IN THE COURT OF APPEALS OF IOWA

No. 9-906 / 08-2034
Filed March 10, 2010

STATE OF IOWA,
Plaintiff-Appellee,

vs.

LEONARD RAY RUSSELL,
Defendant-Appellant.

Appeal from the Iowa District Court for Crawford County, Edward A. Jacobson, Judge.

A defendant appeals his judgment and sentence, challenging the sufficiency of the evidence and certain jury instructions, the district court's ruling on his new trial motion, and the district court's imposition of a fine. **CONVICTION AFFIRMED, SENTENCE VACATED IN PART AND CASE REMANDED FOR RESENTENCING.**

Mark C. Smith, State Appellate Defender, and Theresa R. Wilson, Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Linda J. Hines, Denise Timmins, and Susan Krisko, Assistant Attorneys General, and Vicki Ryan, County Attorney, for appellee.

Considered by Sackett, C.J., and Vaitheswaran and Danilson, JJ.

VAITHESWARAN, J.

Leonard Russell appeals his judgment and sentence for ongoing criminal conduct, two counts of human trafficking, and two counts of pandering. He raises challenges to the sufficiency of the evidence and certain jury instructions, the district court's ruling on his new trial motion, and the district court's imposition of a fine.

I. Background Facts and Proceedings

Two girls, aged fifteen and sixteen, ran away from a Nebraska juvenile home and made their way to a hotel in Omaha. A woman who introduced herself as Jazzie invited the girls to her room to smoke marijuana. Jazzie later introduced them to Russell. The girls were invited to join Jazzie and Russell on a road trip and were told they would have to make money along the way. The girls agreed to go. Prior to leaving, Russell gave one of the girls an identification card of a twenty-three or twenty-four-year old woman. The girls were later told that they would have to work at strip clubs and as prostitutes.

In the days that followed, one or both of the girls performed at strip clubs and had sex in exchange for money. In time, law enforcement officers learned of the runaways' whereabouts and apprehended them. Based on information provided by the girls, they also apprehended Russell. The State charged Russell with the crimes listed above and a jury found Russell guilty as charged.

Russell moved for a new trial, in which he challenged the credibility of the witnesses. The district court denied the motion. The court imposed sentence, which included a fine of $1000 in connection with the conviction for ongoing criminal conduct. Russell appealed.

II. Sufficiency of the Evidence

A. Ongoing Criminal Conduct

The jury was instructed that the State would have to prove the following elements of ongoing criminal conduct:

> 1. During August of 2007, the defendant did commit or did aid and abet in committing acts of specified unlawful activity; namely Human Trafficking or Pandering.
> 2. Concerning element number 1 above, the phrase "specified unlawful activity" means the Human Trafficking or Pandering were preparatory or completed offenses, committed for financial gain and on a continuing basis and are punishable as indictable offenses.
> 3. Concerning element number 2 above, the phrase "on a continuing basis" means that two or more acts of specified unlawful activity occurred and that the acts had the same or similar purpose, results, participants, victims, or method of commission or otherwise are interrelated by distinguishing characteristics or are not isolated events and there was a threat of continuing activity.

Russell challenges the sufficiency of the evidence supporting the "on a continuing basis" prong of the second element. He contends trial counsel was ineffective in failing to challenge this element.

An ineffective-assistance-of-counsel claim is a means of reaching an issue that was not preserved for review. *State v. Truesdell*, 679 N.W.2d 611, 615–16 (Iowa 2004) ("The failure of trial counsel to preserve error at trial can support an ineffective-assistance-of-counsel claim."). So, for example, if trial counsel fails to challenge the sufficiency of the evidence supporting a particular element of a crime, a defendant may nonetheless raise that challenge on appeal by claiming counsel was ineffective in failing to raise it. *See id.*

Here, trial counsel challenged the State's proof that the crime of ongoing criminal conduct was committed "on a continuing basis." Specifically, counsel

moved for a judgment of acquittal on the ground that "[t]here certainly [was] no showing of any financial gain, let alone on the continuing basis." For this reason, we conclude error was preserved and this challenge need not be analyzed under an ineffective-assistance-of-counsel rubric. Our standard of review, therefore, is not de novo, but for errors of law. *Id.* at 615. We must determine whether substantial evidence supports the jury's finding of guilt. *State v. Bass*, 349 N.W.2d 498, 500 (Iowa 1984).

As noted above, the district court defined "on a continuing basis" as two or more criminal acts that were interrelated or not isolated events, where there was a "threat of continuing activity." Russell essentially contends that there was no threat of continuing activity because, by the time authorities approached Russell, one of the girls was on her way to Washington, D.C. and there was "scant evidence" of a "threat of repetition of predicate acts involving" the other girl. A reasonable juror could have found otherwise.

Viewing the evidence in the light most favorable to the State as we must on a challenge to the sufficiency of the evidence, *see id.*, the record reflects that one of the girls was on her way to Washington, D.C. because Russell offered her the opportunity to either continue in the strip club and prostitution business in Iowa or learn the prostitution business better with an acquaintance of his in D.C. The other girl testified that she was afforded the same opportunity to go to D.C. and was told that, if she took it, she would be working as a prostitute for Russell's cousin. The second girl told Russell that she would continue to work at the strip club in Iowa. There was also testimony that at one point, Russell or his associate

Jazzie placed an ad on Craigslist for exotic services picturing the two girls soliciting future "work."

