IN THE SUPREME COURT OF IOWA

No. 16–1213

Filed February 2, 2018

Amended April 17, 2018

STATE OF IOWA,

Appellee,

vs.

JOSE WILLFREDO LOPEZ,

Appellant.

Appeal from the Iowa District Court for Buchanan County, Linda M. Fangman, Judge.

A criminal defendant appeals his conviction for indecent exposure, contending his trial counsel was ineffective for failing to challenge the sufficiency of the evidence, and his sentence for stalking, contending imposition of the Iowa Code section 911.2B surcharge violates the constitutional prohibition against ex post facto laws. **DISTRICT COURT JUDGMENT REVERSED IN PART, SENTENCE VACATED IN PART, AND CASE REMANDED WITH INSTRUCTIONS.**

Mark C. Smith, Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Timothy M. Hau, Assistant Attorney General, Shawn Harden, County Attorney, and Jenalee Zaputil, Assistant County Attorney, for appellee.

HECHT, Justice.

The defendant was convicted of indecent exposure and stalking. On appeal he contends the indecent-exposure conviction should be reversed because his defense counsel was ineffective in failing to challenge the sufficiency of the evidence and in failing to object to the marshaling instruction for that charge. The defendant also contends his sentence for the stalking conviction was illegal because it included a surcharge that was not authorized by law. Upon review, we conclude the indecent-exposure conviction must be reversed because defense counsel provided ineffective assistance. We further conclude the surcharge imposed as part of the sentence for stalking must be vacated because it was not authorized by law under the circumstances of this case.

I. Background Facts and Proceedings.

Jose Lopez met J.S. in the fall of 2014 at her place of employment. After their initial encounter, Lopez began calling J.S. at work to talk with her and express his interest in dating. J.S. asked Lopez not to contact her at work, but he persisted. Seeking to avoid Lopez's calls at her workplace, J.S. gave him her personal cellphone number.

After they met several times at restaurants for food and drinks, Lopez attempted to arrange meetings with J.S. in hotel rooms. When J.S. rebuffed his attempts to engage in intimate contact, Lopez became even more persistent. He entered J.S.'s home without her permission and left notes and theater tickets. Despite J.S.'s repeated requests that he discontinue contacting her, Lopez frequently called and texted her.

J.S. sought and obtained a no-contact order against Lopez in April 2015 after he again came to her home without invitation. Nevertheless, Lopez continued calling and texting J.S., leaving messages with sexual overtones, and sending her flowers, liquor, and food.

On June 13, Lopez texted her a picture of his hand around his erect penis, accompanied by the message, "Me in my glory." On August 1, Lopez texted J.S. informing her that he planned to visit her property that evening. J.S. alerted the sheriff's department. During the night, a deputy observed Lopez approaching and ascending a staircase to the upper deck of J.S.'s home. The deputy announced his presence as Lopez peered through J.S.'s window.

Lopez was arrested and charged with one count of 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). He was subsequently also charged with indecent exposure, a serious misdemeanor, in violation of Iowa Code section 709.9, as a consequence of the text-message transmission of the still photograph of his genitals to J.S.

At trial, Lopez's counsel filed a motion for judgment of acquittal, contending both the stalking and the indecent-exposure counts should be dismissed for lack of sufficient evidence. Specifically, Lopez's counsel asserted although the evidence established numerous no-contact order violations, the evidence presented in support of the stalking charge was insufficient to establish that Lopez knew or should have known his actions would place J.S. in reasonable fear of death or bodily injury. With respect to the indecent-exposure count, Lopez's counsel contended that the evidence was insufficient only because the photograph did not identify the genitals portrayed in the photo as Lopez's, even though it was transmitted from his phone number.

The court denied the motion for judgment of acquittal, and Lopez was convicted on both counts. Lopez was sentenced to an indeterminate term of up to five years in prison plus a suspended fine and a $100

surcharge under Iowa Code section 911.2B on the stalking conviction. The court also imposed a determinate term of one year in jail plus a fine, $100 surcharge, and special sentence of ten years under Iowa Code section 903B.2 on the indecent-exposure conviction. The court ordered that the sentences be served consecutively.

