NO. 46156-1-II

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

STATE OF WASHINGTON,

Respondent,

v.

JOSEPH PAUL OATES,

Appellant.

ON APPEAL FROM THE
SUPERIOR COURT OF CLARK COUNTY

The Honorable Robert Lewis, Judge

OPENING BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The State presented insufficient evidence to prove beyond a reasonable doubt the appellant was guilty of attempted voyeurism.

2. The court improperly denied the appellant's motion to dismiss the attempted voyeurism charge due to insufficient evidence.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. To convict the appellant of the crime of attempted voyeurism, the State was required to prove that he took a substantial step toward the commission of the offense for the purpose of arousing or gratifying his sexual desire. The prosecution argued that Mr. Oates committed attempted voyeurism, but no witness testified that he looked into S.J.V.'s bedroom window other than a momentary glance, no witness testified that Mr. Oates saw S.J.V. inside the house, and although a witness stated that Mr. Oates was near a fence behind S.J.V.'s house, he remained fully dressed and there was no testimony that he was sexually aroused. Where this testimony comprised the only evidence that the crime was committed for the purpose of arousing or gratifying sexual desire, was the evidence insufficient to support the conviction for attempted voyeurism? Assignments of Error No. 1 and 2.

C. STATEMENT OF THE CASE

1. Procedural history:

By amended information filed January 8, 2014, the Clark County Prosecutor charged appellant Joseph Oates with voyeurism, or alternatively with attempted voyeurism. Clerk's Papers (CP) 16.

Jury trial in the matter started March 10, 2014, the Honorable Robert Lewis presiding.

The court denied the defense's "half time" motion to dismiss the charges at the conclusion of the State's case. 1Report of Proceedings (RP) at 145.[1]

Neither exceptions nor objections were taken to the jury instructions were taken by counsel for the defense. 2RP at 182.

2. Trial testimony:

At approximately 6:30 a.m. on November 22, 2013, Joseph Oates went outside his house in Washougal, Washington in order to smoke a cigarette. RP at 73. He usually smoked while sitting in his car, but he stated that he had seen a deer between his house and his neighbor Johannes Voogt's house, and that he followed the deer into the back yard of his own house.

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[1]The record of proceedings consists of two volumes:
1RP—December 6, 2013, March 6, 2014, March 10, 2014, jury trial; and
2RP—March 11, 2014, jury trial, March 27, 2014, and April 21, 2014, sentencing.

1RP at 150. While in the backyard he sat in a chair and smoked cigarettes while watching the deer. 1RP at 150. After approximately sixteen minutes he stood up and noticed that there were lights on at the Voogt's house, which is separated from Mr. Oates' house by a fence. 1RP at 151,152. Mr. Voogt and Mr. Oates had been neighbors for approximately five years. They were long term friends and they frequently socialized together. 1RP at 59, 167.

Mr. Oates stated that he saw there was a light on in S.J.V.'s bedroom, but that he did not specifically look into the room as he walked along the fence. 1RP at 154. He stated that when he looked at her window, it was "just a glance" and he did not see anyone, including S.J.V., inside the house. 1RP at 155.

Mr. Oates stated that when he was walking back to his front door, he encountered Mr. Voogt, who angrily asked Mr. Oates what he was "doing sneaking around back here." 1RP at 156, 157. Mr. Oates stated that he was outside to smoke a cigarette and to check the fence. 1RP at 63, 67. Mr. Voogt testified that he did not see Mr. Oates looking into the house. 1RP at 71.

Mr. Voogt testified that it was cold that morning and that he went outside to start his vehicle to let it warm up before going to work. 1RP at 62. He stated that after starting his vehicle he walked around the side of his house

and saw Mr. Oates come from the back corner of the property near the fence that divides the two properties. 1RP at 62, 63 71. Mr. Oates was walking on his side of the property when seen by Mr. Voogt. 1RP at 70.

Mr. Voogt said that before he went outside to start his car, he woke up his daughter S.J.V. so that she could get ready for school. 1RP at 61. S.J.V., who was in seventh grade at the time of trial, stated that on that morning she got up and got dressed for school. 1RP at 80. Her bedroom has two windows, but only one was covered with a curtain. 1RP at 90.

