2014 IL App (2d) 131210-U
No. 2-13-1210
Order filed June 20, 2014

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of Lake County.
Plaintiff-Appellee,	)	
v.	)	No. 13-CM-293
XIAOHONG WU,	)	Honorable Joseph R. Waldeck,
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE SPENCE delivered the judgment of the court.
Justices Schostok and Hudson concurred in the judgment.

ORDER

¶ 1 *Held:* (1) The State proved defendant guilty beyond a reasonable doubt of prostitution: although the complainant's testimony was inconsistent in certain tangential respects, it was not so fundamentally deficient that the trial court could not credit it; per the applicable statute, defendant's mere offer to touch the complainant's sex organ for money was sufficient; (2) defense counsel was not ineffective for failing to obtain a police report before trial and to put its contents on the record: because defendant merely speculated as to what the report said, she could not establish that counsel's failure was either unreasonable or prejudicial.

¶ 2 After a bench trial, defendant, Xiaohong Wu, was convicted of prostitution (720 ILCS 5/11-14(a) (West 2012)) and sentenced to 12 months' conditional discharge. On appeal, she

argues that (1) she was not proved guilty beyond a reasonable doubt; and (2) her trial attorney rendered ineffective assistance. We affirm.

¶ 3 At trial, the State's sole witness, Don Anderson, testified on direct examination as follows. He was 65 years old and resided in Libertyville. He had had a massage four or five times in the past three or four years. Normally, he recounted, he would enter a room, receive a towel, take a shower, come back into the room, and lie facedown on a table without the towel. On January 6, 2013, about four months before the trial, Anderson received a massage "right in Libertyville." Asked where, he testified, "I believe it was The Dragon something." (The actual name was the Dragon Spa.) Anderson had found the establishment on Craigslist, advertising a full-body massage for $80.

¶ 4 Anderson testified that he called to make an appointment but got no response, so he drove over. The door was locked. He rang the bell. A woman, whom he knew as Lily, answered and told him, "Not yet." She said to come back in 30 or 45 minutes. At trial, Anderson identified defendant as Lily and explained that, before January 6, 2013, he had seen her several times at the Bamboo Massage Parlor (apparently also known as the "Bamboo Spa") in Libertyville, where she had worked.

¶ 5 Anderson testified that, when he returned to the Dragon Spa, defendant was letting someone else out. She was alone. Defendant let Anderson in and locked the door. She told Anderson to go into a room and disrobe. Defendant gave Anderson a towel and asked him to take a shower, which he did. He then went to the massage room. Defendant had him lie facedown on the table and began the massage; she and Anderson talked in English about "casual stuff." At one point, she answered the doorbell, soon returned, and continued the massage.

¶ 6 Anderson testified that, eventually, defendant had him turn over and lie on his back. "In these kind [*sic*] of massage places," it was very common for a masseuse to ask a client to lie on his back with his genitals exposed. Anderson's penis was erect, because defendant "had just finished kind of playing with [his] butt." She had been massaging "[r]ight around [his] anus." After Anderson turned over, defendant placed her hand on his erect penis and told him that "for a hundred dollars she could take care of that." Her hand was moving as she said this. Anderson understood her to mean that she was offering to perform a "hand job" for $100. He told her that he did not have the money. Defendant said that he could go to a bank or an ATM. Anderson declined and told defendant that he did not have that kind of money. The massage continued "for a bit" and did not involve any stroking of the genitals.

¶ 7 Anderson testified that, after the massage was completed, he got dressed and left. Asked when he reported the incident to the police, he testified, "The same day," and "Maybe even within the hour." He also gave the police a handwritten statement.

¶ 8 Anderson testified on cross-examination as follows. Before giving the handwritten statement, he provided an oral statement to the police. He reiterated that he did so on January 6, 2013. Defendant's attorney asked, "And if the officer had placed on the police report that it was January 9th of 2013 when you first contacted the police[,] would that be correct or incorrect?" Anderson responded, "I am not sure I know the answer to that question."

