

WASHINGTON STATE COURT OF APPEALS

DIVISION II

NO. 35523-0-II

STATE OF WASHINGTON,

RESPONDENT,

Vs.

REX E. WHIPPLE,

APPELLANT

REPLY BRIEF OF APPELLANT

ALTON B. McFADDEN
Attorney for Appellant
WSBA No. 28861

OLSEN & McFADDEN, INC., P. S.
216 Ericksen Avenue NE
Bainbridge Island, WA 98110
(206) 780-0240

ORIGINAL

Reply Brief of Appellant Whipple

TABLE OF CONTENTS

	Page Numbers
A. TABLE OF AUTHORITIES.....	iii
B. ASSIGNMENTS OF ERROR.....	NA
C. QUESTIONS PRESENTED.....	NA
D. STATEMENT OF THE CASE.....	NA
E. ARGUMENT.....	1-12
F. CONCLUSION.....	12 - 13

A. TABLE OF AUTHORITIES

Washington Cases

State v. Chester, 82 Wn.App. 422, 431, 918 P.2d 514 (1996), *affirmed by State v. Chester* 133 Wn.2d 15, 940 P.2d 1374 (1997) 5, 6, 7

State v. Chester, 133 Wn.2d 15, 18, 940 P.2d 1374 (1997).11, 12, 13

State v. Grannis, 84 Wn.App. 546, 548 -552, 930 P.2d 327 (1997), *review denied by* 133 Wn.2d 1018, 948 P.2d (1997)...2, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15

State v. Griffith, 129 Wn.App. 482, 120 P.3d 610 (2005) *review denied by* 156 Wn.2d 1037, 134 P.3d 1170 (2006)..... 13, 14, 15

State v. Myers, 82 Wn.App. 435, 918 P.2d 183 (1996) *affirmed by State v. Myers*, 133 Wn.2d 26, 29-30, 941 P.2d 1102 (1997).....6, 7

State v. Myers, 133 Wn.2d 26, 29-30, 941 P.2d 1102 (1997).....6

Statutes

RCW 9.68A.011	1, 2, 3, 4, 6, 7, 9, 11, 12, 13, 14, 15
RCW 9.68A.040.....	5, 6, 11, 12
RCW 9.68A.070.....	1, 5, 9, 10, 12
RCW 9A.44.073.....	3
RCW 9A.44.074.....	3
RCW 9A.44.076.....	3
RCW 9A.44.083.....	3
RCW 9A.44.086.....	3
RCW 9A.44.089.....	3

E. ARGUMENT

1. Contrary to the State's Assertion there is no Distinguishing Difference between the Pictures of the Minor, in this case, and in State v. Grannis.

Mr. Whipple was convicted upon RCW 9.68A.070 which states, "A person who knowingly possesses visual or printed matter depicting a minor engaged in sexually explicit conduct is guilty of a class C felony."

There is no issue raised by the State that E.J.E.'s actions in dressing and undressing that were photographed, in this case, were done by her with a purpose by her of sexual stimulation of the viewer. E.J.E., did not know she was being photographed or viewed. See CP at 11-12; CP at 3-6. Further, there is no evidence and no claim by the State that Mr. Whipple or any other person, took any action what-so-ever to influence E.J.E.'s conduct because again, she did not know she was being photographed or viewed. See CP at 11-12; CP at 3-6.

The real issue therefore, is what is the definition of "sexually explicit conduct"? RCW 9.68A.011 is the definitional statute and the state admits that the relevant portion at issue states:

....

(3) "Sexually explicit conduct" means actual or simulated:

....

(e) Exhibition of the genitals or unclothed pubic or rectal areas of any minor, or the unclothed breast of a female minor, for the purpose of sexual stimulation of the viewer....

The State argues that the facts in *State v. Grannis*, 84 Wn.App. 546, 548-552, 930 P.2d 327 (1997) *review denied by* 133 Wn.2d 1018 948 P.2d (1997) are distinguishable from this case. The State cites to *Grannis*, 84 Wn.App. at 547 suggesting that there is a difference between the pictures of the minor girl discussed in *Grannis supra*, which does not state the age of the minor girl photographed in the bath nude, depicting her breast and pubic area¹, and the minor girl (age 15 years) in this case where her breasts and pubic area were displayed in the pictures. The State suggests the minor girl, in this case falls within a class of minors who are “sexually mature” as compared to the minor girl in *Grannis supra*, which the State suggests was not “sexually mature”. This argument is made, however, without any citation to the age the minor girl *Grannis supra*, or how “sexually mature” the court found her.

