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COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON

No. 34158-1-II

BY CM
DEPUTY

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 Reply Brief

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TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

ARGUMENT..... 1

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

 II. **The “knowledge” instruction contained an improper
 mandatory presumption.**..... 1

 III. **Mr. Boyd was denied the effective assistance of counsel.
 ** 2

 IV. **The Supreme Court has never addressed the
 constitutionality of the “intimate areas” prong of the
 voyeurism statute.** 3

CONCLUSION 5

TABLE OF AUTHORITIES

WASHINGTON CASES

State v. Brown, 147 Wn.2d 330, 58 P.3d 889 (2002) 2

State v. Deal, 128 Wn.2d 693, 911 P.2d 996 (1996) 1

State v. Glas, 147 Wn.2d 410, 54 P.3d 147 (2002)..... 3, 4

State v. Goble, 131 Wn.App. 194, 126 P.3d 821 (2005) 2

State v. Lefaber, 128 Wn.2d 896, 913 P.2d 369 (1996)..... 1

STATUTES

Former RCW 9A.44.115 4

ARGUMENT

I. MR. BOYD WAS DENIED HIS CONSTITUTIONAL RIGHT TO A UNANIMOUS JURY.

Mr. Boyd stands on the argument made in his opening brief.

II. THE “KNOWLEDGE” INSTRUCTION CONTAINED AN IMPROPER MANDATORY PRESUMPTION.

Respondent argues that the mandatory presumption “did not relieve the State of its burden.” Brief of Respondent, p. 3. Without citation to the record or to any authority, Respondent asserts that “[t]he reference to acting intentionally refers to the upskirt shot of Ms. Weinheimer and necessarily incorporates doing that act knowingly.” Brief of Respondent, p. 3.

This argument is erroneous for two reasons. First, the Supreme Court has disallowed the use of mandatory presumptions, regardless of how reasonable they might seem. *State v. Deal*, 128 Wn.2d 693, 911 P.2d 996 (1996). Second, the instructions provide no guidance as to what intentional act gives rise to the mandatory presumption. As the Supreme Court has noted:

The standard for clarity in a jury instruction is higher than for a statute; while we have been able to resolve [ambiguous wording] via statutory construction, a jury lacks such interpretive tools and thus requires a manifestly clear instruction.
State v. Lefaber, 128 Wn.2d 896 at 902, 913 P.2d 369 (1996).

The instruction here was not manifestly clear. The language of Instruction No. 10 directed the jury to conclusively presume that Mr. Boyd acted knowingly if he committed any intentional act. None of the instructions guided the jury as to what intentional act could trigger the mandatory presumption, and nothing limited the jury's consideration to an intentional "upskirt shot," as Respondent suggests. Accordingly, the prosecution was relieved of establishing knowledge by proof beyond a reasonable doubt.

Respondent has not attempted to argue that the error was harmless beyond a reasonable doubt, as required under *State v. Brown*, 147 Wn.2d 330 at 341, 58 P.3d 889 (2002). Therefore, the conviction must be reversed and the case remanded for a new trial. *State v. Goble*, 131 Wn.App. 194, 126 P.3d 821 (2005).

III. MR. BOYD WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL.

Mr. Boyd's ineffectiveness claim turns on the court's resolution of the issue relating to the knowledge instruction. Accordingly, Mr. Boyd rests on his opening brief and the additional argument submitted on that question.

IV. THE SUPREME COURT HAS NEVER ADDRESSED THE CONSTITUTIONALITY OF THE “INTIMATE AREAS” PRONG OF THE VOYEURISM STATUTE.

Relying on *State v. Glas*, 147 Wn.2d 410, 54 P.3d 147 (2002),

Respondent suggests that overbreadth and vagueness challenges to the “intimate areas” prong of the current statute are controlled by the Supreme Court’s analysis of the former statute. Brief of Respondent, p. 4-5. This is completely incorrect.

The former statute, which the Supreme Court analyzed in *Glas*, did not contain any reference to a person’s “intimate areas.” The former statute read as follows:

- (1) As used in this section:
 - (a) "Photographs" or "films" means the making of a photograph, motion picture film, videotape, or any other recording or transmission of the image of a person;
 - (b) "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;
 - (c) "Surveillance" means secret observation of the activities of another person for the purpose of spying upon and invading the privacy of the person;
 - (d) "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 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.
- (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.
Former RCW 9A.44.115.

The former statute did not have any reference to a person's "intimate areas," did not define the phrase "intimate areas," and did not criminalize any activity relating to "intimate areas." Because of this, the Supreme Court in *Glas* did not have the opportunity to address the challenges to the "intimate areas" prong brought by Mr. Boyd. The Supreme Court's overbreadth and vagueness analysis in *Glas* were directed to other aspects of the former statute. *See Glas*, at 418-424.

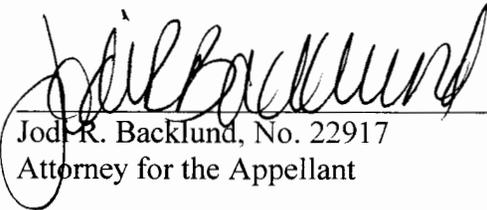
Because *Glas* does not apply to the challenge brought by Mr. Boyd, and because the Respondent has provided no other authority for upholding the statute, Mr. Boyd's arguments must prevail. Accordingly, the convictions must be reversed and the case dismissed.

CONCLUSION

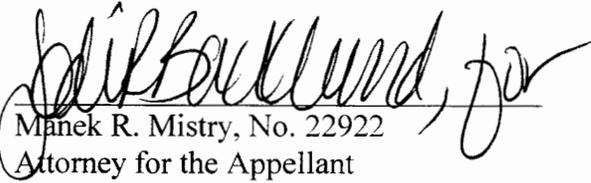
For the foregoing reasons, the conviction must be reversed and the case dismissed. In the alternative, the case must be remanded to the trial court for a new trial.

Respectfully submitted on October 4, 2006.

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CERTIFY

CERTIFICATE OF MAILING

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

Mr. Gary Boyd
40 Sandstone Place
Port Angeles, WA 98362

and to:

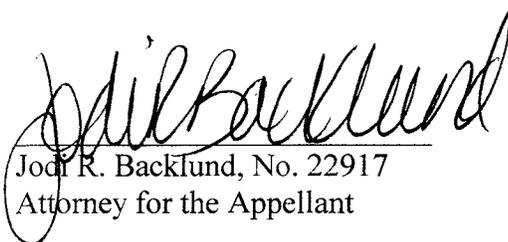
Ms. Jill Landes
Clallam County Prosecutors Office
223 East 4th Street, Suite 11
Port Angeles, WA 98362

And that I sent the original and one copy to the Court of Appeals, Division II, for filing;

All postage prepaid, on October 4, 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 October 4, 2006.



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Attorney for the Appellant