No. 34158-1-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Gary Boyd,

Appellant.

Clallam County Superior Court

Cause No. 04-1-00169-1

The Honorable Judge Kenneth Williams

Appellant's Opening Brief

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ASSIGNMENTS OF ERROR

1. Mr. Boyd was denied his constitutional right to a unanimous jury.

2. The trial court erred by failing to give a unanimity instruction.

3. The trial court erred by instructing the jury with an erroneous definition of knowledge.

4. The trial court erred by giving Instruction No. 10, which reads as follows:

> A person knows or acts knowingly or with knowledge when he is aware of a fact, facts, or circumstances or result which is described by law as being a crime, whether or not the person is aware that the fact, circumstance or result is a crime.
>
> If a person has information which would lead a reasonable person in the same situation to believe that facts exist which are described by law as being a crime, the jury is permitted but not required to find that he or she acted with knowledge.
>
> Acting knowingly or with knowledge also is established if a person acts intentionally.
>
> Supp. CP, Instruction 10.

5. The court's "knowledge" instruction contained an improper mandatory presumption.

6. The court's "knowledge" instruction impermissibly relieved the state of its burden of establishing an element of the offense by proof beyond a reasonable doubt.

7. Mr. Boyd was denied the effective assistance of counsel when his attorney failed to object to the improper "knowledge" instruction.

8. The trial court erred by giving Instruction No. 9, which reads as follows:

> "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.
> Supp. CP, Instruction 9.

9. Mr. Boyd was convicted under a statute that is unconstitutionally vague.

10. Mr. Boyd was convicted under a statute that is unconstitutionally overbroad.

11. The trial court erred by failing to include an instruction limiting the definition of "intimate areas" to its constitutional boundaries.

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

Gary Boyd was charged with one count of voyeurism and five counts of attempted voyeurism. At trial, the prosecution offered two photographs to prove the completed crime charged in Count I. The state's evidence outlined five additional incidents to establish the offense charged in Counts II-VI. The Court dismissed Count IV prior to closing arguments, but did not tell the jury which incident that count related to.

The court did not give a unanimity instruction, and the state did not elect one photograph as the basis for Count I. Nor did the prosecutor indicate which incident related to each count of the remaining charges. The jury returned a general verdict finding Mr. Boyd guilty of Count I and Count VI.

1. Did the absence of a unanimity instruction violate Mr. Boyd's constitutional right to a unanimous verdict? Assignments of Error Nos. 1, 2, 3.

2. Did the prosecution's failure to elect which photograph corresponded to the offense charged in Count I violate Mr. Boyd's constitutional right to a unanimous verdict? Assignments of Error Nos. 1, 2, 3.

3. Did the prosecution's failure to elect which incident corresponded to the offenses charged in Counts II, III, V, and VI violate Mr. Boyd's constitutional right to a unanimous verdict? Assignments of Error Nos. 1, 2, 3.

The court's "knowledge" instruction inappropriately included a mandatory presumption, requiring the jury to find knowledge if Mr. Boyd acted intentionally (without explaining what kind of intentional act could give rise to the presumption). The instruction also misstated the law, defining knowledge to mean awareness "of a fact, circumstance or result which is described by law as being a crime." Defense counsel did not object to the erroneous instruction.

4. Using a *de novo* standard of review, did the trial court's "knowledge" instruction create an impermissible mandatory presumption? Assignments of Error Nos. 4, 5, 6.

5. Using a *de novo* standard of review, did the trial court's "knowledge" instruction misstate the law and mislead the jury? Assignments of Error Nos. 4, 5, 6.

6. Using a *de novo* standard of review, was Mr. Boyd denied the effective assistance of counsel by his lawyer's failure to object to the erroneous "knowledge" instruction? Assignments of Error Nos.4, 5, 6, 7.

