No. 86802

IN THE
SUPREME COURT OF MISSOURI

STATE OF MISSOURI,

Respondent,

v.

JOHN W. VANDEVERE,

Appellant.

Appeal from the Circuit Court of Taney County, Missouri
38th Judicial Circuit, Division 2
Honorable John S. Waters

RESPONDENT'S SUBSTITUTE BRIEF

JEREMIAH W. (JAY) NIXON
Attorney General

LACEY R. SEARFOSS
Assistant Attorney General
Missouri Bar No. 56533

P. O. Box 899
Jefferson City, MO 65102
(573) 751-3321
Fax (573) 751-5391
lacey.searfoss@ago.mo.gov
Attorneys for Respondent

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Error! No table of authorities entries found.

Other Authorities

Error! No table of authorities entries found.

Jurisdictional Statement

This appeal is from a conviction of the Class C felony of sexual abuse, § 566.100, RSMo 2000, obtained in the Circuit Court of Taney County. Appellant was sentenced to four years in the Missouri Department of Corrections.

On March 29, 2005, the Missouri Court of Appeals, Southern District, reversed the trial court's judgment and discharged appellant. On April 12, 2005, respondent filed a motion for rehearing and transfer to the Missouri Supreme Court. On April 19, 2005, the Missouri Court of Appeals, Southern District, denied respondent's motion for rehearing.

On May 3, 2005, respondent filed with this Court an application for transfer. On May 31, 2005, this Court sustained respondent's application to transfer. This Court has jurisdiction. Art. V, § 10, Missouri Constitution.

Statement of Facts

The appellant, John W. Vandevere, was charged by information on October 3, 2002, with the class C felony of sexual abuse, § 566.100, RSMo 2000. On April 29, 2004, this cause went to a bench trial in the Circuit Court of Taney County, the Honorable John Waters presiding (Tr. 2).

The sufficiency of the evidence to sustain the appellant's conviction and sentence is in dispute. Viewed in the light most favorable to the verdict, the following evidence was adduced: On July 13 through July 18, 2002, an organization called American Kids held its national competition in Branson USA, a facility in Branson, Missouri (Tr. 221). Appellant was co-director for Mississippi Kids, a state organization that participated in the national competition held in Branson, Missouri (Tr. 250). Appellant had worked with over five-hundred children as co-director of Mississippi Kids (Tr. 227). Appellant, as a state director for Mississippi Kids, was assigned to run a souvenir booth during the American Kids competition (Tr. 252-253). B.H. and her mother had set up a booth to sell flowers to people participating in the national competition (Tr). Appellant's souvenir stand was across the floor from Ms. Hind's flower booth (Tr. 222).

On July 13, appellant approached B.H., 16 years old, and her mother to buy flowers (Tr. 32). During July 13 to July 17, appellant and B.H. talked on several occasions (Tr. 33-37). On two or three occasions, appellant talked with B.H. about her singing ability and getting her involved with the Missouri Kids group (Tr. 36-37). On July 17, appellant approached B.H. and asked her if she could model some clothes for him (Tr. 38). Appellant

told B.H. that he needed her help picking out an outfit for the dancing group, the Showstoppers[1] (Tr. 38). B.H. asked her mother if she could help appellant pick out the clothes (Tr. 39). B.H.'s mother told B.H. that it was fine as long as she returned before lunch (Tr. 39). B.H. thought that appellant was taking her to a clothing store or another public place to try on the clothes (Tr. 40).

