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No. 67904-0-I

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

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STATE OF WASHINGTON,

Respondent,

v.

RICHARD GORDON BURK,

Appellant.

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ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR KING COUNTY

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APPELLANT'S OPENING BRIEF

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#### A. SUMMARY OF ARGUMENT

One day, the assistant manager at Claire’s Boutique, a retail store in Southcenter Mall, observed Richard Burk place a camera under the skirt of a young woman shopping in the store. The assistant manager chased him out of the store and police soon apprehended him. A search of Mr. Burk’s camera revealed several “up skirt” photographs of women who could not be identified from the photos. There was no evidence linking any of those photographs with the young woman in Claire’s Boutique. She did not testify or give a statement to police. The assistant manager could not describe her other than to say she appeared to be under 18 years of age. Although the evidence showed Mr. Burk placed a camera under her skirt, the State did not prove he actually took a photograph under the skirt. Thus, the State did not prove Mr. Burk photographed the “intimate areas” of the young woman and the evidence is insufficient to sustain his conviction for voyeurism.

#### B. ASSIGNMENTS OF ERROR

1. In the absence of substantial evidence in the record, the court erred in finding Mr. Burk “photographed” the alleged victim.

2. In the absence of substantial evidence in the record, the court erred in finding Mr. Burk photographed the “intimate areas” of the alleged victim.

3. The State did not prove the elements of the crime beyond a reasonable doubt, in violation of constitutional due process.

C. ISSUE PERTAINING TO ASSIGNMENTS OF ERROR

To prove the crime of voyeurism, the State must prove beyond a reasonable doubt that, for the purpose of sexual gratification, the defendant knowingly photographed the “intimate areas” of another person without that person’s knowledge and consent and under circumstances where the person had a reasonable expectation of privacy. Did the State fail to prove the elements of the crime where the State did not prove Mr. Burk actually took a photograph of the “intimate areas” of the young woman in Claire’s Boutique?

D. STATEMENT OF THE CASE

Claire’s Boutique is a retail store in Southcenter Mall in Seattle that sells young women’s fashions. CP 3. Isaiah Lee is an assistant manager at the store. CP 3. One Saturday afternoon in April 2011, Mr. Lee observed Richard Burk enter the store alone and “go[] to the back of the store[,] kneel[] down and put a camera under a girl[’s] skirt like

he was taking a picture.” CP 49. Mr. Lee told Mr. Burk to leave the store and then contacted mall security. CP 49.

Two mall security guards chased Mr. Burk out of the mall and into the parking lot. 9/27/11RP 70-72, 104. As he was running, Mr. Burk dropped a digital camera on the ground. 9/27/11RP 72, 111. The security guards caught up to Mr. Burk and soon afterward three police officers arrived. 9/27/11RP 75, 114. The officers detained Mr. Burk. 9/27/11RP 154.

Meanwhile, one of the security guards found the camera on the ground nearby and gave it to Officer Douglas Johnson. 9/27/11RP 115. Officer Johnson turned on the camera and scrolled through four to six photographs displayed on the screen on the back. 9/27/11RP 58. The first photo was “of a female from the backside.” 9/27/11RP 55. Officer Johnson did not note what that woman was wearing or observe any other identifying characteristics about her, such as her race, height or weight. 9/27/11RP 55-56.

Most of the pictures Officer Johnson scrolled through were “of females from behind.” 9/27/11RP 37. He saw only one photo that he considered a “true . . . up skirt shot.” 9/27/11RP 37. A “true” up skirt shot is “[o]ne that would . . . be at a low angle and show either

underwear or genitalia, something that a female would be intentionally keeping away from the public.” 9/27/11RP 37. Officer Johnson could not tell the race of the woman in the up skirt shot, nor where the photo was taken or whether it was even taken in the mall. 9/27/11RP 66.

The “true” up skirt shot Officer Johnson saw was the only photo he considered to be an actual criminal violation. 9/27/11RP 37, 60. Once he saw that photo, he “looked no further.” 9/27/11RP 37. At that point, he believed he had probable cause to arrest Mr. Burk and the officers arrested him. 9/27/11RP 89; 9/28/11RP 158.