In Count I, Mr. Boyd was charged with knowingly photographing the "intimate areas" of another, without her knowledge and consent and under circumstances where she had a reasonable expectation of privacy, for the purpose of arousing or gratifying sexual desire. In Counts II, III, V, and VI he was charged with attempting this crime.

Consistent with the statute, the trial court defined the phrase "intimate area" to include "any portion of a person's body or undergarments that is covered by clothing and intended to be protected from public view."

7. Does the definition of the phrase "intimate area" under the voyeurism statute depend on the subjective intent of the person viewed, photographed, or filmed? Assignments of Error Nos. 8, 9, 10, 11.

8. Is the voyeurism statute unconstitutionally vague because the definition of the phrase "intimate areas" is too subjective to allow ordinary people to understand what conduct is proscribed? Assignments of Error Nos. 8, 9, 10, 11.

9. Is the voyeurism statute unconstitutionally vague because the definition of the phrase "intimate areas" is too subjective to provide ascertainable standards of guilt to protect against arbitrary enforcement? Assignments of Error Nos. 8, 9, 10, 11.

10. Does the "intimate areas" prong of the voyeurism statute violate the due process clause of the Fourteenth Amendment? Assignments of Error Nos. 8, 9, 10, 11.

11. Is the "intimate areas" prong of the voyeurism statute unconstitutionally overbroad because it infringes a substantial amount of conduct protected by the First Amendment? Assignments of Error Nos. 8, 9, 10, 11.

12. Does the "intimate areas" prong of the voyeurism statute prohibit photography of the clothing covering a person's intimate areas, and thereby prohibit a substantial amount of protected conduct? Assignments of Error Nos. 8, 9, 10, 11.

13. Does the subjective definition of "intimate areas" criminalize a substantial amount of protected conduct? Assignments of Error Nos. 8, 9, 10, 11.

14. Must the "intimate areas" prong of the voyeurism statute be narrowly construed to bring it into conformity with the First Amendment? Assignments of Error Nos. 8, 9, 10, 11.

15. Did the trial court fail to instruct the jury with an instruction limiting the definition of "intimate areas" to its constitutional boundaries? Assignments of Error Nos. 8, 9, 10, 11.

STATEMENT OF FACTS AND PRIOR PROCEEDINGS

Gary Boyd was employed as a janitor at the Port Angeles High School in the spring of 2004. RP (5/24/05) 101. On April 26, 2004, students reported to the principal, Michelle Reid, that they believed he was trying to photograph under students' skirts. Ms. Reid told Mr. Boyd to come to speak with her. RP (5/23/05) 29-31. He turned over his camera, showed how it was used, and she viewed on its small screen several photos that appeared to be of students at the school. RP (5/24/05) 107-109. His home and office were searched, resulting in the seizure of a personal computer from his home. RP(5/24/05) 218-221.

Mr. Boyd was subsequently charged in Clallam County Superior Court with one count of voyeurism and five counts of attempted voyeurism under RCW 9A.44.115. CP 20-22. Counts II - VI of the Information, charging attempted voyeurism, read as follows:

.....

> COUNT II: ATTEMPTED VOYEURISM
>
> In the County of Clallam, State of Washington, on or about a time intervening between January 1, 2004, and April 26, 2004, the above mentioned Defendant, with intent to commit Voyeurism, to wit: for the purpose of arousing and gratifying the sexual desire of any 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; did do an act which was a substantial step towards the commission of that crime;

contrary to Revised Code of Washington 9A.28.020 and RCW 9A.44.115(2)(b), a Gross Misdemeanor;

Maximum Penalty One(1) year in jail or $5.000 fine, or both pursuant to RCW 66.28.250 and RCW 9.92.020, plus restitution, assessments and court costs.

