IN THE COURT OF APPEALS OF IOWA

No. 7-612 / 06-2030
Filed September 19, 2007

STATE OF IOWA,
Plaintiff-Appellee,

vs.

RONNIE JAMES ISAAC,
Defendant-Appellant.

Appeal from the Iowa District Court for Polk County, William A. Price, District Associate Judge.

Ronnie Isaac appeals his conviction for indecent exposure in violation of Iowa Code section 709.9 (2005). **CONVICTION AFFIRMED. SENTENCE VACATED AND REMANDED FOR RESENTENCING.**

Mark C. Smith, State Appellate Defender, and Theresa R. Wilson, Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Mary E. Tabor, Assistant Attorney General, John P. Sarcone, County Attorney, and Susan C. Cox, Assistant County Attorney, for appellee.

Considered by Huitink, P.J., and Vogel and Baker, JJ.

BAKER, J.

Ronnie Isaac appeals his conviction and sentence for indecent exposure in violation of Iowa Code section 709.9 (2005). We affirm the conviction, vacate his sentence as void, and remand for resentencing.

I. Background and Facts

In the early morning hours of June 29, 2006, Ankeny police officers responded to a call from a woman who reported that she had heard knocking on her window and a male voice moaning and repeating sexually explicit exclamations outside her bedroom window. That same morning, a second woman, who lived just two buildings away from the first, heard heavy breathing and something rubbing against the screen outside her bedroom window.

Officer Robert Kovacs checked around the buildings and found Ronnie Isaac outside the second woman's ground-floor apartment. Kovacs testified that Isaac was looking in the woman's window and appeared to be masturbating or fondling himself. Kovacs shined a light on Isaac and identified himself as a police officer. When Isaac turned around to face him, Kovacs noticed that Isaac's zipper was down and that his penis was outside his pants by his hand. Isaac started running and Kovacs apprehended him. During his arrest, Kovacs noticed Isaac's hands were oily, and a bottle of baby oil was found in his pocket.

On November 14, 2006, Isaac was convicted of indecent exposure in violation of Iowa Code section 709.9, a serious misdemeanor.[1] He was

[1] Isaac was also convicted of interference with official acts under Iowa Code section 719.1 and two counts of third-degree harassment under section 708.7(4), all simple misdemeanors, which are not the subject of this appeal.

sentenced to serve one term not to exceed one year and three terms of thirty days concurrently, with all but thirty days suspended. Isaac appeals.

II. Merits

A. Sufficiency of Evidence

Isaac contends there was insufficient evidence to support a conviction for indecent exposure. We review challenges to the sufficiency of the evidence for correction of errors at law. *State v. Bower*, 725 N.W.2d 435, 440-41 (Iowa 2006). Viewing the evidence in the light most favorable to the State, we determine whether the verdict is supported by substantial evidence. *Id.* at 444. "Evidence is substantial if a rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *State v. Schmidt*, 588 N.W.2d 416, 418 (Iowa 1998) (citations omitted).

> There are four elements[2] to the crime of indecent exposure:
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> 1. The exposure of genitals or pubes to someone other than a spouse, or, in the alternative, the commission of a sex act in the presence or view of a third person;
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> 2. That the act is done to arouse the sexual desires of either party;
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> 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.

Adams, 436 N.W.2d at 50 (citations omitted). The offensiveness elements require "the State to show the state of mind of both the actor and the victim-viewer." *State v. Bauer*, 337 N.W.2d 209, 212 (Iowa 1983).

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[2] There is in fact a fifth element, i.e., that someone actually see the proscribed act. *See State v. Adams*, 436 N.W.2d 49, 50 (Iowa 1989) ("The victim did not see [defendant] and cannot be said to have been offended that day by his conduct.").

We find there was sufficient evidence on each element. With respect to the first element, Isaac clearly exposed his genitals to Kovacs. Isaac was masturbating to satisfy his own sexual desires, thus the second element was also met. The third element was met through Kovacs's testimony that he was offended. Finally, Isaac reasonably should have known that the act would be offensive to a viewer, thus the fourth element was met.

