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

REPLY BRIEF OF DEFENDANT-APPELLANT

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ARGUMENT

I.

THE EVIDENCE WAS INSUFFICIENT FOR CONVICTION

The state does not dispute that resolution of Nelson's sufficiency claim turns on the meaning of the statutory requirement that the person depicted nude must have been "nude in a circumstance in which . . . she ha[d] a reasonable expectation of privacy." Wis. Stat. §942.09(2)(a). As explained in Nelson's opening brief at 5-13, that phrase must be given its common and ordinary meaning. That meaning necessarily is consistent with its meaning for Fourth Amendment purposes because "[l]egitimation of expectations of privacy by law must have a source outside of the Fourth Amendment." *Rakas v. Illinois*, 439 U.S. 128, 143 fn.12 (1978).

Despite its scholarly attempt to suggest otherwise, the state cannot evade the facts that (1) the legislature intentionally chose to use the phrase "reasonable expectation of privacy," knowing that it had a well-settled meaning as reflected in Fourth Amendment authorities, and (2) application of that common and ordinary meaning dooms this prosecution.

The various reasons asserted for why the legislature should, in the state's view, have chosen a different privacy standard than the one it chose for Wis. Stat. §942.09, State's Brief at 11-28, are irrelevant. The legislature chose to require that the complainant have a "reasonable expectation of privacy" in order to justify imposition of felony criminal liability, knowing that this specific terminology has a settled legal meaning. At the time the legislature chose this terminology, it also knew that it could have used different language if it had wished to apply a different legal standard, as it has in other provisions. *See, e.g.*, Wis. Stat. §895.50(2)(a) (tort of invasion of privacy); Wis. Stat. §942.08(1)(b) (defining "private place" as "a place where a person may reasonably expect to be safe from being observed without his or her knowledge and consent"); Wis. Stat. §944.15(1); Wis. Stat. §944.17(1).

The legislature also well knew how to define a statutory term if it intended a meaning different than that commonly attached to it. Indeed, although it saw no need to define "reasonable expectation of privacy," the legislature defined "captures a representation," "nudity," and "representation." Wis. Stat. §942.09(1). It chose not to do so.[1]

The state argues, however, that there is nothing in the legislative history of §942.09 which requires that "reasonable expectation of privacy" be construed consistently with its common and ordinary meaning as reflected in the Fourth Amendment authorities. State's Brief at 14-18. Of course, the state points to nothing in the legislative

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[1] Oregon's statute, which the Supreme Court cited in *State v. Stevenson*, 2000 WI 71, ¶24, 236 Wis.2d 86, 613 N.W.2d 90, for its "reasonable expectation of privacy" requirement, expressly defines that phrase. Ore. Rev. Stats. §163.700(2)(c).

history which supports any *other* interpretation.[2] Indeed, despite its mantra that the "common and ordinary meaning" of the phrase is something different than its Fourth Amendment meaning, the state neither provides a different definition nor suggests how the two may differ.

The state concedes that §942.09 was intended to address the constitutional deficiencies in the prior statute identified in *State v. Stevenson*, 2000 WI 71, 236 Wis.2d 86, 613 N.W.2d 90. However, it asserts that remedying the defect would not require imposing a "reasonable expectation of privacy" showing and that nothing suggests the legislature knew what it was doing by using that language. The state is wrong on both counts.

As discussed in Nelson's Brief at 8-10, it was the state itself in *Stevenson* which presented the "reasonable expectation of privacy" requirement as a means of curing the conceded unconstitutionality of the statute which ultimately became §942.09. *Stevenson*, ¶¶21-28. It also was the state which noted 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. The state's position in *Stevenson* thus corroborates Nelson's position that there is no difference between the Fourth Amendment construction of that phrase and its common and ordinary meaning.

There is more, however. The state conveniently ignores the fact that the same assistant attorney general who cited Fourth Amendment litigation in *Stevenson* as defining the "reasonable expectation of privacy" requirement also was heavily involved in the drafting of the amendments (App. 7-14), making it highly unlikely that the legislature did not know what it was doing by employing that language.

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[2] Oddly, the state spends time construing language in the Legislative Reference Bureau's analysis which paraphrases the "reasonable expectation" language of the statute. State's Brief at 16-17. It should go without saying that it is the *statutory* language which is the subject of this appeal.

