

NOTICE
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NO. 4-09-0520

Filed 01/06/11

IN THE APPELLATE COURT
OF ILLINOIS
FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from
Plaintiff-Appellee,)	Circuit Court of
v.)	Macon County
MONICA L. ROHMAN,)	No. 09CM345
Defendant-Appellant.)	
)	Honorable
)	Katherine M. McCarthy,
)	Judge Presiding.

JUSTICE POPE delivered the judgment of the court. Justices Steigmann and Myerscough concurred in the judgment.

ORDER

Held: When the State proved beyond a reasonable doubt defendant agreed to perform an act of sexual penetration in exchange for money and the admission of alleged hearsay testimony was allowable under the coconspirator exception to the hearsay rule, defendant's conviction for prostitution was affirmed against defendant's sufficiency-of-the-evidence, plain-error, and ineffective-assistance-of-counsel arguments.

In June 2009, a jury found defendant, Monica L. Rohman, guilty of prostitution (720 ILCS 5/11-14(a) (West 2008)), a Class A misdemeanor (720 ILCS 5/11-14(b) (West 2008)). In July 2009, the trial court sentenced defendant to 12 months of conditional discharge, ordering her to pay court costs, undergo medical testing for sexually transmittable disease, and either pay a \$500 fine or complete 100 hours of community-service work.

Defendant appeals her conviction, arguing (1) the State

failed to prove her guilty beyond a reasonable doubt, in that the evidence showed she made a gratuitous offer to engage in sexual relations, and (2) the introduction of hearsay testimony portraying her as a prostitute and the State's reference to such testimony in closing arguments constituted plain error or, alternatively, gave rise to an ineffective-assistance-of-counsel claim. We disagree with each of defendant's arguments and affirm.

I. BACKGROUND

On March 13, 2009, the State charged defendant with prostitution, alleging defendant, on March 3, 2009, "knowingly agreed with [Decatur police Detective] Scott Rosenberry to perform an act of sexual penetration by placing her mouth on the sex organ of *** Rosenberry[] for money, \$8[] in U.S. [c]urrency."

In June 2009, the case proceeded to trial. Rosenberry was the sole witness. He testified to the circumstances surrounding his encounter with defendant and to his interaction with defendant, which resulted in her arrest for prostitution. Rosenberry testified he was working undercover, dressed in plain clothes and driving an unmarked vehicle. He was flagged down in a parking lot in Decatur by a person known to him as Kenneth Jackson.

At this point in his testimony, the State asked Rosenberry what happened when Jackson approached the vehicle.

Rosenberry began to testify to the content of Jackson's remarks. The trial court sustained defendant's hearsay objection. Following a sidebar, which was not on the record, the following questions and answers were given.

"[THE STATE:] Without telling me what [Jackson] said, can you tell me sort of the general subject of what he--of his conversation with you?

[ROSENBERRY:] Yes. Basically, my conversation that [Jackson] and I had were in reference to him advising me that he knew individuals that were approximately eight houses down from where we were at that was where I could go and find women who were willing to have sexual intercourse or oral sex for money.

[THE STATE:] And did [Jackson] ever mention whether or not he was going to get anything out of the deal?

[ROSENBERRY:] [Jackson], during our conversation, advised me that if he did find me a female, that he wanted money on top of the girl's price. After he said that, I told him that I would have to think about that. So we did not come to an agreement that he was going to get any type of money out of this situa-

tion."

Defendant did not object to this questioning and testimony.

After their conversation, Rosenberry and Jackson drove to the location Jackson had mentioned. When Rosenberry had parked, Jackson exited the vehicle, knocked on the door of an apartment, and had a brief conversation with defendant. Shortly thereafter, defendant approached Rosenberry's vehicle. Defendant told Rosenberry she had heard he wanted female companionship. Rosenberry unlocked the passenger door, and defendant entered the vehicle.

After she entered Rosenberry's vehicle, defendant offered to engage in oral sex or sexual intercourse with Rosenberry. She said, "I will suck the skin off your dick and fuck your nuts dry for free, but you can help me with my bills if you want." While driving away from the apartment complex where he had picked up defendant, Rosenberry indicated he "only had \$8[]." Defendant said, "Eight is great. Ten is a friend." When Rosenberry asked what she had meant, defendant said she liked to rhyme.