Appellant and B.H. got into appellant's car and left Branson USA and drove to appellant's hotel, the Radisson, around 10:30 a.m. or 11:00 a.m. (Tr.41; 45). B.H. was shocked that appellant drove her to his hotel to try on the clothes (Tr. 42). Appellant grabbed B.H.'s hand and led her into the Radisson Hotel (Tr. 42). Appellant and B.H. went into appellant's hotel room on the second floor (Tr. 43). Appellant chained and deadbolted the door and B.H. was alone with appellant in his room (Tr. 45, 46). Appellant retrieved his suitcase and placed it on the bed (Tr. 47). Appellant pulled out two pair of pants and four or five shirts from his suitcase for B.H. to try on (Tr. 47). Appellant handed B.H. the first pair of pants and the first shirt (Tr. 47). B.H. went into the bathroom and locked the door behind her (Tr. 48). B.H. changed into the first outfit (Tr. 48). B.H. came out of the bathroom and stood by the bathroom door (Tr. 48). Appellant was sitting on the end of his bed (Tr. 48).

[1] The Showstoppers were a group from the Mississippi Kids that appellant's wife directed (Tr. 221).

Appellant told B.H. that she looked good in the outfit and that he wanted to know how she felt in the outfit (Tr. 49). B.H. was nervous and did not know what was going on (Tr. 49). Appellant told B.H. to come sit on his lap (Tr. 49). B.H. did not move towards appellant, so appellant stood up from the bed a little bit and grabbed B.H.'s hand and jerked her arm and pulled her onto his left knee (Tr. 49). Appellant started to rub B.H.'s back and butt and told her that she felt "good" in the outfit (Tr. 50-51). B.H. did not say anything to appellant as he touched her because she was scared (Tr. 51).

Appellant grabbed a second shirt and told B.H. to go try it on (Tr. 51). B.H. went back into the bathroom and put the second shirt on (Tr. 51). B.H. came out of the bathroom and appellant once again grabbed her hand and jerked her arm and pulled her onto his left knee (Tr. 51). This time appellant rubbed B.H.'s leg and got close to her "private parts" (Tr. 52). B.H. tried on a third top and once again appellant grabbed B.H. and put her on his knee and rubbed all over her body (Tr. 53). At some point appellant rubbed on B.H.'s vagina over her clothes (Tr.53). Then appellant asked B.H. to try on another pair of pants and a shirt with a built in bra (Tr. 55, 116-117 232). B.H. went into the bathroom and while she was in there appellant asked her to take off her bra to try on the shirt (Tr. 55; 232). B.H. took off her bra and put on the shirt (Tr. 56). She came out of the bathroom and appellant jerked B.H.'s arm and stood her in between his legs so that she was facing him (Tr. 57; 232). Appellant lifted B.H.'s shirt and kissed her breasts (Tr. 57; 232-233). B.H. was very scared and did not know what to do (Tr. 58). B.H. was shocked that this was happening and she began to cry (Tr. 72).

Appellant gave B.H. some of the tops that she tried on and told her that she could not tell anyone what had happened (Tr. 58-59). B.H. went back into the bathroom to change clothes and while she was in the bathroom, appellant came in and kissed her on her mouth (Tr. 60). B.H. turned away from appellant and started to fold the tops she had tried on (Tr. 60). B.H. gave appellant the tops that she did not want, and appellant put them in his suitcase (Tr. 60). As they were leaving, appellant kissed B.H. again (Tr. 60). Appellant told B.H. not to tell anyone what had happened because it would ruin him (Tr. 59).

In the car on the way back to Branson USA, appellant invited B.H. back to his hotel room so that he could help her with her self-esteem (Tr. 60). Appellant and B.H. went back to Branson USA (Tr. 62). After arriving at Branson USA, B.H. stared to talk with one of her friends, Chris Korblien, a vendor at American Kids (Tr. 62). She asked Mr. Korblein what he would do if he had a situation that he needed to take care of but was afraid to do so (Tr. 63). B.H. did not go into detail about what had happened to her because she was scared to say anything because appellant told her not to (Tr. 64). Mr. Korblein spoke with Greg Petree, the national coordinator and state director in Oklahoma for American Kids, and vaguely told him about B.H.'s situation (Tr. 135; 137). Mr. Petree wanted his wife, Paula Petree, to talk to B.H. to find out what had happened (Tr. 138).

