

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

NO. 35523-0-II

STATE OF WASHINGTON

Respondent,

vs.

REX EDSON WHIPPLE

Appellant.

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STATE OF WASHINGTON
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DEPUTY
Court of Appeals
Superior Court

ON APPEAL FROM THE SUPERIOR COURT
OF THE STATE OF WASHINGTON
FOR JEFFERSON COUNTY
Cause Number: 06-1-00049-3

BRIEF OF RESPONDENT

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Date: September 18, 2007

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I. COUNTER ASSIGNMENTS OF ERROR

1. The trial judge did not err in finding the defendant, Rex Whipple, guilty of nine counts of Possessing Depictions of a Minor Engaged in Sexually Explicit Conduct as there was sufficient evidence to support the conviction on all counts.

II. QUESTIONS PRESENTED

1. If a parent knowingly possesses video clips prominently displaying the unclothed breasts, buttocks, and pubic area of his 15 year old stepdaughter, which clips originated by someone who both surreptitiously and with the purpose of sexual stimulation filmed her through her bedroom window as she was dressing and undressing, may that parent escape criminal liability by asserting that the RCW 9.68.011A(3)(e) statutory definition of sexually explicit conduct requires that the state prove that someone acting with the purpose of sexual stimulation of the viewer have some direct involvement with the minor by initiating, contributing to, or otherwise influencing her actual dressing and undressing?

III. STATEMENT OF THE CASE

On October 2, 3, 4, 5, 11, and 13, 2006, the defendant, Rex Whipple was tried in a bench trial on one count of Sexual Exploitation (RCW 9.68A.040) and eleven counts of Possession of Visual or Printed Matter Depicting a Minor Engaged in Sexually Explicit Conduct (RCW 9.68A.070). CP 3-6.

The key evidentiary facts brought forth in the state's case consisted of the following:

Mr. Whipple, the Principal of Chimacum High School, visited his son and daughter in law in March, 2006, at their home in Arizona.. He brought along his school issued Apple G-4 Powerbook laptop computer. While there his daughter in law, Shauna Whipple, accessed this computer and found multiple clips (both still shots and short videos) of Mr. Whipple's 15 year old stepdaughter "Lizzie" (hereinafter E.J.E.) in various stages of undress to include being fully unclothed. Shauna clicked on 20 to 30 of the 50 or so she encountered in initially scrolling down the pages. It appeared to her that some of the short videos had been edited to include just the act of undressing. It appeared to her that Lizzie had been photographed without her knowledge while she was in her bedroom facing an outside window. She could also see the "history" of these clips and some had been accessed three or four times a day. These histories began

October 5th and went all the way up to March 10th, 2006, the day she accessed the laptop. Shauna called Mr. Whipple's wife, Suzanne, and told her what she had found. RP at I-27-73.

Suzanne Whipple confronted her husband about the clips when he called home while still in Arizona. Mr. Whipple acted stunned and told her he was pulling his car over to look for the file. He called back in a few minutes and confirmed it was there. He told her that the clips showed full frontal nudity of her daughter and that they had probably been taken early in the morning from outside her bedroom window while it was still dark outside. Suzanne testified that he decided to come home to Washington. Suzanne called the police and got a protection order against him. Suzanne described his silver Macintosh laptop. She also described the screen-saver on it which was a picture from Hawaii taken on their honeymoon that featured a palm tree and setting sun. She described Mr. Whipple's habit of going out for walks early in the morning during the October 2005-March 2006 time period at about the same time E.J.E. was getting dressed in her bedroom. I-99-133.

Det. Joe Nole of the Jefferson County Sheriff's Office described how Mr. Whipple had left a message on Saturday, March 11, 2006, saying he wanted to meet sometime that weekend.. The two had worked together on school projects in the past. Det. Nole then called Mr. Whipple who said

he was in Seattle and was getting a hotel room for the night. They arranged to meet at noon the following day. When Mr. Whipple failed to show Det. Nole reached him by phone. Mr. Whipple said he was going to the hospital and would not be able to meet. When asked about the laptop he told Det. Nole "I know this is going to sound bad but I lost it." RP I-74-80. The laptop was never recovered.

Det. Nole obtained search warrants and was able to obtain copies of the clips in question from back up tapes on the Chimacum School Server. The school district had an automatic back up system in place that automatically saved various files from Mr. Whipple's laptop. These copies were placed on four DVD's and were admitted into evidence. RP II-55. Chris Martin, the Chimacum school computer maintenance employee, described Mr. Whipple's Apple G-4 powerbook laptop and the process of the automatic back up. He explained how these backup copies show the dates the original clips were imported into the laptop. He described how one clip of adult porn that was also found on the backup tape copies appeared to have been originally created by someone filming the porn while it was being viewed on a G-4 laptop with its screen-saver still partially visible. This screen-saver appeared similar to the one on Mr. Whipple's G-4. In addition, the adult porn clips also found on the back-up copies contained the same "letter box" editing format as those clips

featuring E.J.E. RP-II-42-67.

