

No. 64513-7-I

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

Snohomish County No. 09-1-00359-3

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STATE OF WASHINGTON,

Respondent,

v.

DAVID MITCHELL,

Appellant.

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APPELLANT'S REPLY BRIEF

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COURT OF APPEALS  
STATE OF WASHINGTON  
DIVISION ONE  
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I. **THE STATE FAILED TO MAKE OUT A PRIMA FACIE CASE THAT THE DEFENDANT “VIEWED” THE VICTIM, AS THAT TERM IS DEFINED IN THE STATUTE, OR THAT HE ACTED FOR THE PURPOSE OF SEXUAL GRATIFICATION**

A. **Even if a Viewing is Not “Casual or cursory,” as Those Terms are Used in the Statutory Definition of Views, the View Must Still be Lengthy Enough to Satisfy the “More Than a Brief Period of Time” Statutory Requirement**

The State attempts to satisfy the requirement in the definition of the element “views,” contained in RCW 9A.44.115(1)(e), by arguing that the phrase “for more than a brief period of time” is modified by the next phrase: “and other than a casual or cursory manner.” The State argues that where a person purposefully looks at another person with an intent to view that person, this satisfies the “view” statutory requirement, apparently even when the view is momentary. *See*: BOR 7-8.

Both the State and the defense cited *State v. Fleming*, 137 Wn.App. 645 (2007).<sup>1</sup> The State, without any further discussion or interpretation of the *Fleming* decision, simply argues that this case supports its position.

An analysis of the majority opinion in *Fleming* demonstrates that, unlike the instant case, there was sufficient evidence in *Fleming* to prove

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<sup>1</sup> Please *see* pages 12-13 of BOA.

that the viewing lasted for more than a brief period of time because the victim, who was sitting in a toilet stall, had enough time to see the defendant staring at her over the partition, to yell at him, to tell him that she had a cell phone and to run out of the toilet stall while he was still looking at her. The Court also explained that the defendant had enough time to continue to stare and to “stick out his tongue at her.” *Id.* at 648.<sup>2</sup>

The facts in *Fleming* are therefore readily distinguishable from those in the instant case where the alleged victim testified that when she looked up she only saw a person’s forehead for a moment as it was dropping down below the top of the wall. Clearly, even under the majority’s holding in *Fleming*, the evidence in the instant case would have been insufficient to establish the element of a viewing for “more than a brief period of time.”

Also of note is that neither the majority nor the dissenting opinions in *Fleming* utilized the State’s rationale that is being promoted here -- that even a very brief viewing satisfies the time requirement if it is done in a manner that is not casual or cursory. Obviously, the act of the defendant in *State v. Fleming* of peering over the wall of the bathroom stall could not be considered casual or cursory. Nevertheless, the *Fleming* Court correctly analyzed the facts to ensure that the viewing was for more than a

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<sup>2</sup> As is also explained in BOA, pages 12-13, Judge Schultheis’s dissent opines that the

brief period of time, an element of the offense. Said another way, if, as the State suggests, a non-casual or cursory viewing satisfied the time requirement, the *Fleming* Court would not have had to undertake an analysis of whether the viewing satisfied the “more than a brief period of time” statutory requirement.

The State did not cite any other authority dealing with the length of time necessary to satisfy the statutory requirement that a viewing be for more than a brief period of time. Since both sides cite *Fleming* as the only case on point, its authority clearly supports the Defendant’s position and requires a dismissal.

**B. Elementary Rules of Statutory Construction Prohibit Excluding Clear Requirements in a Statute as the State Urges**

The statutory definition of the element “views,” contained in RCW 9A.44.115(1)(e), provides:

**“Views”** means the intentional looking upon of another person **for more than a brief period of time, in other than a casual or cursory manner**, with the unaided eye or with a device designed or intended to improve visual acuity. (Emphasis added.)

The State’s suggested approach would have this Court disregard the phrase “more than a brief period of time,” because, it contends, the viewing was “in other than a casual or cursory manner.” This it argues

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viewing was not of sufficient length to satisfy the statutory requirements.

satisfies the time requirement. However, to do so would make the element “for more than a brief period of time” superfluous. Under elementary rules of statutory construction, a court cannot construe a statute in a manner that makes any part of it meaningless or superfluous. *Stone v. Chelan County Sheriff’s Department*, 110 Wn.2d 806, 810 (1988) (interpreting the statute as requested by a party would make other statutory provisions relating to the eligibility requirement for law enforcement officers meaningless). It is also presumed that the legislature does not engage in unnecessary or meaningless acts. *State v. Wanrow*, 88 Wn.2d 221, 228 (1977) (the interpretation of the statute relating to interception of telephone calls suggested by the State would make other provisions of the privacy statute meaningless).

