

IN THE SUPREME COURT OF IOWA

STATE OF IOWA,)
)
 Plaintiff-Appellee,)
)
 v.) S.CT. NO.16-1213
)
 JOSE WILLFREDO LOPEZ,)
)
 Defendant-Appellant.)

APPEAL FROM THE IOWA DISTRICT COURT
FOR BUCHANAN COUNTY
HON. LINDA M. FANGMAN, Judge

APPELLANT'S BRIEF AND ARGUMENT

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CERTIFICATE OF SERVICE

On the 26th day of April, 2017, the undersigned certifies that a true copy of the foregoing instrument was served upon Defendant-Appellant by placing one copy thereof in the United States mail, proper postage attached, addressed to Jose Willfredo Lopez, No. No. 1072574, Newton Correctional Facility, 307 South 60th Avenue, West, P.O. Box 218, Newton, IA 50208.

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STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

I

DEFENDANT WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL. TO THE EXTENT THAT THE RECORD APPEARS ADEQUATE, THIS BRIEF ADDRESSES THE FOLLOWING PARTICULARS:

- 1. Counsel Was Ineffective in Failing to Properly Challenging the Sufficiency and Weight of the Evidence Regarding the Indecent Exposure Charge;**
- 1. Counsel Was Ineffective in Failing to Object to the Jury Instructions Regarding Indecent Exposure.**

Authorities

State v. Tobin, 333 N.W.2d 842 (Iowa 1983)

State v. Webb, 648 N.W.2d 72 (Iowa 2002)

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II

**IN ORDERING LOPEZ TO PAY THE \$100 SURCHARGE
PURSUANT TO IOWA CODE SECTION 911.2B, THE COURT
IMPOSED AN ILLEGAL SENTENCE.**

Authorities

State v. Lathrop, 781 N.W.2d 288 (Iowa 2010)
State v. Anderson, 565 N.W.2d 340 (Iowa 1997)
Taylor v. State, 352 N.W.2d 683 (Iowa 1984)
State v. Bruegger, 773 N.W.2d 862 (Iowa 2009)

Iowa Code section 911.2B (2015 Iowa Acts, Chapter 96, section 15).

U.S. Constitution, Article I, section 9

Iowa Constitution, Article I, section 21

State v. Iowa Dist. Ct., 759 N.W.2d 793 (Iowa 2009)

State v. Fisher, 877 N.W.2d 676 (Iowa 2016)

Iowa Constitution, Article 3, section 26

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ROUTING STATEMENT

Issue raised in part I of this brief is an issue of first impression in Iowa. The case should be retained by the Supreme Court of Iowa. Iowa R. App. P. 6.1101.

STATEMENT OF THE CASE

Nature of the Case: This is an appeal by Jose Wilfredo Lopez from a conviction for Stalking—Violation of Protective Order or Injunction, a class D felony, in violation of Iowa Code sections 708.11(2) and 708.11(3)(b)(1), and Indecent Exposure, an aggravated misdemeanor, in violation of Iowa Code section 709.9, following a jury trial in Buchanan County, Iowa.

Course of Proceedings and Disposition in District

Court:

On August 14, 2015, a trial information was filed charging Lopez with Stalking—Violation of Protective Order or Injunction, a class D felony, in violation of Iowa Code sections 708.11(2) and 708.11(3)(b)(1). [Trial Information] [App. 5].

On August 25, 2015, Lopez entered a plea of not guilty. [Arrest and Order Setting Bond Review Hearing, Trial, and Pretrial Conference, filed 8/25/15] [App. 7].

On October 13, 2015, Lopez waived his right to a speedy trial. [Waiver of Speedy Trial, filed 10/13/15] [App. 9].

On October 14, 2015, the State sought, and the trial court granted permission to amend the trial information. [Motion to Amend Trial Information, filed 10/14/15; Order Granting Motion to Amend Trial Information and Approving Amended and Substituted Trial Information, filed 10/14/15] [App. 10; 11]

On October 14, 2015, an amended and substituted trial information was filed, charging Lopez as follows:

Count I—Stalking—Violation of Protective Order or Injunction, a class D felony, in violation of Iowa Code sections 708.11(2) and 708.11(3)(b)(1) (2015);
Count II—Indecent Exposure, an aggravated misdemeanor, in violation of Iowa Code section 709.9.