COUNT III: ATTEMPTED VOYEURISM

In the County of Clallam, State of Washington, on or about a time intervening between January 1, 2004, and April 26, 2004, with intent to commit Voyeurism, to wit: for the purpose of arousing and gratifying the sexual desire of any person, knowingly viewing, photographing or filming the intimate areas of another person, to wit: J.G., 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; did do an act which was a substantial step towards the commission of that crime; contrary to Revised Code of Washington 9A.28.020 and RCW 9A.44.115(2)(b), a Gross Misdemeanor;

Maximum Penalty One(1) year in jail or $5.000 fine, or both pursuant to RCW 66.28.250 and RCW 9.92.020, plus restitution, assessments and court costs.

COUNT IV: ATTEMPTED VOYEURISM

In the County of Clallam, State of Washington, on or about a time intervening between January 1, 2004, and April 26, 2004, with intent to commit Voyeurism, to wit: for the purpose of arousing and gratifying the sexual desire of any person, knowingly viewing, photographing or filming the intimate areas of another person, to wit: S.R., 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; did do an act which was a substantial step towards the commission of that crime; contrary to Revised Code of Washington 9A.28.020 and RCW 9A.44.115(2)(b), a Gross Misdemeanor;

Maximum Penalty One(1) year in jail or $5.000 fine, or both pursuant to RCW 66.28.250 and RCW 9.92.020, plus restitution, assessments and court costs.

COUNT V: ATTEMPTED VOYEURISM

In the County of Clallam, State of Washington, on or about a time intervening between January 1, 2004, and April 26, 2004, with

intent to commit Voyeurism, to wit: for the purpose of arousing and gratifying the sexual desire of any person, knowingly viewing, photographing or filming the intimate areas of another person, to wit: S.S., 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; did do an act which was a substantial step towards the commission of that crime; contrary to Revised Code of Washington 9A.28.020 and RCW 9A.44.115(2)(b), a Gross Misdemeanor;

Maximum Penalty One(1) year in jail or $5,000 fine, or both pursuant to RCW 66.28.250 and RCW 9.92.020, plus restitution, assessments and court costs.

COUNT VI: ATTEMPTED VOYEURISM

In the County of Clallam, State of Washington, on or about April 26, 2004, with intent to commit Voyeurism, to wit: for the purpose of arousing and gratifying the sexual desire of any person, knowingly viewing, photographing or filming the intimate areas of another person, to wit: H.A., 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; did do an act which was a substantial step towards the commission of that crime; contrary to Revised Code of Washington 9A.28.020 and RCW 9A.44.115(2)(b), a Gross Misdemeanor;

Maximum Penalty One(1) year in jail or $5,000 fine, or both pursuant to RCW 66.28.250 and RCW 9.92.020, plus restitution, assessments and court costs...

CP 21-22.

The state submitted six photographs into evidence as exhibits 3-8. Supp. CP. The photos were enlarged printouts of what had been seen on the small screen of Mr. Boyd's camera; exhibits 7 and 8 were 8x10 photos. RP(5/23/05) 48; RP(5/24/05)98; Supp. CP 3-8. The court overruled the defendant's objection, and admitted these enlargements as evidence. RP (5/24/05) 262.

Count IV was dismissed by the court after the state rested. RP(5/25/05) 44. The court notified the jury that Count IV had been dismissed, but did not identify the incident to which Count IV related. RP (5/25/05) 59-97.

The court instructed to the jury on knowledge, without defense objection:

> A person knows or acts knowingly or with knowledge when he is aware of a fact, facts, or circumstances or result which is described by law as being a crime, whether or not the person is aware that the fact, circumstance or result is a crime.
>
> If a person has information which would lead a reasonable person in the same situation to believe that facts exist which are described by law as being a crime, the jury is permitted but not required to find that he or she acted with knowledge.
>
> Acting knowingly or with knowledge also is established if a person acts intentionally.
> Supp. CP, Instruction 10.

The court also defined the term "intimate areas" for the jury:

> "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.
> Supp. CP, Instruction 9.

