

STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT II

RECEIVED

09-22-2014

**CLERK OF COURT OF APPEALS
OF WISCONSIN**

CASE NO. 2014AP001158 - CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

CHARLES W. ADAMS,

Defendant-Appellant.

BRIEF AND APPENDIX OF
DEFENDANT-APPELLANT

On Appeal From the Decision of The Honorable
Barbara H. Key, Circuit Court Judge
Circuit Court for Winnebago County, Branch III

Peter R. Heyne
State Bar No: 1079303
Counsel for Defendant-Appellant

Heyne Law Office
101 S. Military Ave #264
Green Bay, WI 54303
920-664-5734

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
STATEMENT OF THE ISSUES.....	1
STATEMENT ON ORAL ARGUMENT AND ON PUBLICATION.....	1
STATEMENT OF THE CASE AND FACTS.....	1-4
ARGUMENT	4-10
I. The trial court erred in denying the motion to dismiss; the complainant did not have a reasonable expectation of privacy when she was recorded nude engaging in the illegal act of prostitution.	
CONCLUSION.....	10
FORM/LENGTH CERTIFICATION.....	11
CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)	12
AFFIDAVIT OF MAILING.....	12
APPENDIX CERTIFICATION.....	13

TABLE OF AUTHORITIES

CASES

<i>City of Madison v. Schultz</i> , 98 Wis.2d 188, 295 N.W.2d 798 (Ct. App. 1980).....	3
<i>State v. Jahnke</i> , 2009 WI App 4, 316 Wis.2d 324, 762 N.W.2d 696.....	6-8
<i>State v. Nelson</i> , 2006 WI App 124, 294 Wis.2d 578, 718 N.W.2d 168.....	4-8

CONSTITUTIONAL PROVISIONS AND STATUTES

Wis. Stat. § 942.09(2).....	1-2, 4-5, 9
Wis. Stat. § 944.30.....	3

STATEMENT ON THE ISSUES

The trial court denied Mr. Adams' motion to dismiss, rejecting the argument that the person who was recorded nude while engaging in the illegal act of prostitution had no reasonable expectation of privacy.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Oral argument should not be necessary. Publication may be warranted as this issue appears to be one of first impression. On information and belief, there are only two published Court of Appeals opinions on the current version of the nudity recording statute, the most recent opinion being from 2009 and containing a strongly worded dissent.

STATEMENT OF THE CASE AND FACTS

In an Amended Criminal Complaint filed August 12, 2011, the State charged Mr. Adams with two violations¹ of Wis. Stat § 942.09(2)(am)1.² (5:1, A.

¹ The State later dismissed the first count before trial.

² Wis. Stat. § 942.09(2)(am)1 states:

App. 1). This crime has four elements, the third of which is contested: whether the person who is depicted nude was nude in a circumstance in which he or she had a reasonable expectation of privacy.

On December 2, 2010, when executing a search warrant in Mr. Adams' truck, the police found a laptop that contained numerous videos of Mr. Adams having sex with various women, who are nude in the recordings. (5:2, A. App. 2). One of these videos is entitled "anywayyouwant," and police received a tip that woman on this video was Shawnda Schultz. (5:3, A. App. 3).

In an interview with police, Ms. Schultz positively identified Mr. Adams as having hired her for sexual activity in November 2010 at the Holiday Inn in Neenah, Wisconsin. (5:3, A. App. 3). The complaint states that Mr. Adams stayed at the Holiday Inn in

"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."

All subsequent references to the Wisconsin Statutes are to the 2009–10 version unless otherwise indicated.

Neenah, from October 26, 2010, until November 25, 2010. *Id.* Ms. Schultz and police reviewed the video "anywayyouwant," which had recorded Ms. Schultz nude, and Ms. Schultz said that she had not consented to the recording. *Id.* Per the complaint, in the beginning of the video, Mr. Adams is adjusting the angle of the camera just before Ms. Schultz enters the room. *Id.* The activity appears to be captured via a laptop that is sitting on a desk or dresser. *Id.*

In sum, there is no dispute that the recording depicts nudity, and the nudity was part of act of prostitution, which is a crime. Wis. Stat. § 944.30.

