[Cite as *State v. West*, 2009-Ohio-6270.]

IN THE COURT OF APPEALS OF MONTGOMERY COUNTY, OHIO

STATE OF OHIO	:	
Plaintiff-Appellee	:	C.A. CASE NO. 22966
vs.	:	T.C. CASE NO. 08CR1152
VICKIE L. WEST	:	(Criminal Appeal from Common Pleas Court)
Defendant-Appellant	:	

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O P I N I O N

Rendered on the 25th day of November, 2009.

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GRADY, J.:

{¶ 1} Defendant, Vickie L. West, appeals from her convictions for soliciting another to engage in sexual activity for hire after a positive HIV test, R.C. 2907.24(B), and stopping the operator of a vehicle with a purpose to engage in such solicitation, R.C.

2907.241(A), (B). West was sentenced to concurrent prison terms totaling four years for her two offenses.

{¶ 2} Detective Thomas Harshman of the Dayton Police Department Vice Crime Unit testified at West's trial that he drove to a busy intersection in Dayton where West was seen speaking with drivers of vehicles that had stopped there. As Harshman approached the intersection, West extended her hand to make a hitchhiking signal. Harshman stopped, and West got into his car.

{¶ 3} Detective Harshman testified that West introduced herself as "Jessie" and that he introduced himself as "Tom." Harshman told West that he "was just killing time." West then asked, "Would you like a great blow job? I swallow." Harshman testified: "I told her, 'sure.' And then asked her what she needed for that." Harshman said West did not reply, and instead began "rubbing my penis on the outside of my pants." Harshman testified that prostitutes do that to determine whether the other person is a law enforcement officer. As they drove away, Harshman again "asked her what she needed." West replied "that she wanted a new pair of shoes, and that shoes cost $24; but she would settle for $20." (T. 124-126).

{¶ 4} Harshman drove to a bank where an ATM is located, to obtain the twenty dollars West had asked for. When they arrived, Harshman and another officer, Detective Raymond St. Clair, who

had observed and followed them, arrested West. Her arrest led to West's indictment on the charges for which she was eventually convicted.

FIRST ASSIGNMENT OF ERROR

{¶ 5} "APPELLANT RESPECTFULLY SUBMITS THAT SHE WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL GUARANTEED TO HER BY THE SIXTH AMENDMENT TO THE U.S. CONSTITUTION."

{¶ 6} Counsel's performance will not be deemed ineffective unless and until counsel's performance is proved to have fallen below an objective standard of reasonable representation and, in addition, prejudice arises from counsel's performance. *Strickland v. Washington* (1984), 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674. To show that a defendant has been prejudiced by counsel's deficient performance, the defendant must affirmatively demonstrate to a reasonable probability that were it not for counsel's errors, the result of the trial likely would have been different. *Id.*; *State v. Bradley* (1989), 42 Ohio St.3d 136. Further, the threshold inquiry should be whether a defendant was prejudiced, not whether counsel's performance was deficient. *Strickland*.

{¶ 7} West complains that her trial counsel failed to provide reasonable representation in her defense because he called no witnesses and offered no other evidence, and instead relied on

his cross-examination of the State's witnesses. However, the record does not indicate what evidence counsel could or should have offered. Furthermore, counsel's decision may have been a matter of trial tactics, which is not a basis to find ineffective assistance. *Strickland*. Therefore, on this record, we cannot find that West was prejudiced as a result of her counsel's conduct.

{¶ 8} West's trial counsel told the jury in his opening statement that West "is going to testify in this case. She's going to tell you about her life experiences and tell you everything about her past and be open about it." (T. 91-92). Counsel told the jury that West had previously been convicted and "served some time in prison," but is "on parole today and, at the time of this incident, she was doing well. She will report to you." (T. 92).

{¶ 9} West did not testify at trial. When the trial court inquired of West whether her decision to not testify was knowing and voluntary, West confirmed that it was. West told the court that her decision was made after consulting with her counsel, but the record does not indicate when West made that decision.