After the incident, Mr. Voogt went to work and later made a report to the police alleging that Mr. Oates was looking into his daughter's window. 1RP at 66, 100. Mr. Voogt called later that day and left a message with Mr. Oates' housemate that he had called the police and that Mr. Oates needed to talk to them when they arrived. Mr. Voogt also talked with Mr. Oates and told him that he needed to move that weekend and that Mr. Voogt was going to kill him if he did not move. 1RP at 158.

Mr. Oates' housemate said that after the incident, Mr. Oates said that S.J.V.'s light was on and that "Joe caught me." 1RP at 121.

Officer Frank Koutelieris of the Washougal Police Department went to Mr. Oates' house on November 22 after Mr. Voogt made a report to law enforcement. 1RP at 103. Officer Koutelieris stated that Mr. Oates was

cooperative with him. 1RP at 103. He said that Mr. Oates showed him where he was standing in his backyard. 1RP at 104-06. He told him that he was smoking in the backyard and saw that the light had turned on in S.J.V.'s room, and that he was trying to look at her in her bedroom after her light turned on. 1RP at 103, 115.

3. **Verdict and sentence:**

The jury found Mr. Oates guilty of attempted voyeurism, a gross misdemeanor. CP 112. The court imposed 364 days in custody with 319 days suspended, with credit for 45 days served. CP 129.

Timely notice of appeal was filed April 21, 2014. CP 139. This appeal follows.

D. ARGUMENT

1. THE EVIDENCE PRESENTED WAS INSUFFICIENT TO ESTABLISH THAT APPELLANT ATTEMPTED TO COMMIT VOYEURISM

a. The State must prove each element of the crime beyond a reasonable doubt.

The State charged Mr. Oates in the alternative with one count of attempted voyeurism under RCW 9A.44.115, alleging that he "knowingly view[ed], photograph[ed] or film[ed]: S.J.V. without her knowledge and

consent, while she was in a place where she would have a reasonable expectation of privacy." CP 16. RCW 9A.44.115(2) provides:

> 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 another person, without that person's knowledge and consent, while the person being viewed, photographed, or filmed is in a place where he or she would have a reasonable expectation of privacy.

Therefore, RCW 9A.44.115 requires the state to prove beyond a reasonable doubt that: (1) Mr. Oates intentionally viewed S.J.V. in her bedroom through the window; (2) that she was in a place where she had a reasonable expectation of privacy; (3) the attempt at viewing her was committed for the purpose of sexual gratification; and (4) he attempted to commit voyeurism by taking a substantial step toward its commission. "[C]onduct is not a substantial step 'unless it is strongly corroborative of the actor's criminal purpose.'" *State v. Workman,* 90 Wn.2d 443, 451, 584 P.2d 382 (1978).

Mr. Oates contends that the evidence was insufficient to establish that he attempted to view S.J.V. Due process requires that the State prove every fact necessary to constitute the charged crime beyond a reasonable doubt. U.S. Const. amend. 14; Const. art. 1, § 3; *In re Winship,* 397 U.S. 358, 364, 25 L. Ed. 2d 368, 90 S. Ct. 1068 (1970); *State v. Crediford,* 130 Wn.2d 747, 749, 927

P.2d 1129 (1996). On a challenge to the sufficiency of the evidence, this Court must reverse a conviction when, after viewing the evidence in the light most favorable to the prosecution, no rational trier of fact could have found all the essential elements of the offense beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319, 61 L.Ed.2d 560, 99 S.Ct. 2781 (1979); *State v. Green*, 94 Wn.2d 216, 221, 616 P.2d 628 (1980).

b. The prosecution did not present sufficient evidence to prove Mr. Oates attempted to commit the crime for the purpose of arousing or gratifying his sexual desire.

Where the State charges a defendant with a crime requiring a finding of sexual gratification, the State must prove both the defendant's "purpose" and "sexual gratification." *State v. Halstien,* 122 Wn.2d 109, 119-20, 857 P.2d 270 (1993). "Purpose" refers to the defendant's mental state. *Id.* at 120. While an inference of sexual gratification can often be made, the State must show some extrinsic evidence more than mere touching, or as in this case, the mere viewing of another. *State v. Powell,* 62 Wn.App. 914, 917, 816 P.2d 86 (1991), *rev. denied,* 118 Wn.2d 1013 (1992). In *Powell*, Division Three of this Court established that when attempting to create an inference of sexual gratification, the State must show some extrinsic evidence more than mere touching, or as in this case, the mere viewing. *Id.* at 917. In addition, the

additional extrinsic evidence must be sexual in nature; it cannot be additional innocuous conduct. Id. at 917-18.

