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State of Wisconsin
Court of Appeals
District 2
Appeal No. 2014AP2165-CR

State of Wisconsin,

Plaintiff-Respondent,

v.

Jesse L. Schmucker,

Defendant-Appellant.

On appeal from a judgment of the Ozaukee County Circuit Court, The Honorable Joseph W. Voiland, presiding

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Defendant-Appellant's Brief and Appendix

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Statement on Oral Argument and Publication

The issue presented by this appeal is not controlled by well-settled law. The appellant, Schmucker, was convicted of attempting to capture nudity because he used his cellphone to take an "up-skirt" digital photograph of a woman in the check-out line at Pick 'n Save. Similar "capturing nudity" laws in other states have been found not to prohibit the conduct engaged in by Schmucker. Therefore, the appellant recommends both oral argument and publication.

Statement of the Issues

I. Whether the evidence was sufficient as a matter of law to convict the appellant (Schmucker) of attempting to capture an image of nudity, contrary to § 942.09(2)(am)1, Stats., where:

- While waiting in the checkout line at a grocery store (a public place), Schmucker bent over and used his cellphone camera to attempt to capture an image up the dress of a woman who was near him in line;
- The woman was fully clothed, and she was also wearing underwear.

Answered by the circuit court: Yes. Schmucker attempted to capture nudity because he had a subjective

intent to capture nudity, and he acted on that intent. According to the circuit judge, it does not matter that the woman was not, in fact, in a state of partial nudity. Moreover, even though this took place in a public area, according to the judge, all women have a reasonable expectation of privacy in the area beneath their skirts.

Statutes Presented

§ 942.09, Stats., (capturing nudity) provides in part:

(1) In this section:

(a) "Captures a representation" means takes a photograph, makes a motion picture, videotape, or other visual representation, or records or stores in any medium data that represents a visual image.

(am) "Nude or partially nude person" has the meaning given in s. 942.08(1)(a).

(b) "Nudity" has the meaning given in s. 948.11(1)(d).

(bg) "Post or publish" includes posting or publishing on a Web site on the Internet, if the Web site may be viewed by the general public.

(bn) "Private representation" means a representation depicting a nude or partially nude person or depicting a person engaging in sexually explicit conduct that is intended by the person depicted in the representation to be captured, viewed, or possessed only by the person who, with the consent of the person depicted, captured the representation or to whom the person depicted directly and intentionally gave possession of the representation.

(c) “Representation” means a photograph, exposed film, motion picture, videotape, other visual representation, or data that represents a visual image.

(d) “Sexually explicit conduct” has the meaning given in s. 948.01(7).

(2)(am) Whoever does any of the following is guilty of a Class I felony:

1. Captures a representation that depicts nudity without the knowledge and consent of the person who is depicted nude while that person is nude in a circumstance in which he or she has a reasonable expectation of privacy, if the person knows or has reason to know that the person who is depicted nude does not know of and consent to the capture of the representation.

§ 942.08(1)(a), Stats., provides:

(a) “Nude or partially nude person” means any human being who has less than fully and opaquely covered genitals, pubic area or buttocks, any female human being who has less than a fully opaque covering over any portion of a breast below the top of the nipple, or any male human being with covered genitals in a discernibly turgid state.

Summary of the Argument

In order to be convicted of an attempt to capture nudity, the state must present sufficient evidence to establish that the defendant attempted to capture a representation that depicts nudity without the knowledge and consent of the person who is depicted nude *while that person is nude* in a circumstance in

which he or she has a reasonable expectation of privacy, if the defendant knows or has reason to know that the person who is depicted nude does not know of and consent to the capture of the representation.

Here, the evidence established that Carol K. was shopping at a Pick 'n Save grocery store during business hours. Carol was fully dressed, and she was wearing underpants. While Carol was at the check-out line, Schmucker unobtrusively bent over and, using his cellphone, took a picture up Carol's skirt.

The evidence is insufficient to sustain the jury's verdict because: (1) Carol has no reasonable expectation of privacy while she is shopping at the grocery store; and, (2) Carol was not nude or partially nude at the time Schmucker attempted to capture an image of her.

Statement of the Case

I. Procedural History

The defendant-appellant, Jesse L. Schmucker (hereinafter "Schmucker"), was charged in a criminal complaint (R:2) with disorderly conduct, and attempting to capture nudity, contrary to § 942.09, Stats., and § 939.32, Stats. In a nutshell, the criminal complaint alleged that on June 26, 2013, Schmucker was in the checkout line at a grocery store when

he unobtrusively bent over and, using his cellphone, took a picture up the dress of a woman who was standing near him in line.

Schmucker entered not guilty pleas to both counts.

