05AP2300

STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT IV

Appeal No. 2005AP2300-CR
(La Crosse County Case No. 04-CF-532)

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

MARK E. NELSON,

Defendant-Appellant.

Appeal from the Judgment
Entered in the Circuit Court for La Crosse County,
The Honorable Dale T. Pasel, Circuit Judge, Presiding

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

ROBERT R. HENAK
State Bar No. 1016803
AMELIA L. BIZZARO
State Bar No. 1045709
HENAK LAW OFFICE, S.C.
1223 North Prospect Avenue
Milwaukee, Wisconsin 53202
(414) 283-9300

Counsel for Defendant-Appellant

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ISSUES PRESENTED FOR REVIEW

1. Whether the evidence was sufficient to establish the required element for conviction under Wis. Stat. §942.09(2)(a) that the complainants had a reasonable expectation of privacy in activities conducted in front of an open window readily viewable from another building approximately 10 to 15 feet away.

The circuit court denied Nelson's pretrial motion to dismiss raising this claim.

2. Whether interpretation of Wis. Stat. §942.09(2)(a) to uphold Nelson's conviction for the videorecording of activities conducted in front of an open window readily viewable from another building approximately 10 to 15 feet away violates due process.

The circuit court did not address this issue.

3. Whether reversal is appropriate in the interests of justice on the grounds that the jury instructions did not adequately define when a subjective expectation of privacy may be deemed "reasonable," as required for conviction under Wis. Stat. §942.09(2)(a).

The circuit court did not address this issue.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Oral argument is appropriate in this case under Wis. Stat. (Rule) 809.22. Appellants' arguments clearly are substantial and do not fall within that class of frivolous or near frivolous arguments concerning which oral argument may be denied under Rule 809.22(2)(a).

Because there is a lack of appellate authority construing the "reasonable expectation of privacy" element of Wis. Stat. §942.09(2)(a), publication may be appropriate under Wis. Stat. (Rule) 809.23.

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BRIEF OF DEFENDANT-APPELLANT

STATEMENT OF THE CASE

By criminal complaint dated August 25, 2004, the state charged Mark E. Nelson with two counts of capturing representations depicting nudity in violation of Wis. Stat. §942.09(2)(a) (2003-04). The depictions at issue consisted of video recordings of what Nelson could readily observe through his neighbors' open bathroom window from an upstairs bedroom of his own La Crosse rental property during June and July, 2004. (R3).[1]

After a preliminary hearing (R66; R67), the court bound Nelson over for trial (R67:24) and then arraigned Nelson on an information alleging the same two counts (*id.*:24-25). Nelson moved to dismiss based on the state's failure to establish that the recording violated a

[1] Count 1 concerned recordings made in June, 2004, while Count 2 concerned recordings made in July, 2004 (R69:10-11).

reasonable expectation of privacy on the part of the neighbors (R23), but the court denied the motion on the grounds that the issue was for the jury (R69:2-3).

The case proceeded to a jury trial before the Honorable Dale T. Pasell on February 14, 2005 (R70). Nelson did not dispute much of the state's case. The only disputed issue was whether the complainants had a reasonable expectation of privacy under circumstances in which they knowingly conducted certain activities in front of an open window and subject to observation through the window of a building next door. (*See* R71:27-36 (Defense counsel's opening)).

As relevant to this appeal, the evidence at trial, when viewed most favorably to the state, established that, during the summer of 2004, five UW-La Crosse co-eds rented a five-bedroom apartment in La Crosse (R71:37-39, 58, 77-78). Their second floor bathroom faced directly into the window of a neighboring home approximately 10 to 15 feet away (*id.*: 39, 41, 102, 105, 122-23, 161). Although their bathroom window had fogged privacy glass in it, and the women knew the purpose of the glass was so nobody could see in, they chose to keep the window open to enhance air circulation during the summer heat (*id.*:41, 44, 71). Whether they opened the window or closed it depended on how hot is was (*id.*:49, 89).

Three of the women testified at trial that, although they did not pay close attention (R71:73, 91), they did not believe that anyone lived in the neighboring home because there was a "For Sale" or "For Rent" sign out front, no mail was delivered to it, the lawn was not mowed, and they could not remember seeing anyone at the house or the lights on (*id.*:39-41, 44, 47, 59-60, 65, 67, 79, 89). No one could see into the bathroom except from the neighboring house (*id.*:50; 65-66, 68, 164).

The women did not expect anyone would be at the window of the neighboring house to see into their bathroom (R71:65, 71). They expected privacy because they were in their own bathroom (*id.*:86).

They would have closed the window or installed blinds if they had thought anyone would be there to look in their window (*id.*: 67, 72, 90).

On August 24, 2004, the mother of one of the women noticed something which looked like a lens in the window next door across from their bathroom and they called the police (R71:81-82). A police officer arrived and, while walking up to the neighboring house, looked in through the first floor windows, seeing a desk and phone, a ladder, and some building materials (*id.*:105-07). The officer testified that it was common for him to look in the window before ringing the doorbell (*id.*:127). He also observed a white car with Florida license plates parked behind the house (*id.*:106-07, 121, 160).

The house next door was owned by Mark Nelson. He was present when the officer arrived, explaining that he was staying there off and on while repairing the house. (R71:108, 119, 157-58). Among other things, a search of his house resulted in the seizure of videotapes depicting nudity, excerpts of which were introduced at trial and which included brief depictions of the two complainants nude (*id.*:151-55; R27A (Exhibit 10)).

Nelson admitted filming the complainants through their open bathroom window (R71:158).

The jury returned its verdicts on February 17, 2005, finding Nelson guilty on both counts (R71:212-13).

On March 28, 2005, the La Crosse County Circuit Court, Hon. Dale T. Pasel, presiding, sentenced Mr. Nelson to three years incarceration, consisting of an initial term of confinement of one year and a two-year term of extended supervision. The court also imposed a consecutive four-year term of probation. (R73:84). The court entered judgment on March 29, 2005 (R44; R45).

On April 7, 2005, Nelson filed his notice of intent to pursue post-conviction relief pursuant to Wis. Stat. (Rule) 809.30(2)(b).

Nelson timely ordered the transcripts (*see* R54), this Court having extended the time for doing so (R55).

Nelson timely filed his notice of appeal on September 13, 2005 (R74), this Court having extended the time for filing that document to that date (R63).

The circuit court filed the appeal record with this Court on October 17, 2005.

ARGUMENT

I.

THE EVIDENCE WAS INSUFFICIENT FOR CONVICTION

Because the evidence, when viewed most favorably to the state, failed to establish that Nelson's neighbors had a reasonable expectation of privacy from observation of their activities before an open bathroom window, the state failed to prove a necessary element of the offense of capturing a representation depicting nudity as defined in Wis. Stat. §942.09(2)(a). Nelson's convictions accordingly must be vacated and those charges dismissed.

A. Applicable Legal Principles

1. Sufficiency of the evidence

The burden is on the state to prove every fact necessary for conviction of the crime charged beyond a reasonable doubt. *E.g.*, *Jackson v. Virginia*, 443 U.S. 307 (1979); *In re Winship*, 397 U.S. 358, 364 (1970). "The standard for reviewing the sufficiency of the evidence to support a conviction is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a

reasonable doubt." *State v. Rushing*, 197 Wis.2d 631, 541 N.W.2d 155, 159 (Ct. App. 1995) (citing *Jackson*, 443 U.S. at 319); *see State v. Hayes*, 2004 WI 80, ¶56, 273 Wis.2d 1, 681 N.W.2d 203.