The use of commas, surrounding the phrase “in other than a casual or cursory manner,” implicates another rule of statutory construction:

“Generally, a comma should precede a conjunction connecting two coordinate clauses or phrases in a statute in order to prevent the following qualifying phrases from modifying the clause preceding the conjunction.” *In Re Personal Restraint of Mahrle*, 88 Wn.App. 410, 414, 945 P.2d 1142 (1997) (quoting *Ludwig v. State*, 931 S.W.2d 239, 242 (Tx. Crim. App. 1996)).

*In Re the Welfare of A.T.*, 109 Wn.App. 709, 714 (2002). Therefore, under this rule of statutory construction, the fact that the phrase “in other than a casual or cursory manner,” is delineated with commas, indicates

that it does not modify the antecedent clause relating to time. Instead, it is an additional element or requirement of the statute.

In fact, the statutory definition of “views,” contained in RCW 9A.44.115(1)(e), which includes the requirements that the view be more than a brief period of time, and also in other than a casual or cursory manner, makes sense. That is, if the legislature did not intend to require that a view be more than a brief period of time, it could have just deleted this phrase and instead written that a view just had to be “in other than a casual or cursory manner.” Moreover, these two phrases, one regarding the length of the view and the other relating to the manner of the viewing, deal with different issues. The first instructs that a view has to be of a minimum length. The second specifies that even if the view was long enough to satisfy the temporal requirement, if the view was of a casual or cursory nature, it would still not satisfy the statutory requirement.

As an example, assume that a female “victim” is undressing in her bedroom in her house and neglects to shut the shades. A man walking on the street in front of her home might look up and see the “victim,” become sexually stimulated by her nudity, and stare at her for a sufficient time to be more than “brief.” Nevertheless, in this situation, a jury might believe that such a view was “casual or cursory,” since the viewer was just walking down the street, not planning or attempting to view the “victim,”

did not engage in any additional efforts to view her and therefore did not commit a criminal act. Therefore, to satisfy the legislative intent, all elements must be included and none can be made superfluous, as the State suggests.

C. **The Rule of Lenity Applies Only if the Court Decides That Statutory Definition of “Views” is Not Ambiguous**

The State incorrectly assumes at page 7 of its brief that the defense is solely relying upon the rule of lenity for this result. The State argues that since the language in the statutory definition of “views” is not ambiguous, the rule does not apply. In fact, the Appellant argued in his opening brief that the statutory definition of “views,” which requires a viewing for more than a brief period of time, is not ambiguous. *See*: BOA, p. 9-10, n. 3. Only if the Court disagrees and holds that the statutory definition of “views” is ambiguous does the rule of lenity apply. If so, all inferences must be interpreted in favor of the accused.<sup>3</sup>

Where a statute is unambiguous, it is not subject to judicial construction and its meaning is to be derived solely from the language of the statute itself. *Cherry v. Municipality of Metropolitan Seattle*, 116 Wn.2d 794, 799 (1991). The primary objective of a court when interpreting a statute is to ascertain and carry out the intent of the

legislature. *State v. Chester*, 133 Wn.2d 15, 21 (1997) (prior statute criminalizing the sexual exploitation of minors was unambiguous, not subject to judicial construction and not violated). Words in a statute are given their common law or ordinary meaning. *State v. Smith*, 117 Wn.2d 263, 271 (1991). Where a statute is unambiguous, its meaning must be derived from its actual language and words should be given their ordinary meaning. *State v. Standifer*, 110 Wn.2d 90, 92 (1988) (resorting to common definitions, cash machine card did not meet the statutory definition of credit card for purpose of second degree theft statute, and case reversed). Whenever a court is faced with a question of statutory construction, it must look to the plain meaning of the words used in the statute and “[a] non-technical statutory term may be given its dictionary meaning.” *State v. Fjermestad*, 114 Wn.2d 828, 835 (1990).

The *Fjermestad* Court utilized the dictionary for the definition of the word “any.” Just as that Court utilized a dictionary definition, this Court can also and the common definition for the word “brief,” contained in the statutory definition of “views,” is typically defined as:

Lasting or taking a short time; of short duration: a brief walk, a brief stay in the country.

Dictionary.com.

