[Cite as *State v. Xu*, 2016-Ohio-8237.]

COURT OF APPEALS
DELAWARE COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	JUDGES:
	:	Hon. Sheila G. Farmer, P.J.
Plaintiff-Appellee	:	Hon. W. Scott Gwin, J.
	:	Hon. Patricia A. Delaney, J.
-vs-	:	
	:	
QING XU	:	Case No. 15 CAA 11 0091
	:	
Defendant-Appellant	:	O P I N I O N

CHARACTER OF PROCEEDING:	Appeal from the Court of Common Pleas, Case. No. 15CRI010029B
JUDGMENT:	Affirmed/Reversed in Part and Remanded
DATE OF JUDGMENT:	December 16, 2016

APPEARANCES:

For Plaintiff-Appellee	For Defendant-Appellant
DOUGLAS DUMOLT 140 North Sandusky Street Delaware, OH 43015	CHRISTOPHER J. BURCHINAL P.O. Box 412 Delaware, OH 43015

Farmer, P.J.

{¶1} On January 23, 2015, the Delaware County Grand Jury indicted appellant, Qing Xu, on one count of engaging in a pattern of corrupt activity in violation of R.C. 2923.32 and eight counts of promoting prostitution in violation of R.C. 2907.22. All these counts carried human trafficking specifications pursuant to R.C. 2941.1422 and forfeiture specifications pursuant to R.C. 2941.1417. Appellant was also indicted on three counts of practicing medicine without a certificate in violation of R.C. 4731.41 and three counts of money laundering in violation of R.C. 1315.55, all containing forfeiture specifications pursuant to R.C. 2941.1417. Said charges arose from activities involving three massage parlors. Appellant was charged along with two codefendants, her husband, Xiaoshuang Chao, and her sister, Estella Xu.

{¶2} On March 9, 2015, appellant filed a motion for relief from prejudicial joinder from being tried along with her codefendants. A hearing was held on April 1, 2015. By judgment entry filed May 5, 2015, the trial court denied the motion.

{¶3} On July 24, 2015, appellant filed a motion for individual interpreters. By judgment entry filed July 31, 2015, the trial court denied the motion.

{¶4} A jury trial commenced on August 12, 2015. The trial court swore in three interpreters to be used during the trial. The jury found appellant guilty as charged. By judgment entry filed October 27, 2015, the trial court merged some of the counts and sentenced appellant to an aggregate term of ten years in prison.

{¶5} Appellant filed an appeal and this matter is now before this court for consideration. Assignments of error are as follows:

I

{¶6} "THE TRIAL COURT ERRED WHEN IT FAILED TO PROVIDE THE APPELLANT WITH AN INDIVIDUAL INTERPRETER TO COMMUNICATE DIRECTLY WITH HER COUNSEL."

II

{¶7} "THE TRIAL COURT ERRED WHEN IT IMPOSED POSTRELEASE CONTROL FOR THE MERGED COUNTS 3, 4, 6, 7, 8, 9, 11, 12, 14, AND 15."

III

{¶8} "THE TRIAL COURT ERRED WHEN IT ALLOWED THE TRIAL OF APPELLANT QING XU TO BE JOINED WITH THE TRIALS OF CODEFENDANTS ESTELLA XU AND XIAOSHUANG CHAO."

IV

{¶9} "THE APPELLANT'S CONVICTION WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE."

I

{¶10} Appellant claims the trial court erred in failing to give her an individual interpreter. Appellant claims because only one interpreter was available for all three defendants, her trial counsel was precluded from effectively conferring with her. We disagree.

{¶11} R.C. 2311.14(A)(1) states: "Whenever because of a hearing, speech, or other impairment a party to or witness in a legal proceeding cannot readily understand or communicate, the court shall appoint a qualified interpreter to assist such person."

{¶12} Sup.R. 88(A) states the following:

> **(A) When Appointment of a Foreign Language Interpreter Is Required.** A court shall appoint a foreign language interpreter in a case or court function in either of the following situations:
>
> (1) A party or witness who is limited English proficient or non-English speaking requests a foreign language interpreter and the court determines the services of the interpreter are necessary for the meaningful participation of the party or witness;
>
> (2) Absent a request from a party or witness for a foreign language interpreter, the court concludes the party or witness is limited English proficient or non-English speaking and determines the services of the interpreter are necessary for the meaningful participation of the party or witness.