Police detective Harold Stock obtained a search warrant to search the camera. 9/28/11RP 200. He searched both the camera and the “SD card”<sup>1</sup> inside it. 9/28/11RP 200. There were no photographs stored in the camera other than those on the SD card, although the camera itself could store photographs. 9/28/11RP 198, 202. The SD card contained 127 photographs. 9/28/11RP 202. “Of those, 13 appeared to be taken from under a female’s lower anatomy, up a skirt,

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<sup>1</sup> An “SD” or “Secure Digital” card “is a non-volatile memory card format developed by the SD Card Association (SDA) for use in portable devices.” [http://en.wikipedia.org/wiki/Secure\\_Digital](http://en.wikipedia.org/wiki/Secure_Digital) (visited May 19, 2012). SD cards “are used in many consumer electronic devices, and have become a widespread means of storing several gigabytes of data in a small size.” *Id.* The user of a digital camera with an SD card may remove and replace the card as needed. *Id.*

so to speak. The rest were all of females' buttocks area and legs, fully clothed—most in pants or shorts.” 9/28/11RP 202. “There was no way to identify who the people in the camera were.” 9/28/11RP 234.

The State charged Mr. Burk with one count of voyeurism, RCW 9A.44.115. CP 1. The information alleged:

That the defendant RICHARD GORDON BURK in King County, Washington, on or about April 23, 2011, for the purpose of arousing or gratifying the sexual desire of any person, knowingly viewed, photographed, or filmed the intimate areas of another, without her knowledge and consent, and under circumstances where she had a reasonable expectation of privacy, whether in a public or private place.

Id.

Mr. Burk waived his right to a jury trial and agreed the court could decide the case on the basis of the witnesses' testimonies at the pretrial hearing, the police report, the certification for determination of probable cause, the witnesses' police statements, and the photographs. 9/27/11RP 143; CP 23, 33. The alleged victim never gave a statement to police and did not testify at the pretrial hearing.

The trial court found Mr. Burk guilty of voyeurism. 9/29/11RP 288-89; CP 60. In its oral ruling,<sup>2</sup> the court found Mr. Burk knowingly

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<sup>2</sup> The court did not enter written findings of fact or conclusions of law.

photographed the intimate areas of the young woman in Claire's Boutique without her consent. 9/29/11RP 289. The court found in full:

The circumstantial evidence in this case is that Mr. Lee sees Mr. Burk kneel down with a camera, as if taking photographs, in a store, underneath the skirt of a woman, and I don't think the age is relevant to this particular case.

He is asked to leave by Mr. Lee. At no time, apparently from the evidence that I have seen, Mr. Burk says, "Oh, this is somebody I know, and this is okay." In fact what happens is that he does in fact leave, and runs from security officers. The evidence would support the proposition that he took some advance steps to modify the camera, modify the jacket -- or the coat, whatever it is.<sup>[3]</sup>

He, as I indicated, he leaves. He runs from the officers. He -- according to the testimony and the findings of the Court, tosses the camera, denies he has a camera.

I am satisfied, based on all of the facts of this case, any reasonable finder of fact would, based on the circumstantial evidence, conclude beyond a reasonable doubt, that Mr. Burk was knowingly photographing the intimate areas of another, without her consent, and under circumstances where there was a reasonable expectation of privacy.

9/29/11RP 289.

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<sup>3</sup> At the time of his arrest, Mr. Burk was carrying a gray sweatshirt that had a hole in the pocket with reinforced plastic glued around the hole to hold it open. 9/27/11RP 106; CP 3. The adaptation would allow a person wearing the sweatshirt to take photographs through the hole without revealing the camera. CP 3.

