COURT OF APPEALS
DECISION
DATED AND FILED

January 14, 2014

Diane M. Fremgen
Clerk of Court of Appeals

Appeal Nos. 2013AP992-CR
2013AP993-CR

Cir. Ct. Nos. 2009CF4959
2010CF2075

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JERMAINE L. ROGERS,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: KEVIN E. MARTENS and JEFFREY A. WAGNER, Judges. *Affirmed*.

Before Curley, P.J., Fine and Kessler, JJ.

¶1 CURLEY, P.J. Jermaine L. Rogers appeals the judgment convicting him of numerous sex crimes involving two victims, P.R. and K.D.,

including human trafficking, sexual assault, attempted pandering, and child enticement. He also appeals the order denying his postconviction motion. Rogers presents three arguments on appeal. First, he argues that the trial court erroneously exercised its discretion in granting the State's motion to join the cases regarding P.R. and K.D. Second, he argues that trial counsel was ineffective. Third, he argues that the evidence for three of the eleven counts of which he was convicted was insufficient. We affirm.

BACKGROUND

¶2 In November 2009, Rogers was charged with five sex crimes involving nineteen-year-old P.R.: human trafficking; kidnapping; second-degree sexual assault; solicitation of a prostitute; and pandering.[1] The complaint alleged that in October 27, 2009, Rogers approached P.R. in his car and offered her a ride. P.R. asked to be dropped off at a friend's house, but Rogers instead took her to a house and directed her inside, where he revealed that he was a pimp and that he wanted her to "get in the game" and work for him. Rogers locked P.R. in a bedroom where he again tried to convince her to work for him and sexually assaulted her. Rogers then left P.R. alone in a bedroom, removing the doorknob so she could not escape. When Rogers returned, P.R. asked to use the bathroom, during which time she contacted an FBI victim advocate on her cell phone to ask for help. After P.R. came back from the bathroom, Rogers again locked her in the bedroom and told her that she was going to work for him in Chicago. After several hours, Rogers finally opened the bedroom door and allowed P.R. to go into

[1] The original complaint regarding P.R. alleged only three counts: human trafficking, kidnapping, and second-degree sexual assault; the solicitation of a prostitute and pandering charges were added later.

the living room. Once P.R. was close to the door leading outside and felt she could easily escape, she told Rogers that she had called the FBI and that police were on their way. At this point Rogers' demeanor changed dramatically; he asked P.R. why she would call police, said that she was free to leave, and said that he had done nothing wrong.

¶3 In April 2010, Rogers was charged with six sex crimes involving fifteen-year-old K.D.: two counts of child enticement; one count of soliciting a child for prostitution; two counts of sexual assault, and one count of pandering. The complaint alleged that sometime between May 2004 and May 2006, Rogers approached K.D. in his car and asked if she needed a ride because she looked lost. Rogers took K.D. to a house near 29th Street and Locust in Milwaukee, where he had sex with her and recruited her to work as a prostitute. During the months that followed, K.D. worked as a prostitute for Rogers, sometimes in Milwaukee and sometimes in Chicago. The complaint also alleged that Rogers beat K.D. on several occasions, including when K.D. tried to run away and when K.D. claimed to not have made any money while on a "date."

¶4 In August 2010, the State moved to consolidate the cases involving P.R. and K.D. At the final pretrial hearing, Rogers' counsel objected to the motion.

¶5 The trial court granted the State's motion, reasoning that the two cases were substantively very similar, and that the differences between the cases did not override the similarities:

> The State argues that the matters charged in these two cases are similar and are of the same or similar character, that in each circumstance the facts and what the witnesses will testify to demonstrates the defendant's intent to solicit allege[d] victims for prostitution and intent to

