IN THE SUPREME COURT OF IOWA

STATE OF IOWA, Plaintiff-Appellee, v. CHRISTOPHER WILSON, Defendant-Appellant.	SUPREME COURT 23-0560

APPEAL FROM THE IOWA DISTRICT COURT
FOR STORY COUNTY
HONORABLE STEVEN VAN MAREL, JUDGE

APPELLANT'S BRIEF AND ARGUMENT AND REQUEST FOR ORAL ARGUMENT

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Authorities

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ROUTING STATEMENT

This case should be retained by the Iowa Supreme Court because the issue raised involves a substantial issue of first impression in Iowa: What is the unit of prosecution for indecent exposure under Iowa Code section 709.9? The question to be decided is whether the statute punishes one count per exposure or one count per viewer of the exposure. Iowa R. App. P. 6.903(2)(d) and 6.1101(2)(c).

STATEMENT OF THE CASE

NATURE OF THE CASE

Appellant Christopher Wilson appeals his conviction following a jury trial, judgment, and sentence, to the charge of Indecent Exposure in violation of Iowa Code §§ 709.9 and 709.9(2)(a) (2023). This issue in this appeal is whether or not the unit of prosecution for indecent exposure should be based on the number of exposures or the number of people witnessing the exposure.

THE COURSE OF PROCEEDING

On December 7, 2022, the State charged Wilson with two counts of indecent exposure and a sentencing enhancement due to a second offense. (Trial Information, Dock. 8) (App. pp. 4-6). Wilson entered a written plea of not guilty on December 19, 2022. (Written Arraignment and Plea of Not Guilty, Dock. 13) (App. pp. 7-8). The State filed an amended trial information charging Wilson with two counts of indecent exposure and a sentencing enhancement due to a third offense. (Amended Trial Information, Dock No. 15) (App. pp. 9-11). On February 15, 2023, the jury returned a verdict of guilty on two counts of indecent exposure. (Criminal Verdict Dock. No. 55) (App. pp. 14-17).

Wilson was sentenced to the following: an indeterminate two years (count 1) and an indeterminate two years (count 2). Count one was ordered to run consecutive to count two. Wilson was also sentenced to a special sentence under Iowa Code section 903B.2 for a period of 10 years. (Order of

Disposition; Supplemental Order of Disposition Dock. No. 60 & 61) (App. pp. 18-23). Wilson filed a timely notice of Appeal on April 4, 2023. (Notice, Dock. 64) (App. p. 24).

FACTS:

On November 28, 2022, Emma Hansen and Tyler Anderson left their sorority chapter meeting together and traveled to the Hy-Vee gas station. (02/14/23 Tr. p. 26, L 2-8; p. 61, L 19-25). The two arrived at the gas station around 9:30 pm and it was dark outside. The parking lot of the gas station was empty, but there were lights coming from the gas station. (02/14/23 Tr. p. 26, L 20-p. 27, L 5). Hansen parked her car and exited to head toward the gas station's store. Anderson remained in the vehicle. (02/14/23 Tr. p. 27, L 6-8; L 13-15). The gas station store was closed but the attendant was still present, Hansen spoke with him and then returned to her vehicle. As Hansen walked back to her vehicle, Anderson told her to get into the car. (02/14/23 Tr. p. 27, L 17-24; p. 62, L 3-6). After Hansen got into the car, she noticed a man

walking toward the car and making a motion toward his pants. (02/14/23 Tr. p. 28, L 2-7). The man was a white male, approximately 5 foot 8 inches tall, with longish hair, and he was wearing a red coat and jeans. (02/14/23 Tr. p. 28, L 24-25; p. 62, L 22-23). The man was probably six feet away from her vehicle when she noticed there was a motion coming from his pants. Anderson said that the man was probably masturbating. (02/14/23 Tr. p. 28, L 17-21; p. 29, L 8-10). The man was staring at Hansen and Anderson and he kept doing the motion. The man's coat lifted and he became fully exposed. (02/14/23 Tr. p. 29, L 17-23). Hansen saw the man masturbating and stroking his penis. She could see that everything was out including his testicles. (02/17/24 Tr. p. 30, L 4-18). Anderson also saw the man's exposed genitals. (02/14/23 Tr. p. 64, L 23-p. 65, L 3). Anderson noticed the man's penis was erect as he was masturbating. (02/14/23 Tr. p. 65, L 15-19). Hansen called the police and told them a man was masturbating in public and looking at her and her best