The jury was given the following elements instruction on Counts II, III, V, and VI:

> To convict the Defendant of the crime of ATTEMPTED VOYEURISM as charged in Counts II, III, V and VI, each of the following elements of the crime must be proved beyond a reasonable doubt. Each count must involve a separate and discrete act.

1. That on or about a period of time between January 1, 2004, and April 26, 2004, the Defendant did an act which was a substantial step toward the commission of VOYEURISM;
2. That the act was done with the intent to commit VOYEURISM; and
3. That the acts occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all the evidence, you have a reasonable doubt as to any of these elements, then it will be your duty to return a verdict of not guilty.

Supp. CP., Court's Instruction No. 13.

He was found guilty by the jury of Count I (voyeurism) and Count VI (attempted voyeurism). CP 6. He was sentenced and this timely appeal followed. CP 6-19, 5.

ARGUMENT

I. THE TRIAL COURT'S FAILURE TO GIVE A *PETRICH* INSTRUCTION DENIED MR. BOYD HIS CONSTITUTIONAL RIGHT TO A UNANIMOUS JURY.

A defendant may be convicted only when a unanimous jury concludes that the criminal act charged in the information has been committed. *State v. King*, 75 Wn. App. 899 at 902, 878 P.2d 466 (1994), *review denied*, 125 Wn.2d 1021 (1995). Where the state charges one count of criminal conduct and presents evidence of more than one criminal act, there is a danger that a conviction may not be based on a unanimous jury

finding that the defendant committed any given single criminal act. *State v. Kitchen*, 110 Wn.2d 403 at 411, 756 P.2d 105 (1988).

In order to ensure jury unanimity, the state must elect a single act upon which it will rely for conviction, or the jury must be instructed that all must agree as to what act or acts were proved beyond a reasonable doubt. *State v. Petrich*, 101 Wn.2d 566 at 569, 683 P.2d 173 (1984); *State v. Brooks*, 77 Wn.App. 516 at 521, 892 P.2d 1099 (1995). Failure to follow *Petrich*'s protections is constitutional error that raises "the possibility that some jurors may have relied on one act or incident and some another, resulting in a lack of unanimity on all of the elements necessary for a valid conviction." *Kitchen* at 411. Because of this, the error can be raised for the first time on appeal, and is presumed prejudicial. *State v. Greathouse*, 113 Wn.App. 889 at 916, 56 P.3d 569 (2002); *Kitchen at* 411. The jury verdict will be overturned unless no rational juror could have a reasonable doubt as to any of the incidents alleged. *Kitchen, supra, at* 411.

In Count I of this case, Mr. Boyd was charged with voyeurism relating to Nicole Weinheimer. The state produced evidence of two separate photographs, enlargements of which were admitted as Exhibits 8 and 9. Supp CP. The court did not instruct the jury that it had to unanimously agree that one of these two photographs included an intimate

area; nor did the prosecutor elect one of the photographs. Under the court's instructions, some of the jurors may have concluded that Exhibit 8 was sufficient for a guilty verdict, while others believed that Exhibit 9 was sufficient. This violated Mr. Boyd's constitutional right to a unanimous verdict. *Kitchen, supra.*

The court did not instruct the jury that it had to unanimously agree on a particular incident to convict Mr. Boyd of the attempted voyeurism charge. As with Count I, some jurors may have picked one incident, while others focused on another. Again, this violated Mr. Boyd's constitutional right to a unanimous verdict. *Kitchen, supra.*

The failure to give a *Petrich* instruction was error and is presumed prejudicial. *Greathouse, supra.* Because of this, Mr. Boyd's convictions must be reversed and his case remanded to the Superior Court for a new trial. *Kitchen, supra.*

II. THE COURT'S "KNOWLEDGE" INSTRUCTION VIOLATED DUE PROCESS BECAUSE IT CREATED A MANDATORY PRESUMPTION, MISSTATED THE LAW, AND MISLED THE JURY REGARDING AN ESSENTIAL ELEMENT.

