COURT OF APPEALS DECISION DATED AND FILED

June 19, 2007

David R. Schanker
Clerk of Court of Appeals

NOTICE

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A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. ***See*** **WIS. STAT. § 808.10 and RULE 809.62.**

Appeal No. 2006AP1633-CR **Cir. Ct. No. 2001CF979**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MATTHEW R. STEFFES,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: JOHN A. FRANKE, Judge. *Affirmed*.

Before Wedemeyer, P.J., Fine and Curley, JJ.

¶1 WEDEMEYER, P.J. Matthew R. Steffes appeals from a judgment and order following his convictions for child enticement for prostitution as a party to a crime, soliciting a child for prostitution as a party to a crime, and sexual assault of a child. Steffes claims: (1) there was insufficient evidence to support his conviction on six counts of child enticement for prostitution based on the language of the jury instruction given; (2) his due process rights were violated because he

was charged with soliciting a child for prostitution by *causing* the child to practice prostitution, but the jury instruction only instructed on *soliciting* a child to practice prostitution; and (3) he received ineffective assistance of counsel when his counsel failed to object to the jury instructions. Because Steffes waived any objection to the jury instruction, because any jury instruction error was harmless and because Steffes failed to demonstrate that he received ineffective assistance of counsel, we affirm the judgment and order.

BACKGROUND

¶2 On or about November 5, 1999, 13-year-old, Maria F., and her friend, 12-year-old April W., ran away from home. They were picked up by 22-year-old Joshua Howard, who was Maria's boyfriend, and 15-year-old Matthew Steffes, who was April's boyfriend. The group checked in and out of a variety of motels in the Milwaukee area. At the motels, the group would drink, smoke marijuana and pair off for sex. On one occasion, the four had group sex. At some point in time, the boys asked the girls about working as "escorts" to make money. Both girls agreed. The boys would work as the "pimps," have the girls call the men who showed interest, and set up meetings which occurred at whatever motel the group were staying in at the time.

¶3 The men would come to the motel room, pay the girls $160 and then have sex with one or both of them. The pimps would then take the money. This continued until December 15, 1999. The girls were driven to Gurnee, Illinois, where they called their families and returned home.

¶4 Approximately nine months later, Maria reported what had happened, and Howard and Steffes were charged with a variety of crimes, including sexual assault of a child and child enticement for prostitution. This case

involves the criminal prosecution of Steffes. He pled not guilty and proceeded to a jury trial. In July 2001, a jury convicted him of three counts of sexual assault of a child, six counts of child enticement as a party to a crime, and six counts of soliciting a child for prostitution as a party to a crime.[1]

¶5 After the jury verdict, but before sentencing, Steffes filed a motion seeking a new trial, alleging that the jurors had been exposed to extraneous information. After a hearing, the motion for a new trial was denied. In April 2002, Steffes was sentenced to a total of 112 years. In July 2003, Steffes filed a postconviction motion seeking sentence modification and a new trial. The motion for a new trial was denied in February 2004, but the court ordered briefs and oral argument on the sentencing issues.

¶6 In July 2004, before the sentencing issues were decided, Steffes filed a supplemental motion seeking to vacate four of the six solicitation counts on the basis that they were multiplicitous. In April 2005, the trial court ruled the sentence imposed was unduly harsh and ordered a new sentencing hearing.

¶7 The new sentencing hearing occurred in July 2005. At the start of the hearing, the trial court granted Steffes's motion that the solicitation counts were multiplicitous and vacated four of the six solicitation convictions. At the conclusion of the sentencing hearing, the trial court imposed a sentence totaling forty years.

[1] The jury acquitted Steffes of the two counts relating to delivering marijuana to the girls and the State voluntarily dismissed a count charging physical abuse of a child.

¶8 In January 2006, Steffes filed a postconviction motion alleging that the evidence was insufficient to support the six counts of child enticement, that the convictions on solicitation were different than the charged offense, and that trial counsel provided ineffective assistance of counsel with respect to the jury instructions. The trial court denied the postconviction motion. Steffes now appeals.

DISCUSSION

A. Jury Instruction.

¶9 Steffes first contends that the evidence was insufficient to support the six convictions on child enticement for prostitution because of the language used in a jury instruction.[2] The basis of his argument is that the jury instruction used terminology to suggest that Steffes paid the girls to have sex with him, contrary to the charges in the complaint and the evidence, which proffered that Steffes was making the girls have sex with other men for money. The trial court rejected Steffes's argument. We affirm the trial court.