On appeal, Lopez asserts two propositions: (1) his defense counsel provided ineffective assistance in failing to challenge the sufficiency of the evidence supporting the indecent-exposure charge,[1] and (2) the district court imposed an illegal sentence in violation of the Ex Post Facto Clauses of the Iowa and United States Constitutions in ordering him to pay the $100 surcharge for both convictions.

II. Scope and Standards of Review.

Because defense counsel did not challenge the sufficiency of the evidence supporting the indecent-exposure charge on the grounds that Lopez did not expose himself by texting J.S. a still, digital image of his genitals, error was not preserved for our review on that claim. *See State v. Harris*, 891 N.W.2d 182, 185 (Iowa 2017); *State v. Brubaker*, 805 N.W.2d 164, 170 (Iowa 2011). Accordingly, our review of the merits of that claim turns on whether Lopez's counsel rendered ineffective assistance. *See Harris*, 891 N.W.2d at 185. Claims of ineffective assistance of counsel implicate the constitutional right to counsel; therefore, we review the claim de novo. *State v. McNeal*, 867 N.W.2d 91, 99 (Iowa 2015).

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[1]Lopez also asserts on appeal his trial counsel was ineffective in failing to object to the marshaling instruction on the indecent-exposure charge insofar as it failed to define the word *exposes* in section 709.9. As we conclude Lopez's indecent-exposure conviction must be reversed because the evidence supporting it was insufficient as a matter of law, we need not discuss the claim of ineffective assistance in connection with the jury instruction.

We generally review claims that a sentence is illegal for correction of errors at law; however, when a claim challenges the constitutionality of a sentence, we review it de novo. *State v. Hoeck*, 843 N.W.2d 67, 70 (Iowa 2014).

III. Analysis.

A. Ineffective Assistance of Counsel. Lopez first contends his counsel provided ineffective assistance in failing to challenge the sufficiency of the evidence supporting the indecent-exposure conviction. To succeed on this contention, Lopez must establish by a preponderance of the evidence that "(1) his trial counsel failed to perform an essential duty, and (2) this failure resulted in prejudice." *Harris*, 891 N.W.2d at 185 (quoting *State v. Straw*, 709 N.W.2d 128, 133 (Iowa 2006)); *accord Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064 (1984).

To establish the first prong, Lopez must demonstrate his trial counsel's performance fell below the standard demanded of a reasonably competent attorney. *Ledezma v. State*, 626 N.W.2d 134, 142 (Iowa 2001) (en banc). We presume counsel acted competently and measure counsel's performance against "prevailing professional norms." *Id.* (quoting *Strickland*, 466 U.S. at 688, 104 S. Ct. at 2065). Because counsel does not have a duty to raise a meritless issue, *Harris*, 891 N.W.2d at 186, we now turn to the question of whether Lopez's challenge to the sufficiency of the evidence has merit.

In deciding this case, we must consider the meaning of the word *exposes* in Iowa Code section 709.9. "When interpreting a statute, we seek to ascertain the legislature's intent." *Dakota, Minn. & E. R.R. v. Iowa Dist. Ct.*, 898 N.W.2d 127, 136 (Iowa 2017). We begin with the text of the statute, construing "technical words and phrases, and such others

as may have acquired a peculiar and appropriate meaning in law, . . . according to such meaning," and all others "according to the context and the approved usage of the language." Iowa Code § 4.1(38) (2018); *accord Second Injury Fund of Iowa v. Kratzer*, 778 N.W.2d 42, 46 (Iowa 2010). After having done so, we determine whether the statute's language is ambiguous. *Rolfe State Bank v. Gunderson*, 794 N.W.2d 561, 564 (Iowa 2011).

"A statute is ambiguous 'if reasonable minds could differ or be uncertain as to the meaning of a statute.' " *Id.* (quoting *Holiday Inns Franchising, Inc. v. Branstad*, 537 N.W.2d 724, 728 (Iowa 1995)); *accord City of Waterloo v. Bainbridge*, 749 N.W.2d 245, 248 (Iowa 2008). Ambiguity may arise from the meaning of specific words used and "from the general scope and meaning of a statute when all its provisions are examined." *Rolfe State Bank*, 794 N.W.2d at 564 (quoting *Holiday Inns Franchising*, 537 N.W.2d at 728).

