IN THE SUPREME COURT OF IOWA
Supreme Court No. 16-1213

STATE OF IOWA,
Plaintiff-Appellee,

vs.

JOSE WILLFREDO LOPEZ,
Defendant-Appellant.

APPEAL FROM THE IOWA DISTRICT COURT
FOR BUCHANAN COUNTY
THE HONORABLE LINDA FANGMAN, JUDGE

APPELLEE'S BRIEF

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ROUTING STATEMENT

This case can be decided applying existing legal principles. Transfer to the Iowa Court of Appeals is appropriate. Iowa R. App. P. 6.1101(3).

STATEMENT OF THE CASE

Nature of the Case

Following a jury's verdict convicting him of stalking in violation of Iowa Code section 708.11(2), 708.11(3)(b)(1) (2015) and indecent exposure in violation of Iowa Code section 709.9, Jose Lopez appeals. He asserts that his trial counsel was ineffective for failing to challenge the sufficiency of the evidence or jury instructions used to convict him of indecent exposure and further claims that the district court illegally imposed an ex post facto punishment by subjecting him to Iowa Code section 911.2B's $100 surcharge. The Honorable Linda M. Fangman presided over trial and sentencing.

Facts and Course of Proceedings

Julie Skinner met Jose "Pepe" Lopez while she was working at the Illinois Central Depot, where she gave tours. Trial Tr. p. 132 ln. 7–20, p. 134 ln. 1–7. After this incidental meeting, Lopez began repeatedly calling the depot to talk with Skinner and ask her to go out with him. Trial Tr. p. 133 ln. 1–5. Fearing trouble with her employer,

Skinner asked Lopez to stop calling her at her place of work, but he continued doing so. Trial Tr. p. 133 ln. 6–14. Because Lopez had indicated in the depot's guestbook that he was from Chicago and his statements that he would "only be here a couple of weeks," Skinner eventually gave Lopez her cell phone number so that he would stop contacting her at work. Trial Tr. p. 133 ln. 19–25.

Skinner subsequently agreed to meet Lopez at Bill's, a restaurant in Independence, the Okoboji Grill in Independence, and an Applebee's in Waterloo. Trial Tr. p. 134 ln. 8–p. 135 ln. 4. On one occasion, Lopez rented a hotel room for Skinner to relax in the furnished hot tub, leaving a key card on her car at work. Trial Tr. p. 135 ln. 5–16. Although the two had agreed Lopez would not be at the hotel room, he later appeared there. Trial Tr. p. 135 ln. 17–p. 136 ln. 2. Lopez arrived after Skinner had gotten into the hot tub and attempted to get in. Trial Tr. p. 136 ln. 14–24. On Skinner's insistence, Lopez was only permitted to get in the hot tub so long as he remained fully dressed. Trial Tr. p. 136 ln. 12–24. He did so. Trial Tr. p. 136 ln. 25. Neither party stayed the night at the hotel, and the two were not intimate. Trial Tr. p. 136 ln. 7–11, p. 137 ln. 2–15. Afterwards, Lopez continued renting hotel rooms and leaving the key

for Skinner, but she did not take him up on his offers. Trial Tr. p. 137 ln. 16–p. 138 ln. 10.

In early 2015, Lopez began appearing at Skinner's rural residence. She had not invited him, nor even told him what the address was. Trial Tr. p. 138 ln. 11–p. 139 ln. 4. Lopez would typically park in Skinner's driveway. When arriving home, Skinner would drive away if she saw the car before pulling in or "probably told him that he is not supposed to be there, that I didn't want him there." Trial Tr. p. 139 ln. 9–20. Skinner never invited Lopez into the house. Trial Tr. p. 139 ln. 21–p. 140 ln. 12. Although she was becoming "a little worried" regarding Lopez's behavior, Skinner had not contacted police, hoping that "he would take my hints, not exactly hints but my direct quotes in asking him to leave and not come back." Trial Tr. p. 140 ln. 13–p. 141 ln. 13.

On April 5, 2015, Skinner was at home watching television in the early hours of the morning. Trial Tr. p. 142 ln. 5–6. Lopez had earlier texted Skinner "Ur mhat matters," and "Imr sorrx. Im at Jesup evit. Im coming. I have nothing but lnve fbq u." Trial Tr. p. 143 ln. 16–p. 144 ln. 4; Trial Exh. 6A-6D; Conf. App. 57. Skinner responded to the texts by warning Lopez "I will call the sheriff if you come here."