Isaac wishes to graft upon these four elements a requirement that a defendant can only be convicted if the person toward whom he directs his attention is also the victim-viewer who is offended by the exposure. Under Isaac's interpretation of the statute, if the husband or the child or the neighbor of one of the women toward whom he directed his attention were to view the exposure, he could not be convicted for indecent exposure because his arousal would not be related to that particular viewer.

> In *United States v. Wiltberger*, 18 U.S. (5 Wheat.) 76, 5 L. Ed. 37, Chief Justice Marshall . . . said "that, though penal laws are to be construed strictly, they are not to be construed so strictly as to defeat the obvious intention of the Legislature."

State v. Nelson, 178 N.W.2d 434, 437 (Iowa 1970). We believe that applying Isaac's narrow interpretation of section 709.9 would defeat the Iowa legislature's obvious intent to protect the public from indecent displays.

Further, there is no requirement in section 709.9 that the defendant's actions be directed at a specific person, only that a viewer witness the actions. Whether Isaac's actions were offensive to the women he was watching or to Kovacs is inconsequential. Section 709.9 only requires that the actions occur in the presence or view of ***a*** third person. Further, the statute does not require that

the actions be directed at or intended to arouse that third person. It is sufficient that the actions involve the sexual desires of Isaac, someone saw them and was offended, and Isaac knew, or should have known, a viewer would be offended.

B. Sentencing

Isaac also challenges the sentence imposed by the district court. He argues that a sentence of incarceration "for a period not to exceed one year" is void and illegal because indecent exposure is a serious misdemeanor, and Iowa's indeterminate sentencing statute does not apply to serious misdemeanors.

We review the district court's sentencing for correction of errors at law. *Bower*, 725 N.W.2d at 441. A sentence will not be reversed unless there has been an abuse of discretion or a defect in the sentencing procedure. *State v. Formaro*, 638 N.W.2d 720, 724 (Iowa 2002). [C]riminal sentences not authorized by statute are void and cannot be permitted to stand." *State v. Austin*, 503 N.W.2d 604, 607 (Iowa 1993) (citations omitted).

"The indeterminate sentence law does not apply to misdemeanors." *State v. Welfort*, 238 N.W.2d 781, 782 (Iowa 1976). A jail sentence for a misdemeanor must specify a definite term, or be deemed uncertain and void. *Id.*

At his sentencing hearing and in the sentencing order, the court stated that Isaac "shall be incarcerated for a period not to exceed one year."[3] It is unclear from the record whether the district court intended to give an

[3] At the hearing, the court also informed Isaac that his "total term of incarceration is one year" and that "this sentence shall be suspended except for thirty days." The court's use of the words "not to exceed" at another point in the sentencing hearing, however, precludes us from concluding the court clearly fixed the period of confinement at the hearing.

indeterminate sentence. The words "not to exceed" are commonly used in conjunction with an indeterminate sentence, and their use in the sentence may leave that impression. *State v. Jackson*, 251 Iowa 537, 546, 101 N.W.2d 731, 736-37 (1960). We therefore conclude that the sentence impermissibly imposes an indeterminate term on a serious misdemeanor conviction. Because it is not authorized by statute, the sentence is void.

Pursuant to Iowa Code section 814.20, this court has the power to modify the district court's judgment. *See State v. Williams*, 255 Iowa 657, 658, 123 N.W.2d 406, 407 (1963) (modifying judgment by striking the words "not to exceed"). We are, however, hesitant to modify Isaac's sentence by striking the words "not to exceed" from the sentencing order because it may be argued that such modification actually increases the sentence. *See Jackson*, 251 Iowa at 549, 101 N.W.2d at 738 ("We are not permitted to increase the sentence of the trial court."). We therefore vacate Isaac's sentence and remand for resentencing.

III. Conclusion

There was sufficient evidence to support Isaac's conviction for indecent exposure. Because the sentence impermissibly imposes an indeterminate term on a serious misdemeanor conviction, we vacate the sentence and remand for resentencing.

CONVICTION AFFIRMED. SENTENCE VACATED AND REMANDED FOR RESENTENCING.