IN THE DISTRICT COURT IN AND FOR TULSA COUNTY
STATE OF OKLAHOMA

STATE OF OKLAHOMA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**Case No. CF-2006-3132**
	)	**Judge Tom C. Gillert**
	)	
RICCARDO GINO FERRANTE.	)	
	)	
Defendant.	)	

DEFENDANT RICCARDO FERRANTE'S MOTION
TO QUASH FOR INSUFFICIENT EVIDENCE

The Defendant, Riccardo Ferrante, by and through his attorneys, Paul Brunton and Kevin Adams, moves to quash the information for insufficient evidence pursuant to the provisions of 22 O.S. § 504.1. In Support of the Motion, counsel shows the Court the following:

The defendant is charged with violation of Title 21 O.S. § 1171; *Use of Video Equipment for a Lascivious purpose*. A Preliminary Hearing was held in this matter on October 24, 2006 before Special Judge Allen Klein.

The facts of this case are not in dispute. What will be in dispute is whether the Mr. Ferrante's actions in this case are a violation of the law.

EVIDENCE AT THE PRELIMINARY HEARING

That on July 3, 2006 Corporal Mark Mears was investigating an incident that occurred inside the Super Target located at 10711 East 71st Street in Tulsa. (Preliminary Hearing page 25 lines 21-25; Preliminary Hearing page 5 line 13, hereinafter "P.H.") The incident occurred in Tulsa County and involved the defendant, Gino Ferrante. (P.H. pg. 5 line 15; P.H. pg. 26 Line 2)

When Mr. Ferrante was interviewed by Corporal Mears he admitted that he had recently gotten a camera and had seen something on TV regarding "upskirting" and decided to try it. (P.H. pg. 35 line 6-9) The defendant admitted that "he followed Ms. Talent to the card section, knelt down behind her, and placed the camera up underneath her skirt." (P.H. pg 35 line 11-14)

When asked what his intention was when he placed the camera up underneath the skirt he stated "he was a leg man and that he had intended to take pictures of her legs." (P.H. pg 35 line 17)

ARGUMENTS AND AUTHORITIES

STATE'S BURDEN

In State v. Berry the Oklahoma Court of Criminal Appeals discussed the states burden of proof at a preliminary hearing;

> Although the State is not required to present evidence at the preliminary examination which would be sufficient to support a conviction, *Matricia v. State, 726 P.2d 900 (Okl.Cr. 1986)*, it must establish that a crime was in fact committed and that there is probable cause to believe that the defendant committed the crime. These two elements of the test are supported by entirely different proof requirements.
>
> *State v. Berry*, 799 P.2d 1131, 1133.(Okla. Cr. 1990)

It is the defense's position that the state has failed to prove that a crime was committed in this case. In the *Berry* case the Court discusses the requirement for the state to establish that a crime was committed and the manner in which the magistrate must make that determination.

> When considering whether or not a crime has been committed, the State is required to prove each of the elements of the crime. State v. Rhine, 773 P.2d 762, 764 (Okl.Cr. 1989). This part of the test is totally independent from the involvement of the defendant in the offense. The magistrate must consider the proof established by the State in light of the statutory elements of the given offense. If the elements of the crime are not proven, then the fact of the commission of a crime cannot be said to have been established. A defendant

> cannot be held to answer for actions which do not amount to a crime as defined by our statutes. This is a higher burden of proof than is required for the second part of the preliminary analysis.
>
> *State v. Berry,* 799 P.2d 1131, 1133.(Okla. Cr. 1990)

Put simply, Ricardo Ferrante cannot be held to answer for actions that do not amount to him committing a crime as defined by Oklahoma Statutes. This is a higher burden of proof than is required for the second part of the preliminary hearing. *See Berry, 799 P2d 1131, 1133 (Okla. Cr. 1990)*

SPECIFIC LEGAL QUESTION AT ISSUE

Mr. Ferrante is charged with violating Title 21 O.S. § 1171 (B). Title 21 O.S. § 1171 (B) reads as follows;

> B. Every person who uses photographic, electronic or video equipment in a clandestine manner for any illegal, illegitimate, prurient, lewd or lascivious purpose with the unlawful and willful intent to view, watch, gaze or look upon any person without the knowledge and consent of such person **when the person viewed is in a place where there is a right to a reasonable expectation of privacy**, or who publishes or distributes any image obtained from such act, shall, upon conviction, be guilty of a felony. The violator shall be punished by imprisonment in the State Penitentiary for a term of not more than five (5) years, or by a fine not exceeding Five Thousand Dollars ($5,000.00), or by both such fine and imprisonment.
>
> Title 21 O.S. § 1171 (B) (Emphasis Added)

The issue in this case is one of statutory interpretation. It is the defenses belief that that Title 21 O.S. § 1171 (B), as written, does not prohibit the behavior that Mr. Ferrante is accused

of committing. In the present case the "person viewed" was in a retail store. It is defense counsels' position that the statute Mr. Ferrante was charged under is inapplicable to the facts of this case because the person being viewed was not in a location where they had a "reasonable expectation of privacy". Defense counsels contend that the legislature intended this particular statute to protect persons located in "homes", "locker rooms", "dressing rooms", "restrooms" and "other places of the same kind"; and not individuals located in public places such as retail stores.

