NO. 311554-III

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

STATE OF WASHINGTON,	)	APPEAL FROM BENTON
	)	COUNTY SUPERIOR
	)	COURT CAUSE NUMBER
V.	)	11-1-01463-4
	)	
JIMMI WAYNE MOSER,	)	
	)	
Defendant,	)	
	)	

BRIEF OF APPELLANT

APPEAL FROM BENTON COUNTY SUPERIOR COURT
THE HONOARABLE CRAIG J. MATHESON

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ISSUES ON APPEAL

1. Did the trial court err in finding or concluding that Ms. Farrington had a reasonable expectation of privacy from someone looking at her from the middle of the immediately adjacent public street through her unobstructed, lighted, decorated and uncovered window?

2. Did the trial court err in finding or concluding that Ms. Farrington did not know that Mr. Moser was watching her through her window when she in fact saw him the entire time he was looking at her from the middle of the unobstructed lighted public street in front of her uncovered window and believed he was intentionally trying to get her to see him?

3. Did the trial court err in finding or concluding that Ms. Farrington did not impliedly consent to someone seeing her through her unobstructed, lighted, decorated and uncovered window from the public street immediately in front of it?

ASSIGNMENTS OF ERROR

1. The trial court erred in making any findings that Ms. Farrington had a reasonable expectation of privacy in her unobstructed, lighted, decorated and uncovered window that was immediately adjacent to a public sidewalk and street.

2. The trial court erred in making or finding that Ms. Farrington did not have knowledge and impliedly consent to be viewed by anyone in the lighted public street in front of her unobstructed, lighted, decorated and uncovered window. In the alternative, the court erred in failing to find or conclude that Ms. Farrington did have knowledge and impliedly consent to such viewing.

PROCEDURAL BACKGROUND

The defendant was found guilty of the crimes of Voyeurism (Count I) and Indecent Exposure (Count II) after a stipulated facts bench trial on September 19, 2012 before the Honorable Craig J. Matheson. (CP 19-20). Mr. Moser (the appellant) does not appeal the findings of fact, conclusions of law, or verdict as to count II (Indecent Exposure), but does appeal the Finding of Fact numbers 40 and Conclusion of Law number 1 as to Count I (Voyeurism), that Ms. Farrington was viewed in a place where she had an expectation of privacy. (CP 19-20). In addition, Mr. Moser asserts that Ms. Farrington did have knowledge that he was looking at her as she could see him in the middle of the street the entire time and that she impliedly consented to being viewed by anyone from the sidewalk or street immediately in front

of her home by intentionally leaving her unobstructed window, directly facing the sidewalk and street close-by, lighted, uncovered and decorated with Christmas lights and nutcrackers. (CP 17). In fact, Ms. Farrington believed, by Mr. Moser's conduct, that he was actually trying to gain her attention toward him by continually driving up and down her street and turning on and off his lights. (CP 41)

I. STATEMENT OF FACTS

At approximately 11:10 P.M. on December 14, 2013, Ms. Roberta Farrington was getting ready to go to bed in her home in Kennewick, WA. (CP 16). After she had changed into her nightgown and begun turning off lights in her home she looked out the kitchen window saw a white or silver pickup truck parked in the East bound lane of the street in front of her sliding glass door. (CP

16). As she looked out her window, she could see a man outside in the middle of the street looking at her while she was inside her home. (CP 16). The man was not wearing any pants and was masturbating. (CP 16). Ms. Farrington believes they made contact at this time. (CP 16). Ms. Farrington left the room and called the police. (CP 17).

Later the same night, Ms. Farrington saw the same truck return to the area and again stop on the street in front of her home. (CP 17). Ms. Farrington again called the police. (CP 17). Officer Ayala saw a white truck matching the suspect vehicle in the immediate vicinity of Ms. Farrington's home and stopped it. (CP 17). Mr. Moser was the driver of the truck. (CP 17). Mr. Moser was wearing only a bathrobe without any underwear. (CP 17). Officer Ayala questioned Mr. Moser as to

comings and goings and found Mr. Moser's answers unbelievable. (CP 17). Police transported Mr. Moser to Ms. Farrington's address where she positively identified him. (CP 17).

II. ARGUMENT

A defendant may only be convicted of a crime if there is evidence sufficient to prove each and every element of the crime. *State v. Rice* , 110 Wn.2d, 577, 600, 757 P.2d 889 (1988), *cert. denied*, 491 U.S. 910, 105 L.Ed.2d 707, 109 S.Ct. 3200 (1989). The *Revised Code of Washington* section 9A.44.115 sets out the elements for the criminal offense of Voyeurism. Subsection (2) and (2)(a) states in relevant part: "A person commits the crime of voyeurism, if for the purpose of arousing or gratifying the sexual desire of any

person, he or she knowingly views … [another] person without that person's knowledge and consent while the person being viewed … is in a place where he or she would have a reasonable expectation of privacy … The relevant statutory definitions are found starting in subsections (1)(c): "Place where a person would have a reasonable expectation of privacy means:

(i) A place where a reasonable person would believe that he or she could disrobe in privacy, without being concerned that his or her undressing was being photographed or filmed by another; or

(ii) A place where one may reasonably expect to be safe from hostile intrusion or surveillance.

