IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. ANTHONY MICHAEL TERRY, Appellant.	)	No. 67108-1-I DIVISION ONE UNPUBLISHED OPINION FILED: January 28, 2013

Appelwick, J. — Terry argues that the trial court violated his constitutional right to counsel by refusing to appoint new counsel after he raised a claim of ineffective assistance prior to sentencing. No basis for the claim of ineffective assistance was stated. The trial court acted within its discretion by denying the motion to substitute counsel. Terry's statement of additional grounds does not justify reversal. We affirm.

FACTS

On the evening of June 6, 2010 an undercover detective with the Seattle Police Department, after finding an advertisement on Backpage.com, called Maria Hernandez-Blas. Over the phone, she told the officer to meet her at the Warwick Hotel in downtown Seattle. When the officer arrived, Hernandez-Blas agreed to have sex with him in exchange for money, and the officer arrested her. Police questioned Hernandez-

Blas about her pimp. At the officers' direction, she texted and called her pimp, telling him she needed more condoms for her next customer. Shortly thereafter, Anthony Terry arrived at the door of the hotel room. When the police answered the door and identified themselves, Terry exclaimed, "Oh shit!" and fled. The police arrested him on suspicion of promoting prostitution. They found condoms and a cell phone in Terry's pockets. Officers also found L.F., a minor, in another room in the hotel. The room contained several items of evidence connecting Terry, L.F., and Hernandez-Blas.

While Terry was in jail, he made multiple phone calls to L.F. In the course of those conversations, Terry lamented having involved Hernandez-Blas in their scheme, coached L.F. on what to say to police, and urged L.F. to continue to engage in prostitution to make money to pay for Terry's bail. He also told L.F. he believed she would not be prosecuted because she was a minor.

On June 20, 2010, Terry was released from jail on bail. On July 8, 2010, a police officer saw an advertisement for prostitution featuring L.F.'s photograph on Backpage.com. Police made a date with L.F. When the police arrived at the hotel, they found Terry and L.F. together and arrested both.

Terry was charged with two counts of promoting the commercial sexual abuse of a minor, one count of promoting prostitution in the second degree, and one count of tampering with a witness. Terry waived his right to trial by jury. At the bench trial, both Terry and L.F. testified, denying Terry promoted prostitution of either L.F. or Hernandez-Blas. Despite efforts by the State to locate Hernandez-Blas, she was unavailable to testify at trial. Over the defense's objection, the trial court allowed police to testify about certain statements she made. The court found Terry guilty of all four counts.

At sentencing, Terry raised a claim of ineffective assistance of counsel, and made a motion for substitute counsel for the claim and for sentencing. The court denied the motion and the attorney's request to withdraw until after the sentencing hearing. Defense counsel then noted that Terry asked that counsel "not allocute on his behalf" and when the court asked Terry if he had any comments before it imposed the sentence, he declined. The court sentenced counts I, III, and IV concurrent to count II, which carried the highest sentence. On count II, the court sentenced Terry to 240 months, the low end of the sentencing range.

DISCUSSION

I. Right to Counsel

The appellant argues that his claim at sentencing of ineffective assistance of counsel created a conflict of interest, and that the trial court's refusal to grant his motion to substitute counsel violated his constitutional right to conflict-free representation. However, Terry fails to identify any actual conflict of interest that would require substitution of counsel.

Under the Sixth Amendment, a criminal defendant has a constitutional right to conflict-free representation. State v. Dhaliwal, 150 Wn.2d 559, 566, 79 P.3d 432 (2003). That right to counsel extends to all critical stages of prosecution, including sentencing. State v. Rupe, 108 Wn.2d 734, 741, 743 P.2d 2010 (1987). But, a claim of ineffective assistance of counsel does not necessarily create an unconstitutional conflict of interest requiring substitution of counsel. See State v. Stark, 48 Wn. App. 245, 253, 738 P.2d 684 (1987). Rather, the determination whether an alleged conflict of interest warrants substitution of counsel lies within the discretion of the trial court.

Id. at 252-53. In determining whether an allegation of ineffective assistance warrants appointing new counsel, the court should consider the reasons given for the defendant's claim of ineffective assistance, its own evaluation of the current counsel's fitness, and how the substitution would affect the schedule of proceedings. Id. at 253. If a trial court knows of a potential conflict of interest, the court should inquire into the nature and extent of the conflict. State v. McDonald, 143 Wn.2d 506, 513, 22 P.3d 791 (2001). However, a trial court's failure to conduct an inquiry does not require reversal. Dhaliwal, 150 Wn.2d at 571. We review a trial court's refusal to substitute counsel for abuse of discretion. See State v. Stenson, 132 Wn.2d 668, 737, 940 P.2d 1239 (1997).

