

FILED
Apr 09, 2013
Court of Appeals
Division III
State of Washington

No. 31139-2-III

IN THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION III

STATE OF WASHINGTON,

Plaintiff/Respondent,

vs.

JOHN L. SANDERS,

Defendant/Appellant.

Appellant's Brief

DAVID N. GASCH
WSBA No. 18270
P.O. Box 30339
Spokane, WA 99223-3005
(509) 443-9149
Attorney for Appellant

TABLE OF CONTENTS

A. ASSIGNMENTS OF ERROR.....5

B. ISSUES PERTAINING TO ASSIGNMENT OF ERROR.....5

C. STATEMENT OF THE CASE.....5

D. ARGUMENT.....9

 1. Mr. Sanders’ right to due process under Washington
 Constitution, Article 1, § 3 and United States Constitution,
 Fourteenth Amendment was violated where the State failed to
 prove the essential elements of the crime of attempted indecent
 liberties.....9

 2. Mr. Sanders was entitled to a voluntary intoxication instruction
 because the crime charged included a mental state, there was
 substantial evidence of drinking, and there was evidence that the
 drinking affected his ability to form the requisite intent or mental
 state.....14

E. CONCLUSION.....17

TABLE OF AUTHORITIES

<u>Cases</u>	<u>Page</u>
<i>In re Winship</i> , 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970).....	9, 10
<i>State v. Baeza</i> , 100 Wn.2d 487, 670 P.2d 646 (1983).....	9, 11
<i>State v. Coates</i> , 107 Wn.2d 882, 735 P.2d 64 (1987).....	14, 16
<i>State v. Collins</i> , 2 Wn. App. 757, 470 P.2d 227, 228 (1970).....	10
<i>State v. Gabryschak</i> , 83 Wn.App. 249, 921 P.2d 549 (1996).....	15, 17
<i>State v. Gallegos</i> , 65 Wn.App. 230, 828 P.2d 37 (1992).....	15
<i>State v. Green</i> , 94 Wn.2d 216, 616 P.2d 628 (1980).....	10
<i>State v. Hackett</i> , 64 Wn.App. 780, 827 P.2d 1013 (1992).....	16
<i>State v. Kruger</i> , 116 Wn.App. 685, 67 P.3d 1147 (2003).....	15
<i>State v. Moore</i> , 7 Wn. App. 1, 499 P.2d 16 (1972).....	10
<i>State v. Myers</i> , 133 Wn.2d 26, 941 P.2d 1102 (1997).....	11
<i>State v. Partin</i> , 88 Wn.2d 899, 567 P.2d 1136 (1977).....	11
<i>State v. Salinas</i> , 119 Wn.2d 192, 829 P.2d 1068 (1992).....	10, 11
<i>State v. Taplin</i> , 9 Wn. App. 545, 513 P.2d 549 (1973).....	10
<i>State v. Theroff</i> , 25 Wn. App. 590, 608 P.2d 1254, aff'd, 95 Wn.2d 385, 622 P.2d 1240 (1980).....	11
<i>State v. Webb</i> , 162 Wn.App. 195, 252 P.3d 424 (2011).....	15
<i>State v. Zamora</i> , 63 Wn. App. 220, 817 P.2d 880 (1991).....	11

Constitutional Provisions

United States Constitution, Fourteenth Amendment.....9
Washington Constitution, Article 1, § 3.....9

Statutes

RCW 9A.16.090.....14
RCW 9A.44.100.....11, 16
RCW 9A.44.100(1)(a).....12, 16

Other Sources

WPIC 18.10.....14, 16

A. ASSIGNMENTS OF ERROR

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

2. The trial court erred in denying Mr. Sanders' request for a jury instruction on voluntary intoxication.

B. ISSUES PERTAINING TO ASSIGNMENT OF ERROR

1. Was Mr. Sanders' right to due process under Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment violated where the State failed to prove the essential elements of the crime of attempted indecent liberties?

2. Was Mr. Sanders entitled to a voluntary intoxication instruction where the crime charged included a mental state, there was substantial evidence of drinking, and there was evidence that the drinking affected his ability to form the requisite intent or mental state?

C. STATEMENT OF THE CASE

On March 16, 2012, John Sanders was drinking beer with a couple of acquaintances in Mission Park. RP 102-04. The three men had been drinking beer since 10 a.m. that morning. RP 103. Mr. Sanders thought he had consumed about four 16-ounce beers. RP 126. One of his companions testified that all three of them were intoxicated. RP 104.