While the jury may rely upon reasonable inferences from the facts as well as upon direct evidence, a reasonable inference is a rational and logical deduction from established facts rather than a mere guess or conjecture. *See, e.g.*, 1 Sand, et al., *Modern Federal Practice Jury Instructions* ¶6.01 (2004), and cases cited therein. *See also Leary v. United States*, 395 U.S. 6, 36 (1969) (inference is "irrational" unless presumed fact more likely than not given proven fact); *State v. Haugen*, 52 Wis.2d 791, 191 N.W.2d 12, 15 (1971) (inference of guilt from criminal complaint unreasonable if conclusion of innocence equally reasonable).

This Court reviews challenges to the sufficiency of the evidence necessary to support a verdict *de novo*. *State v. Wanta*, 224 Wis.2d 679, 592 N.W.2d 645, 650 (Ct. App. 1999) (citation omitted).

2. The "reasonable expectation of privacy" requirement of Wis. Stat. §942.09(2)(a)

Wisconsin Statutes §942.09(2)(a) provides as follows:

> (2) Whoever does any of the following is guilty of a Class I felony:
>
> > (a) 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.

Conviction under §942.09(2)(a) thus requires proof, *inter alia*,

that the representation was captured while the person depicted "is nude in a circumstance in which he or she has a reasonable expectation of privacy." *Id.*; *see* Wis. J.I.–Crim. 1396 (2002).

The Supreme Court has dictated the following rules of statutory interpretation:

> When interpreting statutes, our goal is to give effect to the language of the statute. We begin by looking to the language of the statute because we "assume that the legislature's intent is expressed in the statutory language." Technical terms or legal terms of art appearing in the statute are given their accepted technical or legal definitions while nontechnical words and phrases are given their common, everyday meaning. Terms that are specifically defined in a statute are accorded the definition the legislature provided. In addition, we read the language of a specific statutory section in the context of the entire statute. Thus, we interpret a statute in light of its textually manifest scope, context, and purpose.

Peterson v. Volkswagen of Am., Inc., 2005 WI 61, ¶19, 281 Wis.2d 39, 697 N.W.2d 61 (citations omitted). "[E]xtrinsic sources, such as legislative history, are not consulted unless the statute is ambiguous. A statute is ambiguous if it is susceptible to more than one reasonable understanding." *Id.* (citation omitted).

While Wis. Stat. §942.09 defines such statutory terms as "captures a representation," "nudity," and "representation," Wis. Stat. §942.09(1), it does not define when an individual has a "reasonable expectation of privacy" for purposes of the offenses outlined in Wis. Stat. §942.09(2). The statute need not define that term, however, as it is a legal term of art with a settled meaning derived from the Fourth Amendment context. *See Peterson*, ¶19 ("legal terms of art appearing in the statute are given their accepted technical or legal definitions").

The Comment to Wis. J.I.–Crim. 1396 (2002), for instance, makes the common sense observation that "[t]he statute uses the term

'reasonable expectation of privacy," which is most commonly used in the 4th Amendment context," and therefore adopts the Fourth Amendment standard requiring both an actual, subjective expectation of privacy and a finding that the expectation was objectively reasonable. Citing *Katz v. United States*, 389 U.S. 347 (1967).

Adopting the same standards applied in Fourth Amendment cases only make sense. Not only did the legislature choose to use a term of art long associated with a particular set of legal requirements, but the legislative history of the statute confirms the intent to incorporate into the statute those same legal standards applied in the constitutional context.

What is now §942.09 originally was codified at Wis. Stat. §944.205 (1997-98), which provided in relevant part as follows:

> (2) Whoever does any of the following is guilty of a Class E felony:
>
> (a) Takes a photograph or makes a motion picture, videotape or other visual representation or reproduction that depicts nudity without the knowledge or consent of the person who is depicted nude, if the person knows or has reason to know that the person who is depicted nude does not know of and consent to the taking or making of the photograph, motion picture, videotape or other visual representation or reproduction.

Wis. Stat. §944.205(2)(a) (1997-98). *See also* 1995 Wis. Act 249.

In *State v. Stevenson*, 2000 WI 71, 236 Wis.2d 86, 613 N.W.2d 90, however, the Wisconsin Supreme Court struck down this provision as unconstitutionally overbroad:

> ¶21 . . . The statute not only properly prohibits Stevenson's surreptitious videotaping of his former girlfriend in the nude, but also improperly prohibits all visual expression of nudity without explicit consent, including political satire and newsworthy images.

> ¶ 22 Wisconsin Stat. §944.205(2)(a) does not limit its reach to original depictions of nudity but rather over-reaches to all reproductions. It chills the ability to include copies of masterpieces like Michaelangelo's [sic] "David" in a book devoted to famous sculptures and also prevents the dissemination of materials that may portray nudity for health or educational purposes. Accordingly, Wis. Stat. §944.205(2)(a) indiscriminately casts a wide net over expressive conduct protected by the First Amendment and is unconstitutionally overbroad.

Id. ¶¶21-22.

The state conceded as much, *id.* ¶21, but sought to save Stevenson's conviction and the statute by arguing that the Court should interpret the statute to apply only when the victim was photographed or videotaped "while that person is nude in circumstances where they have a reasonable expectation of privacy." *Id.* ¶¶24-25. The state viewed such an interpretation as overcoming the statute's overbreadth by adding two elements to the offense: (1) that the person depicted nude have a reasonable expectation of privacy in the place or circumstances in which the person is depicted, and (2) that the person depicted be contemporaneously present at the time of the depiction. *See id.* ¶28.

In arguing for the "reasonable expectation of privacy" standard, the state noted its source in Fourth Amendment jurisprudence:

> As limited to circumstances in which the subject of a nude picture retained a reasonable expectation of privacy which was invaded without consent, Wis. Stat. §944.205(2)(a) would plainly remain within constitutional bounds in all its applications.
>
> Whether there is a reasonable expectation of privacy under the circumstances is a familiar inquiry which underlies all Fourth Amendment litigation. *See, e.g., State v. Dixon*, 177 Wis.2d 461, 466-69, 501 N.W.2d 442 (1993). . . ..

State v. Scott L. Stevenson, Appeal No. 98-2110-CR (S.Ct.), Brief of

Plaintiff-Respondent at 15.

Despite the state's argument, the Supreme Court declined to judicially amend the statute in this manner, citing in part the proper role of the Court *vis-a-vis* the Legislature and the violence such an interpretation would do to other provisions of the statute. *Stevenson*, ¶¶29-40.

Not surprisingly, addition of the "reasonable expectation of privacy" language to then §944.205(2)(a) was a direct reaction to *Stevenson*. *Stevenson* was decided June 28, 2000, and, on October 23, 2000, Andrew J. Statz of the Department of Administration, State Budget Office sent a memorandum to the Legislative Reference Bureau requesting that statutory language be drafted for inclusion with the 2001-03 biennial budget bill. Mr. Statz noted that, "[i]n part, this request is a reaction to recent Supreme Court rulings regarding the constitutionality of existing prohibitions on . . . voyeurism." Memo contained in bill drafting file for 2001 Wis. Act 16 (App. 1).

As enacted, the amendment closely tracked the language which the state had asked the Court to add in *Stevenson*, providing that the recording must have been made "while that person is nude in a place and circumstance in which he or she has a reasonable expectation of privacy." 2001 Wis. Act 16, §3956.

Subsequent amendments to the statute ultimately modified the "reasonable expectation of privacy" clause to its current language, which even more closely tracks that proposed by the state in *Stevenson*, and also moved the statute to its current location at Wis. Stat. §942.09. 2001 Wis. Act 33. Indeed, the drafting file for 2001 Wis. Act 33 contains multiple substantive memoranda either from AAG Thomas Balistreri, the same attorney who represented the state in *Stevenson*, or in response to his suggestions regarding the provision (App. 7-14). The Legislative Reference Bureau analysis to the underlying bill, 2001 Assembly Bill 60, further states that the bill was intended to narrow the scope of the prior law to remedy the constitutional defects found in

Stevenson (App. 15).

