[Cite as *State v. Kiraizis*, 2004-Ohio-502.]

COURT OF APPEALS OF OHIO, EIGHTH DISTRICT

COUNTY OF CUYAHOGA

NO. 82887

STATE OF OHIO, :
:
Plaintiff-Appellee : JOURNAL ENTRY
: and
vs. : OPINION
:
SAMUEL KIRIAZIS, :
:
Defendant-Appellant :

DATE OF ANNOUNCEMENT
OF DECISION : FEBRUARY 5, 2004

CHARACTER OF PROCEEDING : Criminal appeal from
: Common Pleas Court
: Case No. CR-432333

JUDGMENT : AFFIRMED.

DATE OF JOURNALIZATION :

APPEARANCES:

For plaintiff-appellee: William D. Mason, Esq.
Cuyahoga County Prosecutor
BY: Kaya A. Ikuma, Esq.

Assistant County Prosecutor
The Justice Center – 8th Floor
1200 Ontario Street
Cleveland, Ohio 44113

For defendant-appellant: Robert L. Tobik, Esq.
Cuyahoga County Public Defender
BY: John T. Martin, Esq.
Assistant Public Defender
1200 West Third Street
100 Lakeside Place
Cleveland, Ohio 44113

MICHAEL J. CORRIGAN, A.J.

{¶1} Appellant, Samuel Kiriazis ("appellant"), appeals his conviction of promoting prostitution and possession of criminal tools. For the following reasons, we affirm appellant's conviction.

{¶2} On October 9, 2002, Detective John Graves ("Graves"), a police officer in the vice unit of the Cleveland police department, received a complaint that a male named "Sam" was running an escort service located at 3237 West 25th Street ("West 25th") in Cleveland. Graves obtained the phone number where "Sam" could be reached and spoke to a male who identified himself as "Sam." "Sam" was later identified as appellant. During the telephone call, Graves testified that appellant read him a description of the females he had available, informed Graves that the females charge $150 per hour for "full service," and set up a meeting that night at West 25th. Graves also testified that "full service" meant oral sex or sexual intercourse.

{¶3} For the purposes of security, Graves testified that Detective Ted Thomas ("Thomas"), also a police officer in the vice unit of the Cleveland police department and posing as a "john," went to West 25th in his place. Thomas testified that when he arrived at West 25th, he met appellant and a female. The female took Thomas into a bedroom, asked him to show her that he had money, which he did, and asked him to take off his pants. Thomas testified that the female became nervous thinking that he was a cop and began walking in and out of the bedroom. Finally, the female told Thomas to leave, which he did, and on his way out, appellant informed him that the female thought he was a cop. No charges were filed or arrests were made that night. It was later determined that appellant was the landlord of the West 25th building.

{¶4} A week later, on October 16, 2002, Detective Neil Hutchinson ("Hutchinson"), also a police officer in the vice unit of the Cleveland police department, made a controlled call to appellant at the same phone number Graves called on October 9, 2002 to set up a meeting with a female. Graves was also present for the call. Appellant asked Hutchinson what type of girl he was interested in, whether he had a particular interest in sexual activity, that the females charge $150.00 per hour for "full service," and that a female would call him back to set up a meeting. Hutchinson also testified that "full service" meant oral sex or sexual intercourse. As described by appellant, Jennine Tomazic ("Tomazic") called Hutchinson and set the meeting that night at 2092 West 95th Street ("West 95th"). When

Hutchinson arrived at West 95th, he was led by Tomazic into a bedroom, Tomazic asked him for the money up front, and Tomazic called appellant on her cell phone at the same number used by Graves and Hutchinson. Hutchinson testified that Tomazic called appellant "Sam" and told him that Hutchinson was okay and not a cop. At that point, Hutchinson testified that he gave the signal to his vice unit and charged Tomazic with soliciting prostitution. Tomazic told Hutchinson that of the $150 charged by her for sexual activities, she received $100 and would pay appellant $50 for clients arranged by him.

{¶5} Hutchinson also charged Kurt Lenz ("Lenz"), a male who exited from an adjacent bedroom at West 95th, with drug possession when a crack pipe was discovered on Lenz or within his immediate vicinity. Lenz also told Hutchinson that he came to West 95th to get high and receive oral sex from a female. In addition, Hutchinson charged Katherine Martin ("Martin") with prostitution, who was stopped as she was leaving West 95th, and admitted that she was a prostitute.