Around 1 p.m. Mr. Sanders saw a woman walking through the park that he thought he recognized. RP 104. He whistled and waved at the women to get her attention and started to walk toward her. RP 49-50, 104. The woman was Mary Feltes, a 19-year-old student at Moody Bible College. RP 46-47. When she noticed Mr. Sanders waiving at her, she assumed it was someone she knew from her church or school. RP 49-50. She walked toward Mr. Sanders as he was walking toward her. As she got closer, she did not recognize Mr. Sanders, but thought it would be a good opportunity to “share the gospel” and “lead somebody to Christ.” RP 50-51.

As Mr. Sanders approached, Ms. Feltes said, “Hi, can I help you?” Mr. Sanders replied, “Oh, I’m sorry, I just thought you were Angela.” Ms. Feltes said, “That’s alright.” She asked Mr. Sanders his name, told him her name and they shook hands. RP 52. Mr. Sanders pointed to a stain on her jacket touching her breast and asked, “What is that?” Ms. Feltes pushed his hand away and told him she had spilled some pudding on her jacket a couple of days ago and hadn’t yet washed it off. RP 53. She then said she should maybe get going. Mr. Sanders said, “Oh, don’t go,” grabbing her wrist. RP 54.

Ms. Feltes testified the grabbing of her wrist was not “super forceful” but she was a “little fearful.” When the prosecutor asked, “What kind of fear,” she responded, “I was just, like, uncomfortable because I had never been in a situation like that before.” RP 55.

Before she had a chance to react, Mr. Sanders leaned forward and kissed her on the lips. Ms. Feltes then said she was late for class and had to be going. RP 55. Mr. Sanders let go of her wrist, apologized and said, “I just keep thinking that you’re Angela, my friend Angela. You guys have the same hips.” RP 57. As he was saying this, he touched her hips and rear end. RP 57-58. Ms. Feltes stepped back swatting his hands away. She testified she “thought it was inappropriate and creepy,” and she was concerned she might get hurt. RP 58-59.

Ms. Feltes then told Mr. Sanders, “All right, I’m sorry, but I really have to go,” at which point she turned around and walked away. Mr. Sanders did not pursue her but made some grunting noises and said if she was single to “hit him up.” RP 59. Ms. Feltes contacted her school and called the police who arrived within minutes. RP 44, 62. Police obtained a description of Mr. Sanders from Ms. Feltes, located the three men in the park, and arrested Mr. Sanders on an outstanding warrant. RP 40-41.

The arresting female officer described Mr. Sanders' demeanor as "very belligerent, intoxicated, but not incapacitated." He was able to walk but could not speak very clearly. He made numerous inappropriate sexual comments and sounds to the female officers in the patrol car on his way to the jail. RP 42.

The jury was instructed in pertinent part:

A person commits the crime of indecent liberties when he knowingly causes another person who is not his spouse or registered domestic partner to have sexual contact with him by forcible compulsion.

CP 14.

To convict the defendant of the crime of indecent liberties, each of the following elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about the 16th day of March, 2012, the defendant knowingly caused Mary Feltes to have sexual contact with the defendant;
- (2) That this sexual contact occurred by forcible compulsion.

CP 15.

A person commits the crime of attempted indecent liberties when, with intent to commit that crime, he or she does any act that is a substantial step toward the commission of that crime.

CP 16.

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 oneself or another person or in fear of being kidnapped or that another person will be kidnapped.

CP 21.

A person knows or acts knowingly or with knowledge with respect to a fact, circumstance, or result when he or she is aware of that fact, circumstance, or result . . .

When acting knowingly as to a particular fact is required to establish an element of a crime, the element is also established if a person acts intentionally as to that fact.

CP 19.

The Court denied Mr. Sanders' request for a jury instruction on voluntary intoxication. RP 153-54, Weeks¹ RP 3-4.

This appeal followed. CP 44.

D. ARGUMENT

Issue No. 1. Mr. Sanders' right to due process under Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment was violated where the State failed to prove the essential elements of the crime of attempted indecent liberties.

As a part of the due process rights guaranteed under both the Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment the state must prove every element of a crime charged beyond a reasonable doubt. *State v. Baeza*, 100 Wn.2d 487, 488, 670 P.2d 646 (1983); *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068,

1073, 25 L.Ed.2d 368 (1970). As the United States Supreme Court explained in *Winship*: “[T]he use of the reasonable-doubt standard is indispensable to command the respect and confidence of the community in applications of the criminal law.” *In re Winship*, 397 U.S. at 364.