Whether based on the clear language of the statute or on a review of its legislative history, therefore, it is clear that the "reasonable expectation of privacy" language was intended to have the same meaning under §942.09(2)(a) as it has elsewhere in the law.

3. There is no "reasonable expectation of privacy" in activities one knowingly exposes to the risk of public observation

A reasonable expectation of privacy must meet two requirements. First, the individual - by his conduct - must show an actual, subjective expectation of privacy. *See United States v. Katz*, 389 U.S. 347, 361 (1967) (Harlan, J. concurring). Second, that expectation must be one that society is willing to recognize as reasonable. *Id. See also California v. Ciraolo*, 476 U.S. 207, 211 (1986); *State v. Dixon*, 177 Wis.2d, 461, 501 N.W.2d 442, 445 (Wis. 1993); *State v. Rewolinski*, 159 Wis.2d 1, 464 N.W.2d 401, 405 (Wis. 1990). Whether the facts gave rise to a legitimate expectation of privacy is a matter of law reviewed *de novo*. *Rewolinski*, 464 N.W.2d at 407.

There is no search under the Fourth Amendment where an officer - without making a prior physical intrusion - sees an object within the premises, on a person, or in a vehicle. This is because a person has no reasonable expectation of privacy in an item that is in plain view. *Horton v. California*, 496 U.S. 128, 133 (1990). "What a person knowingly exposes to the public, even in his own home or office, is not a subject of 4th Amendment protection." *Katz*, 389 U.S. at 351-52.

Under the plain view doctrine, "objects falling within the plain view of an officer who has a right to be in the position to have the view are subject to valid seizure and may be introduced in evidence." *State v. Bell*, 62 Wis.2d 534, 540, 215 N.W.2d 535, 539 (1974) (citations omitted); *see State v. Edgeberg*, 188 Wis.2d 339, 524 N.W.2d 911, 914

(Ct. App. 1994). "But whether the property or object involved in the challenged intrusion be the home or its curtilage, with the stringent protection given it under the Constitution, on the one hand, or an automobile or plane, with its 'limited' and 'diminished' right of protection, on the other hand, one has no legitimate expectation of privacy in any object whether it be in the home or a car or a plane if that object is exposed to plain view." *United States v. Bellina*, 665 F.2d 1335, 1341 (4th Cir. 1981).

Even where the individual takes reasonable steps to avoid observation, such as constructing a 10-foot high fence to shield his back-yard marijuana operation from prying eyes of his neighbors or police, any resulting expectation of privacy is deemed unreasonable where the operation could be viewed from another vantage point, as from public airspace. *Ciraolo*, 476 U.S. at 213-14.

In other words, one has no reasonable expectation of privacy in those actions or items intentionally or unintentionally left subject to observation by others from a position in which they are entitled to be. In *State v. Edgeberg*, 188 Wis.2d 339, 524 N.W.2d 911 (Ct. App. 1994), for example, an officer, looking through a screen door, saw marijuana plants growing in the defendant's living room. 524 N.W.2d at 913. The officer was on the porch leading to the screen door investigating a complaint of a barking dog. *Id.* The Court found that there was no reasonable expectation of privacy in the porch as it was the public entryway (and thus in the portions of the home observable from that vantage point). *Id.* at 914-15.

Similarly, in *United States v. Whaley*, 779 F.2d 585 (11th Cir. 1986), the Court held that an individual did not have a reasonable expectation of privacy in activities conducted in a lighted basement before an uncovered window. This was true even though the house was located on three acres of land in a secluded area. Even though the individual did not expect surveillance of his activities, they could be viewed from the adjoining property with the naked eye. *Id.* at 590.

To the same effect is *State v. Vogel*, 428 N.W.2d 272 (S.D. 1988). There, a police officer was able to observe marijuana growing through the windows of the defendant's geodesic dome. The Court held that the officer's observations, both from public airspace and from the "open fields" on the defendant's own property, did not breach any reasonable expectation of privacy because the officer had a right to be where he was when he made the observations and the defendant "took no precautions whatever to mask any view of his windows." *Id.* at 274-77.

In *United States v. Hanahan*, 442 F.2d 649 (7th Cir. 1971), the issue was whether information obtained by officers looking through a window in a service door constituted a search and seizure under the Fourth Amendment. *Id.* at 652. The *Hanahan* Court found that the defendant had no reasonable expectation of privacy, noting that "the service door window through which [the officer] looked while stationed in a place where he had a right to be and through which any other persons interested might have looked, had no cover over it." *Id.* at 653.

And finally, in *Ponce v. Craven,* 409 F.2d 621 (9th Cir.1969), police officers lawfully on a motel parking lot outside a partially opened bathroom window for one of the motel rooms heard the defendant and another discussing heroin and observed the defendant washing drug paraphernalia inside the bathroom. *Id.* at 623. The Court found that any expectation of privacy in the motel bathroom was unreasonable:

> Ponce's reliance on privacy in his motel room was not reasonable under the circumstances. If he did not wish to be observed, he could have drawn his blinds. The officers did not intrude upon any reasonable expectation of privacy in this case by observing with their eyes the activities visible through the window.

Id. at 625.

See also United States v. Taylor, 90 F.3d 903, 908-09 (4th Cir.

1996) (no reasonable expectation of privacy in activities which could be viewed from public area through partially-closed window blinds); *United States v. James*, 40 F.3d 850, 861-62 (7th Cir. 1994) (no violation where officers observed activity through window from walkway accessible to public);[2] *United States v. Tarborda*, 635 F.2d 131, 138-39 (2d Cir. 1980) (upholding unenhanced surveillance from an apartment across the street from defendant's apartment); *United States v. Ortiz,* 603 F.2d 76, 79 (9th Cir. 1979) (no search to view through window into gas station); *United States v. Martin,* 509 F.2d 1211, 1214 (9th Cir. 1975) (officers with neighbor's consent viewing interior of defendant's residence from neighbor's yard did no more than the neighbors might have done); *United States v. Hersh,* 464 F.2d 228, 230 (9th Cir.1972) (no search to peer into window alongside front door); *United States v. Wright,* 449 F.2d 1355, 1361 (per curiam) (D.C. Cir. 1971) (no search to look into garage through 8 to 9 inch gap in door); *United States v. Christensen,* 524 F.Supp. 344, 347 (N.D. Ill. 1981) (upholding binocular surveillance of illegal activity conducted in front of a window); *State v. Dickerson*, 313 N.W.2d 526 (Iowa 1981) (no reasonable expectation of privacy in items or activities viewed through window in door to residence); *State v. Rose,* 128 Wash.2d 388, 909 P.2d 280 (1996) (no illegal search when officer, while standing on front porch of defendant's mobile home, looked with aid of flashlight through unobstructed window to left of front door and saw cut marijuana and scale on table inside); *State v. Poling*, 531 S.E.2d 678, 682 (W. Va. 2000) (officer breached no reasonable expectation of privacy when he "observed what was immediately apparent, obvious, and in his plain view through the uncovered window"); *Schill v. State*, 50 Wis.2d 473, 184 N.W.2d 858 (1971) (police officer's unobstructed view of heroin packets through an open door did not constitute a search).

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[2] The Supreme Court vacated a different holding in *James* in *James v. United States*, 516 U.S. 1022 (1995).

B. The Evidence Was Insufficient to Prove the Necessary Element That the Complainants Had a Reasonable Expectation of Privacy in Their Activities Knowingly Performed Before an Open Window

With all due respect to the jury and to the circuit court, the evidence presented at trial was insufficient for a fact-finder reasonably to conclude that Nelson's neighbors had a reasonable expectation of privacy in activities knowingly performed before an open window readily observable by anyone who might have occupied the building next door. The evidence presented established that any expectation of privacy in those activities was *per se* unreasonable.