> commit some form of sexual assault on the victim as part of those efforts.
>
> That in each circumstance each victim will testify that they were approached by the defendant in a vehicle while on the street, that he transports them to another location or residence where he introduces the idea of engaging in prostitution and working for him in that manner.
>
> These solicitations and the attempts are very similar in each case, including the manner and method, words, word choice, and promises of benefits, protections, rewards, and family.
>
> In each circumstance the State further sets forth witnesses that will testify to the defendant's practice being that of prostituting women in Chicago….
>
> ….
>
> There are differences to the extent that at least in one circumstance of the case, I think it's in the most recently filed case, that the allegations involve active participation in prostitution, and in the other case it was an effort to do so but ultimately not without [sic] success.
>
> The State recognizes that in the '09 case, the allegations involve a great[er] deal of force or coercion than in the older case. Those differences though don't undermine the Court's finding that they are of the same or similar character.
>
> I think also relevant is the analysis with respect to other acts evidence, that apart from the completed acts themselves, the solicitation, the manner in which they occur and the similarity, the State's argument is that that would be relevant under [WIS. STAT. §] 904.04(2), for the purposes of demonstrating the defendant's planning and intent in engaging in those acts.
>
> I'll find that to be a permissible purpose under the statute, that it would otherwise have probative value, and in my judgment would not present or cause any undue prejudice, that I think is also a factor to consider.

The trial court also reasoned that, although the incidents giving rise to the charges regarding P.R. and K.D. occurred a few years apart, the cases still met the criteria

for joinder given the overlapping evidence in the case. In addition, the trial court found that Rogers would not suffer any undue prejudice from joinder.

¶6 Rogers was tried before a jury, which convicted him on all five charges relating to P.R. and all six charges relating to K.D. Rogers thereafter filed a postconviction motion, which was denied.

¶7 Rogers now appeals. Additional facts will be developed as necessary.

ANALYSIS

¶8 Rogers presents three arguments on appeal. First, he argues that the trial court erroneously exercised its discretion in granting the State's motion to join the cases. Second, he argues that trial counsel was ineffective. Third, he argues that the evidence for Counts 1, 5, and 11 was insufficient. We address each argument in turn.

1. The trial court did not erroneously exercise its discretion in granting the State's motion to join the cases regarding K.D. and P.R.

¶9 Rogers first argues that the cases concerning P.R. and K.D. were improperly joined. "Two or more crimes may be charged in the same complaint, information or indictment … if the crimes charged, whether felonies or misdemeanors, or both, are of the same or similar character or are based on the same act or transaction or on 2 or more acts or transactions connected together or constituting parts of a common scheme or plan." WIS. STAT. § 971.12(1)

(2011-12).[2] "To be of the 'same or similar character' ... crimes must be the same type of offenses occurring over a relatively short period of time and the evidence as to each must overlap." ***State v. Hamm***, 146 Wis. 2d 130, 138, 430 N.W.2d 584 (Ct. App. 1988) (citation omitted). We construe the joinder statute "broadly in favor of initial joinder." *See* ***State v. Hoffman***, 106 Wis. 2d 185, 208, 316 N.W.2d 143 (Ct. App. 1982).

¶10 While we independently examine the propriety of the initial determination of joinder as a matter of law, *see* ***State v. Locke***, 177 Wis. 2d 590, 596, 502 N.W.2d 891 (Ct. App. 1993), where a trial court has granted a motion to consolidate, we review the decision for an erroneous exercise of discretion, *see* ***Holmes v. State***, 63 Wis. 2d 389, 396, 217 N.W.2d 657 (1974). In order to establish that the trial court erroneously exercised its discretion, the defendant must establish that he or she suffered "'substantial prejudice.'" *See* ***Hoffman***, 106 Wis. 2d at 209 (citation omitted). "If the offenses meet the criteria for joinder, it is presumed that the defendant will suffer no prejudice from a joint trial." ***State v. Leach***, 124 Wis. 2d 648, 669, 370 N.W.2d 240 (1985). In order to rebut that presumption, "[i]t is not sufficient to show that *some* prejudice was caused." *See* ***Hoffman***, 106 Wis. 2d at 209 (emphasis added). We have previously explained:

> "Any joinder of offenses is apt to involve some element of prejudice to the defendant, since a jury is likely to feel that a (defendant) charged with several crimes must be a bad individual who has done something wrong. However, if the notion of involuntary joinder is to retain any validity, a higher degree of prejudice, *or certainty of prejudice*, must be shown before relief will be in order."

[2] All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

Id. at 209-10 (citation omitted; emphasis added; parenthetical in ***Hoffman***).

