COURT OF APPEALS DECISION DATED AND FILED

December 27, 2007

David R. Schanker
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

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. 2007AP731-CR

Cir. Ct. No. 2005CM3539

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

LAWRENCE E. FEAMAN,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Milwaukee County: PAUL R. VAN GRUNSVEN, Judge. *Affirmed.*

¶1 KESSLER, J.[1] Lawrence E. Feaman appeals from denial of his motion for a mistrial based on alleged juror bias and misconduct, and from a

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[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2) (2005-06). All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

judgment of conviction after a jury found he violated WIS. STAT. § 944.30(2).[2] Because Feaman has not established juror bias or misconduct, and because the record contains evidence from which a reasonable jury could find that the State established all the elements of the offense beyond a reasonable doubt, the conviction is affirmed.

I. Juror misconduct or bias

¶2 Feaman is the owner of a payroll administration company, Payroll Express, Inc. Payroll checks with his signature are issued to employees of his clients. Juror Hunholz received two such payroll checks on behalf of one of Feaman's clients before the voir dire, and one the day after the trial concluded.[3] During voir dire, Hunholz described his occupation as "I'm a carpenter." Feaman argues that Hunholz's failure to disclose his employment by a company that was Feaman's client prevented defense counsel from exploring bias questions that might arise under WIS. STAT. § 805.08(1), relating to statutory bias, and other matters relating to objective or subjective bias with regard to this juror. As a result, Feaman claims he was deprived of his constitutional right to an impartial jury.

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[2] WISCONSIN STAT. § 944.30, Prostitution, states, in pertinent part:

> Any person who intentionally does any of the following is guilty of a Class A misdemeanor: ….
>
> (2) Commits or offers to commit or requests to commit an act of sexual gratification, in public or in private, involving the sex organ of one person and the mouth or anus of another for anything of value.

[3] The voir dire occurred on February 13, 2006. Two payroll checks to Hunholz were dated before the voir dire: January 18, 2006 and February 1, 2006. One check was dated February 15, 2006, which is the day after the verdict was returned.

¶3 The State responds that the claim of juror misconduct fails because there is no evidence of statutory, objective or subjective bias. Feaman's company was described as "a payroll administration company" but was never identified by name during voir dire, thus there was no potential connection for Hunholz to disclose and, in any event, there is no evidence that Hunholz did not truthfully describe his occupation as he could have worked as a carpenter for Feaman's client or could have worked for the client part-time to supplement his income as a carpenter.

¶4 When alleging lack of juror candor in voir dire as grounds for a new trial, the burden is on the person asserting the misconduct to satisfy the court "that (1) a juror incorrectly or incompletely responded to a material question on voir dire and if so that (2) it is more probable than not that under the facts and circumstances surrounding the particular case, the juror was biased against the moving party." ***State v. Faucher***, 227 Wis. 2d 700, 726, 596 N.W.2d 770 (1999). In its seminal decision, the ***Faucher*** court reaffirmed this test as set forth in ***State v. Messelt***, 185 Wis. 2d 254, 268, 518 N.W.2d 232 (1994), which in turn, repeated this test for a new trial, based on juror misconduct in voir dire, which it had originally adopted in ***State v. Wyss***, 124 Wis. 2d 681, 370 N.W.2d 745 (1985), *overruled on other grounds by* ***State v. Poellinger***, 153 Wis. 2d 493, 451 N.W.2d 752 (1990).[4] ***Faucher***, 227 Wis. 2d at 726. The ***Messelt*** court further reminded

[4] The supreme court in ***State v. Messelt***, 185 Wis. 2d 254, 515 N.W.2d 232 (1994), specifically stated:

> [I]n order to be awarded a new trial in such instances the movant must demonstrate: (1) that the juror incorrectly or incompletely responded to a material question on voir dire; and if so, (2) that it is more probable than not that under the facts and circumstances surrounding the particular case, the juror was biased against the moving party.

