

STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT II

RECEIVED

12-01-2014

**CLERK OF COURT OF APPEALS
OF WISCONSIN**

CASE NO. 2014AP001158 - CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

CHARLES W. ADAMS,

Defendant-Appellant.

REPLY BRIEF 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

ARGUMENT

I. Mr. Adams maintains that the trial court erred in denying the motion to dismiss.

The complainant did not have a reasonable expectation under the circumstances that she would not be recorded in the nude when engaging in the act of prostitution with a recording device in plain view in the motel room.

As argued in the initial brief, the facts of the present case are distinguishable from the facts in the two cases interpreting this statute: *State v. Jahnke*, 2009 WI App 4, 316 Wis.2d 324, 762 N.W.2d 696, and *State v. Nelson*, 2006 WI App 124, 294 Wis.2d 578, 718 N.W.2d 168. This is not a case of a camera hidden from view spying into a neighbor's bathroom.

Likewise, the present case is also distinguishable from the exotic dancer hypothetical discussed in *Jahnke*, wherein depending on the facts a strip club "may have a well-known and enforced prohibition on recording." 2009 WI App 4 at ¶ 13. Here, in contrast, the Amended Criminal Complaint did not assert that the complainant had an analogous well-known and

enforced prohibition against johns recording her during her acts of prostitution. Per the complaint, *after the fact* when shown the sex tape, the complainant told the police that she had not consented to the recording.

But the complaint states that activity appeared to be captured via a laptop sitting on a desk or dresser in the motel room (5:3). In this über-digital age, a reasonable person could or should know that devices such as laptops can have the standard feature of a webcam built into the top of the screen frame. Here was no camera concealed under a pile of clothing as in *Jahnke*; the recording device was out in the open.

Consent to recording need not be explicit; a person's actions, or in this case, inaction, can speak louder than words to relinquish the reasonable expectation not to be recorded. *See Jahnke* at ¶ 22. Here the complainant relinquished her reasonable expectation of privacy when she disrobed in the line of sight of an open laptop in plain view in the motel room. The complaint does not appear to assert that at the time she ever insisted that Mr. Adams shut the laptop and/or not record the transaction by any device.

CONCLUSION

For these reasons, Mr. Adams respectfully requests that the Court reverse the trial court's decision denying the motion to dismiss.

Dated this 1st day of December 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) for a brief produced with a proportional serif font. The length of the brief is 421 words.

Dated this 1st day of December 2014.

Peter R. Heyne
State Bar No. 1079303

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.

Dated this 1st day of December 2014.

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 December 1, 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 1st day of December 2014.

Peter R. Heyne
State Bar No. 1079303