"Surveillance is defined in subsection (1)(d) as the "secret observation of the activities of another person for the purpose of spying upon and invading the privacy of the person.

Subsection (1)(e) defines "views" as the "intentional" looking upon of another person of more than a brief period of time, in other than a casual or cursory manner …"

The issue in this case is whether the place where Ms. Farrington was viewed constitutes a "[p]lace where she had a reasonable expectation of privacy." This depends in turn on whether Ms. Farrington was in "a place where a reasonable person would believe that he or she could disrobe in privacy without concern that his or her undressing was being photographed or filmed by

another" or "[a] place where one may reasonably expect to be safe from hostile intrusion or surveillance."

Mr. Moser asserts that Ms. Farrington was not in a place where she had a reasonable expectation of privacy under the definition of the statute and given the totality of the circumstances. First, Ms. Farrington's location was a place clearly visible from a lawful vantage point open to the public on the street and/or sidewalk in front of her home. (CP 16). The uncontested evidence was that the window of her home was in very close proximity to the adjacent street and sidewalk. (CP 16). Further, Ms. Farrington's window had no employed covering, either natural or man-made (i.e. blinds, curtains, bushes or trees), to provide any semblance of privacy from onlookers traveling on the sidewalk or street adjacent to her home. (CP 16 and 26).

In addition, Ms. Farrington had left the light on in her room thus illuminating it and its contents to anyone looking into her window from the public street or sidewalk next to her home. (CP 6-9). In fact, Ms. Farrington had even placed Christmas lighting and nutcrackers in her window with knowledge that it would draw attention to her window by any one passing by it on the adjacent street or sidewalk. (CP 6-9).

The subjective belief that even Ms. Farrington did not have a reasonable expectation of privacy where she was seen by Mr. Moser is demonstrated by the fact that she did not believe she was in a place where she could disrobe without being seen by people on the street or sidewalk. (CP 6-9)

This case presents somewhat of a mirror image to the typical voyeurism case where you have a "peeping Tom" who is trying to view, photograph or film the intimate body parts of another without their knowledge and consent. *See State v. Glas*, 147 Wn.2d 410, 54 P.3d 147 (2002); *State v. Diaz-Flores*, 148 Wn.App. 911 (Div. 1 2009) (looking through window blinds to observe occupants engaging in sexual activity); *State v. Boyd*, 137 Wn.App. 910, 155 P.3d 188 (Div. 2 2007); *State v. Stevenson*, 128 Wn.App. 179, 114 P.3d 699 (Div. 2 2005) (looking through bathroom window blinds to see occupant showering unclothed). Instead, in the instant case, the motive behind any sexual motivation would have to be from Mr. Moser wanting Ms. Farrington to observe his intimate body parts and actions. (See CP 41) In this regard, Mr. Moser's stipulated actions

undoubtedly constitute Indecent Exposure as to Ms. Farrington, however, do they constitute voyeurism simply because she witnessed him from the window of her residence rather than her front porch, or the sidewalk in front of her home? The defendant asserts they do not.

Not only do the facts in this case not support the purposes for the voyeurism statute, but they also dispel any real claim that Ms. Farrington was in [a] place where one may reasonably expect to be safe from hostile intrusion or surveillance." First, there was no hostile intrusion. There was no viewing or attempted viewing of any of Ms. Farrington's intimate body parts or activities. (CP 16-19). Only Mr. Moser's intimate body parts and activities were viewed and those occurred in a public street; hardly a place that could be described a secretive or covert. (CP 16-19). Simply because Mr. Moser chose

to exhibit his behavior in a public street where Ms. Farrington viewed him from the vantage of her window does not change it into an invasion of her reasonable expectation of privacy.

The bottom line is that it's the nature of Mr. Moser's behavior in exposing himself and masturbating in a public place where others were affronted and alarmed is the sum-total of criminal conduct in this case. The proof of this is that if Mr. Moser had simply sat in his truck in the middle of the street and looked at Ms. Farrington through her lighted, decorated, and uncovered window while she was fully clothed, Ms. Farrington would almost certainly not have called the police or felt violated in any way. Instead it was that she could see him engaging in lewd conduct in the street that was objectionable to her. As such, this is nothing more than a case of Indecent

Exposure and not Voyeurism. Ms. Farrington suffered in no greater way than anyone else that would have witnessed the conduct of Mr. Moser from the street, sidewalk, or adjoining properties.