Terry fails to demonstrate an actual conflict of interest. In Stark, the defendant argued that we should require substitution of counsel when a defendant claims ineffective assistance. 48 Wn. App. at 253. We rejected his argument, noting that such a rule would allow defendants to force substitution of counsel at any time and for any reason by claiming ineffective assistance. Id. Instead, we maintained that the decision to substitute counsel lies within the discretion of the trial court. Id. In this case, Terry gave no reasons for his claim of ineffective assistance of counsel. Further, the claim was raised on the morning of sentencing, and substitution of counsel would have resulted in delay of the proceedings. The trial court acted within its discretion by denying the motion to substitute.

Relying on State v. Harell, 80 Wn. App. 802, 911 P.2d 1034 (1996), Terry correctly notes that an allegation of ineffective assistance of counsel can potentially create a conflict of interest. But, Harell is clearly distinguishable from the present case. In Harell, defense counsel refused to assist the defendant on his motion to withdraw a

guilty plea and proceeded to testify against the defendant as a witness for the State. Id. at 803. Concluding that the conflict of interest clearly affected the disposition of Harell's motion, we held that the defendant was denied his right to counsel and remanded for a new hearing with substitute counsel. Id. at 804. However, we noted that the conflict of interest was "evidenced by [counsel's] direct testimony against Harell's interest at the hearing." Id. at 805.

No such evidence of conflict of interest exists in Terry's case. Terry's attorney did not testify against him, and in fact requested and secured the lowest possible sentence within the sentencing range. He also argued, unsuccessfully, that Counts I and II were part of the same "continuum of behavior" and should therefore be merged for sentencing purposes. Counsel's behavior does not suggest an actual conflict of interest.

Further, Terry has not developed the claim of ineffective assistance on appeal. In order to succeed in a claim of ineffective assistance of counsel, the defendant must show that the counsel's performance was deficient and that the deficient performance prejudiced the defense. Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 890 L. Ed. 2d 674 (1984). Terry briefly raises two potential instances of ineffective assistance. He claims that his trial counsel "nearly" opened the door to damaging hearsay and acknowledged failing to file a motion to suppress. Terry was not prejudiced by trial counsel nearly making a mistake. And, he offers no argument to support his suggestion that trial counsel was deficient in failing to file a motion to suppress.

II. Statement of Additional Grounds

Terry also submitted a statement of additional grounds. He argues that the trial court improperly admitted testimonial hearsay, that his convictions are not supported by substantial evidence, and that the trial court miscalculated his offender score.

A. Hearsay

Terry contends that the trial court improperly admitted testimonial hearsay, in violation of the Sixth Amendment's confrontation clause and the face-to-face clause of article 1, § 22 of the Washington State Constitution. We review allegations of violations of the confrontation clause de novo. State v. Jasper, 174 Wn.2d 96, 108, 271 P.3d 876 (2012).

The confrontation clause bars the admission of testimonial statements of a witness who did not appear at trial unless the witness was unavailable and the defendant had a prior opportunity to cross examine the witness about the statements. Crawford v. Washington, 541 U.S. 36, 54, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004). Testimonial statements are statements made to a government official for the purpose of establishing or proving past events potentially relevant to later prosecution. Davis v. Washington, 547 U.S. 813, 822, 126 S. Ct. 2266, 165 L. Ed. 2d 224 (2006). The confrontation clause does not bar the admission of testimonial statements that are not offered to prove the truth of the matter asserted. Crawford, 541 U.S. at 59, n.9.

The trial court admitted two categories of out of court statements made by Maria Hernandez-Blas. Neither category of statements implicates the confrontation clause, for two distinct reasons. First, the court admitted statements made by Hernandez-Blas to Detective Trent Bergmann while he was undercover, before she knew Bergmann was a government agent. While these statements are hearsay, admitted under E.R.

804(b)(3) as statements against interest, they are not testimonial in nature. See Davis, 547 U.S. at 822 (holding that testimonial statements are those made to a government official for the primary purpose of establishing or proving past events potentially relevant to later prosecution); see also State v. Flores, 164 Wn.2d 1, 18, n.9, 186 P.3d 1038 (2008) (statements to confidential informant in drug transaction were nontestimonial). Because the statements were made before Hernandez-Blas knew she was speaking to a police officer, they were not made during an interrogation and did not serve the primary purpose of proving past events.

