> Appendix F.

defendant on plea of guilty where the defendant never pleaded guilty to “sexual motivation.

The defendant acknowledged that he had prior convictions and he did not object to the court’s consideration of his statement on plea of guilty and the judgment and sentence documents. Supra. However the defendant objected to the consideration of any other information about the alleged facts of those convictions and the trial court erred by considering such information. CP 75. Indeed, there appears to be no authority that permits the trial court to consider such information. Despite the defendant’s objection and the lack of authority for its position, the trial court not only informed the defendant that it would consider the information about the criminal history and convictions but also informed him that his criminal history was “damaging.” RP 1/20/06 46. Because the defendant objected to the presentence writer’s rendition of the alleged facts of those cases, the trial court should not have considered that information without an evidentiary hearing.

Because the defendant interposed timely and specific objections to substantial portions of the presentence and provided a redacted copy of the presentence report containing that information which he acknowledged, the trial court erred when it considered information beyond that redacted presentence report.

3. The defendant is entitled to a new sentencing hearing before a different judge because the sentencing judge considered improper and highly prejudicial material.

When a sentencing court hears inadmissible information at a sentencing hearing, then the defendant is entitled to a new sentencing hearing before a different judge. *E.g.*, State v. Van Buren, 101 Wn.2d 206, 217-18, 2 P.3d 991 (2000).

In this case, there is no question that the sentencing judge not only received information about the defendant's prior convictions that was neither acknowledge by him or proved by the state but also the sentencing judge concluded based on this information that this information was "damaging." The defendant is therefore entitled to a new sentencing hearing before a different judge.

4. The trial court erred when it refused to credit the defendant with 343 days of time served for his electronic home monitoring pretrial confinement.

A sentencing court is required to give the offender credit for all confinement time served before the sentencing if the confinement was solely in regard to the offense for which the offender is being sentencing. RCW 9.94A.505(6)<sup>12</sup>. Confinement includes partial confinement. RCW 9.94A.030(11)<sup>13</sup>. Partial confinement includes electronic home monitoring. RCW 9.94A.030(32).<sup>14</sup> Thus, pursuant to the Sentencing Reform Act (RCW 9.94A) the trial court shall award credit for pretrial electronic home monitoring where the

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<sup>12</sup> Appendix G.

<sup>13</sup> Appendix H.

<sup>14</sup> Appendix I.

defendant is not being confined for any other charges. This is true even in sex offense cases. State v. Speaks, 119 Wn.2d 204, 829 P.2d 204 (1992).

In this case, the defendant asked the court for credit for the 343 days he spent on electronic home monitoring prior to being taken into custody when the court found that the he had committed crime of indecent liberties with forcible compulsion.

The court refused to give the defendant credit for time served on electronic home monitoring and invited the defendant to file a motion for reconsideration. RP 1/20/2006 48. Although the defendant initially agreed to file a motion for reconsideration, defendant did not do so. The defendant is not required to file a motion for reconsideration in order to preserve the matter for appellate review.

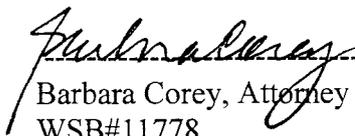
In this case, the trial court's refusal to give the defendant credit for presentence time spent on electronic home monitoring was clear error. The defendant is entitled to be resentenced and given credit for the 343 days served on electronic home monitoring.

D. CONCLUSION:

For the foregoing reasons, the defendant respectfully asks this court to reverse his conviction for indecent liberties for insufficient evidence and dismiss this case. Alternatively, the defendant respectfully asks this court for a new sentencing hearing before a different judge so that he may be properly sentenced before a court that has not reviewed impermissible presentence report information and also so that he may be awarded credit for the 343 days of pretrial confinement on electronic home monitoring.

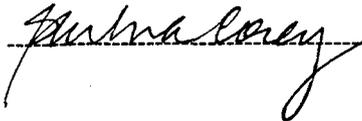
DATED THIS 23<sup>rd</sup> of October, 2006.

Respectfully submitted,

  
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Barbara Corey, Attorney  
WSB#11778

I declare under penalty of perjury under the laws of the State of Washington that on October 23, 2006, I served a copy of this brief on DPA Randall Sutton, Kitsap County Prosecutor's Office, 614 Division Street, Port Orchard, WA via ABC Messenger.

Signed in Tacoma, WA this 23<sup>rd</sup> day of October, 2006.

  
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## Appendix A

RCW 9A.44.100. Indecent liberties

(1) A person is guilty of indecent liberties when he or she knowingly causes another person who is not his or her spouse to have sexual contact with him or her or another:

(a) By forcible compulsion;

## Appendix B

§ 9A.44.010. Definitions

As used in this chapter:

(6) "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.