friend. (02/14/23 Tr. p. 31, L 18-25). Lieutenant Michael Arkovich with the Ames Police Department was dispatched to the Hy-Vee gas station after receiving a call of a man possibly masturbating. (02/14/23 Tr. p. 80, L 24 -p. 81, L 2, L 13-15). When he arrived at the scene at the same time as Officer Nicholas Shieffer and observed a man walking west along the front of the gas station. (02/14/23 Tr. p. 82, L 6-9). The man was wearing a red coat and pants that were ripped along the front and his zipper was undone. (02/14/23 Tr. p. 82, L 23-25). Arkovich and Schieffer spoke with the man and asked him for identification and both smelled alcohol on the individual. (02/14/23 Tr. p. 100, L 16-18). The man was later identified as Christopher Wilson. (02/14/23 Tr. p. 87, L 1-3). Other relevant facts will be mentioned below.

ARGUMENT

I. The unit of prosecution indecent exposure is one count per exposure, not one count per viewer, therefore there was insufficient evidence to convict Wilson of two counts of indecent exposure.

Preservation of Error: The jury trial and subsequent imposition of a sentence following the verdict is "sufficient to preserve error with respect to any challenge to the sufficiency of evidence raised on direct appeal." State v. Crawford, 972 N.W.2d 189, 201 (Iowa 2022).

Standard of Review: The appellate court reviews claims of insufficiency of evidence and statutory interpretation for corrections of errors at law. State. v. Sanford, 814 N.W.2d 611, 615 (Iowa 2012) (citation omitted) (sufficiency); State v. Doe, 943 N.W.2d 608, 609 (Iowa 2020) (statutory interpretation).

Discussion: In this case, the State charged Wilson with two counts of indecent exposure – masturbating in public in the presence of another not a child pursuant to Iowa Code sections 709.9, 709.9(2)(a). (12/07/22 Trial Information

Dock. No. 8) (App. pp. 4-6). Both charges were related to the same incident of exposure occurring on November 28, 2022. (02/15/23 Jury Instruction No. 16, 17, Dock. No. 54) (App. pp. 12-13). Under Iowa law, "a single course of conduct can", under certain circumstances, "give rise to multiple charges and convictions." State v. Velez, 829 N.W.2d 572, 584 (Iowa 2013). The question of when one crime becomes two is answered by determining what unit of prosecution is intended under the statute. State v. Graham, No. 21-0252, 2022 WL 1100920, at *6 (Iowa Ct. App. Apr. 13, 2022). "If the legislature criminalizes two separate and distinct acts, separate sentences on each act are authorized." State v. Copenhaver, 844 N.W.2d 442, 447 (Iowa 2014). Accordingly, to determine how many counts are supported under a criminal statute, it must be determined "what unit of prosecution the legislature intended in enacting the statute", and how many of such units are supported under the factual circumstances at issue. State v. Johnson, 860 N.W.2d 924 (Iowa Ct. App.

2014). That is, "we must first decide what act the general assembly criminalized under [the statute]." State v. Ross, 845 N.W.2d 692, 698 (Iowa 2014). "Determining legislative intent raises issues of statutory interpretation…" See Id. (citation omitted). When the Court interprets a statute, it considers the plain meaning of the statutory language. State v. Nall, 894 N.W.2d 514, 518 (Iowa 2017) (citations omitted); State v. Hearn, 797 N.W.2d 577, 583 (Iowa 2011) ("The starting point of interpreting a statute is the analysis of the language chosen by the legislature.") The Court has said, "[w]e do not inquire what the legislature meant; we ask only what the statute means." State v. Doe, 943 N.W.2d 908, 610 (Iowa 2020). "The wording of the legislature strictly controls" the court's "analysis as to the appropriate unit of prosecution." See State v. Velez, 829 N.W.2d 572, 579 (Iowa 2013).

In relation to the present case, the relevant portion of Iowa Code section 709.9 (2023) provides as follows:

> 709.9 Indecent exposure – masturbation
> 1. A person who exposes the person's genitals or

pubic area 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 all the following apply:

a. The person does so to arouse or satisfy the sexual desires of either party.

b. The person knows or reasonably should know that the act is offensive to the viewer.

2.

a. A person who masturbates in public in the presence of another, not a child, commits a serious misdemeanor.

b. A person who masturbates in public in the presence of a child commits an aggravated misdemeanor.

c. For the purpose of this subsection, "masturbate" means physical stimulation of a person's own genitals or pubic area for the purpose of sexual gratification or arousal of the person regardless of whether the genitals or pubic area is exposed or covered.

