STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT II

STATE OF WISCONSIN,

Plaintiff – Respondent,

v.

Appeal Case No. 2014AP002165-CR
Trial Case No. 2013CM000433

JESSE L. SCHMUCKER,

Defendant – Appellant.

STATE'S RESPONSE ON DEFENDANT'S APPEAL FROM OZAUKEE COUNTY CASE NO. 2013-CM-433 HONORABLE JOSEPH W. VOILAND CIRCUIT COURT JUDGE PRESIDING OZAUKEE COUNTY, WISCONSIN

Respectfully submitted,

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STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The Plaintiff-Appellant neither requests oral argument nor publication. The theory of the prosecution was that the Defendant was taking pictures of women in an effort to obtain images that depicted nudity. In finding the defendant guilty, the jury must have concluded, consistent with their instructions, that the defendant's intent was to do so.

This appeal demands no more than the application of longstanding case law governing attempts to commit crimes. While the facts of this case may be somewhat unique, the factual matters were the province of the jury, and publication would provide no additional guidance to future courts.

CERTIFICATION AS TO FORM

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief and appendix. The margins of the brief correspond with Wis. Stats. § 809.19(8)(b)3c. The page margins are 1.5 inches on the left, with 1 inch on the remaining margins. The body of this brief is printed in Times Roman proportional 13 point font, block quotes are in 11 point Times Roman font. The applicable portions of Appellant's brief have a total of 3473 words and the whole brief consists of 13 pages. An appendix page is attached, although there is no appendix, and is not included in the word or page count.

Dated this 30th Day of January, 2015,

_____

Adam Y. Gerol
Ozaukee County District Attorney
State Bar No. 1012502

CERTIFICATION OF COMPLIANCE
WITH WIS. STAT. § (RULE) 809.19(12)

I certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § (Rule) 809.19 (12).

I further certify that:

The electronic brief is identical in content and format to the printed form of the brief that I am filing today; and

A copy of this certificate has been served with the paper copies of this brief which I have filed with the court and served on all opposing parties.

Dated this 30th Day of January, 2015,

_____

Adam Y. Gerol
Ozaukee County District Attorney
State Bar No. 1012502

STATEMENT OF FACTS.

The Victim testified that on June 26, 2013, she was shopping at a local grocery store wearing a shirt, t-shirt, sports skirt and underwear. (R55:66-7) While near the checkout line she began to help an elderly shopper who needed assistance. (R55:67-8) It was at this point that she first observed the Defendant standing behind her, and noticed that he was simply remaining behind her in the checkout line even though she was not unloading any groceries. (R55:68) The Victim spent some more time with the elderly shopper, speaking with her, helping her sit, and attempting to get water for her before she rejoining the checkout line. (R55:70) The Victim observed that the Defendant was still behind her in the checkout line, even though he was apparently only buying a salad. (R55:70) As she was checking out with her groceries, the Victim noticed that the defendant was now right up against her. (R55:71) She glanced over to find the defendant within inches of her, bent over with his phone, both underneath her skirt and between her legs. (R55:71) The Victim had not considered the possibility of, nor had she consented in any way to, anyone taking a picture up her skirt. (R55:73) After exiting the grocery store the Victim called her husband to tell him what had just occurred. (R55:73) While on the phone, she turned and saw the defendant standing in the middle of the parking lot with his phone once again pointed at her. (R55:73-4) The Victim reported all of this to the police.

Detective David Wenzler of the Grafton Police Department obtained video footage of this incident from the grocery store's surveillance system. (R55:81) (R51) Detective Wenzler identified the suspect. The Defendant was brought to the Grafton Police Department where he waived his constitutional rights and agreed to answer questions. (R55:83-5) The defendant told Detective Wenzler that he was in counseling for an addiction to pornography. (R55:85) The defendant said that as part of his counseling he had filters installed on his computers that would block any attempt he might make to seek pornography. (R55:85) The defendant stated that because of this, to feed his addiction, he had begun taking photographs up women's skirts. (R55:85, 139) The defendant admitted that he had taken a picture up the Victim's skirt at the grocery store. (R55:85) He told Detective Wenzler that this picture had not turned out as well as the other ones, so he deleted them. (R55:85) The defendant also provided a handwritten statement. (R55:87) The video surveillance system footage was played to the jury in its entirety. (R55:88-9)