First, an analysis of RCW 9.68A.011² does not support the State’s

¹ *Grannis*, 84 Wn.App. at 547, states, “The camera then returns to focus on the girl, showing her unclothed **breasts and pubic area.**” (Emphasis added). Counsel cannot find any reference to the age the minor female within the afore-cited case.

² **RCW 9.68A.011. Definitions**

Unless the context clearly indicates otherwise, the definitions in this section apply throughout this chapter.

(1) To "photograph" means to make a print, negative, slide, digital image, motion picture, or videotape. A "photograph" means anything tangible or intangible produced by photographing.

(2) "Visual or printed matter" means any photograph or other material that contains a reproduction of a photograph.

position outlined above. The relevant portion of the definition of minor is in RCW 9.68A.011(4), which states, "Minor" means any person under eighteen years of age." There is nothing within RCW 9.68A.011 that differentiates ages of the protected minors. All minors are protected under RCW 9.68A.011(4). In contrast, the legislature has defined Rape of Child and Child Molestation with various degrees differentiated upon the age of the minor. See RCW 9A.44.073, .074, .076 and RCW 9A.44.083, .086, .089. First degree rape or molestation is a victim under 12 years of age. Second degree rape or molestation the victim is at least 12 but not yet 14 years of age. Third degree rape or molestation the victim is at least 14 but

(3) "Sexually explicit conduct" means actual or simulated:

- (a) Sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex or between humans and animals;
- (b) Penetration of the vagina or rectum by any object;
- (c) Masturbation;
- (d) Sadoomasochistic abuse for the purpose of sexual stimulation of the viewer;
- (e) Exhibition of the genitals or unclothed pubic or rectal areas of any minor, or the unclothed breast of a female minor, for the purpose of sexual stimulation of the viewer;
- (f) Defecation or urination for the purpose of sexual stimulation of the viewer; and
- (g) Touching of a person's clothed or unclothed genitals, pubic area, buttocks, or breast area for the purpose of sexual stimulation of the viewer.

(4) "Minor" means any person under eighteen years of age.

(5) "Live performance" means any play, show, skit, dance, or other exhibition performed or presented to or before an audience of one or more, with or without consideration.

not yet 16 years of age. No such age categories exist in RCW 9.68A.011. It can be seen from the above that the legislature knows how to create age categories and chose not to do so in RCW 9.68A.011. Further, the phrase, “sexually mature” does not occur within RCW 9.68A.011. The State does not even suggest an analysis for any statutory or case law basis for the “sexually mature” dividing line the State has suggested. Brief of Respondent at 10. Thus, the State’s analysis is without any support within RCW 9.68A.011.

Second, essentially the States’ argument is when looking at the pictures in *Grannis supra*, it was not clear the pictures at issue showed sexually explicit conduct. Unfortunately, the State does not provide the pictures in *Grannis supra*, for Counsel or the Court to make their own determination. Further, the State’s explanation of why there is a difference between the pictures depicting the minor girl’s breast and pubic area in *Grannis*, and the minor girl in this case, where her breasts and pubic area were shown is “obvious” because E.J.E. was a “sexually mature 15 year old girl”. Brief of Respondent at 10. There is no citation to any finding that E.J.E. was a “sexually mature 15 year old girl”. Also, there is no definition of “sexually mature”. Additionally, there is no citation to any finding that the minor female child in *Grannis supra*, was “sexually mature” or not “sexually mature” assuming arguendo that a minor child

can be sexually mature. The States argument on this point is made without any foundation in the record or in case law or statute.

