COURT OF APPEALS
DECISION
DATED AND FILED

August 5, 2008

David R. Schanker
Clerk of Court of Appeals

Appeal Nos. 2007AP883-CR
2007AP2289-CR

Cir. Ct. No. 2005CF215

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

HAJJI Y. MCREYNOLDS,

DEFENDANT-APPELLANT.

APPEALS from a judgment and an order of the circuit court for Eau Claire County: BENJAMIN D. PROCTOR, Judge. *Affirmed.*

Before Hoover, P.J., Peterson and Brunner, JJ.

¶1 PER CURIAM. Hajji McReynolds appeals a judgment convicting him of three counts of soliciting women to work as prostitutes for his escort service and three counts of bail jumping. He also appeals an order denying a

postconviction motion in which he alleged ineffective assistance of trial counsel. He argues: (1) the court conducted an inadequate inquiry when McReynolds decided to represent himself at the preliminary examination; (2) the court's finding that McReynolds was competent to stand trial was clearly erroneous, the psychologist's report should not have been utilized because the psychologist had a conflict of interest and McReynolds' trial counsel was ineffective for failing to object to the competency evaluation or request an additional evaluation; (3) the State presented insufficient evidence to support the guilty verdicts; (4) the trial court improperly allowed hearsay evidence and should have admitted an additional statement from a missing witness; and (5) McReynolds' trial counsel was ineffective for failing to move to suppress evidence seized pursuant to a search warrant and for asking a witness a question that led to a prejudicial answer. We reject these arguments and affirm the judgment and order.

BACKGROUND

¶2 The State presented evidence that McReynolds, while released on bail from felony charges, solicited Justine Casas, Stephanie Steele and Melissa Rongstad to act as prostitutes. McReynolds' former girlfriend and several of his associates, including Rongstad, testified that McReynolds established the escort service as a front for prostitution and had prepared a document indicating sexual activities were prohibited in order to shield himself from liability. Although McReynolds did not testify, he offered evidence through Steele and cross-examination of the State's witnesses that McReynolds did not require the escorts to provide sexual services. The jury convicted McReynolds on all six counts.

¶3 Before the preliminary examination, McReynolds' attorney had questioned his competency to proceed. After Dr. Harlan Heinz concluded

McReynolds was competent to stand trial, McReynolds and his attorney, Susan Meade, agreed that McReynolds was competent. They reached this determination knowing that Heinz was related to the assistant district attorney who was prosecuting McReynolds in another action. McReynolds later discharged Meade and represented himself at the preliminary examination.

DISCUSSION

Competency to stand trial.

¶4 McReynolds' challenge to his competency to stand trial and his argument that Heinz had a conflict of interest fail for several reasons. First, McReynolds waived his right to seek appellate review by failing to raise the issue in a postconviction motion. *See* ***State v. Huebner***, 2000 WI 59, ¶10, 235 Wis. 2d 486, 611 N.W.2d 727. Second, McReynolds and his attorney, knowing of Heinz's relationship to the prosecutor, withdrew any objection to the competency evaluation and agreed that McReynolds was competent to stand trial. Third, McReynolds has not established that he was in fact incompetent to proceed. His evidence of incompetency consists of a diagnosis that he is bipolar, and he states he was not taking his medication. This diagnosis does not establish an inability to assist in preparation of a defense, understand the nature and object of the proceedings or consult with counsel. As the trial court observed, not every mentally disordered defendant is incompetent. *See* ***State v. Byrge***, 2000 WI 101, ¶48 n.1, 237 Wis. 2d 197, 614 N.W.2d 47. Psychiatric problems alone are not sufficient to find a defendant incompetent. ***State ex rel. Haskins v. Dodge County Court***, 62 Wis. 2d 250, 263, 214 N.W.2d 575 (1974).

¶5 McReynolds faults his attorney for failing to object to Heinz's competency evaluation and failing to request an additional evaluation. That issue is not properly preserved because McReynolds did not call Meade as a witness at the postconviction hearing. For a claim of ineffective assistance of counsel to succeed, counsel must testify at the hearing to establish counsel's strategy. *See* ***State v. Machner***, 92 Wis. 2d 797, 804, 285 N.W.2d 905 (Ct. App. 1979).