In an oral ruling on October 19, 2011, the trial court denied the motion to dismiss. (100, A. App. 5-15). In particular, the court distinguished *City of Madison v. Schultz*, 98 Wis.2d 188, 295 N.W.2d 798 (Ct. App. 1980)³: "a massage parlor is a whole different ruling as opposed to this where it's the making of a depiction that in this day and age can go on the Internet. It can go all over." (100:5, A. App.

³ The court rejected constitutional challenges to a Madison ordinance banning commercial masturbation, in that case, at a massage parlor.

9:21-24). Further, the court held that even if a person "is engaged in the act of prostitution, none of those cases says that gives someone the right to take pictures of them without knowing about it." (100:6, A. App. 10:1-3).

A jury returned a guilty verdict for the charge. (72).
Mr. Adams filed a timely notice of appeal. (93).

ARGUMENT

I. The trial court erred in denying the motion to dismiss; the complainant did not have a reasonable expectation of privacy when she was recorded nude engaging in the illegal act of prostitution.

This case is really a matter of statutory interpretation. The interpretation of a statute is a question of law, subject to review *de novo*. *State v. Nelson*, 2006 WI App 124, ¶ 18, 294 Wis.2d 578, 718 N.W.2d 168.

Even though the contested third element of Wis. Stat. § 942.09(2)(am)1, the reasonable expectation of privacy, is a matter for the jury to decide, *see id. at* ¶ 47, courts have had to step in to interpret this phrase, which Wis. Stat. § 942.09 does not define either in

whole or in part (namely, not the phrase nor the individual words). *Id.* at ¶ 19.

Absent a specific statutory definition, the court turned to standard dictionary definitions, holding that "Wis. Stat. § 942.09(2)(a) requires that the person who is depicted nude is in a circumstance in which he or she has an assumption that he or she is secluded from the presence or view of others, and that assumption is a reasonable one under all the circumstances, meaning that it is an appropriate one under all the circumstances according to an objective standard." *Id.* at ¶ 21.

The court further held that the "[t]he evident purpose of § 942.09 is to penalize individuals who capture representations of others who are nude—and individuals who reproduce, possess, distribute, or exhibit those representations—in circumstances that invade the privacy of those depicted, when the offenders have *no legitimate reason for doing so.*" *Id.* at ¶ 24 (emphasis added).

In *Nelson*, the offender had no such legitimate reason for secretly recording two women in a state of undress in the bathroom. The jury believed the

testimony that Mr. Nelson had installed a video camera in a house that had appeared vacant, and this camera captured detailed images (likely via a zoom feature) through a window into the bathroom of the adjacent house. *Id.* at ¶ 53. The camera recorded one woman, who was visiting for the summer, sitting on the toilet and inserting a tampon, with her pubic area visible. *Id.* at ¶ 5. The camera also recorded another woman four times using the toilet, with her pubic area visible, and one time applying lotion and her breast is briefly visible. *Id.* at ¶ 5. Under all the circumstances, the court found that these women had a reasonable expectation of privacy when they were thus videotaped in the bathroom. *Id.* at ¶ 53.

Just a few years later, the Court of Appeals revisited this statute and sought to clarify *Nelson's* "incomplete definition" for the reasonable expectation of privacy. *State v. Jahnke*, 2009 WI App 4, ¶ 20, 316 Wis.2d 324, 762 N.W.2d 696. The court explained that "in *Nelson*, we did not purport to provide a definition covering all circumstances." *Id.* at ¶ 18. Thus, the court clarified, permission to be viewed in the nude

does not necessarily mean permission to be recorded in the nude. *See id.* at ¶¶ 21-22.

In *Jahnke*, the following facts were stipulated: Jahnke and his girlfriend had a three-year, sexually intimate relationship. On one occasion, she knowingly exposed her nude body to him, and Jahnke videotaped her without her consent, using a video camera concealed under a pile of clothes. *Id.* at ¶ 2.

The court rejected the hypothetical of an exotic dancer, because the privacy inquiry requires a fact-specific inquiry. *Id.* at ¶ 13. For example, "while not dispositive, a particular club may have a well-known and enforced prohibition on recording." *Id.* To be blunt, the concern is not likely privacy but profits. A strip club, and secondarily, its employee strippers, have a legitimate (in the eyes of the law, not morality) property interest in the nudity depicted. If a person could just watch a secret live video feed, he would not need to pay the cover charge, *etc.*, to the economic detriment of the club and the dancers there employed.