Trial Tr. p. 144 ln. 7–10; Conf. App. 57. Skinner fell asleep in her living room, and despite closing the windows earlier due to the chill, awoke to sounds of the wind blowing her drapes about. Trial Tr. p. 142 ln. 6–24. Skinner got up to see how the window was opened, and saw that the screen had been removed, as well as the window pane. Trial Tr. p. 145 ln. 6–11. Skinner then looked down and saw Lopez crouched outside her window. Trial Tr. p. 145 ln. 13–17. She immediately contacted the sheriff's department, who dispatched deputies Ben Ward and Matthew Cook to the home. Trial Tr. p. 145 ln. 19–22, p. 235 ln. 2–p. 239 ln. 16. Afterwards, Skinner saw that Lopez's car was parked on her property. Trial Tr. p. 146 ln. 6–11. As a result of this incident, a no contact order was entered between Lopez and Skinner. Trial Tr. p. 146 ln. 12–25.

However, Lopez did not stop contacting Skinner. He continued calling and text messaging her repeatedly, often multiple times per day. Trial Tr. p. 147 ln. 1–p. 149 ln. 15, p. 151 ln. 16–21, p. 154 ln. 1–p. 157 ln. 10; Trial Exhs. 1Q-1X, 1CC, 1DD, 2A-2BB, 2KK-2KKKKK; Conf. App. 8–9, 11, 23–29, 32–51. In fact, in the following months Lopez continued returning to Skinner's home, leaving her unsolicited gifts such as flowers, movie tickets, food, and hot chocolate, and

performing chores around the residence. Trial Tr. p. 151 ln. 22–p. 152 ln. 24, p. 167 ln. 3–p. 168 ln. 14, p. 161 ln. 1–12, p. 179 ln. 21–p. 180 ln. 14; Trial Exhs. 1EE, 1II, 1JJ, 5A, 5B; Conf. App. 11–12, 55, 56. Lopez also continued sending messages insinuating that he was on her property, such as "Thanks for leaving a gap in the curtains last nite. Didn't aet a glimse of u but its worth it. Love Pep." Trial Tr. p. 157 ln. 11–p. 158 ln. 16. When incarcerated, Lopez would send her letters directly from jail, with the names "mixed up" to avoid detection. Trial Tr. p. 165 ln. 1–p. 167 ln. 2; Trial Exhs. 4, 4A; Conf. App. 52–53.

Lopez also sent Skinner two photos of his penis, titled "Me in my glory." Trial Tr. p. 158 ln. 17–p. 159 ln. 25; Trial Exhs. 2III, 2LLL; Conf. App. 38. Skinner testified that she did not ask for these photographs and that she was disgusted by each of them. Trial Tr. p. 159 ln. 5–12. She reported them to law enforcement. Trial Tr. p. 159 ln. 13–15.

Skinner testified that she told Lopez to leave her alone "Literally hundreds of times." Trial Tr. p. 180 ln. 22–p. 181 ln. 1. Over time, the tenor of the Lopez's messages darkened: "Maybe u think I don't have the luxury to call u ass but ur mistaken ass." Trial Tr. p. 160 ln. 17.

Lopez began actively following Skinner, sometimes calling contemporaneously to inform her of his presence. Trial Tr. p. 168 ln. 15–p. 172 ln. 24. Despite her attempts to evade him, Lopez continued tailing her, making her feel as though she "was being hunted." Trial Tr. p. 172 ln. 3–24. Skinner, fearing Lopez, began taking additional steps to protect herself. She changed her cell phone number and bought a different car. Trial Tr. p. 177 ln. 1–7, ln. 15–p. 178 ln. 22. She bought a gun. Trial Tr. p. 176 ln. 13–23. She would occasionally stay with her niece in town because she feared Lopez would be at her home. Trial Tr. p. 177 ln. 9–12.

On July 31, 2015, Lopez texted, called, and left five voicemail messages, some indicating that he would be coming to Skinner's house. Trial Tr. p. 173 ln. 25–p. 174 ln. 8; p. 249 ln. 7–p. 255 ln. 20; p. 321 ln. 1–p. 322 ln. 21; Trial Exhs. 2CC, 2DD, 2EE, 2FF, 2GG, 2HH, 2II, 2JJ; Conf. App. 30–31. Skinner reported the messages to law enforcement because she was frightened of Lopez given the escalating nature of his behavior. Trial Tr. p. 174 ln. 9–p. 176 ln. 1. Deputy Westpfahl went to Skinner's home, had her write out a statement, and made arrangements for Skinner to come to the sheriff's department the next day. Trial Tr. p. 318 ln. 22–p. 323 ln. 5.