The dissent in *Stevenson* also renders it unlikely that the legislature missed the significance of the language it chose. Although the majority deemed it inappropriate judicially to amend the statute to include the "reasonable expectation of privacy" language suggested there by the state, the dissent had no such qualms. *Stevenson*, ¶¶42-60 (Wilcox, J., dissenting). In championing inclusion of exactly the language at issue here, the dissent specifically relied upon the Fourth Amendment understanding of that phrase:

> The majority distinguishes the *Osborne* line of cases on the grounds that a scienter element is a presumption in criminal law. However, the concept of "reasonable expectation of privacy" is also widespread in criminal law, particularly in Fourth Amendment litigation. Reading a "reasonable expectation" requirement into a privacy law is as natural as grafting a scienter element onto criminal laws.

Id. ¶55 (Wilcox, J., dissenting).

That the legislature intended the common and ordinary meaning of the phrase "reasonable expectation of privacy" as reflected in the Fourth Amendment authorities is further corroborated by the fact that, with only two irrelevant exceptions, every Wisconsin case counsel could find on Westlaw which used that phrase did so in the context of a search or seizure.

While the state is correct that context is important to meaning, State's Brief at 18, nothing about the context of §942.09 mandates that the legislature choose a different standard for privacy than that which it actually chose. It may be that the legislature could have cured the constitutional defects in the statute with a less restrictive privacy requirement, but it chose to adopt the version proposed by the Attorney General's Office.

The state's attempts to "balance" the interests in observation against a person's privacy interests, State's Brief at 19-20, 28-33, both misconstrues the applicable legal standard and would nullify the

legislature's careful choice to impose criminal liability only on actions invading a "reasonable expectation of privacy."

The purpose of the observer is irrelevant to whether the person observed has a reasonable expectation of privacy. Whether one has a reasonable expectation of privacy from certain observations turns on the reasonableness of his or her subjective expectation that *no one* would be able to make the observations, not that *no one but the police* could do so. *E.g.*, *California v. Ciraolo*, 476 U.S. 207, 214 n.2 (1986) ("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").

The state's novel "balancing" test also ignores the fact that, even in the case of observations by police officers, the existence of a "reasonable expectation of privacy" has never turned on whether the officers are acting for legitimate purposes or merely on a hunch or for purely voyeuristic purposes. The "balancing" test cited by the state, moreover, has been used to *reduce*, not expand, the areas in which one is viewed as having a reasonable expectation of privacy. *E.g.*, *Hudson v. Palmer*, 468 U.S. 517, 527 (1984) (no reasonable expectation of privacy in prison cell); *State v. Whitrock*, 161 Wis.2d 960, 468 N.W.2d 696, 709-10 (1991) (no reasonable expectation of privacy in stolen stereo stored in another's duplex); *State v. Knight*, 2000 WI App 16, ¶¶11-14, 232 Wis.2d 305, 606 N.W.2d 291 (no reasonable expectation of privacy in legal files conveyed to another following disbarment and imprisonment).

The state's proposed "balancing" test also would nullify the legislature's decision to require proof of a reasonable expectation of privacy for conviction under §942.09(2)(a). It is a "basic rule of statutory construction that effect is to be given to every word of a statute if possible, so that no portion of the statute is rendered superfluous." *Lake City Corp. v. City of Mequon,* 207 Wis.2d 155, 162, 558 N.W.2d 100 (1997). As the state concedes, however, one capturing an

image of nudity without the knowledge or consent of the subject rarely if ever would be serving a legitimate societal interest, State's Brief at 20, 31, rendering the "reasonable expectation of privacy" requirement superfluous under its theory.

Authorities from other states concerning application of their own law and traditions regarding the tort of invasion of privacy have no relevance to construction of the specific language in a Wisconsin criminal statute. *See* State's Brief at 21-25. The Wisconsin courts have never construed the tort of invasion of privacy as requiring a reasonable expectation of privacy. They accordingly have not defined that phrase in that context, and certainly have not given it any meaning in that context different from its common and ordinary meaning.

