

64067-4

64067-4

NO. 64067-4-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

JOSE ISIORDIA-PEREZ,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE LAURA GENE MIDDAUGH

2010/11/22 PM 2:00
FILED
CLERK OF COURT

BRIEF OF RESPONDENT

DANIEL T. SATTERBERG
King County Prosecuting Attorney

TERENCE R. CARLSTROM
Deputy Prosecuting Attorney
Attorneys for Respondent

King County Prosecuting Attorney
W554 King County Courthouse
516 Third Avenue
Seattle, Washington 98104
(206) 296-9000

TABLE OF CONTENTS

	Page
ISSUE PRESENTED	1
STATEMENT OF THE CASE.....	1
1. PROCEDURAL FACTS	1
2. SUBSTANTIVE FACTS	2
ARGUMENT.....	6
1. THE EVIDENCE WAS MORE THAN SUFFICIENT TO ESTABLISH THE ELEMENT OF FORCIBLE COMPULSION.....	6
CONCLUSION	10

TABLE OF AUTHORITIES

Page

Table of Cases

Washington State:

<u>State v. Fiser</u> , 99 Wn. App. 714, 995 P.2d 107 (2000).....	7
<u>State v. Gerber</u> , 28 Wn. App. 214, 622 P.2d 888 (1981).....	7
<u>State v. Green</u> , 94 Wn.2d 216, 616 P.2d 628 (1980)	6, 7, 9
<u>State v. McKnight</u> , 54 Wn. App. 521, 774 P.2d 532 (1989).....	7
<u>State v. Ritola</u> , 63 Wn. App. 252, 817 P.2d 1390 (1991).....	9
<u>State v. Salinas</u> , 119 Wn.2d 192, 829 P.2d 1068 (1992)	6, 9

A. ISSUE PRESENTED

1. Evidence is sufficient to support a conviction if, when viewed in the light most favorable to the State, any rational trier of fact could have found guilt beyond a reasonable doubt. Here, in a prosecution for attempted indecent liberties by forcible compulsion, the evidence showed that the defendant grabbed the victim in a bear hug, tackled her onto her bed, and told her repeatedly he wanted to have oral sex with her. She resisted by trying to push the defendant away from her and off of her, and was finally able to kick free when he moved lower on her body. The defendant blocked her path to her front door, grabbed her again, and tried to take her pants off. She pulled away and finally broke free. The jury was instructed in pertinent part that "forcible compulsion" means "physical force which overcomes resistance." Did the State present sufficient evidence of forcible compulsion to support the conviction?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

Appellant Jose Isiordia-Perez was charged by information with one count of attempted indecent liberties by forcible

compulsion. CP 1. He proceeded to a jury trial before the Honorable Laura Jean Middaugh,¹ and was convicted as charged. CP 30. The court imposed an indeterminate sentence and set the minimum term at the low end of the standard range. CP 51-60. Isiordia-Perez timely appealed. CP 61-62.

2. SUBSTANTIVE FACTS

Victim C.G. met Isiordia-Perez through her boyfriend, Rafael Mendez. 2RP 26. The three became friends, and remained so after C.G. and Mendez moved into a Renton apartment together in early August, 2008. 2RP 26-28.

On the afternoon of August 23, 2008, Mendez and Isiordia-Perez attended a company picnic. 3RP 40. After the picnic, they both ended up at a mutual friend's house in Renton. 3RP 43. C.G. came over at some point as well, and she and Mendez argued. 2RP 31. C.G. went home, and Mendez, Isiordia-Perez, and several others went out for a guys' night out. 2RP 31-32; 3RP 43-46.

¹ Five volumes of verbatim reports of proceedings will be referred to as follows:

1RP: August 6, 2009
2RP: August 11, 2009
3RP: August 12, 2009, A.M., Michael P. Townsend court reporter
4RP: August 12, 2009, P.M., Velma Hayes court reporter
5RP: August 13, 2009

At approximately 2:30 a.m. on the 24th, C.G. received a phone call from Isiordia-Perez, who asked whether she wanted to pick up Mendez at a bar in Kirkland or have Isiordia-Perez drive him home. 2RP 35-36. Isiordia-Perez told C.G. that he would drive Mendez home, and also told her that Mendez did not love her. 2RP 37. Isiordia-Perez called C.G. two more times while driving Mendez home, each time telling C.G. that Mendez did not love her and encouraging her to end her relationship with him. 2RP 38-42.