¶ 9 A brief sidebar ensued. Defendant's attorney, Jonathan Lustig, explained to the judge, "This is all I have. I think there may be more discovery out there." The prosecutor, Nicole Cheskey, responded, "This is the same I have as well [*sic*]." Lustig stated, "Which says January 9th not the same day we are talking about, three days. I I [*sic*] don't know if there's another report. Is this it?" Cheskey responded, "This is it."

¶ 10 The cross-examination resumed. Anderson recalled telling the police that he had gone to the "Bamboo" four or five times, possibly six. He also told the police that he had gone to a few massage parlors and had never been solicited for "extra services." In prior massages at other parlors, Anderson had had his buttocks massaged, but "not so close to [his] anus." Defendant's hand had actually touched his anus.

¶ 11 On redirect examination, Anderson was asked, "When you first called to report this incident ***, did you remember the police department that you called?" He answered, "Libertyville." Asked whether he had ever called the Lake County sheriff's office, he answered, "That's a possibility. If I did they directed me to Libertyville because that's where I went." He recalled having spoken to more than one officer. The State rested.

¶ 12 Defendant called Belinda Steckenrider, a Libertyville police officer. On direct examination, she testified from memory that Anderson had spoken to her on January 7, 2013. However, she admitted, her report gave the date as January 9, 2013. She explained that Officer Kemmet took an initial report on January 7, 2013, although her report did not say so.

¶ 13 The attorneys and the court then held a sidebar, as follows:

> "MS. CHESKEY: I don't have that report. I was never provided with that report and the officer's name is not mentioned in the report. So the State was unaware that officer was present for the initial report.
>
> Our understanding is that Mr. Anderson had initially called the Lake County Sheriff's office to report this incident, which at that time he was referred to [*sic*] Libertyville to investigate. The State received the same reports that defense counsel received was [*sic*] Steckenrider's report.

THE COURT: The State has the obligation to give to the attorneys pursuant to my court order any and all discovery. If there exists another report and that's not tendered there could be problem [*sic*]. What I am going to do is take a very short recess here. I am going to allow you the opportunity to talk with this police officer for a limited issue as to that police report if it exists and where it is."

¶ 14 After the recess, the following colloquy ensued:

"MS. CHESKEY: *** After speaking with the police officer the State has received a supplemental report from Officer Kemitt [*sic*] which has been tendered to defense counsel.

MR. LUSTIG: Fair enough. If I may approach the bench I think we might expedite this. I will stipulate that it was submitted it looks like the seven day [*sic*] afterwards. I have no problem.

If you will stipulate to the narrative section I will be fine so we don't have to bring in Kemitt.

MS. CHESKEY: But he met with the complainant on January 7th. The report submitted on the 8th [*sic*] and they have to get a supervisor [to] sign off before it's submitted. It states right there on January 7th [*sic*].

MR. LUSTIG: In the lobby of the police department. I am looking at this in—the terms of this real simple [*sic*]. It says on January 7th of 2013 which is the day after.

MS. CHESKEY: Correct.

MR. LUSTIG: He has testified the day before. I will stipulate if you stipulate to the contents of this.

MS. CHESKEY: I believe that's what his testimony was on the bench [*sic*] as well.

MR. LUSTIG: It says nothing about meeting him on the 6th. Here he was saying the 6th. There is nothing there.

MS. CHESKEY: Correct.

MR. LUSTIG: We will do the stipulation.

THE COURT: Counsel, if you want time I will give it to you to subpoena the officer, get him, or I will order the State to bring him in. That's up to you.

MR. LUSTIG: I am good."

¶ 15 Defendant then testified on direct examination as follows. She owned the Dragon Spa and leased the location. She had invested more than $100,000 in the business and had obtained a business license from the village. She also had a City of Chicago massage license and two out-of-state massage-therapist licenses. At times, she had to operate the spa by herself, and then she would lock the door for safety.

¶ 16 Defendant was unsure whether she had seen Anderson before; it was possible. Asked whether a male customer had ever turned over from a back massage and had an erection, she testified that she had "never seen it," as the rules required each customer to have a large towel covering his or her "bottom part." It was common for a male customer to ask defendant to massage his penis, but she always refused, telling him that she did not provide that service.