Rosenberry asked defendant how much she would accept to perform sexual intercourse. Defendant said she "could not" tell Rosenberry how much. Rosenberry suggested \$20, to which defendant replied \$20 was "a lot of money." Rosenberry asked defendant if she had a condom. Defendant replied she did not but, if

Rosenberry gave her \$20, she would use some of the money to buy one. Rosenberry told her, "[N]o. \$8[] is the agreement."

Rosenberry proceeded to drive the vehicle to a location where defendant indicated she would perform oral sex. Once there, Rosenberry testified, "I ended up taking out the \$8[] and began to hand it to [defendant] and she told me just drop it." Defendant then told Rosenberry she "wanted to see some flesh." As Rosenberry began to unfasten his pants, another detective arrived and placed defendant under arrest for prostitution.

Rosenberry interviewed defendant at the police station. She told him she had been in a similar situation only once or twice in her life and did not consider herself a prostitute. She renewed her offer to engage in oral sex or sexual intercourse with Rosenberry for free and indicated, again, she would accept his help in paying her bills. Rosenberry testified, "Overall[,] she said she was a 49-year[-]old female that was horny and that she was disappointed that she was not going to have sex. That was it."

At the close of Rosenberry's testimony, which constituted the entirety of the State's case, defendant moved for a directed verdict, arguing the State failed to prove defendant agreed to engage in oral sex with Rosenberry for money. The trial court found the State's evidence was sufficient to raise a question for the jury to consider and denied defendant's motion.

Defendant did not testify and did not present any evidence.

The trial proceeded to closing arguments. During its argument, the State referred twice to Rosenberry's testimony regarding his conversation with Jackson. Specifically, reciting the content of Jackson's statements, the State asked the jury to infer defendant was known to be a prostitute and was prepared to perform sexual acts for money. At one point in its closing argument, the State said,

"[Jackson] flags the detective down, says
[']I got some women down the street here,
takes them to the woman,['] says[] [']give me
some money on top of whatever you give
her,['] you know. He has a conversation with
the defendant. Then the defendant comes to
the car. She was being set up with the de-
tective by a pimp. Where there's a pimp,
there must be a prostitute."

The State later said,

"The detective was introduced to this defen-
dant by a man who says [']I know where
there's some women who will have sex with you
for money['] and then she comes. What do you
think is going on here[?] What's going on in
that kind of transaction[?] She was going to

offer her [sic] sex for money."

Defendant did not object to any of these comments. After closing arguments and jury instructions, the jury returned a guilty verdict and the trial court convicted defendant of prostitution.

In July 2009, the trial court held a hearing on posttrial motions and sentencing. Defendant moved for a judgment notwithstanding the verdict or, alternatively, for a new trial. Defendant argued her conduct did not amount to prostitution since she displayed a willingness to perform sexual acts for free. Finding sufficient evidence supported the jury verdict, the court denied defendant's motion. The court sentenced defendant to 12 months' conditional discharge. As conditions, the court ordered defendant to pay court costs, undergo medical testing for sexually transmittable disease, and either pay a \$500 fine or complete 100 hours of community-service work.

This appeal followed.

II. ANALYSIS

Defendant presents two arguments on appeal. First, defendant argues the State failed to prove her guilty of prostitution beyond a reasonable doubt. Specifically, defendant maintains she never agreed to engage in sexual conduct in exchange for money since she expressed a willingness to perform sexual acts with Rosenberry for free. Second, defendant argues the trial court erred by admitting hearsay evidence of Jackson's

conversation with Rosenberry and by allowing the State to use this evidence in closing arguments. Specifically, since defendant failed to preserve the issues for review, defendant argues the court's admission and the State's use of such evidence were plain error. Alternatively, defendant argues her trial counsel's failure to object to Rosenberry's alleged hearsay testimony and to the State's use of it in closing arguments constituted ineffective assistance of counsel. We consider each of defendant's arguments in turn.

A. Sufficiency of the Evidence

Defendant first argues the State failed to prove her guilty of prostitution beyond a reasonable doubt. In response, the State contends the evidence was sufficient for the jury to find her guilty. We agree with the State.

The relevant question on review when a criminal defendant challenges the sufficiency of the evidence at trial is "whether, viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *People v. Brown*, 169 Ill. 2d 132, 152, 661 N.E.2d 287, 296 (1996). "The fact finder's verdict will not be overturned unless its verdict is so unreasonable, improbable, and unsatisfactory as to leave a reasonable doubt as to the defendant's guilt." *Brown*, 169 Ill. 2d at 152, 661 N.E.2d at 296.

