

No. 29246-1-III

COURT OF APPEALS,
DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

JESUS A. SOTO,

Appellant.

BRIEF OF APPELLANT

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I. INTRODUCTION

The defendant, Jesus Soto, is appealing his conviction based on the lack of evidence of forcible compulsion presented at trial. The testimony described nothing more than the usual amount of contact involved when two teenagers are "making out". The law requires more than the actions described at trial to constitute forcible compulsion. Mr. Soto requests that his conviction be reversed.

II. ASSIGNMENTS OF ERROR

A) Assignments of Error

1. The trial court erred in Finding of Fact #11 (CP 6), in finding that the defendant used forcible compulsion to have sexual contact with Ms. Murray.

2. The trial court erred in its Conclusion of Law that forcible compulsion was used by the defendant (CP 6).

B) Issues Pertaining to Assignments of Error

1. Does the testimony of the complainant, Veronica Murray, that the defendant kissed her and was touching her breasts over

the course of a ten minute period, though at one time she said she would rather do this at a later time but continued to kiss the defendant back, establish forcible compulsion? (Assignment of error 1).

2. Whether the evidence presented by the complainant establishes the necessary element of forcible compulsion beyond a reasonable doubt? (Assignment of error 2).

III. STATEMENT OF THE CASE

The defendant, Jesus Soto, was charged in juvenile court with one count of Indecent Liberties with Forcible Compulsion. (CP 1). The allegation was that Mr. Soto had forced sexual contact with another student at his high school, Veronica Murray, on September 22, 2009. (CP 3).

The trial was held on April 19, 2010 before the Honorable Neal Reilly (now retired). (CP 2). Following the close of testimony the Court recessed to consider its ruling. (RP 177). On April 22, 2010 the Court reconvened and adjudicated Mr. Soto guilty of the crime of Indecent Liberties with Forcible Compulsion. (RP 186). Written Findings of Fact and Conclusions of Law were file April 29, 2010. (CP 2). A disposition

hearing was held on July 8, 2010, and Mr. Soto was sentenced. (CP 8). A notice of appeal was filed on July 22, 2010. (CP 16).

The testimony presented at trial generally laid out that Mr. Soto and Mr. Murray knew each other for about a year (RP 15), and had had some romantic contact with each other at a football game earlier in the school year. (RP 55-56). On the date in question, Mr. Soto used a ruse to get Ms. Murray out of class, when they both walked voluntarily through the school and ended up in a room called the "white room" in the trial court. (RP 133-34). The testimony was generally not in dispute to this point.

The testimony about the events in the "white room" diverged, with Mr. Soto believing it was all voluntary and consensual, and Ms. Murray testifying that she did not want the contact and felt it was forced on her. It was Ms. Murray's testimony which formed the basis of the trial court's finding of guilt. (RP 181-186).

IV. ARGUMENT

The defendant, Jesus Soto, is challenging the sufficiency of the evidence of forcible compulsion, a necessary element to support a

conviction. The standard of review for such a challenge is to view the evidence in the light most favorable to the State, then determine whether any rational trier of fact could have found all of the essential elements of the crime beyond a reasonable doubt. State v. Weisberg, 65 Wn. App. 721, 724, 829 P.2d 252 (1992). The State's evidence must be presumed to be true. Id. at 725. If the State fails to provide sufficient evidence of an element of the crime charged, then the remedy is remand for dismissal of the conviction. State v. Howe, 151 Wn. App. 338, 352, 212 P.3d 565 (2009).

Mr. Soto was charged under RCW 9A.44.100(1)(a), which states, "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...(B)y forcible compulsion." "Forcible compulsion" is defined at RCW 9A.44.010(6) as "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 he or she or another person will be kidnapped."

In the present case there is no evidence that Mr. Soto made any threat to Ms. Murray. Ms. Murray testified that she had some feelings of apprehension while in the "white room", but those were only due to the

size difference between herself and Mr. Soto (RP 35, 40) and the fact that she was afraid of being caught outside of class. (RP 60). Mr. Soto did not threaten her in any way, hold her down, or block her exit. (RP 59).

However, "...a finding of forcible compulsion cannot be based solely on the victim's subjective reaction to particular conduct. There also must be a 'threat' - a communication of an intention to cause bodily injury."

Weisberg, 65 Wn. App. at 725. Therefore, in the present case, a finding of forcible compulsion could only be based on actual physical force used.

The testimony established that there was physical contact between Mr. Soto and Ms. Murray. His hands were on her waist, he touched her breasts over her clothing, and they kissed. (RP 33, 34). The testimony described only the usual amount of force or touching that would be needed to accomplish such contact, but law requires more than that to constitute forcible compulsion.

The element of forcible compulsion requires proof of more than the force normally used to achieve the sexual contact. State v. Ritola, 63 Wn. App. 252, 254, 817 P.2d 1390 (1991). Ritola states that "the evidence must be sufficient to show that the force used was directed at overcoming the victim's resistance *and* was more than that which is normally required

to achieve penetration." Id. at 255; State v. Wright, 152 Wn. App. 64, 71, ___ P.3d ___, (2009), rev. den. 168 Wn.2d 1017 (2010) (emphasis added).

In the present case Ms. Murray testified that Mr. Soto grabbed her waist and began groping her. (RP 33). Ms. Murray told him that she should go back to class. (RP 33). Then Mr. Soto was kissing her, and Ms. Murray made the suggestion that they do this another time. (RP 34). Ms. Murray state that while Mr. Soto was kissing her, she pushed him back a little, not even a foot. (RP 36). She stated that Mr. Soto maintained his hands on her waist and they were kissing each other. (RP 36-37).

The actions described by Ms. Murray all involve only the nominal amount of force necessary to touch and kiss another person. Any "resistance" was ambiguous at best, as Ms. Murray continued to kiss Mr. Soto. The law requires that forcible compulsion be used to overcome resistance *and* must be more than normally required for the contact. Ritola, 63 Wn. App. at 255. The evidence does not show that Mr. Soto's intent was to overcome Ms. Murray's "resistance", but rather was the normal response of a 17-year old boy while kissing, and being kissed by, a girl he previously had the same type of contact with previously. It seems axiomatic that, for a person to use force to overcome resistance, that person should first realize there is resistance to overcome.

This incident appears to be a case where the thoughts going through Ms. Murray's mind were not being transmitted through her actions to Mr. Soto in the manner she thought they were. To an outside observer, including Mr. Soto, it would appear everything going on was consensual, with the two of them kissing each other and arranging a future date interspersed with some innocuous moments of "playing hard to get". If there is no genuine appearance of resistance, then Mr. Soto's actions could not have been used to overcome resistance he did not even know was there.

Furthermore, the law has the additional requirement that the force used be more than required for the physical contact to happen. From the testimony of Ms. Murray, the contact she described was only enough to accomplish the actual touching, nothing more. Her testimony did not establish that the kissing was accompanied by more than the usual touching when two people kiss, and her description of the "groping" likewise only describes the minimal amount of touching in such a situation.

In the final analysis, the actions described by Ms. Murray, while possibly being the awkward fumbling of a teenager, do not meet the legal requirements of forcible compulsion.

V. CONCLUSION

The defendant, Jesus Soto, respectfully asks the Court to find that the evidence in this case does not establish beyond a reasonable doubt that he used forcible compulsion. Mr. Soto requests the Court reverse his conviction, and remand for entry of an order of dismissal due to insufficient evidence of a material element.

Respectfully submitted the 8th day of November, 2010.



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