COURT OF APPEALS
DECISION
DATED AND RELEASED

February 14, 1996

No. 94-2612-CR

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT II

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

DONALD D. MENTZEL,

Defendant-Appellant.

APPEAL from a judgment of the circuit court for Fond du Lac County: JOHN W. MICKIEWICZ, Judge. *Affirmed*.

Before Anderson, P.J., Nettesheim and Snyder, JJ.

PER CURIAM. Donald D. Mentzel appeals from a judgment convicting him of keeping a place of prostitution contrary to § 944.34(2), STATS. His appellate issues are: (1) whether the trial court erroneously declined to give an entrapment instruction to the jury; (2) whether the government's agent behaved outrageously such that the charges against him should have been dismissed on due process grounds; (3) whether a jury instruction for § 944.34(2) denied him a unanimous jury verdict; and (4) whether the trial court erroneously refused to give a mistake instruction. We reject each of these claims and affirm.

Mentzel was convicted of keeping a place of prostitution after a jury trial. Although Mentzel does not contest the sufficiency of the evidence to convict him, we briefly review it because it provides a foundation for our discussion of Mentzel's claims on appeal.

Brenda Vandekolk, a former bartender at Mentzel's exotic dance club, The Lagoon, testified that Mentzel was on the premises every night during her term of employment (November 1992 through May 1993) and that he was aware of acts of prostitution occurring on the premises. She stated that she advised him that she had observed acts of prostitution and that while Mentzel said such conduct was prohibited, he took no action to stop it beyond telling the dancers not to engage in prostitution on the premises. Vandekolk testified that the prostitution began in December 1992 or January 1993, and that sex acts frequently occurred on the premises. She testified that Mentzel charged the dancers $25 to leave the premises during their shifts.

A dancer, Jody Bettin-Floyd, testified that she was employed at The Lagoon for all or part of the following months in 1993: January, February, April, June and July. She testified that she wanted to work at The Lagoon because her "regular customers," whom she described as persons interested in her services as a prostitute, were from that area. She testified that Mentzel understood that she engaged in prostitution while employed by him and that she committed such acts on the premises every time she worked and while Mentzel was at the club. She testified that Mentzel knew she left the premises to perform acts of prostitution and that, although she signed a contract acknowledging that she would not commit acts of prostitution on the premises, Mentzel told her the contract did not mean anything. On one occasion, Mentzel told her that certain customers wanted "dates" with her, which she took to mean prostitution encounters, and pointed her toward three men in the club.

Bettin-Floyd also testified about accepting tips from customers while working at The Lagoon. In the course of tipping her, customers often had contact with her genital area. Mentzel was aware of the manner in which she accepted tips from customers. She also testified that Vandekolk let customers fondle her breasts on the premises.

Bettin-Floyd testified that she began working as an agent for the Fond du Lac sheriff in June 1993. While the authorities were aware that she had committed acts of prostitution, she did not tell them that she committed such acts in The Lagoon in April 1993. Law enforcement directed her not to engage in any acts of prostitution while acting as their agent.

On June 15, 1993, Bettin-Floyd went to The Lagoon in an attempt to get Mentzel to agree that she could "do business" in the bar. While Mentzel initially said "no dating" of customers, he later said that dating would be all right but that she could not perform any sex acts at the bar. On July 2, 1993, Bettin-Floyd inquired of Mentzel if she could "do business" from the bar; Mentzel did not tell her she could not. According to Bettin-Floyd, "do business" meant engaging in prostitution. She believed Mentzel understood what she meant.

Bettin-Floyd testified that while she was acting as an informant and wired to record her conversations with Mentzel, she did not engage in any acts of prostitution on the premises. However, when she was not wired, she did engage in acts of prostitution. As far as Bettin-Floyd was aware, it was all right with Mentzel to set up dates with customers. However, she acknowledged that Mentzel made money from cover charges for dancing and drinks, not prostitution.

Deputy Sheriff Ian Nishimoto testified that he went to The Lagoon undercover and was solicited by a dancer for prostitution. After he left the premises with his partner and the dancer, the party traveled to a house down the street owned by Mentzel in which there were many beds and little other furniture. Mentzel then appeared on the premises and yelled at them that there was to be no prostitution. Sheriff Harry Sokel testified that on one occasion, he arranged "a date" with two dancers and that Mentzel did not get involved in the negotiations.