¶11 With the applicable standards in mind, we turn to Rogers' contention that joinder was improper. Rogers contends that joinder was improper because there was an insufficient overlap in evidence. He points out that Rogers' victims were different in age: K.D. was only fourteen or fifteen when she first encountered Rogers, while P.R. was nineteen. Rogers also notes that the time span between the two crimes was different; not only did the allegations involving K.D. occur years before those involving P.R., but Rogers' relationship with K.D. was ongoing, whereas with P.R. the events concluded in a single day. Rogers further claims that because the allegations regarding the two victims were different, the evidence from K.D.'s case—which, in Rogers' view was much stronger—would not have been admissible in P.R.'s case under ***State v. Sullivan***, 216 Wis. 2d 768, 771-73, 576 N.W.2d 30 (1998) (outlining three-part test for admissibility of "other acts" evidence under WIS. STAT. § 904.04), and consequently, the admission of the "stronger" evidence in the joined case substantially prejudiced him.

¶12 We disagree with Rogers, and conclude that joinder was proper. First, the offenses were of the "'same or similar character'" because the evidence regarding each victim did overlap. *See* ***Hamm***, 146 Wis. 2d at 138 (citation omitted). As the State correctly points out, Rogers used a similar modus operandi for soliciting P.R. and K.D. In both cases, Rogers approached the victim in a cream-colored Cadillac and offered her a ride; took the victim to a house, where he then took her into a bedroom and sexually assaulted her; and did not immediately raise the subject of prostitution but waited until the victims were in

the house.[3] Also, as the trial court found and as Rogers does not dispute, the substance of Rogers' solicitation to each victim was similar, "including the manner and method, words, word choice, and promises of benefits, protections, rewards, and family." Additionally, the events took place in the same geographic area. Rogers picked up P.R. at a bus stop on Center Street and picked up K.D. near Hadley Street, just one block north of Center Street. In both cases the victims revealed that Rogers conducted business in Chicago as well as Milwaukee. *See* ***State v. Hall***, 103 Wis. 2d 125, 139, 307 N.W.2d 289 (1981) (crimes occurring "from a distance of approximately 1.6 to 6.5 miles apart" found to have occurred within same geographic area). Finally, the investigation of P.R.'s case led police to identify Rogers as the perpetrator in K.D.'s case. *Cf.* ***State v. Linton***, 2010 WI App 129, ¶17, 329 Wis. 2d 687, 791 N.W.2d 222. At trial, Detective Lynda Stott testified that during the investigation of P.R.'s case, Rogers told a detective that he went by the nickname "Rah-Rah." This information led police to identify Rogers as the possible perpetrator in K.D.'s case because she too had identified her pimp as "Rah-Rah." Together, this evidence not only overlaps, but also shows "a common scheme or plan." *See* WIS. STAT. § 971.12(1).

¶13 In light of the substantial overlap in evidence and the fact that the evidence showed a common scheme or plan, we are not persuaded by Rogers' arguments that the victims were not similar in age, the allegations were too remote in time, and the substance of the allegations was too different to support joinder.

[3] While Rogers' first encounter with K.D. was consensual, it was considered assault because she was only fifteen years old. *See* WIS. STAT. § 948.02(2).

¶14 For example, Rogers cites ***State v. Meehan***, 2001 WI App 119, ¶14, 244 Wis. 2d 121, 630 N.W.2d 722, to support his position that the victims were not close enough in age to support joinder; however, the circumstances in that case were different. In ***Meehan***, there was a "tremendous difference between a twenty-three-year-old male, who is post-pubescent and has had the opportunity to mature to adulthood, and a fourteen-year-old boy, who is still facing that transformation." *See* ***id.***, ¶16. In this case, on the other hand, the victims were a mere four years apart, and both were teenagers. Additionally, there was evidence at trial—evidence that Rogers does not dispute—showing that Rogers had pimped A.R., a sixteen-year-old girl, and F.A., a twenty-year-old woman, during the same time-frame as the allegations against K.D. and P.R. This evidence shows that soliciting women in their mid-to-late teens was part of Rogers' modus operandi and strengthens the argument in favor of joinder.

