SECOND DIVISION
MILLER, P. J.,
RICKMAN and REESE, JJ.

NOTICE: Motions for reconsideration must be *physically received* in our clerk's office within ten days of the date of decision to be deemed timely filed.
http://www.gaappeals.us/rules

September 30, 2019

NOT TO BE OFFICIALLY REPORTED

In the Court of Appeals of Georgia

A19A1578. NUCKLES v. THE STATE.

MILLER, Presiding Judge.

Wanda Nuckles appeals from the trial court's order denying her motion to suppress, arguing that the trial court erred by ruling that certain video recordings obtained from a patient's bedroom at a nursing facility in which she had been employed were admissible at trial. We conclude that the trial court correctly determined that the video recordings were admissible, and so we affirm.

> In reviewing the grant or denial of a motion to suppress, we construe the evidence in a light most favorable to upholding the trial court's findings and judgment. When the trial court's findings are based upon conflicting evidence, we will not disturb the lower court's ruling if there is any evidence to support its findings, and we accept that court's credibility assessments unless clearly erroneous. However, where, as here, an issue

> turns on the question of whether a trial court committed an error of law in granting a motion to suppress, we apply a de novo standard of review.

(Citations and punctuation omitted.) *State v. Criswell*, 327 Ga. App. 377 (759 SE2d 255) (2014).

So viewed, the evidence shows that in December 2013, the victim, 89-year-old James Dempsey, fell and broke his hip. Dempsey underwent surgery and was later discharged to the Northeast Atlanta Health and Rehabilitation Center (the "Center"), where Nuckles had been employed. After a brief stay, Dempsey was transferred back to the hospital due to severe dehydration. Upon his return to the Center, Dempsey was admitted to the "dementia floor" where he shared a room with another resident. The rooms at the Center were inaccessible to the general public, and residents' family members were allowed inside the resident rooms with permission from the resident.

While at the Center, Dempsey told his son, Timothy, that "strange things" would occur in his room during the night. Specifically, Dempsey recounted the following events: (1) a female resident came into his room and tried to climb into his bed; (2) a naked male resident had entered his room; and (3) Dempsey's roommate approached his bed and shook his hand several times during the night. Timothy noted that his father's hearing aids, water bottles, grooming items, and a small fan were

taken from his father's room. Timothy also observed that the Center's employees would delay their response to his father's request for assistance and that his father was served cold food on a number of occasions. Dempsey asked Timothy to stay with him overnight at the Center, but Timothy was unable to because he was the primary caretaker for his two stepchildren and his wife worked at night.

With Dempsey's permission, Timothy installed an audio and video recording device in Dempsey's room.[1] The device resembled a clock radio and was positioned on a dresser directly across from Dempsey's bed. From its position on the dresser, the device showed only Dempsey's side of the room and Dempsey's belongings. The only other individuals who were aware of the recording device in Dempsey's room were Timothy's wife and one of his stepdaughters. Whenever Dempsey told Timothy about strange incidents that had occurred in his room, Timothy would review the recorded footage and follow up with the Center's staff. In all, the device recorded approximately 400 hours of video footage.

Dempsey passed away on February 27, 2014, while living at the Center. Timothy last saw his father a few hours before his passing and noted that his father

[1] The Center's employee handbook contained a policy which allegedly barred video surveillance, although it was unclear whether the policy prohibited surveillance by employees or by all persons present at the facility.

appeared to be "fine." Timothy reviewed the video footage of Dempsey's final hours and contacted law enforcement.[2]

Nuckles, a nurse at the Center, was subsequently indicted on one count of depriving an elder person of essential services (OCGA § 16-5-102) and one count of concealing the death of another (OCGA § 16-10-31).[3] Nuckles filed a "motion to suppress/motion in limine"[4] and argued that the video recordings of Dempsey's hospital room were the product of unlawful surveillance and that she did not give consent to be recorded. Following a hearing, the trial court denied the motion and ruled that the video recordings would be admissible at trial. Specifically, the trial court found that Nuckles did not have a reasonable privacy interest in Dempsey's room. The trial court also found that, assuming Nuckles had a privacy interest in Dempsey's room, the security purposes, crime prevention, and crime detection exception under OCGA § 16-11-62 (2) (B) applied and thus Nuckles' consent to be

---

[2] There is no mention in the record available to us as to what the videos showed.

[3] Nuckles was indicted along with two other individuals in this case.

[4] In the motion, Nuckles also sought suppression of evidence obtained from a co-defendant's vehicle. That portion of Nuckles' motion is not at issue in this appeal.

recorded was not required. The trial court certified its order for immediate review, and this interlocutory appeal followed.

In her sole enumeration of error, Nuckles argues that the video recordings were the product of unlawful surveillance and therefore are inadmissible at trial under OCGA § 16-11-62. We disagree.