McReynolds' competency to represent himself at the preliminary examination.

¶6 McReynolds argues that the court denied him his right to counsel by conducting an inadequate inquiry into his waiver of counsel at the preliminary examination and his competency to represent himself. That issue cannot be raised at this time. A conviction resulting from a fair and errorless trial cures any error at the preliminary hearing. ***State v. Webb***, 260 Wis. 2d 622, 628, 467 N.W.2d 108 (1991). A defendant who claims error occurred at his preliminary hearing may only obtain relief before trial. ***Id.***

Sufficiency of the evidence.

¶7 When reviewing the sufficiency of the evidence to support a conviction, this court defers to the jury. ***State v. Wilson***, 149 Wis. 2d 878, 894, 440 N.W.2d 534 (1989). This court can reverse the conviction only if the evidence viewed most favorably to the State is so insufficient in probative value and force that it can be said as a matter of law that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt. ***State v. Poellinger***, 153 Wis. 2d 493, 501, 451 N.W.2d 752 (1990). This court must accept any appropriate inferences the jury may have drawn from the facts. ***Id.*** at 506-07.

¶8 One commits a felony who intentionally solicits or causes any person to practice prostitution. *See* WIS JI—CRIMINAL 1566 (2006). Intentional solicitation requires that the defendant engaged in solicitation intending that the crime of prostitution be committed. ***Id.*** "To solicit" means to "command, encourage, or request another person to engage in specific conduct that constitutes the practice of prostitution." ***Id.*** "To practice prostitution" means "intentionally engaging in sexual intercourse or other sexual acts for anything of value on an ongoing basis." ***Id.***

¶9 The State presented sufficient evidence to support the convictions. Faith Briggs testified that when she dated McReynolds, he discussed a possible business venture with her. One of the services the business would provide was prostitution. She testified he prepared a document prohibiting employees from any sexual activities to shield him from liability. Briggs testified that she heard McReynolds talk with Steele about working as an escort, and Steele told Briggs she intended to engage in prostitution.

¶10 Shelly Weidler testified that McReynolds asked her to become involved in an escort business. He told her "the girls went out for dinner and then they had sex afterwards," and the women were paid for sex. Weidler also testified that she heard Casas and Steele talk about having sex for money. Weidler testified that Casas told her about a trip to the Minneapolis/St. Paul area where Casas had sex for money. Casas was upset because she only made $50. The rest of the money went to McReynolds.

¶11 Rongstad testified about group discussions regarding how the business would be run. Rongstad described how she, McReynolds, Steele and Casas had gone to Mall of America and passed out cards to "business-looking

men, men that looked like they had money." She identified a flyer placed in men's rooms advertising "sex-sex-sex" for bachelor parties, one on ones, dinner dates, topless/nude massages, and stating "You want it, You pay for it, You got it." Rongstad testified that McReynolds had not said the escorts had to have sex with their clients, but they should "make them happy so they come back." He also suggested that the escorts shave their vaginal area. Rongstad told the jury that McReynolds had set up a date for Steele, but they cancelled the date because they thought the man might have been an undercover police officer. Rongstad also testified that Casas told her she had "given a guy a hand job" on a dinner date and had been paid $200.

¶12 From these facts, the jury could reasonably find that McReynolds' solicited the three women to perform prostitution services. McReynolds' prohibition of prostitution can reasonably be seen as a guise to escape criminal liability while he actively encouraged and facilitated acts of prostitution.

Admissibility of Justine Casas' statements.

¶13 McReynolds argues that Casas' statements to Weidler and Rongstad were inadmissible hearsay and the trial court's conclusion they were admissible as statements of a co-conspirator and statements against penal interest were not supported by any evidence. Casas' statements to Rongstad were admissible under WIS. STAT. § 908.01(4)(a),[1] as statements made by a co-conspirator during the course of and in furtherance of the conspiracy. Casas' statements to Weidler were admissible under WIS. STAT. § 908.045(4) as statements against interest. Contrary

[1] All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

to McReynolds' assertion, in reaching these conclusions, the trial court was not required to base its decision on the actual testimony or written statements of the witnesses. Rather, the court may base an evidentiary ruling on an offer of proof made through the statements of counsel. *See* ***State v. Dodson***, 219 Wis. 2d 65, 76, 580 N.W.2d 181 (1998). The proffered testimony was described to the court in a letter from the district attorney. The statements as described in the letter furthered the conspiracy to operate a prostitution business and exposed Casas to criminal liability for prostitution.