He then filed a pretrial motion to dismiss the complaint (R:12) for the reason that the complaint alleged insufficient facts to establish probable cause to believe he committed the offense alleged. Schmucker's argument was that the complaint alleged that the victim, Carol, was fully clothed, and she was wearing underwear. Thus, Carol was not nude, or partially nude, as those terms are defined in the statutes. In other words, one cannot attempt to capture nudity that does not exist.

The judge denied the motion. (R:54-8) Specifically, the judge reasoned:

> [I]f, indeed, Mr. Schmucker was intending to capture pornography by photographs up the victim's skirt he must necessarily have been intending to capture a visual image of a sexual organ. Which would have to be nudity. So in terms of the attempt to charge, the pornography, the pornography allegations in the probable cause portion of the complaint, I will deny the motion.

Id.[1]

The matter then proceeded to jury trial beginning on March 11, 2014.

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[1] This line of reasoning is a theme that developed throughout the course of the case, so it is worth mentioning here. The circuit judge, at each stage where Schmucker challenged the sufficiency of the evidence, relied upon the inference that Schmucker had the subjective intent to capture nudity. The fact that there was ultimately no nudity to capture, according to the circuit court, is beside the point.

At the close of the state's case, Schmucker moved to dismiss on the grounds that the evidence was insufficient to establish the offenses. (R:54-90) After substantial argument from the parties, the judge denied the motion to dismiss (R:54-114).

Schmucker testified, but he presented no other evidence.

Once again, at the close of all evidence, Schmucker moved to dismiss on the grounds that the evidence was insufficient. (R:54-190) Once again, the circuit judge found the evidence to be legally sufficient. (R:54-198)

On April 10, 2014, the court withheld sentence and placed Schmucker on two years probation on count one (disorderly conduct); and, on count two, the court sentenced Schmucker to nine months in jail. (R:53-35; R:41, 42)

Schmucker timely filed a notice of intent to pursue postconviction relief, and the judge released Schmucker pending appeal. There were no postconviction motions. Schmucker filed a notice of appeal.

II. Factual Background

On June 26, 2013, Carol K. went to the Pick 'n Save grocery store in Grafton. (R:54-66, 67) She wore a short-sleeved tee-shirt and a sports skirt. *Id.* She was also wearing underwear. *Id.*

When Carol got into the checkout line, she noticed Schmucker standing behind her. He had put a salad on the conveyor belt, and then she noticed that he was, "just within inches of me bent over with his phone underneath, kind of between my legs underneath my skirt." (R:54-71) When Schmucker realized that Carol was looking at him, he moved away. *Id.* Not surprisingly, the incident was captured on security video. (R:54-74)

Carol testified that she did not consent to Schmucker taking a picture in that manner. (R:54-73)

Schmucker was arrested shortly thereafter, and he was questioned by police. He told police that he did, in fact, attempt to take a picture up Carol's skirt. (R:54-85) The image did not turn out, though. *Id.*

Schmucker also testified at trial. Again, he admitted that he attempted to use his cellphone to take a picture up Carol's skirt. (R:54-136, 137) Schmucker explained that the reason he did so is because he wanted to see her underwear. *Id.* According to Schmucker, the pictures did not show anything. *Id.*

Argument

I. The evidence was insufficient as a matter of law to sustain the jury's verdict finding Schmucker guilty of an attempt to capture an image of nudity.

A. Standard of Appellate Review

The standard of appellate review on challenges to the sufficiency of the evidence to support a verdict in a criminal case is well-known. In *State v. Poellinger*, 153 Wis. 2d 493, 501 (Wis. 1990), the Supreme Court held:

> We hold that the standard for reviewing the sufficiency of the evidence to support a conviction is the same in either a direct or circumstantial evidence case. Under that standard, an appellate court may not reverse a conviction unless the evidence, viewed most favorably to the state and the conviction, is so insufficient in probative value and force that it can be said as a matter of law that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt.

B. The elements of the offense

The crime of capturing depictions of nudity is committed by one who captures a representation that depicts nudity without the knowledge and consent of the person who is depicted nude *while that person is nude* in a circumstance in which he or she has a reasonable expectation of privacy, if the defendant knows or has reason to know that the person who is depicted nude does not know of and consent to the capture of the representation. § 942.09(2)(am), Stats.

Here, Schmucker was charged with an attempt to capture an image of nudity. Therefore, the state was required to prove that Schmucker did acts toward the commission of the crime of capturing depictions of nudity which demonstrate unequivocally, under all of the circumstances, that he intended to and would have committed the crime of capturing depictions of nudity except for the intervention of another person or some other extraneous factor. Wis. JI-Criminal 508, § 939.42, Stats.

C. Carol had no expectation of privacy in the Pick 'n Save.

An element of the offense of capturing nudity is that the image was captured under circumstances where the person depicted in the image had a reasonable expectation of privacy. Plainly, this statute was written to afford protection to persons who are unclothed while in a restroom, or in his or her home.

