

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE**

STATE OF WASHINGTON,)	
)	No. 62896-8-I
Respondent,)	
)	
v.)	UNPUBLISHED OPINION
)	
)	
OLEKSANDIR YUSIPOVICH,)	
)	
Appellant.)	FILED: <u>July 26, 2010</u>

_____)
Schindler, J. — A jury convicted Oleksandir Yusipovich of indecent liberties by forcible compulsion in violation of RCW 9A.44.100(1)(a). Yusipovich seeks reversal, claiming there is insufficient evidence of forcible compulsion to support his conviction. Because a rational trier of fact could have found forcible compulsion beyond a reasonable doubt and the arguments in the statement of additional grounds are without merit, we affirm.

FACTS

On the evening of February 16, 2006, K.F. was shopping at Fish Gallery and Pets in Kent. At one point, K.F. noticed Yusipovich looking at her. After shopping, K.F. returned to her car. K.F. opened the door, and reaching over the driver’s seat, she placed several items she that had purchased in the passenger seat. Meanwhile,

Yusipovich approached K.F. and asked if she liked animals. K.F. turned to face Yusipovich and politely answered that she did like animals and talked about her pets.

Yusipovich stepped toward K.F. and briefly hugged her. K.F. said that she did not expect or welcome the hug; but she did not try to stop him. When Yusipovich released her, K.F. quickly got into her car. As K.F. tried to shut the car door, Yusipovich stepped between the door and the car and yanked K.F. out of the car. As Yusipovich was pulling K.F. out of the car, her hip hit the steering wheel, causing bruising. K.F. testified that when Yusipovich pulled her out of the car, she “was in shock. I was completely numb. I couldn’t move, I couldn’t talk. I had no idea what was happening.”

After pulling her out of the car, Yusipovich cornered K.F. and pinned her against the car so she could not move. He then grabbed her face and kissed her. Because she recently had four wisdom teeth removed, K.F. experienced intense jaw pain. Yusipovich then released his grip on K.F.’s face, pulled her shirt and bra open, and began to kiss and lick her exposed chest. K.F. pushed Yusipovich away, got back into her car, closed the door, and locked it. Yusipovich drove away.

Donald Delaney was parked in his car next to K.F.’s car. Delaney observed Yusipovich kissing and licking K.F.’s face and neck. After Yusipovich drove away, Delaney heard K.F. crying and went to see if she was all right. Delaney said that K.F. was visibly upset, and she told Delaney what happened. He suggested she call the police. K.F. called 911 and gave the 911 operator the license plate number of

Yusipovich's car and a description of him.

About 15 minutes later, Yusipovich returned. Yusipovich approached K.F., but Delaney pushed him away. K.F. said Yusipovich looked frightened. Yusipovich dropped to his knees and said, "he was so sorry, he was so sorry, excuse me, I have a family, I've never done this before." An employee of a nearby store, Melinda Baggenstos, asked K.F. and Delaney if they needed help. Delaney and K.F. went with Baggenstos into the store to call 911 again. Delaney called 911 and explained that Yusipovich had returned. The police arrived and arrested Yusipovich.

The State charged Yusipovich with indecent liberties by forcible compulsion in violation of RCW 9A.44.100(1)(a). At trial, a number of witnesses testified on behalf of the State, including K.F., Delaney, and Baggenstos. Yusipovich's defense was that the testimony was inconsistent, the witnesses were not credible, and K.F. exaggerated the nature of the contact in order to get attention from her family. Yusipovich did not testify.

A jury convicted Yusipovich as charged of indecent liberties by forcible compulsion. The court imposed a sentence in the standard range. Yusipovich appeals.

ANALYSIS

On appeal, Yusipovich asserts that the State did not present sufficient evidence for a rational jury to find beyond a reasonable doubt that there was forcible compulsion.¹

Evidence is sufficient when any rational trier of fact could have found each essential element of the crime beyond a reasonable doubt. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). In reviewing a challenge to the sufficiency of the evidence, all evidence presented by the State is presumed true, and is considered in the light most favorable to the State. Salinas, 119 Wn.2d at 201. All reasonable inferences are presumed true, and are drawn in favor of the State and against the defendant. Salinas, 119 Wn.2d at 201.