¶ 17 On cross-examination, defendant testified that she had regular customers and walk-ins, so that she did not always know the client she was serving. Defendant spoke "limited English" and sometimes did not converse with the client during the massage. She did not use an interpreter to discuss with the client the specific massage that the client wanted, but she could "just tell when

the customer walk [*sic*] in what kind of services, where the body they need massage on [*sic*], and how long, how much time they need." Defendant provided the nicknames "Lily" and "Angel" to her clients. She had previously worked at the Bamboo Spa. She knew that she could lose her license and her investment if convicted in this case.

¶ 18 In her closing argument, Cheskey noted that, according to defendant, she locked herself in a building with a man who had not made an appointment and whom she did not know well. Cheskey contended that Anderson had testified credibly about a difficult subject and that his testimony established that defendant had offered to perform a sexual act on him for $100. Further, Anderson had testified that defendant had massaged his anus in order to arouse him sexually. Defendant had a strong financial motivation to lie. Turning to the discrepancies in the evidence of when Anderson reported the incident, Cheskey argued that the incident had happened four months ago, but Anderson had been consistent about the incident itself, and that there was some confusion caused by his having initially called the sheriff's office and being transferred to the police.

¶ 19 In his closing argument, Lustig emphasized Anderson's testimony that he contacted the police on the day of the incident, even within the hour, even though he actually did not call until the day after. Lustig stressed that Anderson's memory was crucial to the State's case and that he might have confused this incident with other times at other massage parlors. Also, defendant's financial interest was reason to conclude that she would not risk losing her investment and her licenses for the sake of a mere $100. In rebuttal, Cheskey maintained that Anderson's memory of the incident had been clear; his testimony straightforwardly proved defendant's guilt; and it was defendant whose memory was "clouded."

¶ 20 The trial court found defendant guilty under the statute, which reads:

> "Any person who knowingly performs, *offers* or agrees to perform any act of sexual penetration *** for anything of value, or *any touching or fondling of the sex organs of one person by another person*, for anything of value, for the purpose of sexual arousal or gratification commits an act of prostitution." (Emphases added.) 720 ILCS 5/11-14(a) (West 2012).

¶ 21 The trial court explained as follows. Anderson had testified that defendant had "just finished playing with [his] butt, put her hand on [his] penis and *** said for a hundred dollars she could take care of it." Witness credibility was crucial, and the State had proved that "the request for the hundred dollars more in cash was a request in exchanges [*sic*] for a sexual act."

¶ 22 In her posttrial motion, defendant raised reasonable doubt. The trial court denied the motion, noting again that the case turned on credibility and that the court had "resolved and continue[d] to resolve the question of credibility in this case in favor of the State." After the court sentenced her to a year of conditional discharge, defendant timely appealed.

¶ 23 On appeal, defendant contends first that the State did not prove her guilty beyond a reasonable doubt of committing prostitution. Defendant asserts that Anderson's "uncorroborated testimony" was inherently unsatisfactory for various reasons. We disagree.

¶ 24 In considering a challenge to the sufficiency of the evidence, we ask only whether, after viewing all of the evidence in the light most favorable to the State, any rational fact finder could have found the elements of the offense proved beyond a reasonable doubt. *People v. Ward*, 154 Ill. 2d 272, 326 (1992). The trier of fact is responsible for determining the witnesses' credibility, weighing their testimony, and deciding on the reasonable inferences to be drawn from the evidence. *People v. Hill*, 272 Ill. App. 3d 597, 603-04 (1995). It is not our function to retry the defendant. *People v. Lamon*, 346 Ill. App. 3d 1082, 1089 (2004).

