90190-2

NO. 311554-III

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	
	)	PETITION FOR REVIEW
Respondent,	)	OF DIVISION THREE OF
	)	OF THE COURT OF
V.	)	APPEALS 31155-4-III
	)	
JIMMI WAYNE MOSER,	)	
	)	
Petitioner,	)	

PETITION FOR REVIEW

PETITION FOR REVIEW OF DIVISION THREE OF THE COURT OF APPEALS DECISION TERMINATING REVIEW IN 31155-4

By: SAMUEL P. SWANBERG, WSBA No. 22352
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TABLE OF AUTHORITIES

A. IDENTITY OF PETITIONER

Petitioner, Jimmi Wayne Moser, by and through his attorney of record, Samuel P. Swanberg, asks this Court to accept review of the Court of Appeals decision terminating review designated in Part B of this petition.

B. COURT OF APPEALS

Petitioner asks the Court to reconsider and reverse the decision of the Court of Appeals finding that a person has a reasonable expectation of privacy from being viewed inside a residence when the person knows they can be clearly viewed through an uncovered and unobstructed window from a nearby and adjacent public roadway. A copy of the decision is in the Appendix at pages A1 through A5. A copy of the order denying petitioner's motion for reconsideration is in the appendix at pages A6.

C. ISSUE PRESENTED FOR REVIEW

Is there a reasonable expectation of privacy from being viewed in a residence when the occupant can be clearly viewed

through an uncovered and unobstructed window from an adjacent nearby public roadway?

D. STATEMENT OF THE CASE

At approximately 11:10 P.M. on December 14, 2013, Ms. Roberta Farrington was getting ready to go to bed in her home in Kennewick, WA. (CP 16). As she looked out her window she saw a white or silver pickup truck parked in the East bound lane of the street in front of her sliding glass door. (CP 16). The sliding glass doors are large and were not covered by blinds or any other obstruction, even though they are equipped with such. (CP 16 and 25). The room inside the sliding glass doors was lighted and it was dark outside. (CP 16) As she looked out her window, she could see a man outside in the middle of the street looking at her while she was inside her home. (CP 16). The man was not wearing any pants and was masturbating. (CP 16). Ms. Farrington believes they made eye contact. (CP 16). Ms. Farrington left the room and called the police. (CP 17).

Later the same day Ms. Farrington saw the same truck return to the area and again stop on the street in front of her home. (CP 17). Ms. Farrington again called the police. (CP 17). Officer Ayala saw a white truck matching the suspect vehicle in the immediate vicinity of Ms. Farrington's home and stopped it. (CP 17). Mr. Moser was the driver of the truck. (CP 17). Mr. Moser was wearing only a bathrobe without any underwear. (CP 17). Officer Ayala questioned Mr. Moser as to where he had come from and where he was going and Mr. Moser provided non-credible answers. (CP 17). Police transported Mr. Moser to Ms. Farrington's address where she positively identified him. (CP 17).

The defendant was found guilty of the crimes of Voyeurism (Count I) and Indecent Exposure (Count II) after a stipulated facts bench trial on September 19, 2012. (CP 19-20). Mr. Moser (the appellant) did not appeal the findings of fact, conclusions of law, or verdict as to count II (Indecent Exposure), but only the findings of fact numbers 40 and

Conclusion of Law number 1 as to Count I (Voyeurism) that Ms. Farrington was viewed in a place where she had an expectation of privacy. (CP 19-20). In addition, Mr. Moser asserted that Ms. Farrington did have knowledge that he was looking at her as she could see him in the middle of the street the entire time and that she impliedly consented to being viewed by anyone from the sidewalk or street immediately in front of her home by intentionally leaving her unobstructed window, directly facing the sidewalk and street close-by, lighted, uncovered and decorated with Christmas lights and other decorations. (CP 17, findings number 5). In fact, Ms. Farrington believed by Mr. Moser's conduct that he was actually trying to gain her attention to him by continually driving up and down her street and turning on and off his lights. (CP 41)

The Court of Appeals, in denying the petitioner's appeal reasoned "No Washington legal authority is directly on point regarding whether a home with open blinds is a place where a

person may reasonably expect to be safe from casual or hostile intrusion or surveillance." "But, it is well established that both federal and state constitutions provide protection against intrusions in home." The Court of Appeals then cited *State v. Ferrier*, 136 Wn.2d 103, 110, 960 P.2d 927 (1998) as authority for this assertion. The petitioner thereafter filed a motion for reconsideration pointing out that *Ferrier* does not apply to "clear view" observations made into a home, but only to advisements of rights that must be made by police before voluntary consent to physically enter and search a home is considered legally sufficient to waive the warrant requirement. Petitioner further pointed out that the "clear view" doctrine and all case law dealing with search and seizure by government agents would not support an occupant inside a home having a reasonable expectation of privacy from what could be seen through a large uncovered and unobstructed window from a public street. However, the Court of Appeals denied the

petitioner's motion for reconsideration without further explanation.

E. ARGUMENT WHY REVIEW SHOULD BE GRANTED

This Court should accept review because the petition meets all the criteria set out in RAP 13.4(b) governing acceptance.