[Amended and Substituted Trial Information, filed 10/14/15] [App. 13].

On April 20, 2016, Lopez’s jury trial commenced. [Trial Tr., Vol I, P 1].

On April 25, 2016, the jury returned verdicts, finding Lopez guilty of both Stalking and Indecent Exposure. [Trial Tr., Vol II, P 465, L 5-P 466, L 5] [Criminal Verdict, Count I, filed 4/25/16; Criminal Verdict, Count II, filed 4/25/16; Order for PSI and Setting Sentencing, filed 4/25/16] [App. 16; 17; 18].

On April 28, 2016, trial counsel filed a motion for new trial. [Motion to New Trial, filed 4/28/16] [App. 20].

On May 11, 2016, Lopez filed a pro se motion for new trial. [Lopez Motion for New Trial, filed 5/11/16] [App. 22].

Both motions were denied by the court. [Other Order Motion for New Trial is Denied, filed 7/12/16] [App. 24].

On July 12, 2016, Lopez was sentenced to five years' confinement plus a \$750 suspended fine and surcharge on Count I; two years' confinement plus a \$315 fine and surcharge on Count II. The trial court also ordered a ten-year special sentence pursuant to Iowa Code section 903B.2; sex offender registration pursuant to Iowa Code section 692A.110; and DNA profiling. The trial court ordered victim restitution and assessed court costs. In addition the court assessed an additional \$100 surcharge pursuant to Iowa Code section 911.2B. [Judgment and Sentence, filed 7/12/16] [App. 26].

On July 12, 2016, a no contact order was entered, prohibiting contact between Lopez and the victim for a period of five years from the date of the order. [No Contact Order, filed 7/12/16] [App. 29].

Notice of appeal was filed on July 15, 2016. [Notice of Appeal, filed 7/15/16] [App. 30].

Statement of Facts: Julie Skinner [Skinner] first met Jose Lopez at the Illinois Central depot, where she worked. Initially, Lopez called Skinner at work, but was instructed to call her on her cell phone rather than calling him at work. [Trial Tr., Vol I, P 132, L 12-P 133, L 18].

At times, they met for drinks at a place called “Bill’s”; had dinner at Applebee’s in Waterloo and Okoboji Grill in Independence; and once met in a motel and used the Jacuzzi (clothed), but did not spend the night. [Trial Tr., Vol I, P 134, L 11-P 137, L 11].

In the late evening of April 4, or early morning of April 5, 2015, Skinner received several text messages from Lopez. In response to one of them, Skinner responded that “I will call the sheriff if you come here [to her home].” Skinner then noticed one of the screens on her living room window had been removed; saw that Lopez was crouching outside below the window; and called the sheriff. [Trial Tr., Vol I, P 141, L 23-P 145, L 20].

On April 5, 2015, an order of protection was entered prohibiting Lopez from further contact with Skinner. [Trial Exhibit 10, marked “State’s Exhibit 11”].

Subsequent to entry of the order of protection, Lopez called or texted Skinner in excess of 100 times as shown by numerous photographs of missed calls and text messages retrieved from Skinner’s cell phone. [See, Trial Exhibit 1, marked “State’s Exhibit 3A-E”; Trial Exhibit 2, marked “State’s Exhibit 2A-KKKKK”; Trial Exhibit 3, marked “State’s Exhibit 1A-VVV”; Trial Exhibit 5, marked “State’s Exhibit 6A-D”] [Exhibit App].

Among the text messages, were two photographs, a portion of Trial Exhibit 2, identified as “State’s Exhibits 2III and 2LLL”, showing an erect penis and the words “Me in my glory.” [Trial Tr., Vol I, P 158, L 17-P 159, L 25].