B.H. waited at Mr. Korblein's booth to talk with Mrs. Petree (Tr. 68). Mr. Korblein left his booth to use the restroom, and B.H. put her head down on the table to rest (Tr. 68). Appellant approached B.H. and kissed her on her neck (Tr. 68). Mrs. Petree saw appellant touch B.H.'s face with his own face (Tr. 145). Mrs. Petree immediately walked over to

B.H., and then asked her husband to send B.H. to a conference room behind the stage (Tr. 68; 147). B.H. told Mrs. Petree what appellant had done to her in detail (Tr. 68-70; 148). Mr. Petree contacted the police (Tr. 149).

On July 18, 2002, Detective Brian Bailey met with B.H. at the Division of Family Services office (Tr. 73; 183). B.H. told the detective what had happened to her at appellant's hotel room (Tr. 73; 183). Then Detective Bailey interviewed appellant at his hotel room (Tr. 187-188). Appellant admitted to the detective that he had rubbed B.H.'s back and bottom area (Tr. 191). The detective arrested appellant and took him to the police station (Tr. 193-194). At the police station, appellant admitted to kissing B.H.'s breasts (Tr. 196). Appellant filled out a written statement and made a videotape confession (Tr. 206-207). During appellant's trial, appellant admitted that on July 17, 2002, he patted B.H. on her bottom and that he lifted up her top and kissed her breasts (Tr. 232-233).

At the close of the state's evidence, appellant made a motion for a judgment of acquittal and the court denied the motion (Tr.217-218; L.F. 9). At the close of all the evidence, appellant renewed his motion for judgment of acquittal and the court denied the motion (Tr. 283-284; L.F. 10). On July 9, 2004, the judge found appellant guilty of sexual abuse and appellant was sentenced to four years in the custody of the Missouri Department of Corrections (L.F. 5-6; 15-16). Appellant filed a motion for new trial and it was denied (L. F. 14).

On July 19, 2004, appellant filed notice of appeal (L.F. 6; 20). On March 29, 2005, the Missouri Court of Appeals, Southern District, reversed the trial court's judgment and

discharged appellant. On April 12, 2005, respondent filed a motion for rehearing and transfer to the Missouri Supreme Court. On April 19, 2005, the Missouri Court of Appeals, Southern District, denied respondent's motion for rehearing.

On May 3, 2005, respondent filed with this Court an application for transfer. On May 31, 2005, this Court sustained respondent's application to transfer.

Argument

The trial court did not clearly err in finding appellant guilty of sexual abuse because there was sufficient evidence to establish that appellant used forcible compulsion to sexually abuse B.H. under the totality of the circumstances.

For his sole point on appeal, appellant claims that the trial court erred in finding appellant guilt of the Class C felony of sexual abuse because "that was against the weight of the evidence" in that appellant did not use forcible compulsion on the victim because "the only physical force used was pulling on the victim's arm 'just a tad bit' and the victim did not resist in any manner" (App.Br. 7).

Standard of Review

This Court should review the sufficiency of the evidence in a court-tried criminal case by applying the same standard used in a jury-tried case. *State v. Dawson*, 985 S.W.2d 941, 946 (Mo.App. W.D. 1999). In reviewing the sufficiency of the evidence, appellate review is limited to a determination of whether there is sufficient evidence from which a reasonable jury might have found the defendant guilty beyond a reasonable doubt. *State v. Crawford*, 68 S.W.3d 406, 407-408 (Mo. banc 2002). In applying the standard, the reviewing court accepts as true all of the evidence favorable to the state, including all favorable inferences drawn from the evidence, and disregards all evidence and inferences to the contrary. *State v. Chaney*, 967 S.W.2d 47, 52 (Mo. banc 1998), *cert. denied*, 525 U.S. 1021 (1998). The trial court determines the weight and credibility of the testimony of the witnesses. *Crawford*, 68 S.W.3d at 408. The trial court "may believe all, some, or none of

the testimony of a witness when considered with the facts, circumstances and other testimony in the case." *Id*.