The complainants' hope or expectation that no one would look through their open bathroom window does not make such an expectation reasonable. *E.g.*, *Edgeberg*, 524 N.W.2d at 915 ("If Edgeberg expected that visitors would not step inside to knock on the inner door, his expectation was unreasonable . . .."). *See also California v. Greenwood*, 486 U.S. 35 (1988) (no reasonable expectation of privacy in trash left at curb, even though "[t]he trash was only temporarily on the street, and there was little likelihood that it would be inspected by anyone," *id.* at 39).

While the complainants no doubt assumed or hoped for privacy when they chose to keep their bathroom window open, exposing themselves to view by anyone who happened to occupy the home just 10 to 15 feet away, that hope is not an expectation society is willing to accept as reasonable. *Whaley*, 779 F.2d at 590 ("Although appellant might have believed that activity in his basement would not be observed, a reasonable expectation of privacy by definition means more than a subjective expectation of not being discovered"), citing *Rakas v. Illinois*, 439 U.S. 128, 143 n. 12 (1978). The courts have uniformly recognized that "one has no legitimate expectation of privacy in any object whether it be in the home or a car or a plane if that object is exposed to plain view." *Bellina*, 665 F.2d at 1341; *see, e.g.*, *Horton,*

496 U.S. at 133; *Katz*, 389 U.S. at 351-52.

Had it been police officers watching the complainants from the house next door for evidence of a crime, their observations clearly would have breached no reasonable expectation of privacy. *E.g.*, *Taylor*, *supra; Whaley*, *supra*; *Tarborda*, 635 F.2d at 139 ("observation of objects and activities inside a person's home by unenhanced vision from a location where the observer may properly be does not impair a legitimate expectation of privacy"); *Vogel*, *supra*.

The fact that the observer was Nelson, and not a police officer, can have no rational effect on the reasonableness of the complainants' expectation or hope that they would not be seen through the open window. The obvious difference in purpose between such observations by the police and those by Nelson is both logically and legally irrelevant to the issue of whether one's hope or expectation of privacy is "reasonable." *Ciraolo,* 476 U.S. at 214 n.2 ("we find difficulty understanding exactly how respondent's expectations of privacy from aerial observation might differ when two airplanes pass overhead at identical altitudes, simply for different purposes").

Nor does it matter that the complainants' activities left open to view from the neighboring property took place in their bathroom. *E.g.*, *United States v. White*, 890 F.2d 1012 (8th Cir.1989) (no reasonable expectation of privacy for illegal activity that could be viewed under door of public bathroom stall); *Ponce*, *supra* (no reasonable expectation of privacy in what may be viewed through partially open bathroom window). While one generally would have a reasonable expectation of privacy while in the bathroom, even that expectation of privacy is rendered unreasonable where, as here, the person fails to take the "necessary, common and available steps" to ensure privacy. *State v. Orta*, 2003 WI App 93, ¶16, 264 Wis.2d 765, 663 N.W.2d 358 (no reasonable expectation of privacy in public bathroom stall where defendant failed to take "the usual and customary steps to assure privacy in the restroom stall by locking or latching the stall door or, at

a minimum, assuring that the door was fully closed"); *Moore v. State*, 355 S.3d 1219 (Fla. App. 1978) (upholding plain view of public bathroom stall through ½-inch crack in door).

And finally, the fact that Nelson recorded what he observed in plain view likewise is irrelevant to the issue of whether the complainant's had a reasonable expectation of privacy in their activities before an open window. *E.g.*, *United States v. Taketa*, 923 F.2d 665, 677 (9th Cir. 1991) ("Video surveillance does not in itself violate a reasonable expectation of privacy. Videotaping of suspects in public places, such as banks, does not violate the fourth amendment; the police may record what they normally may view with the naked eye.").

Because the complainants had no reasonable expectation of privacy in their activities which they left open to view through an open window, the state failed to meet its burden of proving all elements of the charged offense beyond a reasonable doubt. Nelson's convictions accordingly must be vacated and the charges dismissed. *E.g.*, *State v. Wulff*, 207 Wis.2d 144, 557 N.W.2d 813, 818 (1997).

II.

INTERPRETATION OF WIS. STAT. §942.09(2)(a) TO AFFIRM NELSON'S CONVICTION WOULD DENY HIM DUE PROCESS

An interpretation of the "reasonable expectation of privacy" requirement of §942.09(2)(a) to uphold the conviction here would deny Nelson due process. Such an interpretation would deny him prior notice of the conduct prohibited. Detaching the statutory element from the settled construction of the same language in the Fourth Amendment context also renders it unconstitutionally vague where, as here, the circumstances clearly would not support a reasonable expectation of privacy under the Constitution.

The Supreme Court has often recognized the "basic principle

that a criminal statute must give fair warning of the conduct that it makes a crime." *Bouie v. City of Columbia,* 378 U.S. 347, 350 (1964); *see, e.g., Rogers v. Tennessee,* 532 U.S. 451, 457 (2001). "Deprivation of the right to fair warning . . . can result both from vague statutory language and from an unforeseeable and retroactive judicial expansion of statutory language that appears narrow and precise on its face." *Rogers,* 532 U.S.at 457, citing *Bouie,* 378 U.S. at 352.

It is therefore settled law that due process prohibits retroactive application of any "judicial construction of a criminal statute [that] is unexpected and indefensible by reference to the law which has been expressed prior to the conduct in issue." *Bouie,* 378 U.S. at 354. *See Rogers,* 532 U.S. at 457-58; *United States v. Lanier,* 520 U.S. 259, 266 (1997) ("[D]ue process bars courts from applying a novel construction of a criminal statute to conduct that neither the statute nor any prior judicial decision has fairly disclosed to be within its scope"); *Marks v. United States,* 430 U.S.188, 191-192 (1977) (Due process protects against judicial infringement of the "right to fair warning" that certain conduct will give rise to criminal penalties); *Douglas v. Buder,* 412 U.S. 430, 432 (1973) *(per curiam)* (trial court's construction of the term "arrest" as including a traffic citation, and application of that construction to defendant to revoke his probation, was unforeseeable and thus violated due process); *Rabe v. Washington,* 405 U.S. 313, 316 (1972) *(per curiam)* (reversing conviction under state obscenity law because it did "not giv[e] fair notice" that the location of the allegedly obscene exhibition was a vital element of the offense).

When proffering the "reasonable expectation of privacy" element as a means to overcome the overbreadth of the predecessor statute in *Stevenson, supra,* the state observed that "[w]hether there is a reasonable expectation of privacy under the circumstances is a familiar inquiry which underlies all Fourth Amendment litigation." *State v. Scott L. Stevenson,* Appeal No. 98-2110-CR (S.Ct.), Brief of Plaintiff-Respondent at 15.

As already demonstrated, whatever their hopes or subjective expectations may have been, the complainants had no reasonable expectation of privacy under this "familiar inquiry" in their actions before an open window exposed to view by anyone who might happen to be in the neighboring building. Section I, *supra*. Should this Court construe §942.09(2)(a) in a manner as to uphold Nelson's conviction, therefore, such a decision would be "unexpected and indefensible by reference to the law which has been expressed prior to the conduct in issue," and thus contrary to Nelson's due process rights. *E.g.*, *Rogers*, *supra*; *Bouie*, *supra*.

An interpretation of the "reasonable expectation of privacy" requirement of §942.09(2)(a) necessary to uphold Nelson's conviction, and thus contrary to existing uniform interpretations of that language, also would likely render the statute void for vagueness as applied to defendants, such as Nelson, who merely videotaped that which they readily could observe through an open window from a place they had a right to be.