¶10 The six child enticement for prostitution charges were based on violations of WIS. STAT. § 948.07(2)(1999-2000),[3] which provides:

> Whoever, with intent to commit any of the following acts, causes or attempts to cause any child who has not attained the age of 18 years to go into any vehicle, building, room or secluded place is guilty of a Class BC felony:

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[2] Steffes presents this claim as a challenge to the sufficiency of the evidence. The State proffers, and we agree, however, that it is really a challenge to the jury instruction because there was more than ample evidence that he violated WIS. STAT. § 948.07(2)(1999-2000).

[3] All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

….

(2) Causing the child to engage in prostitution.

¶11 Steffes contends that because the jury instruction used language, which appeared to require that Steffes himself intended to engage in the act of prostitution with the girls, that it was erroneous because the State's theory was that he was having *other* men pay to have sex with the girls. The language of the jury instruction that Steffes relies on in pertinent part defines the second element of the charge: "Two, that the defendant caused Maria F[.] and/or April W[.] to go into a room with intent to engage in an act with Maria F[.] and/or April W[.] that if engaged in between adults would be an act of prostitution."

¶12 Although the jury instruction did not accurately state that Steffes's intent was to have the girls prostitute themselves with other men, Steffes stipulated to the use of the instruction, and has therefore waived any objection based upon it. *See* Wis. Stat. § 805.13(3) ("Failure to object at the conference constitutes a waiver of any error in the proposed instructions or verdict."); ***State v. McBride***, 187 Wis. 2d 409, 420, 523 N.W.2d 106 (Ct. App. 1994). Because Steffes agreed to the use of this instruction, and therefore has waived any appellate claims based on the instructional error, his only viable challenge would be to allege ineffective assistance of counsel. ***Kimmelman v. Morrison***, 477 U.S. 365 (1986).

¶13 In order to establish that he did not receive effective assistance of counsel, Steffes must prove two things: (1) that his lawyer's performance was deficient; and (2) that "the deficient performance prejudiced the defense." ***Strickland v. Washington***, 466 U.S. 668, 687 (1984); ***State v. Sanchez***, 201 Wis. 2d 219, 236, 548 N.W.2d 69 (1996). A lawyer's performance is not deficient unless he has "made errors so serious that counsel was not functioning as the

‘counsel’ guaranteed the defendant by the Sixth Amendment.” ***Strickland***, 466 U.S. at 687. Even if a defendant can show that his counsel’s performance was deficient, he is not entitled to relief unless he can also prove prejudice; that is, he must demonstrate that his counsel’s errors “were so serious as to deprive [him] of a fair trial, a trial whose result is reliable.” ***Id.*** Stated another way, to satisfy the prejudice prong, “‘[a] defendant must show that there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.’” ***Sanchez***, 201 Wis. 2d at 236 (citation omitted). In assessing Steffes’s claim, we need not address both the deficient performance and prejudice components if he cannot make a sufficient showing on one. *See* ***Strickland***, 466 U.S. at 697. The issues of performance and prejudice present mixed questions of fact and law. *See* ***Sanchez,*** 201 Wis. 2d at 236. Findings of historical fact will not be upset unless they are clearly erroneous, *see* ***id.***, and the questions of whether counsel’s performance was deficient or prejudicial are legal issues we review independently. *See* ***id.*** at 236-37.

¶14 Here, Steffes has failed to establish that trial counsel provided ineffective assistance by stipulating to the instruction. Even if the jury had been instructed differently, there is no possibility that the outcome of this trial would have been different. It is absolutely clear from the record that the State’s theory of prosecution was based on what was actually charged—that Steffes had the girls engage in acts of prostitution with other men. Maria and April both testified, clearly explaining that Steffes intentionally caused them to go into a room and have sex with men for payment, i.e., prostitute themselves. The evidence

supporting the charge of child enticement for prostitution was overwhelming based on the consistent testimony of the two girls.[4]

¶15 Moreover, the dissent's reliance on ***State v. Wulff***, 207 Wis. 2d 143, 557 N.W.2d 813 (1997) is misplaced for two reasons. First, neither waiver nor ineffective assistance of counsel is mentioned in ***Wulff***. Thus, for that reason alone, ***Wulff*** does not control here. Second, the crime at issue in ***Wulff*** involved sexual intercourse with an unconscious person. Sexual intercourse, as defined by statute can be committed in each of three different ways—genital, anal or fellatio—and each way constitutes a separate crime. ***Id*** at 148. In the instant case, the crime charged was child enticement, which "criminalizes the act of causing … a child to go into … [a] secluded place with *any* of six possible prohibited intents. The act of enticement is the crime, not the underlying intended sexual or other misconduct." ***State v. Derango***, 2000 WI 89, ¶17, 236 Wis. 2d 721, 613 N.W.2d 833 (emphasis in original). Thus, ***Wulff*** is distinguishable and clearly inapplicable under the facts and circumstances of this case.