Third, the *Grannis* court cites in their analysis the example from *State v Chester*, 82 Wn.App. 422, 423, 918 P.2d 514 (1996) *affirmed by State v. Chester*, 133 Wn.2d 15, 18, 940 P.2d 1374 (1997), which described a 14-year-old stepdaughter videoed from a camera beneath her bed showing her nude body as she dressed, unaware of the camera. While Mr. Whipple admits that *Chester Supra* was primarily an exploitation case, the *Grannis* court cites the example as support for its conclusion regarding what is required for sexually explicit conduct stating:

That statute, [RCW 9.68A.040] like RCW 9.68A.070, requires proof that a minor engaged in sexually explicit conduct. [FN11] The jury convicted, and the defendant appealed on grounds the evidence was *551 insufficient to support the conviction. Although Judge Bridgewater and Judge Morgan reasoned somewhat differently, and Judge Turner dissented, an essential conclusion was that a minor does not "**engage in sexually explicit conduct**" merely by exiting a shower and getting dressed. Thus, the conviction was not supported by sufficient evidence.

Grannis, 84 Wn.App. at 550-51 (Emphasis added).

Two critical points are made: (1) the definitional statute is the same for both RCW 9.68A.040 and RCW 9.68A.070 and so the same "sexually explicit conduct" is required to violate either statute; and (2) the *Grannis* court found that an essential conclusion of the majority in *State v*

Chester, 82 Wn.App. 422, was that a 14 year old minor female DID NOT engage in sexually explicit conduct by being photographed nude, without her knowledge. Both of these points advance Mr. Whipple’s argument that he could not on the facts before this court have committed the crime charged because it is undisputed E.J.E., did not have any knowledge she was being photographed covertly and her exhibition then was without any sexual purpose.

The *Grannis* court then went on to discuss the *State v. Myers*, 82 Wn.App. 435, 918 P.2d 183 (1996) *affirmed by State v. Myers*, 133 Wn.2d 26, 941 P.2d 1102 (1997). Gary Myers was convicted of sexual exploitation of a minor based on his videotaping his seven-year-old daughter, and asking the child to move in certain ways. *State v. Myers*, 133 Wn.2d 26, 29-30, 941 P.2d 1102 (1997). “The camera zooms in again and again to full frame shots of the child's pubic area.” *Myers*, 133 Wn.2d at 30. Myers challenged whether RCW 9.68A.011(3)(e) (defining “sexually explicit conduct” for purposes of RCW 9.68A.040(1)(b)) is unconstitutionally overbroad. *Myers*, 133 Wn.2d at 30. Once, again the key issue before the *Myers* court was what is meant by “sexually explicit conduct”.

The *Grannis* court stated regarding *Myers*, “At least in part, we held that the minor had engaged in an “[e]xhibition of the genitals ... for

the purpose of sexual stimulation of the viewer," because the defendant had initiated or contributed to the exhibition of her genitals with the purpose of sexually stimulating a viewer (i.e., himself)." *Grannis*, 84 Wn.App. at 551.

The *Grannis* court explained that the 14-year-old in *Chester* was videoed getting dressed without her knowledge and was not therefore engaging in sexually explicit conduct. *Grannis*, 84 Wn.App. at 550-51. This is compared to the 7-year-old girl, in *Myers* case, being told how to pose, where the court did find sexually explicit conduct. *Grannis*, 84 Wn.App. at 551. It would seem fair to assume that the 14 year old was more "sexually mature"³ than the 7 year old. Yet, this distinction, which is the lynchpin of the State's argument of the minor's age and the minor's "sexually maturity" is never addressed by RCW 9.68A.011, *Grannis supra*, *Chester* 82 Wn.App. 422, or *Myers* 82 Wn.App. 435; however, the "exhibition" was analyzed for its purpose in all three cases. The States argument should be dismissed as lacking authority both within the statute at issue and in case law.

2. RCW 9.68A.011(3)(e), the opinions in *Grannis supra*, *Myers*

³ Assuming the State means "physically developed" when using the terms "sexually mature".

supra, and *Chester supra*, all require a showing of actions from either the Defendant, the victim, or some other third party, to change the inanimate exhibition, into a purported “sexually explicit conduct” for the viewer as required by statute.

