

2011 HOUSE JUDICIARY

HB 1249

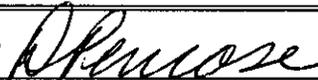
2011 HOUSE STANDING COMMITTEE MINUTES

House Judiciary Committee
Prairie Room, State Capitol

HB 1249
January 24, 2011
13295

Conference Committee

Committee Clerk Signature



Minutes:

Chairman DeKrey: We will open the hearing on HB 1249.

Rep. Kim Koppelman: Sponsor, support. We've dealt with this over the past few sessions. This bill deals with surreptitious intrusion, which in the old days was referred to as peeping toms, someone looking in a window. These days, with electronics and other means of doing this, we have to keep up with technology in terms of how we criminalize it. We did that in the past and as you can see, this bill changes the description of how someone would pursue that kind of behavior/activity. I think the main purpose of the bill will be explained by Mr. Birst, ND Association of Counties, representing the states' attorneys. You have followed a case in Fargo over the past several months, where there was an individual, who was a NDSU student, who had set up a recording device, a camera of some sort, in a bathroom of a female dorm; the purpose was to record females taking showers. It was discovered, charges were brought, and unfortunately that case, based on our statute, was thrown out on constitutionality. This is the attempt to fix that.

Rep. Kretschmar: Would this bill help the gentleman that had the cameras shining on his house that had testified in HB 1224.

Rep. Koppelman: I think subsection 2 might address that. I think it's something that we certainly should bear in mind as we move on this bill.

Chairman DeKrey: Thank you.

Aaron Birst, ND Association of Counties, and States' Attorneys Members: Support (see attached 1). We feel this is an important issue and thank you for bringing it forward.

Chairman DeKrey: I believe that we will put these bills together in a subcommittee to get this worked out (HB 1224, 1249, and 1371).

Rep. Boehning: Is someone taking a picture in the mall a violation of your privacy, because you see it on YouTube. Is that going to be affected?

Aaron Birst: That was the reason why the sexting bill was unconstitutional in the other case. I don't want to blend the issues, but the district court, in that matter, said there has to be some element of expectation of privacy. In the example where you are walking in the mall, those kinds of events you wouldn't have an expectation of privacy, so the statute isn't intended to get at those kinds of cases. This change today, and the sexting change, those bills contain an expectation of privacy. If you look on section 1(d), all of them indicate that there is an expectation of privacy that's being interfered with. In the specific example of this Cass County case, the lady in the shower certainly had an expectation of privacy, so that's what this bill is intended to get at; not the out in public kind of situation.

Rep. Boehning: When I looked at the video, that video was taken by the Mall cameras, not by someone with their video camera.

Aaron Birst: I guess I'm unclear of what video you are talking about.

Rep. Boehning: It was a video I sent out in the Chamber, where a girl was walking in the Mall, texting, she fell into the fountain. This wasn't taken by a normal video camera, this video, I believe, was taken from the Mall video feed. Would that be covered under this bill; are we going to see a lot of lawsuits, because all of a sudden you're walking in the mall and if it comes off a video camera from someplace.

Aaron Birst: I guess I did see the headline of that video, but I didn't watch it. I didn't want to be charged with anything. I don't know the specific example, but there again, the way these bills are written, is that there has to be an expectation of privacy and in the Mall situation, most prosecutors would say that there is not an expectation of privacy because you know there are cameras all around. These are specifically intended, and I can tell you that prosecutors don't want to charge people for violating surreptitious intrusion based on mall cameras. Of course, if the mall camera is installed in the women's changing room, and some security guard is watching those, then we would indicate surreptitious intrusion would apply.

Rep. Klemin: I'm looking that the statute, it seems to have a double intent, a hurdle that you have to get over. First, on line 7, intent to arouse, appeal to, or gratify that individual's lust, passions, or sexual desires. I guess that would be the first intent that you'd have to prove as a prosecutor. Then the second intent you would have to prove, that they're doing this with the intent to intrude upon the privacy of another in various ways. I'm trying to visualize how they do this, how does a person do this without a window or aperture to look in. Could you give me an example, are we talking about looking through the door, but how else do you see into somebody else's house, unless you look through a window or some other kind of opening, aperture.