At various times, Skinner observed Lopez following her car [Trial Tr., Vol I, P 168, LL 15-24; P 170, L 18-P 171, L 10]; visited her house [Trial Tr., Vol I, P 175, LL 19-23; P 178, LL 2-9; P 179, L 21-P 180, L 10]; and was present at the Biolife

center in Waterloo, where Skinner occasionally donated plasma. [Trial Tr., Vol I, P 163, L 16-P 164, L 19].

Lopez also wrote Skinner a letter and purchased a movie ticket and delivered it to Skinner's home. [Trial Exhibit 6, marked "State's Exhibit 4"; Trial Exhibit 8, marked "State's Exhibit 5A"].

Additional facts will be discussed as necessary.

ARGUMENT

I

DEFENDANT WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL. TO THE EXTENT THAT THE RECORD APPEARS ADEQUATE, THIS BRIEF ADDRESSES THE FOLLOWING PARTICULARS:

- 2. Counsel Was Ineffective in Failing to Properly Challenging the Sufficiency and Weight of the Evidence Regarding the Indecent Exposure Charge;**
- 3. Counsel Was Ineffective in Failing to Object to the Jury Instructions Regarding Indecent Exposure.**

Preservation of Error: Appellate review is not precluded if failure to preserve error results from a denial of effective assistance of counsel. State v. Tobin, 333 N.W.2d 842, 844 (Iowa 1983).

Scope of Review: Challenges to the sufficiency of the evidence supporting a guilty verdict are reviewed for correction of errors at law. State v. Webb, 648 N.W.2d 72, 75 (Iowa 2002). In general, error is waived if not raised in a motion for judgment of acquittal that identifies the specific grounds raised on appeal. State v. Truesdell, 679 N.W.2d 611, 616 (Iowa 2004). Claims that the court failed to properly instruct the jury are reviewed for errors at law. State v. Spates, 779 N.W.2d 770, 775 (Iowa 2010). In general, error in jury instructions is waived if the error is not presented to the district court. State v. Maghee, 573 N.W.2d 1, 8 (Iowa 1997). To the extent that either waiver was due to counsel's inadequate motion for judgment of acquittal or failure to object to the instructions, counsel was ineffective. An ineffective assistance of counsel claim, a constitutional violation of the Iowa Constitution, Article I, section 10, and the U. S. Constitution, Sixth and Fourteenth Amendments, the reviewing court makes an independent evaluation of the totality of the circumstances, which is the equivalent to a de

novo review. Taylor v. State, 352 N.W.2d 683, 684 (Iowa 1984).

Merits. An ineffective assistance of counsel claim in a criminal case “need not be raised on direct appeal from the criminal proceedings in order to preserve the claim for post-conviction relief purposes.” Iowa Code section 814.7(1). The defendant may raise the ineffective assistance of counsel claim on direct appeal if appellate counsel “has reasonable grounds to believe that the record is adequate to address the claim on direct appeal.” Iowa Code section 814.7(2). Although ordinarily preserved for post-conviction relief, the merits of such a claim on direct appeal may be considered if the record is adequate. See, State v. Liddell, 672 N.W.2d 805, 809 (Iowa 2003). The record in this case is adequate to address this issue.

To establish ineffective assistance of counsel, a convicted defendant must show that (1) counsel breached an essential duty and (2) prejudice resulted. State v. Graves, 668 N.W.2d 860, 869 (Iowa 2003).

Counsel breached two essential duties each of which resulted in prejudice to Lopez: (1) Counsel failed to properly challenge the sufficiency of the evidence regarding the indecent exposure, as alleged in Count II of the trial information; and (2) Counsel failed to object to the jury instructions regarding the law applicable to the allegations contained in Count II of the trial information.

Sufficiency of the Evidence.

Trial counsel had a duty to raise this specific insufficiency of the evidence in a motion for judgment of acquittal to preserve the error for review. State v. Williams, 695 N.W.2d 23 (Iowa 2005); State v. Crone, 545 N.W.2d 267 (Iowa 1996). Counsel breached this duty.

Iowa Code section 709.9 defines indecent exposure as.