Detective Joseph Wichman testified that in April 1993, he saw Vandekolk expose her breasts for a fee and that prostitution was solicited on the premises. He acknowledged his awareness that Mentzel was having difficulty keeping the dancers on the premises and that they often went across the street

to procure alcohol and cigarettes. Mentzel denied to Wichman that he knew prostitution was occurring on the premises.

Mentzel testified that he had no personal knowledge of acts of prostitution occurring on his premises. He stated that he required the dancers to sign a contract specifying that they would not engage in sex acts on the property. Mentzel testified that he did not hear or see any solicitation for prostitution and had he done so, he would have fired the involved dancer. He testified that the club is well-lit and that he never saw any sex acts occur on the premises, countering Bettin-Floyd's testimony that sex acts occurred there with great frequency. Mentzel fined the dancers for leaving the premises to deter them from going across the street to purchase alcohol and cigarettes. He testified that the fine was not related to prostitution.

Mentzel testified that when Bettin-Floyd mentioned "doing business," he believed she was referring to customers who came to the club specifically to see her dance. Mentzel testified that when he told Bettin-Floyd "no dating," he meant she should not "get personal" with the customers. Mentzel testified that he did not believe that accepting tips in the manner described by Bettin-Floyd made him liable under the law for prostitution occurring on the premises. He testified that the house down the block was used as a dormitory for out-of-town dancers, not as a prostitution site.

The information charged Mentzel with one count of intentionally allowing the continued use of The Lagoon as a place of prostitution contrary to § 944.34(2), STATS. Section 944.34 provides:

> Whoever intentionally does any of the following is guilty of a Class D felony:
>
> **(1)** Keeps a place of prostitution; or
>
> **(2)** Grants the use or allows the continued use of a place as a place of prostitution.

Mentzel requested an entrapment instruction. The trial court declined to give it.

A trial court may decline to give an entrapment instruction if the instruction is not reasonably required by the evidence. ***State v. Hilleshiem***, 172 Wis.2d 1, 9, 492 N.W.2d 381, 384 (Ct. App. 1992), *cert. denied,* 113 S. Ct. 3053 (1993). When an appeal is taken from a refusal to give a requested instruction, "we will view the evidence in the most favorable light it will reasonably admit from the standpoint of the accused." ***Id.*** at 9-10, 492 N.W.2d at 384.

Entrapment is a defense when the "evil intent" and the "criminal design" of the offense originated in the government agent's mind, and the defendant would not have committed the offense but for the urging of the government. ***Id.*** at 8, 492 N.W.2d at 384. To establish entrapment, the defendant must show by a preponderance of the evidence that he or she was induced to commit the crime. ***Id.*** That a government agent furnished the defendant with an opportunity to commit the crime does not by itself constitute entrapment. ***Id.*** at 9, 492 N.W.2d at 384. Entrapment exists only if the agent "used *excessive* incitement, urging, persuasion, or temptation, and prior to the inducement, the defendant was not already predisposed to commit the crime." ***Id.*** The law does not prohibit "some inducement, encouragement, or solicitation in order to detect criminals." ***Id.*** "Because the defense of entrapment allows a person, who under normal circumstances would be guilty, to go free, it is disfavored in the law and should not be entertained lightly by the courts." ***Id.***

Mentzel argues that the trial court should have granted his request for an entrapment instruction, and that the following facts support his entrapment defense. He did not knowingly allow The Lagoon to be used as a place of prostitution and did not witness and was not aware that dancers were soliciting or committing acts of prostitution at The Lagoon before a dancer (Edwyna Smith) was arrested on April 29, 1993. Mentzel fired Smith after her arrest. Mentzel was not aware that Vandekolk was baring her breasts or soliciting undercover officers. Mentzel never witnessed Bettin-Floyd commit an act of prostitution at The Lagoon and his discussions with her in June and July 1993 did not refer to prostitution at The Lagoon. If any illicit activities occurred at The Lagoon, they occurred when Mentzel was not present and without his knowledge and approval.

Viewing the evidence in the most favorable light it will reasonably admit from Mentzel's standpoint, we conclude that Mentzel did not show by a preponderance of the evidence that he was induced to permit The Lagoon to be used as a place of prostitution. *See* ***id.*** at 8, 492 N.W.2d at 384. The fact that Bettin-Floyd entered The Lagoon on two occasions in 1993 (June 15 and July 2) to record conversations with Mentzel regarding prostitution is not sufficient to establish excessive inducement. The evidence does not suggest that Bettin-Floyd did anything other than furnish Mentzel with an opportunity to permit his establishment to be used for prostitution. Bettin-Floyd broached the subject with Mentzel and Mentzel facilitated her request. As we have already stated, such "does not by itself constitute entrapment." ***Id.*** at 9, 492 N.W.2d at 384.