'Knowledge' is an element of voyeurism; to obtain a conviction, the prosecution must prove that the defendant knowingly photographed the intimate areas of another person. RCW 9A.44.115. Under RCW 9A.08.010(1)(b), "A person knows or acts knowingly or with knowledge

when (i) he is aware of a fact, facts, or circumstances or result described by a statute defining an offense; or (ii) he has information which would lead a reasonable man in the same situation to believe that facts exist which facts are described by a statute defining an offense."

Jury instructions, when taken as a whole, must properly inform the trier of fact of the applicable law. *State v. Douglas*, 128 Wn.App. 555 at 562, 116 P.3d 1012 (2005). An omission or misstatement of the law in a jury instruction that relieves the state of its burden to prove every element of the crime charged is erroneous and violates due process. *State v. Thomas*, 150 Wn.2d 821 at 844, 83 P.3d 970 (2004); *State v. Randhawa*, 133 Wn.2d 67 at 76, 941 P.2d 661 (1997). Jury instructions are reviewed *de novo*. *Joyce v. Dept. of Corrections*, 155 Wn.2d 306 at 323, 119 P.3d 825 (2005). A jury instruction which misstates an element of an offense is not harmless unless it can be shown beyond a reasonable doubt that the error did not contribute to the veraict. *State v. Brown*, 147 Wn.2d 330 at 341, 58 P.3d 889 (2002).

Furthermore, due process prohibits the use of conclusive presumptions in jury instructions. Such presumptions conflict with the presumption of innocence and invade the factfinding function of the jury. *State v. Savage*,94 Wn.2d 569 at 573, 618 P.2d 82 (1980), *citing Sandstrom v. Montana*, 442 U.S. 510, 99 S.Ct. 2450, 61 L.Ed.2d 39

(1979)) and *Morissette v. United States*, 342 U.S. 246, 72 S.Ct. 240, 96 L.Ed. 288 (1952).

Here, 'knowledge' was defined by Instruction No. 10 (based on WPIC 10.02), which included the following optional language (bracketed in WPIC 10.02): "Acting knowingly or with knowledge also is established if a person acts intentionally." Instruction No. 10, Supp. CP.[1]

Inappropriate use of the last sentence relieves the prosecution of its burden of establishing the knowledge element, and is reversible error. *State v. Goble*,131 Wn.App. 194, 126 P.3d 821 (2005). In *Goble*, the accused was charged with assaulting a person whom he knew to be a law enforcement officer.[2] The trial court's "knowledge" instruction was the same as that given in this case. The Court of Appeals reversed the conviction because the last sentence of the instruction could be read to mean that an intentional assault established Mr. Goble's knowledge, regardless of whether or not he actually knew the victim's status as a police officer. *Goble, at* 203.

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[1] The final sentence is bracketed in the WPIC because it is to be used only where applicable.

[2] Although not an element of the charged offense, knowledge was included in the "to convict" instruction and thus became an element under the law of the case in *Goble*. *Goble at* 201.

Here, as in *Goble*, the inclusion of the final sentence was erroneous; it allowed the jury to presume that Mr. Boyd knew he'd photographed an intimate area if he did any intentional act, but did not give any guidance as to what intentional act could trigger this mandatory presumption. Under the instruction as given, the jury could attribute to Mr. Boyd knowledge that he'd photographed an intimate area if he intentionally took a photograph, intentionally followed a person, or intentionally walked from point A to point B.

The instruction was also confusing and misleading; the court told the jury that a person "acts knowingly" when he "is aware of a fact, circumstance or result described by law as being a crime…" This language differed from the statutory language of RCW 9A.08.010(1)(b); under Instruction No. 10, the information at issue—the "fact, circumstances or result"—must itself be described by law as a crime. This is nonsensical. *See* RCW 9A.08.010 (which requires that the fact be described by a criminal statute, not that the fact itself be described as a crime). The *Goble* court criticized WPIC 10.02 on this basis as well. *See Goble at* 203 ("We agree that the instruction is confusing.")