¶14 McReynolds also argues that if Casas' statements were admitted, under the "rule of completeness," the court should have admitted Casas' statement to police in which she denied exchanging sexual services for money. McReynolds argues that the court improperly relied on ***Crawford v. Washington***, 541 U.S. 36 (2004), when it disallowed the statement to police. The rule of completeness refers to introducing an entire writing or recorded statement when a part of it is introduced. *See* WIS. STAT. § 901.07. It does not apply to Casas' statement to police because the State did not introduce any part of that statement. The rule of completeness does not authorize introduction of a separate hearsay statement following admission of statements that are properly admitted.

¶15 Contrary to McReynolds' argument, the trial court did not rely on ***Crawford*** to exclude Casas' statement to police. The statement was excluded because it is hearsay. McReynolds identifies no exception to the hearsay rule that would allow admission of the statement.

Effective assistance of counsel.

¶16 To establish ineffective assistance of counsel, McReynolds must show that his counsel's performance was deficient and that the deficiency prejudiced his defense. ***Strickland v. Washington***, 466 U.S. 668, 694 (1984). To show deficient performance, he must show specific acts or omissions by the attorney that were outside the range of professionally competent assistance. ***Id.*** at 690. To establish prejudice, he must show a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different. ***Id.*** at 694. A reasonable probability is one that undermines this court's confidence in the outcome. ***Id.*** If a defendant fails to prove one prong, the reviewing court need not address the other prong. ***State v. Nielsen***, 2001 WI App 192, ¶12, 247 Wis. 2d 466, 634 N.W.2d 325.

¶17 McReynolds has not established deficient performance or prejudice from his trial counsel's failure to file a motion to suppress evidence seized pursuant to a search warrant. At the postconviction hearing, attorney Francis Rivard testified that he saw no basis for suppressing the evidence. We agree. Citing ***United States v. Harju***, 384 F. Supp. 2d 1278, 1286 n.6 (E.D. Wis. 2005), *rev'd*, 466 F.3d 602 (7th Cir. 2006), McReynolds argues that the statements of two informants in support of the warrant provide merely repetition, not independent verification. In ***Harju***, the court relied on a single person making the same allegation twice. Here, two separate sources provided the information leading to the search warrant, and they corroborated each other. One informant said McReynolds was running a sex-for-money escort service out of a residence located at a specific address. The informant identified the prostitutes by name and gave details about the transportation to Minneapolis/St. Paul and the financial

arrangements between McReynolds and the prostitutes. The second informant identified the same prostitutes by name and gave the same address for the business.

¶18 McReynolds also faults Rivard for his cross-examination of Weidler in which he asked Weidler whether she ever saw McReynolds encourage the escorts to have sex or tell them they had to have sex. Weidler answered that he put pressure on them. Rivard then asked what McReynolds specifically did. Weidler answered, "One day he got into a fight with Melissa and he fractured her skull. The girl that was just in here testifying, she told me that 45 minutes ago." McReynolds has not established deficient performance based on Rivard asking the question. Rivard could not have reasonably anticipated that Weidler would have responded as she did. Rivard asked Weidler to provide a specific example of McReynolds pressuring the escorts to have sex. Based on police reports, Rivard had no reason to believe the witness could identify a specific instance. Instead of answering the question, Weidler described an incident in which McReynolds struck an escort who was trying to leave his employment, regardless of whether that employment involved sexual activity. Counsel cannot be expected to anticipate a nonresponsive answer based on information the witness heard forty-five minutes before she testified. Because counsel's performance was not deficient, the ineffective assistance of counsel claim fails.

By the Court.—Judgment and order affirmed.

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