Mentzel claims that he never authorized prostitution on his premises, was unaware if it occurred and, if it did occur in the form of tipping the dancers, was mistaken as to whether the conduct was illegal. These assertions do not establish that Bettin-Floyd, as the government's agent, "used *excessive* incitement, urging, persuasion, or temptation ..." in an attempt to get Mentzel to permit prostitution at The Lagoon. *See* ***id.***

Additionally, we do not agree with Mentzel that the record substantiates that Bettin-Floyd committed an act of prostitution on the premises after she spoke with Mentzel on June 15. In the course of cross-examination, Bettin-Floyd was asked whether while acting as an informant she committed an act of prostitution at The Lagoon. Bettin-Floyd said she had not. She stated that when she was acting as an informant, she was wired and did not work on those nights. She did, however, testify that she went into The Lagoon when she was not wired and committed an act of prostitution. However, no effort was made to clarify the date on which Bettin-Floyd committed prostitution, and the record does not substantiate Mentzel's forceful assertion that she committed an act of prostitution a day or two after June 15, the first occasion on which she spoke with Mentzel in her capacity as an informant. While Bettin-Floyd has admitted to committing acts of prostitution at The Lagoon, the record does not substantiate that such acts occurred after she began acting as an informant.

As the State points out, even if Bettin-Floyd did commit an act of prostitution at The Lagoon after she spoke with Mentzel about soliciting prostitution from there, that fact alone would not have required an instruction on entrapment. Bettin-Floyd and Vandekolk testified that acts of prostitution

were ongoing at The Lagoon since shortly after it opened. The charge against Mentzel was intentionally allowing the continued use of The Lagoon as a place of prostitution between January 19 and June 30, 1993, contrary to § 944.34(2), STATS. Therefore, the fact that Bettin-Floyd may have engaged in prostitution on the premises subsequent to June 15 does not suffice as some form of inducement with regard to the acts which allegedly occurred prior to that date. We fail to see how the commission of a crime subsequent to the alleged inducement can itself be an inducement.

Mentzel apparently argues that Bettin-Floyd's commission of prostitution subsequent to her first recorded meeting with Mentzel was outrageous conduct warranting dismissal of the charges against him on due process grounds.[1] For a defendant to properly assert the "outrageous governmental conduct" defense, he or she must assert the violation of a specific constitutional right and demonstrate that prosecution of the defendant violates "fundamental fairness" and shocks "the universal sense of justice" mandated by the Due Process Clause of the Fifth Amendment. *See* ***State v. Hyndman,*** 170 Wis.2d 198, 208-09, 488 N.W.2d 111, 115 (Ct. App. 1992) (quoted source omitted).

Mentzel does not identify a specific constitutional right violated by Bettin-Floyd's allegedly outrageous conduct. Therefore, we need not address this argument further except to comment that Bettin-Floyd was instructed by her law enforcement contacts not to commit prostitution and she apparently disobeyed this admonition. Additionally, there was testimony at trial that acts of prostitution were ongoing at The Lagoon and that Bettin-Floyd was not the only dancer to solicit or engage in prostitution. We conclude that the conduct which Mentzel alleges was outrageous "does not amount to a violation of fundamental fairness that shocks the universal sense of justice." ***State v. Steadman,*** 152 Wis.2d 293, 302, 448 N.W.2d 267, 271-72 (Ct. App. 1989).

Finally, law enforcement officials testified at trial that they suspected prostitution was occurring at The Lagoon. These allegations, some of which were confirmed when undercover officers were solicited at The Lagoon,

[1] For purposes of this argument, we will assume that Bettin-Floyd did so even though the evidence is not clear on the point.

were a legitimate reason to begin investigating the club and were unrelated to Bettin-Floyd's allegedly outrageous conduct.

Mentzel next argues that the jury instruction for his alleged violation of § 944.34(2), STATS., posed a unanimity problem. Specifically, he complains that he was denied a unanimous verdict when the circuit court instructed the jury that it could find him guilty of the crime of keeping a place of prostitution if he *either* granted the use *or* allowed the continued use of his premises for that purpose, without further requiring the jury to unanimously agree on one or the other use of the premises. *See* ***id***.