During the third phone call Isiordia-Perez arrived at C.G.'s apartment gate, but could not get through so C.G. drove to meet him at a nearby gas station. 2RP 42-43. C.G. led Isiordia-Perez back through the gate, and they parked next to each other in the apartment complex. 2RP 44-45. While Mendez slept in Isiordia-Perez's car, C.G. and Isiordia-Perez stood in the parking lot and talked. 2RP 46-47. Isiordia-Perez continued to tell C.G. that Mendez did not love her, and again encouraged her to end her relationship with him. 2RP 47. C.G. finally told Isiordia-Perez that they should wake Mendez. 2RP 50. Isiordia-Perez said that he would do so and take him upstairs. 2RP 50.

C.G. went back to her apartment, entered her bedroom, and curled up in bed with her back to her bedroom door. 2RP 51, 53.

She left the apartment door unlocked. 2RP 54. The next thing C.G. remembered was someone hugging her from behind in the bed. 2RP 55. She assumed it was Mendez, but when she looked behind her she discovered it was in fact Isiordia-Perez. 2RP 55. C.G. jumped out of bed and asked him what he was doing. 2RP 55.

Isiordia-Perez got up and stood at the foot of the bed, blocking C.G.'s path to the bedroom door. 2RP 57. He told C.G. he wanted her to be intimate or sexual with him, and that she would forget about Mendez. 2RP 58-59. C.G. said no, and begged Isiordia-Perez to help her wake up Mendez. 2RP 60. Isiordia-Perez then grabbed her in a "bear hug" and told her he wanted to have oral sex with her. 2RP 61. C.G. began trying to push him while saying no and pleading with him to just go wake up Mendez. 2RP 61. Isiordia-Perez "turned around and put his weight on me, and that's when he fell on top of me on the bed." 2RP 62. One of C.G.'s hands was pinned beneath her. 2RP 62. Isiordia-Perez continued to tell C.G. that he wanted to have oral sex with her, and his tone became more aggressive. 2RP 60-61, 63-64. C.G. tried to push Isiordia-Perez off of her while saying, "no, no, we can't be doing this, please." 2RP 62. He ignored her pleas to stop and

continued trying to touch her on her breasts, her bottom, and "all over." 2RP 63. Isiordia-Perez also put his face close to C.G.'s chest and stomach, then moved below her waist and tried to pull her pants off. 2RP 64. C.G. tried to lift his head up to keep him from kissing or touching her body. 2RP 64-65. Only when Isiordia-Perez moved lower on C.G.'s body was she able to "kick out" and free herself. 2RP 66.

C.G. moved towards the front door of the apartment, but Isiordia-Perez blocked her path and grabbed her again. 2RP 66-67. He continued to insist that C.G. be intimate with him. 2RP 68. When C.G. refused, he began begging her to show him her private parts, attempted again to pull her pants down, and tried to kiss her. 2RP 68. C.G. pulled away, but not before Isiordia-Perez was able to kiss her on the cheek. 2RP 68. Isiordia-Perez then left the apartment.

C.G. went down to the parking lot to get Mendez, and arrived just as he was getting out of Isiordia-Perez's car. 2RP 69. Mendez, unaware of what had just happened, invited Isiordia-Perez into the apartment for a drink. 2RP 71-72. The three went inside, and C.G. beckoned Mendez into the bedroom where she told him what Isiordia-Perez had done. 2RP 73. Mendez confronted

Isiordia-Perez, who first denied doing anything to C.G. but then admitted, "I disrespected you and I disrespected her." 2RP 74-75. C.G. called the police, and Isiordia-Perez was arrested. 2RP 76-78.

C. **ARGUMENT**

1. THE EVIDENCE WAS MORE THAN SUFFICIENT TO ESTABLISH THE ELEMENT OF FORCIBLE COMPULSION.

Isiordia-Perez asserts that the evidence of forcible compulsion was not sufficient to support his conviction for attempted indecent liberties. He is incorrect. The evidence was more than sufficient to support the conviction.

Evidence is sufficient when, "after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found guilt beyond a reasonable doubt." State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992); State v. Green, 94 Wn.2d 216, 220-22, 616 P.2d 628 (1980). 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." State v. Salinas, 119 Wn.2d at 201. The appellate court must "defer to the trier of fact on issues of conflicting testimony,

credibility of witnesses, and the persuasiveness of the evidence.”

State v. Fiser, 99 Wn. App. 714, 719, 995 P.2d 107 (2000).

Moreover, the appellate court need not be convinced itself beyond a reasonable doubt that the defendant is guilty in order to find that sufficient evidence supports the conviction. State v. Gerber, 28 Wn. App. 214, 216, 622 P.2d 888 (1981), citing State v. Green, 94 Wn.2d at 221.

Here, Isiordia-Perez was charged with attempted indecent liberties by forcible compulsion. CP 1. Specifically, the State alleged that he "did by forcible compulsion knowingly attempt to cause C.G.," who was not his spouse, "to have sexual contact" with him. CP 1. "Forcible compulsion" was defined for the jury, in pertinent part, as "physical force which overcomes resistance." CP 43.