On August 1, Skinner—convinced that Lopez would be coming to her house that night—arrived at the sheriff's department and informed deputies Ward and Hartmann of the situation. Trial Tr. p. 248 ln. 1–p. 255 ln. 20. Deputy Hartmann attempted to reassure Skinner that the sheriff's department would patrol the area near her home and "stay close as long as we had no other calls that night that were more emergent or whatever." Trial Tr. p. 343 ln. 2–p. 345 ln. 7. After Skinner left, Hartmann contacted Wespfahl, and informed other deputies patrolling the area about the situation. Trial Tr. p. 345 ln. 8–20. The deputies devised a plan to "cruise the gravels" and keep an eye out for Lopez's vehicle. Trial Tr. p. 345 ln. 22–p. 346 ln. 12.

At a quarter after 1 a.m. that night, Hartmann observed a license plate reflection in an otherwise abandoned area. Trial Tr. p. 346 ln. 14–p. 347 ln. 1. Upon closer inspection, Hartmann found Lopez's car parked next to an electrical substation. Trial Tr. p. 347 ln. 2–11. There was no one present with the vehicle and an empty bike rack was attached. Trial Tr. p. 347 ln. 11–13. Believing that Lopez had proceeded by bicycle, Hartmann contacted the other deputies about her observations. Trial Tr. p. 351 ln. 5–14. Shortly after, Deputy Cook

radioed that he needed assistance at Skinner's residence. Trial Tr. p. 352 ln. 23–p. 353 ln. 2.

Cook had earlier parked his department vehicle three-quarters of a mile north of Skinner's residence and walked there on foot. Upon arrival, he decided to "hunker down and see what happens." Trial Tr. p. 373 ln. 22–p. 375 ln. 1. After approximately ten minutes of waiting, Cook began hearing footsteps. Trial Tr. p. 376 ln. 2–20. Cook continued to wait, hoping not to scare the individual and have them take off into the adjacent cornfield. Trial Tr. p. 375 ln. 22–p. 377 ln. 3. As the approaching individual came within 100 feet of the house, Cook recognized him as Lopez. Trial Tr. p. 377 ln. 3–7. Cook watched as Lopez continued making "slow careful steps" as though he was "trying not to step on a snake" towards the back of Skinner's home. Trial Tr. p. 377 ln. 8–22. As Lopez ascended the staircase to the home's upper deck, Cook began to slowly approach the porch himself. Trial Tr. p. 378 ln. 1–17. When Lopez reached the top of the deck, he "put his face up to the glass and then cupped his hands like this and moving his head back forth" trying to peek in the home's windows. Trial Tr. p. 378 ln. 18–25. Cook then announced his presence and ordered Lopez to surrender. Trial Tr. p. 379 ln. 2–13. Lopez was

arrested at the scene. Trial Tr p. 380 ln. 3–17. Near the home, the deputies discovered sleeping bags and a bicycle. Trial Tr. p. 381 ln. 6–p. 383 ln. 14; Trial Exh. 10D; Conf. App. 58.

The State accepts the defendant's remaining course of proceedings as adequate and essentially correct. Iowa R. App. P. 6.903(3).

ARGUMENT

I. Defense Counsel was not Ineffective; a Defendant's Direct Transmission of a Photograph of his Penis is Indecent Exposure.

Preservation of Error

Lopez asserts that his act of sending Miller a photograph of his erect penis was not criminalized by Iowa's indecent exposure statute. This claim was not preserved during his motion for judgment of acquittal, nor through a challenge to the jury instructions. *See* Trial Tr. p. 387 ln. 2–22, p. 393 ln. 8–p. 395 ln. 20. However, Lopez presents the claim through aegis of a claim of ineffective assistance of counsel. Appellant's Br. p. 17–25. Under an exception to Iowa's rules of error preservation, claims of ineffective assistance of counsel may be raised for the first time on direct appeal. *State v. Scalise*, 660 N.W.2d 58, 61 (Iowa 2003).

Standard of Review

Iowa courts review claims of ineffective assistance of counsel de novo. *State v. Brubaker*, 805 N.W.2d 164, 171 (Iowa 2011).

Merits

To prevail on his claims of ineffective assistance of counsel, Lopez shoulders the burden of establishing that his counsel's performance fell below an objective standard of reasonableness such that his attorney was not functioning as "counsel" guaranteed by the Sixth Amendment. *Strickland v. Washington*, 466 U.S. 668, 687–88 (1984); *State v. Ondayog*, 722 N.W.2d 778, 784 (Iowa 2006).

