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STATE OF WASHINGTON

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DEPUTY

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

NO. 34158-1-II

STATE OF WASHINGTON,

Respondent,

vs.

Gary Boyd,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR CLALLAM COUNTY
CAUSE NO. 04-1-00169-1

BRIEF OF RESPONDENT

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I. STATEMENT OF THE CASE

Gary Boyd had been a custodian for Port Angeles High School for about four years when, on April 26, 2004, several students went to the principal, Michelle Reid, to tell her that they saw Mr. Boyd following girls around and taking pictures from behind them with a small digital camera. RP (5/23/05) 29-30. One of the students saw Mr. Boyd bend over and hold out what looked like a mirror directing up a girl's skirt as Mr. Boyd was behind her and she walked up some stairs. RP(5/24/05) 12-13.

Other students saw Mr. Boyd follow a different girl up the stairs, hold his hands down with what looked like a camera in his one hand and point it up the girl's skirt. When she turned around he put his hand behind his back and acted like he was picking something up. RP(5/24/05) 23-25, 31,36-37.

Ms. Reid had Mr. Boyd come to her office and he gave her the camera in question when she asked him to do so. Further investigation revealed that there were, indeed, digital images of students on the camera; some of which were upskirt shots. RP (5/24/05) 32. Mr. Boyd told Ms. Reid that he was ashamed of taking the upskirt pictures of the students. RP (5/24/05) 34

Mr. Boyd was subsequently charged with one count of voyeurism and five counts of attempted voyeurism.

II. RESPONSE TO ASSIGNMENTS OF ERROR

- A. *Petrich* does not apply to the facts of this case, therefore the court did not err in not giving a *Petrich* instruction.

“When the evidence indicates that several distinct criminal acts have been committed, but defendant is charge with only one count of criminal conduct, jury unanimity must be protected.” *State v Petrich*, 101 Wn.2d 566,772, 683 P.2d 173 (1984). In this case Mr. Boyd was charged with six distinct and separate acts. Each of the six counts involved a different victim. CP 20-22. In Count 1 the victim was Nicole Weinheimer. Two photographs were admitted into evidence as Exhibits 7 and 8. Supp. CP. Mr. Boyd is incorrect in his assertion that the state had to elect which of these two photos it was using to prove the charge as the photos were taken contemporaneous to one another and showed a continuous course of conduct on Mr. Boyd’s part.” Under appropriate facts, a continuing course of conduct may form the basis of one charge in an information.” *Petrich* at 571. When determining when a charge arises out of a continuing course of conduct “the facts must be evaluated in a commonsense manner.”

Ms. Weinheimer testified that the pictures were taken at the same time and place. RP(5/24/05) P184-185. It is clear when looking at the facts as presented through her testimony and the pictures admitted that this was a continuous incident and not subject to a *Petrich* instruction.

Counts II-VI each related to a separate victim and as such were distinguishable from each other. Indeed the court instructed the jurors

that they had to find that each incident was a separate and discrete act.”
Supp CP., Instruction 13.

When a question came in from the jurors as to clarification the court gave further instruction that conformed with the information filed. That is, which count referred to which specific victim. RP(5/25/05) p 102-105. This clarification was agreed to by both the State and defense counsel. Therefore a *Petrich* instruction was not called for as the jurors were making a determination based on separate and discrete acts of Mr. Boyd.

- B. The trial court gave the correct instruction to the jury regarding the definition of “knowledge”. Adding the intent language did not relieve the State of its burden.

While it may be inartful, the instruction as given did not relieve the State of its burden to prove that Mr. Boyd knowingly took an “upskirt” picture of Ms. Weinheimer’s intimate areas. “In wording jury instructions, trial courts have considerable discretion.” *State v Castle*, 86 Wn.App. 48, 62, 935 P.2d 656 (1997) “An instruction is sufficient if it properly informs the jury of the applicable law without misleading the jury and permits each party to argue its theory of the case.” *Castle* at 62.

The reference to acting intentionally refers to the upskirt shot of Ms. Weinheimer and necessarily incorporates doing that act knowingly.