At trial the defendant admitted to taking pictures under the Victim's skirt, but stated on direct examination that he was only interested in photographing the Victim's underwear. (R55:136-7) He admitted that he knew that the Victim would

not have consented to such pictures. (R55:138) The defendant also said that when he took pictures up women's skirts, he had no idea whether they would be wearing underwear or not. (R55:139-40) The defendant conceded that he could have acquired images of women in underwear through other sources than up-skirting strangers. (R55:141-3)

ARGUMENT

1. Sufficiency of the evidence.

When the sufficiency of the evidence to support a conviction is challenged on appeal, an appellate court views the evidence in the light most favorable to the conviction. State v. Kimbrough, 2001 WI App 138, ¶ 12, 246 Wis. 2d 648, 630 N.W.2d 752. The conviction will not be reversed unless the evidence, viewed most favorably to the State and to the conviction, is so lacking in probative value and force that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt. State v. Watkins, 2002 WI 101, ¶ 68, 255 Wis. 2d 265, 647 N.W.2d 244. Issues of credibility and the weight of evidence are matters for the jury, not an appellate court. State v. Poellinger, 153 Wis. 2d 493, 504, 451 N.W.2d 752 (1990).

Here, the Defendant does not challenge his conviction for Disorderly Conduct. Rather, this appeal is entirely directed toward his conviction for Attempting to Capture an Image of Nudity, Without Consent, Contrary to Wis. Stats. §§ 939.32 and 942.09(2)(am)1. As to this challenge, the Defendant does not claim that the jury was improperly instructed. Instead, his argument focuses entirely on two claims. First, that the Victim had no reasonable expectation of privacy while shopping at the grocery store, and; Second, that the victim was neither nude nor partially nude when the Defendant photographed her. (Defendant's Brief at 7). Both of these arguments fail. The Defendant fails to correctly interpret the legal requirements of an attempted crime and apply a correct standard to the proof in this case. Further, under the facts as presented here, a woman has a reasonable expectation of privacy in the area up her skirt, not otherwise displayed to the public, while in any public place.

2. Reasonable expectation of privacy.

The trial court left the question of whether the Victim had a reasonable expectation of privacy to the jury, but observed:

> In terms of the reasonable expectation of privacy, I do think that this goes to how you look at the place, so to speak, and is the place the Pick 'N Save or is the place up your skirt. And a

> person has a reasonable expectation of privacy up their skirt whether they're in the Pick N' Save, or subway, or the baseball field.

(R55:114) The verdict must assume that the jury believed that such a privacy interest existed. The trial court would also have been correct had it concluded this issue as a matter of law.

It's true that all of us surrender any expectation of privacy in our appearance, speech or attire when we go out. These are held out to the public. However, the Defendant argues that by doing so we also subject ourselves to any intrusion or examination under or through our clothing. This proposition reduces the understood concepts of public versus private to the absurd. While a person's face and attire may be held out to the public while in a grocery store, we cloth ourselves to demonstrate and safeguard both our privacy and the integrity of our bodies underneath.

Unfortunately, technology now provides wrongdoers with better capabilities to defeat these precautions. However, that shouldn't change the concept of what is private. What is underneath someone's clothes must be presumed to be private, regardless of where that person might be. In Kyllo v. United States, 533 U.S. 27 (2001) the Supreme Court was confronted with what might have traditionally been thought of as a legal search –the examination of a residence from a public location. Again, technology had provided a new capacity that challenged the traditional notions of privacy as drawn by earlier courts. Legal concepts are not frozen in time. Drawing from Katz v. United States, 389 U. S. 347 (1967), the Court held that an invasive search could occur where conduct in a public place might also violate a citizen's subjective expectation of privacy somewhere else. Kyllo at 33.