The state's forensic computer analyst, Mr. Soren Poulsen prepared a report reflecting his analysis of the clips featuring E.J.E. found on the back up tape copies. This report indicated the dates each clip was originally copied onto Mr. Whipple's lap top hard drive. RP-II-123-133. Det. Nole also went through a copy of the back up tapes and, using a calendar, prepared a written summary of the dates and times each E.J.E. clip had been initially placed onto Mr. Whipple's laptop. RP-III-41-46.

At the conclusion of the state's case the defense moved to dismiss all counts for insufficiency. The court granted the motion as to the count alleging sexual exploitation but denied the motion as to the remaining counts of possession of visual material depicting a minor engaged in sexually explicit conduct. RP-III-50-75.

The defendant, Rex Whipple, testified in his own behalf and denied knowing possession. The defense also introduced evidence that a disgruntled neighbor and colleague had both motive and opportunity to download the images onto Mr. Whipple's computer. The defense also presented it's own forensic computer expert who described how it was possible to manipulate the dates on the back-up copies which the state was relying on to show when the clips were originally placed onto the defendant's laptop.

After argument the trial judge recessed for two days in order to carefully consider his notes and the evidence. RP-V-50. On October 13, 2006, he announced his findings and gave a detailed explanation of his basis for finding Mr. Whipple guilty on nine of the ten charged counts of Possessing Depictions of a Minor Engaged in Sexually Explicit Conduct, a violation RCW 9.68A.070. (A class C felony at the time). RP V-51-69.

IV. ARGUMENT

In his brief the defendant correctly cites the standard of review in sufficiency challenges and sets forth the relevant portion of the statutory definition of sexually explicit conduct at issue in this case – RCW 9.68A.011(3)(e). Appellant’s brief at 7. At trial the defense presented its case by denying culpability both on the facts as well as on the legal issue presented in this appeal. See defendant’s trial arguments at RP-III-50-61, and RP-V-24-45. Here the defendant forthrightly focuses his appeal solely on the latter – the legal issue of whether surreptitious filming of a minor can ever result in images showing “sexually explicit conduct” as defined in RCW 9.68A.011(3)(e).

RCW 9.68A.011(3)(e) defines sexually explicit conduct as including an “exhibition of the genitals or unclothed pubic or rectal areas of any minor, or the unclothed breast of a female minor, for the purpose of sexual stimulation of the viewer.” The trial judge easily found that the clips in question were visual matter meeting this definition. He based that on their unambiguous content, their number, and the fact that they originated from surreptitious filming by someone with the clear purpose of sexual stimulation. RP-V-54. Defendant’s argument is that, despite all this, the law as set forth in State v. Grannis, 84 Wn. App. 546 (1997), *review denied* by 133 Wn. 2d 1018 (1997) requires the state to prove that

someone with the purpose of sexually stimulating the viewer had to have direct involvement in E.J.E's dressing and undressing as she was being filmed. If no such involvement occurred the defendant argues that the minor's conduct was without purpose and cannot, as a matter of law, meet the RCW 9.68A(3)(e) statutory definition of sexually explicit conduct.

Grannis involved a defendant charged and convicted of, *inter alia*, possessing visual matter depicting a minor engaged in sexually explicit conduct. The evidence consisted of a video tape showing one scene of minor girls on a playground followed by a scene of one minor girl taking a bath. In the playground scene the camera focuses on the clothed genitalia and buttocks, and on one girl's breast area as she bends over. In the second scene the camera focuses on the girl taking a bath showing her unclothed breasts and pubic area. There was no evidence that any adult had initiated, contributed to, or otherwise influenced the conduct of the girls. In evaluating the sufficiency of the evidence Judge Morgan analyzed RCW 9.68A.011(3)(e), the statutory definition of sexually explicit conduct relevant in this appeal, and found insufficient evidence showing a minor had engaged in sexually explicit conduct. *Id.* at 549. He based this finding on the fact that no one with the purpose of sexually stimulating a viewer had been directly involved with the girl's conduct.

The fact that in defendant Whipple's case there is similarly no

evidence that any adult was directly involved in E.J.E.'s physical acts of dressing and undressing should not, as a matter of law, dictate a similar insufficiency finding:

1. The facts in Grannis involved pictures of a child taking a bath and children playing on a playground. As Judge Morgan noted it is not usually a crime to possess pictures of this sort. *Id.* at 547. It seems obvious that some direct involvement of the adult taking the pictures indicating a sexual stimulation purpose would certainly be probative and even necessary to remove the ambiguity of the nudity portrayed. In Mr. Whipple's case there is no ambiguity in the visual material. The inherent sexual nature and sexual stimulation purpose of repeated images, taken surreptitiously, of a sexually mature 15 year old girl dressing and undressing featuring prominent displays of her breasts, buttocks, and pubic area is patently obvious. No parent or grandparent would have difficulty sensing that it was probably illegal to possess such pictures. These grossly dissimilar facts compel an analysis of Grannis that limits its "direct involvement" focus to those situations involving nude images of minors that are clearly ambiguous.

