

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

LC2011-000719-001 DT

03/15/2012

THE HON. CRANE MCCLENNEN

CLERK OF THE COURT
K. Waldner
Deputy

STATE OF ARIZONA

WEBSTER CRAIG JONES

v.

WEN XIA JIN (001)

ELEANOR L MILLER

MESA MUNICIPAL COURT - COURT
ADMINISTRATOR
MESA MUNICIPAL COURT -
PRESIDING JUDGE
REMAND DESK-LCA-CCC

RECORD APPEAL RULING / REMAND

Lower Court Case Number CR 2011-000063.

Defendant-Appellant Wenxia Jin (Defendant) was convicted in Mesa Municipal Court of prostitution and three other related offenses. Defendant contends she was entitled to a jury trial, and further contends the state did not present sufficient evidence for a conviction. For the following reasons, this Court affirms the judgment and sentence imposed.

I. FACTUAL BACKGROUND.

On December 31, 2010, Defendant was cited for prostitution, A.R.S. § 13-3214(A); offering service to gratify sexual desires, M.C.C. § 5-12-18(A)(2)(a) [now § 5-12-19(A)(2)(a)]; offering service touching private areas, M.C.C. § 5-12-18(A)(2)(b) [now § 5-12-19(A)(2)(b)]; and offering services for compensation not listed on schedule of services, M.C.C. § 5-12-18(A)(6) [now § 5-12-19(A)(6)]. (R.T. of Apr. 25, 2011, at 6.) At the pretrial conference, Defendant's attorney made an oral motion for a jury trial on the prostitution charge only. (C.D. of Mar. 2, 2011, at 00:53.) The trial court denied this motion. (*Id.* at 01:08.)

At the trial in this matter, Detective Robert O'Sullivan testified he was on duty with the Criminal Investigations Unit on December 31, 2010. (R.T. of Apr. 25, 2011, at 7-8.) At approximately 5:30 p.m., he went to the Tops Asian Massage Parlor and spoke to Defendant. (*Id.* at 8-10.) He told Defendant he wanted either a "hand job" or a "blow job," and she said "massage only." (*Id.* at 10.) While they were talking, someone else came in, and Defendant took that person to the back area. (*Id.* at 10-11.) Defendant came back, and Detective O'Sullivan again said he wanted either a "hand job" or a "blow job," and gestured with his hand simulating mastur-

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bation. (*Id.* at 11.) Defendant asked him if he was a policeman, and he said he was not, so Defendant said it would be \$40 for the massage and \$20 for a tip. (*Id.* at 12.) Detective O’Sullivan asked Defendant if the \$20 was for the “hand job,” and Defendant nodded and used her hand in motion to gesture male masturbation. (*Id.* at 12, 24.) Defendant told Detective O’Sullivan another girl would be doing the massage and he would be tipping the girl. (*Id.* at 21–23.) At that point, several other officers knocked and announced they were the police. (*Id.* at 12–13.) Defendant then walked away and put on some pants and said, “No, no, no, massage only.” (*Id.* at 13.)

Detective Nate Boulter testified he was on duty with the Community Neighborhood Enforcement Team on December 31, 2010. (R.T. of Apr. 25, 2011, at 26–27.) On that date, he was at the Tops Asian Massage Parlor and discussed with Detective O’Sullivan the arrangements Detective O’Sullivan had made with Defendant. (*Id.* at 27–30.)

After both sides rested, Defendant’s attorney made a motion to dismiss and argued Defendant had not agreed to do anything, and instead the agreement was another girl would commit the sex acts. (R.T. of Apr. 25, 2011, at 31.) The prosecutor argued prostitution was agreeing to engage in a sex act for money, and the person agreeing does not have to be the one that will be doing the sex act. (*Id.* at 32.) The trial court deemed this to be a Motion for Directed Verdict and denied it, finding the State had presented sufficient evidence to show Defendant was guilty beyond a reasonable doubt, “under an accomplice theory if nothing else.” (*Id.* at 33.) The trial court found Defendant guilty of all the charged offenses. (*Id.* at 35.) The trial court then imposed sentence. (*Id.* at 37–38.) On April 27, 2011, Defendant filed a timely notice of appeal. This Court has jurisdiction pursuant to ARIZONA CONSTITUTION Art. 6, § 16, and A.R.S. § 12–124(A).

II. ISSUES.

A. Has Defendant waived any claim for a jury trial.

Defendant contends she should have been given a jury trial on the three Mesa City code violations. The applicable statute provides as follows:

A trial by jury shall be had if demanded by either the state or defendant. Unless the demand is made at least five days before commencement of the trial, a trial by jury shall be deemed waived.