The fact that some states require invasion of a reasonable expectation of privacy to make out such a claim, while others do not, likewise has no effect on what the Wisconsin legislature intended in imposing such a requirement for criminal liability under §942.09. Nor does it make any difference that some states require a reasonable expectation of *limited* privacy, *see Sanders v. American Broadcasting Companies, Inc.*, 978 P.2d 67 (Cal. 1999), while others find "[t]he analytical concept of a reasonable expectation of privacy, developed in the constitutional Fourth Amendment context . . . useful in the civil tort context in discerning the meaning of 'secluded place' and 'private concern.'" *Danai v. Canal Square Associates*, 862 A.2d 395, 400 n.5 (D.C. 2004) (noting historic link between constitutional and common law privacy and finding).

There is nothing to suggest that the legislature even considered foreign tort law in writing §942.09, let alone that it resolved the conflicting strands of law *sub silento* to define statutory language contrary to the common and ordinary meaning given that language in Wisconsin.[3]

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[3] The foreign authorities cited by the state, State's Brief at 24-25, do not construe "reasonable expectation of privacy" in any event. Rather, one (continued...)

The state's argument also makes the common mistake of assuming that the legislature, in criminalizing certain conduct, necessarily intended to criminalize similar conduct as well. The state overlooks the fact that the legislature has implemented a carefully balanced statutory scheme which distinguishes between more serious misconduct subject to criminal liability and less serious actions subject only to civil liability. *Compare* Wis. Stat. §895.50(2) (imposing civil liability for invasions of privacy) *with* Wis. Stat. §§942.08 & 942.09 (imposing criminal liability). Taking offense at particular conduct does not mandate its criminalization.

Finally, the state's assertion that the legislature's choice of elements makes application of the statute complex, State's Brief at 25-28, does not mandate rejection of that choice. As the state observed in its *Stevenson* brief, "[w]hether there is a reasonable expectation of privacy under the circumstances is a familiar inquiry which underlies all Fourth Amendment litigation." *State v. Stevenson*, Appeal No. 98-2110-CR (S.Ct.), Brief of Plaintiff-Respondent at 15. Ample authority exists so that application of the standard to a given case is very straight forward. It is surely no more complex than application of the "party-to-a-crime" law or assessment of whether an officer was acting according to law in a resisting case.

Here, for instance, the law clearly establishes that no reasonable expectation of privacy exists in activities one knowingly exposes to the risk of observation by others. Nelson's Brief at 10-13. *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,

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[3](...continued)
construes its tort of invasion of privacy a requiring only a "reasonable expectation of limited privacy," *Sanders*, 978 P.2d at 71-77, while the other two address the "public disclosure" form of invasion of privacy, in which no form of "reasonable expectation of privacy" is a required element. *Pohle v. Cheatham*, 724 N.E.2d 655 (Ind. Ct. App. 2000); *Doe v. Mills*, 536 N.W.2d 824 (Mich. Ct. App. 1995).

assuring that the door was fully closed"). While the law may be "beyond the ken of the ordinary layman," State's Brief at 27, that is what jury instructions are for.

The distinctions perceived by the state, State's Brief at 5-10, 26, are meaningless. Because a person has no reasonable expectation of privacy in items or activities in plain view by others from a vantage point where they have a right to be, *e.g.*, *Horton v. California*, 496 U.S.128, 133 (1990); *State v. Bell*, 62 Wis.2d 534, 215 N.W.2d 535, 539 (1974), it matters not whether that observation is made from a public street or a neighboring private property. *E.g.*, *United States v. Whaley*, 779 F.2d 585, 590 (11th Cir. 1986). Nor is any distinction made between the home and elsewhere, or between a public bathroom and one in a home, when activities are left open to the risk, however slight, of observation by others from a place they have a right to be. *E.g.*, *Ponce v. Craven*, 409 F.2d 621 (9th Cir. 1969) (observations through partially-open motel bathroom window).[4] Nor does it matter that one does not expect to be observed. *E.g.*, *Whaley*, 779 F.2d at 590.

> [T]he emphasis in any inquiry into a person's reasonable expectation of privacy is not on the ease or difficulty with which third parties might gain access to it, but on the manner in which the possessor "veils or conceals his [or her] property from others."

