**IN THE COURT OF APPEALS OF IOWA**

**No. 3-572 / 12-0180**
**Filed October 2, 2013**

**NICK RHOADES,**
**Applicant-Appellant,**

**vs.**

**STATE OF IOWA,**
**Respondent-Appellee.**

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**Appeal from the Iowa District Court for Black Hawk County, David F. Staudt, Judge.**

Nick Rhoades appeals from the district court's denial of his application for **postconviction relief. AFFIRMED.**

**Christopher R. Clark and Scott A. Schoettes of Lambda Legal Defense & Education Fund, Inc., Chicago, Illinois, and Joseph C. Glazebrook and Dan L. Johnston of Glazebrook & Moe, LLP, Des Moines, for appellant.**

**Thomas J. Miller, Attorney General, Kevin Cmelik, Assistant Attorney General, Thomas J. Ferguson, County Attorney, and Kimberly Griffith, Assistant County Attorney, for appellee State.**

**Earl Kavanaugh of Harrison & Dietz-Kilen, P.L.C., Des Moines, and Tracy Welsh of HIV Law Project, New York, New York, for amicus curiae National Alliance of State and Territorial AIDS Directors, The Center For HIV Law and Policy, and HIV Law Project.**

**Heard by Vaitheswaran, P.J., and Doyle, J., and Goodhue, S.J.***

***Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2013).**

**DOYLE, J.**

Nick Rhoades appeals from the district court's denial of his application for postconviction relief following his 2009 plea of guilty to criminal transmission of human immunodeficiency virus (HIV), contending his trial counsel was ineffective for permitting him to plead guilty to a charge which lacked a factual basis. Upon our review, we affirm the order denying Rhoades' application for postconviction relief.

## *I. Background Facts and Proceedings*

Nick Rhoades is HIV positive. He met A.P. in an online chat room. After conversing via computer for an hour or so, they decided Rhoades would drive from his home in Waverly to A.P.'s home in Cedar Falls so they could meet in person. Once there, Rhoades and A.P. talked, had drinks, and ultimately engaged in consensual sexual acts. These acts included A.P. performing unprotected oral sex on Rhoades, in which Rhoades's penis penetrated A.P.'s mouth, and protected anal intercourse, in which Rhoades' penis penetrated A.P.'s anus.[1] Although Rhoades was aware of his HIV status and was receiving medical treatment for his condition, he either withheld or misrepresented his HIV status to A.P.

Thereafter, A.P. became aware of Rhoades's HIV status and contacted the police. Rhoades was charged by trial information with criminal transmission of HIV, in violation of Iowa Code section 709C.1 (2007). He entered a plea of guilty, which the court accepted.

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[1] Rhoades wore a condom during anal intercourse. According to A.P., the condom slipped off while inside his body and he had to remove it himself. Rhoades did not recall the condom coming off.

The court sentenced Rhoades to twenty-five years in prison and lifetime registration as a sex offender. Several months later, the court reconsidered Rhoades's sentence, and it suspended his prison sentence and placed him on supervised probation for five years. Rhoades did not appeal his conviction.

Rhoades filed an application for postconviction relief, raising claims of ineffective assistance of trial counsel and essentially alleging there was no factual basis to support his plea of guilty. Following a hearing, the court denied Rhoades's application.

Rhoades appeals that ruling, again asserting his trial counsel was ineffective for permitting him to plead guilty to a charge which lacked a factual basis.[2] We review his ineffective-assistance-of-counsel claims de novo. *See Ennenga v. State*, 812 N.W.2d 696, 701 (Iowa 2012).

## *II. Discussion*

To prevail on his claim of ineffective assistance of counsel, Rhoades must show counsel (1) failed to perform an essential duty and (2) prejudice resulted. *State v. Fountain*, 786 N.W.2d 260, 265-66 (Iowa 2010). When trial counsel

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[2] Rhoades and amicus curiae contend chapter 709C is outdated in light of both medical advancements in the treatment of HIV and scientific developments in understanding how HIV is transmitted. However, the proper recourse to address these policy concerns is through the legislature, not the court. *See Chappell v. Bd. of Dirs.*, 39 N.W.2d 628, 635 (Iowa 1949) ("Courts cannot repeal acts of the legislature by declaring them obsolete."); *see also, e.g.*, *Palermo v. Stockton Theatres*, 195 P.2d 1, 7 (Cal. 1948) ("[I]n the absence of a constitutional objection it is generally held that the courts have no right to declare a statute obsolete by reason of a supervening change in the conditions under which it was enacted.") (and cases cited therein). Furthermore, if the supreme court's pronouncements regarding the statute are outdated, they are best addressed by that court. We are bound by our supreme court's holdings. *See State v. Hughes*, 457 N.W.2d 25, 28 (Iowa Ct. App. 1990) (citing *State v. Eichler*, 83 N.W.2d 576, 578 (1957) ("If our previous holdings are to be overruled, we should ordinarily prefer to do it ourselves.")); *State v. Hastings*, 466 N.W.2d 697, 700 (Iowa Ct. App. 1990) ("We are not at liberty to overturn Iowa Supreme Court precedent.").

