



WISCONSIN LEGISLATURE

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Senate Bill 410

December 16, 2015

Testimony from Rep. Spiros & Senator Vukmir

Good morning and thank you Mr. Chairman and members of the Senate Committee on Judiciary and Public Safety for allowing me to have the opportunity to talk to you today regarding Senate Bill 410, a bill that prohibits certain acts that violate a person's right to privacy.

As you may know, over the past several years, there has been a steady increase in the number of cases concerning nude images taken with and without the victim's consent. Often times, these images are distributed or posted on social networking sites. Crimes involving nude images involve a pervasive invasion of privacy, but the posting and distribution of such images causes permanent embarrassment, humiliation and shame to the victim. Images that appear online often cannot be removed and the spreading of images can interfere with a victim's ability to obtain and maintain employment and to develop healthy relationships.

Last session Senator Vukmir and I introduced AB 462/SB 367 which was signed into law on April 8, 2014 and became WI Act 243. Under WI Act 243, no one may reproduce, distribute, exhibit, publish, transmit, or otherwise disseminate (distribute) an image of a person who is nude or partially nude or who is engaging in sexually explicit behavior without the consent of the person. However, even with this change, district attorneys are still facing challenges when prosecuting these types of crimes.

Current law presents significant limitations to prosecution of these crimes because they are outdated with regard to technological advancements. For example, current law prohibits installing a surveillance device that has been installed in a private place to observe a nude or partially nude person without that person's consent. This bill clarifies that a surveillance device need only be capable of observing the activities of a person and need not be designed for that purpose. This bill would update the statutes and allow for more efficient, comprehensive and accurate prosecutions of these crimes.

This legislation updates the statutes to reflect the greater accessibility to filming or recording and publishing images through Smartphones. The proposed

changes also criminalize recording of sexual acts without consent, not just the recordation of nudity. The changes allow for prosecution under situations where a person is aware of recoding or filming, but does not consent and is unable to prevent the images or videos from being captured for various reasons. Overall these changes involve more comprehensive protection given the ways that technological advances have made us all more vulnerable to invasions of privacy.

Furthermore this bill defines consent and establishes that a person under the age of 18 is incapable of consent. Under the bill, a person suffering from a mental illness or defect that impairs his or her capacity to appraise personal conduct and a person who is unconscious or otherwise physically unable to communicate unwillingness to an act are presumed incapable of giving consent.

Amendment 1, which we introduced, clarifies that a telecommunications provider would not be criminally liable for content that was sent using their service by a third party.

Thank you again for allowing me the opportunity to testify in support of this bill, and I would welcome any questions.

TO: Committee on Judiciary and Public Safety

FROM: Lynn Gahagan, Forensic Interviewer, Children's Hospital of Wisconsin

DATE: 12/16/15

RE: Support of SB 410 – relating to the invasion of privacy

“I felt exposed. I couldn't handle anything. I didn't want to go out in public because I felt so uncomfortable.”

“I need the darkness to protect me. It's as if my skin has been ripped off. So everything hurts. The light hurts, and once it is dark, I do not have to think about what I see. “

“I felt so violated that it seemed like I had been raped. I immediately cut myself off from the world around me and I couldn't stand to have anyone see me. I assumed that the whole world had seen the evidence, or that they would see the evidence because I was sure that it would be posted on the internet.”

These are just a few of the things I have heard from victims of crimes involving invasions of privacy.

Chairman Wanggaard and committee members, thank you for allowing me to testify today in support of SB 410. My name is Lynn Gahagan and I am a forensic interviewer for Children's Hospital of Wisconsin. Children's Hospital of Wisconsin serves children from every county in the state. We have inpatient hospitals in Milwaukee and the Fox Valley. We care for every part of a child's health, from critical care at one of our hospitals to routine checkups in our primary care clinics. Children's also provides specialty care, urgent care, emergency care, dental care, school health nurses, Foster care and adoption services, family resource centers, child health advocacy, health education, pediatric medical research and the statewide poison hotline.

My role at Children's is to conduct video recorded investigative interviews of children and teens when there is a suspicion that abuse or neglect has occurred. Since my employment began with Children's in July, I have interviewed over 100 children.

Prior to July of this year, I spent eight years as a Victim Advocate in the Sensitive Crimes Unit of the Milwaukee District Attorney's Office. During my time there, I worked with over 900 victims of sexual abuse. Through that position, and my current one as a Forensic Interviewer of the children and teens at Children's Hospital's Child Protection Center, I have spoken to many people of all ages and backgrounds whose lives have been profoundly impacted by crimes of surreptitious filming and photographing. As these cases came across my desk, they continued to expose limitations in our ability to protect the privacy of many.