¶15 Likewise, the allegations were not too remote in time. *See* ***Hamm***, 146 Wis. 2d at 138. At trial, K.D. testified that she began working for Rogers sometime in May 2006, and that she continued to work as a prostitute for him for about four or five months. The complaint regarding P.R. alleges that Rogers committed the charged crimes in October 2009. This puts the crimes involving the two women roughly three years apart. As we stated in ***Hamm***, "there is no per se rule on when the time period between similar offenses is so great that they may not be joined. Indeed, that is why we have referred to a 'relatively short period of time' between the two offenses, and the possible overlapping of evidence." *See* ***id.***, 146 Wis. 2d at 140 (citation, emphasis and one set of quotation marks omitted). Given the overlapping evidence and substantial similarity of the claims involving K.D. and P.R., the three-year time period is not too remote to support joinder in this case. Moreover, the State provides examples of federal cases

finding that joinder was proper when the time period was longer than in this case—particularly in cases involving sex offenses—that we find persuasive. *See, e.g.*, ***United States v. Bruguier***, No. 11-40012-01, 2011 WL 1833008, unreported opinion at *1 (D. S.D. May 13, 2011) (joinder of sex offenses more than five years apart); ***United States v. Ziegler***, No. 07-30024-01, 2007 WL 2022179, unreported opinion at *2 (D. S.D. July 9, 2007) (joinder of offenses occurring within twelve-year time-frame).

¶16 Moreover, the substance of the allegations was not too different. As explained more fully above, the allegations and evidence adduced at trial showed that Rogers approached K.D. and P.R. in the same car, in the same neighborhood, assaulted them first and attempted to solicit them thereafter, and fed them the same lines about the "benefits" of prostituting for him. He had ongoing business in Milwaukee and Chicago in which he tried to engage them, and had in fact done so with other women who were about the same age as K.D. and P.R. The disparities Rogers points to do not override the similarities.

¶17 Additionally, Rogers has not established that he suffered substantial prejudice from the joint trial. *See* ***Locke***, 177 Wis. 2d at 597. As noted, Rogers argues that if the two cases were not joined, the evidence regarding K.D. would not have been admissible in the P.R. case. According to Rogers, the evidence relating to K.D. would not have been admissible under ***Sullivan***.[4] Rogers does not

[4] In ***State v. Sullivan***, 216 Wis. 2d 768, 576 N.W.2d 30 (1998), the supreme court outlined the analytical framework used to determine the admissibility of other acts evidence under WIS. STAT. §§ 904.04(2) and 904.03:

> (1) Is the other acts evidence offered for an acceptable purpose under WIS. STAT. § (RULE) 904.04(2), such as establishing motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident?

(continued)

take issue with the first two parts of the ***Sullivan*** test—*i.e.*, that the evidence was offered for an acceptable purpose and that it was relevant, *see* ***id.*** at 772—he instead argues that the evidence regarding K.D. was unfairly prejudicial because it was "stronger" and because it did not overlap with the evidence regarding P.R. In other words, Rogers appears to argue that there was insufficient evidence to convict him of the charges relating to P.R. based on P.R.'s testimony alone, and that the jury improperly used the evidence regarding the charges related to K.D. to find Rogers guilty of the charges relating to P.R.

¶18 Rogers' argument referencing ***Sullivan*** fails because there was in fact plenty of evidence to convict him of the charges involving P.R. such that K.D.'s testimony did not confuse the jury. At trial, P.R. testified that Rogers took her to a bedroom, telling her he wanted to talk with her in private. Rogers told P.R. how his prostitution business operated and asked her if she wanted to work for him. P.R. testified that the conversation went "on for awhile because he really wasn't taking no for an answer." She further explained that she told Rogers that

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> (2) Is the other acts evidence relevant, considering the two facets of relevance set forth in WIS. STAT. § (RULE) 904.01? The first consideration in assessing relevance is whether the other acts evidence relates to a fact or proposition that is of consequence to the determination of the action. The second consideration in assessing relevance is whether the evidence has probative value, that is, whether the other acts evidence has a tendency to make the consequential fact or proposition more probable or less probable than it would be without the evidence.
>
> (3) Is the probative value of the other acts evidence substantially outweighed by the danger of unfair prejudice, confusion of the issues or misleading the jury, or by considerations of undue delay, waste of time or needless presentation of cumulative evidence? *See* WIS. STAT. § (RULE) 904.03.

