

64848-9

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NO. 64848-9-I

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION I

STATE OF WASHINGTON,
Respondent,
v.
CLYDE DAVIS,
Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY
THE HONORABLE BRUCE E. HELLER

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BRIEF OF RESPONDENT

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A. ISSUES PRESENTED

To convict a person of voyeurism, the State must prove that, for purposes of sexual gratification, the accused knowingly viewed another person without that person's knowledge and consent, while that other person was in a place where he or she had a reasonable expectation of privacy. The defendant, Clyde Davis (Davis) was convicted of voyeurism for watching his granddaughter K.O. (d.o.b. 5/1/1994) shower at his home. At trial, K.O. testified that there was a house rule that she was not to close the bathroom door or shower curtain when showering, nor was she to close her bedroom door when dressing. She also stated that she never wanted Davis to watch her shower and dress. Despite this, he watched her shower and dress more than 50 times during a two-year period, from approximately victim's ages 12 to 14 years old. She further testified that she did not always know when Davis was watching and sometimes she would just look up and he would be there watching her. Was the evidence presented in trial sufficient to prove each element of the crime of Voyeurism. Specifically, did the State fail to prove K.O. was unaware appellant was watching her and did K.O. have a reasonable expectation of privacy when she showered and dressed at the Davis home.

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

Defendant Clyde Davis was charged with Child Molestation in the Second Degree, Child Molestation in the Third Degree and Voyeurism. CP 7-8; RCW 9A.44.086, .089, .115. K.O. was his biological granddaughter, K.O. (d.o.b. 5/1/94). The allegations were that child molestation occurred when K.O. was 13 and 14 years old and that Davis watched K.O. shower and dress while she lived at his house. CP 3-5.

Davis was tried by a jury before the Honorable Bruce E. Heller. RP¹ 72-336. The jury found Davis guilty as charged. CP 59-61. The Court imposed a 70-month standard range sentence based on an offender score of 6. CP 105-15; RP 410-11.

2. SUBSTANTIVE FACTS

K.O.'s parents separated soon after she was born and as an infant, K.O. and her mother Cheryl Davis (Cheryl) moved in with Cheryl's parents Davis and Kathryn Davis (Kay). RP 104, 136-37. When K.O. was 9 years old, Cheryl moved out of the house but

K.O. remained with her grandparents, Davis and Kay. RP 137. At that point, Davis and Kay took over the daily care of K.O. RP 105.

Up until March 2009, the time of the disclosure and report to police, K.O. lived at the Davis home. RP 162.

From ages 8 to 12 years old, K.O. regularly shared a bed and showered with Davis.

When K.O. protested, the sleeping and showering together stopped. At age 12, K.O. began showering and sleeping alone in her own bedroom. However, house rules were then implemented by Davis. K.O. was not to shower or use the bathroom with the bathroom door closed. The shower had both a glass door and shower curtain. K.O. also was not allowed to close the shower curtain while showering. In addition, she was not allowed to close her bedroom door when dressing. RP 142-43.

K.O. followed the rules. While she showered, Davis would often stand at the bathroom doorway and watch her without saying a word. After showering, he would then watch her get out of the shower, dry off, and go to her bedroom. Davis would follow K.O. to her room and watch her dress. Once K.O. was dressed, he would

¹ There are three consecutively paginated volumes of verbatim report of proceedings collectively referenced as "RP."

walk away. K.O. stated this probably happened more than 50 times. RP 146-47.

K.O. did not always know he was there watching her. Sometimes she would look up and he would "just be there." The last time this occurred was in March 2009. RP 146.

K.O. stated that she did not want Davis watching her shower and get dressed and that these are things she liked to do in private. RP 146.

When asked why K.O. never called the police about Davis' behavior, K.O. stated that she thought Davis watching her shower was "normal" because she "hadn't been told anything different." RP 174.

Kay tried to stop Davis by telling him to stop watching K.O. shower. However, Davis would tell Kay, "No, it's my house. I'll do what I want." RP 154.