{¶13} The decision to appoint an interpreter to assist a defendant rests in a trial court's sound discretion. *State v. Saah,* 67 Ohio App.3d 86, 95 (8th Dist.1990). In order to find an abuse of discretion, we must determine the trial court's decision was unreasonable, arbitrary or unconscionable and not merely an error of law or judgment. *Blakemore v. Blakemore,* 5 Ohio St.3d 217 (1983).

{¶14} The trial court swore in three interpreters for the trial. T. at 81. The record demonstrates the procedures used during the trial (T. at 153-154):

> THE COURT: As I will tell you here a little later, there are three Defendants in this particular case and the Defendants do not speak English, ah, they speak Mandarin. Ah, we have three Interpreters here, you will find that we try to speak in slow motion so that they can affectively communicate to the Defendants what is going on. This is one of the reasons that things take a lot longer in cases like this. I've been involved in other rather lengthy cases involving interpreters and I'll get the high sign every once in awhile if I am not going slow enough. Right now the Interpreter here with the microphone in her hand is communicating what I am saying and what will be said to the Defendants. There is an Interpreter who is seated with the Defendants back there, and again, they'll all be introduced to you so that you'll know exactly who is who. Who will be able to communicate with their lawyers and the lawyers communicate with them during the course of the proceedings. There's a third Interpreter which will relieve the other Interpreter, it's quite a stressful situation for Interpreters to have to continuously go through and interpret, so as a result, they have to be relieved every so often in order to be able to keep up with the process that is taking place.

{¶15} Objections to two of the interpreters were made on the record at the start of the trial, challenging their lack of Supreme Court certification, training, and judicial experience. T. at 57-58, 62, 73-76. The trial court inquired of the defendants and they indicated they could understand and communicate with the interpreters. T. at 45, 63-64,

76-77. Later, objections were raised as to having to share an interpreter in relation to the defendants conferring with their respective attorneys. T. at 99-102.

{¶16} Appellant has not demonstrated via the record any time she had difficulty speaking with her attorney or was unable to speak to him. Appellant has not pointed to any prejudice as a result of the procedures used.

{¶17} Upon review, we find the trial court did not abuse its discretion regarding the interpreters.

{¶18} Assignment of Error I is denied.

II

{¶19} Appellant claims the trial court erred in imposing postrelease control for merged Counts 3, 4, 6, 7, 8, 9, 11, 12, 14, and 15. We agree.

{¶20} In its judgment entry filed October 27, 2015, the trial court stated the following:

> The defendant is notified that as part of this sentence after completion of the prison term, she shall be subject to a mandatory period of supervision, Post-release Control of five years as to Counts One, Two, Three, Four, Five, Six, Seven, Eight, and Nine, and she may be subject to an optional period of supervision, Post-release Control of three years as to Counts Ten, Eleven, Twelve, Thirteen, Fourteen, and Fifteen.

{¶21} The trial court merged Counts 2, 3, and 4 together, Counts 5, 6, 7, 8, and 9 together, Counts 10, 11, and 12 together, and Counts 13, 14, and 15 together. The state elected sentencing on Counts 2, 5, 10, and 13.

{¶22} The state argues the trial court did not impose postrelease control, but merely notified appellant of postrelease control. However, the state concedes postrelease control cannot be aggregated and only one period of postrelease control applies i.e., five years. The trial court is ordered to file a nunc pro tunc entry correcting the postrelease control notification.

{¶23} Assignment of Error II is granted.

III

{¶24} Appellant claims the trial court erred in denying her motion to sever her trial from the trials of the other two codefendants, as the defendants had defenses that contradicted each other and could not be fully explored in a joint trial. We disagree.

{¶25} Crim.R. 14 governs relief from prejudicial joinder and states the following in pertinent part:

> If it appears that a defendant or the state is prejudiced by a joinder of offenses or of defendants in an indictment, information, or complaint, or by such joinder for trial together of indictments, informations or complaints, the court shall order an election or separate trial of counts, grant a severance of defendants, or provide such other relief as justice requires. In ruling on a motion by a defendant for severance, the court shall order the prosecuting attorney to deliver to the court for inspection pursuant to Rule

16(B)(1) any statements or confessions made by the defendants which the state intends to introduce in evidence at the trial.