## Appendix C

Rule 803. Hearsay exceptions; availability of declarant immaterial.

(a) Specific exceptions. The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

(2) Excited utterance. A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.

## Appendix D

§ 9.94A.500. Sentencing hearing -- Presentencing procedures --

(1) Before imposing a sentence upon a defendant, the court shall conduct a sentencing hearing. The sentencing hearing shall be held within forty court days following conviction. Upon the motion of either party for good cause shown, or on its own motion, the court may extend the time period for conducting the sentencing hearing.

Except in cases where the defendant shall be sentenced to a term of total confinement for life without the possibility of release or, when authorized by RCW 10.95.030 for the crime of aggravated murder in the first degree, sentenced to death, the court may order the department to complete a risk assessment report. If available before sentencing, the report shall be provided to the court.

Unless specifically waived by the court, the court shall order the department to complete a chemical dependency screening report before imposing a sentence upon a defendant who has been convicted of a violation of the uniform controlled substances act under chapter 69.50 RCW or a criminal solicitation to commit such a violation under chapter 9A.28 RCW where the court finds that the offender has a chemical dependency that has contributed to his or her offense. In addition, the court shall, at the time of plea or conviction, order the department to complete a presentence report before imposing a sentence upon a defendant who has been convicted of a felony sexual offense. The department of corrections shall give priority to presentence investigations for sexual offenders. If the court determines that the defendant may be a mentally ill person as defined in RCW 71.24.025, although the defendant has not established that at the time of the crime he or she lacked the capacity to commit the crime, was incompetent to commit the crime, or was insane at the time of the crime, the court shall order the department to complete a presentence report before imposing a sentence.

The court shall consider the risk assessment report and presentence reports, if any, including any victim impact statement and criminal history, and allow arguments from the prosecutor, the defense counsel, the offender, the victim, the survivor of the victim, or a representative of the victim or survivor, and an investigative law enforcement officer as to the sentence to be imposed.

If the court is satisfied by a preponderance of the evidence that the defendant has a criminal history, the court shall specify the convictions it has found to exist. All of this information shall be part of the record. Copies of all risk assessment reports and presentence reports presented to the sentencing court and all written findings of facts and conclusions of law as to sentencing entered by the court shall be sent to the department by the clerk of the court at the conclusion of the sentencing and shall accompany the offender if the offender is committed to the custody of the department. Court clerks shall provide, without charge, certified copies of documents relating to criminal convictions requested by prosecuting attorneys.  
ive June 8, 2000, reenacted this section; and added (2).

## Appendix E

9.94A.530. Standard sentence range

(2) In determining any sentence other than a sentence above the standard range, the trial court may rely on no more information than is admitted by the plea agreement, or admitted, acknowledged, or proved in a trial or at the time of sentencing, or proven pursuant to RCW 9.94A.537. Acknowledgement includes not objecting to information stated in the presentence reports. Where the defendant disputes material facts, the court must either not consider the fact or grant an evidentiary hearing on the point. The facts shall be deemed proved at the hearing by a preponderance of the evidence, except as otherwise specified in RCW 9.94A.537.

## Appendix F

RCW 9.94A.030(42)

(42) "Sexual motivation" means that one of the purposes for which the defendant committed the crime was for the purpose of his or her sexual gratification.

## Appendix G

9.94A.505. Sentences

(6) The sentencing court shall give the offender credit for all confinement time served before the sentencing if that confinement was solely in regard to the offense for which the offender is being sentenced.

## Appendix H

§ 9.94A.030. Definitions. (Expires July 1, 2006.)

(11) "Confinement" means total or partial confinement.

## Appendix I

RCW 9.94A.030

(32) "Partial confinement" means confinement for no more than one year in a facility or institution operated or utilized under contract by the state or any other unit of government, or, if home detention or work crew has been ordered by the court, in an approved residence, for a substantial portion of each day with the balance of the day spent in the community. Partial confinement includes work release, home detention, work crew, and a combination of work crew and home detention.

**Barbara Corey, Attorney at Law**

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STATE OF WASHINGTON  
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**IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON  
DIVISION TWO**

STATE OF WASHINGTON,

Respondent,

vs

JOSHUA BARTOLOME,

Appellant.

NO. 34348-7-II

CERTIFICATE OF SERVICE

I declare under penalty of perjury under the laws of the State of Washington that on October 23, 2006, I served a copy of this brief on Joshua Bartolome, DOC #886741, P.O. Box 777, Monroe, WA 98272, by depositing the brief with the U.S. Post Office.

Signed in Tacoma, WA this <sup>24th</sup> 23<sup>rd</sup> day of October, 2006.

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