Sufficient Evidence of Sexual Abuse

Appellant was charged and convicted of sexual abuse. "A person commits the crime of sexual abuse if he subjects another person to sexual contact by the use of forcible compulsion." § 566.100, RSMo 2000. Sexual contact is defined as "any touching of another person with the genitals or any touching of the genitals or anus of any person, or the breast of any female person, or any such touching through the clothing, for the purpose of arousing or gratifying sexual desire of any person." § 566.010(3), RSMo (Cum.Supp. 2003). Appellant does not contest that he had sexual contact with B.H.; he merely contests whether there was sufficient evidence to show he did so by the use of forcible compulsion. "Forcible compulsion" is defined as either "(a) Physical force that overcomes reasonable resistance; or (b) A threat, express or implied, that places a person in reasonable fear of death, serious physical injury or kidnaping of such person or another person." § 556.061(12), RSMo (Cum.Supp. 2003).

Physical force is simply "force applied to the body." *State v. Niederstadt,* 66 S.W.3d 12, 15 (Mo.banc 2002). "In determining if the force used is sufficient to overcome reasonable resistance, the court does not look to any single fact but to the totality of the circumstances." *Id.* Among the factors are whether violence or threats precede the sexual act, the relative ages of the victim and the accused, the atmosphere and setting of the incident, the extent to which the accused was in a position of authority, domination, and

control over the victim, and whether the victim was under duress. *Id.* Each case turns on its own facts. *Id.*

In the present case, viewing the evidence in the light most favorable to the verdict, there was sufficient evidence from which a reasonable trier of fact could find that appellant used forcible compulsion in order to sexually abuse B.H. The totality of the circumstances in the present case show that appellant used sufficient force to overcome B.H.'s reasonable resistance. Appellant befriended B.H. She was only a sixteen-year-old girl and appellant was a fifty-eight year-old man. Appellant did not tell B.H. or her mother that he was going to take B.H. to his hotel room; thus no one else knew where B.H. was (Tr. 40). He drove B.H. to his hotel (Tr. 41). Appellant grabbed B.H.'s hand and took her into the hotel (Tr. 42). B.H. was "shocked that" they were at his hotel (Tr. 42). Appellant took B.H. to his hotel room and locked her inside the room with a chain lock and a dead bolt (Tr. 46). B.H. and appellant were alone in room (Tr. 45). B.H. came out of the bathroom and appellant grabbed her hand and jerked her arm and forced her onto his lap against her will (Tr. 48-49). Then appellant touched B.H.'s back and bottom without her consent (Tr. 49-50). Appellant had B.H. try on at least three different outfits (Tr. 51-60). Each time B.H. came out of the bathroom, appellant grabbed her hand, jerked her arm and forced her onto his lap (Tr. 51-60).

At one point appellant kissed B.H.'s bare breasts and touched her all over her body including her vagina (Tr. 50-51, 53, 57; 232-233). B.H. cried when appellant kissed her bare breasts (Tr. 72). B.H. testified that she never voluntarily got onto appellant's lap and

she never asked appellant to lift up her shirt (Tr.52-53, 57). B.H. also testified that she was scared because this was all new to her (Tr. 58).

B.H. was only 5'3", weighed 103 pounds, and was sixteen years old (Tr. 27,76). Appellant was 6', weighed about 220 pounds, and was 58 years old (Tr. 243, 243). B.H. was alone in appellant's locked hotel room (Tr. 42). B.H. was in a strange place alone with a man that she barely knew. She was scared and nervous (Tr. 58). B.H. had no place to go and no way to leave because appellant drove B.H. to his room and locked her in his room and no one else knew where she was. This was sufficient evidence of "forcible compulsion" on the part of appellant as it showed that appellant who was physically larger than B.H. used physical force against her, by either jerking her arm or grabbing her hand and pulling her to his lap, and rubbed B.H.'s vagina and kissed her breasts against her will. Appellant applied physical force which was sufficient to overcome B.H.'s reasonable resistance, viewed under the totality of the circumstances. *See Niederstadt*, 66 S.W.3d at 15.