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<sup>3</sup> Judge Schultheis, in his dissent in *Fleming*, opined that the phrase “more than a brief period of time” was in fact ambiguous and therefore the rule of lenity applied. 137

Therefore, a time period that is more than a brief period of time is a period of time that is not “short.” While such a period of time does not necessarily have to span hours, or even minutes, it is more than a mere moment in time. That being the case, the State has failed on an essential element of the crime.

**D. There Was Insufficient Evidence That the Defendant Acted for the Purpose of Arousing or Gratifying His Sexual Desires**

In his opening brief, Defendant Mitchell argues that there was a total lack of evidence on the issue of proof that he acted for the purpose of arousing or gratifying his sexual desires. *See* BOA 9-13. In support, the defense analyzed the reported voyeurism cases, all of which have abundant evidence of sexual gratification. The State, in turn, responds that there was no proof of sexual gratification in *State v. Fleming, supra*, other than the defendant peering at a partially clothed person on a toilet implying that this element can be disregarded for purposes of a challenge to the sufficiency of the evidence. *See* BOR p. 13.

A reading of *Fleming* will demonstrate that the Court never considered the issue of sexual gratification, but instead just the length of the time of the viewing. Therefore, one can assume that this issue was not raised on appeal by the appellant and consequently not an issue before the

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Wn.App. at 649 (*see* BOA 12-13).

court. Nevertheless, the defendant in *Fleming* stuck out his tongue while peering over the top of the stall at a woman using the toilet which could be considered an act of a sexual nature which would have satisfied this requirement. The other cases cited and analyzed in the BOA all clearly demonstrate evidence of sexual arousal or gratification.

The State cites *State v. V.J.W.*, 37 Wn.App. 428, 433-434 (1984) as an example of a case where a jury could infer sexual purpose from an alleged prostitute's activities, suggesting such an inference could be reached in the instant case. A reading of that case demonstrates the strength of the State's evidence, as opposed to the instant case. The defendant in *State v. V.J.W.*, who was charged with soliciting prostitution, was seen beckoning and attempting to stop motor vehicles by waving at them along a street, at nighttime in a high prostitution area, conversing with people she stopped, flagging down a passing car and riding briefly in it. The Court correctly found that there was substantial evidence supporting the finding of guilt and, applying the *State v. Green*, 94 Wn.2d 216, 221 (1980) sufficiency of the evidence standard, concluded: "It cannot be said as a matter of law that no rational trier of fact could have found that V.J.W. was guilty of prostitution and loitering." *Id.* at 434.

The facts of the instant case are closer to *State v. Powell*, 62 Wn.App. 914 (1991), a first degree child molestation case, where there

was insufficient evidence to support a finding of sexual gratification.<sup>4</sup> There, the defendant, who knew the child and had caretaking responsibilities, allegedly touched her underpants and thigh while hugging her and assisting her to exit his truck. Nevertheless, the Court held this was insufficient to satisfy the requirement that the defendant acted with the purpose of sexual gratification.<sup>5</sup>

In the instant case, there was no evidence that the Defendant acted for the purpose of sexual arousal or gratification and the case must likewise be dismissed for insufficiency of the evidence on this ground.

E. **The State's Suggestion That this Court Could Find That the Defendant Committed the Crime of Attempted Voyeurism, Even if it Could Not Prove the Completed Crime, Should be Rejected**

The State argues at page 9 of its brief that “alternatively there was sufficient evidence that the Defendant attempted to commit the crime of voyeurism.” Without citation to authority, the State then suggests that even if the Court were to accept the Defendant’s argument on sufficiency of the evidence, “there was sufficient evidence to prove the Defendant **attempted to** view Ms. Hummer while she was tanning.” (Emphasis supplied.)

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<sup>4</sup> A portion of the *Powell* decision, not relevant to the issue at hand, was called into doubt by this Court in *State v. Veliz*, 76 Wn.App. 775, 779 n. 6 (1995).

This argument does not help the State. Assuming, *arguendo*, that there was sufficient evidence to send the case to the jury on an attempted voyeurism lesser, this was not done. Neither side asked that the jury be instructed on an attempt. The jury was not instructed as to the definition of attempt, which requires that the State prove intentional, rather than knowing conduct, and that there was a “substantial step.”

WPIC 100.01 “Attempt – Definition” provides that:

A person commits the crime of attempted voyeurism when, with intent to commit that crime, he or she does any act that is a substantial step towards the commission of that crime.

The jury must therefore be instructed, consistent with WPIC 100.02 “Attempts – Elements,” telling it that the State must prove that the Defendant committed an act that was a substantial step towards commission of the crime and the act was done with the intent to commit the crime of voyeurism. *See also* WPIC 100.05 defining the element of “substantial step.”