"Vagueness may invalidate a criminal law for either of two independent reasons. First, it may fail to provide the kind of ordinary notice that will enable ordinary people to understand what conduct it prohibits; second, it may authorize and even encourage arbitrary and discriminatory enforcement." *City of Chicago v. Morales*, 527 U.S. 41, 56 (1999) (citing *Kolender v. Lawson*, 461 U.S. 352, 357 (1983)).

> It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined. Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law

> impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application.

Grayned v. Rockford, 408 U.S. 104, 108-109 (1972) (footnotes omitted).

To the extent the statutory requirement of a "reasonable expectation of privacy" is construed so broadly that activities pursued knowingly before an open window may be deemed "private," the statute is unconstitutionally vague as applied to Nelson on both grounds identified in *Morales*, *supra*. Nelson would have been unable reasonably to determine what activities left open to public view may merit the protection of a reasonable expectation of privacy, so that videotaping them would violate the statute, and which of such activities would not. For similar reasons, a law enforcement officer, judge or jury assessing Nelson's actions would be left without discernable guidance for assessing what recordings of conduct open to public observation are included within the statutory proscription and which are not.

The Constitution cannot sanction such uncertainty. Nelson's convictions accordingly must be reversed and the charges against him dismissed even if this Court could somehow construe the "reasonable expectation of privacy" element of §942.09(2)(a) as having been met here.

III.

THE JURY INSTRUCTIONS' FAILURE TO DEFINE WHEN AN EXPECTATION OF PRIVACY MAY BE DEEMED "REASONABLE" ALLOWED THE JURY TO IMPOSE ITS OWN STANDARD OF CRIMINAL LIABILITY, JUSTIFYING REVERSAL IN THE INTERESTS OF JUSTICE

The trial court's instructions to the jury did not define when a subjective expectation of privacy may be deemed "reasonable" for purposes of §942.09(2)(a). Rather, the court's instructions on this point were limited to the following:

> Before you may find the defendant guilty of this offense – this is as to both counts and you must consider each offense individually – the State must prove by evidence which satisfies you beyond a reasonable doubt that the following four elements were present.
>
> * * *
>
> Three, the person who is depicted nude was nude in a circumstance in which he or she had a reasonable expectation of privacy.
>
> * * *
>
> Reasonable expectation of privacy means that the person who is depicted nude had an actual expectation of privacy at the time the depiction of nudity was captured. And, that the expectation of privacy was reasonable.

(R71:169-70).

Nelson understands that his counsel did not object to the defective instructions (*see* R71:96, 137, 167, 210). He accordingly cannot challenge the instructions as of right. Wis. Stat. §805.13; *see State v. Schumacher*, 144 Wis.2d 388, 424 N.W.2d 672, 676 (1988). However, "[a] trial court may exercise its power of discretionary reversal in the interest of justice under sec. 805.15(1), if instructional error occurred, whether or not the error was objected to." *State v.*

Harp, 150 Wis.2d 861, 443 N.W.2d 38, 44 (Ct. App. 1989);[3] *see* Wis. Stat. §805.15(1).

This Court likewise may exercise the same discretionary power of reversal in the interests of justice under Wis. Stat. §752.35. *State v. Peters*, 2002 WI App 243, 258 Wis.2d 148, 653 N.W.2d 300; *Steinberg v. Jensen*, 204 Wis.2d 115, 553 N.W.2d 820 (Ct. App. 1996).

The interests of justice require the grant of relief pursuant to Wis. Stat. §752.35 because the instructions' failure to provide the jury guidance on the only disputed issue in the case resulted in the real controversy not being tried. *See Vollmer v. Luety*, 156 Wis.2d 1, 456 N.W.2d 797 (1990). Specifically, by failing to define when a subjective expectation of privacy may be deemed "reasonable," the instructions allowed the jury to inject its own perceptions of reasonableness and failed to require a jury verdict beyond a reasonable doubt on every element necessary for a finding of guilt on the charges offense.

"Reasonable expectation of privacy" is a legal term of art. What members of the general public may view as "reasonable," such as actions taken to reduce but not totally preclude the possibility of being seen by others, the law does not. *E.g.*, *Ciraolo*, 476 U.S. at 213-14 (observations from public airspace of back yard enclosed by 10-foot fence); *Whaley*, 779 F.2d at 590 (observations through open window of home in secluded area); *Taylor*, 90 F.3d at 908-09 (observations from public area through partially-closed window blinds); *Vogel*, 428 N.W.2d at 274-77 (observations through windows from public airspace and open fields surrounding rural home).

By failing to define when a subjective expectation of privacy may be deemed reasonable, and failing to explain that one's subjective expectations of privacy in activities performed before an open window

---

[3] *Harp* was overruled in part on other grounds in *State v. Camacho*, 176 Wis.2d 860, 501 N.W.2d 380, 388 (1993).

subject to observation by anyone in a neighboring building are not reasonable, the jury instructions permitted the jury to convict without making a finding that the circumstances in fact gave rise to a reasonable expectation of privacy as defined by law. Instead, the instructions allowed the jury to substitute its own, subjective and uninformed standard, and thus permitted conviction without a jury finding beyond a reasonable doubt of all elements of the charged offense.

The only disputed issue at trial was whether the complainants' subjective hope or expectation of privacy in the activities which Nelson observed through their open bathroom window and videotaped from his building next door was reasonable. The state did its best to focus the jury's attention on the complainants' subjective expectations and assumptions about the likelihood anyone would occupy the house next door, the reasons why they kept the window open, and the jury's disgust at Nelson's conduct (R71:175-77, 204-05).

But the issue is not whether the complainants' offense at Nelson's conduct was reasonable in a general sense. Nor is it whether the jury might view as reasonable their efforts, if any, to assess and minimize the risk of anyone being present in the home next door to view them through their open bathroom window.[4] Rather, the issue is whether the complainants' subjective expectation or hope of privacy is one that society is willing to recognize as reasonable. *E.g.*, *Ciraolo*, 476 U.S. at 211. Put another way, the issue is whether, given whatever steps the complainants may have taken, society is willing to recognize an expectation of actual privacy to be reasonable.

The Court's discretionary authority to reverse in the interests of justice furthers its obligation to do justice in an individual case. *Vollmer*, 456 N.W.2d at 803. One cannot rationally expect a lay jury

---

[4] After all, one may take reasonable steps to minimize intrusions upon one's privacy, as by lowering one's voice when conversing in a public place, and still have no reasonable expectation of actual privacy.

to divine the applicable meaning of a legal term of art. Because application of just such a term of art spelled the difference between guilt and innocense in this case, the real controversy was not tried and reversal is appropriate under §752.35. *See Vollmer*, 456 N.W.2d at 806 (reversal in interests of justice appropriate, *inter alia*, where erroneous jury instruction was given on a significant issue).

CONCLUSION

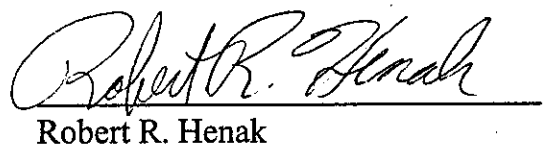
For these reasons, Mark E. Nelson respectfully asks that the Court vacate the judgment of conviction and sentence in this matter and dismiss the charges against him and, if dismissal is not granted, grant him a new trial.

Dated at Milwaukee, Wisconsin, November 28, 2005.

Respectfully submitted,

MARK E. NELSON
Defendant-Appellant

HENAK LAW OFFICE, S.C.