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[4] We also conclude that any error in the instruction was harmless. Here, there is no reasonable possibility that based on the misstatement in the jury instruction, the jury convicted Steffes for personally engaging the girls in the act of prostitution. There is no possibility that this instruction contributed to the convictions. The record contains evidence upon which a jury could find Steffes guilty, and any error in the instruction was harmless. ***State v. Zelenka***, 130 Wis. 2d 34, 49-52, 387 N.W.2d 55 (1986) (error is harmless if the erroneous jury instruction could not have permitted the jury to believe it was convicting the defendant on conduct upon which no evidence had been presented).

B. Solicitation Charge/Instruction.

¶16 Steffes next argues that his due process rights were violated because the two solicitation counts were charged using the term "cause," but the jury instruction submitted to the jury used the term "solicit." He also claims his trial counsel provided ineffective assistance for failing to object to the difference in the terminology. We reject his arguments.

¶17 In the complaint, Steffes was charged with "SOLICITING A CHILD FOR PROSTITUTION" as he "did intentionally *cause* a child to practice prostitution" (emphasis added), contrary to WIS. STAT. § 948.08, which provides:

> Whoever intentionally solicits or causes any child to practice prostitution or establishes any child in a place of prostitution is guilty of a Class BC felony.

Steffes contends that the language in the charging document was distinctly different from the language used in the jury instruction. The jury instruction provided to the jury stated:

> [S]oliciting a child for prostitution as defined by the Criminal Code of Wisconsin is committed by one who intentionally *solicits* any child to practice prostitution.
>
> Before the defendant may be found guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following three elements were present.
>
> First, that the defendant *solicited* Maria [] and/or April [] to practice prostitution.
>
> Second, that the defendant acted intentionally.
>
> Third, that Maria [] and/or April [] had not attained the age of 18 years at the time of the alleged offense.

(Emphasis added.) We are not convinced that the language differential is of any significance. As noted by the trial court, the statute does not appear to "establish two distinct crimes and offers no explanation of how the elements would differ." Rather, the statute uses the phrase "solicits or causes." Both constitute a violation of § 948.08. Steffes attempts to make a distinction by proffering the example that a defendant could "solicit" without "causing" if a child refuses to engage in the acts of prostitution. This proffered example, however, is inapplicable here. Steffes both solicited and caused the girls to engage in prostitution. There was evidence sufficient to support both actions. Therefore, Steffes was not deprived of any due process rights based on the wording of the jury instruction.

¶18 Similarly, there is no merit to his claim that his trial counsel should have objected to the language of the jury instruction. As noted earlier, Steffes has the burden to prove both deficient performance and prejudice in order to succeed on a claim that trial counsel provided ineffective assistance. ***Strickland***, 466 U.S. at 687; ***Sanchez***, 201 Wis. 2d at 236.

¶19 Here, we have already concluded that Steffes was not prejudiced by the different wording in the complaint versus the jury instruction. Thus, Steffes cannot establish that trial counsel provided ineffective assistance. Accordingly, we reject his claim that his attorney should have objected to the wording in the instructions.

C. Sexual Assault Conviction.

¶20 Steffes's last contention is that his trial counsel provided ineffective assistance for stipulating to the jury instruction on first-degree sexual assault of a child, when the instruction omitted the optional phrase in the instruction that the sexual intercourse must be either "by the defendant or upon the defendant's

instruction." We are not convinced. The standards related to an ineffective assistance claim were set forth above and will not be repeated here. Based on those standards, we cannot conclude that Steffes has demonstrated that counsel's failure to object to this instruction was prejudicial to the outcome of this case.

¶21 The first-degree sexual assault conviction was based on April's testimony that she was "giving oral sex to" Steffes during the group sex. Steffes contends that his conviction of first-degree sexual assault should be reversed because the jury was not required to find that: "The act of sexual intercourse must be either by the defendant or upon the defendant's instruction." This language was not included in the jury instruction submitted to the jury.