Second, the trial court allowed Detective Bergman to testify about a text message and a phone call Hernandez-Blas made to Terry in the officers' presence, after she was aware they were police. According to Detective Bergmann, in the text message and phone call Hernandez-Blas told Terry she had another customer coming and asked Terry to bring her more condoms. Those statements were not offered to prove the truth of the matter asserted and do not implicate the confrontation clause.

B. Sufficiency of the Evidence

Terry argues that his convictions on counts I, II, and III are not supported by sufficient evidence. Where the trial court makes findings of fact and conclusions of law following a bench trial, our review is limited to whether the findings of fact are supported by substantial evidence and whether the findings support the conclusions of law. State v. Stevenson, 128 Wn. App. 179, 193, 114 P.3d 699 (2005). Evidence is sufficient to support a conviction if, after the evidence and all reasonable inferences from it is viewed in the light most favorable to the State, a rational trier of fact could find each element of the crime proven beyond a reasonable doubt. State v. Green, 94

Wn.2d 216, 221, 616 P.2d 628 (1980).

1. Count I: Promoting the Commercial Sexual Abuse of a Minor

A person is guilty of promoting commercial sexual abuse of a minor if he or she knowingly advances commercial sexual abuse or a sexually explicit act of a minor or profits from a minor engaged in sexual conduct or a sexually explicit act. RCW 9.68A.101(1). The term "advances commercial sexual abuse of a minor" means that a person: (1) causes or aides a person to commit or engage in commercial sexual abuse of a minor, or (2) procures or solicits customers for commercial sexual abuse of a minor, or (3) provides persons or premises for the purposes of engaging in commercial sexual abuse of a minor, or (4) operates or assists in the operation of a house or enterprise for the purpose of engaging in commercial sexual abuse of a minor, or (5) engages in any other conduct designed to institute, aid, or facilitate an act or enterprise of commercial sexual abuse of a minor. RCW 9.68A.101(3)(a). The term "profits from commercial sexual abuse of a minor" means that a person accepts or receives money or other property pursuant to an agreement or understanding with any person whereby he participates or will participate in the proceeds of commercial sexual abuse of a minor. RCW 9.68A.101(3)(b).

It is not a defense that the defendant did not know the alleged victim's age. RCW 9.68A.110(3). But, it is a defense that the defendant made a bona fide attempt to ascertain the true age of the minor by requiring production of a driver's license, marriage license, birth certificate, or other government or educational identification card or paper and did not rely solely on the oral allegations or apparent age of the minor. Id.

Count I alleges crimes committed between January 1 and June 6, 2010. It is

undisputed that L.F. was a minor at the time. The trial court found:

> Between March 2010 to June 6, 2010, [L.F.] was less than 18 years of age. During this same time, Terry knowingly and intentionally assisted [L.F.] in committing acts of prostitution by photographing her in lingerie or naked in sexually explicit or provocative poses, for the purpose of using these photos in Internet advertisements to find customers willing to pay [L.F.] money for sex. Terry also assisted [L.F.] in prostitution by asking Matthew Taylor to rent a hotel room at the Warwick Hotel with the intent of using that room for [L.F.] to meet customers to engage in prostitution. Terry knew during this time period that [L.F.] was a minor. Terry personally profited from the commercial sexual abuse of a minor because Terry received the proceeds from [L.F.]'s prostitution activities and used them to purchase drugs and alcohol and rent hotel rooms. Terry's activities in advancing [L.F.]'s prostitution occurred in the State of Washington.

Regarding Terry's claim that he did not know L.F.'s true age, the trial court found:

> The only evidence that Terry attempted to ascertain [L.F.]'s true age came from [L.F.] and Terry. [L.F.] testified that she showed a fake identification card to Terry. Terry also testified that he saw a driver's license indicating that [L.F.] was 20 years old. Neither [L.F.]'s testimony nor that of Terry is credible, given Terry's admission in the jail phone records that he was aware [L.F.] was a juvenile. Terry has not proved by a preponderance of the evidence that he made a reasonable bona fide attempt to ascertain [L.F.]'s true age before assisting her in prostitution.

Terry argues that there is no evidence that he knew L.F. was a minor, that he knew L.F. engaged in sexual activity for money, or that Terry profited from it.

It is irrelevant whether Terry affirmatively knew L.F. was a minor before June 6, because not knowing the victim's age is not a defense. RCW 9.68A.110(3). Although Terry and L.F. testified that L.F. showed Terry a fake identification card, the trial court determined that they were not credible. Credibility determinations are not reviewable on appeal. State v. Camarillo, 115 Wn.2d 60, 71, 794 P.2d 850 (1990).