Robert R. Henak
State Bar No. 1016803
Amelia L. Bizzaro
State Bar No. 1045709

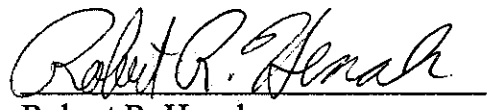
P.O. ADDRESS:

1223 North Prospect Avenue
Milwaukee, Wisconsin 53202
(414) 283-9300

Nelson CA Brf1.wpd

RULE 809.19(8)(d) CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Rule 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 6,708 words.



Robert R. Henak

Brf cert.wpd

STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT IV

Appeal No. 2005AP2300-CR
(La Crosse County Case No. 04-CF-532)

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

MARK E. NELSON,

Defendant-Appellant.

APPENDIX OF
DEFENDANT-APPELLANT

STATE OF WISCONSIN
DEPARTMENT OF ADMINISTRATION
101 East Wilson Street, Madison, Wisconsin

TOMMY G. THOMPSON
GOVERNOR

GEORGE LIGHTBOURN
SECRETARY

Division of Executive Budget and Finance
Post Office Box 7864
Madison, WI 53707-7864
Voice (608) 266-1736
Fax (608) 267-0372
TTY (608) 267-9629

Date: October 23, 2000

To: Steve Miller
Legislative Reference Bureau

From: Andrew J. Statz
DOA - State Budget Office

Subject: Budget drafting request to create an Internet crimes chapter

I am requesting statutory language be drafted for inclusion with the 2001-03 biennial budget bill.

The draft will create a new chapter in the statutes addressing crimes related to and facilitated by the Internet and other modern communications technologies. To avoid redrafting, language should also address any future communications technology.

In part, this request is a reaction to recent Supreme Court rulings regarding the constitutionality of existing prohibitions on child enticement, exposing a child to harmful materials, and voyeurism. One goal of this request is to resolve constitutional inconsistencies such as burden of proof and the issue of protected speech. Another is addressing loopholes in existing laws that are enabled by language that is too broad.

Sections should include, but are not limited to, child enticement, stalking, harassment, child pornography, viruses, identity theft, drug trafficking, fraud, libel, video voyeurism, copyright infringement, hacking, cyber-terrorism, and credit card theft.

One element of this task may be defining these crimes and updating existing offenses to include reference to new electronic means of communication and future technologies. An effort should be made to feasibly eliminate the reliance on face-to-face contact to establish a reasonable assumption that a defendant knew or should have known the recipient's age.

I have forwarded information on the actions of other states to Mike Dsida. Naturally, additional guidance can be gleaned from recent Supreme Court decisions.

If you have any questions regarding this request, please give me a call at 267-0370. Thank you.

Andrew & Mike
11/2/00

Defs (definitions)
Investigation,
Prosecution
} Desired items for chapt.

DOJ have grant for child enticement by internet

create a Sub-dw / taskforce to investigate internet crimes

does a person possess porn if views on a webpage — Andrew wants to cover it

means fix to
Voyeurism — Stevenson
connection is that people put the video on internet
~~& gen. distr~~
prohibit the taping & any kind of distribution

cyberterrorism
any form of terrorism } expand to cover private businesses/orgs. can't do so electronic

don't ~~need~~ to include unauth. theft of sound — Napster issue

Andrew will provide details

Mayor will want to address interstate agreements
extradition agreements — require ability to have meet w/ neighboring States
OR's investigators

enhancer for using encryption technology

investigating prosecuting will likely be at State level. for all of it.

leave ~~penalties~~ penalties for Andrea to fill in

2001 DRAFTING REQUEST

Bill

Received: **12/05/2000**

Received By: **rryan**

Wanted: **Soon**

Identical to LRB:

For: **Mark Gundrum (608) 267-5158**

By/Representing: **himself**

This file may be shown to any legislator: **NO**

Drafter: **rryan**

May Contact:

Alt. Drafters:

Subject: **Criminal Law - miscellaneous**

Extra Copies: **MGD**

Pre Topic:

No specific pre topic given

Topic:

Depiction of nudity without the subject's consent

Instructions:

Draft Stevenson fix that is teh same as LRB 01-0228/4, and add language that covers production, possession and distribution of computer images

---

Drafting History:

Vers.	Drafted	Reviewed	Typed	Proofed	Submitted	Jacketed	Required
/1	rryan 12/18/2000	jdyer 12/19/2000	pgreensl 12/20/2000	_____ _____	lrb_docadmin 12/20/2000		
/2	rryan 12/29/2000	jdyer 01/02/2001	martykr 01/03/2001	_____ _____	lrb_docadmin 01/03/2001	lrb_docadmin 01/03/2001	
/3	rryan 01/08/2001	jdyer 01/08/2001	martykr 01/08/2001	_____ _____	lrb_docadmin 01/08/2001	lrb_docadmin 01/08/2001	
/4	rryan 01/11/2001	jdyer 01/12/2001	kfollet 01/24/2001	_____ _____	lrb_docadmin 01/24/2001	lrb_docadmin 01/24/2001	

FE Sent For:

<END>

0228/3 12/5 (PM)

Conundrum:

Analysis – 3rd ¶ makes it seem like person who sets up video camera to record while he or she is not present wouldn't be covered by the amended 940.225 ~~not necessarily~~ – might need to clarify the analysis.

takes a photo or makes – – –
or causes a – – – – to be made

applies to all modes of making an image

12/6 maybe add line clarifying that person needn't be there as long as set up equipment

attempt to viol. 944.205 – same as punishment for completed act

– add this material to new request not 0228/ new request

Rep. Gundrum 12/12

Sending over a memo from DOJ on Stevenson case. Argues w/ DOJ comments except last comment re redundancy of reproduction depicting nudity.

I may call Ballestrem re memo.

CORRESPONDENCE/MEMORANDUM DEPARTMENT OF JUSTICE

Date: December 8, 2000

To: Joanna Richard
Alan Lee
Susan Crawford

From: Tom Balistreri

Subject: LRB-0228/3

As a general matter, this proposal to amend the statute which makes it a crime to make pictures of unconsenting nude persons appears to adequately address the overbreadth problems with the present statute identified in *State v. Stevenson.* It limits the application of the statute to those situations where there is an unconsensual invasion of privacy, which in my opinion brings the statute within the range of conduct which may be constitutionally proscribed by the state. It should be remembered, though, that the supreme court never ruled that such a limitation would make the statute constitutional, so there is no guarantee that the amended statute will not be subject to further attack or even invalidation.

There are a couple of specific things in the proposal that I think need to be changed.

First, this statute should be moved out of Chap. 944 dealing with crimes against sexual morality into Chap. 942 dealing with crimes against privacy etc. This would make it more clear that the statute is intended to protect privacy rather than to proscribe expression, as is suggested by its current placement among the provisions dealing with obscenity. Statutes like this one affecting First Amendment rights are presumed to be unconstitutional so we have to do everything we can to meet our burden to rebut that presumption.

Besides, Chap. 942 already contains a statute, § 942.08, which makes it a crime to install or use a surveillance device to observe persons while they are nude without their consent. The present § 944.205 deals with a very analogous subject, making pictures of persons while they are nude without their consent, so it makes sense for organizational reasons to place them together in the same chapter.

Second, the commentary indicates that this proposal applies only to pictures made while the subject is contemporaneously nude. I agree that in order to be a constitutionally sound privacy statute instead of an unconstitutional obscenity statute the provision should be limited to those situations where the person depicted is actually nude at the time of the depiction because those are the situations where there is a clearly legitimate concern about privacy. The problem is that this proposal is not limited in this way as presently written.

