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STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT II

**CLERK OF COURT OF APPEALS
OF WISCONSIN**

Case No. 2014AP1158-CR

STATE OF WISCONSIN,
Plaintiff-Respondent,

v.

CHARLES W. ADAMS,
Defendant-Appellant.

APPEAL FROM A JUDGMENT OF THE
CIRCUIT COURT FOR WINNEBAGO COUNTY,
BARBARA H. KEY, JUDGE

BRIEF FOR PLAINTIFF-RESPONDENT

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ORAL ARGUMENT AND PUBLICATION

There is no need for oral argument of this appeal because it would add nothing to the arguments in the briefs. The opinion should not be published because this appeal involves only the application of settled law to the facts of this case.

ARGUMENT

Adams was properly convicted of surreptitiously video recording a prostitute without her consent while she was nude in circumstances where she had an objectively reasonable expectation that she would not be recorded.

Wisconsin Statute § 942.09(2)(am)1. (2011-12), prohibits anyone from video recording a person who is nude without that person's knowledge or consent in circumstances where the nude person has a reasonable expectation of privacy. *State v. Jahnke*, 2009 WI App 4, ¶ 5, 316 Wis. 2d 324, 762 N.W.2d 696; *State v. Nelson*, 2006 WI App 124, ¶ 14, 294 Wis. 2d 578, 718 N.W.2d 168.

A person has a reasonable expectation of privacy where the person can make an objectively reasonable assumption under the circumstances that the person is secluded from the presence or view of others, *Nelson*, 294 Wis. 2d 578, ¶¶ 21, 33, or that the person will not be recorded in the nude. *Jahnke*, 316 Wis. 2d 324, ¶¶ 7, 9, 14.

Thus, a person who consents to have another view her nude may still have an objectively reasonable expectation that the viewer will not record her nude. *Jahnke*, 316 Wis. 2d 324, ¶¶ 6-12. Indeed, even a person who exposes her nude body to the public view of many persons for money may have a reasonable expectation that she will not be recorded nude. *Jahnke*, 316 Wis. 2d 324, ¶ 13.

And although a person who engages in commercial sexual activity has no constitutional right to privacy which would shield their activities from government intrusion, *City of Madison v. Schultz*, 98 Wis. 2d 188, 204, 295 N.W.2d 798 (Ct.

App. 1980), the statute does not incorporate the constitutional right to privacy, but rather a right to privacy that is commonly understood by its terms. *Nelson*, 294 Wis. 2d 578, ¶¶ 19-33, 54. Balancing society's interest in law enforcement against a depicted person's interest in privacy is not a relevant standard because law enforcement is not the invader of the person's privacy. *Nelson*, 294 Wis. 2d 578, ¶ 24.

So even a prostitute has a right to privacy under § 942.09(2)(am)1. if she has an objectively reasonable expectation that she will not be video recorded nude despite her consent to be viewed live in the nude as a commercial transaction. *See Jahnke*, 316 Wis. 2d 324, ¶¶ 6-13.

Recognizing that a prostitute has this limited right to privacy does not condone prostitution. The prostitute can still be prosecuted for engaging in the criminal act she performs. The statute merely recognizes that a person who commits a crime should not be left vulnerable to being the victim of another crime. It is no defense to a prosecution for a crime that the victim was also guilty of a crime. Wis. Stat. § 939.14 (2011-12).

The defendant-appellant, Charles W. Adams, conceding that whether the victim had a reasonable expectation of privacy is a question for the jury, Brief for Defendant-Appellant at 4, *see Nelson*, 294 Wis. 2d 578, ¶¶ 47, 53, does not appear to argue that the prostitute he video recorded nude did not have an objectively reasonable expectation that she would not be recorded while she was having sex with him for money.

Seizing on a comment made in *Nelson*, Adams argues, instead, that he could not be convicted of a crime under § 942.09(2)(am)1. because he had a legitimate reason for

recording his encounter with a prostitute. Brief for Defendant-Appellant at 8, 9.

This argument assumes that this court created either an element of or a defense to the statute that does not otherwise exist. But a more complete reading of *Nelson* shows that this court did no such thing.

In *Nelson*, this court said that the evident purpose of § 942.09 is to penalize those who invade the privacy of persons who are depicted nude “when the offenders have no legitimate reason for doing so.” *Nelson*, 294 Wis. 2d 578, ¶ 24. But the court quickly added that “the legislature has already made the judgment that, in the circumstances described in the statute, the offender does not have a legitimate interest in capturing representations depicting nudity.” *Nelson*, 294 Wis. 2d 578, ¶ 24.

Thus, having recorded a woman nude in the circumstances described by the statute, Adams’ reasons for doing so are neither a defense to this criminal conduct that he can attempt to prove nor an element of the offense that the state has to disprove.

Moreover, recording someone nude to protect himself against the collateral consequences of committing a crime is not a legitimate reason for committing another crime.

A person cannot be prosecuted for committing a crime if his conduct is privileged, although otherwise criminal. Wis. Stat. § 939.45 (2011-12). But under this statute, there is no privilege to keep committing crimes as protection against the consequences of committing other crimes.

The crime of prostitution is committed by the person who pays another to perform sexual acts as well as by the person who is paid to perform them. *State v. McCollum*, 159 Wis. 2d 184, 200, 464 N.W.2d 44 (Ct. App. 1990); Wis. Stat. § 944.30(1m)(a) (2014).

The only legitimate way to protect against the collateral consequences of this crime is not committing it in the first place. If you don't pay a prostitute to have sex with you, you don't have to worry about the prostitute robbing you or making false claims against you.

Finally, there is no evidence that Adams recorded the prostitute nude for the purpose of self-protection.

Even if this was a legitimate defense as a matter of law, it would have to be raised by evidence to be a legitimate defense as a matter of fact in a particular case. *See State v. Trentadue*, 180 Wis. 2d 670, 674-75, 510 N.W.2d 727 (Ct. App. 1993). *See also State v. Giminski*, 2001 WI App 211, ¶ 11, 247 Wis. 2d 750, 634 N.W.2d 604 (submission of theory of defense to jury turns on evidence in case).

As far as the evidence in this case is concerned, Adams video recorded his encounter with a prostitute so he could relive it again and again without having to pay the prostitute for additional services.

Since Adams had no factual or legal defense, he was properly convicted of a crime for surreptitiously video recording another person in the nude, without the knowledge of that person or her consent to be recorded, in circumstances where the nude person had reason to expect that she would not be recorded.

CONCLUSION

It is therefore respectfully submitted that the judgment convicting Adams of violating Wis. Stat. § 942.09(2)(am)1. should be affirmed.

Dated: November 12, 2014.

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 1,103 words.

Dated this 12th day of November, 2014.

Thomas J. Balistreri
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CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § (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 Wis. Stat. § (Rule) 809.19(12).

I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 12th day of November, 2014.

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