Iowa Code § 709.9 (2023).

A person commits the serious misdemeanor version of indecent exposure if either [1] (a) the person "exposes the person's genitals or public area to another, not the person's spouse, or … commits a sex act in the presence or view of a third person", (b) "[t]he person does so to arouse or satisfy the sexual desires of either party and (c) "[t]he person knows or

reasonably should know that the act is offensive to the viewer"; or [2] the person "masturbates in public in the presence of another, not a child." Iowa Code § 709.9(1)-(2)(a) (2023). A person commits the aggravated misdemeanor version of indecent exposure if: the person "masturbates in public in the presence of a child." Iowa Code § 709.9(2)(b) (2023). Therefore, the legislature has defined the unit of prosecution for Indecent Exposure based upon the conduct of the defendant – one who "exposes", "commits a sex act", or "masturbates" (with or without exposure[1]) in the specified circumstances and commits the offense of indecent exposure. Iowa Code § 709.9 (2020). See also State v. Copenhaver, 844 N.W.2d 442, 447 (Iowa 2014) ("the legislature has defined the unit of prosecution for robbery based upon the actions of the defendant."); State v. Ross, 845 N.W.2d 692, 699 (Iowa 2014) ("A plain reading of the statute indicates the general assembly

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1 See Iowa Code § 709.9(2)(c) (defining "masturbate" as physical stimulation for sexual gratification or arousal "regardless of whether the genitals or public area is exposed or covered.")

intended to criminalize four alternative acts that would constitute intimidation with a dangerous weapon with intent"). The particular circumstances and age of the person present at the time of the prohibited act impact only the level of the offense – that is, if the act is masturbating (with or without exposure) and a child is present, then the crime is elevated from a serious misdemeanor to an aggravated misdemeanor. Iowa Code § 709.9 (2023).

Under the statute, because the legislature has defined the unit of prosecution by the conduct of the defendant and not by the number of viewers exposed to the conduct, any occasion of prohibited conduct while anyone is present amounts to only one indecent exposure. The statute does not consider how many persons are present, or how many types of exposure or masturbation are undertaken during a single incident. On the other hand, if there are two separate and distinct occasions of prohibited conduct, then the defendant has committed two separate indecent exposure. See e.g. State

v. Copenhaver, 844 N.W.2d 442, 449 (Iowa 2014) ("if a defendant intends to commit two separate and distinct thefts, and the defendant accompanies each intended theft with one or more of the [prohibited actions/conduct] – the defendant has committed two separate robberies."). If the statute had considered the number of viewers present, it would have an absurd result. If a defendant exposed himself to a large crowd of 30 more individuals, who viewed the exposure, he could be charged with 30 counts of indecent exposure for one act. It is clear that the legislature did not intend for this absurd result and thus limited the indecent exposure to the actual incident of exposure and not the viewers.

Other jurisdictions have reached similar conclusions as to the unit of prosecution for indecent exposure and similar offenses. See People v. Smith, 147 Cal. Rptr. 3d 314, 319 (Cal. App. 2012) "[T]he plain language of the statute talks in terms of exposures, so there is no statutory basis for charging separate violations based on the number of viewings."); Harris

v. State, 359 S.W.3d 625, 631 (Tex. Crim. App. 2011) ("we believe that the clear language of [the statute] indicates that the exposure, not the number of children present, constitutes the unit of prosecution."); State v. Eisenshank, 521 P.2d 239, 240-241 (Wash. App. 1974) ("We hold that the crime is completed when the inappropriate exhibition takes place in the presence of another. Although the crime may be treated differently because of the age of the 'victim', one crime only is committed whether the act takes place in the presence of one or one hundred persons within the specified age group."); State v. Vars, 237 P.3d 378, 387 (Wash. App. 2010) ("the indecent exposure statute focuses on the defendant's improper exhibition of his or her genitalia. This crime is complete when an inappropriate exhibition takes place in the presence of others, whether the exposure lasts for mere moments or hours and without regard to the number of simultaneous or consecutive observers.").

In the present case, the key to determining how many separate counts of indecent exposure were committed by Wilson is determining how many separate and distinct occasions of prohibited conduct took place. In State v. Velez, 829 N.W.2d 572, 581-83 (Iowa 2013), the Iowa Supreme Court discussed three separate tests to determine if substantial evidence existed to convict a defendant of multiple counts of the same crime (there, assault) arising from a single incident. "We delineated the tests as the separate-acts test, the break-in-the-action test, and the completed-acts test." State v. Ross, 845 N.W.2d 692, 702 (Iowa 2014). "Although we discussed each test separately, the goal in applying each test was to determine where the record established a factual basis to convict the defendant of separate and distinct acts of assault or only a single continuous act of assault." Id. See also Velez, 829 N.W.2d at 577 (The "fighting issue" is "whether Velez committed two 'acts' causing serious injury.").