¶ 25 The trial court found that defendant offered to give Anderson a "hand job" (masturbation) in return for $100 (in addition to the price of the massage). The court credited Anderson's testimony straightforwardly recounting this offer, and it discredited defendant's assertion to the contrary. The court could infer that the purpose of the touching, and the reason why defendant thought that Anderson might accept the offer, was Anderson's sexual arousal or gratification. Not only is this an obvious commonsense inference from the proposition itself, but the court could credit the evidence that defendant had, immediately before making her offer, massaged Anderson's anus in order to make him more amenable to her suggested action. Therefore, the evidence proved beyond a reasonable doubt all the elements of the offense.

¶ 26 Defendant, however, contends that Anderson's testimony was inherently insufficient. She first asserts that Anderson could not recall the name of defendant's business or its exact location. We note that Anderson referred to defendant's business as "The Dragon something," not a far cry from "The Dragon Spa," and that he recalled its approximate location. He had not been there previously. Defendant notes that Anderson had been to another massage parlor in Libertyville, where he had also seen defendant. She argues that this fact is "crucial," but she does not explain why. That Anderson had seen defendant in another spa on an earlier date does not raise a reasonable doubt that he visited her at the Dragon Spa on January 6, 2013. Indeed, this evidence explained why he recognized her and recalled the nickname that she gave clients.

¶ 27 Defendant also asserts that Anderson testified "without any foundation" that it is common for a masseuse to ask a client to turn over with his genitals exposed. Defendant does not explain why the trial court could not credit this testimony, to which she did not object. More important, defendant does not explain why this testimony bears on whether she was proved guilty beyond a reasonable doubt. At most, it gave the trial court cause to doubt Anderson's credibility, if the

court so chose, but it did not require the court to discredit anything Anderson said about defendant's conduct.

¶ 28 Defendant contends next that there was no evidence that she touched or fondled defendant's penis for the purpose of sexual arousal or gratification. However, the trial court found that she *offered* to masturbate Anderson, for $100, and, as noted, the court could infer that the purpose of the offered act would have been Anderson's sexual arousal or gratification. Defendant appears to argue that, because sexual penetration was not involved, the State had to prove that she actually touched or fondled Anderson's penis for the purpose of his sexual arousal or gratification, as a mere offer can amount to prostitution only if it involves sexual penetration.

¶ 29 Defendant does not explain her construction of the statute, much less support it with any citation to legal authority. Therefore, she has forfeited her statutory-construction argument. See Ill. S. Ct. R. 341(h)(7) (eff. Feb. 6, 2013); *Vancura v. Katris*, 238 Ill. 2d 352, 369 (2010). However, as this argument involves reasonable doubt, we choose to address it.

¶ 30 In her reply brief, defendant admits citing no authority for her construction of the statute, but she asserts that its "plain language" required the State to prove actual touching or fondling. Although a court must afford a statute its plain and ordinary meaning (*People v. Alvarado*, 2013 IL App (3d) 120467, ¶ 19), we hold that the statute here plainly supported defendant's conviction based on her mere offer to touch or fondle Anderson's penis.

¶ 31 The statute, read according to ordinary rules of grammar, unambiguously states that a person commits prostitution if she (1) knowingly performs or offers or agrees to perform (2) either (a) any act of sexual penetration for anything of value; or (b) any touching or fondling of the sex organs of another person for anything of value. Defendant posits that the "value component" of the statute allows a conviction based on a mere offer of sexual penetration but

that the "second clause" of the statute requires actual touching or fondling where no sexual penetration is involved. This construction does not make grammatical sense. It implies that the words "Any person who knowingly performs, offers or agrees to perform" apply only to the phrase "any act of sexual penetration ***" but not to the phrase "any touching or fondling ***." 720 ILCS 5/11-14(a) (West 2012). But this would require us to read, as an independent clause, "any touching or fondling of the sex organs of one person by another person, for anything of value, for the purpose of sexual arousal commits an act of prostitution." *Id.*

¶ 32 "[A]ny touching *** commits an act of prostitution" is highly irregular English. In common parlance, a *person* commits an act of prostitution. Reading the first 10 words of the statute to apply to the parallel phrases that both begin with "any" and both describe categories of sexual conduct avoids grammatical infirmity. "[A]nyone well versed in statutory construction, or even English grammar, would find the plain language" of the statute contrary to defendant's argument. *Bowman v. American River Transportation Co.*, 217 Ill. 2d 75, 83 (2005).