In analyzing Mentzel's claim, we employ the analysis set out in ***Manson v. State,*** 101 Wis.2d 413, 304 N.W.2d 729 (1981). In considering Mentzel's contention that the instruction deprived him of a unanimous jury verdict, we read § 944.34(2), STATS., to determine whether the statute defines two offenses or one offense with alternative means of committing the offense. ***Manson,*** 101 Wis.2d at 419, 304 N.W.2d at 732. If the statute defines two offenses, jury unanimity as to each offense is required to convict the defendant of each offense. ***Id.*** However, if the statute creates only a single offense, then we must determine whether the jury may be instructed in the disjunctive without being instructed that unanimity is required as to each alternative. ***Id.***

Determining whether § 944.34(2), STATS., defines a single offense or two separate offenses depends upon legislative intent. ***Manson,*** 101 Wis.2d at 422, 304 N.W.2d at 734. We consider the following factors in assessing legislative intent: (1) the statute's language; (2) the statute's legislative history and context; (3) the nature of the proscribed conduct; and (4) the appropriateness of multiple punishment for the conduct. ***Id.***

That the prohibited conduct appears in the same subsection of § 944.34, STATS., suggests that § 944.34(2) encompasses a single idea: it is illegal to allow a place to be used for prostitution. "Grants the use" and "allows the continued use" are conceptually similar. *See* ***Manson***, 101 Wis.2d at 427, 304 N.W.2d at 736. Similarly, the nature of the proscribed conduct is similar, indicating a legislative intent that the conduct prohibited by § 944.34(2)—the use of premises for prostitution—is one offense which can be committed in two ways. *See* ***Manson***, 101 Wis.2d at 426, 304 N.W.2d at 736.

We need not examine the legislative history of § 944.34(2), STATS., to determine whether one or two offenses are contemplated. In ***Johnson v. State,*** 76 Wis.2d 672, 251 N.W.2d 834 (1977), our supreme court noted that "[p]roof of either ["allows" or "grants"] constitutes proof of a violation [of the statute]." ***Id.*** at 678, 251 N.W.2d at 837. Similarly, the comments to WIS J I—CRIMINAL 1571 recognize that § 944.34(2) contains "two alternatives" for committing the same offense. WIS J I—CRIMINAL 1571 at 2.

Mentzel also argues that the jury should have been given a mistake instruction. Section 939.43(1), STATS., provides: "An honest error, whether of fact or of law other than criminal law, is a defense if it negatives the existence of a state of mind essential to the crime." Mentzel testified that he did not believe that a patron coming in contact with the dancer's genital area while tipping her constituted "an act of prostitution." Mentzel claims that he was operating under a mistake of fact, i.e., a mistake as to what constitutes allowable conduct for dancers under Fond du Lac County's cabaret ordinance. The trial court denied Mentzel's request for WIS J I—CRIMINAL 770, the mistake instruction.

As we have already stated, a trial court may decline to give an instruction if the instruction is not reasonably required by the evidence. *See* ***Hilleshiem,*** 172 Wis.2d at 9, 492 N.W.2d at 384. We view the evidence in the most favorable light it will reasonably admit from the defendant's standpoint. ***Id.*** at 9-10, 492 N.W.2d at 384.

Prostitution is defined under § 944.30(5), STATS., as "commit[ting] or offer[ing] to commit or request[ing] to commit an act of sexual contact for anything of value." Sexual contact is defined as "any intentional touching ... either directly or through clothing by the use of any body part or object, of ... intimate parts if that intentional touching is either for the purpose of sexually degrading; or for the purpose of sexually humiliating ... or sexually arousing or gratifying ...." Section 940.225(5)(b), STATS.

Mentzel was not mistaken with regard to a fact; he was aware that the dancers accepted tips in the manner described. Rather, he claims to have been mistaken as to whether such conduct constituted prostitution—a criminal offense. However, such does not implicate the defense of mistake. A defendant

who correctly perceives the operable facts but does not believe that those facts amount to a violation of the criminal law is not entitled to a mistake instruction. *See* ***State v. Britzke,*** 108 Wis.2d 675, 683, 324 N.W.2d 289, 292 (Ct. App. 1982), *aff'd,* 110 Wis.2d 728, 329 N.W.2d 207 (1983). It is not a defense to be unaware that conduct is criminally punishable. ***Id.*** "A mistake of fact, then, is where one makes an erroneous perception of the facts which actually exist." ***State v. Bougneit,*** 97 Wis.2d 687, 693, 294 N.W.2d 675, 679 (Ct. App. 1980). The trial court did not err in declining to give the mistake instruction because the evidence did not reasonably require it.[2]

Finally, Mentzel argues that the trial court erroneously limited his cross-examination of Bettin-Floyd and Fond du Lac County Sheriff's Department Sergeant Mark Strand regarding what constitutes lewd and lascivious conduct and whether tipping an exotic dancer violated the criminal law or the County's cabaret ordinance.