Mere possibility, suspicion, speculation, conjecture, or even a scintilla of evidence, is not substantial evidence, and does not meet the minimum requirements of due process. *State v. Moore*, 7 Wn. App. 1, 499 P.2d 16 (1972). As a result, any conviction not supported by substantial evidence may be attacked for the first time on appeal as a due process violation. *Id.* “Substantial evidence” in the context of a criminal case, means evidence sufficient to persuade “an unprejudiced thinking mind of the truth of the fact to which the evidence is directed.” *State v. Taplin*, 9 Wn. App. 545, 513 P.2d 549 (1973) (quoting *State v. Collins*, 2 Wn. App. 757, 759, 470 P.2d 227, 228 (1970)).

In determining the sufficiency of the evidence, the test is "whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992) (citing *State v. Green*, 94 Wn.2d 216, 220-22, 616 P.2d

¹ A different court reporter, Becky Weeks, reported the exceptions to the jury

628 (1980)). "When the sufficiency of the evidence is challenged in a criminal case, all reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant." *Salinas*, 119 Wn.2d at 201, 829 P.2d 1068 (citing *State v. Partin*, 88 Wn.2d 899, 906-07, 567 P.2d 1136 (1977)). "A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom." *Salinas*, 119 Wn.2d at 201, 829 P.2d 1068 (citing *State v. Theroff*, 25 Wn. App. 590, 593, 608 P.2d 1254, aff'd, 95 Wn.2d 385, 622 P.2d 1240 (1980)).

While circumstantial evidence is no less reliable than direct evidence, *State v. Myers*, 133 Wn.2d 26, 38, 941 P.2d 1102 (1997), evidence is insufficient if the inferences drawn from it do not establish the requisite facts beyond a reasonable doubt. *Baeza*, 100 Wn.2d at 491, 670 P.2d 646. Specific criminal intent may be inferred from circumstances as a matter of logical probability." *State v. Zamora*, 63 Wn. App. 220, 223, 817 P.2d 880 (1991).

RCW 9A.44.100 provides in pertinent part:

(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:

instructions, the reading of the jury instructions, closing arguments and the verdict.

(a) By forcible compulsion; . . .

RCW 9A.44.100(1)(a).

The jury in this case was similarly instructed:

To convict the defendant of the crime of indecent liberties, each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about the 16th day of March, 2012, the defendant knowingly caused Mary Feltes to have sexual contact with the defendant;

(2) That this sexual contact occurred by forcible compulsion.

CP 15.

A person commits the crime of attempted indecent liberties when, with intent to commit that crime, he or she does any act that is a substantial step toward the commission of that crime.

CP 16.

The jury was also instructed:

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 oneself or another person or in fear of being kidnapped or that another person will be kidnapped.

CP 21.

Here, there was insufficient evidence to support Mr. Sanders' conviction because there was no evidence that he took a substantial step toward causing Mary Feltes to have sexual contact with him by forcible compulsion. Specifically, there was no evidence of physical force which

overcame resistance, or a threat, express or implied, that placed Mary Feltes in fear of death or physical injury to herself or another person or in fear of being kidnapped or that another person would be kidnapped.

Ms. Feltes testified the grabbing of her wrist was not “super forceful” but she was “a little fearful.” When the prosecutor asked, “What kind of fear,” she responded, “I was just, like, uncomfortable because I had never been in a situation like that before.” RP 55. Being “a little fearful” or “uncomfortable” does not equate to “fear of death or physical injury to herself or another person or in fear of being kidnapped or that another person would be kidnapped.”

Similarly, when Mr. Sanders touched her hips and rear end and Ms. Feltes stepped back swatting his hands away, she testified she “thought it was inappropriate and creepy,” and she was concerned she might get hurt. RP 58-59. Again, this level of concern is not indicative of the level of “fear of death or physical injury” defined as forcible compulsion. Absence of forcible compulsion or attempted forcible compulsion was also exemplified by the fact that Mr. Sanders did not pursue Ms. Feltes when she turned around and walked away. RP 59.

Considering all these facts, there was insufficient evidence to support Mr. Sanders’ conviction because there was no evidence that he

took a substantial step toward causing Mary Feltes to have sexual contact with him by forcible compulsion.

Issue No. 2. Mr. Sanders was entitled to a voluntary intoxication instruction because the crime charged included a mental state, there was substantial evidence of drinking, and there was evidence that the drinking affected his ability to form the requisite intent or mental state.

RCW 9A.16.090 is the law at issue:

No act committed by a person while in a state of voluntary intoxication shall be deemed less criminal by reason of his condition, but whenever the actual existence of any particular mental state is a necessary element to constitute a particular species or degree of crime, the fact of his intoxication may be taken into consideration in determining such mental state.

