IN THE COURT OF APPEALS OF IOWA

No. 1-263 / 10-1007
Filed June 15, 2011

STATE OF IOWA,
Plaintiff-Appellee,

vs.

JASON VAUGHN TURKLE,
Defendant-Appellant.

Appeal from the Iowa District Court for Scott County, Thomas Preacher, District Associate Judge.

Jason Vaughn Turkle appeals from a conviction of indecent exposure. **REVERSED AND REMANDED.**

Mark C. Smith, State Appellate Defender, and Patricia Reynolds, Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Sheryl Soich, Assistant Attorney General, Michael J. Walton, County Attorney, and James Crosby, Assistant County Attorney, for appellee.

Considered by Sackett, C.J., and Doyle and Danilson, JJ. Tabor, J., takes no part.

SACKETT, C.J.

Jason Vaughn Turkle appeals from a conviction of indecent exposure, a serious misdemeanor, in violation of Iowa Code section 709.9 (2009). He contends (1) there was insufficient evidence to support his conviction, (2) the district court imposed an illegal sentence, and (3) his attorney was ineffective in failing to argue the attorney fees Turkle was required to pay should not exceed $600. We reverse and remand for a judgment of acquittal and for an order setting attorney fees not to exceed $600.

BACKGROUND. In the evening of December 12, 2009, Turkle came to the home of a friend Tammy Ramey. Turkle was intoxicated and he fell asleep on a couch in the downstairs of the house. He subsequently went to the second floor where Kaeb Bowdry testified Turkle pulled down his pants saying "I got to take a shit." Bowdry directed Turkle to the bathroom but Turkle just laid on the floor. Turkle was helped back down stairs and his pants were pulled up. Ramey subsequently heard her six-year-old daughter yell, "Mom." Ramey ran downstairs and found Turkle standing about five feet from the girl. Turkle's pants were around his ankles and he was masturbating. Ramey pushed Turkle to the couch, covered him with a blanket and called the police. Turkle was charged on December 28, 2009, by trial information with indecent exposure in violation of Iowa Code section 709.9. A written arraignment and plea of not guilty was filed on January 6, 2010. Turkle filed a notice of diminished responsibility on February 18, 2010.

The matter was tried to the court. At the close of the State's evidence the court asked Turkle's counsel if he had any motions. Turkle's attorney responded by saying, "Directed verdict" with nothing more. The court denied the motion concluding one could find from the evidence Turkle was guilty of the crime. The motion was renewed at the close of the evidence. Defense counsel argued there was no evidence to prove Turkle guilty beyond a reasonable doubt noting, "particularly in light of the extreme level of intoxication of my client."

The district court made an oral ruling. After opining it was a difficult call, the court found that the victim was offended and Turkle knew or should have known the act was offensive to the witnesses noting:

> I don't believe that that's to be constructed as reading something along the line of someone in a position of the defendant who was also intoxicated to the extreme knew or should reasonably know. Rather it's just a person in the position of defendant, period. And that's all "either knew or should have reasonably known" that—I find beyond a reasonable doubt that that element is satisfied.

The court concluded that Turkle exposed his genitals to a victim who was not then Turkle's spouse.

The court went on to find:

> Clearly, the defendant had the ability notwithstanding his intoxication, to form the specific intent to arouse or satisfy his sexual desire because that's what masturbation is about and that's what he was doing. . . . Its Res Ipsa Loquitur. The act speaks for its self. . . .
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> . . . Even if he didn't know he was exposing his genitals, he's not excused by that fact because of his drunkenness because the drunkenness was voluntary. He intentionally exposed his genitals. Or even if it wasn't intentional because of drunkenness, the voluntary nature of the drunkenness does not excuse it. He clearly had the intent to arouse or satisfy his desire by his action of which exposing himself was a necessary part.
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> . . . I conclude from that that his drunkenness did not prevent him from forming the specific intent to satisfy his sexual

> desire and in doing that, he exposed himself to someone else even if he didn't know he was doing it. . . . I will find the defendant guilty. I trust that analysis is clear as mud, but that's where I come down on it.

Turkle appeared for sentencing on June 8, 2010. The court asked Turkle's attorney if he had an estimate of what his attorney fees would be and the attorney indicated they would not exceed $1250. The court then stated, "The attorney fees shall not exceed $1250." The court sentenced Turkle to a year in the Scott County Jail, suspended the sentence, and placed Turkle on probation for two years. The court also imposed a $625 fine, ordered Turkle to pay the costs of this action including attorney fees not to exceed $1250 as well as correctional and probation fees.

JUDGMENT OF ACQUITAL. Turkle contends the district court should have entered a judgment of acquittal because the evidence was insufficient to establish that Turkle exposed himself with a sexual intent. The State concedes that error was preserved.

Turkle argues the evidence is that he was so drunk he was not aware of his surroundings and the audience who witnessed his masturbation. He points out that just prior to his masturbation he could not find a nearby toilet after being told where it was.

Challenges to the sufficiency of the evidence are reviewed for correction of errors at law. *State v. Quinn*, 691 N.W.2d 403, 406 (Iowa 2005). The district court's findings of the required elements of an offense are binding on appeal if supported by substantial evidence. *State v. Hopkins*, 576 N.W.2d 374, 377 (Iowa 1998). Evidence is substantial if it would convince a rational trier of fact the

defendant is guilty beyond a reasonable doubt. *State v. Sutton*, 636 N.W.2d 107, 110 (Iowa 2001).