¶22 The trial court rejected Steffes's claim on the basis that the entire defense was based on the theory that the girls were lying and not credible—that they had concocted the whole story. Thus, the trial court found that counsel's decision to forgo requesting insertion of the above language was strategic. The defense was hoping for outright acquittal on all charges on the basis that the girls were lying. Asking for the additional language quoted above would have been inconsistent with the defense theory. The additional language would have caused counsel to have to argue that Steffes did not ask April for oral sex, but rather, she gave him oral sex on her own accord.

¶23 Based on the foregoing, we agree that declining to push for the omitted language in the jury instruction was a reasonable strategic choice. Counsel was going for outright acquittal on all counts, not just acquittal on one sexual assault count. Thus, we conclude that Steffes has failed to demonstrate that his counsel provided ineffective assistance for failing to challenge this jury instruction.

By the Court.—Judgment and order affirmed.

Not recommended for publication in the official reports.

¶24 CURLEY, J. (*concurring/dissenting*). I would affirm the convictions for soliciting a child for prostitution and sexual assault of a child. I would reverse the convictions for child enticement (prostitution) as a party to the crime.

¶25 On February 21, 2001, Steffes was charged with twenty-two crimes that were to have occurred in the months of November and December 1999, when he was fifteen years old. The original complaint alleged that he, "as party to a crime, with intent to cause the child to engage in prostitution, did cause [the girls] to go into a room contrary to Wisconsin Statutes section 948.07 (2) and 939.05." The complaint stated that Steffes and the co-defendant would provide men for the girls to have sex with at a motel, and Steffes and the co-defendant would take the money from the men. The girls' testimony at trial was consistent with the allegations in the complaint concerning these charges. However, at the end of the trial, the trial judge instructed the jury more than once that: "Two, that the defendant caused [the girls] to go into a room with intent to engage in an act with [the girls] that if engaged in between adults would be an act of prostitution."

¶26 Consequently, while Steffes was initially charged with causing the girls to have sex with other men for money, and the testimony supported that charge, the jury convicted him of *his* having sex with the girls for money. Indeed, the trial court explained away this mistake in its postconviction decision denying Steffes's motion by writing:

> It would appear that the problem arose from a misuse of suggested language in footnote 1 to Wis-JI Criminal 2436, a footnote that contains a series of suggestions as to the drafting of the second element of the offense depending on the underlying criminal activity. The proposed language for charges based on causing the child to engage in prostitution would seem to apply only where the defendant himself intended to engage in the act of prostitution. Here the state charged and contended that the defendant intended to cause the child to engage in an act of prostitution with others. The evidence was more than sufficient to support a verdict of guilty on this theory.

This court would have agreed with that assessment and affirmed the convictions, but for the holding in ***State v. Wulff***, 207 Wis. 2d 143, 557 N.W.2d 813 (1997).

¶27 In ***Wulff***, the defendant was charged with attempted second-degree sexual assault. The victim claimed that she awoke to find Wulff attempting to insert his penis into her mouth. At the conclusion of the trial, the trial court read the jury an instruction that omitted the definition of sexual intercourse found in WIS. STAT. § 940.225(5)(c), and instead gave the jury an abbreviated definition that: "'Sexual intercourse' means any intrusion, however slight, by any part of a person's body or of any object, into the genital or anal opening of another. Emission of semen is not required." ***Wulff***, 557 N.W.2d at 816. Glaringly absent in the definition was the mention of fellatio. Like the situation here, our supreme court noted there was sufficient evidence to convict Wulff of the charged crime, had the jury been properly instructed on it. ***Id.*** at 817. However, the court went on to cite federal cases that held "we cannot affirm a criminal conviction on the basis of a theory not presented to the jury." ***Id.*** "We can uphold Wulff's conviction only if there was sufficient evidence to support guilt on the charge submitted to the jury in the instructions." ***Id.*** at 818. Following the directive of the supreme court, I believe we must reverse the convictions for child enticement (prostitution).

¶28 Although the majority opinion claims ***Wulff*** is distinguishable because neither waiver or ineffective assistance of counsel are mentioned in the decision, I note that our supreme court stated it could "uphold Wulff's conviction only if there was sufficient evidence to support guilt on the charge submitted to the jury in the instructions." ***Wulff***, 557 N.W.2d at 818. Presumably that directive would not be trumped by waiver or an ineffective assistance of counsel claim. If our society is to have confidence in jury verdicts, the instructions given by the court must accurately define the actual crimes charged and the evidence presented. Consequently, I would reverse these convictions.