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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 Reply Brief

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Argument

I. Whether a person has a legitimate expectation of privacy is not determined by the person's body position.

In his opening brief Schmucker pointed out that a woman who is shopping in a grocery store has no legitimate expectation of privacy[1]. The Massachusetts Supreme Court came to a similar conclusion in *Commonwealth v. Robertson,* 467 Mass. 371 (2014), where the court held that a woman seated on a subway car has no legitimate expectation of privacy concerning the manner in which she is dressed.

Undeterred, the state claims that:

> Those facts [in *Robertson*] are readily distinguished from this case. Simply put, it's [sic] 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 (R:55-71). The Defendant has also waited in line some time to be in an appropriate position to do so. (R:55-67-71). This is far different from being able to take a picture of a women's [sic] underwear, from several feet away, by taking advantage of the manner in which the women were seated.

(Respondent's brief p. 8). Evidently, the state's argument is that, in a public place, a skirted woman's expectation of privacy concerning the area covered by her skirt is legitimate so long as she is in a posture where that area cannot be seen

[1] Assuming that her body is not touched in any way so as to alter her manner of dress.

by members of the public without a certain amount of maneuvering. If her posture is such[2] that the public may see the area beneath her skirt without maneuvering, then there is no legitimate expectation of privacy.

The state's argument is preposterous. When in a public place, a woman assumes the risk that other members of the public may view her from almost any angle or from any vantage point. It is not reasonable for a woman to expect that, in a public place, other persons will never be in a position to see up her skirt, for example, while she is walking up the stairs; or to see down the front of her blouse while viewing her from a second-floor window. The woman's posture while in public does not determine whether she has a legitimate expectation of privacy. Similarly, the vantage point of another member of the public-- so long as no other laws or rules are violated-- does not determine whether the woman's expectation of privacy is legitimate.

[2] For example, seated.

II. Even if, in taking the photograph up the woman's skirt, Schmucker's subjective motivation was to "feed his addiction" to pornography, this does not create partial nudity where none exists.

In what may be best described as pretzel logic, the state argues that because Schmucker told the detective that his motivation for taking the up-skirt photograph was to "feed his addiction" to pornography, the jury could have reasonably inferred that Schmucker hoped that the woman was not wearing panties, because the definition of pornography generally includes images of unclothed genitals.

The state overthinks the matter. Let us assume that Schmucker subjectively hoped that the woman was not wearing panties. This still does not establish that, in taking the photograph up the woman's skirt, Schmucker attempted to capture nudity. There was, in fact, no nudity to capture; and Schucker did not believe that there was nudity to capture.

Schmucker addressed this argument in footnote four of his opening brief; but it let us here make it explicit: Schmucker's *subjective hope* cannot manufacture the existence of partial nudity where it does not exist. If it is a crime for a photographer to entertain prurient ruminations while photographing a fully-clothed woman in a public place, then we have truly come to the point of criminalizing thought.

III. Impossibility does not absolve a defendant of an attempted crime only where the impossibility was not apparent to the defendant.

In one last-ditch effort to salvage this conviction, the state acknowledges the impossibility of capturing nudity where it does not exist, but then suggests that the "impossibility" ought not absolve Schmucker of his attempt to capture nudity.

The state state's own citation of law, though, conclusively rebuts this argument. In, *State v. Kordas,* 191 Wis. 2d 124, 130, 528 N.W.2d 483, 486 (Ct. App. 1995), undercover police officers set up Kordas by offering to sell him a "stolen" motorcycle. The motorcycle in question was not really stolen, and, therefore, it was impossible for Kordas to actually commit the crime of receiving stolen property. Nevertheless, the court of appeals explained:

> According to the allegations in the amended complaint, Kordas "did in fact possess the necessary criminal intent to commit" the crime of receiving stolen property. *See Berry,* 90 Wis.2d at 327, 280 N.W.2d at 209. The extraneous factor-that the motorcycle was not stolen-was unknown to him and had no impact on his intent. Thus, the legal "impossibility not apparent to [Kordas] should not absolve him from the offense of attempt to commit the crime he intended.

Here, the impossibility was not unknown to Schmucker. He did not know one way or the other whether Carole was wearing panties; but, certainly, the odds were that she was wearing underwear.

Thus, Schmucker did not possess the requisite *intent* to capture nudity. He may have held out the hope that there was some nudity to capture, but he did not believe there was, in fact, nudity to capture[3].

To draw an analogy with the situation in *Kordas*, suppose an undercover police officer falsely told a suspect that there was a woman in the fitting room at a department store, and she was not wearing any underwear; and then the suspect snuck into the fitting room area and unobtrusively took photographs from a vantage point beneath the blinds of the fitting room. This would be the crime of attempting to capture nudity, even though there was no actual nudity to capture. In this analogy, the suspect had the actual-- but false-- belief that there was nudity to capture, and he attempted to do so. The impossibility was not apparent to him.

This was not the case with Schmucker. Carole was not in a private place, and Schmucker had no reason to believe she was not wearing underwear.

[3] All of this, of course, is beside the fact that Carole was not in a private place when Schmucker photographed her.

Dated at Milwaukee, Wisconsin, this _____ day of February, 2015.

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Jeffrey W. Jensen