Likewise, it is irrelevant whether L.F. actually engaged in sexual activity for

money or whether Terry profited from it. Neither of those facts are necessary elements of promoting the commercial sexual abuse of a minor. Even if there was no evidence to support those propositions, the trial court also found that Terry assisted L.F. by photographing her for the purpose of using the photos in online prostitution advertisements, and by asking Matthew Taylor to rent a hotel room for L.F. to use for her prostitution activities. Those findings amply support the finding of guilt.

2. Count II: Promoting the Commercial Sexual Abuse of a Minor

Terry was also convicted of promoting the commercial sexual abuse of a minor for acts that occurred on July 8. The trial court found:

> On July 8, 2010, [L.F.] was less than 18 years of age. Terry knowingly and intentionally assisted [L.F.] in committing acts of prostitution on July 8, 2010, by asking Jason Hoffman to rent a hotel room at the Bothell Country Suites and Inn and providing Hoffman with cash to pay for the room, with the intent of using that room for [L.F.] to engage in prostitution. Terry knew during this time period that [L.F.] was a minor. Terry personally profited from the commercial sexual abuse of a minor because [L.F.] engaged in prostitution for the explicit purpose of earning money to give to Terry. Terry and [L.F.] shared the proceeds from [L.F.]'s prostitution activities and Terry was in physical possession of these proceeds on the day of his arrest on July 8, 2010. Terry's activities in advanced [L.F.]'s prostitution occurred in the State of Washington.

Terry argues that there is no evidence that L.F. actually had sex in exchange for money, that there was any money to share, or that he gave money to Hoffman with the intent of assisting L.F.'s prostitution. As noted, it is immaterial whether L.F. actually engaged in sex for money on July 8. That is not a necessary element of promoting the commercial sexual abuse of a minor. Terry does not dispute the trial court's finding that he provided premises for L.F. to engage in prostitution by asking Hoffman to rent a hotel for L.F. Further, he does not dispute that he and L.F. spent a significant amount

of time together in the weeks leading up to July 8 or that Terry used a new laptop to look for hotels and motels in the area. He does not dispute the findings that L.F. posted online advertisements for sex and made a "date" with a detective at Bothell Country Suites and Inn. He does not dispute the finding that text messages between him and L.F. on July 8 reveal that he was acting as a look-out for customers arriving at Bothell Country Suites and Inn in response to the online advertisements. He does not dispute the finding that he and L.F. were together at Bothell Country Suites and Inn when the police arrived. Taken together, these undisputed facts are sufficient evidence to prove that Terry provided premises for and otherwise facilitated the commercial sexual abuse of a minor.

3. Count III: Promoting Prostitution in the Second Degree

A person commits the crime of promoting prostitution in the second degree when he knowingly profits from or advances prostitution. RCW 9A.88.080. A person "advances prostitution" when, acting other than as a prostitute or as a customer of a prostitute, he causes or aids a person to commit or engage in prostitution, procures or solicits customers for prostitution, provides persons or premises for prostitution purposes, operates or assists in the operation of a house of prostitution or a prostitution enterprise, or engages in any other conduct designed to institute, aid, or facilitate an act or enterprise of prostitution. RCW 9A.88.060(1).

The trial court found:

> Terry knew that Maria Hernandez-Blas was engaging in acts of prostitution in early June 2010. Terry intentionally assisted Hernandez-Blas in prostitution by providing her with food and clothing, by taking photographs of her in lingerie with [L.F.] for use in Internet advertisements, by working with [L.F.] to "post up" ads for Hernadez-Blas

> on [B]ackpage.com, and by supplying Hernandez-Blas with condoms for her use with customers.

Terry argues that the State did not prove that he knew of or advanced Hernandez-Blas's prostitution activities. Specifically, he argues the State did not prove that he provided Hernandez-Blas with food and clothing or took pictures of her for online advertisements.[1]

The State presented overwhelming evidence that Terry knew of Hernandez-Blas's prostitution activities. After arresting Hernandez-Blas for agreeing to have sex with an officer in exchange for money, police officers directed her to ask her pimp for more condoms for her next assignment. After sending a text message and making a phone call, Terry arrived with condoms in his pocket. The condoms were the same brand as the condoms found in L.F.'s room by arresting officers, and at least one condom had the same lot number as those found in L.F.'s room. In phone calls that Terry made to L.F. from jail, he told L.F. that Hernandez-Blas set him up, and he screwed up by bringing her into the picture. He indicated he only brought her in to maximize profit.