{¶26} Crim.R. 8(B) governs joinder of defendants and states the following:

> Two or more defendants may be charged in the same indictment, information or complaint if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses, or in the same course of criminal conduct. Such defendants may be charged in one or more counts together or separately, and all of the defendants need not be charged in each count.

{¶27} The decision to grant severance rests in a trial court's sound discretion. *State v. Torres,* 66 Ohio St.2d 340 (1981); *Blakemore, supra.*

{¶28} A hearing on the motion was held on April 1, 2015. At the start of the hearing, the trial court qualified an interpreter and all defense counsel indicated their satisfaction with the interpreter. April 1, 2015 T. at 5-9. The trial court then entertained the merits of the motion which included arguments of possible finger-pointing of one against the other and the spillover of potentially prejudicial evidence. *Id.* at 10-14. We note the spillover argument is diminished in merit since one of the codefendants, Mr. Chao, was acquitted of the charges.

{¶29} In its May 5, 2015 judgment entry denying the motion to sever, the trial court stated the following:

> The Defendants are all charged in a RICO count of Engaging in a Pattern of Corrupt Activity involving the operation of massage parlors for purposes of prostitution. As in all cases involving an enterprise, different individuals may have different levels of participation or involvement.
>
> The Defendants failed to affirmatively show prejudice by joinder. The Court is not convinced the jury cannot make a reliable judgment about the relative culpability of each Defendant. Nor did counsel for the Defendants establish that their defenses were mutually exclusive.

{¶30} We concur with the trial court's analysis that because both women were charged with engaging in a pattern of corrupt activity, the spillover effect argument was negated.

{¶31} On July 24, 2015, appellant had filed a motion in limine to exclude prior acts or conduct, arguing the following:

> The State of Ohio has disclosed information accumulated in its investigation concerning the revocation of a business license in the City of Monitbello, California. This business, U-Spa, was licensed to Defendant Estella Xu, and Minghui Jia. Ms. Jia is not a party or otherwise involved in this case. An employee Dong Mei Wang, also not a party or otherwise involved in this case was charged with prostitution, which resulted in the business license being immediately suspended. Ms. Xu was not charged.

> It is also worth noting that nothing in the materials disclosed by the State of Ohio relating to the U-Spa business in California suggest any connection to that business by Defendants Qing Xu, or Xiaoshuang Chao. So it would be even more egregious to admit any reference to the California matter in a joint trial involving Qing Xu, and Xiaoshuang Chao, as this Court has previously overruled Qing Xu's motion to sever the charges pending against her for separate trial.
>
> For the foregoing reasons Defendant now requests that this court issue an order specifically excluding the introduction of the status, results, or disposition of any charges, findings, or determinations relating to the operation of U-Spa in Montibello, California, upon trial of this matter. The business in question is not linked to two of the Defendants herein, the charges which were the basis for the license revocation were not filed against any of the Defendants or other participants to this case, and introduction of this material would be extremely prejudicial.

{¶32} The trial court granted the motion as part of the state's case-in-chief, but would permit the records in rebuttal should the door somehow be opened. T. at 112-114.

{¶33} Upon review, find no undue prejudice sufficient to sever the trials. The trial court did not abuse its discretion in denying the motion for severance.

{¶34} Assignment of Error III is denied.

IV

{¶35} Appellant claims her convictions for engaging in a pattern of corrupt activity, promoting prostitution, practice of medicine or surgery without qualification, and money laundering are against the manifest weight of the evidence as the elements of each offense were not proven beyond a reasonable doubt. We disagree.

