COURT OF APPEALS DECISION DATED AND FILED

April 8, 2015

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

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A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2014AP2165-CR

Cir. Ct. No. 2013CM433

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT II

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JESSE L. SCHMUCKER,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Ozaukee County: JOSEPH W. VOILAND, Judge. *Affirmed*.

¶1 NEUBAUER, P.J.[1] Jesse Schmucker appeals from his conviction based on "upskirting," or taking a picture up a woman's skirt without her consent.

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[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (2013-14). All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

Schmucker argues that the evidence was insufficient to sustain the jury's finding of guilt of an attempt to violate WIS. STAT. § 942.09(2)(am)1., which criminalizes capturing a representation that depicts nudity without the knowledge or consent of the person who is depicted nude in circumstances where that person had a reasonable expectation of privacy. Schmucker argues that he cannot have attempted to violate the statute because the victim was not nude or even partially nude, and the victim had no reasonable expectation of privacy while shopping at the grocery store. We disagree. The evidence was sufficient for the jury to conclude that Schmucker was trying to capture a partially nude image of the victim, who had a reasonable expectation of privacy not to have pictures taken up her skirt in the grocery store. We affirm.

BACKGROUND

¶2 The victim was standing in line at the check-out counter of the grocery store, fully dressed, when Schmucker bent over and took a picture up her skirt by placing his cell phone between her legs. The incident was captured on security video. Schmucker was charged with attempt to capture nudity, contrary to WIS. STAT. §§ 942.09(2)(am)1. and 939.32, and disorderly conduct. There was testimony at trial that Schmucker told a police detective that he was seeking replacement pornography because he had his computers blocked from pornography as part of his counseling for an addiction to pornography. Schmucker testified that the reason he took the picture was because he wanted to see the victim's underwear, though he also testified that when he took pictures up women's skirts, he had no idea whether they would be wearing underwear or not. Schmucker knew that the victim would not have consented to such pictures. Schmucker moved to dismiss the case prior to trial, at the end of the State's case, and again after the verdict. The trial court denied all three motions. The jury

found Schmucker guilty of both (1) attempting to capture a representation of nudity without the victim's consent and while the victim had a reasonable expectation of privacy and (2) disorderly conduct. Schmucker appeals the attempting to capture nudity conviction, arguing that the evidence was insufficient to sustain the jury's verdict.

DISCUSSION

Standard of Review

¶3 On a challenge to the sufficiency of the evidence, we review the evidence in the light most favorable to the jury's verdict. ***State v. Kimbrough***, 2001 WI App 138, ¶12, 246 Wis. 2d 648, 630 N.W.2d 752.

> 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.

State v. Poellinger, 153 Wis. 2d 493, 501, 451 N.W.2d 752 (1990). Credibility and the weight to be given the evidence are for the trier of fact, not the appellate court. ***Id.*** at 504.

Statute

¶4 WISCONSIN STAT. § 942.09(2)(am)1. makes any person who does the following guilty of a Class I felony:

> 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.[2]

Attempt to Capture a Representation of a Nude or Partially Nude Person

¶5 Schmucker contends that nudity or partial nudity of the victim is an element of the offense and that there was insufficient evidence to establish this element of attempting to capture a representation of a nude or partially nude person. In essence, Schmucker argues that it was factually impossible for him to commit the crime of capturing a representation of partial nudity, so he cannot be convicted of the attempt. The State responds that Schmucker can be found guilty of the attempted crime even though the woman was wearing underwear and that sufficient evidence supports the jury's determination that Schmucker intended to capture partial nudity. We agree.

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[2] WISCONSIN STAT. § 942.09(1)(am) and (b) tell us that in § 942.09 "nudity" and "nude or partially nude person" have the definitions set forth in WIS. STAT. §§ 948.11(1)(d) and 942.08(1)(a). Under those statutes, "nudity" means

> the showing of the human male or female genitals, pubic area or buttocks with less than a full opaque covering, or the showing of the female breast with less than a fully opaque covering of any portion thereof below the top of the nipple, or the depiction of covered male genitals in a discernibly turgid state.

Sec. 948.11(1)(d). "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.

Sec. 942.08(1)(a).

¶6 WISCONSIN STAT. § 939.32(3) sets forth the requirements for an attempt to commit a crime.

> An attempt to commit a crime requires that the actor have an intent to perform acts and attain a result which, if accomplished, would constitute such crime and that the actor does acts toward the commission of the crime which demonstrate unequivocally, under all the circumstances, that the actor formed that intent and would commit the crime except for the intervention of another person or some other extraneous factor.

WIS. STAT. § 939.32(3). Thus, there are two elements to the crime of attempt: "(1) an intent to commit the crime charged; and (2) sufficient acts in furtherance of the criminal intent to demonstrate unequivocally that it was improbable the accused would desist from the crime of his or her own free will." ***State v. Robins***, 2002 WI 65, ¶36, 253 Wis. 2d 298, 646 N.W.2d 287 (citation omitted). The law does not punish a person for guilty intentions alone, but for "acts that further the criminal objective." ***State v. Stewart***, 143 Wis. 2d 28, 37, 420 N.W.2d 44 (1988). "The crime of attempt is complete when the intent to commit the underlying crime is coupled with sufficient acts to demonstrate the improbability of free will desistance …." ***Robins***, 253 Wis. 2d 298, ¶37.

