COURT OF APPEALS
DECISION
DATED AND FILED

July 26, 2005

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 2005AP771-CR **Cir. Ct. No. 2004CM7812**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

CONSTANTINE F. WEIMER,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Milwaukee County: WILLIAM D. GARDNER, Judge. *Affirmed.*

¶1 KESSLER, J.[1] Constantine F. Weimer appeals from a conviction for solicitation, contrary to WIS. STAT. § 944.30(1). Weimer offered to pay a woman, who was actually an undercover police officer, "$20.00 for sex." Weimer

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2) (2003-04).

argues that a defendant cannot be convicted for violating § 944.30(1) if all he says is that he will pay "$20.00 for sex" without further clarifying whether he is requesting the act of sexual intercourse, some other prohibited sex act, or a nonprohibited sex act. Weimer, who is married and has six children, argues there is no proof of what he meant by offering to pay "for sex" and, therefore, the intent element of solicitation for prostitution has not been established. Weimer also argues that the statute violates his substantive due process rights and his equal protection rights, if its application depends on the police officer's subjective interpretation of the offer. Finally, he contends that the statute is unconstitutionally vague. This court rejects his arguments and affirms the judgment.

BACKGROUND

¶2 For purposes of this appeal, Weimer has accepted as true the facts as found by the trial court.[2] The trial court found most credible the testimony of Officer Lisa Ordonez, whose testimony is summarized below.

¶3 On the afternoon of October 5, 2004, Ordonez was working as part of an anti-prostitution operation on Milwaukee's south side. Pursuant to her role as a female decoy, she walked from corner to corner to see if men approached her for prostitution. Other officers were stationed nearby, prepared to arrest the men once Ordonez gave them a pre-arranged signal.

[2] At trial, Weimer denied ever having made the statement in question, and essentially denied everything to which two police officers testified. Weimer offers an explanation for his presence in the area where he was arrested and for his conduct prior to the arrest, which the trial court found incredible.

¶4 Ordonez testified that she saw a maroon truck circle the block numerous times, and that she and the driver made eye contact more than once as the driver passed. Ordonez said that based on her training and experience, she believes the truck was probably driving around the block multiple times to look for police vehicles in the area.

¶5 Ordonez said that after circling the block several times, the driver pulled the truck to the side of the road and waived Ordonez over. She approached the vehicle and looked at the driver through the open passenger window. The driver asked Ordonez if she was a cop, and she said no. Then the driver asked Ordonez "to show him something to prove to him [that she] was not a cop." Ordonez began to walk away, stating again that she was not a cop. The driver "waived and hollered," indicating that Ordonez should come back. She went back to the car and the driver told her to get into the truck so they could go somewhere. Ordonez declined. The driver then said he would give Ordonez "$20.00 for sex." Ordonez gave her fellow officers a pre-arranged signal, indicating they could come and arrest the driver.

¶6 The driver, later identified as Weimer, was arrested and charged with violating WIS. STAT. § 944.30(1), for requesting "to have nonmarital sexual intercourse for anything of value." The matter was tried to the trial court. At the close of the State's case, Weimer moved to dismiss the complaint on grounds that even if Ordonez's testimony was true, the State had not proven that he was seeking "sexual intercourse" as opposed to phone sex or some other type of sex that is not a violation of § 944.30(1). The trial court denied the motion, relying on Ordonez's testimony that in the area where she was working, the price, coupled with the phrase "for sex," was commonly understood to mean sexual intercourse.

¶7 Weimer testified in his own defense. He vigorously disagreed with Ordonez, testifying that it was Ordonez who approached his vehicle, that Ordonez began the conversation, that Ordonez walked into the street and spontaneously opened the passenger door of his truck while he was stuck in traffic, and that Weimer never talked with Ordonez about sex or money. The trial court did not believe Weimer's testimony and found him guilty. This appeal followed.