Reviewing courts' scrutiny of counsel's performance is highly deferential, and courts indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. *Strickland*, 466 U.S. at 689 ("Judicial scrutiny of counsel's performance must be highly deferential. It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable."). No defendant is entitled to perfect representation; the Constitution

assures only representation within the range of normal competency. *Karasek v. State*, 310 N.W.2d 190, 192 (Iowa 1981). To that effect, "[i]mprovident trial strategy, miscalculated tactics, mistakes, carelessness, or inexperience do not necessarily amount to ineffective assistance of counsel." *State v. Aldape*, 307 N.W.2d 32, 42 (Iowa 1981) (quoting *Parsons v. Brewer*, 202 N.W.2d 49, 54 (Iowa 1972)); *see also Sallis v. Rhoads*, 325 N.W.2d 121, 123 (Iowa 1982). "There are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way." *Strickland*, 466 U.S. at 689.

To satisfy the first of the two-part test of ineffective assistance, Lopez must prove a breach of an essential duty. *State v. Risdal*, 404 N.W.2d 130, 131 (Iowa 1987). Noted above, counsel's actions are presumed to be reasonable under the circumstances, falling within the range of professional competency for criminal defense attorneys. *Id.* To satisfy the second prong of the test and establish prejudice, Lopez must prove that there is a reasonable probability that, but for counsel's unprofessional error, the result of the proceeding would have been different. *State v. Hildebrant*, 405 N.W.2d 839, 841 (Iowa 1987).

The reviewing court can look at either prong of the test first to dispose of an ineffective assistance claim. If the court concludes either is lacking, the claim fails outright. *State v. McKettrick*, 480 N.W.2d 52, 56 (Iowa 1992). Where the record is insufficient to fully address the ineffective-assistance claim, Iowa courts may preserve the matter for postconviction proceedings to allow for full development of the facts surrounding counsel's conduct. *State v. Atley*, 564 N.W.2d 817, 833 (Iowa 1997); *State v. Coil*, 264 N.W.2d 293, 296 (Iowa 1978) ("Even a lawyer is entitled to his day in court, especially when his professional reputation is impugned."); *Foster v. State*, 478 N.W.2d 884, 887 (Iowa Ct. App. 1991) (declining to review postconviction applicant's claim that counsel was ineffective for failing to request applicable lesser-included instruction on limited record where decision may have been tactical in nature). However, when the record is adequate to decide the issue, Iowa courts may also elect to address the claim on direct appeal. The issues presented by Lopez's brief are entirely legal, and accordingly, the State agrees with Lopez that this Court may resolve the matter on the present record.

Lopez's first claim is that there was insufficient evidence to convict him of indecent exposure, because in his view, Iowa Code

section 709.9's language does not contemplate or criminalize an individual sending an unsolicited electronic image of an erect penis to another. Appellant's Br. 20–22. He asserts that "[t]here 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." Appellant's Br. 20 (emphasis in original). The State respectfully disagrees, Lopez's ineffective assistance claims fail as counsel had no duty to raise facially invalid objections.

Iowa Code section 709.9 prohibits

> A person [from] exposing 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 . . . 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.

The Iowa Supreme Court has subsequently formulated the crime to have four elements:

> 1. The exposure of genitals or pubes to someone other than the defendant's spouse
>
> 2. The exposure was done to arouse the sexual desires of either party

3. The viewer was offended by the conduct; and

4. The defendant knew, or under the circumstances should have known, the victim would be offended.

State v. Isaac, 756 N.W.2d 817, 819 (Iowa 2008). Because this case turns on the proper interpretation and use of the word "exposing," this Court's goal is to ascertain the legislature's intent and give it effect if possible. *See State v. Finders*, 743 N.W.2d 546, 548 (Iowa 2008). To accomplish this task, the Court considers the legislature's "object sought to be accomplished and the evil sought to be remedied, and seek a reasonable interpretation that will best effect the legislative purpose and avoid absurd results." *Id.* Where the legislature's used language is clear, the court need look no further than its express terms. The State agrees with Lopez that Iowa Code section 709.9 is not ambiguous. Appellant's Br. 21. The statute's clear wording and this Court's rules of construction require a finding that intentional transmission of a photograph of one's genitals is a violation of Iowa Code section 709.9.

The Iowa Supreme Court has noted that in drafting section 709.9, the Iowa legislature created "essentially a visual assault crime" *State v. Bauer*, 337 N.W.2d 209, 211 (Iowa 1983) (quoting Kermit L.

Dunahoo, *The New Iowa Criminal Code: Part II*, 29 Drake L. Rev. 491, 541 (1979–80)). When construing the word "expose" the Iowa Supreme Court has examined dictionary definitions of the word, including "exhibit," "display," and "lay open to view." *See State v. Jorgensen*, 758 N.W.2d 830, 835–36 (Iowa 2008) (quoting *Webster's Third New International Dictionary* 802 (unabr. ed. 2002) and *Mirriam-Webster's Collegiate Dictionary* 409 (10th ed. 2004)). The *Jorgensen* court ultimately adopted a definition that "exposure" requires a defendant to have "caused to be visible or open to view" his or her genitals. *See Jorgensen*, 758 N.W.2d at 835–36.

