**IN THE COURT OF APPEALS OF IOWA**

No. 9-501 / 09-0108
Filed July 22, 2009

**STATE OF IOWA,**
Plaintiff-Appellee,

**vs.**

**RYAN BRYCE NICHOLS,**
Defendant-Appellant.

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Appeal from the Iowa District Court for Audubon County, James M. Richardson, Judge.

The defendant appeals his conviction and sentence on a plea of guilty to indecent exposure. **AFFIRMED.**

Drew Kouris, Council Bluffs, for appellant.

Thomas J. Miller, Attorney General, Kevin Cmelik, Assistant Attorney General, and Francine O'Brien Andersen, County Attorney, for appellee.

Considered by Mahan, P.J., and Eisenhauer and Mansfield, JJ.

**MANSFIELD, J.**

Ryan Nichols appeals the judgment and sentence imposed on his guilty plea to indecent exposure in violation of Iowa Code section 709.9 (2007). Nichols argues the district court failed to disclose the factual basis it relied upon in accepting his plea. Nichols further argues that there was no factual basis for his plea, because "public exposure" is an element of indecent exposure and the exposure here took place inside a home.

The State points out that Nichols waived his challenge to the guilty plea by failing to file a motion in arrest of judgment. Therefore, according to the State, Nichols's arguments may only be considered as claims of ineffective assistance of counsel. Additionally, the State maintains that the appellate record is adequate to address and dispose of Nichols's claims of ineffective assistance of counsel.

For the reasons set forth below, we agree with the State's contentions and affirm.

**I. Background Facts and Proceedings.**

According to the minutes of testimony, during the early hours of October 27, 2008, Ryan Nichols and his brother invited two fifteen-year-old girls to the house of Nichols's sister-in-law, who was in the process of getting a divorce from Nichols's brother. Nichols took one of the minors, P.N., to the basement. Nichols tried to persuade P.N. to take her clothes off and have sex with him. P.N. refused. Nichols took off his own clothes and attempted to remove P.N.'s clothes. P.N. was able to stop Nichols from removing her clothes. P.N. tried to leave the basement. Nichols tried to stop her. Eventually, P.N. was

able to get out of the basement and left the house. P.N. later reported she was "disgusted and offended" by Nichols's removing his clothes.

After P.N. left, Nichols got into an altercation with his brother, which resulted in the brother calling the police. When the police arrived, Nichols was standing on the steps of the house, naked and intoxicated. Nichols acted belligerently and combatively, shouting obscenities and attempting to fight the officers, before finally being subdued by them.

On December 15, 2008, Nichols pled guilty to assault on a peace officer and indecent exposure in violation of Iowa Code sections 708.3A and 709.9. Nichols was sentenced to one year of incarceration on each charge, the sentences to run consecutively. However, all but thirty days of the incarceration were suspended. Nichols was placed on probation for two years and was required to register as a sex offender.

Nichols did not file a motion in arrest of judgment pursuant to Iowa Rule of Criminal Procedure 2.24(3), and indeed, waived that right so he could proceed immediately to sentencing on December 15. However, Nichols now appeals his conviction and sentence on the indecent exposure charge, claiming the district court did not disclose the factual basis it relied upon in accepting his guilty plea and, in any event, there was no factual basis for the plea.

**II. Analysis.**

Because Nichols failed to file a motion in arrest of judgment, the only possible challenge to his guilty plea is through a claim of ineffective assistance of counsel. *See* Iowa R. Crim. P. 2.24(3)(*a*) ("A defendant's failure to challenge the adequacy of a guilty plea proceeding by motion in arrest of judgment shall

preclude the defendant's right to assert such challenge on appeal."); *State v. Royer*, 632 N.W.2d 905, 909 (Iowa 2001). While ordinarily we would preserve the ineffective assistance claim for subsequent postconviction relief proceedings, in this instance we believe the record is adequate to resolve the issue on direct appeal. *See State v. Leckington*, 713 N.W.2d 208, 217 (Iowa 2006). We review ineffective-assistance-of-counsel claims de novo. *Collins v. State*, 588 N.W.2d 399, 401 (Iowa 1998). Ineffective assistance of counsel is established when the defendant proves that "(1) counsel failed to perform an essential duty, and (2) prejudice resulted." *State v. Cromer*, 765 N.W.2d 1, 7 (Iowa 2009).

In this case, Nichols's trial counsel was not ineffective for failing to file a motion in arrest of judgment because it is clear that the motion would not have been successful.

The record of the guilty plea proceedings must disclose the factual basis upon which the court relied. *State v. Greene*, 226 N.W.2d 829, 831 (Iowa 1975) ("It is essential, whatever source is used, that the factual basis be identified and disclosed in the record."). Here, the district court specifically asked Nichols, "And do you think that the State could prove each and every thing contained in that Trial Information and Minutes of Testimony?" Nichols answered in the affirmative. This is sufficient. *Id*. (concluding that where trial judge asked defendant whether the minutes of testimony correctly reflected what happened and defendant replied they did, a factual basis for the plea was adequately identified and disclosed). Thus, Nichols's trial counsel was not ineffective for failing to challenge the guilty plea on this ground.

Nichols also argues that his trial counsel should have challenged the lack of factual basis for his indecent exposure plea because he had to have exposed himself in a public place—i.e., not a basement—in order to violate the statute. However, this argument is without legal support. Iowa Code section 709.9 provides:

> A person who exposes the person's genitals or pubes to another not the person's spouse . . . commits a serious misdemeanor, if: (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.

There is no requirement of public exposure in the statute.

Furthermore, Iowa case law confirms that exposure in a public place is not a required element of the offense set forth in section 709.9. The elements of indecent exposure are consistently enumerated as:

> 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. Jorgensen*, 758 N.W.2d 830, 834 (Iowa 2008) (quoting *State v. Adams*, 436 N.W.2d 49, 50 (Iowa 1989)). In short, exposure in a public place is not one of the required statutory elements.

In this case, the minutes of testimony summarized above indicate that Nichols exposed himself to P.N. for the purpose of sexual arousal or satisfaction. P.N. was offended by Nichols's exposure, and Nichols knew or reasonably should have known by P.N.'s reactions that she would be offended. These facts alone, which Nichols agreed the State could prove, establish a factual basis for

Nichols's guilty plea. We find the district court did not err in finding a factual basis for Nichols's guilty plea.

For the foregoing reasons, we affirm Nichols's conviction and sentence.

**AFFIRMED.**