See ***Sullivan***, 216 Wis. 2d at 771-73 (footnote omitted; parentheticals in ***Sullivan***).

she had been "forced like this before and that [she] wasn't going to do it again." While Rogers was trying to persuade her to work with him, she testified, he kept touching her and she "was constantly removing his hands." P.R. testified that Rogers then left the bedroom, closing the door behind him. P.R. testified that the door did not have a knob on her side and that she tried but was unable to open the door. She also testified that she could not have gotten out through the windows because they were barred. P.R. also testified that when Rogers reentered the room, she told him that she wanted to go home, but that Rogers replied, "you're not going home" and that he ultimately sexually assaulted her. After the assault, Rogers again left P.R. in the room alone, where she was able to charge her cell phone and send a text message to a woman she knew who was a victim specialist with the FBI, and eventually speak with her. When Rogers came back into the room and told her that they could sit in the living room and "chill for awhile," P.R. asked Rogers to take her home, but he refused. P.R. then told him that the police would be coming if he did not let her go. According to P.R., Rogers appeared surprised and said that he was not worried because he had not done anything wrong. It was only at this point that Rogers told P.R. that she could leave, and she did.

¶19 Moreover, the evidence regarding K.D. certainly would have been admissible under WIS. STAT. § 944.33(3). Rogers argues that the statute would not apply because the allegations regarding K.D. and P.R. are too dissimilar, but, as we have already explained, this is not true. Nor is it true that the evidence regarding K.D. would be inadmissible in P.R.'s case simply because Rogers' attempts to pimp P.R. were ultimately unsuccessful. His argument regarding this issue is underdeveloped, and we will not consider it further. *See* ***State v. Pettit***,

171 Wis. 2d 627, 646, 492 N.W.2d 633 (1992) (court of appeals may decline to review inadequately developed issues).

¶20 In sum, joinder was proper in this case because the crimes charged were of the "same or similar character" and were "connected together" as "parts of a common scheme or plan," *see* WIS. STAT. § 971.12(1), and Rogers has not shown "certainty of prejudice" resulting from the joinder of the cases, *see* ***Hoffman***, 106 Wis. 2d at 209. Therefore, we conclude that the trial court did not erroneously exercise its discretion in granting the State's motion for joinder.

2. Trial counsel was not ineffective.

¶21 Next, Rogers claims that trial counsel was ineffective. To succeed on this claim, Rogers must show that trial counsel's performance was deficient and that this deficient performance was prejudicial. *See* ***State v. Mayo***, 2007 WI 78, ¶33, 301 Wis. 2d 642, 734 N.W.2d 115; *see also* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). To establish deficient performance, Rogers must show facts from which a court could conclude that trial counsel's representation was below objective standards of reasonableness. *See* ***State v. Wesley***, 2009 WI App 118, ¶23, 321 Wis. 2d 151, 772 N.W.2d 232. To demonstrate prejudice, he "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *See* ***Strickland***, 466 U.S. at 694. The issues of performance and prejudice present mixed questions of fact and law. *See* ***State v. Sanchez***, 201 Wis. 2d 219, 236, 548 N.W.2d 69 (1996). Findings of historical fact will not be upset unless they are clearly erroneous, *see* ***id.***, but the questions of whether counsel's performance was deficient or prejudicial are legal issues we review independently, *see* ***id.*** at 236-37.

¶22 Rogers presents five ways in which trial counsel was allegedly ineffective. We discuss each in turn.

(a) Trial counsel was not ineffective for failing to object to the State's motion for joinder.

¶23 Rogers argues that trial counsel was ineffective for failing to object to the State's motion for joinder. Rogers is incorrect; trial counsel *did* object to joinder. While trial counsel did not brief the issue, counsel did object for the record at the pretrial hearing. More importantly, regardless of the thoroughness of the objection, trial counsel was not ineffective because, as explained more fully above, the trial court did not erroneously exercise its discretion in granting the State's motion to join the cases. *See* ***State v. Berggren***, 2009 WI App 82, ¶21, 320 Wis. 2d 209, 769 N.W.2d 110 (trial counsel is not ineffective for failing to bring meritless challenges). Because Rogers is unable to prove deficient performance, his challenge of trial counsel's effectiveness fails. *See* ***Strickland***, 466 U.S. at 687, 697.