A person who exposes the person's genitals or pubes to another not the person's spouse, or who commits a sex act in the presence of or view of a third person, commits a serious misdemeanor, if:

1. The person does so to arouse or satisfy the sexual desires of either party; and
2. The person knows or reasonably should know that the act is offensive to the viewer.

Iowa Code section 709.9.

The burden is on the state to prove every fact necessary to constitute the offense with which a defendant has been charged. State v. Gibbs, 239 N.W.2d 866, 867 (Iowa 1976). It is sufficient if the evidence raises a fair inference of guilt as to each essential element of the crime, although the evidence must do more than raise suspicion, speculation, or conjecture. State v. LaPointe, 418 N.W.2d 49, 51 (Iowa 1988). The relevant question is whether a rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. State v. Turner, 345 N.W.2d 552, 555-56 (Iowa 1983); State v. Robinson, 288 N.W.2d 337, 340 (Iowa 1980). The verdict must be supported by substantial evidence which is “such evidence as could convince a rational trier of fact that the defendant is guilty beyond a reasonable doubt.” State v. Webb, 648 N.W.2d 72, 75 (Iowa 2002).

The amended and substituted trial information alleges that Lopez committed indecent exposure, violating Iowa Code section 709.9, by exposing genitals or pubes to Julie Margaret Skinner to arouse or satisfy the sexual desires of either when

the defendant knew or reasonably should have known that the act was offensive to the viewer.” [Amended and Substituted Trial Information, Count II] [App. 13].

In the light, most favorable to the state, the evidence shows:

1. Lopez sent two photos, showing an erect penis and the words “Me in my glory” to Margaret Skinner. See “State’s Exhibits 2III and 2LLL.” [Trial Tr., Vol I, P 158, L 17-P 159, L 25];
2. Lopez and Skinner were not married to one another;
3. Lopez sought to arouse either himself or Skinner; and
4. Lopez should have known that the photos may have been offensive to Skinner.

There is no evidence that Lopez **exposed** anything to any other person—he merely sent inappropriate photographs to someone, not his spouse, who was reasonably and justifiably offended.

Iowa Code section 709.9 does not criminalize sending sexually-explicit photographs.

The introductory paragraph provides:

A person who **exposes** the person's genitals or pubes **to another** not the person's spouse, or who commits a sex act in the **presence of or view of a third person**, commits a serious misdemeanor, if:

Iowa Code section 709.9.

In construing statutes, courts look to what the legislature said rather than what it might have said. Iowa R. App. P. 6.904(3)(m).

The express terms of the statute require exposure of one's genitals to another, not sending a photograph of one's genitals to another. In enacting 709.9, the legislature criminalized exposed of one's genitals—not photographs of them—to another person under well-defined circumstances.

Had the legislature intended to criminalize sending photographs, it could have done so. The legislature certainly knows how to criminalize sending sexually-explicit photos. *See, eg.*, Iowa Code chapter 728—Obscenity.

At the close of the state's evidence, counsel move for judgment of acquittal on the basis that the evidence of identity of the genitals as belonging to Lopez was insufficient. [Trial Tr., Vol II, P 387, LL 15-22]. Counsel for the state summarized

sufficient evidence of identity. [Trial Tr., Vol II, P 388, L 19-P 389, L 7]. This motion was properly overruled. [Trial Tr., Vol II, P 389, LL 19-50].

Following the close of the evidence, no further record was made.

In his motion for a new trial, counsel for Lopez sought a new trial, alleging the “evidence presented to the jury when taken in context shows defendant lacked the specific intent required by the jury instructions.” [Motion for New Trial, filed 4/28/16, paragraph 6] [App. 21].

This motion was denied by the court. [Other Order Motion for New Trial is Denied, filed 7/12/16] [App. 24].

Counsel never raised the insufficiency of the evidence on the issue of exposure of one’s genitals to another.

Trial counsel had a duty to raise this specific insufficiency of the evidence on this issue to preserve the error for review. State v. Williams, 695 N.W.2d 23 (Iowa 2005); State v. Crone, 545 N.W.2d 267 (Iowa 1996).