(1) The decision of the Court of Appeals in conflict with a decision of the Supreme Court.

In *Katz v. United States*, 389 U.S. 347, 361, 88 S.Ct. 507, 516-17, 19 L.Ed.2d (1967); cited in *State v. Berber*, 48 Wn.App. 583, 740 P.2d 863 (Div. 3 1987) (Applying the same standard to Article I Section 7 of Washington Constitution), the Supreme Court found that a person does not have a reasonable expectation of privacy from being viewed while in a telephone booth. In his concurring opinion Justice Harlan noted: "Thus a man's home is for most purposes, a place where he expects privacy, but objects, activities or statements that he exposes to the 'plain view' of outsiders are not 'protected' because no

intention to keep them to himself has been exhibited." The court of Appeals failed to recognize or follow this decision or the doctrine of "plain view" in ruling that Ms. Farrington had a reasonable expectation of privacy from being seen by the unaided eye from the nearby public street though her large uncovered window.

(2) The decision of the Court of Appeals is in conflict with another decision of the Court of Appeals.

In *State v. Chiles*, 53 Wn.App. 452, 453, 767 P.2d 597 (Div. 2 1989), the Court ruled that the evidence was sufficient to uphold a conviction for Indecent Exposure based upon Mr. Chiles standing naked in the front window of his home and thereby exposing his private body parts to pedestrians on the sidewalk in front of his home. The ruling by the Court of Appeals that Ms. Farrington had a reasonable expectation from being seen in her lit home through her large uncovered window from a person on a public street in front of the window cannot be rectified with the decision in *Chiles*.

In addition, the Court of Appeals reliance upon *State v. Ferrier* is misplaced and contradicts all case law dealing with "plain view."

(3) The petition involves a significant question of law under the constitutions of the State of Washington and the United States.

The decision of the Court of Appeals hinges upon the defining of the state and federal constitutional guarantee to the expectation of privacy. As regards the Washington and the criminal voyeurism statute, this is an area that has not been clearly established or set. As such, this is an issue that should be addressed by this Court.

(4) The petition involves an issue of substantial public interest that should be determined by the Supreme Court.

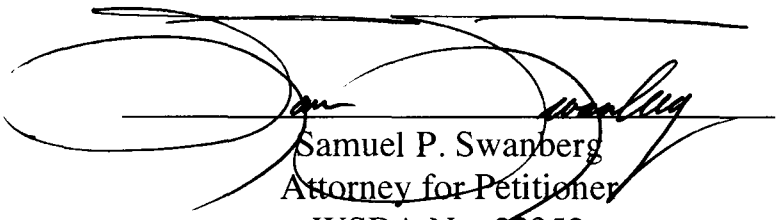
This petition involves a major element of the state criminal voyeurism statute that is essential for knowing what it covers. As such, it is of critical importance for providing notice to the citizenry of this state as to what

conduct is prohibited as well as what protections it actually affords.

F. CONCLUSION

The petitioner respectfully requests this Court to accept review of the Court of Appeals decision terminating review and ultimately reverse his conviction because the alleged victim did not have a legally recognized reasonable expectation of privacy from being seen by the defendant when he could see her from the public street through her large uncovered window.

RESPECTFULLY SUBMITTED
THIS 21st day of April, 2014.



Samuel P. Swanberg
Attorney for Petitioner
WSBA No. 22352

CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury that a copy of the forgoing Petition for Review was sent by legal messenger to TERRY BLOOR, Benton County Deputy Prosecuting Attorney, @ the Benton County Prosecutor's Office in Kennewick, WA this 21st day of April 2014. & to Mr. Moser.

Kathi Dell
Legal Assistant to Sam Swanberg

APPENDIX A

FILED
FEB. 27, 2014
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

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

STATE OF WASHINGTON, Respondent, v. JIMMIE WAYNE MOSER, Appellant.	)	No. 31155-4-III UNPUBLISHED OPINION

BROWN, J. — Jimmie W. Moser appeals his voyeurism conviction, contending sufficient evidence does not show the victim had a reasonable expectation of privacy in her home when the curtains were open, lights were on, and Christmas decorations were around one of the windows. We affirm.

FACTS

Roberta Farrington lives in a retirement community. A "no trespassing" sign is posted on her street. One evening as Ms. Farrington was getting ready for bed, she stood in her kitchen and looked out her sliding glass doors and saw Mr. Moser looking into her house from the street. The blinds on the glass doors were open and the lights were on in the home; additionally, Ms. Farrington's kitchen window curtains were open with Christmas decorations around it. Mr. Moser made eye contact with Ms. Farrington.

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Ms. Farrington observed that Mr. Moser was masturbating. Ms. Farrington called the police who soon found and arrested Mr. Moser.

The State charged Mr. Moser with indecent exposure and voyeurism. At a bench trial, Mr. Moser stipulated he knowingly viewed Ms. Farrington for the purpose of arousing his sexual desire, but he did not stipulate Ms. Farrington was in a place where she had a reasonable expectation of privacy. The court found Mr. Moser guilty of both charges. He solely appeals his voyeurism conviction.