Stated another way, the "place" in the statute refers to the "place" the person is located; not the place on the person being filmed. And the place the person was located in the present case is not a place covered by the statute.

It is defense counsels' belief that the State will take the position that the "reasonable expectation of privacy" should apply not to the place the person is located "in", as stated in the statute; but to the location of the part of the person's body that is being filmed. The position that the defense anticipates the state will take is contrary to the plain language of the statute, violates the rules of statutory construction and has been specifically be rejected by other courts.

THE PLAIN MEANING

It is also well established that statutes are to be construed according to the plain and ordinary meaning of their language. *Wallace v. State*, 1997 OK CR 18, ¶ 4, 935 P.2d 366, 369-370; *Virgin v. State*, 1990 OK CR 27, ¶ 7, 792 P.2d 1186, 1188.

Not only are statutes to be construed according to the plain and ordinary meaning of their language; "Rules of statutory construction require criminal statutes be constructed strictly against the State and liberally in favor of the accused". *State v. Young*, 1999 OK CR 14, ¶13, 989 P.2d

949, 952.

The plain language of the statute clearly states;

…….when the person viewed is in a place where there is a right to a reasonable expectation of privacy…..

Title 21 O.S. § 1171 (B)

The plain language of the statute states “when the person viewed is in a place where there is a reasonable expectation of privacy”. The statute clearly does not apply the expectation of privacy to the location of the person’s body being filmed. It applies the “reasonable expectation of privacy” to the “place” the person is located in.

THE RULE OF STATUTORY CONSTRUCTION "EJUSDEM GENERIS," GIVES GUIDANCE ON THE PROPER INTERPRETATION OF THIS STATUTE.

The rule of “Ejusdem Generis” makes it clear that the “place” refereed to in the statute does not included the greeting card isle of a retail store.

> The rule of "ejusdem generis" is well established in the decisions of the courts of this country. This phrase may be freely translated as "of the same kind or species." The rule when applied to statutory construction may be stated thus:
>
> "Where an enumeration of specific things is followed by some more general word or phrase, such general word or phrase is held to refer to things of the same kind as previously enumerated."
>
> Ex Parte Carson, 243 P. 260, 33 Okl.Cr. 198, 202 (Okla. Cr. 1926)

The rule of “ejusdem generis” is helpful in interpreting the statute at question when section (A) of this statute is read. Title 21 § 1171 (A) reads;

> A. Every person who hides, waits or otherwise loiters in the vicinity of any private dwelling house, apartment building, any other place of residence, or in the vicinity of any locker room, dressing room, restroom or any other place where a person has a right to a

> reasonable expectation of privacy, with the unlawful and willful intent to watch, gaze, or look upon any person in a clandestine manner, shall, upon conviction, be guilty of a misdemeanor. The violator shall be punished by imprisonment in the county jail for a term of not more than one (1) year, or by a fine not to exceed Five thousand Dollars ($5,000.00), or by both such fine and imprisonment.

Title 21 § 1171 (A) (Emphasis Added)

In section (A) of 1171 the legislature specifically listed a number of different places that they intended the statute to apply to;

"any private dwelling house"

"apartment building"

"any other place of residence"

"or in the vicinity of any locker room"

"dressing room"

"restroom"

"or any other place where a person has a right to a reasonable expectation of privacy"

The rule of "ejusdem generis" dictates that the general words of "*or any other place where a person has a right to a reasonable expectation of privacy"* would apply to things of the same kind that were previously enumerated.

All of the places previously enumerated by the statute are places were an individual would normally disrobe. The fact that a person would normally disrobe in such places is the logical reason for the "expects a reasonable expectation of privacy." An example of another place "of same kind previously enumerated" in the statute would be a tanning booth; people normally

disrobe in a tanning booth and therefore have an expectation of privacy because of it.

However, the place at issue in this case is not a place where people normally disrobe. The place at issue in this case is the greeting card isle of a retail store and that is not of the same kind at all as a residence, apartment building, dressing room or restroom. Since the location of the person being viewed in this case is not "of the same kind previously enumerated" the rule of "ejusdem generis" leads us to the conclusion that "the greeting card isle of a retail store" was not the type of place intended to be included by this statute.