Iowa Code section 709.9 defines indecent exposure. It states in relevant part: 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 § 709.9.

The Iowa Supreme Court has broken down the crime of indecent exposure into four elements:

> 1. The exposure of genitals or pubes to someone other than a spouse . . . ;
> 2. That the act is done to arouse the sexual desires of either party;
> 3. The viewer was offended by the conduct; and
> 4. The actor knew, or under the circumstances should have known, the victim would be offended.

State v. Isaac, 756 N.W.2d 817, 819 (Iowa 2008); *State v. Adams*, 436 N.W.2d 49, 50 (Iowa 1989) (citing *State v. Bauer*, 337 N.W.2d 209, 212 (Iowa 1983)). It is only exposure with a sexual motivation, inflicted upon an unwilling viewer, that will constitute the offense. *Isaac*, 756 N.W.2d at 819; *Bauer*, 337 N.W.2d at 211.

The State responds by acknowledging that voluntary intoxication may negate Turkle's ability to form specific intent[1] and notes that the prosecutor, defense lawyer, and trial court agreed evidence of Turkle's intoxication would be relevant to the intent element of indecent exposure, that is whether Turkle had the intent to arouse or satisfy his or his victim's sexual desires. *See Bauer*, 337

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[1] Citing *State v. Fountain*, 786 N.W.2d 260, 265 (Iowa 2010).

N.W.2d at 212. There the court determined the State, to prove indecent exposure, needed "to show the state of mind of both the actor and the viewer."

The State argues the district court found Turkle's intoxication did not inhibit his ability to form the specific intent to satisfy his sexual desires and in doing so that he exposed himself to someone "even though he did not know he was doing it."

The difficulty with the court's oral ruling is it contains what appear to be contrary findings, in that it found Turkle's drunkenness did not prevent him from forming a specific intent and then adding "even though he didn't know he was doing it." To form intent a person must have the ability and understanding to know what they are intent on doing and form a conscious intent. Specific intent means not only being aware of an action and doing it voluntarily but in addition doing it with a specific purpose in mind. The court's finding he "didn't know he was doing it" belies a finding that he formed an intent.

We also disagree with the court's statement that Turkle was not excused because the drunkenness was voluntary. Voluntary intoxication and diminished capacity are defenses to the specific intent element of a crime. *State v. Caldwell*, 385 N.W.2d 553, 557 (Iowa 1986); *Veverka v. Cash*, 318 N.W.2d 447, 449 (Iowa 1982); *see also State v. Keeton*, 710 N.W.2d 531, 533 (Iowa 2006). The record supports the district court's finding Turkle did not know what he was doing. We reverse and remand to the district court for a judgment of acquittal. Having so decided, we need not address the sentencing issue raised by Turkle.

INEFFECTIVE ASSISTANCE OF COUNSEL. The defendant claims his trial attorney was ineffective. A defendant is entitled to effective assistance of counsel. *See Strickland v. Washington*, 466 U.S. 668, 686, 104 S. Ct. 2052, 2063, 80 L. Ed. 2d 674, 692 (1984). The test is "whether under the entire record and totality of the circumstances counsel's performance was within the normal range of competence." *State v. Artzer*, 609 N.W.2d 526, 531 (Iowa 2000); *Snethen v. State*, 308 N.W.2d 11, 14 (Iowa 1981). A defendant is not entitled to perfect representation, rather representation which is within the normal range of competency. *Karasek v. State*, 310 N.W.2d 190, 192 (Iowa 1981). Ordinarily, ineffective assistance of counsel claims are reserved for postconviction relief actions. *State v. Carter*, 602 N.W.2d 818, 820 (Iowa 1999). However, when the appellate record is sufficient to permit a ruling, we will address the claims on direct appeal. *Id*.

For the defendant to succeed on an ineffective assistance of counsel claim the record must show (1) counsel failed to perform an essential duty, and (2) prejudice resulted. *Jones v. Scurr*, 316 N.W.2d 905, 911 (Iowa 1982). To show prejudice, the defendant must demonstrate there is a reasonable probability that, but for counsel's unprofessional errors, the result would have been different. *See Strickland*, 466 U.S. at 694, 104 S. Ct. at 2068, 80 L. Ed. 2d at 698.

Turkle claims the court entered an illegal sentence by ordering him to pay "attorney's fees not to exceed $1,250"[2] when the fee limitation for serious

[2] The fee claim filed by Turkle's attorney was in the amount of $1218.

misdemeanors in Iowa Administrative Code rule 493-12.6(1) is $600. He claims this violates *State v. Dudley*, 766 N.W.2d 606, 622 (Iowa 2009), where the Iowa Supreme Court held acquitted defendants represented by contract attorneys cannot be ordered to pay more than the fee limitations applicable to defendants represented by state public defenders. Turkle's attorney should have challenged the amount ordered by the court.

Turkle asks this court to remand the case so a revised order can be entered limiting the amount he has to pay to a maximum of $600. The State agrees the case should be remanded to order attorney fees not to exceed $600.

We reverse the amount of attorney fees ordered and remand for the district court to set the attorney fee award in an amount not to exceed the limit set by the State Public Defender. *See* Iowa Code § 13B.4(1); Iowa Admin. Code r. 493-12.6(1).

REVERSED AND REMANDED.