If the statute is unambiguous, we do not search for meaning beyond the statute's express terms. *Id.* However, if the statute is ambiguous, we consider such concepts as the "object sought to be attained"; "circumstances under which the statute was enacted"; "legislative history"; "common law or former statutory provisions, including laws upon the same or similar subjects"; and "consequences of a particular construction." Iowa Code § 4.6; *accord State v. McCullah*, 787 N.W.2d 90, 95 (Iowa 2010). Additionally, we consider the overall structure and context of the statute, *Rolfe State Bank*, 794 N.W.2d at 564, "not just isolated words or phrases," *Kline v. Southgate Prop. Mgmt., LLC*, 895 N.W.2d 429, 438 (Iowa 2017).

Iowa Code section 709.9 is titled "Indecent exposure" and 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:
>
> 1. The person does so to arouse or satisfy the sexual desires of either party; and
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> 2. The person knows or reasonably should know that the act is offensive to the viewer.

Iowa Code § 709.9 (2015) (emphasis added).

Exposes is not defined in the statute. Thus, "we assign it its common, ordinary meaning in the context in which it is used." *See Kline*, 895 N.W.2d at 438. By its ordinary meaning, *expose* means "to lay open to view **:** lay bare **:** make known **:** set forth." *Expose*, *Webster's Third New International Dictionary* (unabr. ed. 2002). *Webster's* indicates *exhibit* and *display* are synonyms of *expose* and provides the following as illustrative examples: "*exposing* a sun-tanned back"; "each had started *exposing* his views"; and "the new display object is to [expose] the package." *Id.* The *American Heritage Dictionary* similarly defines *expose* as "[t]o lay open, as to something undesirable or injurious"; "[t]o make visible: *Cleaning exposed the grain of the wood*"; or "[t]o make known (a crime, for example)." *Expose*, *American Heritage Dictionary* (2d Collegiate ed. 1985).

Additionally, the term *visible* in this context can mean, alternatively, "capable of being seen," "capable of being discovered or perceived," or "devised to keep a particular part or item always in full view or readily seen or referred to." *Visible*, *Merriam Webster's Collegiate Dictionary* (11th ed. 2014). *Open*, on the other hand, can mean either "having no protective covering" or "completely free from concealment :

exposed to general view or knowledge." *Open*, *Merriam Webster's Collegiate Dictionary*.

In *State v. Jorgensen*, we concluded the first element of indecent exposure "requires the defendant to expose or 'cause to be visible or open to view' his or her genitals or pubes to someone other than a spouse." 758 N.W.2d 830, 835 (Iowa 2008). *See generally State v. Lane*, 743 N.W.2d 178, 182 (Iowa 2007) (" '[W]e may refer to prior decisions of this court and others, similar statutes, dictionary definitions, and common usage' to determine [the statute's] meaning." (alterations in original) (quoting *State v. Shanahan*, 712 N.W.2d 121, 142 (Iowa 2006))). However, nothing in the dictionary definition or our prior caselaw explicitly addresses whether causing one's genitals to be visible or open to view is limited to only in-person scenarios or if it can be done through electronic communication.[2]

Under the interpretation advanced by the State, one exposes one's genitals by transmitting an image of them via text message because the image is made visible for a recipient. Under Lopez's preferred interpretation, one does not expose one's genitals merely by transmitting an image of them to another person. Because we find both interpretations of the word *exposes* to be plausible, we conclude the statute is ambiguous. Therefore, we resort to our tools of statutory interpretation.

When interpreting an ambiguous statute, we consider "[t]he object sought to be attained." Iowa Code § 4.6(1) (2018). In *State v. Bauer*, we noted the legislature's purpose in drafting section 709.9 "is to render

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[2]In *Jorgensen*, we noted this specific legal issue was not before the court. 758 N.W.2d at 834 n.3 ("The appellant does not challenge whether observation via a closed-circuit video system *itself* constitutes exposure for purposes of the statute, only that there was insufficient evidence he was aware he was being observed via video camera.").

