



ALAN WILSON
ATTORNEY GENERAL

March 11, 2011

The Honorable Larry A. Martin
Senator, Pickens County
Gressette Senate Office Building
P.O. Box 142
Columbia, SC 29202

Dear Senator Martin:

You have requested an opinion from this office concerning the application of S.C. Code Ann. §16-17-470(B) (2003). The essential question presented is whether the statute is violated if a person films another person, without that person's knowledge and consent, while the person is in a place where he or she would have a reasonable expectation of privacy, "without showing that the purpose was to arouse or gratify the sexual desire of the person committing the act."

Section 16-17-470(B) states:

[a] person commits the crime of voyeurism if, for the purpose of arousing or gratifying sexual desire of any person, he or she knowingly views, photographs, audio records, video records, produces, or creates a digital electronic file, or films another person, without that person's knowledge and consent, while the person is in a place where he or she would have a reasonable expectation of privacy. [Emphasis added].

This section clearly prescribes basic elements that must be satisfied for the criminal sanctions to apply. These elements consist of the following: (1) for the purpose of arousing or gratifying the sexual desire of any person; (2) the defendant knowingly views, photographs, audio records, video records, produces, creates a digital electronic file, or films another person; (3) without the other person's knowledge or consent; (4) and the other person must have a reasonable expectation of privacy.

We have previously advised that, in construing statutes, the intention of the Legislature is the paramount consideration. Where the terms of a statute are clear and unambiguous, there is no room for construction and the literal meaning must be applied. Moreover, courts have held that statutes which are criminal or penal in nature must be strictly construed. Ops. Atty. Gen., July 29, 2005; August 24, 1992; August 24, 1978.

It is the opinion of this office that, given the necessary elements above, absent a showing of lewd and lascivious intent by the defendant, there is no violation of §16-17-470(B).

The courts of this State have provided little analysis concerning §16-17-470. In fact, there are only two cases which provide any language concerning the application of the statute. In Herald Publishing Company, Inc. v. Barnwell, 291 S.C. 4, 351 S.E.2d 878, 883 (Ct. App. 1986), the court stated, in *dicta*, that §16-17-470 was “obviously inapplicable since the [defendants] were on public property and not ‘on or about the premises of another.’” In State v. Caldwell, 378 S.C. 268, 662 S.E.2d 474 (Ct. App. 2008), the court considered the admission of certain types of evidence against a defendant on trial for eavesdropping. The court also rejected the defendant’s claim that he had to be unlawfully on the premises prior to the objectionable conduct for the statute to apply. See State v. Harris, 293 S.C. 75, 358 S.E.2d 713 (1987) [finding a violation of the §16-17-470 has long been considered a crime of moral turpitude].

The courts of several states, however, have specifically addressed the requisite intent element for a conviction pursuant to voyeurism statutes very similar to §16-17-470(B). For example, in State v. Schaller, 15 So.3d 1046 (La. App. 2009), the Louisiana Court of Appeal discussed La. Rev. Stat. Ann. §283.1(A), defining voyeurism as “. . . the viewing, observing, spying upon, or invading the privacy of a person by looking through the doors, windows, or other openings of a private residence without the consent of the victim who has a reasonable expectation of privacy for the purpose of arousing or gratifying the sexual desires of the offender.” [Emphasis added]. The court held that videotapes depicting girls other than victim were admissible under the other-acts rule at a trial for video voyeurism involving a juvenile to show that the defendant had lewd or lascivious intent when he secretly recorded the victim and her boyfriend kissing. All of the disputed videotapes appeared to have been made by the defendant or in his presence, and all of the videotapes contained some sort of sexual display or behavior involving teenage girls. The court concluded it could easily have been inferred that the defendant collected and used the videotapes for his own sexual gratification. Schaller, 15 So.3d at 1061.

In State v. Glas, 106 Wash. App. 895, 27 P.3d 216 (2001), *rev’d on other grounds*, 147 Wash.2d 410, 54 P.3d 147 (2002), the Washington Court of Appeals discussed Washington’s voyeurism statute, Wash. Rev. Code Ann. §9A.44.115, which provides that 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. [Emphasis added]. Dismissing the defendant’s allegation that the State failed to prove he was sexually aroused or gratified by the offending conduct, the court explained the statute requires only that the purpose of the behavior be to arouse or gratify in some manner some sexual desire of any person. Glas, 27 P.3d at 220.

In State v. Huffman, 165 Ohio App.3d 518, 847 N.E.2d 58 (2006), the Ohio Court of Appeals discussed Ohio Rev. Code Ann. §§2907.08(A)-(C), Ohio’s voyeurism statute, which proscribes invading the privacy of another to eavesdrop, videotape, film, photograph, or otherwise record the other person in a state of nudity, “for the purpose of sexually arousing or gratifying the person’s self . . .”. The court denied the defendant’s directed verdict motion, finding the State presented sufficient evidence that defendant’s actions in secretly tape recording individuals at his tanning business were motivated by sexual arousal or self-gratification, as required to support his convictions for voyeurism.