**permits a defendant to plead guilty and waive the right to file a motion in arrest of judgment absent a factual basis to support the guilty plea, counsel violates an essential duty, and prejudice is presumed.** *State v. Rodriguez*, **804 N.W.2d 844, 849 (Iowa 2011).**

**Before accepting a guilty plea, the district court must first determine the plea has a factual basis, and that factual basis must be disclosed in the record.** *State v. Finney*, **834 N.W.2d 46, 61-62 (Iowa 2013)**; *see* **Iowa R. Crim. P.** 2.8(2)(b). We determine whether a factual basis existed by considering "the entire record before the district court" at the guilty plea hearing. *Finney*, **834 N.W.2d at 62.**

**On appeal, Rhoades raises two related challenges to his plea of guilty.** He contends his trial counsel was ineffective for permitting him to plead guilty "to **a violation of [section] 709C.1 when there was, in fact, no factual basis for the** charge." Rhoades also contends his trial counsel was ineffective for allowing **the district court to accept his guilty plea without establishing during the plea colloquy that he understood an element of the crime he contends the State was required to prove—i.e.,** that he "intentionally exposed his bodily fluids to the body part of **an**other in a manner that could result in the transmission of HIV."

A violation of section 709C.1 occurs if a "person, knowing that the person's human immunodeficiency virus status is positive, **. . . [e]ngages in** intimate contact with another person."[3] **Iowa Code § 709C.1(1)(a). Section**

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[3] **A person also violates section 709C.1(1) if he knows he is HIV positive and** *b*. **Transfers, donates, or provides the person's blood, tissue, semen, organs, or other potentially infectious bodily fluids for transfusion, transplantation, insemination, or other administration to another person.**

709C.1(2)(b) defines "intimate contact" as "the intentional exposure of the body of one person to a bodily fluid of another person in a manner that could result in the transmission of the human immunodeficiency virus." As our supreme court has stated, "The obvious purpose of this statute is the protection of public health by discouraging the transmission of the AIDS virus." *State v. Musser*, 721 N.W.2d 734, 744 (Iowa 2006). The court explained:

> Considering the ease of transmitting AIDS and HIV through sexual penetration and the absence of any "cure," the state's interest in protecting the public health, safety, and general welfare of its citizenry becomes extremely significant. Although the statute may significantly infringe defendant's individual interests in remaining silent, the state's interest to compel her to disclose that she is HIV infected before engaging in sexual penetration is undeniably overwhelming.

*Id.* (quoting *People v. Jensen*, 586 N.W.2d 748, 759 (Mich. Ct. App. 1998)).

> It is a well-known fact that an infected individual may possibly transmit the HIV through unprotected sexual intercourse with his or her partner. . . . HIV may be transmitted through contact with an infected individual's blood, semen or vaginal fluid, and that sexual intercourse is one of the most common methods of passing the virus.

*State v. Keene*, 629 N.W.2d 360, 366 (Iowa 2001) (internal citation omitted). Sexual intercourse may be committed through oral sex, and oral sex is a well-recognized means of transmission of HIV. *State v. Stevens*, 719 N.W.2d 547, 551 (Iowa 2006). The person exposed to HIV need not become infected with the virus in order for the infected person to be prosecuted under section 709C.1(4).[4]

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> *c*. Dispenses, delivers, exchanges, sells, or in any other way transfers to another person any nonsterile intravenous or intramuscular drug paraphernalia previously used by the person infected with the human immunodeficiency virus.

Iowa Code § 709C.1(1)(b), (c).

[4] In this case, A.P. did not become infected with HIV.

"Thus, for a p**erson to be guilty of violating section 709C.1, it must simply be shown that transmission of the HIV from the infected person to the exposed person was** *possible* considering the circumstances." *Keene*, **629 N.W.2d at 365 (emphasis in original). However, if the exposed person was aware of the** infected person's HIV positive status, an affirmative defense exists. **Iowa Code § 709C.1(5).**

**The minutes of testimony indicate Rhoades and A.P. engaged in consensual unprotected** oral intercourse in which Rhoades'**s penis penetrated** A.P.'s mouth**, and consensual protected** anal intercourse in which Rhoades'**s** penis penetrated A.P.'s anus. The minutes further **indicate that at the time of these acts, Rhoades was aware he was HIV positive, and he did not disclose his HIV status to A.P.**