OCGA § 16-11-62 (2) provides that it is unlawful for "[a]ny person, through the use of any device, without the consent of all persons observed, to observe, photograph, or record the activities of another which occur in any private place and out of public view. . . ." Thus, as explained by the Supreme Court of Georgia,

> OCGA § 16-11-62 (2) states in no uncertain terms that all persons observed must consent to observational activities such as being photographed or having their own activities recorded with any device before someone else can legally record them through any means that allow them to be observed. The statute is written in terms that cover the types of observational surveillance that involve the capturing of images of another person on a spy camera without that person's consent.[5]

---

[5] Evidence obtained in violation of OCGA § 16-11-60 et seq. is not admissible at trial "in any court of this state except to prove violations of this part." OCGA § 16-11-67.

State v. Cohen, 302 Ga. 616, 626 (2) (a) (807 SE2d 861) (2017). In analyzing whether Dempsey's room constituted a "private place," the trial court defined "private place" as "a place where there is a reasonable expectation of privacy." This definition, although presently correct, did not apply to Nuckles' case because the video recordings were made in 2014, prior to the amendment of OCGA § 16-11-60 (3) on July 1, 2015. See Laws 2000, p. 875, § 2; Laws 2015, Act 173, § 2, effective July 1, 2015. See also *Wilson v. State*, — Ga. App. —, (1) — n. 2 (830 SE2d 407) (2019) (holding that the former OCGA § 16-11-60 (3) applied to the recorded interview at issue because the interview was recorded in 2013, prior to the statute's amendment on July 1, 2015). Instead, as stated by the Supreme Court of Georgia, under the former OCGA § 16-11-60 (3), a "private place" was "a place where one is entitled reasonably to expect to be safe from casual or hostile intrusion or surveillance." (Citation omitted.) Id.; OCGA § 16-11-60 (3) (2002). Therefore, the issue of whether the video recordings in this case ran afoul of OCGA § 16-11-62 (2) depends on whether the person or persons recorded could have reasonably expected to be safe from casual or hostile intrusion or surveillance in the place where the recorded activities occurred. See *Cohen*, supra, 302 Ga. at 628 (2) (b) (determining that the indictment sufficiently alleged a violation of OCGA § 16-11-62 by analyzing whether

the persons recorded could have reasonably expected to be safe from casual or hostile surveillance in the place where the recorded sexual activities occurred). Accordingly, the trial court used the wrong legal standard in determining whether the video recordings were subject to exclusion under OCGA § 16-11-62 (2).

Notwithstanding the trial court's use of an inapplicable legal standard, the trial court nevertheless correctly determined that the video recordings were admissible at Nuckles' trial because they came within the ambit of the exception provided in OCGA § 16-11-62 (2) (B).

Video recordings obtained in violation of OCGA § 16-11-60 et seq. are not admissible at trial "in any court of this state except to prove violations of this part." OCGA § 16-11-67. An exception to this rule is found in OCGA § 16-11-62 (2) (B), which allows "an owner or occupier of real property to use for security purposes, crime prevention, or crime detection any device to observe, photograph, or record the activities of persons who are on the property. . . ."

Here, the record shows that prior to Dempsey's passing, Dempsey told Timothy about "strange things" that would occur in his room during the night. Specifically, Dempsey told Timothy about the following: (1) a female resident came into his room and tried to climb into his bed; (2) a naked male resident had entered his room; and

(3) Dempsey's roommate approached his bed and shook his hand several times during the night. Additionally, Timothy himself noted that

his father's hearing aids, water bottles, grooming items, and a small fan were taken from his father's room. Timothy also observed that the Center's employees would delay their response to his father's request for assistance and that his father was served cold food on a number of occasions. The record also shows that Dempsey gave Timothy permission to install the audio and video recording device in Dempsey's room as a result of these occurrences.

Accordingly, even if Dempsey's room was a "private place" such that Nuckles' consent would have been required prior to recording her, the trial court correctly determined that the video recordings of Dempsey's room fell within the statutory exception outlined in OCGA § 16-11-62 (2) (B). The record supports the trial court's determination that Timothy installed the recording device in his father's room to identify the random individuals entering his father's room, the individuals who were stealing items from his father's room, and also to determine whether the hospital staff were neglecting his father. Hence, the record is clear that the video recordings at issue fall squarely within the statutory exception provided in OCGA § 16-11-62 (2) (B), and the video recordings are therefore admissible at Nuckles' trial.

Accordingly, we affirm the trial court's order denying Nuckles' motion to suppress/motion in limine.

Judgment affirmed. Rickman and Reese, JJ., concur.

Court of Appeals
of the State of Georgia

ATLANTA, October 25, 2019

The Court of Appeals hereby passes the following order

A19A1578. WANDA NUCKLES v. THE STATE.

Upon consideration of the APPELLANT'S Motion for Reconsideration in the above styled case, it is ordered that the motion is hereby DENIED.

Court of Appeals of the State of Georgia
Clerk's Office, Atlanta, October 25, 2019.

I certify that the above is a true extract from the minutes of the Court of Appeals of Georgia.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

Stephen E. Castlen, *Clerk.*