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AUG 24 2010

King County Prosecutor
Appellate Unit

NO. 64848-9-I

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

STATE OF WASHINGTON,

Respondent,

v.

CLYDE DAVIS,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR KING COUNTY

The Honorable Bruce E. Heller, Judge

BRIEF OF APPELLANT

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2010 AUG 24 PM 4:15

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A. ASSIGNMENT OF ERROR

The evidence was insufficient evidence to convict appellant of voyeurism.

Issue Pertaining to Assignment of Error

To convict a person of voyeurism, the State must prove that, for purposes of sexual gratification, the accused knowingly viewed another person without that person's knowledge and consent, while that other person was in a place where he or she had a reasonable expectation of privacy. The State prosecuted appellant with voyeurism for allegedly watching his granddaughter, who lived in his home, take showers. At trial, the granddaughter testified she was aware appellant was watching her shower, and that the house rule was that the bathroom door had to be left open when she showered. Under these circumstances, was the evidence insufficient to convict appellant of voyeurism because the State failed to prove the granddaughter was unaware appellant was watching her and/or that the granddaughter had a reasonably expectation of privacy while showering given the open-door rule?

B. STATEMENT OF THE CASE

1. Procedural Facts

The King County Prosecutor charged appellant Clyde Davis (Davis) with second and third degree child molestation and voyeurism.

CP 7-8; RCW 9A.44.086, .089, .115. The State alleged Davis molested his granddaughter, K.O. (d.o.b. 5/1/94), when she was 13 and 14 years old, and that he surreptitiously watched her shower and dress. CP 3-5.

Davis was tried by a jury before the Honorable Bruce E. Heller. RP¹ 72-336. The jury found Davis guilty as charged. CP 59-61. The court imposed a 70-month standard range sentence based on an offender score of "6" (each conviction counted as three points towards the offender score for every other conviction). CP 105-15; RP 410-11. Davis appeals. CP 123.

2. Substantive Facts

K.O. was only six months old when her parents separated and she and her mother, Cheryl Davis (Cheryl), moved in with her grandparents (Cheryl's parent's), Davis and Kathryn Davis (Kay). RP 104; 136-37. Cheryl moved out of the home several years later and Davis and Kay took over the responsibility of raising K.O. RP 105. K.O. lived with her grandparents until March 2009, when she was two months short of 15 years old, when first made allegation of sexual misconduct by Davis. RP 137; see CP 3.²

¹ There are three consecutively paginated volumes of verbatim report of proceedings collectively referenced as "RP."

² The certification of determination of probable cause notes police first learned of K.O.'s allegations on March 9, 2009.

At trial, K.O. admitted that one of the rules at her grandparents' home was that she was not allowed to close either her bedroom door or the door to the bathroom she used. RP 142-43. K.O. also admitted that she often got in trouble with her grandparents for texting on her cell phone and having boyfriends. RP 167-68. The consequences included having her phone taken away, being grounded, not being able to see friends and losing television privileges. Id.

Although there were no associated charges against Davis, K.O. explained at trial that between the ages of nine and 12, she routinely showered with Davis in the master bathroom, and that she began sleeping with him in his bed after her mother moved out of the house. RP 138-40. She had no recollection, however, of Davis touching or looking at her while they showered together, nor did she claim anything untoward occurred when they were in bed. RP 140-41. These practices ended, however, when K.O. turned 12. RP 107-08, 140. At that point K.O. slept in her own room. She also showered in another bathroom in which the ceiling vent fan was broken, which consequently caused moisture problems. RP 112-13, 142, 278.

With regard to the voyeurism charge, K.O. testified:

Just about every time I took a shower [Davis would] be standing in the hallway in the doorway, uh watching me..

...
Just staring, and like he was staring off into space.

...
[He was looking directly at me, not saying anything, not doing anything with his hands.]

[H]e would stand there the entire time I was in the shower, and when I got out and dried off and got all dressed he'd walk in his bedroom.

...
[Or if I was going to dress in my bedroom,] [h]e would move out of the way so that I could walk into my bedroom, and then he would stand in the doorway in between my bedroom and the hallway [staring at me, not saying anything, and once I was dressed,] [h]e would walk down the stairs.

RP 144-45.

When the prosecutor asked K.O., "did you always know he was there watching or were there times when you'd just looked up and he was just there?", she replied, "There were times that I would look up and he was just there." RP 146. K.O. also agreed that she did not want Davis to watch her while she was showering or getting dressed, and those were things she preferred to do in private. RP 146. K.O. estimated that Davis watched her shower more than 50 times, and agreed that it was "just common." RP 146-47. In fact, K.O. thought it was "normal." RP 174.

Following the conclusion of the State's case-in-chief, Davis moved to dismiss all of the charges, arguing the State had failed to present any evidence that his alleged acts were done for purposes of sexual gratification or, with regard to the voyeurism charge, that K.O. was

unaware she was being watched or that she had an expectation of privacy. RP 221-24. The court denied the motion, finding there was sufficient evidence to support a finding of sexual gratification to let the jury decide guilt or innocence. RP 225-26. The court did not, however, address Davis's arguments about the lack-of-knowledge and expectation-of-privacy elements for the voyeurism charge.

Thereafter, Davis testified and denied engaging in any sexually motivated behavior towards his granddaughter. RP 232-94.