While Constitutional protections were at issue in Kyllo, we are instructed in these cases that the term "reasonable expectation of privacy" should not be interpreted in the context of a 4th Amendment challenge to police conduct. Rather, the term must be viewed in a common sense manner so as to accomplish the purpose of the statute. State v. Nelson, 2006 WI App 124, ¶¶17 – 26, 294 Wis.2d 578, 590 – 595, 718 N.W.2d 168.

> ¶ 21. 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.

Nelson, at ¶21, 592. It is consistent with that purpose to conclude that a woman wearing a skirt can reasonably assume that the covered area of her body is protected from intrusion by others while she is walking about. This assumption isn't altered by the type of underwear she is wearing, whether there is any underwear at all, or the opacity of such underwear or nylons. Objectively, a reasonable person wearing a skirt in public would believe that they would be guarded against any invasion of such an area in any manner – let alone someone possibly photographing them there.

The defendant looks to Commonwealth v. Robertson, 467 Mass. 371, ___ N.E.3d ___ (Massachusetts, 2014) for support that such an expectation does not universally exist. This analogy is based on a false premise, as the facts of the Massachusetts case are significantly different than this one.

In Robertson, the defendant took pictures of women's underwear without their knowledge. The incidents occurred on a mass transit trolley while the women were sitting across from the defendant. Robertson, 372-3. Robertson was standing, and held his telephone camera near his waist where he was apparently able to view and capture pictures of the victims' underwear. Ibid. The decision tells us that the closest Robertson came to any of his victims was two feet away. Ibid. Also, from the language of the decision, it appears that Robertson was able to take his pictures from an ordinary vantage point on the train. Apparently, the women were clothed, but seated in a manner that made these pictures possible from where the defendant was standing.

Those facts are readily distinguished from this case. Simply put, it's one thing to be standing in line in a grocery store with a skirt, and another to be seated on a subway train. Here, the defendant stuck the camera underneath the victim's skirt and between her legs. (R55:71). The Defendant had also waited in line some time to be in an appropriate position to do so. (R55:67-71). This is far different from being able to take a picture of a women's underwear, from several feet away, by taking advantage of the manner in which the women were seated.

3. Attempt to commit a crime.

The Defendant makes two related errors with regard to the sufficiency of the evidence. First, he contends that he cannot be convicted because the Victim was actually wearing underwear. This is incorrect. A defendant may be convicted

of attempting to commit a crime even though, under the circumstances, it might have been impossible to do so at that time. State v. Kordas, 191 Wis.2d 124, 528 N.W.2d 483 (Ct.App. 1995). Second, the Defendant erroneously contends that "Schmucker's subjective intent is irrelevant" because the Victim was not nude. This is incorrect as the Defendant's intent is a central issue.

a. Intent.

The Defendant was convicted of attempting to commit a crime.

> "To convict a person of attempt, the State must prove that he or she did `acts toward the commission of the crime which demonstrate unequivocally, under all the circumstances, that he or she formed that intent and would commit the crime except for the intervention of another person or some other extraneous factor'" State v. Moffett, 2000 WI App 67, ¶ 13, 233 Wis. 2d 628, 608 N.W.2d 733 (Moffett I), aff'd, 2000 WI 130, 239 Wis. 2d 629, 619 N.W.2d 918 (Moffett II) (brackets omitted).

In State v. Thiel, 183 Wis.2d 505, 515 N.W.2d 847 (1994) the Wisconsin Supreme Court held that "[i]ntent may be inferred from the defendant's conduct, including his words and gestures taken in the context of the circumstances." Id. at 35 (citing Jacobs v. State, 50 Wis.2d 361, 366, 184 N.W.2d 113 (1971), and Adams v. State, 57 Wis.2d 515, 519, 204 N.W.2d 515 (1973)). From the Defendant's words and gestures in this case, this jury could conclude that the defendant intended to obtain nude photographs contrary to Wis. Stats. § 942.09. Particularly since one of the words he used to explain his conduct was "pornography."

1. Definition of 'pornography.'

The Defendant told Detective Wenzler that he was seeking a replacement for "pornography." (R55:85) Since the Defendant chose the term, the State contends that trier of fact was entitled to consider what the defendant meant by it as opposed to being restricted to a legal definition. See generally, Kaufman v. McCaughtry, 419 F. 3d 678, 685 (7th Cir. 2005).