Appellant concedes that there was minimal force used against B.H., but argues that "[t]he totality of the circumstances show that at least some resistance was warranted to constitute 'reasonable resistance' and thus constitute 'forcible compulsion' by [appellant]" (App.Br. 7, 18). The Court of Appeals in holding that there was insufficient evidence to convict appellant relied heavily on its observation that there was "very little evidence of any kind of resistance" by B.H. *State v. Vandevere*, No.26386 (Mo.App. S.D. March 29, 2005). However, there was resistance by B.H. She never willingly came close to appellant. Appellant had to grab her arm and pull her every time to get her to come close to him. B.H.

also began to cry when appellant kissed her bare breasts. Appellant and the Court of Appeals suggest many ways in which B.H. should have resisted appellant (App. Br. 16); *Vandevere*, slip op. at 7. But the way B.H. did resist was reasonable considering the circumstances that appellant had created. B.H. resisted by standing by the bathroom door and not coming close to appellant and by crying. Instead of focusing on different ways that B.H. could have let appellant know that what he was doing was not acceptable to her, this Court should focus on appellant's actions: the fact that appellant locked a sixteen-year-old girl in his hotel room and sexually abused her by pulling her arm and forcing her onto his lap and kissing her bare breasts.

Moreover, appellant is mistaken in his assertion that some resistance was needed to constitute "reasonable resistance." *See State v. Thiele*, 935 S.W.2d 726, 729 (Mo.App. 1996). The force involved need not come after the victim has physically resisted. *Id*. In the present case, the fact that appellant created a situation where he was alone with a sixteen year old girl in his locked hotel room and grabbed her hand, jerked her arm and forced her to his lap and forced her in between his legs was enough force to overcome B.H.'s reasonable resistance. The law does not require B.H. to physically resist appellant. *Thiele*, 935 S.W.2d at 729.

For example, in *Niederstadt*, this Court found that the defendant used forcible compulsion to penetrate the victim's vagina with his finger, even though she did not physically resist him at the time of the incident. *Niederstadt*, 66 S.W.3d at 15. The facts of *Niederstadt*, were as follows: The victim was a sixteen-year-old girl who had been sent

by her parents to live with the forty-year-old defendant and his family. *Id*. at 14. When she began to get in trouble at school, the defendant would beat her about once a month. *Id*. The defendant also fondled her continually throughout the school year and the victim was afraid to report the abuse to the authorities. *Id*. Specifically, the victim testified to one incident where she awoke from her sleep to find the defendant penetrating her with his finger. *Id*. This was the only incident with which the defendant was charged. *Id*. As outlined above, this Court applied a totality of the circumstances test, listing factors including the following: (1) the relative ages of the victim and the accused; (2) atmosphere and setting of the incident; (3) extent to which the accused was in the position of authority, domination and control over the victim; and (4) whether the victim was under duress. *Id*. at 15. This Court found ample circumstantial evidence that the defendant overcame reasonable resistence, because the victim was only sixteen and he was forty, the incidents all occurred in the home where she was sent to live by her parents, she was wholly dependant on the defendant for her subsistence, and she was afraid to report the incidents because she feared further violence. *Id*.

In the instant case, as discussed above, the totality of the circumstances show that appellant used sufficient force to overcome B.H.'s reasonable resistance. B.H. was only sixteen years old and appellant was fifty-eight-years-old. Appellant drove B.H. to his hotel room. Appellant and B.H. were completely alone in appellant's locked hotel room (Tr. 45, 46). Appellant had complete domination over B.H. in that he took her to his hotel room and locked her in it, and B.H. had no way of leaving. B.H. was also under duress. She was

scared and nervous and did not know what to do (Tr. 58). Appellant grabbed B.H.'s hand, jerked her arm and forced her in between his legs where appellant proceeded to kiss B.H.'s breasts against her will.