DISCUSSION

¶8 Weimer articulates the issues in several different ways throughout his brief. This court begins with the threshold question: was there sufficient evidence to convict Weimer of violating WIS. STAT. § 944.30(1)?[3] When reviewing the sufficiency of the evidence to support a conviction, this court will affirm the conviction unless the evidence, viewed most favorably to the State and the conviction, is so insufficient in probative value and force that no reasonable

[3] WISCONSIN STAT. § 944.30 provides in its entirety:

> **Prostitution.** Any person who intentionally does any of the following is guilty of a Class A misdemeanor:
>
> **(1)** Has or offers to have or requests to have nonmarital sexual intercourse for anything of value.
>
> **(2)** Commits or offers to commit or requests to commit an act of sexual gratification, in public or in private, involving the sex organ of one person and the mouth or anus of another for anything of value.
>
> **(3)** Is an inmate of a place of prostitution.
>
> **(4)** Masturbates a person or offers to masturbate a person or requests to be masturbated by a person for anything of value.
>
> **(5)** Commits or offers to commit or requests to commit an act of sexual contact for anything of value.

trier of fact could have found guilt beyond a reasonable doubt. ***State v. Poellinger***, 153 Wis. 2d 493, 501, 451 N.W.2d 752 (1990). This court concludes there was sufficient evidence to support the conviction.

¶9 The trial court found that Ordonez's testimony was credible. Based on that testimony, the established facts are that Weimer circled the block several times, called Ordonez to the car, asked her if she was a cop, asked her to get in the truck, and then said he would give her "$20.00 for sex." Weimer does not contend that the facts leading up to the actual offer are inconsistent with solicitation of prostitution. His only argument is that saying "$20.00 for sex" is insufficient to establish that Weimer was seeking sexual intercourse, as opposed to sexual activity prohibited by other subsections of WIS. STAT. § 944.30 (*e.g.,* oral or anal sex), or other sexual activity not prohibited by the statute (*e.g.*, erotic phone conversations).

¶10 Weimer argues that the arresting officer's interpretation of the word "sex," in the context of these events, is not relevant to the factual determination of Weimer's intent. He explains:

> Under the State's interpretation [of WIS. STAT. § 944.30], if "Sex" to Officer A means "Oral Sex or Anal Sex" then a defendant who asks simply for "Sex" could be charged under [§ 944.30(2)]. However, if "Sex" to Officer B means "Masturbation" then the same conduct could be charged under [§ 944.30(3)] and so on down through the list enunciated in the statute….
>
> In the instant case Weimer merely asked for "Sex" and because to Officer Ordonez this generic word always means "Sexual Intercourse" the State charged Weimer under [§ 944.30(1)]. But what if by "Sex" Weimer was referring to, say, "Phone Sex"? If all he was exploring was whether the woman was willing to call him on his cell phone later that day and make obscene remarks to him, there was no violation of any of the subsections of the statute.

(Emphasis in original.)

¶11 To convict Weimer of violating WIS. STAT. § 944.30(1), the State had to prove three elements: (1) that Weimer offered to have nonmarital sexual intercourse; (2) that the offer was for something of value; and (3) that Weimer acted intentionally. *See* WIS JI—CRIMINAL 1560 (1995). The trial court had to find that the phrase "$20.00 for sex" was intended as an offer for sexual intercourse. There are several bases upon which the trial court could so find. The testimony from Ordonez about her experience with use of that term, the trial court's own independent ability to interpret a commonly used word, and all of the surrounding circumstances, provide proof beyond a reasonable doubt that Weimer was offering money in exchange for sexual intercourse.

¶12 Ordonez testified that, based on her work experience in the area where she was working, the usual charge for sexual intercourse is twenty dollars, and the term "sex" means "sexual intercourse." Weimer acknowledges that defendants do not have to use the precise words used in the statute to be found guilty. He concedes that the five prohibited categories of WIS. STAT. § 944.30 "extend to the ***street vernacular equivalent*** of each." (Emphasis in original.) However, Weimer contends that because Ordonez did not testify that "in *street vernacular* the word 'Sex' always means sexual intercourse," he cannot be convicted. (Emphasis in original.) This court disagrees. Ordonez's testimony that to her, based on her experience, the term "sex" means "sexual intercourse," is tantamount to saying that in that area "sex" is the street vernacular equivalent of "sexual intercourse." Ordonez's testimony about the common usage of the term in the specific area where she was working is a fact upon which the trial court could base its finding.

¶13 Even without Ordonez's testimony about the meaning of the term "sex," the trial court could find that the term meant sexual intercourse, based on the generally accepted meaning of the word "sex." Numerous dictionaries include "sexual intercourse" as one definition of the word "sex." *See* BLACK'S LAW DICTIONARY 1379 (7th ed. 1999); WEBSTER'S II NEW COLLEGE DICTIONARY 1012 (1995); and THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 1653 (3d ed. 1992). Factfinders may rely on their own life experiences to make factual determinations. Whether the word "sex" means "sexual intercourse" in the common vernacular can be a matter within the factfinder's experience.