(b) Trial counsel was not ineffective for failing to object to leading questions.

¶24 Rogers next argues that trial counsel's failure to object to allegedly leading questions during the testimony of Detective Stott constituted ineffective assistance of counsel. In his brief, Rogers highlights testimony in which the prosecutor asked Detective Stott about certain text messages found on Rogers' cell phone; however, neither his brief-in-chief nor his reply brief provide us with

record citations to the highlighted testimony. *See* WIS. STAT. § 809.19(1)(e) (arguments must be supported by "parts of the record relied on").[5]

¶25 Rogers' claim fails because he cannot show prejudice. Rogers' sole argument regarding the prejudicial effect of this testimony is that, "Objections to the questions to Detective Stott as leading would have conveyed to the jury the defendant's objection to the points being raised by the [S]tate." This in no way satisfies the ***Strickland*** standard. *See* ***id.*** at 694 (To demonstrate prejudice, defendant "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different."). *See also* ***Pettit***, 171 Wis. 2d at 646; ***State v. Waste Mgmt. of Wis., Inc.***, 81 Wis. 2d 555, 564, 261 N.W.2d 147 (1978).

(c) Trial counsel was not ineffective for failing to object to references to his nickname.

¶26 Rogers next faults trial counsel for failing to object to the use of his nickname, "Pimp Rah," during the following testimony from A.R.:

> Q. Can you tell me[,] did you have any kind of nicknames that you used at the time you were with Pimp Rah?
>
> A. Dimples?
>
> Q. Okay. Do you still go by that nickname?
>
> A. Yes.
>
> Q. Can you tell me if you recall if when you were with Pimp Rah, if he had any sort of vehicle?
>
> A. Like a cream Cadillac, you know cream Cadillac, a little off-white….

[5] Fortunately, the State provided us with citations to the relevant testimony.

According to Rogers, trial counsel's failure to object during the two times he was referred to as "Pimp Rah" during this exchange was deficient because it was up to the jury to decide whether he was a pimp and because the nickname cast him in a negative light.

¶27 Rogers does not, however, sufficiently argue that had trial counsel objected on these two occasions, that "the result of the proceeding would have been different." *See* ***Strickland***, 466 U.S. at 694. Therefore, he has not demonstrated prejudice. *See* ***id.*** at 694, 697. The effect of referring to Rogers as "Pimp Rah" in these very limited circumstances was undoubtedly *de minimus* in light of the other overwhelming evidence of guilt in this case. Counsel was not ineffective for failing to object during the highlighted testimony.

(d) Trial counsel was not ineffective in cross-examining K.D.

¶28 Rogers also argues that trial counsel's cross-examination of K.D. constituted ineffective assistance because "counsel seemed determined to have [K.D.] admit that she gave Rogers money," which would have established a critical element of the pandering and pimping charges. Rogers refers us to the following questioning from K.D.'s cross-examination:

> Q. All right. And you're telling us that the entire time that you were with Mr. Rogers, a 4 to 5 month period with breaks in between, that you never ever came up to him at all and said, hey, Daddy or, hey, Jermaine, here's what I made today and gave him some money?
>
> A. I gave him a couple dollars here and there, but I never gave him more than I thought he deserved.
>
> Q. A couple dollars? That to me is $2, $5, $10. Was it more than a hundred, less than a hundred?
>
> A. It was less than a hundred.

> Q. Okay. So 4 to 5 months that you lived with him, would it be in between 120 to 150 days, and on average you gave him about 67 cents or less a day?

According to Rogers, engaging in this line of questioning proved an element of pimping and pandering. Rogers asserts that proving this element was both deficient and prejudicial because K.D.'s testimony on direct examination did not prove this element. Rogers is incorrect for several reasons.