The evidence presented in this case indicates that, based on his actions when taking the pictures, Mr. Boyd knew what he was doing was illegal when he was doing it. The instruction, as given, allowed the State

to argue its theory of the case. By the same token it also allowed Mr. Boyd to argue that he had no idea that what he was doing was illegal.

C. RCW 9A.44.115 (2)(b) is not overbroad in its language regarding what constitutes “intimate parts”

The constitutionality of a statute is reviewed do novo. *State v Eckblad*, 152 Wn.2d 515, 518, 98 P.3rd 1184 (2004). “A court will presume that a statute is constitutional and it will make every presumption in favor of constitutionality where the statute’s purpose is to promote safety and welfare, and the statute bears a reasonable and substantial relationship to that purpose.” *State v Stevenson*, 128 Wn. App. 179, 114 P3d 699 (2005) quoting *State v Glas*, 147 Wn.2d 410,422, 54 P.3d 147 (2002) The burden of establishing the statute’s unconstitutionality beyond a reasonable doubt rests with the party asserting the vagueness challenge. *City of Spokane v Douglass*, 115 Wn. 2d 171, 795 P 2d 693 (1991). “A statute is not unconstitutionally vague merely because a person cannot predict with complete certainty the exact point at which his actions would be classified as prohibited conduct” *City of Seattle v Eze*, 111 Wn. 2d 22, 28, 759 P.2d 366 (1988). With regard to RCW 9A.44.115 the Supreme Court specifically held that this statute was not void for vagueness in *State v Glas*, 147 Wn.2d 410,422, 54 P.3d 147 (2002). “We hold that the voyeurism statute is not void for vagueness because all of the terms can be defined and given reasonable meaning in the appropriate context.” *Glas* at 423.

Regarding Mr. Boyd's facial challenge, the same court above held that the statute was not overbroad as written. "We also hold that RCW 9A.44.115 is not overbroad as written." *Id.* While the Court above was ruling on the former voyeurism statute, the language in question in the amended statute is the same as in the former. Given the Supreme Court's ruling in the above case, Mr. Boyd's challenge is moot and must fail.

D. Mr. Boyd was adequately represented during his trial.

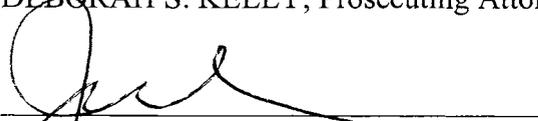
As stated in Mr. Boyd's brief, trial counsel's performance is evaluated against the entire record. *State v Lopez*, 107 Wn.App 270, 275, 27 P.3d 237(2001). The state submits that Mr. Boyd has made an insufficient showing of ineffective assistance based on the two pronged test. The record is replete with vigorous advocacy for Mr. Boyd by his trial counsel through argument in motions and objections during trial. There is nothing in Mr. Boyd's brief to indicate that trial counsel's performance was either: (1) deficient or (2) prejudiced the defendant. It is Mr. Boyd's opinion only that the knowledge instruction was misleading and reasonable minds, let alone competent attorneys, can certainly disagree on that point.

CONCLUSION

Based on the foregoing argument, Mr. Boyd's request for remand for a new trial should be denied.

DATED this 12 day of September, 2006.

DEBORAH S. KELLY, Prosecuting Attorney

A handwritten signature in black ink, appearing to read "Jill Landes", written over a horizontal line.

JILL LANDES WBA #22941

Deputy Prosecuting Attorney
Attorney for Respondent

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STATE OF WASHINGTON,
Respondent,

NO. 34158-1-H

AMM
DEPUTY

vs.

AFFIDAVIT OF SERVICE BY MAIL

GARY BOYD,
Appellant.

○

STATE OF WASHINGTON)
: ss.
County of Clallam)

The undersigned, being first duly sworn, on oath deposes and says:

That the affiant is a citizen of the United States and over the age of eighteen years; that on the 12 th day of September, 2006, affiant deposited in the mail of the United States of America a properly stamped and addressed envelope containing a copy of the Brief of Respondent, addressed as follows:

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SUBSCRIBED AND SWORN TO before me this 12th day of September, 2006.

Ann Monger

(PRINTED NAME:) Ann Monger

NOTARY PUBLIC in and for the State of Washington
Residing at Port Angeles, Washington
My commission expires: 10/21/2008