{¶36} On review for manifest weight, a reviewing court is to examine the entire record, weigh the evidence and all reasonable inferences, consider the credibility of witnesses and determine "whether in resolving conflicts in the evidence, the jury clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered." *State v. Martin,* 20 Ohio App.3d 172, 175 (1st Dist.1983). See also, *State v. Thompkins*, 78 Ohio St.3d 380, 1997-Ohio-52. The granting of a new trial "should be exercised only in the exceptional case in which the evidence weighs heavily against the conviction." *Martin* at 175. We note the weight to be given to the evidence and the credibility of the witnesses are issues for the trier of fact. *State v. Jamison,* 49 Ohio St.3d 182 (1990). The trier of fact "has the best opportunity to view the demeanor, attitude, and credibility of each witness, something that does not translate well on the written page." *Davis v. Flickinger,* 77 Ohio St.3d 415, 418, 1997-Ohio-260.

{¶37} Appellant argues she properly registered the businesses with the state of Ohio and declared her income and paid taxes, and no evidence was presented that she brought her workers to Ohio and forced them to work for her.

{¶38} We note appellant does not specifically point to any particular testimony in support of her argument, but argues the some 1,800+ pages of the transcript does not support the state's position.

{¶39} Appellant was convicted of engaging in a pattern of corrupt activity in violation of R.C. 2923.32(A)(1) which states: "No person employed by, or associated with, any enterprise shall conduct or participate in, directly or indirectly, the affairs of the enterprise through a pattern of corrupt activity or the collection of an unlawful debt."

{¶40} Appellant was also convicted of promoting prostitution in violation of R.C. 2907.22(A)(1) which states: "No person shall knowingly: ***Establish, maintain, operate, manage, supervise, control, or have an interest in a brothel or any other enterprise a purpose of which is to facilitate engagement in sexual activity for hire."

{¶41} Appellant was also convicted of practicing medicine without a certificate in violation of R.C. 4731.41 which states:

> No person shall practice medicine and surgery, or any of its branches, without the appropriate certificate from the state medical board to engage in the practice. No person shall advertise or claim to the public to be a practitioner of medicine and surgery, or any of its branches, without a certificate from the board. No person shall open or conduct an office or other place for such practice without a certificate from the board. No person shall conduct an office in the name of some person who has a certificate to practice medicine and surgery, or any of its branches. No person shall practice medicine and surgery, or any of its branches, after the person's

> certificate has been revoked, or, if suspended, during the time of such suspension.
>
> A certificate signed by the secretary of the board to which is affixed the official seal of the board to the effect that it appears from the records of the board that no such certificate to practice medicine and surgery, or any of its branches, in this state has been issued to the person specified therein, or that a certificate to practice, if issued, has been revoked or suspended, shall be received as prima-facie evidence of the record of the board in any court or before any officer of the state.

{¶42} Lastly, appellant was charged with money laundering in violation of R.C. 1315.55(A)(1) which states: "No person shall conduct or attempt to conduct a transaction knowing that the property involved in the transaction is the proceeds of some form of unlawful activity with the purpose of committing or furthering the commission of corrupt activity."

{¶43} From our review of the testimony, the tale that is woven by the evidence is simple. Appellant and her sister Estella managed and profited from the running of three massage parlors in Hilliard, Powell, and Worthington, Ohio. They were both identified by their respective employees as "the boss." T. at 493-494, 496, 643-645, 690-691. Appellant was identified as the person who hired, managed, and fired the employees. T. at 488, 496, 498, 578-579. She provided for the transportation of the employees to the store for shopping, and told them how to dress. T. at 500-501, 509, 578, 651-652, 700-701, 760, 762, 823-824, 837. If an employee wanted to leave, they were forced to stay

until there was a replacement employee. T. at 586-587, 660-661, 705, 768-769. The employees who testified told of being surprised that the clients required "assistance" after being aroused by their massages. T. at 501-503, 581-582. They claimed to have complained to appellant and her sister, but were told to "keep the customers happy," "be nice," "have a good attitude," and do not annoy the customers. T. at 494, 501-502, 504, 577, 584, 655-656, 658, 768, 826, 828, 849. No one, including appellant and her sister, who worked at the three massage parlors and gave massages had an Ohio license required for the therapeutic and deep massages that were given. T. at 495, 571, 591, 641, 652, 659, 694, 754, 763, 820, 1146, 1162, 1164-1165. The massage parlors were advertised on "Backpage.com," not in the general massage area, but in "Body Rubs" under the "Adult" section. T. at 896, 908, 920-921, 925, 1665-1666. Sex trafficking networks use Backpage.com. T. at 1829