ANALYSIS

The sole issue is whether sufficient evidence supports Mr. Moser's voyeurism conviction. He contends the State failed to prove Ms. Farrington had a reasonable expectation of privacy inside her home, considering she had the blinds open, lights on, and Christmas decorations around one of her windows.

We review evidence insufficiency claims to determine whether any rational trier of fact could have found the essential elements of the charged crime beyond a reasonable doubt. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). Evidence sufficiency challenges admit the truth of the State's evidence and all reasonable inferences drawn from it. *Id.*

After a bench trial, we determine whether substantial evidence supports the trial court's findings of fact and, in turn, whether the findings support the conclusions of law. *Perry v. Costco Wholesale, Inc.*, 123 Wn. App. 783, 792, 98 P.3d 1264 (2004). Substantial evidence is evidence sufficient to persuade a fair-minded, rational person of

the finding's truth. *State v. Solomon*, 114 Wn. App. 781, 789, 60 P.3d 1215 (2002). We consider unchallenged findings of fact verities on appeal, and we review conclusions of law de novo. *Perry*, 123 Wn. App. at 792.

In a criminal matter, the State must prove every element of the crime charged. *State v. Teal*, 152 Wn.2d 333, 337, 96 P.3d 974 (2004). To prove voyeurism, the State had to show Mr. Moser (1) knowingly viewed Ms. Farrington without her knowledge or consent while (2) she was in a place where she had a reasonable expectation of privacy, or that Mr. Moser viewed Ms. Farrington's intimate areas without her knowledge or consent where she had a reasonable expectation of privacy, whether in a public or private place. RCW 9A.44.115(2). The State had to prove Mr. Moser viewed Ms. Farrington to arouse or gratify his sexual desires. RCW 9A.44.115(2). Mr. Moser stipulated that he viewed Ms. Farrington to arouse or gratify sexual desire, leaving the narrow question of whether Ms. Farrington had a reasonable expectation of privacy within her home.

RCW 9A.44.115(1)(c)(ii) clarifies that a place where a person would have a reasonable expectation of privacy is "[a] place where one may reasonably expect to be safe from casual or hostile intrusion or surveillance." No Washington legal authority is directly on point regarding whether a home with open blinds is a place where a person may reasonably expect to be safe from casual or hostile intrusion or surveillance. But, it is well established that both the federal and state constitutions provide protection against intrusions in the home. Indeed, in *State v. Ferrier*, 136 Wn.2d 103, 110, 960

P.2d 927 (1998), our Supreme Court recognized the expectation of privacy in the home as "clearly 'one which a citizen of this state should be entitled to hold,' because 'the home receives heightened constitutional protection.'" *Id.* at 118 (citations omitted).

By comparison, in *State v. Stevenson*, 128 Wn. App. 179, 195, 114 P.3d 699 (2005), Division Two of this court held sufficient evidence supported the defendant's conviction after he observed his daughter walking through the family home's kitchen and then continued to watch her when she went into the bathroom to shower. In *State v. Diaz-Flores*, 148 Wn. App. 911, 919, 201 P.3d 1073 (2009), Division One of this court held sufficient evidence supported a voyeurism conviction when the defendant looked through the blinds to watch a couple engage in sexual activity inside their home.

Here, Ms. Farrington lived in a retirement community with a "no trespassing" sign posted on her nearby street. She was inside her home late at night, preparing to go to bed when she saw Mr. Moser masturbating while watching her through an open window. Although Ms. Farrington's factual situation is not identical to the victims in *Stevenson* and *Diaz-Flores*, she similarly had an expectation of privacy within her home; the record shows no facts tending to show Ms. Farrington invited or encouraged any diminishment in her expectation of privacy in her home. Indeed, leaving the blinds open, leaving the lights on, and decorating a window do not negate her privacy interests in any material way. Ms. Farrington was without a reasonable doubt in a place where she expected "to be safe from casual . . . surveillance" as set forth in RCW 9A.44.115(1)(c)(ii).

Given all, we conclude Ms. Farrington had, under these facts, an undiminished expectation of privacy within her home. Accordingly, we hold sufficient evidence exists to support Mr. Moser's voyeurism conviction.

Affirmed.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

Brown, J.

Brown, J.

WE CONCUR:

Siddoway, A.C.J.

Siddoway, A.C.J.

Fearing, J.

Fearing, J.

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FILED
MARCH 25, 2014
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

COURT OF APPEALS, STATE OF WASHINGTON, DIVISION III

STATE OF WASHINGTON,	)	No. 31155-4-III
	)	
Respondent,	)	ORDER DENYING MOTION
v.	)	FOR RECONSIDERATION
	)	
JIMMIE WAYNE MOSER,	)	
	)	
Respondent.	)	

THE COURT has considered respondent's motion for reconsideration of this court's decision of February 27, 2014, and having reviewed the records and files herein, is of the opinion the motion should be denied. Therefore,

IT IS ORDERED, respondent's motion for reconsideration is hereby denied.

DATED: 3/25/14

PANEL: Jj. Brown, Siddoway, Fearing

FOR THE COURT:

KEVIN M. KORSMO
CHIEF JUDGE

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