{¶6} Hutchinson then went to West 25th where he placed appellant under arrest for promoting prostitution. While at West 25th, the police discovered and took as evidence three notebooks and a cell phone. One notebook contained at least 45 female names, their body measurements, their phone numbers, their sexual preferences, and their availability. A second notebook was an appointment book, which contained an appointment for "Neil" (Hutchinson's first name) with his phone number and $150 next to

his name. The third notebook contained the first names of customers, their telephone numbers, the amount charged and paid, and comments received about their meeting with certain females. In addition to the notebooks, the police confiscated appellant's cell phone, which still had Hutchinson's phone number in its call history, and it was determined by calling the cell phone number that it was the identical number Graves, Hutchinson, and Tomazic called. With these notebooks and cell phone, the police advised appellant that he was also being arrested for possession of criminal tools.

{¶7} Further, appellant told police after he was read his Miranda rights, that he had been running the business for a few months, and was simply trying to make some money. Appellant also told police that he knew the females were engaging in sexual activities and that he received $50 each time he set up a meeting for the females.

I

{¶8} For his first assignment of error, appellant contends that there was insufficient evidence to sustain his conviction. In particular, appellant asserts that while the bill of particulars indicates that appellant's offense occurred on West 95th Street in Cleveland, the evidence sufficient to sustain his conviction presented by the state at trial concerned the West 25th location only. As argued by appellant, there was insufficient evidence to sustain his conviction because there was a discrepancy between the place of the offense indicated

on the bill of particulars and the place of the offense presented at trial. This argument, however, lacks merit.

{¶9} First, the purpose of a bill of particulars is to "particularize the conduct of the accused to constitute the charged offense." *State v. Sellards* (1985), 17 Ohio St.3d 169, 171, 478 N.E.2d 781. It is not the purpose of a bill of particulars "to provide the accused with specifications of evidence or to serve as a substitute for discovery." Id. Likewise, Crim.R. 33(E)(2) provides that a variance between the allegations and the evidence at trial is not reversible error unless the defense is prejudiced or misled thereby. On the record before us, we cannot conclude that the state's failure to list on the bill of particulars West 25th as also the location where appellant committed his offense constituted prejudicial error or otherwise misled appellant.

{¶10} The Supreme Court of Ohio held in *State v. Thompkins* (1997), 78 Ohio St.3d 380, 386, 678 N.E.2d 541, that "sufficiency of the evidence is the legal standard applied to determine whether the case may go to the jury or whether the evidence is legally sufficient as a matter of law to support the jury verdict." In reviewing the record for sufficiency, "the relevant inquiry is whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt." *State v. Smith*, 80 Ohio St.3d 89, 113, 1997-Ohio-

355, 684 N.E.2d 668, citing *State v. Jenks* (1991), 61 Ohio St.3d 259, 574 N.E.2d 492, paragraph two of the syllabus.

{¶11} Promoting prostitution, per R.C. 2907.22, provides as follows:

{¶12} "(A) No person shall knowingly:

{¶13} "(1) Establish, maintain, operate, manage, supervise, control, or have an interest in a brothel;

{¶14} "(2) Supervise, manage, or control the activities of a prostitute in engaging in sexual activity for hire;

{¶15} "(3) Transport another, or cause another to be transported across the boundary of this state or of any county in this state, in order to facilitate the other person's engaging in sexual activity for hire;

{¶16} "(4) For the purpose of violating or facilitating a violation of this section, induce or procure another to engage in sexual activity for hire.

{¶17} "(B) Whoever violates this section is guilty of promoting prostitution, a felony of the fourth degree. If any prostitute in the brothel involved in the offense, or the prostitute whose activities are supervised, managed, or controlled by the offender, or the person transported, induced, or procured by the offender to engage in sexual activity for hire, is a minor, whether or not the offender knows the age of the minor, then promoting prostitution is a felony of the third degree."

{¶18} In addition, a "brothel," since it is undefined by statute, must be construed according to the rules of grammar and common usage. *State v. Poirier*, Lucas App. Nos. L-01-1479, L-01-1480, L-01-1481, 2002-Ohio-4218, citing *State v. Coburn* (1992), 84 Ohio App.3d 170, 173, 616 N.E.2d 567. "Brothel" is synonymous with the word "bordello," which is defined as "a building in which prostitutes are available." Merriam Webster's Collegiate Dictionary (10 Ed.1996) 146.