There are other jurisdictions with criminal voyeurism statutes similar to §16-17-470(B). *See, e.g.*, Ariz. Rev. Stat. §13-1424(A) ["It is unlawful to knowingly invade the privacy of another person without the knowledge of the other person for the purpose of sexual stimulation . . ."]; Arkansas Code Ann. §5-16-102(b) ["A person commits the offense of voyeurism if for the purpose of sexual arousal or gratification . . ."]; Conn. Gen. Stat. §53a-189a ["A person is guilty of voyeurism when . . . with intent to arouse or satisfy the sexual desire of such person or any other person . . ."]; Fla. Stat. Ann. §§810.14(1), 810.845(2) ["A person commits the offense of (voyeurism) when he or she, with lewd, lascivious, or indecent intent . . ."]; Miss. Code Ann. §97-29-61 ["Any person who enters real property . . . for the lewd, licentious and indecent purpose of spying upon the occupants thereof . . ."]; R.I. Gen. Laws §11-64-2(1) ["A person is guilty of video voyeurism when, for the purpose of sexual arousal . . ."].¹ We are enclosing copies of these statutes for your review.

By way of analogy, we also bring to your attention South Carolina's lewd act statute, which requires a similar lewd and lascivious intent. Section 16-15-140 (2003) states:

[i]t is unlawful for a person over the age of fourteen years to wilfully and lewdly commit or attempt a lewd or lascivious act upon or with the body, or its parts, of a child under the age of sixteen years, with the intent of arousing, appealing to, or gratifying the lust or passions or sexual desires of the person or of the child. . . . [Emphasis added].

Our State courts have addressed the requisite intent element for a lewd act charge on several grounds. In State v. Hardee, 279 S.C. 409, 308 S.E.2d 521, 524 (1983), the South Carolina Supreme Court dismissed the defendant's directed verdict claim, stating there was sufficient evidence presented by the State to show any act "was done with the intent of arousing the sexual desires of the minor." In State v. Norton, 286 S.C. 95, 332 S.E.2d 531 (1985), the Supreme Court held that a defendant could be reindicted for committing a lewd act upon a minor after the trial court previously directed a verdict of acquittal on a charge of first degree criminal sexual conduct with a minor. Dismissing the defendant's double jeopardy claim, the court distinguished the elements of both offenses, and it noted the crime of committing a lewd act on a minor does not require a sexual battery. "Rather, the person committing the crime must act with the intent of appealing to the lust or passions of himself or the child." Norton, 332 S.E.2d at 532; *see also* State v. Brock, 335 S.C. 267, 516 S.E.2d 212, 214 (Ct. App. 1999)[determining a lewd act charge is not a lesser-included offense of first degree assault with intent to commit criminal sexual conduct, because a lewd act charge requires, *inter alia*, the perpetrator must commit a lewd or lascivious act upon the body of the child and "must act 'with the intent of arousing, appealing to, or gratifying the lust or passions or sexual desires' of the perpetrator or the minor victim"].

We further advise that in a criminal trial, the State is required to prove every element of the crime for which an accused is charged. Jackson v. Virginia, 443 U.S. 307, 316 (1979); In re Winship, 397 U.S.

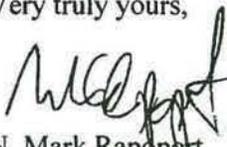
¹In contrast, criminal voyeurism statutes in other jurisdictions do not require a specific showing of lewd and lascivious intent. *See, e.g.*, 18 U.S.C.A. §1801(a); Ind. Code Ann. §35-45-4-5; Ky. Rev. Stat. Ann. §531.090; N.M. Stat. Ann. §30-9-20.

The Honorable Larry A. Martin
Page 4
March 11, 2011

358, 364 (1970); State v. Smith, 274 S.C. 622, 266 S.E.2d 422, 423 (1980); State v. Barksdale, 311 S.C. 210, 428 S.E.2d 498, 501 (Ct. App. 1993). In the event the State fails to produce evidence of the offense charged, an accused is entitled to a directed verdict of acquittal. State v. McHoney, 344 S.C. 85, 544 S.E.2d 30, 36 (2001). Of course, this office is unable to comment on any specific factual situation concerning your question, and we can obviously not predict with any certainty how a court will rule if presented with particular facts.

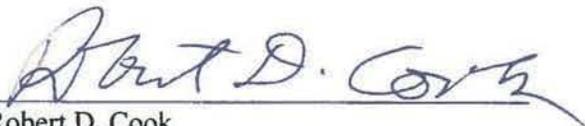
Please advise how I may be of further assistance.

Very truly yours,



N. Mark Rapoport
Senior Assistant Attorney General

REVIEWED AND APPROVED BY:



Robert D. Cook
Deputy Attorney General