{¶ 10} West complains that her trial counsel was deficient in promising the jury that she would testify when she did not, and that she was prejudiced as a result. The State argues that West's counsel cannot be charged with knowledge that West would not testify when he represented to the jury that she would. The State also

points out that the court charged the jury that West had a constitutional right to not testify, and "[t]he fact that she did not testify must not be considered for any purpose." (T. 164).

{¶ 11} In his closing argument, West's counsel told the jury:

{¶ 12} "I want to apologize for something to start with. We had told you that Vickie was going to testify. But if you remember something what I told you in opening, actually in voir dire when we were first talking, I mentioned to each and every one of you that, if I, as the attorney, advise Vickie that she did not need to testify, that she would leave that decision to me, that you would not hold that against her. I want you each to remember that." (T. 153).

{¶ 13} An opening statement permits counsel to tell the jury what evidence it will hear. However, counsel should be wary of representing that a defendant will waive her Fifth Amendment right and testify, especially when whether she will is then an open question, as it apparently was here. If a defendant elects to not testify, the representation may then burden a defendant's exercise of her constitutional right.

{¶ 14} Nevertheless, "[t]he benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Strickland*,

466 U.S. at 686. A presumption exists that the jury followed the court's instruction. *Pang v. Minch* (1990), 53 Ohio St.3d 186. In view of the court's instruction that West's decision to not testify must not be considered for any purpose, as well as counsel's apology for his misdirected promise, we cannot find that West was prejudiced to the extent that *Strickland* and *Bradley* require for a finding of ineffective assistance.

{¶ 15} The first assignment of error is overruled.

SECOND ASSIGNMENT OF ERROR

{¶ 16} "APPELLANT RESPECTFULLY SUBMITS THAT HER CONVICTION WAS NOT SUPPORTED BY SUFFICIENT EVIDENCE."

{¶ 17} A person is not guilty of a criminal offense unless (1) the person engaged in conduct that a section of the Revised Code prohibits and (2) acts with the requisite degree of culpability for each element as to which a culpable mental state is specified by the section defining the offense. R.C. 2901.21(A). The burden of proof for all elements of the offense, beyond a reasonable doubt, is on the prosecution. R.C. 2901.05(A). "Sufficiency" of the evidence is a term of art for the legal standard that is applied to determine whether the evidence that was offered is sufficient as a matter of law to support a finding of criminal liability. *State v. Tompkins* (1997), 78 Ohio St.3d 380.

{¶ 18} R.C. 2907.04(A) requires the state to offer evidence

sufficient to prove (1) the accused's solicitation of another, (2) to engage in sexual activity, (3) for hire. R.C. 2907.041(A) requires the state to prove that the accused engaged in one or more of several specific forms of conduct for the purpose of such solicitation. One of those is stopping or attempting to stop the operator of a vehicle or approaching a stationary vehicle for that purpose.

{¶ 19} The courts in *State v. Howard* (1983), 7 Ohio Misc.2d 45, and *State v. Swann* (2001), 142 Ohio App.3d 88, held that an accused's mere agreement to a proposal made by another that they engage in sexual activity or that the accused would do that for hire does not constitute solicitation, because "the crime is in the asking," *Howard*, at 45, and "the specific crime . . . does not prohibit acceptance, only entreaty." *Swann*, at 90. Defendant relies on those holdings, and points out that while she offered to engage in sexual activity, she made no mention of a price of any kind, except in response to Officer Harshman's inquiry concerning "what she needed for that." Defendant argues that, therefore, the evidence failed to prove that her act of solicitation included an offer to perform "for hire."

{¶ 20} "'Prostitute' means a male or female who engages in sexual activity for hire, regardless of whether the hire is paid to the prostitute or to another." R.C. 2907.01(D). Engaging in

sexual activity for hire is a criminal offense. R.C. 2907.25(A). Other sections of the Revised Code make certain related conduct also criminal. R.C. 2907.21 prohibits compelling prostitution. R.C. 2907.22 prohibits promoting prostitution. R.C. 2907.23 prohibits procuring another to patronize a prostitute. R.C. 2907.24(A) prohibits soliciting another to engage in sexual activity for hire. Paragraph (B) of that section prohibits solicitation after a positive HIV test. R.C. 2907.241 prohibits certain conduct when the actor's purpose is to solicit another to engage in sexual activity for hire.