The proposal states that it is unlawful to make a picture of a person who is depicted nude "while the person depicted *nude is in* a place or circumstances in which he or she has a

reasonable expectation of privacy." Thus, the victim need only be depicted nude while in a private place. The victim does not actually have to be nude in a private place when they are depicted in that place. So it would be unlawful to take a picture of a person who is fully clothed in their bedroom, and then use computer technology to superimpose the image of a nude torso on that picture.

This problem is easy to solve simply by reversing the order of two words. Instead of "nude is in" the statute should read "is nude in" a private place. This would make it clear that there must be contemporaneously depicted nudity which plainly implicates privacy concerns.

Finally, the provisions for reproducing and possessing unconsensual nude pictures in §§ 2&3 of the proposal should not strictly prohibit these acts merely because the original pictures were made without consent. The evil to be addressed with reproducing and possessing unconsensual nude pictures is different from the evil involved in taking the pictures in the first place. There is a different kind of invasion of privacy. It is indirect rather than direct. The lack of consent to the reproduction or possession of the pictures should be an element of these offenses. Otherwise, these provisions could have absurd results which could result in a finding that they are unconstitutionally overbroad.

For example, suppose a photographer surreptitiously takes nude pictures of a porn star in her bathroom without her knowledge and consent, thereby committing a crime under § 1, but a magazine gets the pictures and is willing the pay the porn star big money for the right to reproduce them. The porn star would like nothing better, but she cannot agree to this because it would be a crime to reproduce the pictures simply because they were taken without her consent even though she now enthusiastically consents to their reproduction. It could be seriously argued that this application of the statute would violate the First Amendment rights of both the porn star and the magazine.

Or consider a situation where the porn star gets the nude pictures and would like to give one to her husband. She cannot do that because it would be a crime for him to possess the picture even though the person depicted wants him to have it. Again, it could be argued that the First Amendment rights of both the porn star and her husband would be violated.

I suggest, therefore, that both §§ 2&3 should have a section added which says that "the person depicted nude does not consent to the (reproduction)(possession)."

Also, as a minor stylistic matter, the phrase "that depicts nudity" at the end of § 2 is redundant and should be deleted. Material is not in violation of § 1 unless it depicts nudity.

Rep. Gundrum requests inclusion of all but the point regarding redundancy

Ryan, Robin

From: Balistreri, Thomas J.
Sent: December 14, 2000 3:17 PM
To: Ryan, Robin
Subject: RE: Bill draft for Stevenson fix

I don't think an affirmative defense would survive either an equal protection or a First Amendment challenge. As far as equal protection, we would have to come up with a good reason for making lack of consent an element when the picture is originally made, but not an element when it is reproduced. I can't think of any. In fact, in light of some other recent cases, e.g., *State v. Weidner*, there would be more justification for dispensing with an element of consent when the defendant is in a position to confront the victim personally so he can ask for consent than when the defendant is just dealing with the reproduction of the picture where he may not have any opportunity to confront the victim and ask for permission. As far as the First Amendment, we would prohibit a defendant from exercising his right to expression by disseminating a copy of a picture because it would be impossible for him to ask for consent if he does not know the name of the person portrayed or how to get ahold of her. On the other side of the balance, it is usually pretty easy to show lack of consent just by getting the victim to testify. If there is no complaining victim to testify, we usually would not have any reason to bring a prosecution.

-----Original Message-----
From: Ryan, Robin
Sent: Thursday, December 14, 2000 2:37 PM
To: Balistreri, Thomas J.
Subject: Bill draft for Stevenson fix

I work at the Legislative Reference Bureau and wrote the bill draft regarding s. 944.205 that Representative Gundrum asked you to review. Rep. Gundrum shared a copy of your Dec. 8th memo with me. Is there any problem with making consent to reproduction of a picture that depicts nudity an affirmative defense rather than making lack of consent to reproduction an element of the crime?

Thanks

CORRESPONDENCE/MEMORANDUM **DEPARTMENT OF JUSTICE**

Date: January 2, 2001

To: JoAnna Richard
Susan Crawford
Alan Lee

From: Tom Balistreri #6-1523

Subject: LRB-1425/1dn
12/20/00 revision to statute
prohibiting taking nude pictures
without consent

The provision in the latest revision of present Wis. Stat. § 944.205 (renumbered to 942.09) which makes the penalty for attempting to make an original nude picture the same as the penalty for the completed crime of making an original nude picture creates equal protection problems. Ordinarily, the penalty for an attempt is one-half the penalty for the completed crime. *See* Wis. Stat. § 939.32(1). If we are going to treat people who attempt to commit violations of § 942.09(2)(a) differently from people who attempt to commit robberies, rapes, homicides and other crimes we have to have a rational basis for doing so, and I am unable to come up with one just off the top of my head. The problem is exacerbated because those who attempt to violate the statute in other ways, i.e. by attempting to make, possess or distribute representations or reproductions of nonconsensual nude pictures, are only subject to one-half the penalty for the completed crime. I am unable to justify that disparity either.

I find the language about "capturing a representation" confusing and unnecessary. Apparently this language was added to deal with the situation in which someone sets up a camera but is not present when the camera actually records the image of a nude person. There is no problem which needs to be solved, however, since the present, easier-to-understand language plainly applies regardless of whether the photographer is physically present. The prohibited act is making a picture, not being present when the picture is made. And actually, this present language could be simplified even more by changing it to "makes or records any visual representation." That language covers any kind of image from paintings to computer data. I am a firm believer in the principle that the more language you add to a statute, the bigger the target you create for those who will attack it.

I also think that the language in 942.09(2)(am) "and that depicts the nudity depicted in the representation captured in violation of par. (a)" is confusing and unnecessary. There is no reproduction unless the copy reproduces the original so this language is essentially redundant.

Gundrum 1/4/00
Please call Balistreri re #2 - omission keeping def. of representation?

1/4/02 Gundrum: 1325/1

1. make sure taking picture & not developing film covered as prohibited act
make sure computer images covered
2. ok to elim higher penalty for attempt
3. clarify w/ Balistreri need for language regarding nudity in reproductions

Balistreri: (Atty. Gen's Office)
Disagrees w/ philosophy behind #3.
no problem enforcing if just say reproductions
reproduction essentially the same image if change & add nudity
if change in way that fails to subtract nudity)
doesn't foresee a practical enforcement problem
nude picture w/ superficial changes & retain nudity
thinks should prohibit press from publishing picture of Lady Di nude even w/ cover nudity.

Hunts "makes" records a usual representation" does cover date" would get rid of def. of representation

Gundrum 1/4

Just get rid of higher penalty for attempt - no other changes

DRAFTER'S NOTE
FROM THE
LEGISLATIVE REFERENCE BUREAU

LRB–1325/4dn
RLR:jld:kjf

January 24, 2001

Representative Gundrum:

I changed the bill to require that the subject of an depiction be "in circumstances" in which he or she may reasonably expect privacy, rather than both "in a place and circumstance" in which he or she may reasonably expect privacy when the depiction is made.

The language suggested by the state, as quoted in the Supreme Court opinion, is:

"Takes a photograph...that depicts nudity without the knowledge and consent of the person who is depicted nude while that person is nude in circumstances where they have a reasonable expectation of privacy...."

In reviewing the effect of the state's language, the court suggested that, if adopted, the language would add two elements to the prohibition: 1) that the person depicted nude have a reasonable expectation of privacy in the place or circumstances [emphasis added] in which the person is depicted; and 2) that the person depicted be contemporaneously present at the time of the depiction. The court's explanation indicates that place is an element of the circumstances. Therefore, removing "place" from the bill does not necessarily eliminate place from the consideration as to whether the person may reasonably expect privacy. To the contrary, requiring consideration of place is important to the constitutionality of the the statute. If place is not considered, publishing the newsworthy photograph that depicts a Vietnamese girl running nude following a napalm attack that the court cited in its opinion might be prohibited by the statute, again rendering it overbroad.