Here, the question is how many separate and distinct incidents of exposure or masturbation took place (irrespective of the number of viewers for each incident). The trial record supports that at most only one incident of exposure or masturbation took place, not two. The exposure happened on November 28, 2022, and involved two viewers Hansen (Count I) and Anderson (Count II), who were in the same vehicle. (02/14/23 Tr. p. 29, L 8-10; p. 29, L 17-23; p. 31, L 18-25; p. 64, L 23-p. 65, L 3). The facts reveal that the two charges of indecent exposure were based on the single allegation that Wilson committed only one act of indecent exposure, while two viewers noticed from a vehicle. (02/14/23 Tr. p. 29, L 8-10; p. 29, L 17-23; p. 31, L 18-25; p. 64, L 23-p. 65, L 3). The trial record only supports a conviction for one count of indecent exposure, not the two counts of which Wilson was convicted. Because Wilson was convicted of two counts of indecent exposure, for one instance of alleged exposure/masturbation involving a total of two viewers the unit of prosecution requires

that Wilson only be convicted of a single count of Indecent Exposure.

II. The unit of prosecution for indecent exposure is one count per exposure, not one count per viewer. Wilson's conviction on two counts amounted to an illegal sentence.

Preservation of Error: Procedurally defective, illegal, or void sentences may be corrected at any time, State v. Thomas, 520 N.W.2d 311, 313 (Iowa Ct. App. 1994), and are not subject to the usual concept of waiver or requirement of error preservation. State v. Woody, 613 N.W.2d 215, 217 (Iowa 2000). "Where…the claim is that the sentence itself is inherently illegal, whether based on constitution or statute… the claim may be brought at any time." State v. Bruegger, 773 N.W.2d 862, 872 (Iowa 2009). The Federal Double Jeopardy prohibition against cumulative punishment implicates the legality of the sentence. See Hill v. United States, 368 U.S. 424, 430 (1962) (challenges to an illegal sentence include whether "multiple terms were… imposed for the same offense, … [or] the terms of the sentence [were] … constitutionally

invalid in any other respect.") (accord State v. Bruegger, 773 N.W.2d at 862, 872 (Iowa 2009)) (emphasis omitted).

Standard of Review: Constitutional double jeopardy claims are reviewed de novo. State v. Finnel, 515 N.W.2d 41, 42 (Iowa 1994).

Discussion: If this Court determines the sufficiency question cannot be remedied then the multiplicity/unit of prosecution matter must be addressed as an illegal sentence. "[T]he Federal Double Jeopardy Clause protects against… multiple punishments for the same offense." State v. Johnson, 860 N.W.2d 924 (Iowa Ct. App. 2014) (quoting State v. Velez, 829 N.W.2d 572, 584 (Iowa 2014). "An illegal sentence is a sentence that is not permitted by statute." Id. (quoting State v. Copenhaver, 844 N.W.2d 442, 447 (Iowa 2014)). "If the legislature criminalizes two separate and distinct acts, separate sentences on each act are not illegal." Id. (quoting Copenhaver, 844 N.W.2d at 447). "Another way to ask what conduct the legislature criminalized is to ask what

unit of prosecution the legislature intended in enacting the statute." Copenhaver, 844 N.W.2d at 447 (Iowa 2014). Thus, we must determine "what unit of prosecution the legislature intended in enacting the statute." Id. See also State v. Baker, 886 N.W.2d 106 (Iowa Ct. App. 2016) ("Given his admission to two sex acts, under [caselaw addressing the unit-of-prosecution question for sexual abuse prosecutions], Baker did not suffer double jeopardy by the court accepting his pleas and sentencing him for two offenses."); State v. Ross, 845 N.W.2d 692, 695 (Iowa 2014) (Concluding substantial evidence supported only two (rather than five) separate counts of intimidation, and "vacat[ing] the defendant's convictions on three counts of intimidation…."). In cases involving greater-and-lesser included offenses, the illegal sentence issue is worded in terms of "merger." Copenhaver, 844 N.W.2d at 447. However, the principle of merger is technically limited to claims involving greater- and lesser-included offenses – without extending to cases like the instant one where the