Courts have traditionally looked at the totality of facts as to whether an individual has a reasonable expectation of privacy in their location and noted that it is in fact the person and not the location which is protected. *Katz v. United States, infra.* In *Katz*, the Court found that a person does not have an expectation of privacy from being viewed while in a telephone booth. *Katz v. United States*, 389 U.S. 347, 361, 88 S.Ct. 507, 516-17, 19 L.Ed.2d (1967); *cited in State v. Berber*, 48 Wn.App. 583, 740 P.2d 863 (Div. 3 1987) (Applying same standard to Article I Section 7 of Washington Constitution). In his concurring opinion Justice Harlan

noted: "Thus a man's home is for the most purposes, a place where he expects privacy, but objects, activities or statements that he exposes to the 'plain view' of outsiders are not 'protected' because no intention to keep them to himself has been exhibited." In the instant case Ms. Farrington knowingly, if not even intentionally, exposed herself to anyone passing down the public sidewalk or street adjacent to her window. (CP 6-9, 16-19, and 26)

As set forth above, the Voyeurism statue prohibits only the unknowing and non-consensual viewing of another. Mr. Moser asserts that contrary to the statute, Ms. Farrington did know that Mr. Moser was watching her from the middle of the lighted street directly in front of her window. (CP 6-9, 16-19, and 41). She acknowledged she could see him the entire time (CP 16-19); which would only make sense since his behavior

sure seemed to indicate he was trying to be seen by her. (See CP 41). In fact, she indicates that she believed his conduct was made with the intention of trying to get her to see him in the street. (CP 41). Therefore, contrary to the statute the viewing was with the knowledge of Ms. Farrington. In addition, Mr. Moser asserts that Ms. Farrington impliedly consented to being viewed through her unobstructed window when she intentionally chose to leave it lighted, uncovered and decorated so as to invite, if not even encourage, people to look at it.

Had Mr. Moser been the owner of the residence in this case, and while situated in the same area as Ms. Farrington with the uncovered, decorated and lighted window, engaged in his behavior he would have been subject to being convicted for Indecent Exposure as to anyone seeing him while walking or driving down the

adjacent public sidewalk or street. It is therefore difficult to conclude how Mr. Moser could be legally convicted of voyeurism based on simply looking into the window of Ms. Farrington from the street while engaging in such conduct. *See State v. Chiles*, *infra* at 453.

In *State v. Chiles*, 53 Wn.App. 452, 453, 767 P.2d 597 (Div. 2 1989), the Court found that evidence of the crime of Indecent Exposure was legally sufficient for conviction based upon Mr. Chiles standing in the front window of his home and exposing his private body parts so as to be readily observable to pedestrians on the sidewalk in front of his home. This ruling simply does not conform to the position of the court in this case that Ms. Farrington had a reasonable expectation of privacy where she readily exposed herself to being viewed by anyone in the street immediately in front of her window.

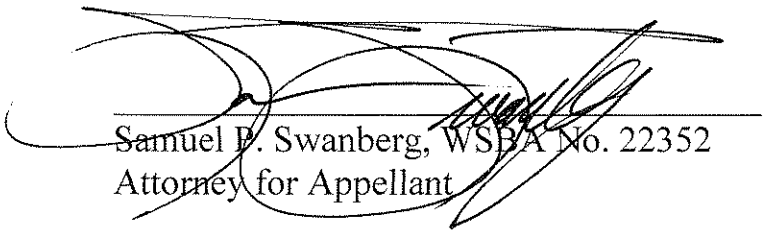
Given the conviction of Mr. Moser in this case, any of the pedestrians that had looked into Mr. Chiles home to see him exposing himself to the world could have been convicted of Voyeurism if they would looked longer at him because of any sexual gratification as he would under the reasoning of the trial Court in the instant case had a reasonable expectation of privacy for such onlooker's.

III. CONCLUSION

Mr. Moser committed the crime of indecent exposure by masturbating while standing in a public street in front of Ms. Farrington's home. Simply because Mr. Moser could see Ms. Farrington through her unobstructed, uncovered, lighted and decorated window while she was fully clothed and not engaged in any private activities does not make his act of Indecent

Exposure an act of Voyeurism. Ms. Farrington was not in a place where she had a reasonable expectation that a person would not be able to see her from the street in front of her home and no hostile intrusion even occurred in this case given Ms. Farrington was always fully clothed and not engaged in any type of private activity. Further, Ms. Farrington had knowledge that Mr. Moser could see her through her window and impliedly consented to being seen through her window by leaving it uncovered, lighted, decorated, and totally unobstructed from the street where Mr. Moser was standing.

RESPECTFULLY SUBMITTED THIS 17th day of May, 2013.



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

STATE OF WASHINGTON	)	
	)	
Respondent	)	No. 311554
	)	
vs.	)	CERTIFICATE OF MAILING
	)	
	)	
JIMMIE WAYNE MOSER,	)	
Appellant.	)	

I hereby certify under penalty of perjury under the laws of the State of Washington, that a copy of the (amended) Appellant's Brief was emailed and sent via messenger service TERRY J. BLOOR, Attorney for the State, 7122 W. Okanogan Place, Kennewick, Washington the date below written , and a copy was sent via regular mail to Appellant at 1525 S. Van Buren Place, Kennewick, WA 99336

Dated this 30th day of April, 2013.

K. M. Dell, Paralegal to
SAM SWANBERG