¶29 First, we do not agree that the testimony elicited by trial counsel tended to prove an element of pandering. Trial counsel's questions appear to have been calculated to cast doubt on K.D.'s credibility, not to develop an element of the pandering charge. *See* ***State v. Elm***, 201 Wis. 2d 452, 464-65, 549 N.W.2d 471 (Ct. App. 1996) ("A strategic trial decision rationally based on the facts and the law will not support a claim of ineffective assistance of counsel."). Indeed, at the jury instruction conference, the State moved to amend the pandering charges involving K.D. to attempted pandering. The State explained that it wanted the charge amended because the prosecutor was "not sure if the testimony was sufficiently clear regarding [K.D.] turning over proceeds." Therefore, trial counsel's cross-examination of K.D. was not deficient.

¶30 Second, contrary to what Rogers argues, K.D. provided ample evidence of attempted pandering on direct examination. K.D. testified on direct examination that when she first met Rogers, she had a conversation with him in which Rogers told her that she would make money for him. Rogers then dropped her off at a location on the north side of Milwaukee, where she engaged in two acts of prostitution. According to K.D., Rogers expected her to give him all of the money she received, but she kept it for herself. K.D. also testified that, throughout the four to five months that she was with Rogers, Rogers drove her to locations

where she was supposed to find customers and that he told her what to charge for various services. During this time, she had about seventeen "dates." Rogers had a number of rules that K.D. was supposed to follow, one of which was that she was supposed to give him money she made. And, on one occasion, Rogers punched K.D. in the diaphragm when she told him that she did not have any money. Therefore, because K.D.'s testimony on direct examination provided the jury with ample evidence to convict Rogers of attempted pandering, *see* WIS. STAT. §§ 944.33(1)-(2), 939.32, any deficiency that may have arisen from trial counsel's questions on cross-examination was *de minimus* and not prejudicial. Trial counsel's cross-examination of K.D. was not ineffective. *See* ***Strickland***, 466 U.S. at 694, 697.

(e) Trial counsel was not ineffective because no conflict of interest existed.

¶31 Rogers also argues that trial counsel's performance was ineffective due to a conflict of interest. Rogers points to the fact that one of the State's other-acts witnesses, F.A., was the girlfriend of one of trial counsel's former clients, and that at one point F.A. paid her boyfriend's legal bills.

¶32 Trial counsel made note of this fact at trial:

> Judge, one more matter…. One of the [S]tate's witnesses is [F.A.], Your Honor. I know [F.A.] only because I represented her boyfriend for a while … and [F.A.] did hire me. I know there is a conflict of interest, but I never represented [F.A.], Judge, and [the State's attorney] is aware, and she does not feel there is a conflict. I just wanted to make a record of that. I never represented her. She only paid me money."

¶33 Rogers argues that the fact that F.A. paid trial counsel for her boyfriend's legal bills was "a conflict of interest" that "together, with the other examples of poor lawyering by defense counsel" rendered trial counsel's

performance ineffective; however, even assuming *arguendo* that there was a conflict, Rogers' claim fails because he does not sufficiently explain how trial counsel's alleged conflict prejudiced him. *See* ***Strickland***, 466 U.S. at 694, 697. Rogers argues that trial counsel's cross-examination of F.A. was "meaningless" and that "[t]he way that defense counsel cross examined [F.A.] supported the fact that there was a conflict of interest." He also states that he "is entitled to a hearing as to what discussions took place between Rogers and defense counsel, if any, about this conflict of interest, whether Rogers should have been given the opportunity prior to trial to find new counsel." He does not, however, explain how trial counsel's cross-examination of F.A. undermines confidence in the trial's outcome. *See* ***id.*** at 694. Therefore, we must reject his claim.

3. The evidence for Counts 1, 5, and 11 was sufficient.

¶34 Rogers further argues that there is insufficient evidence to support his conviction for counts 1, 5, and 11. We review sufficiency of the evidence claims in the light most favorable to the jury's verdict. *See* ***State v. Booker***, 2006 WI 79, ¶22, 292 Wis. 2d 43, 717 N.W.2d 676; ***Bautista v. State***, 53 Wis. 2d 218, 223, 191 N.W.2d 725 (1971). Reasonable inferences drawn from the evidence can support a finding of fact and, if more than one reasonable inference can be drawn from the evidence, we must adopt the inference that supports the verdict. ***State v. Poellinger***, 153 Wis. 2d 493, 506-07, 451 N.W.2d 752 (1990).

