NO. 311554-III

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

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

Reply Brief of Appellant

APPEAL FROM BENTON COUNTY SUPERIOR COURT

THE HONORABLE CRAIG J. MATHESON

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I. ARGUMENT

A. Response to Respondent's Argument A2: Mr. Moser maintains the trial court erred in making any findings that Mrs. Farrington had a reasonable expectation of privacy where her unobstructed and uncovered large sliding glass doors, immediately adjacent to a public sidewalk and street, were lighted in the dark of night.

RCW 9A.44.115(1)(c) states "a place where he or she would have a reasonable expectation of privacy means

i. a place where a reasonable person would believe 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 casual or hostile intrusion or surveillance."

RCW 9A.44.115(1)(c)(i)(ii).

Based on the above definition the area in Mrs. Farrington's home in front of her large, uncovered, sliding glass doors, where Mr. Moser was able to observe Mrs. Farrington from the public street, is not a place where a person would have a reasonable expectation of privacy. A reasonable person would not feel comfortable disrobing in front of uncovered large sliding glass doors that are immediately adjacent to a public sidewalk and street. Nor would a reasonable person expect to be safe from either casual or hostile intrusion in such an area. Mrs. Farrington states that several vehicles will pass her house each week after dark (CP 28, No. 4). It is a matter of common knowledge that when it is dark outside, and you have

lights on inside, a passerby can see directly into your home through any uncovered window. Mrs. Farrington had sliding glass doors that remained uncovered and illuminated from the inside, and knew that several times a week people would pass by on the adjacent sidewalk or street. A reasonable person would not feel safe from casual or hostile intrusion under these facts in the area of the house thus illuminated at night.

Respondent cites case law relevant to government search and seizure (Resp. Brief at 3 citing *State v. Young*, 123 Wn.2d 173, 867 P.2d 593 (1994)), yet states Mr. Moser cites cases not supported by his position, because the individuals in question were an individual in a telephone booth (Resp. Brief at 3 referring to *Katz v. United States*, 389 U.S. 347, 88 S. Ct 507, 19 L.Ed2d (1967)) and a person in a public restroom (Resp. Brief at 3 referring to *State v. Berber*, 48 Wn. App. 583, 740 P.2d 863 (1987)). Mr. Moser asserts that because Washington case law has not had to address the privacy rights of an individual in her home in relation to a private individual intruding upon those rights, the Court can and should look to cases that address privacy rights, even where the facts are not completely analogous to the case at hand.

For instance, In *Lewis v. United States*, the U.S. Supreme Court held that an occupant's actions (in the *Lewis* case conducting illegal

activity in a home) can alter the individual's expectation of privacy from government intrusion in her home. 385 U.S. 206, 87 S. Ct. 424, 17 L.Ed.2d 312 (1966). Justice Brennan, concurring, states that a home "occupant can break the seal of sanctity and waive his right to privacy in the premises." *Id.* at 212. Clearly, Mrs. Farrington was not conducting illegal activity in her home and did not completely waive her right to privacy on her premises. However, the principle translates that a person's actions can alter her expectation of privacy in her home. In this case, Mr. Moser contends that Mrs. Farrington altered her expectation of privacy by failing to close the blinds that would completely cover her sliding glass doors at night, when she had lights on inside illuminating her premises for any passerby to see. A reasonable person would expect someone walking or driving by at night to be able to see through the large sliding glass doors when the blinds were not drawn to cover them, there was no outside shrubbery blocking the view, it was completely dark outside and there were lights on inside.

B. Response to Respondent's Argument A3: Mr. Moser's emphasis on the fact that Mrs. Farrington had Christmas decorations in her uncovered window merely points to the fact that these decorations drew attention to Mrs. Farrington's uncovered window.

It is not Mr. Moser's assertion that Mrs. Farrington's Christmas decorations granted permission for passersby to look inside her residence.

C. Response to Respondent's Argument B2, 4: Parties did stipulate that Mrs. Farrington had no actual knowledge or actual consent, but her actions implied consent.

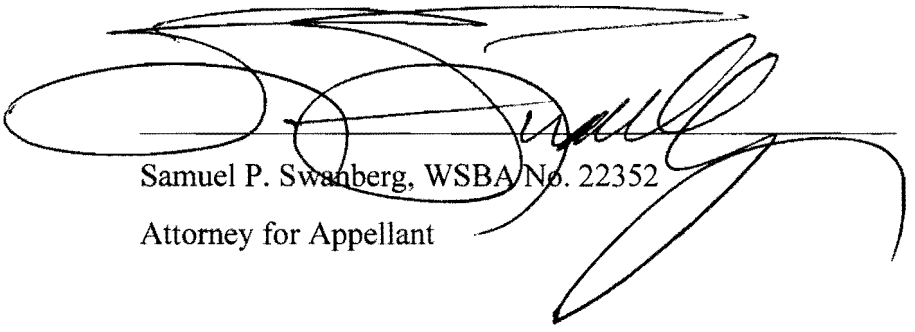
On the night in question, Mrs. Farrington looked out of her sliding glass doors which were uncovered and lighted, to see a man in the street looking in at her (CP 16 , No. 3 and 4). She then called the police (CP 17, No. 8). The sliding glass doors are large and have blinds that can be pulled shut to block out viewing (CP 25). There is no indication that Mrs. Farrington, after calling the police, then shut the blinds that could cover the sliding glass doors. In fact, when the defendant returned to the street later that night, which return led to his apprehension, Mrs. Farrington saw him again out in the street (CP 17, No. 9), presumably through the uncovered sliding glass doors. While case law does not include a definition for consent or implied consent under RCW 9A.44.115, Voyeurism, a reasonable person who has seen someone looking in at them through large uncovered sliding glass doors, with house lights on in the dark of the night would shut the available blinds to block that person or others from looking in. Mrs. Farrington saw the defendant on the street, had noticed that someone could look into and was looking into her home and then chose to not use the available blinds to cover the large, lighted,

sliding glass doors, thus impliedly consenting to a person looking into her windows.

II. CONCLUSION

Mr. Moser again agrees that his actions on December 14, 2011, constitute the crime of Indecent Exposure. However, Mr. Moser asserts that Mrs. Farrington's actions or failure to act in the form of not drawing her blinds at night where she had inside lights on, illuminating her home thereby permitting any pedestrian or vehicle driving by the adjacent sidewalk and street to see into her home altered her expectation of privacy to the extent she no longer had a reasonable expectation of privacy in those illuminated areas, and his conviction for Voyeurism should thus be reversed.

RESPECTFULLY SUBMITTED this 22 day of August, 2013.



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