Likewise, the *Jorgensen* court noted that in prior cases "The words 'indecent exposure' clearly imply that the act is *either* in the actual presence and sight of others, *or* is in such a place *or under such circumstances that the exhibition is liable to be seen by others, and is presumably made for that purpose*, or with reckless and criminal disregard of the decencies of life." *Id.* (emphasis added) (quoting *State v. Martin*, 101 N.W. 637, 638 (Iowa 1904)). Although the *Jorgensen* court observed that the earlier opinion's definition of the word "expose" "presupposes a public exposure as opposed to a private one," the court identified the modern iteration of the statute

"does not explicitly restrict the *mode of exposure*. The only limitation on the first element is that the *exposure or act making visible* must be to another person not the defendant's spouse." *Jorgensen*, 758 N.W.2d at 836 (discussing *Martin*, 101 N.W. at 638)). The legislature could certainly have created an express "public" or "in-person" requirement on the means of exposure—it did so in the *same* statute for the commission of sex acts "in the *presence of or view* of a third person." Iowa Code § 709.9 (emphasis added). Yet the legislature did not create this requirement for the exhibition of genitals or pubes, and subsequent Iowa courts have had little difficulty finding that indecent exposure transpired where the defendant was not "in public" at the time of the exhibition. *See State v. Thede*, No. 15-0751, 2016 WL 5930417, at *1, *5 (Iowa Ct. App. Oct. 12, 2016) (minor granddaughter shaving grandfather's pubic hair and anus with electric razor in his home at his request was sufficient for conviction for indecent exposure); *State v. Spivey*, No. 11-0014, 2013 WL 1453253, at *3–4 (Iowa Ct. App. Apr. 10, 2013) (affirming conviction for indecent exposure where defendant picked up complaining witness in his vehicle, drove around, and once parked, asked "how would you like to make another $200 today?" and had pulled out his

penis); *State v. Elias*, No. 10-2045, 2012 WL 170645, at *3–4 (Iowa Ct. App. Jan. 19, 2012) (finding sufficient evidence to support conviction for indecent exposure based upon defendant's act of pulling out his erect penis and asking juvenile complaining witness "to give him a hand job" while the two were alone in her bedroom); *State v. Nichols*, No. 09-0108, 2009 WL 2170213, at *2–*3 (Iowa Ct. App. July 22, 2009) (rejecting claim of ineffective assistance of counsel for failing to challenge factual basis on grounds "he had to have exposed himself in a public place," concluding "exposure in a public place is not one of the required statutory elements"). Likewise, the *Klemme*, *Jorgensen*, and *Blair* courts each noted that although the defendants' were not in the "presence" of their victims, they "knew or ought to have known that others" would see their genitals and be offended. *See Jorgensen*, 758 N.W.2d at 837–38, 834 n.3 (defendant was guilty of indecent exposure where three store employees observed him exhibiting his genitals via closed circuit surveillance cameras, whether observation via electronic transmission qualified as "exposure" not directly challenged in case); *State v. Klemme*, No. 10-0859, 2011 WL 2112463, at *3 (Iowa Ct. App. May 25, 2011) (finding sufficient evidence to support conviction for

indecent exposure given defendant's nocturnal act of masturbating in his living room with lights on in house, which permitted neighbors to see into the home and see observe his genitals); *State v. Blair*, 798 N.W.2d 322, 325–26 (Iowa Ct. App. 2011) (concluding there was substantial evidence to support indecent exposure conviction where Blair exposed himself before a window and ran the risk that someone outside that window would observe him). Other states have concluded that electronic transmission of images of one's genitals is "exposure." *See State v. Bouse*, 150 S.W.3d 326, 330 (Mo. Ct. App. 2004) (defendant's act of sending images of his penis to an individual he believed to be under the age of 14 was "exposure"); *Brooker v. Commonwealth*, 587 S.E.2d 732, 735–36 (Va. Ct. App. 2003) (finding defendant's act of exhibiting his genitals through webcam to person he believed to be a minor was consistent with court's definition of "exposure" and sufficient to support conviction).

