

67904-0

67904-0

No. 67904-0-I

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

STATE OF WASHINGTON,

Respondent,

v.

RICHARD GORDON BURK,

Appellant.

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

APPELLANT'S REPLY BRIEF

MAUREEN M. CYR
Attorney for Appellant

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 701
Seattle, Washington 98101
(206) 587-2711

SEP 7 11 44 AM '09
STATE OF WASHINGTON
COURT OF APPEALS
DIVISION ONE

TABLE OF CONTENTS

A. SUPPLEMENTAL ASSIGNMENTS OF ERROR..... 1

B. ARGUMENT IN REPLY..... 2

THE STATE DID NOT PROVE BEYOND A REASONABLE
DOUBT THAT MR. BURK ACTUALLY TOOK A
PHOTOGRAPH UNDER THE SKIRT OF THE YOUNG
WOMAN IN CLAIRE’S BOUTIQUE..... 2

C. CONCLUSION..... 5

A. SUPPLEMENTAL ASSIGNMENTS OF ERROR¹

1. In the absence of substantial evidence, the court erred in finding “Claire’s Boutique Assistant Manage Isaiah Lee, observed Defendant inside his store taking photographs up the skirts of unsuspecting females.” CP 89.

2. In the absence of substantial evidence, the court erred in finding “Sergeant Johnson viewed a few images on the camera, the majority of which were of female shoppers from behind. Sergeant Johnson located on [sic] image that appeared to be up the skirt of a female shopper.” CP 92.

3. In the absence of substantial evidence, the court erred in finding:

Even though the females were never identified and therefore did not provide statements affirmatively establishing their lack of knowledge and consent to being photographs [sic], there is sufficient circumstantial evidence to establish this element. Based on the number of photographs taken of women from behind, as well as Defendant’s reaction upon being confronted about his behavior – his flight from the store, through the mall, and out in to the parking lot, and further, attempting to discard the camera, jacket, and camera batteries all constitute circumstantial evidence that the females

¹ The court entered written findings of fact and conclusions of law on May 29, 2012, after the opening brief was filed. The supplemental assignments of error pertain to the court’s written findings and conclusions and do not raise any new issues not already raised in the opening brief.

photographed were unaware of Defendant's actions and further, did not consent to being photographed.

CP 92.

4. The court erred in concluding the State proved beyond a reasonable doubt and that Mr. Burk committed the crime of voyeurism on April 23, 2011. CP 93.

B. ARGUMENT IN REPLY

THE STATE DID NOT PROVE BEYOND A REASONABLE DOUBT THAT MR. BURK ACTUALLY TOOK A PHOTOGRAPH UNDER THE SKIRT OF THE YOUNG WOMAN IN CLAIRE'S BOUTIQUE

As stated in the opening brief, according to the way the State pled and prosecuted the charge in this case, the State was required to prove beyond a reasonable doubt that Mr. Burk actually took a photograph up the skirt of the young woman in Claire's Boutique on April 23, 2011, without her knowledge and consent. The evidence is insufficient to prove these elements beyond a reasonable doubt.

The State contends the evidence is sufficient to show Mr. Burk actually took a photograph up the young woman's skirt in Claire's Boutique. SRB at 8-9. Similarly, the trial court found Mr. Burk actually took "photographs up the skirts of unsuspecting females" in

the store. CP 89. But the evidence does not support the State's argument or the court's finding.

As stated in the opening brief, the only evidence of what Mr. Burk actually did inside the store on that date came from the police statement of the manager, Isaiah Lee.² Mr. Lee did *not* tell police he saw Mr. Burk taking photographs up the young woman's skirt. Instead, he told police he saw Mr. Burk "go[] to the back of the store[,] kneel[] down and put a camera under a girl[']s skirt *like* he was taking a picture." CP 49 (emphasis added). There is no evidence that Mr. Burk *actually took* a photograph.