The end result was that the jury was unable to determine what was meant by the knowledge element of Instructions 7 and 8. The instruction defining knowledge created a conclusive presumption and violated due

process. *Goble, supra; Savage, supra.* Because of this, the conviction must be reversed and the case remanded for a new trial. *Goble, supra.*

III. DEFENSE COUNSEL WAS INEFFECTIVE FOR FAILING TO OBJECT TO THE COURT'S "KNOWLEDGE" INSTRUCTION.

The Sixth Amendment to the United States Constitution guarantees that "In all criminal prosecutions, the accused shall enjoy the Right... to have the Assistance of Counsel for his defense." U.S. Const. Amend. VI. Similarly, Article I, Section 22 of the Washington State Constitution declares that "In criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel..." Wash. Const. Article I, Section 22. The right to counsel is the right to the effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 686, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984) (quoting *McMann v. Richardson*, 397 U.S. 759 at 771 n. 14, 90 S.Ct. 1441, 25 L.Ed.2d 763 (1970)).

Defense counsel must employ "such skill and knowledge as will render the trial a reliable adversarial testing process." *State v. Lopez*, 107 Wn.App. 270 at 275, 27 P.3d 237 (2001). Counsel's performance is evaluated against the entire record. *Lopez, at* 275.

The test for ineffective assistance of counsel consists of two prongs: (1) whether defense counsel's performance was deficient, and (2) whether this deficiency prejudiced the defendant. *State v. Holm*, 91

Wn.App. 429, 957 P.2d 1278 (1998), *citing Strickland, supra*. The defendant must show a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. *Holm, supra*, at 1281. Finally, a reviewing court is not required to address both prongs of the test if the defendant makes an insufficient showing on either prong.

To establish deficient performance, a defendant must demonstrate that counsel's representation fell below an objective standard of reasonableness based on consideration of all the circumstances. *State v. Bradley*, 141 Wn.2d 731, 10 P.3d 358 (2000). To prevail on the prejudice prong of the test for ineffective assistance of counsel, an appellant must show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different." *State v. Saunders*, 91 Wn.App. 575 at 578, 958 P.2d 364 (1998). A reasonable probability is a probability sufficient to undermine confidence in the outcome. *In re Fleming*, 142 Wn.2d 853 at 866, 16 P.3d 610 (2001). A claim of ineffective assistance is reviewed *de novo*. *State v. S.M.*, 100 Wn.App. 401 at 409, 996 P.2d 1111 (2000).

Here, 'knowledge' was an essential element of the crime charged. Despite this, Mr. Boyd's attorney failed to object to the court's "knowledge" instruction, which was a distortion of the statutory definition

found in RCW 9A.08.010(1)(b). RP(5/24/05) 263-285; RP(5/25/05) 54-58. This failure to object was deficient performance; a reasonably competent attorney would have been familiar with the statute, and would have known that the language of the instruction differed from the language of the statute. *See, e.g., State v. Thomas*, 109 Wn.2d 222 at 229, 743 P.2d 816 (1987) ("[a] reasonably competent attorney would have been sufficiently aware of relevant legal principles to enable him or her to propose an [appropriate] instruction.")

Mr. Boyd was prejudiced by the error. The "knowledge" instruction was confusing and misleading, and it misstated the law. As a result, the jury would not have been able to properly interpret the "to convict" instructions. Defense counsel's failure to object to the improper "knowledge" instruction denied Mr. Boyd the effective assistance of counsel. *Strickland.* The conviction must be reversed, and the case remanded for a new trial.

IV. THE "INTIMATE AREAS" PRONG OF THE VOYEURISM STATUTE IS UNCONSTITUTIONAL.

Under RCW 9A.44.115(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...[t]he 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.