2. The two cases cited by Judge Morgan in Grannis to support his view that every exhibition of nudity is inanimate and incapable of

being sexually explicit without some direct involvement indicative of a sexual stimulation purpose do not, with the exception of his own concurring opinion in one of those cases, provide such support. The first case was State v. Chester, 82 Wn. App. 422 (1996), *affirmed by* 133 Wn. 2d 15 (1997). The second was State v. Myers, 82 Wn. App. 435 (1996), *affirmed by* 133 Wn. 2d 26 (1997). Both of these cases dealt only with the offense of sexual exploitation of a minor (RCW 9.68A.040) and that particular statute's need to have some affirmative act on the part of the accused established in order for criminal liability to result. Neither case dissected and discussed the RCW 9.68A(3)(e) statutory definition of sexually explicit conduct in a manner supporting Judge Morgan's view. As a result, neither the majority opinion in Chester nor the majority opinion in Myers offer any support for Judge Morgan's definitional legal theory in Grannis. It is true, however, that it was in Chester that Judge Morgan first espoused his distinct interpretation of RCW 9.68A.011(3)(e). See Judge Morgan's concurring opinion at 426. That portion of Chester is correctly cited by Judge Morgan in Grannis. But, of course, he is essentially citing himself in a concurring opinion joined in by none of the other judges in that case.

3. In affirming State v. Chester the Washington Supreme Court ignored the theory put forth by Judge Morgan in his Court of Appeals concurring opinion and, by implication, acknowledged that surreptitious filming of a teenaged girl can result in “sexually explicit” conduct. State v. Chester, 133 Wn. 2d 15, 18 (1997) The facts in Chester were very similar to the ones in this case except that the charge was sexual exploitation not possession of visual matter depicting a minor engaged in sexually explicit conduct. The issue in Chester was whether, as a voyeur, a parent could secretly film a teenaged stepdaughter undressing and be guilty of sexual exploitation of a minor. It was assumed both by Judge Bridgewater at the Court of Appeals and by Justice Guy at the Supreme Court (the authors of the majority opinions) that the filming had resulted in sexually explicit conduct and the court’s focus was on whether the defendant had performed the specific criminal act required by the sexual exploitation statute. Is it not fair then to conclude that, at least by implication, our Supreme Court has rejected Judge Morgan’s position on surreptitious filming?

4. The court in State v. Griffith, 129 Wn. App. 482, 486 (2005), *review denied* by 156 Wn. 2d 1037 (2006) the only Court of Appeals

case to cite Grannis in the context of a possession of a child pornography context used that citation to emphasize that as far as nude images of minor's are concerned it is the purpose for which the images are taken which determine whether they are sexually explicit. The court stated without any qualification that "if a minor is unclothed and the picture is for the sexual stimulation of the viewer, then it meets the definition of sexually explicit conduct". Griffith at 486. It was only as an afterthought in evaluating the totality of the facts supporting the issuance of the search warrant in question that the Griffith court noted, without any specific citation to Grannis, that others were also helping the minor pose while the defendant took the pictures. *Id.* It seems clear that the Griffith court declined to specifically endorse Judge Morgan's *sine qua non* "direct involvement" requirement regarding RCW 9.68A.011(3)(e) sexually explicit conduct. Instead, the Griffith court appropriately focused on all of the facts surrounding the production of the images

5. Common sense and plain meaning interpretation of statutory language dictate the conclusion that when an individual secretly films for sexual stimulation purposes the unclothed breasts, buttocks, and pubic area of a teenaged girl while she is dressing and undressing, the

images produced meet the RCW 9.68A.011(3)(e) statutory definition of sexually explicit conduct. In possession of depictions of a minor engaged in sexually explicit conduct cases the focus has to be on the images and the purpose for which they were produced as well as on the conduct of the minor involved. To do otherwise defeats the plain meaning and intent of the statutory language involved and creates the illogical result mandated by a narrow reading of Judge Morgan's opinion in Grannis.

V. CONCLUSION

Based upon the foregoing analysis and facts the state requests this court to find there was sufficient evidence to find the defendant guilty on all counts and to affirm his conviction and that appellant be ordered to pay costs, including attorney fees, pursuant to RAP 14.3,18.1 and RCW 10.73.

Respectfully submitted this 18th day of September, 2007.



JUELANNE DALZELL, Jefferson County
Prosecuting Attorney, WSBA #21508

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2 DIVISION II

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DECLARATION OF MAILING

07 SEP 20 11:23
STATE OF WASHINGTON
BY [Signature]
DEPUTY

8 Janice N. Chadbourne declares:

9 That at all times mentioned herein I was over 18 years of age and a
10 citizen of the United States; that on the 19th day September, 2007, I
11 mailed, postage prepaid, a copy of the State's Brief of Respondent to the
12 following:

13 David C. Ponzoha, Clerk
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216 Ericksen Ave. NE
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13 Rex Whipple
14 1320 S. Carlsbad Street
15 Deming, New Mexico 88083

16 I declare under penalty of perjury under the laws of the State of
17 Washington that the foregoing declaration is true and correct.

18 Dated this 19th day of September, 2007, at Port Townsend,
19 Washington.

20 
21 Janice N. Chadbourne
22 Legal Assistant