indecent exposure 'essentially a visual assault crime.' " 337 N.W.2d 209, 211 (Iowa 1983) (en banc) (quoting Kermit L. Dunahoo, *The New Iowa Criminal Code: Part II*, 29 Drake L. Rev. 491, 541 (1979–1980)); *see Indecent exposure*, *Black's Law Dictionary* (10th ed. 2014) (noting the crime of indecent exposure is also termed "indecent assault by exposure"). An assault, as defined in Iowa Code section 708.1, requires either the apparent ability[3] to cause pain or injury through physical contact or to place another in fear of immediate physical contact, or the intentional pointing of a firearm or displaying in a threatening manner any dangerous weapon toward another. Iowa Code § 708.1(2) (2015). Notably, both of the alternative means of committing an assault include features of temporal and physical presence. The apparent-ability alternative of assault requires proof of physical contact or the fear of *immediate* physical contact. Under the other assault alternative, the State may support an assault conviction through proof that the defendant pointed or displayed[4] a firearm or dangerous weapon *toward another*. Because the offense of indecent exposure constitutes a crime of visual *assault*, we conclude the meaning of the word *exposes* in section 709.9 must be understood as having features of temporal and physical proximity.

The State argues there is no logical distinction between revealing one's genitals in-person and by sending an image of such to an unwilling recipient because, ultimately, the viewer can be offended by the

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[3]" '[A]pparent ability' means a reasonable person in the defendant's position would expect the act to be completed under the existing facts and circumstances." Iowa Criminal Jury Instruction 800.6 (2017). *See generally* 4 Robert R. Rigg, *Iowa Practice Series:™ Criminal Law* § 5:3, at 173–75 (2017).

[4]*Webster's* indicates *display* is a synonym of *expose*. *Expose*, *Webster's Third New International Dictionary*.

observation regardless if the observation is in-person or through an electronic device. The State supports its argument by citing a decision of the Missouri Court of Appeals. In *State v. Bouse*, a divided 6–5 court held "[a]ffront 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." 150 S.W.3d 326, 335 (Mo. Ct. App. 2004) (citation omitted).[5]

We acknowledge that an unwelcome viewing of another's genitals can cause offense regardless if it is directly observed from a vantage point in close physical proximity or from a remote location via electronic transmission of the image. But the mere fact of offensiveness cannot be the only consideration in our interpretation of *exposes* in section 709.9. We must also consider the circumstances surrounding the unwanted observation. *Cf. FCC v. Pacifica Found.*, 438 U.S. 726, 745, 98 S. Ct. 3026, 3038 (1978) (Stevens, J., writing for three Justices) ("[T]he fact that society may find speech offensive is not a sufficient reason for suppressing it. Indeed, if it is the speaker's opinion that gives offense, that consequence is a reason for according it constitutional protection."); *Schenck v. United States*, 249 U.S. 47, 52, 39 S. Ct. 247, 248 (1919) ("[T]he character of every act depends upon the circumstances in which it is done.").

In this context, other courts have considered the potential offensiveness of unwelcome in-person exposures of genitalia as compared

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[5]Five members of the Missouri court dissented, concluding a person does not expose the person's genitals by displaying a photograph of such, although for different reasons. *Bouse*, 150 S.W.3d at 336 (Ellis, J., dissenting); *id.* at 336 (Lowenstein, J., dissenting). Two dissenters reasoned "common sense . . . compels the conclusion that displaying a photographic image does not constitute 'expos[ing] the person's genitals' in the lay person's everyday usage and understanding." *Id.* at 336 (Ellis, J., dissenting) (alteration in original). The other three dissenters resorted to the rules of statutory construction, relying heavily on the rule of lenity. *Id.* at 337, 339–40 (Lowenstein, J., dissenting).

with the offensiveness of unwanted pornographic images transmitted to remote viewers. As the United States Army Court of Criminal Appeals noted in *United States v. Williams*, "there is an added danger and discomfort when people physically expose in the presence of their victims as opposed to displaying or sending people a pornographic picture." 75 M.J. 663, 666 (A. Ct. Crim. App. 2016). In *United States v. Uriostegui*, the defendant was charged with indecent exposure in violation of Article 120c(c), Uniform Code of Military Justice (UCMJ),[6] after he "photographed his erect penis with his cell phone camera and sent it to an undercover law enforcement agent over the internet by means of the 'Kik messenger app.' " 75 M.J. 857, 863, 864–65 (N-M. Ct. Crim. App. 2016). The court concluded this conduct did not qualify as indecent exposure "because indecent exposure has 'a temporal and physical presence aspect . . . [and] violations occur when a victim [may be] present to view the *actual* body parts listed in the statutes, not images or likenesses of the listed parts.' " *Id.* at 865 (alterations in original) (quoting *Williams*, 75 M.J. at 666).

