NO. 311554-III

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

THE STATE OF WASHINGTON, Respondent

v.

JIMMIE WAYNE MOSER, Appellant

APPEAL FROM THE SUPERIOR COURT
FOR BENTON COUNTY

NO. 11-1-01463-4

BRIEF OF RESPONDENT

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I. STATEMENT OF FACTS

The defendant drove his vehicle to Roberta Farrington's residence late at night, about 11:10 p.m. on December 14, 2011. (CP 16). Mrs. Farrington at the time was 70 years old and lived in a retirement community with a "no trespassing" sign posted on her block. (CP 16, 18, 19). Mrs. Farrington had changed into her nightgown and was turning off the lights when she saw the defendant looking into her house from the street. (CP 16). Prior to this, Mrs. Farrington did not know that the defendant was viewing her nor did she consent to him viewing her. (CP 17). The defendant made eye contact with Mrs. Farrington; he was masturbating. (CP 16). Mrs. Farrington called the police, and the defendant was arrested as he was leaving the area. (CP 17).

The only factual issue not stipulated was whether Mrs. Farrington had a reasonable expectation of privacy. The court found that she did have a reasonable expectation of privacy. (CP 19).

The defendant was found guilty of Voyeurism at a stipulated facts bench trial and this appeal follows.[1] (CP 43).

[1] The State will only address Count I since the defendant has not sought any relief from Count II, Indecent Exposure.

II. ARGUMENT

A. RESPONSE TO DEFENDANT'S ASSIGNMENT OF ERROR NUMBER 1

> "The trial court erred in making any findings that Mrs. Farrington had a reasonable expectation of privacy in her unobstructed, lighted, decorated and uncovered window that was immediately adjacent to a public sidewalk and street." (App. Brief at iii).

1. The Standard on Review:

The standard on review where a finding of fact is challenged is whether there is substantial evidence to sustain the finding. *State v. Mewes,* 84 Wn. App. 620, 622, 929 P.2d 505 (1997). Evidence is substantial if it is sufficient to convince a reasonable person of the truth of the finding. *State v. Rankin*, 151 Wn.2d 689, 92 P.3d 202 (2004).

2. There was substantial evidence that Mrs. Farrington had a reasonable expectation of privacy in her residence.

Under RCW 9A.44.115(1)(c), a "'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 concerning 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.

RCW 9A.44.115(1)(c)(i)(ii).

Both of these prongs are satisfied. Mrs. Farrington was a 69-year-old woman living in a retirement community, "no trespassing" signs were posted on her street, and there was little car or foot traffic especially after dark. (CP 28). In her own home, she could reasonably feel she could undress for bed and/or be safe from casual surveillance.

Additionally, the cases involving the law in search and seizure have recognized a heightened expectation of privacy in one's home. "In no area is a citizen more entitled to privacy than in his or her own home." *State v. Young*, 123 Wn.2d 173, 867 P.2d 593 (1994). The defendant argues that "it is in fact the person and not the location which is protected." (citing *Katz v. United States,* 389 U.S. 347, 88 S. Ct 507, 19 L.Ed.2d (1967)). (App. Brief at 12).

The cases cited by the defendant do not support his position. *Katz*, supra, dealt with the expectation of privacy for a person in a telephone booth. *State v. Berber,* 48 Wn. App. 583, 740 P.2d 863 (1987) dealt with the privacy interest of a person in a public restroom who could be seen by members of the public while standing over a toilet.

Mrs. Farrington's reasonable expectation of privacy while in her home is also illustrated by the defendant's hypothetical examples. What if, the defendant asks rhetorically, he was masturbating in public and Mrs. Farrington happened to see him as she walked down a sidewalk by her

house? (App. Brief at 10). Likewise, the defendant argues that Mrs. Farrington was in the same situation as anyone who may have been on the street and observed the defendant masturbating. (App. Brief at 12). However, the Voyeurism statute provides greater protection to people who are in private areas, such as their homes, from being viewed. If the defendant wanted to go to a parking lot at a Wal-Mart and masturbate, he would not commit the crime of Voyeurism because no victim would have been in a place where he or she had an expectation of privacy. The defendant committed the crime of Voyeurism by going to Mrs. Farrington's residence, peering in, and making eye contact with her while he was masturbating.

The defendant also poses another hypothetical situation. What if the defendant exposed himself from his own home to pedestrians or drivers who happened by? (App Brief at 14-15). True, there may be exhibitionists who stand beside a bedroom window and expose themselves to neighbors. However, Mrs. Farrington is not an exhibitionist and she, like most home owners, is entitled to expect privacy when she is in her own residence. In the defendant's hypothetical, unlike the actual situation, he does not expose himself to a person who is in a place in which he or she could expect privacy.

3. There are several points the defendant raises which are not accurate.

First, the defendant claims that Mrs. Farrington "did not believe she was in a place where she could disrobe without being seen by people on the street or sidewalk." (App. Brief at 8). Clerk's Papers pages six through nine contain the defendant's own argument on his *Knapstad* motion. There is no testimony, suggestion, or comment from Mrs. Farrington that she felt she would be seen by people on the street when she disrobes.