(continued)

us that "[a] determination by the circuit court that a prospective juror can be impartial should be overturned only when bias is 'manifest.'" ***Id.***, 185 Wis. 2d at 269 (citation omitted).

¶5 We have reviewed the transcript of the voir dire. Feaman's company was not identified by name during voir dire. The transcript of the voir dire demonstrates that Feaman was identified to the jury only by the following statements:

> DEFENSE ATTORNEY: My client is Mr. Larry Feaman.… He owns a business in Milwaukee. It's a payroll administration company with about 400 companies throughout the Milwaukee County metropolitan area. So if you do know him we need to know that.… We'll be calling Mr. Feaman to the witness stand.

¶6 The trial court asked the venire panel a number of questions designed to disclose a juror's acquaintance with parties or witnesses, financial interest in the outcome, or other feelings that suggest bias. Hunholz did not respond affirmatively to any of these questions. The trial court asked each juror to stand and answer questions that were displayed in the courtroom. The answers of the various jurors make it clear they were asked to state their name, their marital status, how many children they had, where they lived, their occupation, their prior jury experience, and their hobbies. Hunholz' response was "John Hunholz. I'm single. No children. Live in Milwaukee County. I'm a carpenter. And no prior experience. And hobbies are sports." This is the totality of statements by Hunholz in this record. There is no evidence that defense counsel made inquiries during voir dire which would have revealed whether anyone received payroll checks

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Id. at 268 (citation omitted).

signed by Feaman, specifically identified Feaman's company, or asked specific employer information which would have made it possible for Feaman to determine if any potential jurors were employed by one of his clients.

¶7 The trial court, after reviewing the transcript of the voir dire questioning, observed that the jurors all denied any knowledge of Feaman or familiarity with his payroll administration company. Feaman neither asked for an evidentiary hearing to establish juror prejudice, as approved in ***Messelt***, nor did he provide a juror affidavit or otherwise make the preliminary showing of probable bias necessary to obtain an evidentiary hearing. *See* ***id.*** at 280, 282. The trial court concluded that the fact that a juror's payroll check was serviced by Feaman's payroll business did not establish a claim of unrevealed bias because it is pure speculation to conclude that Feaman's involvement with the juror's payroll checks caused bias in the mind of the challenged juror, and the record as a whole demonstrated no jury bias as a result of Feaman's processing the juror's payroll checks. The trial court, in effect, determined that Hunholz was impartial.

¶8 Feaman's claim of misconduct is built on the premise that his signature on a payroll check is a reason to believe the recipient of the check would be biased against him. No evidence in support of that conclusion appears in this record. Nor does logical analysis compel that conclusion. One could just as easily hypothesize that the recipient of a payroll check would be grateful to the signer, or that the recipient would be completely indifferent or without knowledge as to who signed the check. This record does not factually support the conclusion that Hunholz failed to disclose a material fact (that Feaman signed two of his payroll checks), or that Feaman was probably prejudiced because he had processed two paychecks for a juror at the time of the voir dire. Nothing from the juror, or any

other source, provides any facts from which the inference of bias by Hunholz against Feaman could be drawn.

¶9 As we have seen, a trial court determination that a juror can be impartial is entitled to great deference and "should be overturned only when bias is 'manifest.'" ***Id.*** at 269. We see no reason why the same deference to the trial court should not be given to a retrospective determination based on a claim of inaccurate voir dire responses that is to be applied to a trial court's prospective determination of impartiality during the voir dire. The facts in the record amply support the trial court's findings. Feaman has not made the showing necessary to establish juror bias or misconduct. There is no specific evidence of juror bias or misconduct in the record before us. Nor is there evidence of material nondisclosure, deliberate concealment or other mendacious conduct from which bias might reasonably be inferred. *See* ***Faucher***, 227 Wis. 2d at 726;[5] ***Messelt***, 185 Wis. 2d at 268. The trial court correctly denied Feaman's request for a new trial based on juror misconduct or bias.