Whether the evidence establishes sufficient 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 McKnight, this Court held that there was sufficient evidence of forcible compulsion to support the defendant's conviction for second-degree rape where he slowly pushed a physically weak

fourteen year old onto a couch, disrobed her, and had non-consensual sexual intercourse with her. Id.

If the conduct in McKnight was sufficient to establish forcible compulsion, and it was, then clearly the State presented sufficient evidence to meet that element here. Isiordia-Perez twice grabbed C.G. in a bear hug, each time telling her he wanted to touch her sexually. 2RP 61, 66-67. The first time C.G. tried unsuccessfully to push him away while saying no and pleading with him to go wake up Mendez. 2RP 61. At that point Isiordia-Perez essentially tackled her onto the bed (he "turned around and put his weight on me, and that's when he fell on top of me on the bed"), pinning one of her hands beneath her. 2RP 62. His tone became more aggressive, and C.G. tried again to push him off of her. 2RP 60-64. When Isiordia-Perez moved lower on C.G.'s body, she tried to lift his head up to keep him from kissing or touching her sexually. 2RP 64-65. Only then was she able to "kick out" and free herself. 2RP 66.

But Isiordia-Perez was not finished. He blocked C.G.'s path to her front door and grabbed her again, continuing to insist on sexual contact. 2RP 66-68. He tried to pull C.G.'s pants down, begged her to show him her private parts, and tried to kiss her.

2RP 68. C.G. was able to pull away, but not before Isiordia-Perez managed to kiss her on her cheek. 2RP 68. During both encounters C.G. repeatedly told Isiordia-Perez no. 2RP 60-68.

Accordingly, when the evidence is viewed in the light most favorable to the State, as it must be under State v. Salinas, 119 Wn.2d 192, and State v. Green, 94 Wn.2d 216, it is abundantly clear that Isiordia-Perez used physical force in an unsuccessful effort to have sexual contact with C.G. It is equally clear that C.G. resisted. Thus, the evidence was more than sufficient to establish the element of forcible compulsion, and Isiordia-Perez's conviction should be affirmed.

Nevertheless, Isiordia-Perez asserts that State v. Ritola, 63 Wn. App. 252, 817 P.2d 1390 (1991), supports his argument that the evidence of forcible compulsion was insufficient. But Ritola is distinguishable. There, Ritola was convicted of indecent liberties by forcible compulsion for suddenly grabbing the breast of his Toutle River Boys Ranch counselor, squeezing it, and instantaneously removing his hand. Id. at 253. Division Two reversed, holding that the force used was inherent in the touching and therefore did not constitute force used to overcome resistance. Id. at 254-55.

Here, by contrast, the force used by Isiordia-Perez was not

inherent in his effort to have sexual contact with C.G. Before grabbing her in a bear hug the first time, Isiordia-Perez had slipped into C.G.'s bed and wrapped his arms around her. 2RP 55. C.G. leapt out of bed as soon as she realized who it was and asked him what he was doing. 2RP 55. The physical force that followed—grabbing her in a bear hug, tackling her onto the bed, etc.—was clearly aimed at overcoming C.G.'s physical resistance to his advances and her clear verbal expressions of her lack of consent. That C.G. did not lash out at or strike Isiordia-Perez does not mean, as he suggests, that she did not physically resist. As documented above, she tried repeatedly to push Isiordia-Perez off of or away from her. She also lifted his head up and pulled away from him to prevent sexual touching. Fortunately for her, his efforts were ultimately unsuccessful. But the evidence of forcible compulsion was clear and unmistakable, and it is more than sufficient to support the conviction.

D. CONCLUSION

For the reasons set forth above, the State respectfully requests that this Court affirm Isiordia-Perez's conviction.

DATED this 22nd day of March, 2010.

Respectfully submitted,

DANIEL T. SATTERBERG
King County Prosecuting Attorney

By: *Terence R. Carlstrom*
TERENCE R. CARLSTROM, WSBA #32249
Deputy Prosecuting Attorney
Attorneys for Respondent
Office WSBA #91002

Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Eric J. Nielsen, the attorney for the appellant, at Nielsen Broman & Koch, P.L.L.C., 1908 E. Madison Street, Seattle, WA 98122, containing a copy of the Brief of Respondent, in STATE V. JOSE ISIRDIA-PEREZ, Cause No. 64067-4-I, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

Holly L. Gilmore
Name
Done in Kent, Washington
Holly L. Gilmore, Paralegal

3/22/2010
Date
3/22/2010

210MAR22 11 38 AM
U.S. DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
SEATTLE