STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

BARBARA C. EATON,

Defendant-Appellee.

UNPUBLISHED
January 17, 1997

No. 182079
Oakland Circuit Court
LC No. 93-126318-FH

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

BARBARA C. EATON,

Defendant-Appellant.

No. 183688
Oakland Circuit Court
LC No. 93-126318-FH

Before: O'Connell, P.J., and Smolenski and T.G. Power,* JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of accepting the earnings of a prostitute, MCL 750.457; MSA 28.712. The trial court sentenced her to two years' probation, the first 180 days to be served in the Oakland County Jail. The balance of defendant's prison sentence was suspended after twenty-two days upon compliance with electronic monitoring. The prosecution appeals as of right the sentence imposed by the court, claiming it is disproportionately low. Defendant appeals her conviction as of right, raising several issues arising from her trial. We affirm.

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* Circuit judge, sitting on the Court of Appeals by assignment.

I.

The prosecution argues that the sentence imposed by the trial court is disproportionate to the circumstances surrounding defendant and the offense and, therefore, constituted an abuse of discretion. We disagree.

The sentences imposed upon criminal defendants are reviewed for an abuse of discretion. *People v Milbourn*, 435 Mich 630; 461 NW2d 1 (1990). A sentence constitutes an abuse of discretion if it is disproportionate to the seriousness of the circumstances surrounding the offense and the offender. *Id.* In determining the appropriate sentence, a court should consider: "(a) the reformation of the offender, (b) protection of society, (c) the disciplining of the wrongdoer, and (d) the deterrence of others from committing like offenses." *People v Snow*, 386 Mich 586, 592; 194 NW2d 314 (1972). A sentencing judge, however, is not limited to the above factors in determining the appropriate sentence. *People v Johnson*, 173 Mich App 706, 709; 434 NW2d 218 (1988). Furthermore, failure to note all four of the factors does not destroy the propriety of the sentencing court's rational. *Id.* "[R]ehabilitation is only one of many societal interests to be fulfilled in sentencing . . . and the sentencing decision, necessarily reflecting the weighing of different interests and trade-offs of competing interests, is appropriately an ad hoc determination, given the unique circumstances of the defendant and the crime." *People v Stammer*, 179 Mich App 432, 437; 446 NW2d 312 (1989). The sentencing court is, therefore, afforded a wide latitude of discretion. *Id*

We find that defendant's sentence was not disproportionate to the seriousness of the circumstances surrounding the offense and the offender. The Sentencing Guidelines do not apply to accepting the earnings of a prostitute, MCL 750.457; MSA 28.712, and the statutory maximum penalty for this crime is twenty years' imprisonment; there is no statutory minimum penalty. A review of defendant's sentence indicates that the sentencing judge considered the four factors enumerated in *Snow* in determining her sentence: (1) rehabilitation (reformation), (2) protection of society, (3) punishment, and (4) deterrence. Plaintiff correctly points out that the sentencing judge improperly considered the government's seizure of defendant's assets in considering the punishment and deterrent factors since there was no evidence indicating that the government's seizure resulted from defendant's conviction for accepting earnings from a prostitute. Rather, it appears the seizure related to an independent IRS investigation. Notwithstanding, we believe that the sentence adequately punished defendant and deterred her from committing the offense in the future. Defendant was placed on probation for two years and sentenced to six months' imprisonment. Although she was released after twenty-two days, defendant was required to seek regular employment and perform one-hundred hours of community services. We further hold that the sentencing judge correctly determined that defendant's sentence adequately addressed the factors relating to rehabilitation and protection of society. Accordingly, the trial court did not abuse its discretion in sentencing defendant.

II.

Defendant first argues that there was insufficient evidence to support her conviction. We disagree.

When reviewing a claim of insufficient evidence, this Court views the evidence in a light most favorable to the prosecution and determines whether a rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt. *People v Head*, 211 Mich App 205, 210; 535 NW2d 563 (1995). Defendant's conviction arose from an undercover investigation of Centerfolds, Inc., which provided escort, massage and dancing services. The offense of accepting earnings of a prostitute is enumerated in MCL 750.457; MSA 28.712:

> Any person who shall *knowingly* accept, receive, levy or appropriate any money or valuable thing without consideration from the proceeds of the earnings of any woman engaged in prostitution, or any person, knowing a female to be a prostitute, shall live or derive support or maintenance, in whole or in part, from the earnings or proceeds of the prostitution of said prostitute, or from moneys loaned or advanced to or charged against her by any keeper or manager or inmate of a house or other place where prostitution is practiced or allowed, shall be guilty of a felony, punishable by imprisonment in the state prison not more than 20 years. And such acceptance, receipt, levy or appropriation of such money or valuable thing, shall, upon any proceeding or trial for violation of this section, be presumptive evidence of lack of consideration. [(Emphasis supplied).]