¶ 33 Not only is defendant's argument unsound, but we have already rejected it. In *People v. DeBartolo*, 242 Ill. App. 3d 811 (1993), the defendant, a massage parlor operator, was convicted of prostitution, based on his agreement with an undercover police officer to masturbate her for a fee. The agreed-upon act did not take place. We affirmed the defendant's conviction. We noted, "While the prostitution statute prohibits a person from *offering* or agreeing to an act of sexual conduct for money for the purpose of sexual arousal or gratification, *the statute does not require a completed act of sexual conduct*." (Emphases added.) Id. at 820-21. The statute has not changed materially since *DeBartolo*, and that case's facts are essentially indistinguishable. We conclude that defendant was proved guilty beyond a reasonable doubt of prostitution.

¶ 34 We turn to defendant's second argument on appeal. She contends that Lustig, her trial counsel, was ineffective for failing to obtain Kemmet's police report before trial and, once the State had disclosed the report, failing to "spread of record" what it said. Defendant asserts that the State's discovery violation entitled her to a new trial, although she appears to raise this not as a separate claim of error but only to support her contention that Lustig was ineffective. The State responds that the record shows neither any basis for granting defendant a new trial nor any basis for concluding that Lustig was ineffective. We agree with the State.

¶ 35 To prevail on a claim that counsel was ineffective, a defendant must show that (1) counsel's performance was objectively unreasonable; and (2) it is reasonably likely that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Strickland v. Washington*, 466 U.S. 668, 688, 694 (1984); *People v. Manning*, 241 Ill. 2d 319, 326 (2011). Our scrutiny of counsel's performance must be highly deferential. *People v. Fuller*, 205 Ill. 2d 308, 330-31 (2002). Mistakes in strategy or in judgment do not, in themselves, render representation incompetent. *Id.* at 331.

¶ 36 Defendant cannot meet either prong of the *Strickland* test, because her ineffectiveness claim is built on speculation, and implausible speculation at that. She cannot establish why Kemmet's report was so crucial that Lustig's failure to obtain it before trial or to "spread of record" what it said was either unreasonable or prejudicial. Defendant asserts that, owing to Lustig's conduct, we do not know precisely what was in Kemmet's report. However, that is exactly the point: without this information, defendant's claim rests on guesswork.

¶ 37 Moreover, what we do know from the record severely undermines any assertion that Lustig was ineffective (or that the State's discovery infraction warranted a new trial). Lustig was given a copy of the report; he read it; and he decided that he did not need to subpoena Kemmet

or spread the contents of the report of record. We must presume that Lustig's choice of strategy was reasonable, and we have no basis to conclude that it was prejudicial.

¶ 38 There is little ground to infer that anything in Kemmet's report that was not made of record at trial would have affected the trial's outcome. It appears that the only significance that the parties attached to the report was that it cast doubt on Anderson's testimony that he reported the incident to the police on the day that it occurred, January 6, 2013. However, Steckenrider testified that Kemmet made his report on January 7, 2013. The inconsistency in the evidence of when Anderson told the authorities about the incident was an issue in the case, with Lustig arguing that the inconsistency helped to create a reasonable doubt of defendant's guilt. The trial court was made aware of this inconsistency and credited Anderson anyway. Defendant offers nothing to suggest that more detail would have changed anything.

¶ 39 Also, for similar reasons, defendant has not shown that any discovery violation warranted a new trial (insofar as she has preserved this argument and raised it properly). Although the evidence could be considered close, nothing suggests that the undisclosed evidence was strong (and, of course, it was no longer undisclosed after the sidebar), or that prior notice would have helped defendant, or that the State acted willfully in failing to disclose the evidence timely. See *People v. Weaver*, 92 Ill. 2d 545, 560 (1982). Indeed, defendant concedes the fourth factor.

¶ 40 For the foregoing reasons, the judgment of the circuit court of Lake County is affirmed.

¶ 41 Affirmed.