C. ARGUMENT

THE EVIDENCE WAS SUFFICIENT TO CONVICT DAVIS OF VOYEURISM.

The evidence was sufficient to convict Davis of voyeurism because the evidence showed that Davis watched K.O. shower

without her knowledge and consent and it was in a place where she had a reasonable expectation of privacy. Therefore, the conviction for Voyeurism should be affirmed.

As appellant concedes, a challenge to the sufficiency of the evidence requires the appellate court to view the evidence in the light most favorable to the prosecution. Appellant's Brief at 6 (citing *State v. Brockob*, 159 Wn.2d 311, 336, 150 P.2d 59 (2006)).

After reviewing the evidence in the light most favorable to the prosecution, the appellate court should only reverse the conviction if it finds that no rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. In addition, "all reasonable inferences . . . must be drawn in favor of the State and interpreted most strongly against the defendant." Appellant's claim of insufficient evidence admits the truth of the State's evidence. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992), citing *State v. Green*, 94 Wn.2d 216, 220-22, 616 P.2d 628 (1980), *overruled on other grounds by Washington v. Recuenco*, 548 U.S. 212, 126 S. Ct. 2546, 165 L. Ed. 2d 466 (2006); *State v. Partin*, 88 Wn.2d 899, 906-07, 567 P.2d 1136 (1977); *State v. Theroff*, 25 Wn. App. 590, 593, 608 P.2d 1254, *aff'd*, 95 Wn.2d 385, 622 P.2d 1240 (1980). The elements of the

crime may be established by either direct or circumstantial evidence; one type is no more valuable than the other. *State v. Fleming*, 137 Wn. App. 645, 647-48, 154 P.3d 304, 305 (Wn. App. Div. 3, 2007).

Finally, as in all cases on appeal, the appellate court may affirm for any basis apparent in the record. *State v. Jones*, 71 Wn. App. 798, 863 P.2d 85 (1993); *State v. Swan*, 114 Wn.2d 613, 790 P.2d 610 (1990); *State v. Butler*, 53 Wn. App. 214, 766 P.2d 505 (1989).

The voyeurism statute states:

(2) 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, photographs, or films:

(a) Another person without that person's knowledge and consent while the person being viewed, photographed, or filmed is in a place where he or she would have a reasonable expectation of privacy; or

(b) The intimate areas of another person without that person's knowledge and consent and under circumstances where the person has a reasonable expectation of privacy, whether in a public or private place.

RCW 9A.44.115(2).

1. K.O. Never Consented Nor Did She Always Have Knowledge Of The Viewing.

The defense correctly notes that the legislative intent behind RCW 9A.44.115 is to protect against the invasion of privacy through "the surreptitious viewing of [another person] for purposes of sexual gratification." *State v. Diaz-Flores*, 148 Wn. App. 911, 917, 201 P.3d 1073, *review denied*, 166 Wn.2d 1017, 210 P.3d 1019 (2009).

Furthermore, RCW 9A.44.115(1)(e) requires the State to prove that Davis intentionally viewed K.O. "for more than a brief period of time, in other than a casual or cursory manner." *State v. Fleming*, 137 Wn. App. 645, 648, 154 P.3d 304, 306 (Wn. App. Div. 3, 2007)

In *Diaz-Flores*, the defendant was observed by officers peering into a bedroom window from the outside and watching a couple have sex without the couple's consent. *Diaz-Flores*, 148 Wn. App. at 914.

Here, not unlike the victims in *Diaz-Flores*, Davis observed his granddaughter K.O. shower without her consent. While K.O. knew that Davis often watched her shower and get dressed, she did not agree to it. In fact, she stated that these were things she

did not want him to watch her do and were things she wanted to do in private. RP 146.

In *Fleming*, the victim was using a restroom when the defendant entered the stall next to her. She noticed his shoes facing the toilet and then saw the shoes were gone. The victim looked up and saw the defendant looking directly down at her. He stuck his tongue out at the victim. She immediately started yelling and told him she had a cell phone to call 911. The victim got up, grabbed her purse, and got out of the bathroom stall. The encounter did not last long only because the victim spotted the defendant quickly. *Fleming*, 137 Wn. App. at 648.