Similarly, Mr. Lee did *not* tell police he saw Mr. Burk taking photographs of any other person in the store. CP 49. Therefore, the evidence does not support the court's finding that Mr. Burk took "photographs up the skirts of unsuspecting *females*" in the store. CP 89 (emphasis added).

The State contends Mr. Burk's flight from the store shows consciousness of guilt and is therefore evidence that he actually took a photograph. But Mr. Burk's flight from the store is not sufficient to

² Mr. Lee did not testify.

prove beyond a reasonable doubt that he *actually took* a photograph, even if it tends to show that he *attempted* to take a photograph.

The State contends the evidence is sufficient to show Mr. Burk actually took the up-skirt photographs stored on the camera because he was seen discarding the camera and acknowledged some awareness of its contents. SRB at 8-9. But even if the evidence is sufficient to show Mr. Burk possessed the camera and was aware of its contents, it is not sufficient to show he actually took the photographs stored on it.

More important, even if the evidence is sufficient to show Mr. Burk actually took the photographs stored on the camera, it is not sufficient to prove beyond a reasonable doubt that he *actually took* a photograph of the young woman in Claire's Boutique. There is no evidence that any of the photographs contained on the camera were of that young woman. Contrary to the court's finding, there is no evidence that the photographs were even of "female shoppers." CP 92. Instead, the evidence affirmatively shows the women in the photographs could not be identified. There is no evidence that they were "female shoppers."³

³ Officer Johnson testified he could not discern any identifying characteristics of the woman in the first photograph, which was not an up-skirt shot. He could not tell what she was wearing; he could not tell her race, height or weight. 9/27/11RP 55-56. Similarly, Officer

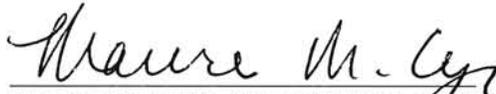
Finally, the State contends the evidence is sufficient to show the photographs on the camera were taken without the consent of the women in the photographs. But even if that is so, the evidence is not sufficient to show Mr. Burk actually took those photographs, or that any of those photographs were of the woman in Claire's Boutique.

In sum, the evidence is insufficient, even when viewed in the light most favorable to the State, to show beyond a reasonable doubt that Mr. Burk actually committed the felony crime of voyeurism in Claire's Boutique on April 23, 2011. Therefore, the evidence is insufficient to prove the elements of the crime as pled and prosecuted.

C. CONCLUSION

Because the evidence is insufficient to prove the elements of the crime beyond a reasonable doubt, the conviction must be reversed and the charge dismissed.

Respectfully submitted this 7th day of September, 2012.


MAUREEN M. CYR (WSBA 28724)
Washington Appellate Project - 91052
Attorneys for Appellant

Johnson could not tell the race of the woman in the only up-skirt shot he viewed; he could not tell where the photograph was taken or even whether it was taken in the mall. 9/27/11RP 66. Finally, Detective Stock, who searched the camera, testified "[t]here was no way to identify who the people in the camera were." 9/28/11RP 234.

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

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	NO. 67904-0-I
v.)	
)	
RICHARD BURK,)	
)	
Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ANA ARRANZA RILEY, STATE THAT ON THE 7TH DAY OF SEPTEMBER, 2012, I CAUSED THE ORIGINAL **REPLY BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS - DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

[X] KING COUNTY PROSECUTOR'S OFFICE APPELLATE UNIT 516 THIRD AVENUE, W-554 SEATTLE, WA 98104	(X) () ()	U.S. MAIL HAND DELIVERY _____
[X] RICHARD BURK 2500 ALDER ST. #25 MILTON, WA 98354-8608	(X) () ()	U.S. MAIL HAND DELIVERY _____

SIGNED IN SEATTLE, WASHINGTON THIS 7TH DAY OF SEPTEMBER, 2012.

X _____ 

2012 SEP 7 PM 4:49
STANDARD

Washington Appellate Project
701 Melbourne Tower
1511 Third Avenue
Seattle, WA 98101
Phone (206) 587-2711
Fax (206) 587-2710