The text of Iowa Code section 709.9's predecessor statute also supports the conclusion that the current formalization of indecent exposure does not contain an implicit in-person restriction on the means of exposure. That former section—Iowa Code section 725.1 (1971)—criminalized "any man or woman, married or unmarried, is

guilty of *open* and *gross* lewdness, and designedly makes an *open* and indecent or obscene exposure of his or her person, or of the person of another." Iowa Code § 725.1 (1971). By using the words "open" and "gross" the legislature criminalized the specific means of showing of one's genitals. *See generally Bouse*, 150 S.W.3d at 333 (observing that "Missouri courts interpreted 'open' and 'gross' as related to lewd acts . . . as requiring presence"). Again, Iowa Code section 709.9 does not require the criminal showing be "open"—the new version omits any requirements on the means of exposure. The display need only be to a person not the exhibitor's spouse, for the purposes of sexual excitement, and in a context in which the exhibitor knew or should have known the act is offensive to the viewer. Iowa Code § 709.9 (2015). Iowa Courts presume that when the legislature amends a statute, that the amendment is meaningful. *See State v. Phelps*, 417 N.W.2d 460, 461–62 (Iowa 1988) ("Any material change in language of an original statute is presumed to indicate a change in legal rights. When an amendment to a statute deletes certain words, a change in the law is presumed unless the remaining language amounts to the same thing." (internal citation omitted)).

Admittedly, the current version of Iowa Code section 709.9 has remained unchanged since 1977. The Iowa Legislature could not have anticipated certain technological developments that have followed its adoption, including but not limited to cell phones, micro-cameras, and mobile internet connections. *See* 1977 Iowa Acts ch. 147, § 13 (codified at 709.9 (1979)). However the evil that the legislature sought to remedy—the offensive and unsolicited visual assault caused by the perception of another individual's genitalia in violation of accepted norms of social behavior—undoubtedly covers Lopez's conduct here: the direct transmission of images of his erect penis. There is no logical distinction to be made between revealing one's genitals in person or by placing an image of the same before the eyes of an unwilling target, the "visual assault" is the same. It cannot be seriously contended that the shock, affront, and offense caused by unwanted observation of another's genitals cannot also occur through an electronic screen. *See Bouse*, 150 S.W.3d at 335 ("Affront or alarm exists because an affronting or alarming act of exposure is seen, and as Bouse's case demonstrates, an act of exposure can be seen without physical presence." (internal citation omitted)). Aside from actually disrobing in front of Skinner, Lopez utilized the most direct manner

possible to show her his penis—electronic transmission of an image to her personal phone. Respectfully, Lopez is simply mistaken that "the legislature criminalized [exposure] of one's genitals—not photographs of them—to another person under well-defined circumstances." Appellant's Br. 21.

The State notes that at trial and on appeal, Lopez does not contest that he sent the images, that he did so for the purpose of arousing the sexual desires of either party, or that he knew or should have known that the photos may have been offensive to Skinner. Appellant's Br. 20; Trial Tr. p. 441 ln. 21–p. 442 ln. 19, p. 453 ln. 23–p. 454 ln. 12. At trial, Skinner testified to her "disgust" at seeing the images. Trial Tr. p. 158 ln. 17–p. 159 ln. 25. This Court should reject Lopez's claim that the State offered insufficient evidence that he "exposed" his genitals because he was not in the same locality as Skinner or because he did so through an electronic medium. Such a ruling would create a perverse loophole to Iowa's level-headed prohibition on lewdness and creates an undoubtedly absurd result. *See State v. Carpenter*, 616 N.W.2d 540, 542 (Iowa 2000) (Iowa courts do not construe language of statue in a manner to produce an

absurd or impractical assault, and presume the legislature intends a reasonable result in enacting laws).

In sum, Lopez reads "presence" and "public" requirements into Iowa Code section 709.9 that simply do not exist. Lopez's conduct was squarely covered under the Iowa Code prohibition on indecent exhibition, and his counsel was under no obligation to file a motion for judgment of acquittal. This conclusion also resolves Lopez's second claim on appeal, that counsel was obligated to object to district court's offered jury instructions. Appellant's Br. 23–25. Though he suggests the instructions described a "non-existent crime" Lopez acknowledges that instruction given was a "literally correct" statement of the law. Appellant's Br. 24. The indecent exposure jury instruction was indeed a correct statement of the law and was properly given to the jury. Defense counsel was under no obligation to object to the jury instructions offered, nor obligated to request a different formulation of the same. Respectfully, Lopez has failed to prove that his counsel was ineffective and this Court should affirm his conviction for indecent exposure.

II. The Sentencing Court's did not Impose Ex Post Facto Punishment; the Jury's Verdict Covered Conduct Committed After the Surcharge's Effective Date.

Preservation of Error

The State cannot contest error preservation on this claim. "A defendant may challenge an illegal sentence at any time." *State v. Bruegger*, 773 N.W.2d 862, 869 (Iowa 2009). This includes allegations that a court imposed ex post facto punishment. *See State v. Lathrop*, 781 N.W.2d 288, 293 (Iowa 2010).