Prostitution is defined in section 11-14(a) of the Criminal Code of 1963 (720 ILCS 5/11-14(a) (West 2008)). A person commits an act of prostitution when he or she, *inter alia*, "performs, offers or agrees to perform any act of sexual penetration *** for any money." 720 ILCS 5/11-14(a) (West 2008). As it prohibits offers and agreements to engage in sexual activity for money, the prostitution statute does not require "a completed act of sexual conduct." *People v. DeBartolo*, 242 Ill. App. 3d 811, 820-21, 610 N.E.2d 131, 138 (1993). Because section 11-14(a) "proscribes activity that may be described as inchoate, the statute is likely to be applied to conduct that is to some degree ambiguous." *DeBartolo*, 242 Ill. App. 3d at 821, 610 N.E.2d at 138. Thus, in a prostitution case, a court must balance two considerations. "First, to prevent circumvention of the statute, the offer or agreement need not be express *** but may be implied from the words and actions of the defendant taken in context." *DeBartolo*, 242 Ill. App. 3d at 821, 610 N.E.2d at 138. "Second, *** the danger exists that the defendant's offer or agreement may be innocent or ambiguous." *DeBartolo*, 242 Ill. App. 3d at 821, 610 N.E.2d at 138.

In this case, the evidence, taken in the light most favorable to the State, supports defendant's conviction. Rosenberry's testimony demonstrates defendant was prepared to accept money in exchange for performing an act of sexual penetra-

tion. Defendant clearly intended to engage in sexual conduct with Rosenberry. The only question, then, is whether she agreed to an exchange of money. Defendant agreed up front to accept Rosenberry's help in paying her bills, meaning she would receive money from him. Later, when she was preparing to perform the sexual act, she did not take cash from Rosenberry's hand but asked him to leave it for her on the vehicle's console. The jury was permitted to infer the money would be defendant's to take after she had performed the act.

Arguably, defendant's willingness to perform an act of sexual penetration for free raised the question whether the sexual and monetary transactions were one and the same or whether each was gratuitous and unrelated. That is, on the one hand, the evidence could show defendant was performing an act of sexual penetration in exchange for money while, on the other, it could show she intended to perform the sexual act for free and to accept Rosenberry's monetary gift unrelated to the sexual act. The latter interpretation of the facts stretches plausibility and, in any event, this is a question the jury was entitled to resolve in the State's favor. Accordingly, we find the State proved defendant guilty of prostitution beyond a reasonable doubt.

B. Hearsay, Plain Error, and Ineffective
Assistance of Counsel

Defendant also argues the trial court erred by admit-

ting hearsay testimony revealing the contents of Jackson's statements to Rosenberry and by allowing the State to use these statements in closing arguments. Defendant argues these errors are reversible under the plain-error doctrine or, alternatively, defendant's trial counsel's failure to preserve the errors for review constituted ineffective assistance of counsel. The State argues the challenged testimony was admissible under the hearsay exception for statements by a coconspirator made in the course of a conspiracy. Alternatively, if the challenged testimony was inadmissible, the State contends other properly admitted testimony proved defendant guilty of prostitution. We conclude the challenged testimony was admissible pursuant to the coconspirator hearsay exception.

Defendant forfeited her challenge to Rosenberry's alleged hearsay by failing to object at trial and to renew the objection in a posttrial motion. See *People v. Sorrels*, 389 Ill. App. 3d 547, 552, 906 N.E.2d 788, 793 (2009). However, we will look past defendant's forfeiture if the trial court committed plain error. Under the plain-error doctrine, an otherwise forfeited and unpreserved error will be reviewed if the error was clear and obvious and either (1) "the evidence in the case is so closely balanced that the jury's guilty verdict may have resulted from the error and not the evidence" or (2) "the error is so serious that the defendant was denied a substantial right, and

thus a fair trial." *People v. McLaurin*, 235 Ill. 2d 478, 489, 922 N.E.2d 344, 351 (2009). The party claiming the error bears the burden of satisfying all elements of plain-error analysis. *People v. Lewis*, 234 Ill. 2d 32, 43, 912 N.E.2d 1220, 1227 (2009).