I do not believe that deleting "place" will render the bill unconstitutionally overbroad, but only because courts will consider the place where a person is nude as one of the circumstances. Including "place" simply clarifies that consideration of whether a person is in a place in which he or she can reasonably expect privacy is required.

Robin Ryan
Legislative Attorney
Phone: (608) 261–6927
E–mail: robin.ryan@legis.state.wi.us

2001 ASSEMBLY BILL 60

February 1, 2001 - Introduced by Representatives GUNDRUM, BOCK, RHOADES, GRONEMUS, AINSWORTH, COGGS, STONE, LASSA, LADWIG, HUNDERTMARK, TURNER, KESTELL, MORRIS-TATUM, WADE, GROTHMAN, MUSSER, M. LEHMAN, WILLIAMS, OLSEN, VRAKAS, JESKEWITZ, ALBERS, NASS, HUEBSCH, POWERS, KEDZIE, SERATTI, MONTGOMERY, SUDER, KRAWCZYK, LIPPERT, GUNDERSON, URBAN, PLOUFF, SYKORA and OTT, cosponsored by Senators PLACHE, HARSDORF, ROESSLER, BAUMGART, LAZICH, HUELSMAN, SCHULTZ, FARROW, DARLING and ROSENZWEIG. Referred to Committee on Judiciary.

AN ACT ***to renumber and amend*** 944.205 (title), 944.205 (1), 944.205 (2) and 944.205 (3) and (4); and ***to create*** 942.09 (1) (a) to (c) and 942.09 (2) (am) of the statutes; **relating to:** the prohibition against making, possessing, or distributing a representation that depicts nudity, and providing a penalty.

Analysis by the Legislative Reference Bureau

Current law prohibits production, possession, and distribution of a photograph, motion picture, videotape, or other visual representation or reproduction that depicts nudity if the person depicted nude did not consent to the representation or reproduction and if the person who makes, possesses, or distributes the representation or reproduction knows or should know that the person depicted nude did not consent to the nude depiction. Current law exempts from criminal liability parents, guardians, and legal custodians who make or possess visual representations depicting their children nude, or who distribute the representations for other than commercial purposes. The penalty for violating the prohibition against production, possession, and distribution of representations depicting nudity is a fine of up to $10,000, or imprisonment not to exceed five years, or both.

The Wisconsin supreme court recently found the state statute prohibiting nude representations unconstitutional, because it prohibits all depictions of nudity made without consent, including artistic, political, and newsworthy depictions that are protected by the First Amendment (*State v. Stevenson*, 236 Wis. 2d 86 (2000)).

This bill narrows the scope of the prohibition against making an original representation that depicts nudity by requiring that, at the time the representation

is made, the subject of the depiction be in circumstances in which he or she can reasonably expect privacy.

The bill applies the prohibition against making a reproduction that depicts nudity only to the act of reproducing an original representation that the reproducer knows or should know was made in violation of the prohibition against making an original representation, although the bill exempts a reproducer from criminal liability if the subject of the representation does consent to the reproduction even if he or she did not consent to the original representation. The bill treats the prohibitions against possessing and distributing representations depicting nudity similarly to the prohibition against making reproductions. The bill prohibits possessing or distributing a representation that is unlawfully made, unless the subject of the representation consents to the possession or distribution even if he or she did not consent to the making of the representation.

The bill expands the categories of representations that a person may not create, reproduce, possess, or distribute by prohibiting creation, reproduction, possession, or distribution of data representations of visual images including computer programs and the stored memory of an image captured with a digital camera.

The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:

SECTION 1. 942.09 (1) (a) to (c) of the statutes are created to read:

942.09 **(1)** (a) "Captures a representation" means takes a photograph, makes a motion picture, videotape, or other visual representation, or records or stores in any medium data that represents a visual image.

(b) "Nudity" has the meaning given in s. 948.11 (1) (d).

(c) "Representation" means a photograph, exposed film, motion picture, videotape, other visual representation, or data that represents a visual image.

SECTION 2. 942.09 (2) (am) of the statutes is created to read:

942.09 **(2)** (am) Makes a reproduction of a representation that the person knows or has reason to know was captured in violation of par. (a) and that depicts the nudity depicted in the representation captured in violation of par. (a), if the person depicted nude in the reproduction did not consent to the making of the reproduction.

SECTION 3. 944.205 (title) of the statutes is renumbered 942.09 (title) and amended to read:

942.09 (title) ~~**Photographs, motion pictures, videotapes or other visual representations showing**~~ **Representations depicting nudity.**

SECTION 4. 944.205 (1) of the statutes is renumbered 942.09 (1) (intro.) and amended to read:

942.09 **(1)** (intro.) In this section~~, "nudity" has the meaning given in s. 948.11 (1) (d).~~:

SECTION 5. 944.205 (2) of the statutes is renumbered 942.09 (2), and 942.09 (2) (a) and (b), as renumbered, are amended to read:

942.09 **(2)** (a) ~~Takes a photograph or makes a motion picture, videotape or other visual representation or reproduction~~ Captures a representation that depicts nudity without the knowledge and consent of the person who is depicted nude while that person is nude in circumstances 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 ~~taking or making of the photograph, motion picture, videotape or other visual representation or reproduction~~ capture of the representation.

(b) Possesses or distributes a ~~photograph, motion picture, videotape or other visual representation~~ representation that was captured in violation of par. (a) or a reproduction ~~that depicts nudity and~~ that was ~~taken or~~ made ~~without the knowledge and consent of the person who is depicted nude~~ in violation of par. (am), if the person knows or has reason to know that the ~~photograph, motion picture, videotape or other visual~~ representation was captured in violation of par. (a) or the reproduction was ~~taken or~~ made ~~without the knowledge and consent of~~ in violation of par. (am), and

if the person who is depicted nude in the representation or reproduction did not consent to the possession or distribution.

SECTION 6. 944.205 (3) and (4) of the statutes are renumbered 942.09 (3) and (4) and amended to read:

942.09 **(3)** Notwithstanding sub. (2) (a), (am), and (b), if the person depicted nude in a ~~photograph, motion picture, videotape or other visual~~ representation or reproduction is a child and the ~~making~~ capture, possession, or distribution of the ~~photograph, motion picture, videotape or other visual~~ representation, or the making, possession, or distribution of the reproduction, does not violate s. 948.05 or 948.12, a parent, guardian, or legal custodian of the child may do any of the following:

(a) ~~Make~~ Capture and possess the ~~photograph, motion picture, videotape or other visual~~ representation or make and possess the reproduction ~~of~~ depicting the child.

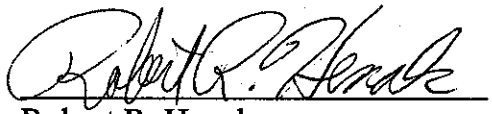
(b) Distribute a ~~photograph, motion picture, videotape or other visual~~ representation captured or possessed under par. (a), or distribute a reproduction made or possessed under par. (a), if the distribution is not for commercial purposes.

(4) This section does not apply to a person who receives a ~~photograph, motion picture, videotape or other visual~~ representation or reproduction ~~of~~ depicting a child from a parent, guardian or legal custodian of the child under sub. (3) (b), if the possession and distribution are not for commercial purposes.

(END)

CERTIFICATE OF MAILING

I hereby certify pursuant to Wis. Stat. (Rule) 809.80(4) that, on the 28th day of November, 2005, I caused 10 copies of the Brief and Appendix of Defendant-Appellant Mark Nelson to be mailed, properly addressed and postage prepaid, to the Wisconsin Court of Appeals, P.O. Box 1688, Madison, Wisconsin 53701-1688.



Robert R. Henak

Cert. of Mailing.wpd