Aaron Birst: As you would see, and I should have brought it along, the jury instruction for this statute is interesting, because there are those two. You do have to prove the intent to arouse, appeal to...the individual's passions. In addition, there is also the intent to intrude upon or interfere with somebody's privacy rights. So there are those two elements. In particular with your question, the way the current statute was written, was window, door, hole in the wall that is what is thought of. With this bill, by taking that out, the videotaping, the installing of video cameras, etc. while not necessarily going through a window, door, or peephole, just having it somewhere in there would catch that kind of conduct.

Rep. Klemin: I'm trying to determine how a person looks into somebody else's house, like on line 10, without looking through a window or aperture.

Aaron Birst: I see what you're saying. How would you do it?

Rep. Klemin: You're taking the language out so you don't need to look through a window or aperture; but if there isn't a window/aperture there, unless you have x-ray vision, how do you do that.

Aaron Birst: The videoing that was in the Cass County case would be clearly covered on page 2, that section when you talk about page 1, line 10, how would you do it without looking through a window. I would simply suggest that modern technology, flaring, the thermal imaging, etc. By taking that out, any type of invasion through technological means, other than a window would violate the statute.

Rep. Klemin: Thermal imaging allows you to look into somebody else's house.

Aaron Birst: Absolutely.

Rep. Maragos: I'm curious, and I know there is probably a legal explanation for it, but on line 7, paragraph 1, if it just said an individual is guilty of a class A misdemeanor, if that individual does any of the following, it says with intent, then why isn't "with intent to arouse, appeal or gratify that individual's lust, passions, or sexual desires" down in one of these alphabetically numbered reasons. They all start with intent.

Aaron Birst: Under the jury instruction, all of the language in #1 on line 7, is also included on a,b,c, all the way throughout, so that language carries through because you first have to prove that line 1 language, then you can get to line 10, 13, etc. for language for the second subparts, there. In other words, to prove surreptitious intrusion, a prosecutor has to prove beyond a reasonable doubt that the individual had intent to arouse, appeal to, or gratify that individual's lust, and then did the following, intended to intrude upon the privacy of another.

Rep. Maragos: Would it say the same on line 10, if you struck the words "with intent to" and just says intrudes. Do you have to prove intent every time, or if this person

intrudes, with the intent of the above? It seems to me that you have to keep proving intent all the time.

Aaron Birst: Maybe this is more complicated than horse racing. Yes, I do understand what you're talking about. This does read awkwardly. That's how it's always been; we didn't want to suggest trying to change the language to make it easier to understand, other than taking out the "window" part. You are correct, subsection 1 is in a,b,c. Why would you need to have extra language to explain that. Again, the intent here is to say if somebody is looking into your house, under any scenario whether they are looking through a window or using video technology, or installing video cameras, and you have an expectation of privacy there, that violates the law.

Rep. Klemin: Just to take off where you left off there, just looking into somebody's house under this law, doesn't violate the law unless it's done with the intent to arouse or appeal to that person's sexual desires. Isn't that right.

Aaron Birst: Correct. That's correct. I think the reason why the legislature put that in, and I wasn't there during that time, it was to stop a prosecution from happening, if somebody just walking on the sidewalk and looks in and sees somebody in the window who's naked. That wasn't their intent to see that, they weren't going up to the windows and peeping in the windows, it just happened. That's language that tries to get more at the criminal element as opposed to other things.

Rep. Steiner: If someone wanted to embarrass somebody, let's say you have two female roommates, and the same thing was done. There wouldn't have been any intent to arouse, it was just simply to embarrass another person, that wouldn't be covered under this.

Aaron Birst: In other words, a situation where the facts are the same thing, where we install some sort of video camera in the shower, but you're not trying to appeal or gratify to your sexual nature, you just want to make fun of somebody. Then the statute could become problematic, then hopefully the new bill that we have, the sexting bill would address that. You are correct, in that situation if I couldn't prove intent to appeal to one's sexual nature, I couldn't use this statute.