In closing argument, the prosecutor elected to rely on "the shower incident [K.O.] describes to you being watched by her grandfather while she was taking a shower[]" as the basis for the voyeurism charge. RP 303. In arguing the required elements for the voyeurism charge had been proved, the prosecutor argued K.O. had a "reasonable expectation of privacy [in the bathroom] just like any other reasonable person. Just like any one of us. This is the place -- the kind of place where you would expect [inaudible] private." RP 307. The prosecutor also argued:

Was it done without [K.O.'s] knowledge and consent? Yes. She knew he was -- he was around. But she told you she'd look up and he'd be there. So, a portion of that viewing is actually without her -- her -- excuse me, her knowledge. . . . So we know it wasn't with her knowledge or a least a portion of it, and then clearly without her consent. For those reasons the State has proven the charge of Voyeurism.

RP 309.

C. ARGUMENT

THE EVIDENCE WAS INSUFFICIENT TO CONVICT DAVIS OF VOYEURISM.

The evidence was insufficient to convict Davis of voyeurism because there was no evidence to support a finding that Davis watched K.O. shower without her knowledge or in a place where she had a reasonable expectation of privacy. Therefore, Davis' voyeurism conviction must be reversed and dismissed and the matter remanded for resentencing on the remaining two convictions.

When reviewing the sufficiency of the evidence for a criminal conviction, the question is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. State v. Brockob, 159 Wn.2d 311, 336, 150 P.2d 59 (2006). On review, circumstantial and direct evidence carry equal weight. State v. Goodman, 150 Wn.2d 774, 781, 83 P.3d 410 (2004). If the evidence is insufficient to support the verdict, the court must reverse and dismiss the conviction. State v. Stanton, 68 Wn. App. 855, 867, 845 P.2d 1365 (1993).

The voyeurism statute provides:

(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.

RCW 9A.44.115(2) (emphasis added).

This Court recently noted the legislative intent behind RCW 9A.44.115 is to protect against the invasion of privacy through "the surreptitious viewing of [another person] for purposes of sexual gratification." State v. Diaz-Flores, 148 Wn. App. 911, 917, 201 P.3d 1073, review denied, 166 Wn.2d 1017, 210 P.3d 1019 (2009).

Davis' jury was instructed that to convict him of voyeurism, the State had to prove the following elements beyond a reasonable doubt:

(1) That on or about the time period intervening between May 1, 2006 and March 9, 2009, the defendant knowingly viewed a second person;

(2) That the viewing was for the purpose of arousing or gratifying the sexual desire of any person;

(3) That the viewing was without the second person's knowledge and consent;

(4) That the second person was viewed in a place where she would have a reasonable expectation of privacy; and

(5) That any of these acts occurred in the State of Washington.

CP 55 (Instruction 14) (emphasis added).

The State failed to meet its burden in two ways. First, the State failed to prove element (3), that Davis viewed K.O. without her knowledge and consent. Instead, the evidence shows only that K.O. knew Davis watched her shower. Although K.O. claimed that sometime she would look up and Davis was "just there," she never claimed this was unexpected or surprising. RP 146. To the contrary, K.O. agreed that Davis watching her shower was "just common" and "normal." RP 147, 174. Thus, despite the prosecutor's closing argument to the contrary, there was nothing surreptitious about Davis's viewing of K.O. showering. Rather, as Davis's counsel alluded to in arguing the charge should be dismissed, Davis was "notorious" for watching K.O. shower. RP 222. Therefore, the State failed to prove the third element of the voyeurism charge.

Second, the State failed to prove element (4), that K.O. had a reasonable expectation of privacy when she showered.

RCW 9A.44.115(1) provides the following definition:

(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[.]

This definition was interpreted to mean that two conditions must be met for a "reasonable expectation of privacy" to exist. "F]irst, a person exhibits a subjective expectation of privacy, and second, that expectation is one that society is prepared to recognize as reasonable." State v. Glas, 106 Wn. App. 895, 903-04, 27 P.3d 216 (2001), reversed on other grounds, 147 Wn.2d 410, 54 P.3d 147 (2002). It cannot reasonably be disputed that privacy in the bathroom is recognized by society as reasonable. State v. Glas, 147 Wn.2d 410, 416, 54 P.3d 147 (2002); State v. Stevenson, 128 Wn. App. 179, 190, 114 P.3d 699 (2005).

The issue here then is whether K.O. exhibited "a subjective expectation of privacy" in the bathroom where she showered. She did not.

As K.O. acknowledged, it was a house rule that she not close the door to the bathroom when she showered. RP 142-43. And as previously noted, Davis watching K.O. shower was "just common" and "normal." RP 147, 174. In other words, K.O. could expect that "[j]ust about every time

[she] took a shower [Davis would] be standing in the hallway in the doorway . . . watching [her]." RP 144. K.O. did not have a subjective expectation of privacy when she showered because more often than not, Davis was there to watch here. Therefore the State failed to prove K.O. "was viewed in a place where she would have a reasonable expectation of privacy" and failed to prove the fourth element of the voyeurism charge. CP 55.

D. CONCLUSION

This Court should reverse and dismiss Davis's voyeurism conviction and remand for resentencing. Stanton, 68 Wn. App. at 867.

DATED this 24th day of August, 2010.

Respectfully Submitted,

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