IN THE COURT OF APPEALS OF IOWA

No. 9-587 / 08-1430
Filed February 10, 2010

STATE OF IOWA,
Plaintiff-Appellant,

vs.

CLARENCE GENE JUDY,
Defendant-Appellee.

Appeal from the Iowa District Court for Fremont County, Timothy O'Grady, Judge.

The State seeks discretionary review of a district court's order sustaining a defendant's motion for judgment of acquittal relating to three counts of public indecent exposure. **APPEAL DISMISSED.**

Thomas J. Miller, Attorney General, Mary Tabor and Kyle Hanson, Assistant Attorneys General, Margaret Johnson, County Attorney, and Richard Davidson, Special Prosecutor, for appellant.

Michael Murphy, Council Bluffs, for appellee.

John O. Moeller, Davenport, and Bradley J. Shafer of Shafer & Associates, P.C., Lansing, Michigan, for amici curiae.

Heard by Sackett, C.J., and Vaitheswaran and Danilson, JJ.

VAITHESWARAN, J.

The State charged Clarence Judy, owner of a strip club in Hamburg, Iowa, with three counts of public indecent exposure in violation of Iowa Code sections 728.5 (3), (4), and (6) (2007).[1] At trial, Judy moved for a judgment of acquittal alleging that his establishment fell into an exemption for "theaters." *See* Iowa Code § 728.5. The district court reserved ruling until the close of trial. In its final order, the court sustained Judy's motion and dismissed the charges against him.

The State sought discretionary review of the district court order, which the Iowa Supreme Court granted before transferring the appeal to this court. In an amicus curiae brief, another strip club owner asserts discretionary review was improvidently granted. In response, the State concedes that the Double Jeopardy Clause prevents the State from retrying Judy, but argues that we should nonetheless review the final judgment for the future benefit of the bench and bar. *See id.* § 814.5(2)(d) (affording the State a right of appeal from "[a] final judgment or order raising a question of law important to the judiciary and the profession"). The State maintains that it is not appealing the sufficiency of the evidence resulting in acquittal but "an interpretation of the theater exception in section 728.5."

The State correctly alludes to the fact that we ordinarily will not review State challenges to the sufficiency of the evidence supporting a judgment of acquittal. *See State v. Wardenburg*, 261 Iowa 1395, 1398, 158 N.W.2d 147, 149

[1] He was also charged with establishing or using a premises where alcoholic beverages are given to a person under the legal age in violation of Iowa Code sections 123.60, 123.61, and 123.90, but that charge was dismissed.

(1968). Despite the State's assertion to the contrary, we believe this appeal raises just such a challenge.

The district court required the State to prove as an element of its case "that Judy's place of business was not a theater." After summarizing the evidence proffered by the State on this element, the court concluded that the State "failed to prove beyond a reasonable doubt that [the strip club] is not a theater." On appeal, the State frames the issue for review as "whether a strip club in which the defendant permitted a minor to dance fully nude qualifies as a 'theater' exempted under the public decency statute contained in Iowa Code section 728.5." The issue as framed squarely challenges the sufficiency of the evidence on the theater element. No useful purpose would be served by reaching the merits of this factual issue. *See State v. Kriens*, 255 Iowa 1130, 1132, 125 N.W.2d 263, 264 (1963) ("We do not believe these queries are so vital to the practice that an opinion should be rendered at this time."); *State v. Traas*, 230 Iowa 826, 828, 298 N.W. 862, 864 (1941) ("Since the defendant cannot be again tried for the same offense, it would serve no purpose to pass upon errors respecting matters of fact which could be of no benefit in the trial of criminal cases in the future.").

APPEAL DISMISSED.