Another case that is instructive is *State v. Kilmartin*, 904 S.W.2d 370 (Mo.App. W.D. 1995). In that case the defendant was convicted of forcible sodomy but challenged the sufficiency of his conviction on the ground that the state failed to prove forcible compulsion. *Id*. The evidence was that the defendant, who was thirty at the time of the trial, formed a friendship with the victim, an eleven year old boy. *Id*. One day while the victim was lifting weights at the defendant's home, the defendant asked the victim two times if he could give him a penis massage, to which the victim said "no" each time. *Id*. The defendant then sat behind the victim on the weight bench, grabbed him, and said "I could force you, but I'm not that kind of guy." *Id*. This frightened the victim, and after a few more requests by the defendant, the victim relented. *Id*. The victim went into the bedroom, pulled down his pants, and closed his eyes while the defendant sodomized him. *Id*. The court found that there was sufficient evidence from which a reasonable jury could have found that the defendant used forcible compulsion by grabbing the boy and using psychological factors to instill fear and wear down the boy's resistence. *Id*. at 374.

In the instant case, B.H. was a young girl who was scared about what was happening to her. Appellant asserted physical force that overcame her resistance to appellant's sexual attack in that appellant grabbed her hand, jerked her arm and forced her to come close to him. And as outlined above, appellant used various psychological tactics that first created a

relationship of trust, placed his victim under his control, and ultimately instilled fear and a sense of helplessness.

Appellant relies heavily on *State v. Daleske*, 866 S.W.2d 476 (Mo.App. W.D. 1993), for authority that a reversal is mandated, because, *in dicta*, the court suggested that guiding a victim's head to the defendant's penis was insufficient to establish forcible compulsion (App.Br. 19-21). However, this case is readily distinguishable. In *Daleske*, the state submitted its case to the jury based on the definition of "forcible compulsion" found in section 566.061(12)(b), that is, threats of death or serious bodily injury or kidnaping. The court held that there was no evidence of threats of death or serious bodily injury or kidnaping. So when the court addressed the issue of whether there was evidence of physical force, it was *dicta*[2]. Furthermore, *Daleske* is distinguishable because as outlined above appellant did not merely guide B.H., he grabbed her hand, jerked her arm and forced her to sit on his lap (Tr.49-53). Appellant's reliance on the *dicta* in *Daleske* is misplaced and as shown above the facts in the present case demonstrate that appellant commited his crimes through use of forcible compulsion.

Lastly, if this Court determines that there was insufficient evidence of forcible compulsion, the proper remedy is to enter a conviction for the lesser offense of sexual

[2] Cases decided subsequent to *Daleske* have declined to follow the *dicta* in *Daleske* that appellant is relying on. See *Niederstadt*, 66 S.W.3d at 16; *Thiele*, 935 S.W.2d at 729.

misconduct in the first degree under § 566.090 RSMo 2000. Where, as here, "a conviction of a greater offense has been overturned for insufficiency of the evidence, the reviewing court may enter a conviction for a lesser offense if the evidence was sufficient for the jury to find each of the elements and the jury was required to find those elements to enter the ill-fated conviction on the greater offense." *State v. O'Brien,* 857 S.W.2d 212, 220 (Mo.banc 1993).

Here, the Judge made the necessary findings for the entry of a conviction of the lesser offense. The elements of each offense can be compared as follows:

Sexual Abuse, § 566.100	Sexual Misconduct, § 566.090
1. That the defendant touched the genitals or breast of the victim, and	1. That the defendant touched genitals or breast of the victim, and
2. That the defendant did so for the purpose of arousing or gratifying his own sexual desires, and	2. That the defendant did so for the purpose of arousing or gratifying his own sexual desires
3. That the defendant did so by the use of forcible compulsion, and	3. That the defendant did so without the consent of the victim
4. That the defendant did so knowingly.	4. That the defendant knew or was aware that such touching was being accomplished without the consent fo the victim.