Here, the State failed to prove that Mr. Oates had taken a substantial step toward viewing S.J.V. as alleged. Instead, in a light most favorable to the State, the prosecution merely established that: (1) he walked along the fence separating the two houses, and (2) looked briefly in S.J.V.'s window as he went past. Under these circumstances, the State failed to show that Mr. Oates succeeded in seeing S.J.V. in her bedroom or even made a substantial step toward committing the crime, and if he did see her, the State failed to show that she was in a state of undress; there was no testimony that he saw S.J.V. while she was naked or dressing.

Moreover, assuming arguendo that Mr. Oates *had* seen S.J.V., there is no testimony that looking into the window was anything more than a casual or cursory manner of very short duration. Therefore, any view of S.J.V. would have been for no more than a brief moment. Such viewing is too brief under the voyeurism statute. RCW 9A.44.115(1)(d).

Finally, again assuming a brief viewing occurred, such could not have been for the "purpose of arousing or gratifying the sexual desire of any person" (RCW 9A.44.115(2)) because Mr. Oates was fully clothed and was doing

nothing of a sexual manner. He was simply walking by the fence, there was no mention of his hands being near his genitals or that he otherwise appeared to be sexually aroused.

In short, the evidence was insufficient to establish that Mr. Oates took a substantial step toward viewing S.J.V., and that even if he had attempted to view S.J.V. there was no showing that it was for the purpose of sexual gratification (RCW 9A.44.115(2)).

c. **Reversal is the appropriate remedy**

In the absence of evidence from which a rational trier of fact could find beyond a reasonable doubt that Mr. Oates took a substantial step toward viewing S.J.V. for the purpose of arousing or gratifying his sexual desire. Absent proof of every essential element, the conviction must be reversed and the charge dismissed. *State v. Hundley*, 126 Wn.2d 418, 421-22, 895 P.2d 403 (1995). Since the State failed to present any additional extrinsic evidence of a sexual nature, there is insufficient evidence from which the jury could find beyond a reasonable doubt that Mr. Oate's actions, without more, were a substantial step taken for the purpose of arousing or gratifying his sexual desire.

F. CONCLUSION

Based on the arguments contained herein, Mr. Oates respectfully

requests that this Court reverse his conviction for attempted voyeurism and dismiss the charge against him.

DATED: September 26, 2014.

Respectfully submitted,
THE TILLER LAW FIRM

PETER B. TILLER-WSBA 20835
Of Attorneys for Joseph Oates

CERTIFICATE OF SERVICE

The undersigned certifies that on September 26, 2014, that this Opening Brief filed by JIS to the Clerk of the Court, Court of Appeals, Division II, 950 Broadway, Ste. 300, Tacoma, WA 98402, and copies were mailed by U.S. mail, postage prepaid to Ms. Anne Cruser, Deputy Prosecuting Attorney, Clark County Prosecutor's Office, PO Box 5000, Vancouver WA 98666-5000, and to Mr. Joseph P. Oates, 937 I Street, Washougal, WA 98671 true and correct copies of this Brief.

This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Centralia, Washington on September 26, 2014.

PETER B. TILLER

RCW 9A.44.115

Voyeurism.

(1) As used in this section:

(a) "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;

(b) "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;

(c) "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 concerned 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;

(d) "Surveillance" means secret observation of the activities of another person for the purpose of spying upon and invading the privacy of the person;

(e) "Views" means the intentional looking upon of another person for more than a brief period of time, in other than a casual or cursory manner, with the unaided eye or with a device designed or intended to improve visual acuity.

(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:

(a) Another person without that person's knowledge and consent while the person being viewed, photographed, or filmed is in a place where he or she would have a reasonable expectation of privacy; or

(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.

(3) Voyeurism is a class C felony.

(4) This section does not apply to viewing, photographing, or filming by personnel of the department of corrections or of a local jail or correctional facility for security purposes or during investigation of alleged misconduct by a person in the custody of the department of corrections or the local jail or correctional facility.

(5) If a person is convicted of a violation of this section, the court may order the destruction of any photograph, motion picture film, digital image, videotape, or any other recording of an image that was made by the person in violation of this section.

TILLER LAW OFFICE

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