A.R.S. § 22–320. This statute applies to justice courts, and to police courts (also known as municipal courts or city courts). *Benitez v. Dunevant*, 194 Ariz. 224, 227, 979 P.2d 1017, 1020 (Ct. App. 1998), *vacated on other grounds*, 198 Ariz. 90, 97, 7 P.3d 99, 106 (2000); *Rothweiler v. Superior Ct.*, 1 Ariz. App. 334, 341, 402 P.2d 1010, 1017 (1965), *aff’d*, 100 Ariz. 37, 410 P.2d 479 (1965). In the present matter, Defendant’s attorney requested a jury trial for the prostitution charge, but did not request a jury trial for the three Mesa City Code charges. Because Defendant did not request a jury trial for these three charges, she has waived any right to a jury trial for them.

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Further, absent fundamental error, failure to raise an issue at trial waives the right to raise the issue on appeal. *State v. Gendron*, 168 Ariz. 153, 154, 812 P.2d 626, 627 (1991); *State v. Gatliff*, 209 Ariz. 362, 102 P.3d 981, ¶ 9 (Ct. App. 2004). Fundamental error is limited to those rare cases that involve error going to the foundation of the defendant's case, error that takes from the defendant a right essential to the defendant's defense, and error of such magnitude that the defendant could not possibly have received a fair trial, and places the burden on the defendant to show both that error existed and that the defendant was prejudiced by the error. *State v. Soliz*, 223 Ariz. 116, 219 P.3d 1045, ¶ 11 (2009). Because Defendant made no claim with the trial court she was entitled to a jury trial for the Mesa City Code offenses, she would be entitled to relief on appeal only if she could show both that error existed and that she was prejudiced by the error. Defendant has, however, failed to show error.

Under Arizona law, a defendant is entitled to a jury trial for an offense that is the same as, or is similar to, a common-law offense for which a defendant was entitled to a jury trial prior to statehood. *Derendal v. Griffith*, 209 Ariz. 416, 104 P.3d 147, ¶¶ 9–12, 36–39 (2005). Defendant makes the following argument: (1) the three Mesa City Code offenses are similar to keeping a house of prostitution; (2) keeping a house of prostitution (or keeping a bawdy house) was a common-law offense for which a defendant was entitled to a jury trial prior to statehood; thus (3) Defendant was entitled to a jury trial for the three Mesa City Code offenses. For two reasons, this Court concludes Defendant is incorrect in this analysis.

First, it appears the Mesa City Code offenses are not the same as, or is similar to, keeping a bawdy house or keeping a house of prostitution. The three Mesa City Code offenses are (1) offering service to gratify sexual desires, (2) offering service touching private areas, and (3) offering services for compensation not listed on schedule of services. The common-law offense of keeping a bawdy house would be similar to keeping a house of prostitution, which is defined as follows:

A. A person who knowingly is an employee at a house of prostitution or prostitution enterprise is guilty of a class 1 misdemeanor.

B. A person who knowingly operates or maintains a house of prostitution or prostitution enterprise is guilty of a class 5 felony.

A.R.S. § 13–3208. Nowhere in § 13–3208 is there some requirement that a person keeping a house of prostitution must post a schedule of services offered, thus § 5–12–18(A)(6) [now § 5–12–19(A)(6)] is not similar to keeping a bawdy house or house of prostitution. Further, under § 13–3208(A) and (B), the person who is an employee in, and the person operating, a house of prostitution does not have to be the one offering sexual service, which is a requirement of both § 5–12–18(A)(2)(a) and (b) [now § 5–12–19(A)(2)(a) and (b)]. Thus those two offenses would not be similar to keeping a bawdy house or house of prostitution.

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Second, even if the three Mesa City Code offenses were similar to keeping a bawdy house or house of prostitution, Defendant still would not be entitled to a jury trial. As noted above, a defendant is entitled to a jury trial if the charged offense is the same as, or is similar to, a *common-law* offense for which a defendant was entitled to a jury trial before statehood. But the jury trial rights provided for crimes under the *territorial penal code* prior to statehood were not preserved by the Arizona Constitution, thus the fact that a defendant had the right to a jury trial for an offense under the territorial penal code does not necessarily mean a defendant is presently entitled to a jury trial. *Abuhl v. Howell*, 212 Ariz. 513, 135 P.3d 68, ¶¶ 10–11 (Ct. App. 2006) (although there may have been statutory crime of false reporting to law enforcement agency at time of statehood, there was no common-law crime, thus defendant not entitled to jury trial under this part of test); *Phoenix City Prosecutor's Office v. Klausner (Buford)*, 211 Ariz. 177, 118 P.3d 1141, ¶¶ 9–10 (Ct. App. 2005) (defendants contended that, prior to statehood, persons charged with misdemeanors were given jury trials on demand, thus he was entitled to jury trial for charge of assault; court held fact that territorial courts granted jury trials in misdemeanor cases in compliance with territorial statutes did not mean defendants were presently entitled to jury trials); *Newkirk v. Nothwehr*, 210 Ariz. 601, 115 P.3d 1264, ¶¶ 10–12 (Ct. App. 2005) (jury trial on allegation of prior conviction was statutory right under territorial penal code, thus allegation of prior conviction had no common-law antecedent that would require jury trial on present allegation of prior conviction). The antecedent for keeping a house of prostitution under A.R.S. § 13–3208 was a statutory offense under the territorial penal code:

It shall be unlawful for any owner or agent of any owner or other person or persons, to keep or reside in any room, apartment or house of ill-fame or ill repute, or house, room or apartment resorted to for the purpose of prostitution or assignation or to let, lease or rent for any length of time whatever to any person of ill fame any house, room or structure situated four hundred yards in a direct line of any school house or school room used by any of the schools in the Territory of Arizona, or within two hundred and fifty yards in a direct line of any county court house, city hall or other public building in the Territory of Arizona Any person violating any of the provisions of this act is guilty of a misdemeanor.

ARIZ. PENAL CODE of 1901 § 275. This section was re-enacted after statehood. ARIZ. PENAL CODE of 1913 § 306; ARIZ. REV. CODE of 1928 § 4661; ARIZ. CODE of 1939 § 43–4407; A.R.S. of 1956 § 13–589. Thus, because keeping a house of ill repute or house of prostitution was a statutory crime under the territorial penal code and not a common-law offense in Arizona, the fact that a defendant may have received a jury trial for that offense prior to statehood does not entitle Defendant to a jury trial for the three charges under the Mesa City Code. Defendant has thus failed to show error.

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B. Did the State present sufficient evidence to show Defendant was guilty of prostitution.

Defendant contends the evidence presented showed Defendant offered to have the Detective have sex with another person, and thus the evidence was not sufficient to show she had committed prostitution. An appellate court will not reverse a conviction for insufficient evidence unless there is no substantial evidence to support the verdict. *State v. Scott*, 187 Ariz. 474, 477, 930 P.2d 551, 554 (Ct. App. 1996), citing *State v. Hallman*, 137 Ariz. 31, 38, 668 P.2d 874, 881 (1983). Substantial evidence is more than a mere scintilla, and is what a reasonable person could accept as sufficient to support a guilty verdict beyond a reasonable doubt. *State v. Hughes*, 189 Ariz. 62, 73, 938 P.2d 457, 468 (1997). “[T]he relevant question is whether, after 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.” *State v. Montano*, 204 Ariz. 413, 65 P.3d 61, ¶ 43 (2003), quoting *State v. Tison*, 129 Ariz. 546, 552, 633 P.2d 355, 361 (1981). “When considering whether a verdict is contrary to the evidence, this court does not consider whether it would reach the same conclusion as the [trier of fact], but whether there is a complete absence of probative facts to support its conclusion.” *State v. Mauro*, 159 Ariz. 186, 206, 766 P.2d 59, 79 (1988). Defendant was convicted of prostitution, which provides, “It is unlawful for a person to knowingly engage in prostitution.” A.R.S. § 13–3214(A). “Prostitution” presently is defined as:

“Prostitution” means engaging in or agreeing or offering to engage in sexual conduct under a fee arrangement with any person for money or any other valuable consideration.

A.R.S. § 13–3211(5). “Prostitution” formally was defined as:

“Prostitution” means engaging in or agreeing or offering to engage in sexual conduct with another person under a fee arrangement with that person or any other person.

A.R.S. § 13–3211(5) (amended in 2007). Under the former version, it prohibited conduct only by the prostitute and the customer because it prohibited “sexual conduct with another person” under a fee arrangement with “that person or any other person.” The new version still retains the element of a fee arrangement with the prostitute or a pimp because it provides for “a fee arrangement with any person for money or any other valuable consideration.” But the new version expanded the reach of the statute because, while the former version prohibited “sexual conduct with another person,” the new version merely prohibits “sexual conduct” and does not limit it to that person.

Viewed in this manner, the record shows the evidence presented supported the conviction. Defendant and Detective O’Sullivan agreed on “a fee arrangement with any person for money or any other valuable consideration.” Further, Defendant offered to have Detective O’Sullivan “engage in sexual conduct” with one of the women on the premises. The evidence was thus sufficient to support the conviction.

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III. CONCLUSION.

Based on the foregoing, this Court concludes Defendant was not entitled to a jury trial on the three Mesa City code violations, and the evidence supported the convictions.

IT IS THEREFORE ORDERED affirming the judgment and sentence of the Mesa Municipal Court.

IT IS FURTHER ORDERED remanding this matter to the Mesa Municipal Court for all further appropriate proceedings.

IT IS FURTHER ORDERED signing this minute entry as a formal Order of the Court.

/s/ Crane McClennen

THE HON. CRANE MCCLENNEN
JUDGE OF THE SUPERIOR COURT

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