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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

STATE OF IOWA,)
Appellee,) Filed October 19, 1978
vs.)
RONALD ARTHUR MASSEY,)
Appellant.) 629/61268

Appeal from Polk District Court - Thomas S. Bown, Judge.

Defendant appeals his conviction and sentence for keeping a house of ill fame contrary to § 724.3, The Code, 1977. - Affirmed.

Alfredo G. Parrish, Des Moines, for appellant.

Richard C. Turner, Attorney General, J. Susan Carney, Assistant Attorney General, and Dan Johnston, Polk County Attorney, for appellee.

Heard by Donielson, Acting C.J., Snell and Carter, JJ. Oxberger, J. takes no part.

PER CURIAM

Defendant appeals his conviction and sentence for keeping a house of ill fame contrary to § 724.3, The Code, 1977. He assigns several errors. We affirm the trial court.

I. Objections to instructions. Defendant objected to several instructions given to the jury by the trial court. We first consider his claim on this appeal that the instructions failed to convey his theory of the case. Instruction 9 given by the trial court was as follows:

> It is the defendant's theory of the case that David S. Taylor was hired as the manager of the Leisure Spa and that while so employed he had some female employees engage in sexual misconduct, and that he kept knowledge of this conduct from his employer, Ron Massey.
>
> If you find from the evidence that such illegal activities, if any, were unknown to Ron Massey, then you **should consider this evidence in arriving at your verdict.** (Emphasis added.)

Defendant urges that in lieu of the emphasized words the jury should have been told flat out in instruction 9 that if the illicit activities were unknown to the defendant he must be acquitted.

In the trial court's marshalling instruction (no. 6) the jury was told that the defendant must be found not guilty unless the State established beyond a reasonable doubt that: "said place of business was kept by the defendant with knowledge of the prostitution and lewdness." The instructions must be considered as a whole. When this is done we must conclude that defendant's theory of defense (claimed lack of knowledge) was adequately conveyed to the jury in the court's instructions. No error results from a mere failure to submit an issue in the form requested. State v. Lott, 255 N.W.2d 105, 108-09 (Iowa 1977).

Next defendant contends the trial court's instructions fail to properly define the element of control required to be established in order to render him guilty of the offense charged. We disagree. As already stated, instruction 6 required the State to establish that said place of business was kept by the defendant with knowledge of the prostitution and lewdness. In addition, instruction 7 provided:

> The State must prove beyond a reasonable doubt not only that it was a house of ill fame — that is, that it was a place resorted to by outsiders for prostitution and lewdness — but also that the defendant, either by himself or in concert with another person or persons, was in charge of and managed the conduct, if any, which caused said house to be a house of ill fame.

The element of control was sufficiently covered in the instructions.

Defendant's final challenge to the instructions relates to the instruction defining prostitution so as to include sex acts other than sexual intercourse. In considering this argument we may concede without determining the issue that the legal definition of prostitution was limited to sexual intercourse for pecuniary gain under the law in force at the time the relevant occurrences took place. But this does not require a reversal in the present case. The statutory offense of which the defendant was charged and convicted involves keeping ahouse of ill fame "resorted to for purposes of prostitution or lewdness." Section 724.3, The Code, 1977. We conclude that the concept of "lewdness" embraced by the statute includes sex acts for pecuniary profit other than sexual intercourse.

The challenged instruction provided:

> Unless you find beyond a reasonable doubt that the defendant was a keeper of the place of business involved in this case, you cannot find him guilty, even if you should find the place of business to be a house of ill fame.
>
> The State must prove beyond a reasonable doubt not only that it was a house of ill fame — that is, that it was a place resorted to by outsiders for prostitution and lewdness — but also that the defendant, either by himself or in concert with another person or persons, was in charge of and managed the conduct, if any, which caused said house to be a house of ill fame.
>
> Prostitution is the performance of a sex act or acts for pecuniary gain.

While perhaps it would have better form for the trial court to have instructed the jury that "prostitution or lewdness is the performance of a sex act or acts for pecuniary gain" there was no prejudice to defendant in failing to do so. The instruction adequately apprised the jury of the type of conduct proscribed by the statute and whether such conduct be labelled prostitution, lewdness, or both, is not material in determining whether defendant was guilty of the offense charged.

II. Overruling of hearsay objection to certain testimony. Defendant made a timely hearsay objection to the substance of a conversation between an undercover law enforcement officer, who entered defendant's massage parlor to gather evidence of prostitution, and a female employee of that establishment. The trial court overruled the objection and the witness testified that the employee answered affirmatively when asked "if the boss would permit sex in the back room." In so ruling the trial court stated that the testimony fell within the res gestae exception to the hearsay rule. While

perhaps lacking the elements of res gestae we agree that the evidence was properly admitted. Evidence of this conversation was necessary to complete the story of the crime on trial and formed a part of the transactions giving rise to the crime. State v. Hinkle, 229 N.W.2d 744, 748 (Iowa 1975); State v. Lyons, 210 N.W.2d 543, 546-47 (Iowa 1973). The trial court did not err in overruling defendant's objection to the conversation.

III. Admissibility of evidence of reputation. Finally, defendant complains that the trial court erred in overruling his objection to testimony offered to prove the general reputation of his establishment as a house of ill fame. Section 724.4, The Code, 1977, provides:

> The State, upon the trial of any person indicted for keeping a house of ill fame, may, for the purpose of establishing the character of the house kept by defendant, introduce evidence of the general reputation of such house as so kept.

In reliance on this statute the trial court permitted three law enforcement agents to testify as to the reputation of defendant's massage parlor as a front for prostitution.

In reviewing defendant's contention we note that no objection is made to this evidence on the ground that it constitutes hearsay or denies defendant's right to confront witnesses against him. The objection urged is that the State failed to lay sufficient foundation for the expression of such opinions by the witnesses in question. Defendant urges that the rather strict foundational requirement applied to use of reputation testimony to prove character should also be applied to the type of reputation testimony involved in the present case. The State concedes that the foundational requirements applied to character testimony based on reputation, as established in State v. Hobbs, 172 N.W.2d 268 (Iowa 1969) have not been met. It is urged, however, that a lesser standard exists with respect to the type of evidence contemplated by § 724.4.

While the issue is not free from doubt we conclude that under prior interpretations placed upon § 724.4 by the supreme court the record contains sufficient foundation to render the challenged reputation testimony admissible. See, e.g., State v. Mauch, 236 Iowa 217, 17 N.W.2d 536, 541 (1945); State v. Mulhollen, 173 Iowa 242, 155 N.W. 252, 253 (1915).

And if it were otherwise, we would hold such testimony to be harmless error. The challenged testimony went only to the reputation of the establishment; not to defendant's involvement in or knowledge of the alleged sexual activities carried on there. As indicated in our discussion under division I, supra, it was defendant's theory of

the case that while some sexual misconduct took place at his massage parlor this was done at the insistence of his hired manager without defendant's knowledge. Because the issues were framed in this manner we conclude that the challenged evidence even if not admissible was not sufficiently prejudicial to require reversal. See, e.g., State v. Gilmore, 259 N.W.2d 846, 858-59 (Iowa 1977).

We have considered all issues presented and find no basis for reversal.

AFFIRMED.