As to whether Terry supplied Hernandez-Blas with food and clothing or took pictures of her for online advertisements, the arresting officers seized two laptops and a camera. The trial court indicated that photographs of Hernandez-Blas and L.F. together matched the dates of photographs of L.F. and Terry together. It also noted that Terry's clothing appeared in the background of at least one picture. Further, L.F.'s

[1] Terry also argues that he cannot be guilty of a crime committed between January 1 and June 6, because police did not discover Hernandez-Blas's activities until June 6. But, when activities are first uncovered has no bearing on when the activities actually occurred.

Backpage.com alias was used to post an advertisement for Hernandez-Blas at a time when L.F. and Terry were together. The photographs relied upon by the trial court were not designated for appeal and thus we are unable to consider them. Even without that evidence, however, it is apparent that there was sufficient evidence to support Terry's conviction for promoting prostitution in the second degree.

C. Offender Score Calculation

Terry argues that the trial court erred in calculating his offender score for sentencing purposes. Generally, challenges to a miscalculation of an offender score may be raised for the first time on appeal. See In re Pers. Restraint of Goodwin, 146 Wn.2d 861, 873-74, 50 P.3d 618 (2002). However, a defendant may waive a challenge to an offender score where the alleged error involves a matter of trial court discretion, such as whether the two convictions encompass the same criminal conduct, by failing to raise the issue at the time of sentencing. State v. Jackson, 150 Wn. App. 877, 892, 209 P.3d 553 (2009). Terry did not object to the offender score at sentencing, and now contends counsel was deficient for failing to raise the same criminal conduct issue at sentencing. SAG 14. As noted previously, in order to succeed on a claim of ineffective assistance of counsel, the defendant must show that the counsel's performance was deficient and that the deficient performance prejudiced the defense. Strickland, 466 U.S. at 687. Defense counsel is not required to pursue every issue which the defendant believes important, where it is not supported by facts or law. State v. Piche, 71 Wn.2d 583, 590, 430 P.2d 522 (1967). The trial court did not calculate Terry's offender score incorrectly, and thus his counsel was not deficient.

First, Terry argues that his prior adult convictions for drive-by shooting and

unlawful possession of a firearm constitute the "same criminal conduct" and should therefore be counted as a single prior felony conviction for purposes of calculating his offender score.

Under the Sentencing Reform Act of 1981, prior offenses that encompass the same criminal conduct are counted as one offense when calculating the offender score. RCW 9.94A.525(5)(a)(i). The trial court must determine whether prior offenses encompass the same criminal conduct. Id. Offenses constitute the same criminal conduct if they involve the same criminal intent, are committed at the same time and place, and involve the same victim. RCW 9.94A.589(1)(a). Where any one of these elements is missing, the court must count the offenses separately. State v. Lessley, 118 Wn.2d 773, 778, 827 P.2d 996 (1992). We construe same criminal conduct narrowly and review a trial court's determination of same criminal conduct for abuse of discretion or clear misapplication of the law. State v. Wilson, 136 Wn. App. 596, 613. 150 P.3d 144 (2007).

In this case, Terry's prior convictions for drive by shooting and unlawful possession of a firearm involved different victims. The victim of unlawful possession of a firearm is the general public. State v. Haddock, 141 Wn.2d 103, 110-11, 3 P.3d 733 (2000). The victims of the drive by shooting, on the other hand, are the specific individuals toward whom shots were fired. Under RCW 9A.36.045(1) a person is guilty of drive-by shooting when he fires a weapon from a motor vehicle and thereby "creates a substantial risk of death or serious physical injury *to another person*." (Emphasis added.) Thus, the legislature identified the victim of drive-by shooting as the specific individuals placed at risk by the shooting. Because the two offenses do not have the

same victim, the same criminal conduct test is not satisfied, and the trial court correctly counted each as separate offenses.

Terry also contends that the trial court erred in calculating the "other current offenses" section of his offender score. Terry maintains that the court incorrectly entered the number of other sex offense convictions as one when calculating his offender score for counts I and II. But, Terry was convicted of two counts of promoting the commercial sexual abuse of a minor. In calculating the sentence for each count, the court must include the other count under "other current sex offense." RCW 9.94A.525(1). This single conviction is then multiplied by three, according to RCW 9.94A.525(17). The court correctly added the point in the other current offenses section of the score.

We affirm.

Appelwick, J.

WE CONCUR:

Leach, J.

Grosse, J.