I am here today because I have seen the ways in which we are all vulnerable to invasions of privacy. And I am here because the laws we rely on to protect us are leaving us all exposed. Many of the men, women, and children in your lives are at risk of falling victim to horrible acts that fall within gaps and limitations of current statutes. As technology advances and our devices

consolidate and shrink, the risk only increases. While the paraphilia of voyeurism is not new, there is an ever growing ability to memorialize peeping tom behavior.

Current law against invading privacy requires that a person “install a surveillance device”. It states that the device must be “designed to be used or primarily intended to be used” to observe the private acts of a person. As I hear a story from a teenage girl who was followed into a tanning salon, I dread the potential that the man who held his phone over the wall separating the tanning booths will not be held accountable. His phone was designed to be used to make phone calls and he merely held it over the wall to peek into her dressing area. We will have no evidence that he captured an image. I worry for her that if police recover an image that it will be of her intimate parts. But I also worry that it won't, that for whatever reason (her body positioning, operator error) that the image captured won't be a violation of the Representations Depicting Nudity statute because it does not display her nudity.

I know that she will never feel safe using a public restroom or tanning bed ever again. She may decide, like others I have met, to change her appearance; anticipating that he may have posted a video of her online on one of the many legal voyeurism fetish websites, or even worse, on Facebook. She may be overcome by the realistic fear that an employer may one day do a reverse google image search of her only to find her nude images online. And while the passing of a revenge porn law protected many, her image or video will not fit the definition of a private representation. It is mere nudity, neither sexually explicit nor a lewd exhibition of the genitals. She may not be protected by child pornography laws. She is a child. Forever exposed and humiliated. An act that took mere seconds, but has changed her life forever.

Technology has advanced to allow for one device to be capable of photographing, filming, uploading, distributing, and posting all within seconds. These are capabilities that could not be anticipated when the laws related to privacy originated. Current statutes require that the victim have no knowledge of the filming and not consent to the filming. Many teens and young women who have been filmed or photographed without their consent became aware of the recording, but because of the accessibility of the camera on a Smartphone and the speed at which an image can be captured, they were unable to express lack of consent or to prevent the capturing of the image. This can make a person feel powerless and humiliated instantly. When such an image is distributed, the consequences can be devastating and for various reasons, and may not be covered by any law including the new Revenge Porn section of the statute.

The proposed changes to the format of this statute also provide protection for people who are filmed while urinating, defecating, or changing a feminine hygiene product, audio recordings of sexual activity, and upskirting behavior. When an image or video of this activity is memorialized without the consent of the individual filmed, the act is humiliating whether or not nudity is captured. The changes proposed in this legislation focus the criminality of the act on the behavior and intent of the offender rather than the positioning or clothing of the victim.

In addition, this bill clarifies the issue of consent and makes it consistent with definitions of consent found in other statutes. A person who is unconscious, highly intoxicated, under 18, or suffering from severe mental illness or cognitive delays, cannot freely consent to being

photographed or filmed in intimate circumstances. In many ways this again puts elements of the crime on the offender's behavior and prevents exploitation of the most vulnerable people in our community.

Now think about some of these other scenarios that fall within the current statutory gaps, a woman using the bathroom or changing a tampon where the image captured with a pen camera does not clearly depict nudity, a fully clothed person performing oral sex within the privacy of their own bedroom being filmed by their partner, a teenage male staying in a hotel room for a basketball tournament whose buddy starts snapping pictures of him when he steps out of the shower, a correctional officer whose coworker leaves an iPod in the locker room with hopes of capturing video of her nude while changing but she never faces the device, a stepfather who sets up a hidden camera in the bathroom of his home facing the toilet so he can film his 11 year old stepdaughter's vagina as she urinates.

Could these be your children? Could this be you? As I read through these examples, did a single one of you think that these people do not deserve protection under these statutes? Did you think these prohibitions were over reaching or encroaching on the rights of individuals? Were you shocked that in all of those examples no statute clearly protects the victims? I ask you not to rely on the creativity and innovation of prosecutors to stretch the limits of these and other laws currently in place.

We may not be able to envision every way that privacy invasions could occur, but it is our position that these proposed changes give law enforcement and prosecutors proper tools to adapt. I believe SB 410 reflects our beliefs as a society about what should be private, but with an understanding that many will use technological advancements for deviant acts. We have a responsibility to maintain healthy boundaries for those around us. Especially for young people who are growing up in a world of instant gratification, webcams, snapchat, and pornhub. So today, as I shine light on our vulnerability, I ask you to strengthen our sense of safety and support SB 410.

Chairman Wanggaard, thank you for allowing me to testify today in support of SB 410. If you have any questions you can contact me at LGahagan@chw.org or via phone at 414-277-8980.