{¶ 21} In *Swann*, the First District Court of Appeals reasoned that because criminal statutes must be construed strictly against the state and liberally in favor of the accused, R.C. 2901.04(A), in order to prove a violation of R.C. 2907.24 the State has the burden to demonstrate that a person accused of soliciting prostitution not only offered to engage in sexual activity for hire, but initiated an offer that was complete in those terms. We do not agree.

{¶ 22} The conduct that R.C. 2907.24 prohibits is the offer. Whether it is done in the form of an initial offer, a counter offer, or in response to an open inquiry, is immaterial. Furthermore, whether the criminal idea or purpose instead originated with the other person implicates the affirmative defense

of entrapment and the related issue of the accused's predisposition, which are evidentiary issues to be resolved after proof of solicitation is offered. West's request to be paid $20 demonstrates that her offer to engage in sexual activity was to do so "for hire."

{¶ 23} Defendant's convictions are therefore supported by sufficient evidence.

{¶ 24} The second assignment of error is overruled.

THIRD ASSIGNMENT OF ERROR

{¶ 25} "APPELLANT WAS CONVICTED UNDER A DEFECTIVE INDICTMENT."

{¶ 26} Because R.C. 2907.24(B) specifies no culpable mental state for the conduct the section prohibits, and no legislative purpose to impose strict liability for its violation is plainly indicated, recklessness is sufficient culpability to commit the offense. R.C. 2901.21(B); *Toledo v. Bravo* (May 31, 1985), Lucas App.No. L-84-403.

{¶ 27} The indictment charging West with a violation of R.C. 2907.24(B) alleged no culpable mental state. At the close of the evidence in its case-in-chief, the State moved to amend the indictment to include the culpable mental state of recklessness. Defendant objected that the motion was untimely, further arguing that the proper culpable mental state is instead purposefulness. The trial court overruled the objection and granted the State's

motion to amend. (T. 147).

{¶ 28} Crim.R. 7(D) authorizes the court to amend an indictment "at any time before, during, or after a trial. . . in respect to any defect, imperfection, or omission in form or substance, . . . provided no change is made in the name or identity of the crime charged." If a change is made "to the substance of an indictment," the defendant is entitled "to a discharge of the jury on the defendant's motion, . . . and to a reasonable continuance," absent certain showings.

{¶ 29} The State's motion was not untimely, and the omission of a culpable mental state from R.C. 2907.24(B), as that offense is defined, would not permit an allegation of purposeful conduct in any event. We agree with the holding in *Bravo* that, per R.C. 2901.21(B), recklessness is the culpable mental state applicable to an alleged violation of R.C. 2907.24(B). Its omission from the indictment was properly corrected by the amendment the court ordered. The amendment did not change the name or identity of the crime charged. *State v. O'Brien*, (1987), 30 Ohio St.3d 122. The amendment did change the substance of the indictment, but Defendant did not move to discharge the jury or for a reasonable continuance. We find no error in the trial court's ruling.

{¶ 30} Defendant argues that failure to allege recklessness in the indictment nevertheless prejudiced her due process right

of prior notice of the charges against her. Defendant did not raise that constitutional argument in the trial court, and has therefore waived it for purposes of appeal. ***Danis Clarkco Landfill Co. v. Clark County Solid Waste Management District,*** **73 Ohio St.3d 590, 1995-Ohio-301. Defendant likewise waived the error by her failure to request a continuance, which is the mechanism established by Crim.R. 7(D) to avoid prejudice arising from a lack of prior notice of which Defendant complains.**

{¶ 31} The third assignment of error is overruled. The judgment of conviction and sentence will be affirmed.

DONOVAN, P.J., And BROGAN, J., concur.

Copies mailed to:

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