Second, the defendant misquotes RCW 9A.44.115(1)(c)(ii). The defendant refers to: "[a] place where one may reasonably expect to be safe from hostile intrusion or surveillance." (App. Brief at 10). The actual subsection is:

> (c) "Place where he or she would have a reasonable expectation of privacy" means:
> (ii) A place where one may reasonably expect to be safe from *casual* or hostile intrusion or surveillance;

(Emphasis added). RCW 9A.44.115(1)(c)(ii).

The defendant eliminated the word "casual" above. The defendant's action of making eye contact with Mrs. Farrington while he was naked and masturbating while she was in her house getting ready for bed may very well be considered a "hostile" intrusion or surveillance.

Nevertheless, the defendant's act certainly meets the definition of *casual* intrusion or surveillance.

Third, the defendant speculates that "if Mr. Moser had simply sat in his truck in the middle of the street and looked at Ms. Farrington through her lighted, decorated, and uncovered window while she was fully clothed, Ms. Farrington would almost certainly not have called the police or felt violated in any way." (App. Brief at 11). It is more likely that if the defendant had sat in his truck late at night, masturbating, while peering into Mrs. Farrington's residence and making eye contact with her while she was preparing for bed, she would have called the police. Even if the defendant was not masturbating, but was sitting in his truck while peering into her residence and making eye contact with her after she had changed into a nightgown and was turning off the lights in her house, she would have almost certainly called the police.

Fourth, the defendant's emphasis on the fact that Mrs. Farrington had Christmas decorations in her window is misplaced. Clerk's Papers number 25 and 26 show photos of Mrs. Farrington's residence looking out into the street and from the street looking in. (CP 25, 26). It was December 14, 2011. There is nothing unusual about her Christmas decorations which would encourage a pedestrian to stare into her residence. Many people enjoy viewing such decorations, but neither the

homeowners or spectators take such things as granting permission to look inside the residence at whoever is present.

B. RESPONSE TO DEFENDANT'S ASSIGNMENT OF ERROR NUMBER 2:

> "The trial court erred in making or finding that Ms. Farrington did not have knowledge and impliedly consent to be viewed by anyone in the lighted public street in front of her unobstructed, lighted, decorated and uncovered window. In the alternative, the court erred in failing to find or conclude that Ms. Farrington did have knowledge and impliedly consent to such viewing." (App. Brief at iv).

1. The Standard on Review:

The standard on review where a finding of fact is challenged is whether there is substantial evidence to sustain the finding. *State v. Mewes,* 84 Wn. App. at 622. Evidence is substantial if it is sufficient to convince a reasonable person of the truth of the finding. *State v. Rankin,* 151 Wn.2d at 689.

2. The parties stipulated that Mrs. Farrington did not have actual knowledge or give actual consent to the defendant viewing her.

The parties stipulated that, "Until Mrs. Farrington saw the defendant outside her residence, she did not have actual knowledge that he was viewing her. She also did not give actual consent to the defendant to view her." (CP 17, No. 20).

The defendant specifically did not stipulate to a finding that Mrs. Farrington was in a place where she had a reasonable expectation of privacy. *See* Finding of Fact No. 40. (CP 19).

3. Even without this stipulation, the trial court correctly concluded that Mrs. Farrington did not know or give consent to the defendant viewing her while she was in her residence.

Ignoring the stipulation that Mrs. Farrington did not consent to the defendant viewing her or have knowledge he was doing so, the court still had these facts:

- Mrs. Farrington was turning off the lights in her home and getting ready for bed. *See* Finding No. 3. (CP 16).

- It was about 11:10 p.m. when she first saw the defendant. *See* Finding No. 1. (CP 16).

- The fact that her curtains were open was not an invitation for someone to look at her. *See* Finding No. 19. (CP 17).

- The defendant never claimed Mrs. Farrington knew or consented to his viewing her. In fact, his explanation of his presence was not credible. *See* Findings 14, 15, and 16. (CP 17).

- It is rare to have any vehicle or pedestrian traffic in Mrs. Farrington's retirement community after dark. *See* Finding No. 37. (CP 19).

4. The defendant's claims that Mrs. Farrington gave "implied consent" or "had knowledge that Mr. Moser could see her through her window" do not constitute defenses.

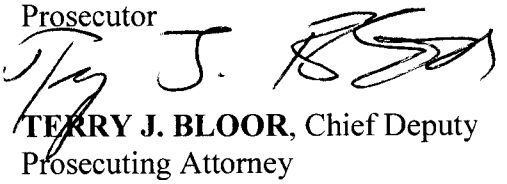
The defendant argues that "Ms. Farrington had knowledge that Mr. Moser could see her through her window and impliedly consented to being seen through her window . . . ." (App. Brief at 17). However, the statute only speaks of "consent," not "implied consent." In any event, there is no evidence that Mrs. Farrington consented, implied or actual, to the defendant's acts. Perhaps the best evidence of this is the defendant himself who did not claim to law enforcement that Mrs. Farrington consented, impliedly or actually, to his viewing her. Nor did he claim that she should have known he was outside her residence. Rather, he gave an implausible story about going to a grocery store dressed only in a bathrobe without any underwear. *See* Finding Numbers 14, 15, and 17. (CP 17).

III. CONCLUSION

The defendant's conviction should be affirmed.

RESPECTFULLY SUBMITTED this 22nd day of July 2013.

ANDY MILLER
Prosecutor



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CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington that on this day I served, in the manner indicated below, a true and correct copy of the foregoing document as follows:

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Signed at Kennewick, Washington on July 22, 2013.

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