While we acknowledge that one can be offended by a sexually explicit image transmitted via text message, it is much easier to "look away" from that image than it is to avoid an offensive in-person exposure. *Cf. Pacifica Found.*, 438 U.S. at 760 n.2, 98 S. Ct. at 3046 n.2

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[6]Article 120c(c), UCMJ, provides,

> Any person subject to this chapter who intentionally exposes, in an indecent manner, the genitalia, anus, buttocks, or female areola or nipple is guilty of indecent exposure and shall b[e] punished as a court-martial may direct.

10 U.S.C. § 920c(c) (2012). Notably, Article 120c(c), UCMJ, does not explicitly require the indecent exposure to be of oneself, whereas Iowa Code section 709.9 does. *Compare id.*, *with* Iowa Code § 709.9 ("A person who exposes *the person's* genitals or pubes . . . ." (Emphasis added.)).

(Powell, J., concurring in part and concurring in the judgment) ("It is true that the radio listener quickly may tune out speech that is offensive to him."); *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 209, 95 S. Ct. 2268, 2272–73 (1975) ("[W]hen the government, acting as censor, undertakes selectively to shield the public from some kinds of speech on the ground that they are more offensive than others, the First Amendment strictly limits its power. Such selective restrictions have been upheld only when the speaker intrudes on the privacy of the home or the degree of captivity makes it impractical for the unwilling viewer or auditor to avoid exposure." (Footnote omitted.) (Citations omitted.)). *But cf. Pacifica Found.*, 438 U.S. at 748–49, 98 S. Ct. at 3040 (majority) ("To say that one may avoid further offense by turning off the radio when he hears indecent language is like saying that the remedy for an assault is to run away after the first blow. One may hang up on an indecent phone call, but that option does not give the caller a constitutional immunity or avoid a harm that has already taken place."). The unwilling recipient of an unwelcome sexually explicit image received via text message can immediately close the message and choose not to reopen it, delete it, and block the sender's number. In contrast, if a person is sitting on his or her front porch and observes a couple on the nearby public sidewalk engaging in a sex act, it is not as easy to avoid the impact of the exposure. We consider this qualitative distinction between in-person and electronically transmitted exposures in arriving at our understanding of the parameters of *exposes* under section 709.9.

In interpreting the statute, we also consider the overall structure and context of the statute, not just specific words or phrases in a vacuum. *E.g.*, *Kline*, 895 N.W.2d at 438. Section 709.9 criminalizes both the exposure of one's genitals or pubes and the commission of a sex

act "in the presence of or view of a third person." Iowa Code § 709.9. One might posit that if the legislature intended for the exposure-of-one's-genitals-or-pubes alternative to require proof of direct, in-person observation, it would have explicitly mandated the exposure be "in the presence of or view of" the offended viewer, as it did in the sex-act alternative of committing the offense. This was, in fact, one of the Missouri Court of Appeals' reasons for holding a person could commit indecent exposure under Missouri law through transmission of an electronic image. *Bouse*, 150 S.W.3d at 335 (majority). But we reject that reasoning for several broader contextual reasons.

First, we note that only four crimes enumerated in chapter 709 can be committed without a physical presence or connection between the defendant and the victim. They are (1) lascivious acts with a child by "[s]olict[ing] a child to engage in a sex act or solicit[ing] a person to arrange a sex act with a child," in violation of section 709.8(1)(*d*); (2) indecent contact with a child by soliciting the child to "fondle or touch" or to allow the infliction of pain or discomfort, in violation of section 709.12(1)(*c*) or (*d*); (3) lascivious conduct with a minor by "forc[ing], persuad[ing], or coerc[ing] a minor . . . to disrobe or partially disrobe," in violation of section 709.14; and (4) invasion of privacy by viewing, photographing, or filming another person, who is fully or partially nude, without the other person's consent, in violation of section 709.21(1). Notably, three of these crimes involve a victim under the age of eighteen. *See* Iowa Code § 709.8(1)(*d*) (lascivious acts with a child); *id.* § 709.12(1)(*c*), (*d*) (indecent contact with a child); *id.* § 709.14 (lascivious conduct with a minor). In contrast, all of the crimes in chapter 709 that can involve an adult victim (except invasion of privacy) require some degree of physical presence or in-person connection between the

defendant and the victim. *See* Iowa Code § 709.2 (first-degree sexual abuse); *id.* § 709.3 (second-degree sexual abuse); *id.* § 709.4 (third-degree sexual abuse); *id.* § 709.11 (assault with intent to commit sexual abuse); *id.* § 709.15 (sexual exploitation by a counselor, therapist, or school employee); *id.* § 709.16 (sexual misconduct with offenders and juveniles); *id.* § 709.18 (sexual abuse of a corpse).