Here, though, Carol was in a public place-- a Pick 'n Save grocery store-- during business hours. Plainly, Carol had no reasonable expectation of privacy under those circumstances. In other words, she could not have had a reasonable expectation that she could to go nude, or partially nude, under those circumstances.

The court of appeals has specifically defined the concept of a "reasonable expectation of privacy" as it is used in the statute. In, *State v. Nelson*, 2006 WI App 124, 294 Wis. 2d

578, 592, 718 N.W.2d 168, 174-75, the court held:

> If we apply the common meanings of "expectation" and "privacy" and the well-established meaning of the term "reasonable," Wis. Stat. § 942.09(2)(a) requires that the person who is depicted nude is in a circumstance in which he or she has an assumption that he or she is secluded from the presence or view of others, and that assumption is a reasonable one under all the circumstances, meaning that it is an appropriate one under all the circumstances according to an objective standard. We conclude this is a reasonable construction of "reasonable expectation of privacy" because it employs the common and well-established meanings of the words.

Later, the definition was augmented in *State v. Jahnke*, 2009 WI App 4, 316 Wis. 2d 324, 333, 762 N.W.2d 696, 700, where the court of appeals added that, "[T]he phrase 'reasonable expectation of privacy' in Wis. Stat. § 942.09(2)(am)1. means a reasonable expectation under the circumstances that one will not be recorded in the nude."

A woman who is grocery shopping at Pic 'n Save during business hours simply has no reasonable expectation of privacy. Even under the narrower definition in *Jahnke*, the woman has no reasonable expectation under the circumstances that she will not be recorded while in the Pick 'n Save.[2]

This is precisely how the Massachusetts Supreme Court recently interpreted a substantially similar statute. The court

[2] In fact, as we know from the security video, Carol was secretly recorded by the store while she was shopping.

wrote

> At the core of the Commonwealth's argument . . is the proposition that a woman, and in particular a woman riding on a public trolley, has a reasonable expectation of privacy in not having a stranger secretly take photographs up her skirt. The proposition is eminently reasonable, but § 105 (*b*) in its current form does not address it.

Commonwealth. v. Robertson, 467 Mass. 371, 380 (2014).

Similarly, it might be reasonable for a woman to expect that while grocery shopping a man will not unobtrusively take a photograph up her skirt. Nevertheless, the statute does not prohibit it.

D. Carol was not nude or partially nude and, therefore, Schmucker's subjective intent is irrelevant.

Another element of the offense is that the person who is the subject of this image is nude or partially nude when the image is captured. Here, Carol was fully dressed. Thus, the evidence wholly fails to support this element of the offense.

In this case, the circuit judge consistently reasoned that it is Schmucker's subjective intent that governs. In other words, if Schmucker acted with the subjective intent to capture nudity, it does not matter that there was no nudity available to capture. This, of course, overlooks critical language in the statute.

The statute requires that the image is captured while the

other person "is partially nude"[3]. This language, given its plain meaning, requires a *state of being* for the alleged victim (the victim *is partially nude*). A woman who is wearing a skirt covering her genitals and buttocks is not a person who is "partially nude," no matter what is or is not underneath the skirt by way of underwear or other clothing. The woman's skirt fully and opaquely covers her genital area. Here, though, Carol testified that she was, in fact, wearing underpants. This is an added layer of covering over her genitals.

Thus, under no meaning of the phrase, was Carol in the actual state of being "partially nude" when Schmucker attempted to take a picture of her.[4] For this reason, the evidence was insufficient to establish this element of the offense as well.

Conclusion

It is respectfully requested that the court of appeals reverse Schmucker's conviction for an attempt to capture an image of nudity, and order that a judgment of acquittal be

[3] "Nude or partially nude person" means any human being who has less than fully and opaquely covered genitals, pubic area or buttocks, any female human being who has less than a fully opaque covering over any portion of a breast below the top of the nipple . . " § 942.08, Stats.

[4] To interpret the statute as the circuit judge did leads to absurd results. Under the circuit judge's interpretation, a person violates the statute if he photographs a fully clothed woman while harboring a subjective hope that, at the critical moment, she will have a "wardrobe malfunction" that exposes a breast.

entered.

Dated at Milwaukee, Wisconsin, this _____ day of December, 2014.

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Jeffrey W. Jensen

State of Wisconsin
Court of Appeals
District 2
Appeal No. 2014AP2165-CR

State of Wisconsin,

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v.

Jesse L. Schmucker,

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Defendant-Appellant's Appendix

A. Record on appeal

B. Excerpt of circuit judge's ruling denying Schmucker's motion to dismiss at the close of all evidence

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with s. 809.19 (2) (a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; and (3) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings

of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Dated this ____ day of December, 2014.

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Jeffrey W. Jensen