Defense counsel asked Strand whether tipping a dancer violated the criminal law. Strand testified he was not aware that was true. At that point, the trial court interrupted and ruled that such inquiries invaded the province of the court to instruct the jury on the law. We see no error in the trial court's ruling. Mentzel did not qualify Strand as an expert who could express an opinion regarding the meaning of the criminal law. *See* § 907.02, STATS., 1991-92 (a witness qualified as an expert may testify in the form of an opinion). It is the province of the trial court to instruct the jury and to provide the jury with the law to be applied to the case. *See* WIS J I—CRIMINAL 100. Finally, the trial court has discretionary authority to control "the mode and order of interrogating witnesses and presenting evidence ...." Section 906.11(1), STATS.

Mentzel also complains that the trial court circumscribed his examination of Bettin-Floyd regarding when and how many times she allegedly committed acts of prostitution at the club. In an attempt to identify one specific

[2] Mentzel's proposed mistake instruction bears out his erroneous understanding of the necessity for the instruction. His proposed instruction stated: "There is evidence that at the time of the alleged offense the defendant believed that allowing dancers to accept tips from customers who touched them was not in violation of the criminal law." This statement indicates a mistake regarding the criminal law, not a mistake of fact, ***State v. Dahlk,*** 111 Wis.2d 287, 305, 330 N.W.2d 611, 621 (Ct. App. 1983), and is not cognizable under § 939.43(1), STATS.

act of prostitution, defense counsel asked Bettin-Floyd to identify one person with whom she had sexual contact at The Lagoon. The State objected on relevance grounds and the trial court sustained the objection. Mentzel also complains that the trial court precluded him from examining Bettin-Floyd regarding inconsistencies between her testimony at trial and at the preliminary examination.

On direct examination, Bettin-Floyd testified that when she referred to "customers," she meant people who came to see her dance and with whom she spent time other than at work. She engaged in acts of prostitution with some of her customers. On cross-examination, defense counsel wanted to impeach Bettin-Floyd with testimony she gave at the preliminary examination as to what she meant when she talked to Mentzel about "customers." At the preliminary hearing, Bettin-Floyd testified that by "customers," she meant people who came to see her dance, some of whom engaged in acts of prostitution with her. Even though the trial court disallowed this line of inquiry at trial, defense counsel asked Bettin-Floyd whether she remembered testifying at the preliminary examination that she entertained customers by dancing rather than by prostitution. Bettin-Floyd responded that although she did not consider herself a prostitute, she had committed acts of prostitution. She acknowledged that Mentzel had hired her to be a dancer, not a prostitute.

At each court appearance, Bettin-Floyd admitted committing acts of prostitution with Lagoon customers. We see no error in the trial court's decision to preclude impeachment of otherwise consistent testimony.

Mentzel also argues that the trial court improperly curtailed defense questioning of Bettin-Floyd about her knowledge of Vandekolk's solicitation activities at The Lagoon when Mentzel was not present. Bettin-Floyd testified that the level of prostitution was pretty steady regardless of whether Mentzel was on the premises. Mentzel claims that his inability to question Bettin-Floyd about Vandekolk's solicitation activities deprived him of the opportunity to present a significant part of his defense, i.e., that solicitation for or acts of prostitution occurred at The Lagoon in his absence and without his knowledge. However, Bettin-Floyd did testify that she never heard Mentzel direct Vandekolk to commit any acts of prostitution and she did not know whether he had ever done so. We are not convinced that the trial court precluded the development of this defense.

Mentzel also complains that the trial court limited questioning of Bettin-Floyd regarding her recollection of tape recorded conversations with Mentzel. Mentzel argues that these discussions were probative as to his knowledge and state of mind about Bettin-Floyd's activities. Mentzel does not adequately demonstrate on appeal why the trial court erred.

We conclude that the foregoing evidentiary rulings were properly made in the exercise of the trial court's discretion. *See* ***State v. Lindh,*** 161 Wis.2d 324, 348, 468 N.W.2d 168, 176 (1991) (evidentiary rulings are within the trial court's discretion).

By the Court.—Judgment affirmed.

This opinion will not be published. *See* RULE 809.23(1)(b)5, STATS.