To convict Yusipovich of indecent liberties, the State had to prove beyond a reasonable doubt that Yusipovich knowingly had sexual contact with K.F. by forcible compulsion. RCW 9A.44.100(1)(a). “Forcible compulsion” is defined in RCW 9A.44.010(6) as follows:

[P]hysical 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.

Case law interprets “force” to mean the force used or threatened to overcome or prevent resistance. State v McKnight, 54 Wn. App. 521, 527, 774 P.2d 532 (1989). Resistance need not be manifested by physical means. McKnight, 54 Wn. App. at 525.

Relying on State v. Ritola, 63 Wn. App. 252, 817 P.2d 1390 (1991), Yusipovich contends insufficient evidence supports a finding of forcible compulsion because K.F. did not physically resist when he pulled down her shirt and kissed her chest.

¹ Yusipovich concedes that there was sufficient evidence to find that he had sexual contact with K.F., and seeks only to challenge the sufficiency of the evidence of forcible compulsion.

In Ritola, a boy grabbed a female camp counselor's breast, but withdrew his hand before she had time to react. Ritola, 63 Wn. App. at 253. The camp counselor was so surprised, and the encounter so sudden, that she had no time to resist. Ritola, 63 Wn. App. at 253. The court concluded that there was insufficient evidence to "support a reasonable inference that the force used by Ritola was directed at overcoming resistance, or that such force was more than that needed to accomplish sexual touching." Ritola, 63 Wn. App. at 255-256.

Here, unlike in Ritola, when K.F. attempted to get in her car after Yusipovich hugged her, he prevented her from closing the car door, forcibly grabbed her, and pulled her out of the car. Yusipovich then pinned K.F. against the car before pulling down her shirt. The evidence supports a reasonable inference that the force used by Yusipovich was directed at overcoming K.F.'s resistance. The evidence also supports a reasonable inference that there was an implied threat of physical injury if K.F. resisted. Before kissing and licking her chest, Yusipovich injured K.F. when he forcibly pulled her out of the car, and also caused her intense jaw pain by gripping her face.

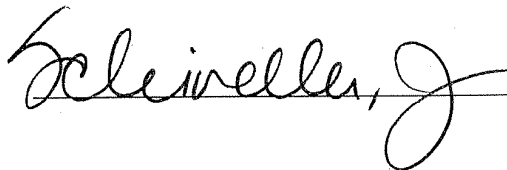
In his statement of additional grounds for review, Yusipovich claims he received ineffective assistance of counsel because his attorney failed to introduce a recording of the second 911 call and did not obtain a copy of a security video. To establish ineffective assistance, Yusipovich must show that counsel's performance was deficient and that prejudice resulted from the deficiency. State v. McFarland, 127

Wn.2d 322, 334-35, 899 P.2d 1251 (1995); Strickland v. Washington, 466 U.S. 668, 688, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). The defendant has the burden of finding a sufficient basis in the record to rebut the strong presumption of effective assistance of counsel. McFarland, 127 Wn.2d at 337. Legitimate trial strategy or tactics cannot be the basis for a showing of ineffective assistance of counsel. State v. Hendrickson, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996). The record indicates that defense counsel was aware of the second 911 tape, was familiar with its contents, and had a reasonable strategy in mind when he decided not to introduce it. Yusipovich also appears to claim his attorney failed to obtain video from a nearby security camera that would have been exculpatory. But Yusipovich's speculative allegation that a security video exists and that it would contain exculpatory evidence does not establish ineffective assistance of counsel.

Yusipovich also argues that he was not advised of his right to represent himself pro se. In order to exercise the right to self-representation, a defendant must make a knowing, intelligent, and unequivocal waiver of the right to counsel. State v. DeWeese, 117 Wn.2d 369, 376-377, 816 P.2d 1 (1991). Here, the record does not indicate that Yusipovich asked to proceed pro se.

Finally, Yusipovich asserts that the State's witnesses were not credible. We defer to the trier of fact for resolving conflicting testimony and determining credibility. State v. Walton, 64 Wn. App. 410, 415-16, 824 P.2d 533 (1992).

We affirm.

A handwritten signature in black ink, appearing to read "Schweidler, J". The signature is written in a cursive style with a large, looping initial "S" and a long horizontal stroke at the end.

WE CONCUR:

Leach, A.C.J.

Becker, J.