Rep. Koppelman: There was a question earlier from Rep. Kretschmar when I was at the podium, about section b. I don't know if you were here during that hearing, but there is another bill that deals with the question of surveillance cameras, video cameras that people install on the outside of their homes. The question of whether they can point that through the window of their neighbor. As we're discussing this bill more, my first thought was maybe this could be used to deal with that issue. The issue that has just been discussed about the precursor. I suppose you could do that without any intent to arouse sexual prurient interest, but you could still be intruding by looking through somebody's window. Do you have a thought on that, on whether those two can be paired.

Aaron Birst: I was not there for that bill, and I saw it and couldn't make that hearing. If I remember correctly we did something like that in the last session. Normally those kinds of situations when they come up, disorderly conduct statute could also be worked into handling that. This would be more of the expectation of privacy, if you're naked in front of your window, you probably have less expectation of privacy than in your shower. That's why this bill is to get at those, it would not be to cover those security cameras that happened to catch somebody's house. So maybe there is a separate bill draft that has to be done for that.

Chairman DeKrey: Thank you. Further testimony in support of HB 1249. Testimony in opposition. We will close the hearing.

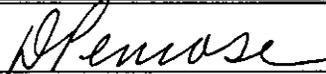
2011 HOUSE STANDING COMMITTEE MINUTES

House Judiciary Committee
Prairie Room, State Capitol

HB 1249
February 14, 2011
14506

Conference Committee

Committee Clerk Signature



Minutes:

Chairman DeKrey: We will take a look at HB 1249.

Rep. Koppelman: There were three bills that were to have been looked at together. One of the bills was already passed out. This bill doesn't need any amendments. We have amendments for HB 1224. HB 1249 was sponsored at the request of the States Attorneys dealing with this parallel issue to Rep. Delmore's bill. If you recall the case in Fargo, that we've discussed a little bit in this committee, of the male student who took video of a female student in the shower. I don't know if they were roommates or not, but he apparently had a video recording device in the pocket of some clothing hanging on a wall and that was how he took the videos unknown to her of course. The prosecutors had trouble charging that because the current law, if you look at the statute that HB 1249 seeks to amend, talks about peeping in the window or any other aperture into a house.. throughout the statute. So HB 1249 seeks to change the language to just say peeping into a house. They couldn't charge under that statute because it wasn't peeping through a window. It was a technicality, but nevertheless something we need to fix. The other bill was HB 1224, which dealt with recording devices, security system devices on houses designed to record the exterior, what's going on outside and there was a bill brought because someone had a concern about apparently a neighbor aiming one of those devices through this window and there was concern about that. We thought they were parallel issues, certainly not the same issue, but we thought we should take a look at both of them. The subcommittee recommends passage of HB 1249 as is and amend HB 1224. I move a Do Pass on HB 1249.

Rep. Beadle: Second the motion.

14 YES 0 NO 0 ABSENT

DO PASS

CARRIER: Rep. Onstad

Date: 2/14/11
 Roll Call Vote # 1

2011 HOUSE STANDING COMMITTEE ROLL CALL VOTES
 BILL/RESOLUTION NO. 1249

House JUDICIARY Committee

Check here for Conference Committee

Legislative Council Amendment Number _____

Action Taken: Do Pass Do Not Pass Amended Adopt Amendment
 Rerefer to Appropriations Reconsider

Motion Made By Rep Koppelman Seconded By Rep. Beadle

| Representatives | Yes | No | Representatives | Yes | No |
|-----------------|-----|----|-----------------|-----|----|
| Ch. DeKrey | ✓ | | Rep. Delmore | ✓ | |
| Rep. Klemin | ✓ | | Rep. Guggisberg | ✓ | |
| Rep. Beadle | ✓ | | Rep. Hogan | ✓ | |
| Rep. Boehning | ✓ | | Rep. Onstad | ✓ | |
| Rep. Brabandt | ✓ | | | | |
| Rep. Kingsbury | ✓ | | | | |
| Rep. Koppelman | ✓ | | | | |
| Rep. Kretschmar | ✓ | | | | |
| Rep. Maragos | ✓ | | | | |
| Rep. Steiner | ✓ | | | | |
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Total (Yes) 14 No 0

Absent 0

Floor Assignment Rep. Onstad

If the vote is on an amendment, briefly indicate intent:

REPORT OF STANDING COMMITTEE

HB 1249: Judiciary Committee (Rep. DeKrey, Chairman) recommends **DO PASS**
(14 YEAS, 0 NAYS, 0 ABSENT AND NOT VOTING). HB 1249 was placed on the
Eleventh order on the calendar.