The *Fleming* court found that in these circumstances, the jury could find that the defendant viewed the victim for "more than a brief period of time," and that a jury could reasonably infer that the defendant intentionally viewed the victim "in other than a casual or cursory manner." *State v. Fleming*, 137 Wn. App. 645, 648, 154 P.3d 304, 306 (Wn. App. Div. 3, 2007).

Here, not unlike the *Fleming* victim, K.O. did not know Davis was watching until she looked up and "he was just there." RP 146.

Implicitly in that testimony, it means that there was some period of time when he was watching without her knowledge before

she became aware he was there. Arguably, Davis likely could have been watching K.O. without her knowledge for a substantially longer period of time than the *Fleming* victim.

The only reason why K.O. did not stop Davis by yelling at him, storming out of the bathroom, and calling 911 is because she was a child groomed to believe that this was "normal" behavior.

RP 174.

2. K.O. Had An Expectation Of Privacy In The Bathroom And The Bedroom.

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.

RCW 9A.44.115(2).

(b) "Place where he or she 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 casual or hostile intrusion or surveillance.

State v. Glas, 106 Wn. App. 895, 900, 27 P.3d 216, 218-19 (Wn. App. Div. 3, 2001).

As the appellant concedes, privacy in the bathroom is recognized by society as reasonable. Appellant's Brief at 9. That expectation of privacy existed in K.O.'s bathroom and bedroom.

The appellant relies on *State v. Glas* which states that privacy protection attaches when two conditions are met: first, a person exhibits a subjective expectation of privacy, and second, that expectation is one that society is prepared to recognize as reasonable. *State v. Glas*, 106 Wn. App. 895, 903-04, 27 P.3d 216, 220 (Wn. App. Div. 3, 2001).

In *Glas*, the Court was dealing with the issue of whether women had an expectation of privacy that would prohibit someone from taking photographs up their skirts while they were in a public place and not in one of the traditional private places such as bathrooms and bedrooms. *Glas*, 106 Wn. App. at 899.

Here, the intrusion occurred in a traditional private place. The activity, showering and dressing, is traditionally done in private. *Glas* does not create new limits on the expectation of privacy in

these traditionally private places during these activities. It stands for the principle that a victim need not be in one of these traditionally private places to have an expectation of privacy. The statute protects people, not places. *Glas*, 106 Wn. App. at 903.

The fact that Davis violated K.O.'s privacy more than 50 times by watching her shower and dress in the course of two years did not take away K.O.'s expectation of privacy in the bathroom and bedroom. RP 146-47.

K.O. stated that she wanted to shower and dress in private but that there were house rules that prohibited her from closing the bathroom door, shower curtain, and bedroom door. RP 142-43, 146. There was even an expectation from other family members that K.O. should have been able to shower and dress without her grandfather watching. When Kay tried to step in and stop Davis from watching his granddaughter shower, he fired back by saying "This is my house. I'll do what I want." RP 154.

Appellant argues that K.O. had no expectation of privacy because she stated that Davis watching her shower and dress was "just common" and "normal." Appellant's Brief at 9.

Such logic only rewards wrongdoing. The fact that keeping doors open was a "house rule" strongly suggests that K.O. wanted

to close these doors for privacy and Davis had to create a rule to stop her. Davis manipulated the family and groomed K.O. to the point where she did not believe she could stop him and that his behavior was somewhat "normal." RP 147. Despite this, she still wanted and expected privacy when showering and dressing. The circumstances created by Davis to make it easier for him to watch his granddaughter shower and dress did not and should not eliminate K.O.'s reasonable expectation of privacy.

D. CONCLUSION

For the aforementioned reasons, the Court should affirm Davis' voyeurism conviction.

DATED this 22nd day of October, 2010.

Respectfully submitted,

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