The crux of Rhoades'**s claims is that the evidence against him does not** support a finding he "*intentionally* exposed" **his bodily fluid to A.P.**[5] **To support his cause, Rhoades argues he did not ejaculate during oral intercourse,**[6] **which demonstrated his intent not to expose his bodily fluid to A.P. in a manner that could transmit HIV. Furthermore, he points to the fact that he wore a condom**

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[5] In this vein, Rhoades states his trial counsel failed to explain "the intent element" of the charge against him. He alleges he would not have pled guilty had he understood that the "legal meaning" of intimate contact in section 709C.1(a), which **according** to Rhoades, "required the State "to prove [he] *intentionally* **exposed his bodily** fluid to the [A.P.] in a manner that could result in the transmission of HIV" because the evidence "affirmatively demonstrated [he] intended *not* **to expose his bodily fluid to** [A.P.]."

[6] **During the postconviction relief proceedings, Rhoades testified he: had no recollection of the oral sex, had no recollection of emitting any semen during the sexual encounter; did not recall any bodily fluid coming out of his penis during oral sex; did not believe any bodily fluids came out; was sure he did not have any fluid come out of his penis; did not climax that night; and doubted that he did [climax]. A.P. testified during** the same proceedings that "there was a substantial amount of pre**-ejaculatory fluid,** which would be bodily fluid, in my mouth" while performing oral sex on Rhoades.

during anal intercourse with A.P., which "demonstrates" his intent to "prevent the **exchange of bod**ily fluids," and in any event, "it is not even clear that any ejaculation occurred."

Rhoades'**s claim is similar to a claim raised in** *Keene*. **In that case, Keene engaged in consensual, unprotected sexual intercourse with C.J.H.** *Keene*, **629 N.W.2d at 362.** Keene claimed he "never intended to expose C.J.H. to the HIV." *Id.* **at 363. The basis for that claim appears to be that Keene either did not ejaculate, or if he did, it was outside** C.J.H.'s **body.** *Id.* **at 366. Nevertheless, the** *Keene* **court concluded that** "**any reasonably intelligent person is aware it is possible to transmit HIV during sexual intercourse, especially when it is unprotected.**" *Id.* **at 365**; *see also Stevens*, **719 N.W.2d at 552 (and cases cited therein including** *Recreational Devs. of Phoenix, Inc. v. City of Phoenix*, **83 F. Supp. 2d 1072, 1101 (D. Ariz. 1999),** *aff'd*, **238 F.3d 430 (9th Cir.** 2000) ("It is **common knowledge that engaging in sexual intercourse and oral sex without the use of condoms place people at risk for sexually transmitted diseases, including** HIV/AIDS.")**). In construing section 709C.1, the court declared that a claim of non-ejaculation is irrelevant.** *Keene*, **629 N.W.2d at** 366 ("[A]ny claim by Keene **that he did not ejaculate . . . or that if he did ejaculate, he ejaculated outside** C.J.H.'s body, is irrelevant." **(citing** *State v. Stark*, **832 P.2d 109, 114 (Wash. Ct. App. 1992))). Thus, the decision to engage in** *unprotected* **sex with another person generally** evidences one's intent to **expose that person to bodily fluid.**[7] *See generally id*.

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[7] **Amicus curiae points out that**

Applying the court's reasoning in *Keene* to the facts of this case, that Rhoades may not have ejaculated during the unprotected oral sex is irrelevant. *See id*. Here, the minutes of testimony unequivocally establish Rhoades engaged in unprotected oral sex with A.P., and consequently, Rhoades's claim that he did not ejaculate provides no support to his argument there was a lack of a factual basis regarding the "intent element" of "intimate contact." *See id*. We therefore conclude a factual basis existed to support Rhoades's plea of guilty.[8] Accordingly, Rhoades's trial counsel was not ineffective in permitting Rhoades to plead guilty, and we affirm the order denying Rhoades's application for postconviction relief.

**AFFIRMED.**

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> [o]ral intercourse—even when unprotected—poses *an extremely low risk* of HIV transmission, and there are *no documented cases* of transmission due to oral sex without ejaculation. The risk of transmission through oral sex with an HIV-positive individual with no measureable viral load as a consequence of effective [antiretroviral therapy], as is the case with Mr. Rhoades, *is likely zero or near zero*.

(Emphasis added.) Although the risk appears low, transmission of HIV via unprotected oral sex, as described by amicus curie, is still *possible*. Rhoades's physician testified even though Rhoades's HIV viral load was undetectable, "there [was] a risk" to transmit HIV through the specific sexual acts engaged in by Rhoades and A.P.

[8] In view of our conclusion that the unprotected oral sex act was sufficient to support a factual basis for the guilty plea, it is not necessary for us to consider whether the protected anal intercourse would support a factual basis for the plea, nor do we need address Rhoades's argument that section 709C.1 should be construed to "include[] an explicit mens rea element."