Counsel breached this duty. Insufficiency of the evidence, properly raised and ruled on would have resulted in dismissal of Count II.

Trial counsel was ineffective in failing to challenge the sufficiency of the evidence to support the crime charged in Count II. State v. Graves, 668 N.W.2d 860, 869 (Iowa 2003).

Lopez was prejudiced by counsel ineffectiveness.

Jury Instructions.

The court has a duty to fully, accurately and fairly instruct the jury on the issues presented in the case. State v. Spates, 779 N.W.2d 770, 775 (Iowa 2010). Similarly, trial counsel has a reciprocal duty to object to the instructions to alert the trial court to the short-comings in the instructions proposed. State v. Maghee, 573 N.W.2d 1, 8 (Iowa 1997). Therefore, failure to object to instructions is the breach of an essential duty on the part of trial counsel.

The trial court, closely parroting the wording of Iowa Code section 709.9, instructed the jury:

Count II

The state must prove all of the following elements of Indecent Exposure:

1. On or about the 14th day of June, 2015, the defendant exposed his genitals or pubes to Julie Margaret Skinner who was not then the defendant's spouse.
2. The defendant did so with the specific intent to arouse or satisfy the sexual desire of the defendant or Julie Margaret Skinner.
3. Julie Margaret Skinner was offended by the defendant's conduct.
4. The defendant knew or reasonably should have known that the act was offensive to Julie Margaret Skinner or to other viewers.

If the state has proven all of the elements, the defendant is guilty of Indecent Exposure. If the state has failed to prove any one of the elements, the defendant is not guilty of Indecent Exposure.

[Jury Instruction No. 17] [App. 15].

This is a literally correct, inadequate statement of the law. This instruction permitted the jury to convict Lopez of a non-existent crime. As noted above, without an explicit instruction requiring physical, personal exposure, the instruction is inadequate and misleading.

The court has a duty to fully, accurately and fairly instruct the jury on the issues presented in the case. State v.

Spates, 779 N.W.2d 770, 775 (Iowa 2010). Defense counsel has a reciprocal duty to object to the instructions to alert the trial court to the short-comings in the instructions proposed. State v. Maghee, 573 N.W.2d 1, 8 (Iowa 1997).

Although there was a fairly-extensive discussion regarding exhibits to be provided to the jury, there is no discussion of the instructions at all. [Trial Tr., Vol II, P 406, L 20-P 410, L 22].

Failure to object to instructions is the breach of an essential duty on the part of trial counsel. State v. Maghee, 573 N.W.2d 1, 8 (Iowa 1997). Permitting the jury to convict Lopez of a non-existent crime based on inadequate jury instructions was prejudicial. Trial counsel was ineffective in failing to challenge the jury instruction regarding the purported crime charged in Count II. State v. Graves, 668 N.W.2d 860, 869 (Iowa 2003).

Conclusion.

Counsel was ineffective; Lopez is entitled to dismissal of Count II.

II

IN ORDERING LOPEZ TO PAY THE \$100 SURCHARGE PURSUANT TO IOWA CODE SECTION 911.2B, THE COURT IMPOSED AN ILLEGAL SENTENCE.

Preservation of Error. Void, illegal, or procedurally defective sentences may be corrected on appeal even absent an objection before the trial court. State v. Lathrop, 781 N.W.2d 288, 292-93 (Iowa 2010).

Scope of Review. Illegal sentences are review for correction of errors at law. State v. Anderson, 565 N.W.2d 340, 342 (Iowa 1997). To the extent that a sentence is illegal because of a constitutional violation, the reviewing court makes an independent evaluation of the totality of the circumstances, which is the equivalent to a de novo review. Taylor v. State, 352 N.W.2d 683,684 (Iowa 1984).

Merits. An illegal sentence is a sentence which is not authorized by statute or is otherwise legally flawed or one which the court lacked the authority to impose. State v. Bruegger, 773 N.W.2d 862, 871 (Iowa 2009).