Second, the only chapter 709 crime that can involve an adult victim and that does not require physical presence—invasion of privacy in violation of section 709.21—was added in 2004. *See* 2004 Iowa Acts ch. 1099, § 1 (codified at Iowa Code § 709.21 (2005)). Section 709.21 expressly criminalizes not only the direct viewing of a nude or partially nude person in a place where that person has a reasonable expectation of privacy, but also the photographing and filming of a nude or partially nude person. Iowa Code § 709.21(1) (2015). The legislature defined the verbs *photographs* and *films* to mean "the making of any photograph, motion picture film, videotape, or any other recording or transmission of the image of a person." *Id.* § 709.21(2)(*b*). This language clearly indicates the legislature has contemplated the use of photography and film in the commission of an offense under chapter 709. We conclude that if the legislature had intended the offense of indecent exposure to include the transmission of an image of the sender's genitalia, it would have said so in section 709.9.

Third, we note that the legislature has expressly addressed the transmission of inappropriate images in other statutes. Invasion of privacy is the only offense enumerated in chapter 709 that expressly criminalizes the transmission of inappropriate *images*. *See id.* § 709.21(1). Within the separate chapter addressing obscenity, two other provisions are particularly relevant. Section 728.5 criminalizes public

indecent exposure in certain establishments. *Id.* § 728.5. Importantly, under section 728.5 as it initially appeared following the 1978 criminal code revisions, it was unlawful to "allow or permit the displaying of moving pictures, films, or pictures depicting any sex act or the display of the pubic hair, anus, or genitals upon or in such licensed premises." Iowa Code § 728.5(5) (1979). Although this quoted language has since been removed from the statute by amendment, *see* 1997 Iowa Acts ch. 125, § 3, it reveals that, when the legislature enacted the current version of section 709.9 in 1978, it comprehended a distinction between in-person exposures and exposures accomplished through photographs or films. Additionally, section 728.15 criminalizes disseminating obscene material to *minors by telephone*—but notably does not address telephonic dissemination of such material to adults. Iowa Code § 728.15(1)(*b*) (2015). Thus, the legislature has expressly criminalized the transmission of images in some contexts but has not signaled that the general indecent-exposure provision in section 709.9 should be interpreted as criminalizing the transmission of a picture of one's genitals to an unwilling *adult*.[7]

For these reasons, we hold section 709.9 does not criminalize one's transmission of a still image of his or her genitals or pubes via text message.[8] Because Lopez's indecent-exposure conviction was based

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[7]The criminalization of sending sexually explicit electronic communications is not novel. For example, Congress has criminalized the sending of unsolicited commercial bulk email (i.e., spam) that is vulgar or pornographic in nature without including a warning label indicating the content is sexually oriented. *See* Controlling the Assault of Non-Solicited Pornography and Market Act of 2003, 15 U.S.C. § 7704(d). Similarly, the Iowa legislature has criminalized the sending of unwanted commercial bulk email, although it has not expressly addressed spam email that is sexually explicit. *See* Iowa Code § 716A.2.

[8]Our holding on this issue is narrow and limited to the electronic transmission of a still image of the sender's genitals or pubes. Our conclusion in this case does not

exclusively on his transmission of the image of his genitals, we conclude the conviction was not supported by sufficient evidence. The district court would have sustained a timely motion for judgment of acquittal had it been filed in this case. Thus Lopez was prejudiced by his trial counsel's failure to challenge, in a motion for judgment of acquittal, the sufficiency of the evidence of indecent exposure on the grounds that Lopez did not expose himself to J.S. *See Brubaker*, 805 N.W.2d at 174. Accordingly, we conclude Lopez's counsel was ineffective as a matter of law. *See id.* We reverse that conviction and remand to the district court for dismissal of that charge. *See id.*

