STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CHRISTOPHER DAVID WYMAN,

Defendant-Appellant.

UNPUBLISHED
May 19, 1998

No. 196710
Livingston Circuit Court
LC No. 95-008805 FH

Before: Sawyer, P.J., and Kelly and Smolenski, JJ.

PER CURIAM.

Defendant appeals as of right his convictions, following a jury trial, of two counts of transporting a female for the purpose of prostitution, MCL 750.459; MSA 28.714. We affirm.

First, defendant claims that there was insufficient evidence to support his convictions. We disagree.

A person violates MCL 750.459; MSA 28.714 if the person transports a female and the object of the trip is for the purpose of prostitution. See *People v Green*, 123 Mich App 563, 568; 332 NW2d 610 (1983). In the case at bar, testimony indicated that defendant transported two women to a fraternity party, and that those women engaged in sexual acts with the members of the fraternity. The testimony also indicated that the fraternity members gave defendant "tips" for the women following the sexual acts. The fraternity member who set up the party, Thomas Epperson, testified that defendant told him prior to the party that the women would dance first and then offer "extras" afterwards. Epperson further stated that, based on his conversation with defendant, he understood "extras" to mean sexual acts. This evidence, viewed in a light most favorable to the prosecution, is sufficient to allow a rational trier of fact to find beyond a reasonable doubt that defendant transported the two women to the fraternity party for the purpose of prostitution. *People v Daniels*, 192 Mich App 658, 665; 482 NW2d 176 (1991).

Next, defendant claims that the verdict was against the great weight of the evidence. Defendant argues that the overwhelming evidence indicated that he and the women went to the fraternity party simply to dance, and that the sexual activity was spontaneous and unplanned. Defendant contends that

Epperson's testimony to the contrary was not credible. Defendant also submits that the trial court applied an incorrect legal standard in analyzing the weight of the evidence.

Although the trial court used the phrase "ample evidence" when ruling on the great weight of the evidence, we are not convinced that the trial court applied an incorrect legal standard. It is clear from the trial court's opinion that the court was aware that the issue was whether the verdict was against the great weight of the evidence. Even assuming the trial court's analysis of the issue was legally incorrect, because we find that the trial court reached the right result, reversal is not required. See *People v Ortiz (After Second Remand)*, 224 Mich App 468, 477; 569 NW2d 653 (1997).

To determine whether a verdict is against the great weight of the evidence, or has resulted in an injustice, the trial court necessarily reviews the whole body of proofs. *People v Herbert*, 444 Mich 466, 475; 511 NW2d 654 (1993). The trial judge may grant a new trial because he disbelieves the testimony of the witnesses of the prevailing party. *Id*. at 476. In the case at bar, defendant has not shown that Epperson's testimony should not be believed. Epperson was cross-examined about his conversation with defendant, giving the jury adequate grounds to assess his credibility. Simply because Epperson was unavailable and his prior testimony was read into the record does not mean that his testimony was less credible than the "live" witnesses' testimony. See CJI2d 4.10.

In any event, even if we were to discount Epperson's testimony, other evidence supported the jury's verdict. The evidence indicated that defendant prepared for sexual activity by bringing sex toys and a video camera to the party. When asked why he was videotaping the sexual activity, defendant stated that it was to show customers what his business had to offer. There was also testimony, although disputed, that the women did not dance at all, but simply engaged in sexual activity from the outset. This evidence, along with testimony from defendant's employees that defendant was aware of, and encouraged, his dancers to engage in sexual activity, supported the verdict, and was not greatly outweighed by contrary evidence.

Next, defendant claims that the trial court erred in finding that the prosecution acted with due diligence in attempting to produce Epperson and allowing Epperson's prior testimony to be read into the record. We disagree.

Former testimony of a witness is admissible in a later proceeding when that witness is unavailable to testify, and the party against whom the testimony is being admitted had an opportunity to cross-examine the witness at that time. MCR 804(b)(1); *People v Briseno*, 211 Mich App 11, 14; 535 NW2d 559 (1995). The party wishing to have the former testimony admitted must demonstrate that it made a reasonable, good-faith effort to secure the declarant's presence at trial. *Id*. at 14. The test does not require a determination that more stringent efforts would not have procured the testimony, or that all avenues were exhausted. *Id*. at 14, 16. A finding of due diligence is a finding of fact reviewed for clear error. *Id*. at 14. Contrary to defendant's claim, due diligence does not require the prosecution to apply to the court in another state for process to compel the return of a witness to Michigan. *People v Serra*, 301 Mich 124, 131; 3 NW2d 35 (1942).

Here, the testimony showed that the prosecution made a reasonable, good-faith effort to locate Epperson. The trial court did not clearly err in finding that due diligence was exercised.

Defendant also claims that reading Epperson's testimony into the record denied him his right to confront the witnesses against him. However, former testimony of a witness may be used consistently with the accused's right of confrontation if the witness is unavailable under MRE 804, and the former testimony bears satisfactory indicia of reliability. *People v Conner*, 182 Mich App 674, 680-681; 452 NW2d 877 (1990). Here, Epperson was unavailable, and was sufficiently cross-examined by defendant at the prior proceeding, thereby making his testimony sufficiently reliable. *Id*. at 684; see also *People v Pickett*, 339 Mich 294, 306; 63 NW2d 681 (1954). Defendant's right of confrontation was not violated.

Next, defendant claims that he was denied due process when the trial court allowed the information to be amended after the close of the prosecution's case in chief. We disagree.

A trial court may amend the information at any time before, during or after trial in order to cure a variance between the information and the proofs as long as the accused is not prejudiced by the amendment and the amendment does not charge a new crime. *People v Stricklin*, 162 Mich App 623, 633; 413 NW2d 457 (1987). Prejudice occurs when the defendant does not admit guilt and is not given the chance to defend against the crime. *Id*.

Here, the amendment occurred before the presentation of defendant's case. As a result, defendant had the opportunity to present evidence against the charge, as amended. The amendment did not charge defendant with a new offense; it alleged a violation of the same statute under which defendant was initially charged. Following the amendment, defendant took the stand and denied that the purpose of the trip to the fraternity party was prostitution. Nothing in the record indicates that a different defense would have been presented had defendant originally been charged as amended. We conclude that the amendment did not prejudice defendant.

Defendant also claims that trial counsel was ineffective by failing to request a continuance following the amendment of the information. Even if such a request should have been made, and would have been granted, defendant has failed to show how he would have defended differently, or that there is a reasonable probability that that defense could have led to a different outcome. As a result, defendant has failed to satisfy his burden of showing that he was denied the effective assistance of counsel. See *People v Stanaway*, 446 Mich 643, 687-688; 521 NW2d 557 (1994).

Next, defendant claims the trial court erred by refusing to instruct the jury on requested, lesser misdemeanor offenses. We disagree. The record is unclear whether defendant actually requested some of the instructions he now argues should have been given. In any event, we have reviewed all of the offenses on which defendant claims the jury should have been instructed and conclude that they do not bear a sufficient "inherent relationship" to the offense of transporting a female for the purpose of prostitution to justify an instruction. See *People v Stephens*, 416 Mich 252, 261-265; 330 NW2d 675 (1982).

Last, defendant claims that the cumulative effect of errors below deprived him of a fair trial. After a review of the entire record, while there may have been slight imperfections during the course of the proceedings below, on the whole, defendant was not denied a fair trial. *People v Kvam*, 160 Mich App 189, 200-201; 408 NW2d 71 (1987).

Affirmed.

/s/ David H. Sawyer
/s/ Michael J. Kelly
/s/ Michael R. Smolenski