Diminished capacity from intoxication is not a true "defense." *State v. Coates*, 107 Wn.2d 882, 891-92, 735 P.2d 64 (1987). Rather, "[e]vidence of intoxication may bear upon whether the defendant acted with the requisite mental state, but the proper way to deal with the issue is to instruct the jury that it may consider evidence of the defendant's intoxication in deciding whether the defendant acted with the requisite mental state." *Id.* (citing WPIC 18.10).

A defendant is entitled to a voluntary intoxication instruction when (1) the crime charged includes a mental state, (2) there is substantial evidence of drinking, and (3) there is evidence that the drinking affected

the defendant's ability to form the requisite intent or mental state. *State v. Gallegos*, 65 Wn.App. 230, 238, 828 P.2d 37 (1992). In other words, the 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. Kruger*, 116 Wn.App. 685, 691-92, 67 P.3d 1147 (2003) (citing *State v. Gabryschak*, 83 Wn.App. 249, 252-53, 921 P.2d 549 (1996)).

Simply showing that someone has been drinking is not enough.

The evidence must show the effects of the alcohol:

Intoxication is not an all-or-nothing proposition. A person can be intoxicated and still be able to form the requisite mental state, or he can be so intoxicated as to be unconscious. Somewhere between these two extremes of intoxication is a point on the scale at which a rational trier of fact can conclude that the State has failed to meet its burden of proof with respect to the required mental state.

Gabryschak, 83 Wn.App. at 254, 921 P.2d 549 (citation omitted). But a voluntary intoxication defense does not require expert testimony because the effects of alcohol are commonly known and the jurors can draw reasonable inferences from the evidence presented. *State v. Webb*, 162 Wn.App. 195, 208, 252 P.3d 424 (2011).

A typical voluntary intoxication instruction would read:

No act committed by a person while in a state of voluntary intoxication is less criminal by reason of that condition. However,

evidence of intoxication may be considered in determining whether the defendant [acted] ... with [intent].

WPIC 18.10, cited with approval in *Coates*, 107 Wn.2d at 892, 735 P.2d 64; *State v. Hackett*, 64 Wn.App. 780, 786, 827 P.2d 1013 (1992). Intent is an element of indecent liberties. The statute requires the perpetrator to *knowingly* cause another person who is not his or her spouse to have sexual contact with him. RCW 9A.44.100(1)(a).² The record reflects substantial evidence of Mr. Sanders' level of intoxication and there is ample evidence of his level of intoxication in both his mind and body.

The evidence showed that Mr. Sanders and his two companions had been drinking beer since 10 a.m. that morning. RP 103. Mr. Sanders guessed he had consumed about four 16-ounce beers. RP 126. One of the other two men testified that all three men were intoxicated. RP 104. This evidence combined with Mr. Sanders' subsequent behavior toward Ms. Feltes is more than sufficient to warrant the giving of the instruction.

The arresting officer described Mr. Sanders' demeanor as "very belligerent, intoxicated, but not incapacitated." He was able to walk but could not speak very clearly. This description by the arresting officer

²RCW 9A.44.100 provides: (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; . . . (emphasis added)

places Mr. Sanders' degree of intoxication at that same point on the scale discussed in *Gabryschak*, where a rational trier of fact can conclude that the State has failed to meet its burden of proof with respect to the required mental state. See *Gabryschak*, supra. This argument is strengthened further by the numerous inappropriate sexual comments and sounds made by Mr. Sanders to the arresting female officers on the way to the jail. RP 42. Only a fool or someone highly intoxicated would put himself in further hot water by making such derogatory comments to the officers who had just arrested him.

Based on the totality of this evidence, Mr. Sanders was entitled to the jury instruction on voluntary intoxication.

E. CONCLUSION

For the reasons stated, the conviction should be reversed

Respectfully submitted April 9, 2013,

s/David N. Gasch
Attorney for Appellant

PROOF OF SERVICE (RAP 18.5(b))

I, David N. Gasch, do hereby certify under penalty of perjury that on April 9, 2013, I mailed to the following by U.S. Postal Service first class mail, postage prepaid, or e-mailed by prior agreement (as indicated), a true and correct copy of brief of appellant:

John L. Sanders
#359879
PO Box 769
Connell WA 99326

E-mail: kowens@spokanecounty.org
Mark E. Lindsey/Andrew Metts
Deputy Prosecuting Attorney
1100 West Mallon Avenue
Spokane WA 99260-2043

s/David N. Gasch, WSBA #18270
Gasch Law Office
P.O. Box 30339
Spokane, WA 99223-3005
(509) 443-9149
FAX: None
gaschlaw@msn.com