{¶44} Although the employees claimed they were hired only to do massages, eleven "clients" testified the massages were not the standard traditional type of massage, but were given in a fashion that caused arousal resulting in self-masturbation or assisted masturbation. T. at 465-470, 612-613, 627-630, 735, 743-744, 811-812, 1015-1016, 1028-1029, 1083-1084, 1236-1237. "Extras" meant "hand jobs." T. at 1828. These clients, except one, claimed they did not know it was that kind of massage parlor, but all admitted to giving tips at the end of their sessions. T. at 466-467, 470, 613, 617, 628-629, 734, 810, 1017, 1025, 1029, 1235.

{¶45} Forensic evidence gathered at the scene as well as dumpster searches established that sexual activity was occurring in the parlors. B.C.I. forensic scientists testified to the presence of semen and sexual fluid on materials found in the dumpsters

associated with the massage parlors and on pads and sheets in the massage rooms. T. at 978, 998, 1263, 1267, 1269-1270, 1273-1274, 1276, 1279-1281, 1284-1285. Also, DNA of both men and women were found on the seized items. T. at 1352-1354.

{¶46} While the parlors were being surveillance by Columbus and Powell police officers, a definite pattern of activity was discernable. T. at 956-957, 964, 1370-1371, 1522-1523, 1689. Appellant and her husband transported employees to and from the parlors to obtain food and clothing. T. at 584-585. Appellant would travel between the parlors, retrieving the receipts. T. at 653, 765, 1680-1682. There was a constant rotation/replacement of employees. T. at 1689. The client base was viewed as one hundred per cent male which is not the statistical average for massage parlors. T. at 1679. The employees for the Powell and Worthington parlors lived in the parlors as was demonstrated by the viewed activity and the presence of clothing and food. The employees who were interviewed by the police were frightened, non-verbal, unable to speak English, and would never specifically admit to participating in sexual conduct. T. at 589, 662, 708, 770. Some have since returned to China. T. at 822. Many worked to pay off the money advanced to them to come to the United States. T. at 830. There was no proof that any of the codefendants paid for their transport. However, each employee was picked up in Columbus, stayed thereafter in the Hilliard apartment or in the parlors, and were rarely seen outside the parlors. T. at 1677-1678. They admitted to not knowing how to leave the parlors, call a taxi, or get to Columbus. T. at 504, 509-511, 585, 654-655, 775.

{¶47} Appellant was on two US Bank accounts, Estella was on one, and there was an account doing business as "Amsun Healthcare, LLC." T. at 1072, 1699, 1705,

1708, 1748-1749. Appellant was the principle on the accounts. She was observed collecting receipts from the parlors and making deposits into US Bank. The business records of the parlors were found in the Hilliard apartment. T. at 1751-1752, 1758. All four accounts controlled by appellant were used to deposit receipts, in cash and credit card transactions. T. at 1700, 1708, 1710. The rent, advertising, and food were paid from these accounts. T. at 1701, 1749.

{¶48} This evidence demonstrated a pattern of activity that appellant, with her sister, ran and controlled a business engaging in the offers of sexual conduct for hire. They managed and controlled the parlors and the employees and profited from the sexual activity conducted in the parlors.

{¶49} There existed a pattern of money obtained from sex for hire being deposited in to accounts appellant and her sister controlled. The money was then used for the personal benefit of appellant and also for the financing of the sex for hire activity at the three parlors.

{¶50} We find the record as a whole substantiates that the state established the elements of the offenses for each of the three parlors. There is no dispute that there were no licensed masseuses at any of the parlors and that appellant did not have a license.

{¶51} Upon review, we find sufficient evidence to prove the offenses beyond a reasonable doubt, and do not find any miscarriage of justice.

{¶52} Assignment of Error IV is denied.

{¶53} The judgment of the Court of Common Pleas of Delaware County, Ohio is hereby affirmed in part and reversed in part, and the matter is remanded to said court for further proceedings consistent with this opinion.

By Farmer, P.J.

Gwin, J. and

Delaney, J. concur.

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