¶35 "The standard for determining whether sufficient evidence supports a finding of guilt … is … well established." ***State v. Watkins***, 2002 WI 101, ¶67, 255 Wis. 2d 265, 647 N.W.2d 244. We cannot reverse a criminal conviction unless the evidence, viewed most favorably to the State and the conviction, "'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.'" ***Booker***, 292 Wis. 2d 43, ¶22 (citing ***Poellinger***, 153 Wis. 2d at 501). If any possibility exists that the jury could have drawn the appropriate inferences from the evidence adduced at trial to find the requisite guilt, we may not overturn the verdict, even if we believe that the jury should not have found Rogers guilty. *See* ***Poellinger***, 153 Wis. 2d at 507.

¶36 Regarding Count 1, human trafficking of P.R., and Count 5, attempted felony pandering or pimping of P.R., Rogers argues that the evidence only demonstrated "mere preparation" and that P.R. "could have left through the large, unbarred window"[6] and "was allowed to call the police with the cell phone Rogers allowed her to retain."

¶37 Rogers is incorrect. Regarding Count 1, to prove human trafficking, contrary to WIS. STAT. § 940.302(2)(a), the State had to prove that Rogers knowingly recruited, enticed, harbored, or transported P.R.—or even attempted to do any of the same, *see* § 940.302(1)(d) (defining trafficking)—and that the trafficking was (1) for the purposes of labor, services, or a commercial sex act; and (2) was done by restraining or threatening to restrain any individual. *See* § 940.302(2)(a)1.-2.; *see also* WIS JI—CRIMINAL 1276 (2011). Regarding Count 5, to prove attempted felony pandering, the State had to prove that Rogers formed the intent to facilitate another in having sex with P.R. as a prostitute and to collect money from the endeavor, and that he would have done so but for some extraneous factor. *See* ***State v. Moffett***, 2000 WI App 67, ¶13, 233 Wis. 2d 628,

[6] As noted, P.R. testified that the windows of the bedroom in which she was held captive *were* barred.

608 N.W.2d 733, *aff'd*, 2000 WI 130, 239 Wis. 2d 629, 619 N.W.2d 918; WIS. STAT. § 944.33(1)-(2).

¶38 As detailed more fully in Part 1 of our analysis above, P.R.'s trial testimony amply supports the jury's verdicts regarding Counts 1 and 5. Rogers engaged in human trafficking, and he clearly had every intent to pander P.R. and to receive compensation from doing so, and would have done so had P.R. not repeatedly resisted his efforts and ultimately told him that she had called the police. The fact that P.R. was ultimately able to use her cell phone to contact the FBI, and that she may or may not have been able to escape through a window that may or may not have been barred, does not negate the evidence supporting the jury's verdict. The evidence is sufficient and the verdict will stand.

¶39 Turning to Count 11, attempted felony pandering of K.D., Rogers argues that K.D.'s testimony was insufficient to support the verdict because it was contradictory. According to Rogers, K.D. testified at some points that Rogers asked her for money, but at other points she could not remember whether Rogers asked her for money. Rogers also points to the fact that K.D. may or may not have given Rogers more than a few dollars from her work as a prostitute. Rogers argues that if one or two of K.D.'s statements are considered "independently, there may be evidence to support the jury verdict. However, all the evidence" is "contradictory" and "the majority of the statements … concerning money given to Rogers [are] that she never gave money to Rogers."

¶40 Rogers misstates the law. As we explained more fully above, it does not matter whether Rogers actually did receive compensation from his efforts to pimp K.D., *see* WIS. STAT. § 944.33(2) (felony pandering if defendant receives compensation from prostitute's earnings), because the question is whether Rogers

attempted, given the evidence at trial, to do so, *see* WIS. STAT. § 939.32. As detailed more fully in Part 2 above, there was plenty of evidence supporting the verdict as to Count 11, and the verdict will stand.

By the Court.—Judgment and order affirmed.

Not recommended for publication in the official reports.