First, we must determine whether defendant has demonstrated the trial court committed a clear and obvious error. We conclude she has not. Defendant argues the challenged testimony was hearsay. The State does not contest defendant's assertion the testimony was hearsay. Rather, the State claims the testimony was admissible under the coconspirator exception to the hearsay rule. Under the coconspirator exception, any act or declaration by a party to a conspiracy made in furtherance of the conspiracy during its pendency is admissible against each and every coconspirator, "'provided that *** a foundation for its reception is laid by independent proof of the conspiracy.'" *People v. Coleman*, 399 Ill. App. 3d 1198, 1202-03, 931 N.E.2d 268, 271 (2010), quoting *People v. Childrous*, 196 Ill. App. 3d 38, 51, 552 N.E.2d 1252, 1261 (1990).

Before the coconspirator exception can apply, the State must make a *prima facie* showing of a conspiracy between the declarant and the coconspirator against whom the statements are being admitted pursuant to the exception. *Coleman*, 399 Ill. App. 3d at 1203, 931 N.E.2d at 271. "Evidence of the conspiracy may

be totally circumstantial; however, it must be sufficient, substantial, and independent of the declarations made by the coconspirator ***." *Coleman*, 399 Ill. App. 3d at 1203, 931 N.E.2d at 271.

In this case, defendant claims, absent Jackson's statements to Rosenberry, the State lacks substantial evidence of an agreement between Jackson and defendant. We disagree. Rosenberry's nonhearsay testimony demonstrates an agreement between Jackson and defendant with the goal of committing prostitution. Rosenberry told Jackson he wanted female companionship. He and Jackson drove to an apartment complex, where Jackson left the vehicle and had a brief conversation with defendant. Following her conversation with Jackson, defendant approached Rosenberry's vehicle and told him she had heard he wanted female companionship. Defendant proceeded to agree with Rosenberry to engage in an act of sexual penetration in exchange for money. While circumstantial, this evidence makes out a *prima facie* showing of a conspiracy between Jackson and defendant.

Rosenberry's challenged testimony regarding the content of his conversation with Jackson was admissible against defendant. It qualifies for the coconspirator exception to the hearsay rule by satisfying the three requirements: the statement was made (1) by a member of a conspiracy (2) in furtherance of the conspiracy (3) while the conspiracy was ongoing. First, as

explained, sufficient evidence shows Jackson conspired with defendant to commit prostitution. Second, Jackson's statements to Rosenberry served the ends of the conspiracy by introducing Rosenberry to defendant for the purpose of committing prostitution. Third, the evidence suggests Jackson's statements were made during the pendency of the conspiracy: Jackson knew of defendant's location and knew she was available to prostitute herself at the time the statements were made, suggesting he had a prior agreement with defendant, and Jackson made the statements before the conspiracy was consummated. These conclusions are supported by independent evidence. Accordingly, Jackson's statements were admissible against defendant pursuant to the coconspirator exception to the hearsay rule and the court did not err in admitting Rosenberry's testimony regarding the statements. Thus, we reject defendant's plain-error argument.

Further, we reject defendant's ineffective-assistance-of-counsel argument because she cannot demonstrate prejudice. To establish defendant's trial counsel provided ineffective assistance, defendant must show (1) her counsel's performance was inadequate "in that it fell below an objective standard of reasonableness" and (2) there is a reasonable probability the outcome of the trial would have been different absent her counsel's deficient performance. *People v. Moore*, 189 Ill. 2d 521, 535, 727 N.E.2d 348, 355-56 (2000), citing *Strickland v. Washing-*

ton, 466 U.S. 668, 687, 694, 80 L. Ed. 2d 674, 693, 698, 104 S. Ct. 2052, 2064, 2068 (1984). Defendant claims her trial counsel provided ineffective assistance by failing to object to Rosenberry's testimony regarding Jackson's statements and to the State's use of it in closing arguments. However, any objections to Rosenberry's testimony would have been overruled pursuant to the coconspirator hearsay exception. Further, defendant's challenge of the State's use of the evidence in its argument presupposes the evidence was inadmissible. Thus, defendant cannot show she was prejudiced by defense counsel's alleged deficient performance. Accordingly, we reject defendant's ineffective-assistance-of-counsel argument.

III. CONCLUSION

For the reasons stated, we affirm the trial court's judgment. As part of our judgment, we award the State its \$50 statutory assessment against defendant as costs of this appeal.

Affirmed.