The present situation is distinguishable from the situations of *Nelson* and *Jahnke*, as well as the exotic

dancer hypothetical. Neither the spying neighbor in *Nelson* nor the betraying boyfriend in *Jahnke* had any legitimate reason for secretly recording the nudity. Likewise, a person is basically stealing if installs a secret camera in a licensed strip club (with a well-known and enforced ban on recording) so he can watch live nude shows at home free of charge. There is nothing legitimate about this seedy analog to theft of cable services.

In contrast, Mr. Adams had a legitimate reason for recording his sexual encounter with the prostitute. Prostitution is a business fraught with risk for both parties. As a crime, prostitution necessarily involves people willing to break the law--both the prostitute and the john. Persons willing to break this law may be also more willing to break other laws (*e.g.*, relating to illegal controlled substances). Not only do both parties risk contracting sexually transmitted diseases or other communicable diseases, but they risk being victims of crimes against their persons and property. The prostitute or john could be hurt, drugged, robbed, or all of the above. Likewise, the prostitute or john could

falsely accuse the other hurting, drugging, robbing, *etc.*, her or him. A person should not violate the prostitution statute in the first place, but if a person chooses to do so, then a definitive recording of that encounter could save him from charges much more serious than a Class A misdemeanor--felony charges such as 2nd degree sexual assault/use of force, false imprisonment, *etc.*. If the prostitute *sua sponte* ingests heroin and then mortally overdoses, then the john found on scene with the corpse could be in a very bad place--unless a video could prove that he had nothing to do with the overdose.

There are also wider public policy concerns. If Wis. Stat. § 942.09(2) provides privacy protections to prostitutes when they engage in prostitution, then the legal system is in effect condoning prostitution and any other illegal sex act involving nudity (such as commercial masturbation by a nude masseuse). Persons on both sides of the illicit transaction, prostitute and john, may be more deterred if either realizes that their lawbreaking activity could be recorded, openly or secretly, and then possibly

distributed, including online. The prospect of a prostitution video going viral should be a potent deterrent.

CONCLUSION

For the reasons stated above, the complainant had no reasonable expectation of privacy when she was recorded nude engaging in the crime of prostitution. Mr. Adams thus respectfully requests that the Court reverse the trial court's decision denying the motion to dismiss.

Dated this 22nd day of September, 2014.

Respectfully submitted,

Peter R. Heyne
State Bar No. 1079303
Attorney for Defendant-Appellant

CERTIFICATION AS TO FORM/LENGTH

I certify that this brief meets the form and length requirements of Rule 809.19(8)(b) and (c) in that it is: proportional serif font, minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points and maximum of 60 characters per line of body text. The length of the brief is 1,674 words.

Peter R. Heyne
State Bar No. 1079303

Heyne Law Office
101 S. Military Ave #264
Green Bay, WI 54303
920-664-5734

CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of § 809.19(12).

I further certify that this electronic brief is identical in content and format to the printed form of the brief filed on or after this date.

Peter R. Heyne
State Bar No. 1079303

AFFIDAVIT OF MAILING

I certify that copies of this brief and appendix were deposited in the United States mail for first class delivery on September 22, 2014, to the following:

Diane M. Fremgen
Clerk of Court of Appeals
P.O. Box 1688
Madison, WI 53701-1688

Gregory M. Weber
Assistant Attorney General
Wisconsin Department of Justice
PO Box 7857
Madison, WI 53707

Dated this 22nd day of September, 2014.

Peter R. Heyne
State Bar No. 1079303

Heyne Law Office
101 S. Military Ave #264
Green Bay, WI 54303
920-664-5734

CERTIFICATION AS TO APPENDIX

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with § 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; and (3) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Dated this 22nd day of September, 2014.

Peter R. Heyne
State Bar No. 1079303

Heyne Law Office
101 S. Military Ave #264
Green Bay, WI 54303
920-664-5734

APPENDIX

Record has been so reproduced
to preserve confidentiality

INDEX TO
APPENDIX

Amended Criminal Complaint (R.5).....A. App. 1-4

Transcript of Oral Ruling

Denying Motion to Dismiss (R.100).....A. App. 5-15