question is *how many counts* of a *single* statutory offense are authorized (unit-of-prosecution or multiplicity cases). Id.; State v. Schmitz, 610 N.W.2d 514, 516 (Iowa 2000); State v. Graham, No. 21-0252, 2022 WL 1100920, at *6 (Iowa Ct. App. Apr. 13, 2022). In the latter circumstance, the issue is not technically one of merger, but "'of combining or uniting'" the convictions. But, though not termed "merger" in the context of multiplicity or unit of prosecution cases, the required remedy is the substantive equivalent of merger – e.g., "'[t]he act or an instance of combining or uniting' to ask us to combine his convictions.'" Copenhaver, 844 N.W.2d at 447 (citing *Black's Law Dictionary* 1078 (9th ed.2009)); See also Ross, 845 N.W.2d at 697 & 701 (discussing the claim that "the court should have combined the seven counts of intimidation with a dangerous weapon with intent into one count."). Whether termed 'merger' (in the context of greater-and-lesser included offenses) or only the 'combining' of the convictions (in the context of multiple counts of the same offense), the issue

raised is an "illegal sentence" claim. Copenhaver, 844 N.W.2d at 447.

As discussed above in Division I, the unit of prosecution for indecent exposure is one count per exposure/masturbation, not one count per viewer. Wilson's conviction on two counts rather than one count violates the Double Jeopardy protection against cumulative punishment and amounts to an illegal sentence. The trial record supports one incident of exposure or masturbation. Wilson requests that counts one and two should be combined into a single conviction.

III. The Court did not give reasons for ordering Wilson's sentence for two counts of indecent exposure to run consecutively.

Preservation of Error: The trial and subsequent imposition of a sentence following the jury's verdict is "sufficient to preserve error with respect to any challenge to the sufficiency of evidence raised on direct appeal." State v. Crawford, 972 N.W.2d 189, 201 (Iowa 2022).

Standard of Review: Appellate courts review the district court's sentence for an abuse of discretion. State v. Barnes, 791 N.W.2d 817, 827 (Iowa 2010). A district court abuses its discretion when it exercises its discretion on grounds clearly untenable or to an extent clearly unreasonable. Id. A district court's "ground or reason is untenable when it is not supported by substantial evidence or when it is based on an erroneous application of the law." State v. Putnam, 848 N.W.2d 1, 8 (Iowa 2014) (quoting In re Det. of Stenzel, 827 N.W.2d 690, 697 (Iowa 2013)). "When a sentence is not mandatory, the district court must exercise its discretion…" State v. Milsap, 704 N.W.2d 426, 433 (Iowa 2005) (quoting State v. Thomas, 547 N.W.2d 223, 225 (Iowa 1996)).

Discussion: Iowa Rule of Criminal Procedure 2.23 (2)(g) requires the district court to "state on the record the basis for the sentence imposed and shall particularly state the reason for the imposition of any consecutive sentence." Iowa R. Crim. Pr. 2.23 (2)(g) (2023). In State v. Thompson, the Iowa

Supreme Court reiterated the purposes served by requiring the sentencing court to explain its reasons for imposing a particular sentence. 856 N.W.2d 915, 919 (Iowa 2014). "[T]his requirement ensures defendants are well aware of the consequences of their criminal actions." Id. "[M]ost importantly, this requirement "affords our appellate courts the opportunity to review the discretion of the sentencing court." Id. In this case, during the sentencing, the court said the following about the consecutive sentence: These sentences shall be served consecutively and consecutively to any other sentence you're serving her in Iowa." (03/08/23 Sentencing Tr. p. 12, L 23-25). The district court failed to state reasons for sentencing Wilson to a consecutive prison term.

CONCLUSION

Wilson respectfully requests this Court reverse his conviction for indecent exposure and remand it for a sentencing hearing before a different judge.

REQUEST FOR ORAL ARGUMENT

Counsel requests to be heard in oral argument.

ATTORNEY'S COST CERTIFICATE

Counsel hereby certifies that the true cost of producing the necessary copies of the foregoing Brief and Argument was $1.91, and that amount has been paid in full by the Office of the Appellate Defender.

CERTIFICATE OF COMPLIANCE WITH TYPEFACE REQUIREMENTS AND TYPE-VOLUME LIMITATION

This brief complies with the typeface requirements and type-volume limitation of Iowa Rs. App. P. 6.903(1)(d) and 6.903(1)(g)(1) because:

[X] This brief has been prepared in a proportionally spaced typeface Bookman Old Style, font 14 point, and contains 3,713 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

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