State v. Grawien, 123 Wis.2d 428, 367 N.W.2d 816, 820 (Ct.App.1985) (citation omitted). Nor does it matter that the observation is for private rather than police purposes. *E.g.*, *Ciraolo*, *supra.*

Also, while there may be circumstances in which the use of technological enhancement may intrude upon a reasonable expectation of privacy, *e.g.*, *Kyllo v. United States*, 533 U.S. 27 (2001), this is not one of them. The state's reliance upon *United States v. Taborda*, 635

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[4] Contrary to the state's suggestion, State's Brief at 6-7, one's motel room is entitled to full Fourth Amendment protection. *E.g.*, *United States v. Mitchell*, 429 F.3d 952, 958 (10th Cir. 2005).

F.2d 131 (2d Cir. 1980), and *State v. Peck*, 143 Wis.2d 624, 422 N.W.2d 160 (Ct. App. 1988), is misplaced. Nelson videotaped activities that were readily observable with unenhanced vision from his own window just 10 to 15 feet away. Use of the zoom feature did not bring anything into view which was not already observable.

Tabora and *Peck*, by their own terms, thus dictate rejection of the state's argument. *Tabora* explains that "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." 635 F.2d at 139. Similarly, while this Court recognized in *Peck* that the use of binoculars to view that which could not otherwise be observed in one's home would violate a reasonable expectation of privacy, it held that the opposite is true when, as here, "the area is one which is otherwise exposed to view." 422 N.W.2d at 166-67. Under those circumstances, like here, "the use of binoculars or other vision enhancement devices does not violate fourth amendment privileges." *Id.*

II.

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

Upholding Nelson's conviction would require application of some novel interpretation of "reasonable expectation of privacy" different from the common and ordinary meaning of that phrase as reflected in Fourth Amendment authority. Such an interpretation would be contrary to Wis. Stat. §990.01(1) and to all prior usage of the phrase in this state. As such, it necessarily would be "unexpected and indefensible by reference to the law which had been expressed prior to the conduct in issue," and would violate Nelson's due process right to notice. *Bouie v. City of Columbia*, 378 U.S. 347, 354 (1964). *See, e.g., 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"); Nelson's Brief at 16-18.

Such an interpretation also would render the statute unconstitutionally vague. Nelson's Brief at 18-19. While arguing to the contrary, State's Brief at 35-39, the state never even suggests what legal standard it seeks to apply other than that it must be broad enough to ensnare Nelson. This is exactly the type of subjective, *ad hoc* standard barred by due process. *E.g.*, *Grayned v. Rockford*, 408 U.S. 104, 108-09 (1972).

Nelson relies, not on hypotheticals, but his own circumstances. Given existing legal standards, Nelson had no reason to believe he was violating §942.09 in recording activities conducted before an open window subject to observation from his adjoining property.

III.

DEFICIENT JURY INSTRUCTIONS JUSTIFY REVERSAL IN THE INTERESTS OF JUSTICE

The state's defense of the jury instructions' failure adequately to define the requirements for conviction rests on its prior, erroneous claims, State's Brief at 39-40, and thus fails for the same reasons.

CONCLUSION

Mark E. Nelson accordingly asks that the Court vacate the judgment of conviction and sentence and dismiss the charge against him and, if dismissal is not granted, grant him a new trial.

Dated at Milwaukee, Wisconsin, February 7, 2006.

Respectfully submitted,

MARK E. NELSON
Defendant-Appellant

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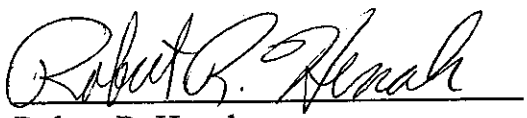

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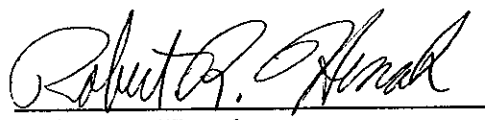
RULE 809.19(8)(d) CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Rule 809.19(8)(b) and (c) for a reply brief produced with a proportional serif font. The length of this brief is 2,989 words.



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CERTIFICATE OF MAILING

I hereby certify pursuant to Wis. Stat. (Rule) 809.80(4) that, on the 7th day of February, 2006, I caused 10 copies of the Reply Brief 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

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