Under the statute, the phrase "intimate areas" includes "any portion of a person's body or undergarments that is covered by clothing and intended to be protected from public view..." RCW 9A.44.115(1)(a).

This portion of the statute is unconstitutional because it is both vague and overbroad.

A. The "intimate areas" prong of the voyeurism statute is unconstitutionally vague under the due process clause because the definition of "intimate areas" explicitly incorporates a personal standard, subjective to the person being photographed, filmed, or viewed.

Under the due process clause of the Fourteenth Amendment, a criminal statute is unconstitutionally vague if it fails to define an offense with sufficient definiteness that ordinary people can understand what conduct is proscribed, or if it fails to provide ascertainable standards of guilt to protect against arbitrary enforcement. *State v. Williams,* 144 Wn.2d 197 at 203-204, 26 P.3d 890 (2001), *citing City of Bellevue v. Lorang*, 140 Wn.2d 19 at 30, 992 P.2d 496 (2000). A statute is void for vagueness if it is framed in terms so vague that persons of common intelligence must necessarily guess at its meaning and differ as to its applicability. *Williams, supra, at* 204.

The purpose of the vagueness doctrine is to provide citizens with fair warning of what conduct they must avoid; and second, to protect them from arbitrary, ad hoc, or discriminatory law enforcement. *Williams, supra, at* 203-204. A statute is unconstitutionally vague if either requirement is not satisfied. *Williams, supra, at* 203-204. Special caution is applied in examining statutes that implicate First Amendment interests. *Lorang*, at 31. A criminal statute is unconstitutionally vague when it is overly subjective, allowing officers, judges, and juries to decide what conduct the statute proscribes and what conduct will be in compliance with the statute. *Lorang, supra*, at 31.

As noted above, what constitutes an "intimate area" under RCW 9A.44.115(1)(a) depends on the subjective intent of the person being viewed, photographed, or filmed. Specifically, an area of the body or underclothing is an intimate area under the statute only if the person being viewed covers that area with the intent to protect it from public view. This standard explicitly incorporates a subjective standard that changes from person to person.

For example, a muslim woman (observing purdah) who covers herself with a full burqa may intend to protect her entire body and to conceal her form. A non-muslim woman attending a Halloween party might wear the same outfit without caring that parts of her body are visible

to prying eyes. Similarly, a high school girl who wears a short skirt may intend to protect her underclothing from view, but a prostitute wearing the same short skirt may hope to attract customers by providing tantalizing glimpses of her underclothing.

Because the statute explicitly incorporates a subjective standard into the definition of "intimate areas," it is unconstitutionally vague. There is no objective test for determining what conduct is prescribed and what conduct is permitted; instead, citizens are left to guess whether their actions will offend the sensibilities of individuals whom they view, photograph, or film in public places. Like the statute in *Williams, supra,* which criminalized threats to "mental health," the "intimate areas" prong of the voyeurism statute cannot withstand constitutional scrutiny, and must be severed from the remainder of the statute. *Williams, supra, at* 212. Since Mr. Boyd's conviction rested on the "intimate areas" prong, it must be reversed, and the case dismissed with prejudice.

B. The "intimate areas" prong of the voyeurism statute is unconstitutionally overbroad because it prohibits constitutionally protected free speech activities.

The First Amendment to the U.S. Constitution provides that

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people

> peaceably to assemble, and to petition the Government for a redress of grievances.
> U.S. Const. Amend. I.

This provision is applicable to the states through the action of the Fourteenth Amendment. U.S. Const. Amend. XIV; *Adams v. Hinkle*, 51 Wn.2d 763 at 768, 322 P.2d 844 (1958) (collecting cases). Washington's Constitution affords a similar protection in Article I, Section 5:

> Every person may freely speak, write and publish on all subjects, being responsible for the abuse of that right.
> Wash. Const. Article I, Section 5.