B. Iowa Code Section 911.2B Surcharge. Lopez next asserts the district court imposed an illegal sentence on the stalking conviction when it ordered him to pay a $100 surcharge under Iowa Code section 911.2B because that provision did not take effect until July 1, 2015—midway through his alleged course of stalking behavior. He claims imposition of this sentence violates the prohibition on ex post facto laws contained in Article I, Section 9 of the United States Constitution and article I, section 21 of the Iowa Constitution. Although this claim was not raised below, we do not find a problem with error preservation because "[i]llegal sentences may be challenged at any time." *State v. Lathrop*, 781 N.W.2d 288, 293 (Iowa 2010).

In Iowa,

> a challenge to an illegal sentence includes claims that the court lacked the power to impose the sentence or that the sentence itself is somehow inherently legally flawed, including claims that the sentence is outside the statutory bounds or that the sentence itself is unconstitutional.

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address a situation in which the sender's genitals or pubes are viewed via a real-time electronic transmission, such as through Skype, FaceTime, or similar technology.

State v. Bruegger, 773 N.W.2d 862, 871 (Iowa 2009). A claim that a sentence violates the Ex Post Facto Clauses of the United States and Iowa Constitutions is therefore a claim that the sentence is illegal. *See Lathrop*, 781 N.W.2d at 293.

When interpreting the Iowa Constitution, we reserve the right to apply a more protective standard than is applied under the United States Constitution. *State v. Jackson*, 878 N.W.2d 422, 442 (Iowa 2016). Lopez has not asked us to apply a more protective standard in this case, and we decline to consider whether such a departure is warranted here. *See State v. Short*, 851 N.W.2d 474, 491 (Iowa 2014).

Both the Federal and Iowa Constitutions forbid ex post facto punishment. *See State v. Cowles*, 757 N.W.2d 614, 617 (Iowa 2008). In particular, the United States Constitution provides that "[n]o State shall . . . pass any . . . expost facto Law," U.S. Const. art. I, § 10, and the Iowa Constitution provides that "[n]o . . . ex post facto law . . . shall ever be passed," Iowa Const. art. I, § 21. Both provisions prohibit legislative acts that apply "a new punitive measure to conduct already committed" or that make the punishment for a crime more burdensome after its commission. *State v. Seering*, 701 N.W.2d 655, 666 (Iowa 2005) (quoting *Schreiber v. State*, 666 N.W.2d 127, 129 (Iowa 2003)).

A criminal law constitutes an ex post facto law if two elements are present. *Lathrop*, 781 N.W.2d at 295. "First, the law 'must be retrospective, that is, it must apply to events occurring before its enactment.' " *Id.* (quoting *State v. Iowa Dist. Ct.*, 759 N.W.2d 793, 797 (Iowa 2009)). Second, the law must either "alter[ ] the definition of criminal conduct or increase[ ] the penalty by which a crime is punishable." *Id.* (alterations in original) (quoting *Iowa Dist. Ct.*, 759 N.W.2d at 797 n.5).

We first consider whether section 911.2B operates retrospectively under the facts of this case. "In determining whether a new law is retrospectively applied, we ask 'whether the law changes the legal consequences of acts completed before its effective date.' " *Id.* at 297 (quoting *Iowa Dist. Ct.*, 759 N.W.2d at 798).

Section 911.2B became effective on July 1, 2015. 2015 Iowa Acts ch. 96, §§ 15, 17. The amended trial information in this case alleged Lopez committed the stalking offense between April 3, 2015, and August 2, 2015, and the indecent-exposure offense on or about June 14, 2015. The sentencing court imposed the section 911.2B surcharge for both offenses. As we concluded above, there is insufficient evidence from which a jury could convict Lopez for indecent exposure; thus, no punishment can be imposed for that alleged crime. *See State v. Fisher*, 877 N.W.2d 676, 685–86 (Iowa 2016) (holding a surcharge is a penalty).

The jury was instructed that the alleged stalking behavior for which Lopez was charged spanned from April 3 to August 2 of 2015. The jury was not instructed, however, to make a finding as to the dates on which the stalking conduct occurred, and it returned a general verdict of guilty.