¶7 It is no defense to an attempt crime that a factual impossibility has arisen that prevents the actor from committing the intended crime. 2 WAYNE R. LAFAVE, SUBSTANTIVE CRIMINAL LAW § 11.5(a), at 233 (2d ed. 2003). For example, in ***State v. Kordas***, 191 Wis. 2d 124, 528 N.W.2d 483 (Ct. App. 1995), Kordas bought a motorcycle from an undercover police officer. ***Id.*** at 126. The police had modified the motorcycle so that it appeared stolen. ***Id.*** Kordas admitted that he thought the motorcycle was stolen. ***Id.*** at 127. Notwithstanding, Kordas moved to dismiss the complaint charging him with attempting to receive stolen property, and the trial court concluded that it was "legally impossible" to

commit attempt to receive stolen property when the property was in fact not stolen. ***Id.*** at 128. The court of appeals reversed, reasoning that a fact unknown to the actor cannot negate his intent to commit the crime. ***Id.*** at 127-29.

> [I]mpossibility 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. Damms, 9 Wis. 2d 183, 190-91, 100 N.W.2d 592 (1960) (defendant's inability to commit murder with unloaded gun did not preclude conviction for attempted murder where defendant intended to kill and thought gun was loaded); *see also* ***Robins***, 253 Wis. 2d 298, ¶45 (crime of attempted child enticement may be charged even though, unbeknownst to the defendant, the child is fictitious).

¶8 Thus, it is no defense that a fortuitous circumstance made it impossible to effectuate the intended result. There were sufficient facts to show that Schmucker took acts to further his criminal objective. Regarding Schmucker's actual intent, Schmucker testified at trial that he took the picture because he wanted to see the victim's underwear, and he argues on appeal that underwear would be expected, and thus was not an unknown impossibility. But there was also testimony that when he took pictures up women's skirts, Schmucker had no idea whether they would be wearing underwear or not. There was testimony that Schmucker told a police detective that he was seeking replacement pornography because his computer had a filtering device that would block inquiries for porn. Schmucker told the detective that he had installed the filter and that he had an addiction to pornography. In denying the motion to dismiss prior to trial, the trial court understood pornography to mean "printed or

visual material containing the explicit description or display of sexual organs or activity," and the jury could have used a similar understanding to conclude that under the circumstances Schmucker was attempting to capture an image of the victim's nude buttocks or genitalia. "The credibility of the witnesses and the weight of the evidence is for the trier of fact." ***Poellinger***, 153 Wis. 2d at 504.

¶9 Here, the jury found that Schmucker intended to capture an image of a partially nude person and that he committed acts that would have constituted that crime. It is no defense that the fortuitous circumstances—that the victim was wearing underwear—made that crime factually impossible.

Reasonable Expectation of Privacy

¶10 Schmucker next argues that the woman did not have a reasonable expectation of privacy in not being photographed under her skirt while in the grocery store. In ***State v. Nelson***, 2006 WI App 124, ¶19, 294 Wis. 2d 578, 718 N.W.2d 168, "we concluded that 'reasonable expectation of privacy' is not a technical or specially defined phrase in the statute. Rather, we looked to the common meanings of the words 'expectation' and 'privacy.'" ***State v. Jahnke***, 2009 WI App 4, ¶8, 316 Wis. 2d 324, 762 N.W.2d 696 (2008) (quoting ***Nelson***, 294 Wis. 2d 578, ¶19). We noted that the statute requires that the person 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 … according to an objective standard." ***Nelson***, 294 Wis. 2d 578, ¶21. In ***Jahnke***, we clarified that WIS. STAT. § 942.09(2)(am) "does not criminalize the *viewing* of a nude person, regardless of the circumstances." ***Jahnke***, 316 Wis. 2d 324, ¶9. Instead, it protects a person's interest in limiting the capturing of images of his or her nude body. ***Id.*** "It follows that the pertinent

privacy element question is whether the person depicted nude had a reasonable expectation, under the circumstances, that he or she would not be recorded in the nude." ***Id.*** Whether someone has such a reasonable expectation of privacy under the circumstances is a fact-specific inquiry. ***Id.***, ¶13.

¶11 Schmucker argues that the victim had no reasonable expectation of privacy in a public place—the grocery store. When denying Schmucker's motion to dismiss after the close of the State's evidence, the trial court focused on the more specific location of under the victim's skirt:

> 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.

¶12 We agree with the trial court that a jury could reasonably conclude that the victim had a reasonable expectation of privacy regarding surreptitious photographs taken of the private area underneath her skirt in a public place. We reject Schmucker's argument that a woman in a public place "assumes the risk that other members of the public may view her from almost any angle or from any vantage point." The facts here were sufficient for the jury to determine that the woman had a reasonable assumption under the circumstances that her pubic area and buttocks were secluded from the view, and the photography, of others. We reject Schmucker's argument that, as a matter of law, a woman relinquishes her reasonable expectation of privacy from being photographed without knowledge or consent underneath her skirt because she is in a public place.

CONCLUSION

¶13 The evidence supports Schmucker's conviction of an attempt 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." WIS. STAT. § 942.09(2)(am)1. The victim had a reasonable expectation of privacy that the area underneath her skirt would not be photographed while she was at the grocery store. Furthermore, while the victim was clothed, the evidence supports the jury's conclusion that Schmucker attempted to capture an image of her while partially nude. We affirm the conviction.

By the Court.—Judgment affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)4.