II. Sufficiency of the evidence

¶10 The standard of reviewing the sufficiency of the evidence is the same whether the evidence is direct or circumstantial. ***Poellinger***, 153 Wis. 2d at 493. This applies with equal weight to evidence of a defendant's intent or knowledge. ***Id.*** ***Poellinger*** involved an appeal from a conviction for knowingly

[5] The ***Faucher*** case adopted new terminology to describe juror bias: statutory, subjective and objective. We need not discuss this difference further because we conclude that Feaman fails this threshold test of misconduct and because, as ***Faucher*** itself states, this new terminology did not change existing jurisprudence. *See* ***State v. Faucher***, 227 Wis. 2d 700, 704-05, 596 N.W.2d 770 (1990).

possessing cocaine based on residue found in the screw threads of a glass vial in the defendant's purse. ***Id.*** at 498. The defendant denied knowingly possessing cocaine because she thought the vial was empty. ***Id.*** The jury found her guilty. ***Id.*** at 499. On review, our supreme court instructed that when reviewing a record of historical facts supporting more than one inference, "an appellate court must accept and follow the inference drawn by the trier of fact unless the evidence on which that inference is based is incredible as a matter of law." ***Id.*** at 507. The court further explained that:

> In reviewing the sufficiency of circumstantial evidence to support a conviction, an appellate court need not concern itself in any way with evidence which might support other theories of the crime. An appellate court need only decide whether the theory of guilt accepted by the trier of fact is supported by sufficient evidence to sustain the verdict rendered.

Id. at 507-08.

¶11 The jury, as finder of fact, is to resolve conflicts in the testimony, weigh the evidence and draw reasonable inferences from the facts. ***Id.*** at 506; *see also* ***State v. Bodoh***, 226 Wis. 2d 718, 727, 728, 595 N.W.2d 330 (1999):

> It is the function of the trier of fact, and not of an appellate court, to fairly resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts…. [W]hen faced with a record of historical facts which supports more than one inference, an appellate court must accept and follow the inference drawn by the trier of fact unless the evidence on which that inference is based is incredible as a matter of law.

"It is not within the province of … any appellate court to choose not to accept an inference drawn by a factfinder when the inference drawn is a reasonable one." ***State v. Friday***, 147 Wis. 2d 359, 370-71, 434 N.W.2d 85 (1989); *see also* ***Poellinger***, 153 Wis. 2d at 507. To overturn the jury verdict, we must examine the

evidence most favorable to the State and set aside the conviction only if the evidence 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." ***Id.*** at 501.

¶12 Here, Feaman denied that his conduct violated the prostitution statute, WIS. STAT. § 944.30(2), because, he asserts: (1) he had an innocent reason for talking with the woman who approached his car; he did not request the sexual act, rather, it was proposed by the woman; and, when arrested, he was leaving the scene and he did not intend to return to participate in the sexual act discussed. As to material facts tending to establish elements of the offense, Feaman's version differs from that of the female decoy police officer, Nicole Reaves, only in who mentioned the oral sex act. Feaman's statement to the police and his trial testimony tends to either corroborate other trial testimony or establish the elements of the offense.

¶13 Reaves testified that Feaman waved her over to his car and that in response to her asking him if he was a police officer and what he wanted, he requested a blow job. Reaves said she told Feaman she normally charged forty dollars, and Feaman said that was too much and offered twenty. Feaman told her he did not have any money and needed to run to a gas station but would return. She then signaled her partner who blocked Feaman's car from leaving and arrested him.

¶14 Feaman made a statement which was summarized by Detective Daniel Wilcox, added to by Feaman in his handwriting, and signed by Feaman. According to the signed statement, Feaman thought the woman (the decoy police officer) might need a ride, she approached his car on the passenger side, they had a

conversation in which he agreed to pay her twenty dollars in exchange for a "blow job," he knew it was illegal to offer to pay a woman money for sex and that he will never to it again. Feaman added two additional sentences before signing the statement: "I told the officer that I would need to go to the gas station to get the money and that I would be back. I was planning on leaving and never coming back." At trial, Feaman admitted that he knew the meaning of "blow job," the sexual act he agrees was discussed.