> When circumstances make it impossible for the court to determine whether a verdict rests on a valid legal basis or on an alternative invalid basis, we give the defendant the benefit of the doubt and assume the verdict is based on the invalid ground.

Lathrop, 781 N.W.2d at 297. On this record, we cannot determine whether the jury based its verdict on conduct occurring before or after section 911.2B became effective on July 1, 2015. Therefore, we must assume the verdict is based on conduct occurring before section

911.2B's July 1, 2015 effective date, and we conclude section 911.2B has been applied retrospectively in this case.

Next, we must determine whether section 911.2B "alters the definition of criminal conduct or increases the penalty by which a crime is punishable." *Id.* at 298 (quoting *Cal. Dep't of Corr. v. Morales*, 541 U.S. 499, 506 n.3, 115 S. Ct. 1597, 1602 n.3 (1995)). As a surcharge is a form of punishment, the imposition of the newly enacted one for stalking increased the penalty for that offense. *See Fisher*, 877 N.W.2d at 685–86. Accordingly, the imposition of the section 911.2B surcharge for conduct occurring prior to the July 1, 2015 effective date violates the Ex Post Facto Clauses of the Iowa and United States Constitutions.

When a portion of a defendant's sentence violates the Ex Post Facto Clause, we generally vacate that portion of the district court's sentence and remand for the entry of a corrected sentence. *E.g.*, *State v. Corwin*, 616 N.W.2d 600, 602 (Iowa 2000) (en banc) (vacating portion of sentence imposing restitution that violates Ex Post Facto Clause and remanding for entry of corrected judgment). If, however, we cannot vacate a discrete feature of the sentence, we vacate the entire sentence and remand to the district court for resentencing. *E.g.*, *State v. Smith*, 291 N.W.2d 25, 29 (Iowa 1980) (holding reliance upon Iowa Code section 901.8 to mandate consecutive sentence violated Ex Post Facto Clause and vacating entire sentence and remanding for resentencing). Here, we are able to vacate only that discrete portion of Lopez's sentence imposing the section 911.2B surcharge and remand to the district court for entry of a corrected sentence.

IV. Disposition.

We reverse the judgment for indecent exposure and remand the case for dismissal of that charge. We vacate that portion of the district

court's sentence imposing the section 911.2B surcharge for the stalking conviction and remand for the entry of a corrected sentence.

DISTRICT COURT JUDGMENT REVERSED IN PART, SENTENCE VACATED IN PART, AND CASE REMANDED WITH INSTRUCTIONS.

All justices concur except Mansfield, J., and Cady, C.J., who concur specially.

MANSFIELD, Justice (concurring specially).

I agree that Jose Lopez's conviction for indecent exposure should be reversed. The statute criminalizes only the act of exposing oneself, not an image of oneself. However, I find the majority's otherwise insightful analysis incomplete, because it is strictly limited to the facts of the case. The majority doesn't tell us where Iowa Code section 709.9 ultimately draws the line between criminal and noncriminal conduct. Therefore, while I join the court's opinion, I would go further and adopt a standard to govern future cases. When we are asked to interpret a criminal statute, our answer to that question should give fair notice of the conduct that the statute prohibits. *See State v. Hearn*, 797 N.W.2d 577, 585 (Iowa 2011) (discussing principles of statutory construction).

I think we can use an existing definition from another body of law to achieve that goal here. When a person transmits video or photos that have previously been "fixed in any tangible medium of expression," *see* 17 U.S.C. § 102(a) (2012), that person is exposing an image rather than exposing himself or herself. Therefore, Iowa Code section 709.9 does not cover that conduct. *See* Iowa Code § 709.9 (2015) (defining indecent exposure in part as when a person "exposes the person's genitals or pubes to another not the person's spouse").

By this standard, Lopez's crude act of texting a previously taken photo of his erect penis did not amount to indecent exposure. However, this legal standard also makes it clear that a person can be convicted of indecent exposure if he or she intentionally exposes himself or herself to another via a real-time electronic connection, such as a security camera, FaceTime, or Skype. *See State v. Jorgensen*, 758 N.W.2d 830, 834 n.3

(Iowa 2008) (not deciding this issue). In that case, what is being transmitted is not a previously recorded image.

For the foregoing reasons, I join in the court's opinion but also specially concur.

Cady, C.J., joins this special concurrence.