This testimony amounts to substantial evidence in support of the jury's finding that Russell engaged in human trafficking or pandering "on a continuing basis." *See State v. Reed*, 618 N.W.2d 327, 334–35 (Iowa 2000) (looking in part to past criminal acts in determining whether defendant intended to continue criminal activity). Although the time frame of the criminal activity was not lengthy, it was shortened by the successful intervention by law enforcement. Accordingly, we affirm the jury's finding of guilt on the ongoing criminal conduct count.

B. Human Trafficking

The jury was instructed that the State would have to prove the following elements of human trafficking:

> 1. During August of 2007, the defendant did knowingly participate or aid and abet the participation in a venture to recruit, harbor, transport, or supply provisions for the purpose of the commercial sexual activity of A.H. or C.C.
> 2. A.H. and C.C. are under the age of eighteen.

The jury was further instructed that "commercial sexual activity" means "any sex act on behalf of which anything of value is given, promised to, or received by any person and includes, but is not limited to, prostitution and performance in strip clubs." "Sex act" was defined for the jury as sexual contact between specified body parts.

Russell maintains that trial counsel was ineffective in failing to challenge the sufficiency of the evidence supporting the "commercial sexual activity" language of the first element. He contends Iowa Code section 710A.1(1) (2007), the statute on which the human trafficking instruction is based, qualifies a

performance in a strip club "as commercial sexual activity but requires a predicate sex act." He argues "there is no evidence [the girls] engaged in any sex acts during their performances" at the strip clubs.

Trial counsel did not make this argument in his motion for judgment of acquittal. Therefore, we will review the challenge under an ineffective-assistance-of-counsel rubric. *Truesdell*, 679 N.W.2d at 615–16. Our review is de novo. *Id.* at 615.

We begin by noting that Russell focuses on only one portion of the human trafficking definition. When read as a whole, section 710A.1(1) and the instruction used here require a showing that a person participated "in a venture to recruit, harbor, transport, or supply provisions for the purpose of" a commercial sexual activity. *See* Iowa Code § 710A.1(4). Neither the statute nor the instruction requires proof of sex acts by the recruited persons.

Applying the entire sentence of the first element to the facts, there is no question that the State proved the challenged element. The record reflects that Russell's young assistant, Jazzie, recruited the girls to participate in prostitution and stripping. Russell transported the girls from town to town and from strip club to strip club. He or Jazzie told them how to attract customers and what to do to detect undercover law enforcement officers. Most of the money the girls made was handed over to Jazzie or Russell. Russell made the choices for the girls. They were told "he was pretty much a pimp and that we had to go out and make his money." In light of this evidence, trial counsel was not ineffective in failing to challenge the first element of human trafficking. We would reach this conclusion

even if the instruction were read to require a sex act, as the record contains evidence that both girls engaged in sex acts for money with three men in a car.

Russell also argues that his challenge to the sufficiency of the evidence on the human trafficking count "puts the jury instructions regarding Ongoing Criminal Conduct into question," as that crime requires proof of human trafficking. Our resolution of Russell's challenge to the human trafficking count disposes of this jury instruction issue.

III. New Trial Motion

Russell contends that the district court abused its discretion in overruling his motion for new trial based on the weight of the evidence. He argues that the court applied the incorrect standard in ruling on his motion. As error was preserved on this issue, we will proceed to the merits. Our review of the district court's ruling is for an abuse of discretion. *State v. Reeves*, 670 N.W.2d 199, 202 (Iowa 2003).

In denying the new trial motion, the district court stated,

> Now, I agree with [defense counsel] that these certainly were not the most credible witnesses I have ever heard testify. They did, however, admit to the jury they lied at various times while giving statements. They both insisted that they were telling the truth on the witness stand. The jury was properly instructed on determining the truth and veracity of the witnesses' testimony and was told that if they believe that the witness knowingly falsely testified, they could disregard any and all [of] that witness'[s] testimony. And it is apparent that the jury believed that version of the testimony that the girls told here under oath in court. And certainly if that testimony is believed, the weight of the evidence was virtually 100 percent in favor of the State and against the defendant.
>
> Thus, I don't think that part of the motion has any merit and that is overruled.

There is no question that the court used the correct standard in ruling on this portion of Russell's new trial motion. *See State v. Ellis*, 578 N.W.2d 655, 658 (Iowa 1998) ("The 'weight of the evidence' refers to 'a determination [by] the trier of fact that a greater amount of credible evidence supports one side of an issue or cause than the other.'" (quoting *Tibbs v. Florida*, 457 U.S. 31, 37–38, 102 S. Ct. 2211, 2216, 72 L. Ed. 2d 652, 658 (1982))). We also find no abuse of discretion in the court's application of that standard. The court mentioned the girls' testimony and made a judgment that they were not the most credible witnesses. The court nonetheless denied the motion, a ruling that is consistent with the Iowa Supreme Court's admonition to exercise judicial discretion "carefully and sparingly." *Id.* at 659. For these reasons, we affirm the district court's ruling.

IV. Fine

Russell challenges the $1000 fine imposed in connection with his sentence for ongoing criminal conduct. The State agrees with Russell that there is no statutory authority supporting this fine. *See* Iowa Code §§ 706A.4 (classifying ongoing criminal conduct as a class "B" felony); 902.9(2) (authorizing confinement of no more than twenty-five years, but not mentioning a fine). Accordingly, we vacate that portion of Russell's sentence. *See State v. Ross*, 729 N.W.2d 806, 809 (Iowa 2007) ("Accordingly, the unauthorized fines imposed as part of the defendant's sentences must be vacated.").

CONVICTION AFFIRMED, SENTENCE VACATED IN PART AND CASE REMANDED FOR RESENTENCING.