The State argues that Judge Morgan’s opinion in *Grannis* is singular and without support. First, *State v. Grannis*, 84 Wn.App. 546, was appealed to the Washington Supreme Court and that *review was denied* by 133 Wn.2d 1018 948 P.2d (1997). The Washington Supreme Court chose not to disturb the holdings in *Grannis supra* and they had the opportunity to change or at least address the issues, if they had so desired. Second, Judge Morgan wrote the majority opinion, with which Judge C.J. Houghton concurred.

Third, as discussed above both *Myers*, and *Chester*, dealt with the definition of “sexually explicit conduct”, which Mr. Whipple would argue is the key issue in this case, also.

Fourth, the State fails to provide an analysis attacking the lynchpin of the *Grannis* court’s decision “**that by itself, an exhibition is inanimate and without any purpose of its own.**” *Grannis*, 84 Wn.App. at 549 (Emphasis added). Mr. Whipple argues that the *Grannis* courts’ analysis turns on whether the purpose of the person or persons who initiate, contribute to, or otherwise influence the exhibition(s) at issue is to

sexually stimulate a viewer. *Grannis*, 84 Wn.App. at 549-50.

This is consistent with what RCW 9.68A.011(3)(e) requires for proof, which is the “exhibition . . . for the purpose of sexual stimulation of the viewer”. By the wording of the statute, the exhibition itself, not some subsequent viewer or viewing of the exhibition, must possess the purpose of sexual stimulation of the viewer.

Logically, this must be true or even innocent pictures of a minor nude child, which showed any “unclothed pubic or rectal areas of any minor, or the unclothed breast of a female minor” would be criminal to possess because in our society there are unfortunately sick people, who in viewing even the most innocent of such pictures do so for their own vile purpose of sexual stimulation. See RCW 9.68A.011(3)(e).

Mr. Whipple asserts that the State is asking this court to accept a tortured and convoluted reading of RCW 9.68A.011(3)(e) in order to get at what the State believes is a just result, in this case. What is to prevent parents and grandparents from being criminally charged with violation of RCW 9.68A.070, for the nude pictures they possess of their children and grandchildren under the State’s reading of the statute. As argued above the State can’t point to any dividing line in RCW 9.68A.011 or case law, because its “sexually mature” dividing line is without any authority. Further, the State’s position rejects the limiting analysis requiring the

exhibition of the nudity be for the purpose of sexual stimulation of the viewer, put forth explicitly in *Grannis* supra.

This “sexually purposed exhibition” cannot occur if the minor is merely getting dressed or undressed and is without knowledge of a voyeur viewing the minor or taking pictures of the minor. There would be no sexual purpose in the exhibition other than getting dressed or undressed. A viewer of a minor dressing and undressing might well be committing the crime of voyeurism, but that crime is not at issue in this appeal.

Further, this “sexually purposed exhibition” would not occur by a mother taking a bath picture of her toddler daughter for her baby book and to share with the grandparents or with her husband perhaps serving overseas. However, such a “sexually purposed exhibition” can occur as it did in *Myers* by the coaching of the perpetrator father to convince child to display her genitals. The State’s proposed analysis would leave us without any way to differentiate the above, all would fall within the sweep of RCW 9.68A.070. Such an interpretation would leave the statute open to new challenges for vagueness and enforcement would be at the whim of any prosecutor or law enforcement officer.

Mr. Whipple argues the legislature has by statute given a clear differentiation. The “Peeping Tom” taking pictures through the window of person’s bedroom while they are getting dressed is a voyeur, whether the

person dressing is minor or an adult. The mother taking baby pictures does not fall within the sweep of RCW 9.68A.011, as there is no showing of a “sexually purposed exhibition” for the sexual stimulation of the viewer. Lastly, the man cajoling the young girl to show her breast’s and genitals for him to photograph is creating the “sexually purposed exhibition” for the sexual stimulation of the viewer required by RCW 9.68A.011, to make the pictures criminal to possess.