¶14 Here, the trial court found that it was reasonable to infer from all the surrounding circumstances that the use of the word "sex" as used by Weimer in his offer meant sexual intercourse. All of the surrounding circumstances can be considered in determining the intent of the person making the offer. ***State v. Wilson***, 41 Wis. 2d 29, 33-34, 162 N.W.2d 605 (1968). Here, the circumstances included Weimer circling the block numerous times, Weimer asking Ordonez if she was a cop, Weimer asking her to "show him something" to prove she was not a cop, Weimer initiating the contact, renewing the contact, inviting her into the truck and making the proposal of sex for twenty dollars. Ordonez testified that, based on her experience, a prostitute on 31st and National typically charges twenty dollars for sexual intercourse. Twenty dollars was the precise amount offered by Weimer.

¶15 The case law Weimer offers in support of his position does not compel a different result. Weimer cites ***Wilson***, where the court observed that because the defendant, a prostitute, had offered a man a "half and half" without explaining what that meant, the State would have had difficulty meeting its burden

of proof if not for the surrounding facts and circumstances. ***Id.*** at 34. Those include: defendant initiated the contact; defendant set the price; defendant had the officer follow her to a residence; defendant introduced the officer to a third party; defendant took money from the officer to pay a third party for use of the room; defendant told the officer to put the money on the dresser; and defendant left and returned with soap and water. *See* ***id.***

¶16 Weimer also relies on ***State v. Kittilstad***, 231 Wis. 2d 245, 603 N.W.2d 732 (1999), where the court stated that when evaluating charges under WIS. STAT. § 944.30, it "looks to the individual mental state of the particular person who is alleged to have engaged in acts constituting prostitution[.]" *See* ***Kittilstad***, 231 Wis. 2d at 260. However, the supreme court in ***Kittilstad*** repeatedly referred to the defendant's numerous requests that various individuals "have sex" in the context of whether that can be solicitation of prostitution. The supreme court concluded that the commonly understood meaning of "have sex" is sexual intercourse or other conduct prohibited by WIS. STAT. § 944.30. The trial court here found that it could infer Weimer's intent from the combination of the words he used and his actions. Were the test otherwise, a defendant could always defeat a solicitation charge by testifying that his or her subjective intent, when offering money "for sex," was really to take the other person to a movie, to dinner, or to a rock concert. If this court were to adopt Weimer's theory of what is required for proof of intent, conviction of anyone for solicitation of prostitution would become nearly impossible. As the supreme court has explained, "[t]his court seeks to avoid interpretations that produce unreasonable results." ***Kittilstad***, 231 Wis. 2d at 260.

¶17 Weimer's constitutional challenges to the statute are equally unconvincing. He claims that the statute denies him substantive due process

because police officers interpret words and terms differently, and may therefore charge two defendants differently, even if both used exactly the same words. Weimer presents no concrete example of such event. As noted earlier, this argument fails because ultimately, the factfinder still must determine the defendant's intent beyond a reasonable doubt from all the surrounding facts and circumstances. If there is credible evidence that the term "sex" was used to refer to oral sex in one case and sexual intercourse in another, both findings can be sustained on appeal.

¶18 Weimer also presents an equal protection challenge, arguing that because officers make charging recommendations based on their interpretation of words defendants use, this is a subjective application of WIS. STAT. § 944.30 that violates equal protection. This court is not persuaded. Just as the State may charge one domestic disturbance as disorderly conduct and a similar matter as battery, the ultimate determination of facts rests with the factfinder. If a factfinder agrees with a defendant that the State has failed to meet its burden of proof, the defendant will be acquitted. It so happens that in this case, the State met its burden of proof. This court discerns no constitutional violation.

¶19 Finally, Weimer argues that WIS. STAT. § 944.30 is unconstitutionally vague because under the application in this case, "just saying the word 'Sex' is a crime[.]" However, as this court has previously explained, because the factfinder must consider *all* of the surrounding facts and circumstances, merely uttering the word "sex" would not be sufficient, in the absence of other very persuasive circumstances, to sustain a conviction. The statute is not unconstitutionally vague. Sexual intercourse is explicitly identified in the statute. Weimer was on notice that one could not offer money in exchange for sexual intercourse. What Weimer is again challenging is the trial court's

finding that Weimer indeed did so. For the reasons previously explained, the trial court's finding is not clearly erroneous.

By the Court.—Judgment affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)4.