¶15 The jury apparently found Reaves' testimony describing her encounter with Feaman more credible. Her testimony, contrary to Feaman's, is that he initiated the request for a blow job in response to her question about what he wanted. With the decision to believe Reaves rather than Feaman on a material disputed fact, all of the elements of the crime of prostitution are established.

¶16 As relevant to this case, WIS. STAT. § 944.30(2) requires that a person "intentionally" "request" "an act of sexual gratification" which involves "the sex organ of one person and the mouth … of another" in exchange "for anything of value." The crime of prostitution does not, by the terms of the statute, necessarily require performance of a sexual act. ***Id.*** The crime is completed upon the intentional *request* to perform a particular type of sexual act in exchange for something of value. ***Id.***; *see, e.g.*, ***State v. Kittilstad***, 231 Wis. 2d 245, 258-62, 603 N.W.2d 732 (1999) (interpreting WIS. STAT. § 944.30 relating to soliciting prostitution). Feaman's claim that he never "requested" the sexual act was rejected by the jury. Reaves' testimony is competent evidence from which the jury could, and did, conclude that Feaman did, indeed, request a sexual act in exchange for money.

¶17 Feaman admits he talked to Reaves and that a blow job was discussed. Reaves testified that Feaman asked for a "blow job" in response to her question of what he wanted. Feaman testified that he knew what a "blow job" meant.[6] The request was for oral sex, a sexual act involving the mouth of one person and the sex organ of another. Money was discussed in the context of the cost of the blow job. Whether it is forty dollars, twenty dollars, or some other sum, money is something of value in the context of this statute. Reaves' testimony, together with Feaman's testimony and written statement, establish that money was to be exchanged for the specific act of sexual gratification discussed. The record supports the jury finding as to each element of the statute.

¶18 Feaman claims that because he had formed the undisclosed mental intent not to complete the sexual act, but to leave the encounter and never return, he therefore did not "intentionally" commit the crime of prostitution. What this claim amounts to is actually an affirmative defense of withdrawal from the agreement with Reaves to commit prostitution. However, our supreme court has indicated that raising an affirmative defense does not negate the intent element of criminal activity. *See* ***Moes v. State***, 91 Wis. 2d 756, 768, 284 N.W.2d 66 (1979). If Feaman's logic were correct, it would absolve of criminal responsibility any person who has taken all the steps necessary to complete a criminal act if the person simply changes his mind but tells no one. That is not the law. The intent to withdraw from criminal activity which involves more than one person (as

[6] In view of the enormous publicity attendant to the Monica Lewinsky disclosure of oral sex with then President Bill Clinton, it is hard to imagine that any literate adult in this country is unfamiliar with the equation of oral sex and it's slang term "blow job." The term is defined as "usually vulgar: an act of fellatio." *See* Merriam-Webster's Online Dictionary, http://www.m-w.com/dictionary/blow%20job.

prostitution necessarily does) must be communicated to other actors before withdrawal can be considered a defense. *See* WIS JI—CRIMINAL 412, Withdrawal from a Conspiracy, cmt. ("The burden of production is on the defendant to introduce or point to 'some evidence' tending to show withdrawal. If that showing is made, the burden of persuasion is on the State to prove beyond a reasonable doubt that withdrawal did not occur.") Here, not only did Feaman not communicate his intent to Reaves that he was not going to go through with the deal made, he said exactly the opposite—that he would get money and return. His undisclosed mental state is irrelevant to the jury findings.

By the Court.—Judgment affirmed.

This opinion will not be published. *See* WIS. STAT RULE 809.23(1)(b)4.