2011 SENATE JUDICIARY

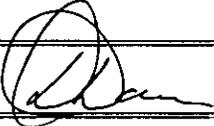
HB 1249

2011 SENATE STANDING COMMITTEE MINUTES

Senate Judiciary Committee
Fort Lincoln Room, State Capitol

HB1249
3/29/11
Job #16139

Conference Committee

Committee Clerk Signature 

Explanation or reason for introduction of bill/resolution:

Relating to surreptitious intrusion

Minutes:

There is attached testimony

Senator Nething - Chairman

Representative Koppelman – Introduced the bill saying that it basically clarifies the statute.

He said our statute reads “in the window or other aperture” and it is being changed to “in to a house”. He then relates a case in Fargo that brought this on.

Aaron Birst – Association of Counties – See written testimony.

Senator Sitte – Asked if this would include drones.

Birst – Replies yes, anytime a device is installed or used to intrude on someone’s privacy.

Opposition – 0

Neutral – 0

Close 1249

Senator Nelson moves a do pass

Senator Sitte seconded

Roll call vote – 6 yes, 0 no

Senator Lyson will carry

REPORT OF STANDING COMMITTEE

HB 1249: Judiciary Committee (Sen. Nething, Chairman) recommends DO PASS
(6 YEAS, 0 NAYS, 0 ABSENT AND NOT VOTING). HB 1249 was placed on the
Fourteenth order on the calendar.

2011 TESTIMONY

HB 1249

Testimony to the
HOUSE JUDICIARY

Prepared January 24, 2011 by the North Dakota Association of Counties
Aaron Birst, Legal Counsel

CONCERNING HOUSE BILL 1249

Chairman DeKrey and members of the committee, the North Dakota Association of Counties is here today to support HB 1249 which was brought to our attention as a result of a criminal case out of Cass County this past summer.

The facts of that case involved one NDSU student capturing his female roommate taking a shower with his cell phone camera. This video was taken unbeknownst and without the approval of the female roommate. Eventually law enforcement became aware of the issue and conducted an investigation and sent it to the Cass County State's Attorneys office for charges.

The prosecutor initially charged a violation of NDCC 12.1-20-12.2 Surreptitious intrusion. However, upon further review of that statute it appeared the simple words "through the window or any other aperture of" would create an additional element the prosecutor could not prove since the video was not taken through any windows.

The prosecutor then had to amend the charge to a different crime which ultimately the District Court found unconstitutional. By striking the following language the legislature would allow this statute to be more effective against clearly unacceptable conduct.

For the following reasons I ask that you support House Bill 1249.

Thank you.

Testimony to the
SENATE JUDICIARY
Prepared March 29, 2011 by the North Dakota Association of Counties
Aaron Birst, Legal Counsel

CONCERNING HOUSE BILL 1249

Chairman Nething and members of the committee, the North Dakota Association of Counties is here today to support HB 1249 which was brought to our attention as a result of a criminal case out of Cass County this past summer.

The facts of that case involved one NDSU student capturing his female roommate taking a shower with his cell phone camera. This video was taken unbeknownst and without the approval of the female roommate. Eventually law enforcement became aware of the issue and conducted an investigation and sent it to the Cass County State's Attorney's office for charges.

The prosecutor initially charged a violation of NDCC 12.1-20-12.2 Surreptitious intrusion. However, upon further review of that statute it appeared the simple words "through the window or any other aperture of" would create an additional element the prosecutor could not prove since the video was not taken through any windows.

The prosecutor then had to amend the charge to a different crime which ultimately the District Court found unconstitutional. (That statute is being addressed by HB 1371) By striking the following language the legislature would allow this statute to be more effective against clearly unacceptable conduct.

For the following reasons I ask that you support House Bill 1249.

Thank you.