Photographs-- even photographs that appear to depict child pornography-- are protected speech under the First Amendment. *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 122 S. Ct. 1389, 152 L. Ed. 2d 403 (2002).

A statute is unconstitutionally overbroad if its prohibitions extend beyond proper bounds and violate the constitutional protection of free speech. *Lorang, supra, at* 26. Overbreadth challenges are facial; it is irrelevant that the defendant's own conduct may not be protected. *Lorang, supra,* at 26. A statute which reaches a "substantial" amount of protected conduct is unconstitutionally overbroad, unless the conduct is "likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest." *Lorang, supra,* at 27, *citations omitted.* Where possible, an overbroad statute should be

narrowly construed to bring it in line with the constitution. *State v. Johnston*, 156 Wn.2d 355 at 363, 127 P.3d 707 (2006).

Without a limiting construction, the "intimate areas" prong of RCW 9A.44.115 is unconstitutionally overbroad because it criminalizes a substantial amount of protected speech. First, the statute appears to criminalize photographing, filming, or viewing the *exterior* of the clothing. As noted above, RCW 9A.44.115 prohibits (in relevant part) viewing, photographing, or filming "any portion of a person's body... that is covered by clothing and intended to be protected from public view..." When interpreted broadly, the statute appears to prohibit viewing, photographing, or filming the breasts, buttocks, or genital area even when covered with clothing. In other words, any viewing, photography, or filming of a person in a public place would be criminalized, assuming the other elements of the statute can be established. Because such activity is clearly protected by the First Amendment, a limiting construction must be imposed, prohibiting only viewing, photography, or filming of the skin or underclothing covered by exterior clothing. *Johnston, supra.*

Even where a limiting instruction can save a statute, the defendant's conviction must be reversed unless the court properly instructed the jury in accordance with the limiting construction of the statute. *Johnston*, at 364. In this case, the court did not provide any

instructions limiting the reach of the statute. Without such an instruction, the jury may have convicted Mr. Boyd based on his photography of the *exterior* of the girls' clothing. Accordingly, the conviction must be reversed, and the case remanded with a new trial. On remand, the trial court's instructions must make clear that conviction is appropriate only if Mr. Boyd viewed, photographed, or filmed the "intimate areas" beneath the girls' clothing.

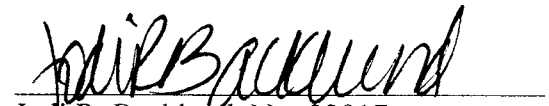
A second overbreadth problem arises from the subjective standard contained in the definition of "intimate areas." As noted above, whether a particular area is "intimate" depends on the subjective intent of the person viewed, photographed, or filmed. A sensitive and private person may object to having her or his face photographed, wearing a hat to avoid prying eyes and lenses. That person's particular sensitivities may bring their face within the definition of "intimate areas," but the First Amendment would nonetheless protect public photography of the face. There is no limiting construction which can save the statute from this overbreadth problem. Accordingly, the "intimate areas" prong must be severed from the remainder of the statute, Mr. Boyd's conviction must be reversed, and the case must be dismissed. *Williams, supra.*

CONCLUSION

For the foregoing reasons, the conviction must be reversed and the case dismissed. In the alternative, the case must be remanded to the trial court for a new trial.

Respectfully submitted on June 26, 2006.

BACKLUND AND MISTRY



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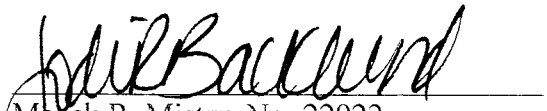

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CERTIFICATE OF MAILING

I certify that I mailed a copy of Appellant's Opening Brief to:

Mr. Gary Boyd
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and to:

Ms. Jill Landes
Clallam County Prosecutors Office
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And that I sent the original and one copy to the Court of Appeals, Division II, for filing;

All postage prepaid, on June 26, 2006.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on June 26, 2006.

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