{¶19} Possessing criminal tools, per R.C. 2923.24(A), provides as follows:

{¶20} "(A) No person shall possess or have under the person's control any substance, device, instrument, or article, with purpose to use it criminally."

{¶21} Despite appellant's arguments to the contrary, the evidence presented at trial was more than sufficient to sustain appellant's conviction. Any rational trier of fact could have found that through the use of notebooks and a cell phone, appellant operated a brothel out of both the West 25th and West 95th locations. As testified by Graves and Hutchinson, appellant arranged customers to meet with females who charged $150 per hour for "full service," which meant oral sex or sexual intercourse. Appellant first arranged for Graves to meet him and a female at West 25th for sex. Although the purchase never materialized because the female suspected Thomas (filling in for Graves) to be a cop, the purchase materialized the following week when appellant arranged for Hutchinson to meet Tomazic at West 95th for sex. After Hutchinson charged Tomazic for soliciting prostitution,

as well as charged Martin, also at West 95th, for prostitution after she admitted being a prostitute, he charged Lenz, a male exiting a nearby bedroom at West 95th, with drug possession. Hutchinson testified that he later learned that Lenz went to West 95th to get high and receive oral sex.

{¶22} This evidence, coupled with Tomazic's testimony that she gives a $50 cut of the $150 to appellant for all sexual activities she performs with clients arranged by appellant and appellant's statement that he had been running the business for a few months, knew the females were having sex, and would receive a $50 cut for each meeting he arranged, could lead any rational trier of fact to conclude that the essential elements of promoting prostitution and possession of criminal tools were proven beyond a reasonable doubt.

II

{¶23} For his second assignment of error, appellant contends that his conviction was against the manifest weight of the evidence. However, appellant's contention lacks merit.

{¶24} The proper test to be used when addressing the issue of manifest weight of the evidence is set forth as follows:

{¶25} "Here, the test [for manifest weight] is much broader. The court, reviewing the entire record, weighs the evidence and all reasonable inferences, considers the credibility

of the witnesses and determines whether in resolving conflicts in the evidence, the [fact finder] clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered. ***" *State v. Moore*, Cuyahoga App. No. 81876, 2003-Ohio-3526, ¶8, quoting *State v. Martin* (1983), 20 Ohio App.3d 172, 175, 485 N.E.2d 717; see, also, *Tibbs v. Florida* (1982), 457 U.S. 31, 102 S.Ct. 2211, 72 L.Ed.2d 652.

{¶26} The weight of the evidence and credibility of the witnesses are primarily for the trier of fact. *Moore* at ¶8, citing *State v. DeHass* (1967), 10 Ohio St.2d 230, 227 N.E.2d 212. The power to reverse a judgment of conviction as against the manifest weight must be exercised with caution and in only the rare case in which the evidence weighs heavily against the conviction. *Moore* at ¶8, citing *Martin*.

{¶27} In determining whether a judgment of conviction is against the manifest weight of the evidence, this court in *State v. Wilson* (June 9, 1994), Cuyahoga App. Nos. 64442 and 64443, adopted the guidelines set forth in *State v. Mattison* (1985), 23 Ohio App.3d 10, 490 N.E.2d 926. These factors, which are not exhaustive, include:

{¶28} "1) Knowledge that even a reviewing court is not required to accept the incredible as true;

{¶29} "2) Whether evidence is uncontradicted;

{¶30} "3) Whether a witness was impeached;

{¶31} "4) Attention to what was not proved;

{¶32} "5) The certainty of the evidence;

{¶33} "6) The reliability of the evidence;

{¶34} "7) The extent to which a witness may have a personal interest to advance or defend their testimony; and

{¶35} "8) The extent to which the evidence is vague, uncertain, conflicting or fragmentary." *Mattison*, 23 Ohio App.3d at syllabus.

{¶36} Based upon the evidence presented at trial, there is nothing in the record to suggest that the trial court clearly lost its way and created such a miscarriage of justice as to require reversal of appellant's conviction. To the contrary, the record is replete with evidence that appellant, through his notebooks and a cell phone, arranged sexual meetings for customers with prostitutes for a $50 fee. In fact, appellant told police that he had been running the business for a few months, knew the prostitutes were engaging in sex, and that he received a $50 fee from each encounter he arranged with the prostitutes. Upon review of the record, appellant's conviction for promoting prostitution and possession of criminal tools is not against the manifest weight of the evidence. Indeed, the manifest weight of the evidence supports appellant's conviction.