## E. ARGUMENT

THE STATE DID NOT PROVE THE ELEMENTS OF VOYEURISM BEYOND A REASONABLE DOUBT BECAUSE THE STATE DID NOT PROVE MR. BURK ACTUALLY TOOK A PHOTOGRAPH OF THE INTIMATE AREAS OF THE ALLEGED VICTIM

### 1. Standard of review.

In reviewing challenged findings of fact following a bench trial in a criminal case, the Court determines whether substantial evidence supports the findings. State v. Mewes, 84 Wn. App. 620, 622, 929 P.2d 505 (1997). Substantial evidence is that which is sufficient to persuade a fair-minded rational person of the truth of the findings. State v. Hill, 123 Wn.2d 641, 644, 870 P.2d 313 (1994). Unchallenged findings of fact are viewed as verities on appeal. Id.; see also State v. Alvarez, 105 Wn. App. 215, 220, 19 P.3d 485 (2001). “Review is then limited to determining whether the findings support the conclusions of law.” Alvarez, 105 Wn. App. at 220. Conclusions of law are reviewed de novo. State v. Mendez, 137 Wn.2d 208, 214, 970 P.2d 722 (1999).

### 2. The State did not prove the elements of the crime beyond a reasonable doubt.

It is a fundamental principle of constitutional due process that the State must prove every element of a charged offense beyond a reasonable doubt. Apprendi v. New Jersey, 530 U.S. 466, 477, 120 S.

Ct. 2348, 147 L. Ed. 2d 435 (2000); In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970); U.S. Const. amend. XIV; Const. art. I, § 3.

In reviewing the sufficiency of the evidence to uphold a conviction, the question is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979); State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980).

In this case, the trial court found Mr. Burk guilty of voyeurism based on its finding that he knowingly photographed the “intimate areas” of the young woman in Claire’s Boutique without her consent. 9/29/11RP 289. Thus, to prove the crime as charged by the State and found by the court, the State was required to prove beyond a reasonable doubt that (1) for the purpose of gratifying the sexual desire of any person, (2) Mr. Burk knowingly “photographed” (3) the “intimate areas” of the young woman in Claire’s Boutique, (4) without her knowledge and consent, and (5) under circumstances where she had a reasonable expectation of privacy, whether in a public or private place.

9/29/11RP 289; CP 1; RCW 9A.44.115(2)(b).<sup>4</sup> “Intimate areas” means “any portion of a person’s body or undergarments that is covered by clothing and intended to be protected from public view.” RCW 9A.44.115(1)(a). “‘Photographs’ or ‘films’ means the making of a photograph, motion picture film, videotape, digital image, or any other recording or transmission of the image of a person.” RCW 9A.44.115(1)(b).

The State did not prove the elements of voyeurism beyond a reasonable doubt because it did not prove Mr. Burk actually took a photograph of the “intimate areas” of the young woman in Claire’s Boutique. The assistant manager told police he saw Mr. Burk go to the back of the store, kneel down, and “put a camera under [the] girl[‘s] skirt like he was taking a picture.” CP 49. But the evidence does not show that Mr. Burk actually took a photograph under the girl’s skirt.

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<sup>4</sup> The statute provides:

(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:

...

(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)(b).

The “SD card” on the camera Mr. Burk was carrying contained 13 “up skirt” photographs. 9/28/11RP 202. But no evidence linked any of those photos with the young woman in Claire’s Boutique. The record contains no description of the young woman or what she was wearing. She did not testify and never gave a statement to police. The assistant manager did not describe her other than to say she “appeared to be under 18 years of age.” CP 49. Detective Stock testified “[t]here was no way to identify who the people in the camera were.” 9/28/11RP 234. The record contains no evidence showing that any of those photos were even taken in the store. Thus, the State did not prove beyond a reasonable doubt that the SD card contained an “up skirt” photograph of the young woman in Claire’s Boutique.

Even if Mr. Burk intended to take a photograph of the young woman, the State did not prove he actually did so. The store manager saw Mr. Burk place a camera under the girl’s skirt “*like* he was taking a picture.” CP 49 (emphasis added). But the State did not prove Mr. Burk *actually took* a picture under the skirt. He might have been interrupted before he could take any picture at all.