Standard of Review

Iowa courts review claims of an illegal sentence for correction of errors at law. *See State v. Lidell*, 672 N.W.2d 805, 815 (Iowa 2014). When the sentence is claimed to be unconstitutional, the court reviews such constitutional questions de novo. *Bruegger*, 773 N.W.2d at 869.

Merits

Lopez asserts that the application of Iowa Code section 911.2B's $100 victim surcharge to his stalking conviction was ex post facto punishment, relying upon *State v. Lathrop*, 781 N.W.2d 288 (Iowa 2010). To the contrary, there can be no question the jury found him guilty of stalking behavior after the surcharge's July 1, 2015 effective date. The unrebutted evidence at trial established that Lopez had

contacted Miller numerous times after July of 2015, and at trial Lopez conceded he was arrested by police *on* Miller's property in August 2015. There was no ex post facto violation. This Court should affirm Lopez's sentence in its entirety.

Ex post facto punishment is barred by the Federal and Iowa Constitutions. *See* U.S. Const. Art. I, § 9; Iowa Const. Art. I, § 21. Ex post facto laws include legislative acts that increase or create new punitive consequences that make the "punishment for a crime more burdensome after its commitment." *State v. Iowa Dist. Ct.*, 795 N.W.2d 793, 797 (Iowa 2009). To violate the prohibition on ex post facto punishment, the law must meet two elements when applied to a defendant. First, the law must be applied to events transpiring before its enactment, that is, it must be retroactive. *Id.* Second, it must increase the penalty attached to a preexisting crime or criminalize conduct previously innocent. *Id.* at 797 n.5. The State agrees with Lopez that the Iowa Legislature has imposed a $100 victim surcharge on people convicted of domestic abuse assault, sexual abuse, stalking, and human trafficking. Iowa Code § 911.2B(1); Appellant's Br. 28. The legislation was passed during the general assembly's 2015 session (2015 Iowa Acts ch. 96), and the surcharge took effect on July 1, 2015.

Iowa Code § 3.7(1).[1] The surcharge fund is then directed toward the Iowa Secretary of State's address confidentiality program. *See* Iowa Code § 911.2B(3), § 602.8108(7), § 9.8. The State further agrees that the Iowa Supreme Court has previously ruled that fines and surcharges can constitute punishment. *See State v. Fisher*, 877 N.W.2d 676, 685–86 (Iowa 2016) (concluding that Iowa Code section 311.1's 35% criminal penalty surcharge was punitive in nature where the surcharge was automatically imposed and the funds placed in the general fund, not diverted for a non-punitive or remedial purpose). However, when a punishment is applied to a defendant's conduct occurring both before *and* after the adoption of the statute, the prohibition against ex post facto punishment is not violated. *See State v. Cowles*, 757 N.W.2d 614, 617–18 (Iowa 2008).

Lopez attempts to sidestep that final principle, arguing that because his stalking conduct straddled the July 1, 2015 enforcement date of Iowa Code section 911.2B, and because no special interrogatory was requested of the jury regarding the dates of Lopez's stalking conduct, his conviction for stalking cannot serve as the basis for imposing the surcharge pursuant to *State v. Lathrop*, 781 N.W.2d

[1] Other portions of the legislation took effect January 1, 2016. 2015 Iowa Acts ch. 96, § 17.

288 (Iowa 2010). Appellant's Br. 27–30. In his view, "Although certain of the actions may have occurred after the effective date of the statute, the jury made no specific determination of which actions constituted the crime." Appellant's Br. 29. The State respectfully disagrees. Upon a full examination of the rationale of *Lathrop* and the facts of this case, the presumption employed by the supreme court in *Lathrop* is inapposite and the case is unavailing.

In *Lathrop*, the Iowa Supreme Court reviewed a claim that a defendant convicted of sexual abuse in the third degree had been subject to ex post facto punishment when ordered to serve a special sentence of parole pursuant to Iowa Code 903B.1. *See Lathrop*, 781 N.W.2d at 291, 297. The State had charged Lathrop with engaging in sexual conduct with a fifteen-year-old between June 2005 and September 2005. *Id.* at 297. Iowa Code section 903B.1's special sentence of parole came into effect on July 1 of that year. The *Lathrop* court noted that the evidence admitted at trial "included testimony by the victim that she had sex with the defendant soon after they began dating in March of 2005. In addition, two witnesses testified to a specific sexual act occurring between the defendant and the victim in June 2005." *Id.* The opinion pointed out no evidence that

corroborated the State's charge that the sex acts continued beyond July 1. *Id.* Pointing out that the jury rendered a general verdict that did not articulate when the jury believed the sex acts occurred, the supreme court stated: "When the circumstances make it impossible for the court to determine whether a verdict rests on a valid legal basis or an alternative invalid basis, we give the defendant the benefit of the doubt and assume the verdict is based on the invalid ground." As support, the Court cited *State v. Heemstra*, 721 N.W.2d 549, 558–59 (Iowa 2006), *State v. Hogrefe*, 557 N.W.2d 871, 881 (Iowa 1996), and *State v. Pilcher*, 242 N.W.2d 348, 354–56 (Iowa 1976) for the proposition that where a jury's general verdict would permit conviction based on both a legally valid and legally invalid theory of the crime, the appellate court is to presume the invalid theory was used. *Id.*