III

{¶37} For his third assignment of error, appellant contends that the trial court did not strictly comply with the requirements of R.C. 2945.05, which are the guidelines for a valid waiver of a jury trial. In particular, appellant argues that the written waiver was not executed in open court, that the written waiver "may or may not have been" filed before trial began, and that the trial court's journalization of the waiver was not entered before trial began. However, appellant's argument is without merit.

{¶38} R.C. 2945.05 provides in whole:

{¶39} "In all criminal cases pending in courts of record in this state, the defendant may waive a trial by jury and be tried by the court without a jury. Such waiver by a defendant, shall be in writing, signed by the defendant, and filed in said cause and made a part of the record thereof. It shall be entitled in the court and cause, and in substance as follows: 'I . . . ., defendant in the above cause, hereby voluntarily waive and relinquish my right to a trial by jury, and elect to be tried by a Judge of the Court in which the said cause may be pending. I fully understand that under the laws of this state, I have a constitutional right to a trial by jury.'

{¶40} "Such waiver of trial by jury must be made in open court after the defendant has been arraigned and has had opportunity to consult with counsel. Such waiver may be withdrawn by the defendant at any time before the commencement of the trial."

{¶41} The Supreme Court of Ohio held in *State v. Pless*, 74 Ohio St.3d 333, 339, 1996-Ohio-102, 658 N.E.2d 766, "that in a criminal case where the defendant elects to waive the right to trial by jury, R.C. 2945.05 mandates that the waiver must be in writing, signed by the defendant, filed in the criminal action and made part of the record thereof." Thus, the waiver, to be valid pursuant to R.C. 2945.05, must meet the four-part test; that is, the waiver must be (1) in writing, (2) signed by the defendant, (3) filed in the criminal action, and (4) made part of the record of the case. Here, despite appellant's argument that his waiver was not executed in open court, this court has held that as long as the trial court engages in a colloquy with the defendant "extensive enough for the trial judge to make a reasonable determination that the defendant has been advised and is aware of the implications of voluntarily relinquishing a constitutional right," it is not necessary that the waiver be signed in open court. *State v. Huber*, Cuyahoga App. No. 80616, 2002-Ohio-5839, citing *State v. Ford*, Cuyahoga App. Nos. 79441 and 79442, 2002-Ohio-1100; see, also, *State v. Gammalo* (July 5, 2001), Cuyahoga App. No. 78531. Upon review of the transcript, the trial court conducted a lengthy colloquy with appellant regarding his waiver of a jury trial at the forefront of trial. There is nothing in the record to suggest that the trial court acted unreasonably in determining that appellant's waiver (signed by him and written in the language to mirror R.C. 2945.05) was entered into other than knowingly.

{¶42} Further, despite appellant's arguments that it is unclear as to whether his waiver was filed before trial began and that the trial court's journalization of his waiver was not filed until after trial was over, R.C. 2945.05 does not require the waiver nor the journalization of the waiver to be filed prior to trial. *State v. Antoncic* (Nov. 22, 2000), Cuyahoga App. No. 77678. Moreover, the critical issue is not whether the filing occurred before trial, but if the filing occurred at all. *State v. Bryant*, Cuyahoga App. No. 79841, 2002-Ohio-2136. Upon review of the record, appellant's waiver was time-stamped and filed on April 1, 2003, which was the day of trial, and journalized on April 4, 2003. Because appellant's waiver was in writing, signed by appellant, filed and journalized in the case, and made a part of the record, the trial court strictly complied with the requirements of R.C. 2945.05.

{¶43} The judgment is affirmed.

Judgment affirmed.

ANN DYKE and KENNETH A. ROCCO, JJ., concur.

It is ordered that appellee recover of appellant its costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the Common Pleas Court to carry this judgment into execution. The defendant's conviction having been affirmed, any bail pending appeal is terminated. Case remanded to the trial court for execution of sentence.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

MICHAEL J. CORRIGAN
ADMINISTRATIVE JUDGE

N.B. This entry is an announcement of the court's decision. See App.R. 22(B), 22(D) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R.22(E) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the

journalization of this court's announcement of decision by the clerk per App.R. 22(E). See, also, S.Ct.Prac.R. II, Section 2(A)(1).