The State next argues that *State v. Chester*, 133 Wn.2d 15, 940 P.2d 1374 (Decided Aug. 7, 1997) by implication acknowledged that surreptitious filming of a teenaged girl can result in sexually explicit conduct⁴. Brief of Respondent at 12. A problem with this analysis is that *State v. Grannis*, 84 Wn.App. 546, was put forward for review and the *review was denied* by the Washington Supreme Court in 133 Wn.2d 1018 948 P.2d (November 06, 1997), some two months after *Chester supra*. Assuming arguendo the legitimacy of the States implication argument, the logical inference would be that the Supreme Court endorsed the *Grannis* courts decision as it denied review of the RCW 9.68A.011 interpretation issue in *Grannis*, which is now before this court, subsequent to its judgment being rendered in *Chester supra*.

⁴ This argument seems to contradict the States argument made in its Brief of Respondent at page 11 where State argues that *State v. Chester* “dealt only the offense of sexual exploitation of a minor (RCW 9.68A.040) and that particular statute’s need to have some affirmative act on the part of the accused established in order for criminal liability to result.” Brief of Respondent at page 11.

Further, not only the Supreme Court, but the State legislature were aware of the *Grannis* court's holding and analysis of 9.68A.011(3)(e) because the case is cited in *Chester supra* as follows:

The Court of Appeals has reaffirmed its interpretation of the statute in two subsequent cases. See *State v. Myers*, 82 Wn.App. 435, 918 P.2d 183, review granted, 130 Wn.2d 1016, 928 P.2d 413 (1996), and *State v. Grannis*, 84 Wn.App. 546, 930 P.2d 327 (1997). [FN3]

FN3. During the 1997 legislative session, two bills were introduced as a result of the Court of Appeals opinions in *Chester*, *Myers*, and *Grannis*. Both bills unanimously passed the House but failed to timely make it out of the Senate Law and Justice Committee. . . .

Chester, 133 Wn.2d at 20.

While Mr. Whipple admits that *Chester* decision focused mainly on RCW 9.68A.040, even the Supreme Court noted *Grannis* had interpreted the statute at issue in *Chester*, 133 Wn.2d at 18. *Grannis* dealt with both RCW 9.68A.040 and 070, but the case turned on the court's holding that RCW 9.68A.011(3) required an affirmative act at the exhibition, by someone for the purpose of sexual stimulation of the viewer. *Grannis supra*. The essential holding is that a minor does not "engage in sexually explicit conduct" merely by being photographed nude, including even photos of a minor girls breast and pubic because the minor girl had no purpose of sexually stimulating a viewer, and there is no evidence that the defendant or someone else initiated, contributed to, or in any way influenced the girls' conduct. *Grannis*, 84 Wn.App. at 551. Without such evidence there is not showing of an exhibition of the genitals or breasts for the purpose of sexually stimulating a viewer, or that the

minor girls engaged in "sexually explicit conduct" *Grannis*, 84 Wn.App. at 551.

The Supreme Court, in *Chester supra*, cited *Grannis* and its interpretation of the statute. Further, from that cite it is apparent that the Court saw the interpretation in *Grannis supra* as consistent with *Myers supra*. The Court also noted that the legislature had considered changing the statutes at issue, after the opinions by the Court of Appeals in *Chester*, *Myers*, and *Grannis* and had chosen not to change it. *Chester*, 133 Wn.2d at 18. The Supreme Court had the opportunity to address any significant error, if one existed, in *Grannis* and did not accept the case. The State's claim that *Chester supra* is at odds with *Grannis'* interpretation of RCW 9.68A.011(3) is not supported by the analysis above or by any fair reading of *Chester*. Instead, it seems apparent that the Supreme Court found the opinions by the Court of Appeals in *Chester*, *Myers*, and *Grannis* consistent and endorsed them all by affirming in *Chester*.

3. A fair reading of State v. Griffith, shows that not only does it cite to Grannis as good law, but that it also showed that to change an inanimate exhibition, into a purposed "sexually explicit conduct" for the viewer as required by statute required the actions of the victim, defendand or other third parties.

The State argues that under *State v. Griffith*, 129 Wn.App. 482, 120 P.3d 610 (2005) that the definition of "sexually explicit conduct" used is not consistent with *Grannis supra*. The State is essentially arguing that *Griffith* should be read as a case that limits or distinguishes *Grannis*.