In addition to the 13 “up skirt” photos, the SD card contained 114 photos of “females’ buttocks area and legs, fully clothed—most in

pants or shorts.” 9/28/11RP 202-03. In other words, the SD card contained 114 photos that do not qualify as photos of a person’s “intimate areas” for purposes of the statute. See RCW 9A.44.115(1)(a) (“intimate areas” are portions of a person’s body “covered by clothing and intended to be protected from public view”). Even if one of those photos is of the young woman in Claire’s Boutique, the photo could not sustain a conviction for voyeurism because it is not a violation of the statute to take a photograph of a person’s backside, fully clothed.

Because the State did not present any evidence linking any of the “up skirt” photos on the SD card with the young woman in Claire’s Boutique, the State did not prove the elements of the crime beyond a reasonable doubt.

Finally, the State did not prove Mr. Burk took *any* of the photographs that were stored on the SD card. Detective Stock testified there were no photos stored on the camera itself and all of the photos were stored on the SD card, although the camera itself was capable of storing photos. 9/28/11RP 198, 202. The photographs on the SD card could have been taken with a different camera and simply stored on the camera that was in Mr. Burk’s possession. In addition, the State was required to present affirmative evidence that Mr. Burk took a

photograph of another's "intimate areas" without her knowledge and consent. RCW 9A.44.115(2)(b); CP 1. Even if Mr. Burk took the photographs stored on the SD card, the State did not prove any of those photos were taken without the women's knowledge and consent.

In sum, even when the evidence is viewed in the light most favorable to the State, it is insufficient to prove beyond a reasonable doubt that Mr. Burk actually took a photograph under the skirt of the young woman in Claire's Boutique on April 23, 2011. Therefore, the State did not prove the elements of the crime, in violation of constitutional due process. Appendi, 530 U.S. at 477; Green, 94 Wn.2d at 221.

3. The conviction must be reversed and the charge dismissed.

If the reviewing court finds insufficient evidence to prove an element of the crime, reversal is required. State v. Lee, 128 Wn.2d 151, 164, 904 P.2d 1143 (1995). Retrial following reversal for insufficient evidence is "unequivocally prohibited" and dismissal is the remedy. State v. Hardesty, 129 Wn.2d 303, 309, 915 P.2d 1080 (1996) ("The double jeopardy clause of the Fifth Amendment to the U.S. Constitution protects against a second prosecution for the same offense, after acquittal, conviction, or a reversal for lack of sufficient

evidence.”) (citing North Carolina v. Pearce, 395 U.S. 711, 717, 89 S. Ct. 2072, 23 L. Ed. 2d 656 (1969), overruled in part on other grounds by Alabama v. Smith, 490 U.S. 794, 109 S. Ct. 2201, 104 L. Ed. 2d 865 (1989)).

Because the State did not prove the elements of the crime beyond a reasonable doubt, the conviction must be reversed and the charge dismissed with prejudice.

F. CONCLUSION

The State did not prove beyond a reasonable doubt that Mr. Burk took a photograph of the intimate areas of the young woman in Claire’s Boutique on the day of the incident. Therefore, the conviction must be reversed and the charge dismissed with prejudice.

Respectfully submitted this 22nd day of May 2012.



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

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STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	NO. 67904-0-I
v.	)	
	)	
RICHARD BURK,	)	
	)	
Appellant.	)	

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**DECLARATION OF DOCUMENT FILING AND SERVICE**

I, MARIA ARRANZA RILEY, STATE THAT ON THE 22<sup>ND</sup> DAY OF MAY, 2012, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

[X] KING COUNTY PROSECUTING ATTORNEY APPELLATE UNIT KING COUNTY COURTHOUSE 516 THIRD AVENUE, W-554 SEATTLE, WA 98104	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____
[X] RICHARD BURK 2500 ALDER ST. UNIT 25 MILTON, WA 98354-8608	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____

**SIGNED** IN SEATTLE, WASHINGTON THIS 22<sup>ND</sup> DAY OF MAY, 2012.

X \_\_\_\_\_ 

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STATE OF WASHINGTON  
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