The trial court considered pornography to be "printed or visual material containing the explicit description or display of sexual organs or activity." (54:7) Merriam-Webster's dictionary defines pornography as:

> : movies, pictures, magazines, etc., that show or describe naked people or sex in a very open and direct way in order to cause sexual excitement

Merriam-webster.com. http://www.merriam-webster.com/dictionary/pornography .

Both of these definitions capture what the term "pornography" likely means to the average person. Since the term ordinarily connotes nudity and the exhibition of sex organs, the jury was free to include these concepts when evaluating the Defendant's intent.

b. Partially nude.

As the trial court noted both at trial and at the motion hearing, the fact that it might be reasonable to assume that a person would be wearing underwear doesn't mean that it's impossible that the same victim might also be nude or partially nude.

"Partially nude" means:

> [Having] 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.

Wis. Stats. § 942.08(1)(a). While many Wisconsin decisions use this term, none specifically discuss the distinction between "nude" and "partially nude." However, in State v. Lala, 2009 WI App 137, 321 Wis.2d 292, 773 N.W.2d 218, the Court of Appeals was forced to consider the nature of an allegedly opaque covering in the context of a child pornography case. Lala at ¶ 16, 302. In Lala, the children depicted could have been wearing nylons, however the trier of fact was still capable of considering whether or not there was a "full opaque covering over the … vagina and pubic mound." Lala at ¶14, 301. There, the trial court held that there was not.

A detailed discussion of types of underwear, the degree to which they might cover a female's body, or different practices or patterns of dress while women are wearing skirts isn't necessary for this brief. It is well understood that there may be women whose dress may not provide a full and opaque covering of the genitals, pubic area, or buttocks. The jury, who was also instructed that they could use their common sense and life experience, was entitled to apply this rationale as well. Accordingly, it is reasonable to conclude from the defendant's efforts, standing alone, that he was attempting to obtain depictions of nudity. (R55: 91- 97, 11-113)(54: 7-8)

While the defendant testified that he was only interested in taking pictures of women's underwear, the jury was also free to accept this explanation or reject it. In doing so, it was fair for the jury to consider the inconsistency between this explanation and the ready availability of images of women in underwear that can be found on television, or in any department store circular. (R55:141-3)

c. Claimed impossibility of the crime attempted.

A defendant may be convicted of attempting to commit a crime even though, under the circumstances at that time, it was impossible to do so.

In State v. Kordas, 191 Wis.2d 124, 528 N.W.2d 483 (Ct. App. 1995), the defendant was charged with attempting to receive stolen property. These charges followed an investigation where the police had made modifications to a motorcycle to make it appear as though it was stolen, then passed it off as stolen property to a buyer. Kordas argued that he could not be found guilty of the crime of attempting to receive stolen property where the property was never actually stolen. The Court of Appeals disagreed, stating:

> ... impossibility not apparent to the actor should not absolve him from the offense of attempt to commit the crime he intended . . . . In so far as the actor knows, he has done everything necessary to insure the commission of the crime intended, and he should not escape punishment because of the fortuitous circumstance that by reason of some fact unknown to him it was impossible to effectuate the intended result.

State v. Kordas, 191 Wis.2d 124, 129 (Ct. App. 1995) (Citing State v. Damms, 9 Wis.2d 183, 190-191, 100 N.W.2d 592, 596 (1960)). Contrary to what the Defendant asserts, the Defendant's intent is far more relevant than whether the crime could have actually been completed at that time. Regardless of whether the Victim was completely covered, the conviction here may still stand.

CONCLUSION

The Defendant considers this case to be a referendum on the legality of photographing a woman up her skirt, consistent with his reading of Commonwealth v. Robertson. However, this case should properly be focused on the defendant's intent while doing so. That issue has been decided by a jury. There

is evidence in the record that supports their conclusion. As such, this appeal should be denied.

Dated this 30th Day of January, 2015,

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APPENDIX

The State will not be submitting an appendix.

Index to Appendix.

The State has not submitted an appendix.