See MAI-CR 3d 320.27 and 320.21.1. As the chart illustrates the only real difference is whether the defendant used forcible compulsion or if the defendant's touching was accomplished without the victim's consent. Common sense dictates that if sexual contact occurs by forcible compulsion, it is without consent. *See generally State v. Gomez*, 92 S.W.3d 253, 258 (Mo.App. S.D. 2002). In order to convict appellant of the greater offense, sexual abuse, the trial court had to find that appellant engaged in sexual contact with B.H., knowing it was without her consent, because if she had consented, appellant could not have been found to have used forcible compulsion. Thus, sexual misconduct in the first degree qualifies as a lesser included offense of sexual abuse.

Despite the fact that the element of "without consent" is plainly included within the element of forcible compulsion, the court in *Gomez* concluded that without consent was not established in that case. *Gomez*, 92 S.W.3d at 258. That conclusion was incorrect and does not compel the same conclusion in this case. The Court of Appeals in *Gomez* relied heavily on the fact the legislature removed the language "without consent" from the rape statute. The Court of Appeals interpreted the amendment to the rape statute to mean that without consent was no longer an element. But the more probable interpretation of the legislature's amendment is that "without consent" was extraneous language. The legislature was acting in a common sense manner by removing the superfluous language of "without consent" because compelled by force includes "without consent".

This conclusion is further illustrated by the fact that if a person assents to sexual contact because of force, duress or deception, this does not constitute valid "consent."

§556.061(5)(c), RSMo 2000. Simply put, where there is forcible compulsion, there cannot be consent.

Appellant argues that a person convicted of sexual abuse may arguably also be guilty of sexual misconduct, but a person absolved of sexual abuse is not necessarily guilty of sexual misconduct (App.Br. 30). But appellant is incorrect. As outlined above, in order for the trial court to have found "without consent", all that is needed is a finding of force in this case (though not necessarily force sufficient to establish forcible compulsion). "Lack of consent may be established by a showing of *actual force* or a showing that the victim submitted because of fear induced by violence or threats of violence." *State v. Naasz*, 142 S.W.3d 869, 877 (Mo.App. S.D. 2004) (emphasis added). Appellant concedes that he used physical force against B.H. (App.Sub.Br. 16). Thus, the element of force for sexual misconduct was established. Sexual misconduct does not include the additional element found in sexual abuse, force that overcomes reasonable resistence. Thus, if this Court finds that the evidence was insufficient, to support the greater offense, this Court should enter a judgment of sexual misconduct against appellant because sexual misconduct is a lesser included offense of sexual abuse.

CONCLUSION

In view of the foregoing, respondent submits that appellant's conviction and sentence be affirmed.

Respectfully submitted,

JEREMIAH W. (JAY) NIXON
Attorney General

LACEY R. SEARFOSS
Assistant Attorney General
Missouri Bar No. 56533

P. O. Box 899
Jefferson City, MO 65102
(573) 751-3321
Fax (573) 751-5391
lacey.searfoss@ago.mo.gov
Attorneys for Respondent

CERTIFICATE OF COMPLIANCE AND SERVICE

I hereby certify:

1. That the attached brief complies with the limitations contained in Missouri Supreme Court Rule 84.06(b) and contains 24,487 words, excluding the cover, this certification and the appendix, as determined by WordPerfect 9 software; and

2. That the floppy disk filed with this brief, containing a copy of this brief, has been scanned for viruses and is virus-free; and

3. That a true and correct copy of the attached brief, and a floppy disk containing a copy of this brief, were mailed, postage prepaid, this ___ day of August, 2005, to:

Randall Anglen
Attorney at Law
P. O. Box 1562
Branson, MO 65615
417-335-2685

JEREMIAH W. (JAY) NIXON
Attorney General

LACEY R. SEARFOSS
Assistant Attorney General
Missouri Bar No. 56533

P.O. Box 899
Jefferson City, Missouri 65102
(573) 751-3321
Fax (573) 751-5391
lacey.searfoss@ago.mo.gov
Attorneys for Respondent

RESPONDENT'S APPENDIX