To begin with, the State fails to note in its analysis that *Griffith supra*, is a probable cause case focused on the issue of was there probable cause to support the warrant and not whether there was sufficient evidence to support a conviction for sexual exploitation or possessing pictures depicting a minor engaged in sexually explicit conduct.

The State cites *Griffith*, 129 Wn.App. at 486, stating: “If a minor is unclothed and the picture is for the sexual stimulation of the viewer, then it meets the definition of sexually explicit conduct.” *Griffith* at 486. However, the State fails to give the citation, which the *Griffith* court provides for this statement of law, which was, *Grannis* at 549, (quoting RCW 9.68A.011(3)(e)). As previously argued RCW 9.68A.011(3)(e) requires that it is the exhibition that must have the offending purpose.

However, *Griffith supra*, goes on to state: “The purpose for which the picture of a nude minor is taken determines whether probable cause may be found. *Id.* [referring to *Grannis*] at 550, 930 P.2d 327. C.R. said the pictures were taken as a birthday present for Mr. Griffith. **The affidavit also noted that others were helping her pose for the pictures.**” *Griffith* at 486 (emphasis added). The law and facts, which the *Griffith* court felt needed to be reiterated when finishing its analysis and coming to its holding focused on the “facts” showing the “purpose” were why C.R. got undressed as a birthday present and that she had help posing from others.

The *Griffith* court then immediately finishes its analysis holding the above establish probable cause. *Id.* This rendition of the facts was not an after-thought as suggested by the State. It specifically reiterates the key

facts for what was required to meet the standard laid out in *Grannis*, which was exhibition by it self is without purpose. *Grannis* at 549. Purpose is required and can be found in: (1) why the minor was disrobing, i.e, to give a birthday present to a man, or (2) that the defendant posed the minor as was described in *Myers supra*, or (3) that some other actor(s), such as in *Griffith*, where onlookers posed the minor in suggestive poses. *See Griffith*, 129 Wn.App. at 485, 488. This analysis that the *Griffith* court went through even for the much lower standard of probable cause is the analysis required under *Grannis* and which the State is urging this court to disregard.

F. CONCLUSION

The State's essential position is the same as was argued by Judge Turner in his dissent where he stated:

A child need not be an *553 exhibitionist or be posed to be a victim of sexual exploitation under RCW 9.68A.040 and 070. Covert filming of an innocent child's genitalia may constitute an exhibition. *See State v. Chester*, 82 Wn.App. 422, 433, 918 P.2d 514 (1996) (Turner, J. dissenting). And if its purpose is sexual stimulation of a viewer, then it is punishable under these statutes.

Grannis at 552-3. In truth, the State is asking this court to change the law, into what Judge Turner believed it should be and ignore the statutory requirement that the "exhibition" be for the purpose of sexual stimulation of the viewer. RCW 9.68A.011(3). Based upon the foregoing analysis and facts, Mr. Rex Whipple respectfully requests this court to find that

there was insufficient evidence to uphold his convictions in this matter and to find him not guilty on all charges.

Respectfully submitted this 9th day of October, 2007.



Alton B. McFadden WSBA #28861
Attorney for Mr. Rex Whipple.

FILED
BY *ym*

WASHINGTON STATE COURT OF APPEALS
DIVISION II

NO. 35523-0-II

STATE OF WASHINGTON,
RESPONDENT,
Vs.
REX E. WHIPPLE,
APPELLANT

DECLARATION OF MAILING

ALTON B. McFADDEN
Attorney for Appellant
WSBA No. 28861

OLSEN & McFADDEN, INC., P. S.
216 Ericksen Avenue NE
Bainbridge Island, WA 98110
(206) 780-0240

ORIGINAL

TO: CLERK OF COURT

On October 9, 2007, I placed the foregoing pleading(s):

1) **REPLY BRIEF OF APPELLANT**

with the United States Postal Service, postage prepaid, addressed to:

Juelanne Dalzell
PROSECUTING ATTORNEY
FOR JEFFERSON COUNTY
PO Box 1220
Port Townsend, WA 98368

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Signed at Bainbridge Island, Washington on October 9, 2007.



Naomi M. Nobles
Legal Assistant to Alton B. McFadden
OLSEN & McFADDEN, INC., P. S.