OTHER COURTS HAVE DECIDED THIS VERY ISSUE

There is no Oklahoma Court of Criminal Appeals case on this issue. However, the Washington Supreme Court decided this exact issue in *State v. Glass, 54 P3d 147 (2002).* In *State v. Glass* the two defendants used electronic devices to take either photographs or videos "up the skirt" of women without their permission. In both cases the defendants took photographs or videos of the women while the women were in a shopping mall.

Washington State had a statute that was virtually identical to the relevant portions of the Oklahoma Statute. Both the Washington State and Oklahoma statues require the person being viewed to be in a location where the person has a reasonable expectation of privacy. Washington State's statute read;

> A person commits the crime of voyeurism if, for the purpose of arousing or gratifying the sexual desire of any person, he or she knowingly views, photographs, or films another person, without that person's knowledge and consent, **while the person being viewed**, photographed, or filmed ***is in a place where he or she would have a reasonable expectation of privacy.***
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> *State v. Glass, 54 P3d 147, 149 (2002)(Emphasis Added)* (A copy of State v. Glass is attached)

In State v. Glass, the Washington Supreme Court concluded;

> Although Glas' and Sorrells' actions are reprehensible, we agree that the voyeurism statute, as written, does not prohibit upskirt photography in a public location.
>
> *State v. Glass, 54 P3d 147, 150(2002).*

In explaining its ruling the Court stated;

> The voyeurism statute protects an individual "while the person . . . is in a *place* where he or she would have a reasonable expectation of privacy." *RCW 9A.44.115(2)* (emphasis added). Grammatically, it does not make sense to apply this statement to a part of a person's body. It is the person who is *in* the place, not a part of the person.
>
> *State v. Glass, 54 P3d 147, 150(2002).*

The Washington Supreme Court even went on to discuss the fact that other states have had similar problems with no statute to address the issue;

> Other state courts have faced similar frustration when confronted with acts of voyeurism, but with no statute clearly covering the challenged violations. *See generally* Lance E. Rothenberg, *Re-Thinking Privacy: Peeping Toms, Video Voyeurs, and Failure of the Criminal Law to Recognize a Reasonable Expectation of Privacy in the Public Space, 49 AM. U. L. REV. 1127 (2000).* Of these states, a situation in California draws the closest parallel to the case presented here. In 1998, citizens in Orange County were subjected to three incidents of video voyeurism, including one case where the perpetrator followed several dozen women while he attempted to position a gym bag containing a hidden video camera between the women's legs while they stood in line or shopped in a crowded store. *Id. at 1159.* Prosecutors determined that California's voyeurism statute was inadequate to cover these incidents. *Id.* The statute provided:
>
> Any person who looks through a hole or opening, into, or otherwise views, by means of any instrumentality, including, but not limited to, a periscope, telescope, binoculars, camera, motion picture camera, or camcorder, the interior of a bathroom, changing room, fitting room, dressing room, or tanning booth, or the

> interior of any other area in which the occupant has a reasonable expectation of privacy, with the intent to invade the privacy of a person or persons inside.
>
> *CAL. PENAL CODE § 647(k)(1)* (West). Significantly, the statute focused on the location of the incident and did not cover public places.
>
> In response, the California Legislature amended its statute, adding a subsection that focused on the nature of the invasion itself, rather than where the crime was committed.
>
> *State v. Glass, 54 P3d 147, 151(2002).*

Oklahoma's legislature has not amended our statute to focus on the nature of the invasion rather than the location of the individual when they were being filmed or photographed.

COURTS SHOULD NOT ENLARGE THE MEANING OF WORDS IN ORDER TO CREATE A CRIME NOT DEFINED BY STATUTE

Unlike other states, our legislature has not amended the statute to focus on the act and not he location of the person being viewed; and since the definition of criminal acts is a legislative decision, the courts are without the authority to do it for them.

> Further, Courts will not enlarge the meaning of words included in the statute to create a crime not defined by that statute.
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> State v. Young, 1999 OK CR 14, at ¶ 27, 989 P.2d 949 at 955. (Okl.Cr. 1956).

CONCLUSION

Therefore, defense counsels request that after considering the evidence presented at the Preliminary Hearing and the legal arguments made in this motion that the court make a finding

that the state has failed to establish that a crime was committed and enter an order dismissing this case.

Respectfully Submitted,

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CERTIFICATE OF HAND DELIVERY

I hear by certify that a copy of the foregoing instrument was hand delivered on November 27, 2006 to the office of the following:

Jared Sigler
Tulsa County District Attorney's Office
500 S. Denver
Tulsa, OK 74103

_____

Kevin D Adams