Intent is an element of all attempted crimes and the jury must also be instructed on its definition. *State v. Allen*, 101 Wn.2d 355 (1984) (finding reversible error where jury was not instructed on the statutory definition of intent in an attempted burglary case). Here, there was no

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<sup>5</sup> The Court contrasted other cases where defendants had no caretaking function with a child and the alleged sexual contact met the requirement of the sexual gratification element.

definition of “intent” given to the jury. It is error of constitutional magnitude to fail to give an instruction informing the jury that both intent and a substantial step are elements of an attempt to commit a crime. *State v. Jackson*, 62 Wn.App. 53, 60-61 (1991).

The *scienter* required for the completed crime of voyeurism is that one “knowingly views” another. In the *scienter* hierarchy of Washington law, acting knowingly, or with knowledge, is a less strenuous standard than acting intentionally. RCW 9A.08.010. Within this framework, “proof of a higher mental state is necessarily proof of a lower mental state.” *State v. Acosta*, 101 Wn.2d 612, 618 (1984); RCW 9A.08.010(2). Therefore, proof of intent necessarily establishes knowledge. *City of Spokane v. White*, 102 Wn.App. 955 (2000). However, the converse is not true. That is, proof of knowledge, the *scienter* element for the offense of voyeurism, cannot establish that one acted intentionally, which is the *scienter* requirement for attempted voyeurism.

It is unclear what the State’s purpose is for raising the issue of attempted voyeurism. The State does not suggest, nor cite any authority, indicating that an appellate court in a situation such as this, could agree with the defense that there was insufficient evidence as to the completed crime of voyeurism yet enter a judgment on attempted voyeurism. Nor, is there any authority that this Court can reverse and remand for retrial on

attempted voyeurism, without violating the Double Jeopardy Clauses of the Fifth Amendment of the United States Constitution and Art. 1, § 9 of the Washington State Constitution.

The issue here is unlike those in the cases where felony murder convictions were reversed following the *In Re Andress*, 147 Wn.2d 602 (2002) decision. In that line of cases, the courts have held that defendants whose felony murder convictions were reversed because of the invalidity of the charge could nevertheless be retried for second degree intentional murder. *State v. Wright*, 165 Wn.2d 783 (2009). Nevertheless, *Wright* also makes clear that this rule is limited to cases where a reversal was required “due to the invalidity of the charge,” not because there was “insufficient evidence.” *Id.* at 796.

Here, the State strategically decided not to request that the jury be instructed on the lesser offense of attempted voyeurism, but instead to ask the jury to convict Defendant Mitchell of the major charge of voyeurism. Having decided to put all its proverbial eggs in one basket, the State cannot now ask the Court to act as an after-the-fact jury and instead convict the Defendant of attempted voyeurism. By parity of reasoning, if a defendant was entitled to an attempt instruction, but strategically decided to not request one but instead proceed to verdict on only the crime charged, he could not appeal and later ask that the case be remanded for

retrial for an attempted crime or that a judgment should be entered for the lesser. *State v. Cienfuegos*, 144 Wn.2d 222, 227 (2001) (strategic decisions by defense counsel cannot be ineffective assistance of counsel).

## II. REPLY TO STATE'S ARGUMENT REGARDING INEFFECTIVE ASSISTANCE OF COUNSEL

At page 18 of the BOR, the State argues that even though the trial judge stated that defense counsel should have made a pretrial motion to compel the victim to disclose her drug use, nevertheless his failure to do so was a “legitimate trial tactic that will not support a claim of ineffective assistance of counsel.” BOR 18.

It is difficult to fathom how defense counsel’s failure to file a pretrial motion for discovery concerning a victim’s drug use during the time of the incident could possibly be a strategic or tactical decision. That is, what possible purpose would there be to fail to follow up on such an important issue? Drug use by the “victim” is admissible because it goes to her ability to perceive, recall and testify. *State v. Lord*, 128 Wn.App. 216 (2005) (a party may impeach the credibility of a witness with evidence of drug use at the time of the event in question); *State v. Russell*, 125 Wn.2d 24, 83-84 (1994) (“it is well settled in Washington that evidence of drug use is admissible to impeach the credibility of a witness if there is a

showing that the witness was using or was influenced by the drugs at the time of the occurrence which is the subject of the testimony”).