Assessment of the “domestic abuse assault, sexual abuse, stalking, and human trafficking victim surcharge,”

pursuant to Iowa Code section 911.2B, as applied to this case violates the ex post facto clauses of both the U.S and Iowa constitutions.

Both Article I, section 9, of the U.S. Constitution and Article I, section 21, of the Iowa Constitution prohibit ex post facto laws.

Two elements must be present for a criminal law to operate as an ex post facto law. First, the law must be retrospective, that is, it must apply to events occurring before its enactment. Second, it must alter the definition of criminal conduct or increase the penalty by which a crime is punishable. State v. Lathrop, 781 N.W.2d 288, 294-95 (Iowa 2010), citing State v. Iowa Dist. Ct., 759 N.W.2d 793, 797 (Iowa 2009).

An ex post facto law includes “one that makes the punishment for a crime more burdensome after its commitment.” State v. Iowa Dist. Ct., 759 N.W.2d 793, 797 (Iowa 2009).

There is no doubt that imposition of surcharges is punishment. State v. Fisher, 877 N.W.2d 676 (Iowa 2016).

Similarly, it goes without saying that being required to pay money, in the form of an additional surcharge, is more burdensome than its non-imposition.

Iowa Code section 911.2B, creating the “domestic abuse assault, sexual abuse, stalking, and human trafficking victim surcharge, was enacted by the 2015 session of the Iowa Legislature. *See*, 2015 Iowa Acts, Chapter 96, section 15.

Acts passed in a regular session of the general assembly take effect on July 1 following passage unless a different effective date is stated in the act. *See*, Article 3, section 26, of the Iowa Constitution.

Although chapter 96 established a different effective date (January 1, 2016) for certain provisions of the act, passage of 911.2B was not one of those provisions. *See*, 2015 Iowa Acts, Chapter 96, section 17.

Iowa Code section 911.2B became effective on July 1, 2015. The surcharge (punishment) imposed by that section applies only to criminal acts committed on or after the effective date of the act. *Frideres v. Schlitz*, 540 N.W.2d 261, 264 (Iowa 1995) (the principle that statutes are presumed to apply only

prospectively means they apply only to actions arising after the effective date of the act).

In this case, the amended and substituted trial information alleges that the events constituting stalking allegedly occurred on or between April 3, 2015 and August 2, 2015; the indecent exposure claim on or about June 14, 2015. [Amended and Substituted Trial Information, filed 10/14/15] [App. 13].

It is clear that whatever actions are alleged to have constituted the indecent exposure claim happened before the effective date of the statute and that charge cannot form the basis for imposition of the surcharge.

Although certain of the actions claimed to constitute stalking may have occurred after the effective date of the statute, the jury made no specific determination of which actions constituted the crime. Just as the court held in Lathrop, this conviction cannot serve as the basis for imposition of the surcharge.

The sentence imposed by the court is illegal in that the sentence requiring Lopez to pay the \$100 surcharge pursuant

to Iowa Code section 911.2B—a surcharge which was not in existence at the time of the actions alleged in the trial information. See, State v. Lathrop, 781 N.W.2d 288 (Iowa 2010).

CONCLUSION

Jose Willfredo Lopez requests that the Court reverse his conviction and sentence; remand the case to the district court for dismissal of Count II; and remand the case to the district court for resentencing on Count I, with the 911.2B surcharge stricken.

REQUEST FOR ORAL ARGUMENT

Counsel wishes to be heard in oral argument upon submission of this appeal.

ATTORNEY'S COST CERTIFICATE

The undersigned, hereby certifies that the true cost of producing the necessary copies of the foregoing Brief and Argument was \$ 3.17 and that amount has been paid in full by the Office of the Appellate Defender.

**CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME
LIMITATIONS, TYPEFACE REQUIREMENTS AND TYPE-
STYLE REQUIREMENTS**

This brief complies with the typeface requirements and type-volume limitation of Iowa Rs. App. P. 6.903(1)(d) and 6.903(1)(g)(1) because:

[X] this brief has been prepared in a proportionally spaced typeface Bookman Old Style, font 14 point and contains 3,570 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

/s/ Mark C. Smith

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