The court then contrasted the case with *Cowles*, 757 N.W.2d 614, in which a defendant's guilty plea alleging twenty counts of second-degree sexual abuse between April 1996 and February 1997 provided an "implicit admission by the defendant that he committed the offense after July 1, 1996" and the court had "expressly distinguished 'cases in which a general verdict of guilt leaves the court

with uncertainty as to whether the verdict is based on a valid factual or legal basis, or on an alternative invalid theory submitted to the jury." *Id.* at 297–98 (quoting *Cowles*, 757 N.W.2d at 615, 615 n.1). Concluding that absent evidence of Lathrop engaging in post-July 2005 sexual acts, the jury's general verdict resulted in "such a case of uncertainty here" the supreme court presumed the verdict rested "on conduct that occurred before the enactment of the lifetime-parole law," and that section 903B.1 had been applied retroactively. *Id.* at 298. Yet, that "uncertainty" is absent from the present record; the presumption employed in such cases is inapplicable.

Unlike *Lathrop*, there can be no speculation that Lopez's stalking of Miller continued after the July 1 effective date of Iowa Code section 911.2B. The uncontested evidence presented at trial established that Lopez's stalking continued well into August 2015, through his obsessive text-messaging, letter writing, telephone calls, physical following, and unwelcome presence outside *and within* her home. Trial Tr. p. 138 ln. 11–p. 140 ln. 21; p. 142 ln. 2–p. 146 ln. 11; p. 147 ln. 1–p. 149 ln. 15; p. 151 ln. 22–p. 153 ln. 15; p. 154 ln. 1–20; p. 167 ln. 3–p. 168 ln. 14 p. 168 ln. 15–p. 172 ln. 24; p. 281 ln. 10–p. 283 ln. 6; Tr. Exhs. 1L, 1EE, 1II-1PP, 1RR-1III, 1MMM-1TTT, 2DD, 2FF-

2JJ, 4, 4A, 5A, 5B; Conf. App. 6, 11, 12–21, 30–31, 52–56. Defense counsel conceded that Lopez committed all of the alleged conduct, but argued that it could not have placed Miller in fear for her safety. Trial Tr. p. 441 ln. 21–p. 442 ln. 18; p. 446 ln. 15–p. 448 ln. 24. Respectfully, there can be no uncertainty about the conduct the jury relied upon when even defense counsel conceded at closing argument that Lopez was arrested peering through the windows outside of Miller's home on August 2, 2015. Trial Tr. p. 353 ln. 5–p. 354 ln. 8; p. 357 ln. 1–p. 359 ln. 7; p. 372 ln. 5–ln. 19; p. 373 ln. 22–p. 376 ln. 8; p. 376 ln. 14–p. 379 ln. 13; p. 380 ln. 18–24; p. 381 ln. 6–p. 384 ln. 4; p. 441 ln. 21– p. 442 ln. 3; p. 445 ln. 13–p. 446 ln. 6; Trial Exhs. 10A-J; Conf. App. 58–60. Here, the circumstances established at trial make it entirely clear that the jury's verdict rested on conduct occurring after July 1—akin to the implicit admission contained within the guilty plea in *Cowles*. Trial Tr. p. 441 ln. 21– p. 442 ln. 3; p. 445 ln. 13–p. 446 ln. 6. The presumption employed in *Lathrop* is inapplicable.

Finally, the State notes that section 911.2B's status as punishment is an open question. Funds brought in by the surcharge are specifically reserved for the address confidentiality program,

distinguishing it from the surcharges discussed in *Fisher*. *See Fisher*, 877 N.W.2d at 685–86. This would suggest that like victim restitution, court costs, and attorney's fees, Section 911.2B imposes a non-punitive sanction on a defendant. *See State v. Brady*, 442 N.W.2d 57, 59 (Iowa 1989); *see also Fisher*, 877 N.W.2d at 686 (noting that labels do not necessarily control the treatment of a surcharge). In either instance, this Court should affirm Lopez's sentence in its entirety.

CONCLUSION

The Court should affirm Lopez's convictions and sentences.

REQUEST FOR NONORAL SUBMISSION

The State does not request oral submission in this case. In the event the Court orders oral argument, the State requests to be heard.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

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