The State argues that the defense would not have known what the “victim” might have said on cross-examination and therefore avoided the subject matter of the use of drugs all together, for this reason. *See* BOR 20. This begs the question since if counsel had moved, pretrial, for discovery, the court would have obviously given the defense leave to re-interview Ms. Hummer on the issue of her drug use and the effect that it had on her.<sup>6</sup> If this had been done, defense counsel would have been aware of her responses and been able to design his cross-examination accordingly. Moreover, given the three drug cocktail combination utilized by Ms. Hummer as well as the effect of these drugs as demonstrated by the Sworn Statement of Dr. Julien (presented in the Motion for a New Trial), such cross-examination would have been effective and in no way dangerous for the defense. CP 35-39; *see also* BOA p. 20-21.

The State also argues that there is nothing to suggest from the record that Ms. Hummer’s powers of perception were in any way affected and that defense counsel apparently understood this because he asked whether medications affected her and then quickly withdrew the question

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<sup>6</sup> The trial judge remarked at the Motion for a New Trial that the defense should have brought a pretrial motion to compel Ms. Hummer to disclose her drug use. RP 132-133; *see also* BOA p. 18-19.

by posing a different question. *See* BOR 20. Instead of showing a strategic motive by defense counsel, this instead further demonstrates that defense counsel was ineffective. The problem defense counsel had in posing such a question was that because he had not interviewed the victim pretrial on her drug use, he was asking a question on cross where he did not already know what her answer would be, definitely a dangerous strategy. Moreover, the question posed, and then withdrawn, was not a leading question, but instead a non-leading one which would not have been effective:

DEFENSE COUNSEL: Q. Okay, do they affect you in any way? These are narcotics: correct?

MS. HUMMER: A. Yes.

RP 28.

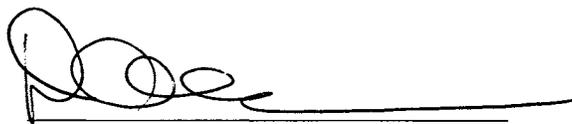
The State further points out that neither Dr. Wardle, the defense expert witness at trial who was not allowed to testify regarding the effect of these drugs on the victim, nor Dr. Julien, who provided a sworn statement in support of the Motion for a New Trial, knew what dosages Ms. Hummer took and therefore could not predict what effect it would have. This further highlights the deficiency of defense counsel's performance. Having not availed himself of a pretrial motion to discover this information, defense counsel should have at least asked Ms. Hummer

on cross-examination as to her dosage and frequency of use of her three drug cocktail of Methadone, OxyContin and OxyCodone. There would have been no downside in asking this question.

It is very likely that had defense counsel taken the very routine steps of moving pretrial for discovery and properly disclosed a qualified expert, the result at trial would probably have been different. The jury would have been informed as to Ms. Hummer's use of drugs and the effect of those drugs on her perception.<sup>7</sup> This, by itself, would have probably created a reasonable doubt in the jurors' minds and a reasonable probability, but for trial counsel's deficient performance, a different outcome. *Strickland v. Washington*, 466 U.S. 668, 694 (1984).

For the above reasons, this Court is urged to reverse the conviction due to ineffective assistance of counsel.

RESPECTFULLY SUBMITTED this 29<sup>th</sup> day of July, 2010.

A handwritten signature in black ink, consisting of several loops and a long horizontal stroke extending to the right.

DAVID ALLEN, WSBA #500  
Attorney for Appellant

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<sup>7</sup> Dr. Julien wrote in his Sworn Statement of Dr. Julien in Support of a New Trial that OxyCodone and Methadone produce "profound psychological effects" including "altered perception" and "mental clouding," but that persons so impaired may nevertheless appear "normal" and "not intoxicated." CP 35, 37-38.

**PROOF OF SERVICE**

David Allen swears the following is true under penalty of perjury under the laws of the State of Washington:

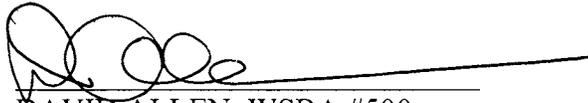
On the 29<sup>th</sup> day of July, 2010, I sent by U.S. Mail, postage prepaid, one true copy of Appellant's Reply Brief directed to attorney for Respondent:

Kathleen Webber, DPA  
Snohomish County Prosecutor's Office  
3000 Rockefeller Ave.  
Everett, WA 98201

And mailed to Appellant:

David Mitchell

DATED at Seattle, Washington this 29<sup>th</sup> day of July, 2010.

  
\_\_\_\_\_  
DAVID ALLEN, WSBA #500  
Attorney for Appellant