The phrase "without consideration" may be interpreted to mean "without adequate consideration. *People v Hill*, 32 Mich App 404, 407-409; 188 NW2d 896 (1971).

Defendant argues there was insufficient evidence establishing that she actually and knowingly accepted earnings of a prostitute. Although the money was technically paid to a corporation, defendant, its owner, received the benefit of those earnings. Moreover, we hold that a rational trier of fact could have found that the evidence, viewed in a light most favorable to the prosecution, established that defendant knew the money her employees paid her was earned through prostitution. The evidence established that defendant instructed her employees that their job was to make their clients ejaculate, and that it could be accomplished by either hand stimulation or sexual intercourse. The evidence further established that defendant knew her employees engaged in sexual intercourse with their clients.

Defendant also argues that there was insufficient evidence establishing that she accepted earnings of a prostitute without giving consideration. Defendant claimed that she gave her employees business cards and an appointment setting service in exchange for a percentage of the money paid by their clients for the "massages." Contrary to defendant's argument, we find that this did not constitute "adequate consideration," as required by MCL 750.457; MSA 28.712. See *Hill, supra* at 408-409. Defendant's employees paid her $90 in exchange for business cards and an appointment setting service. Since the evidence established that the average national rate for an hour massage was $40, we hold that a reasonable juror could have concluded that a person would not pay $90 for an hour massage that did not include sexual intercourse. Accordingly, a rational trier of fact could have concluded that defendant received the earnings of a prostitute without "adequate consideration."

III.

Defendant next argues that the standard jury instruction relied upon by the trial court was erroneous because it replaced the statutory element of knowledge with the element of intent to profit, not an element of the offense. We disagree.

The trial court is required to instruct the jury on all the elements of the crime charged. *People v Moldenhauer*, 210 Mich App 158, 159; 533 NW2d 9 (1995). Instructions are reviewed in their entirety to determine if reversal is required. *Id.* Reversal is not required where the jury instructions, taken as a whole, sufficiently protect the defendant's rights. *Id.* Furthermore, the failure to give a requested instruction is error requiring reversal only if the requested instruction (1) is substantially correct, (2) was not substantially covered in the charge given to the jury, and (3) concerns and important point in the trial so that the failure to give it seriously impaired the defendant's ability to effectively present a given defense theory. *Id.* at 159-160. The Michigan Criminal Jury Instructions do not have the official sanction of the Michigan Supreme Court. *People v Legg*, 197 Mich App 131, 133; 494 NW2d 797 (1992). Their use is not required and trial judges should examine them carefully to ensure their accuracy and appropriateness to cases before them. *People v Ullah*, 216 Mich App 669, 677; 550 NW2d 568 (1996). Indeed, MCL 768.29; MSA 28.1052 provides that it is the duty of the trial court to instruct the jury as to the law applicable to the case. *Id.* Similarly, MCR 6.414(F) provides that the court must instruct the jury as required and as appropriate. *Id.*

The trial court instructed the jury on the offense of accepting the earnings of a prostitute, MCL 750.457; MSA 28.712, in accordance with the Michigan Criminal Jury Instructions, CJI2d 20.35. Defendant argues that the instructions were in error since they erroneously included the element of "intent to profit" to the offense. We hold that the jury instructions did not constitute error requiring reversal because the jury instructions, taken as a whole, sufficiently protected defendant's rights. *Moldenhauer, supra* at 159. The standard jury instructions merely state that the offense of accepting the earnings of a prostitute can be committed if the defendant received the prostitute's earnings "without adequate consideration" instead of simply "without consideration." This was a correct statement of the law since, as discussed under Issue II, the phrase "without consideration" may be interpreted to mean "without adequate consideration." See *Hill, supra* at 407. Accordingly, contrary to defendant's assertion, the trial court did not replace an element of accepting the earnings of a prostitute to including "profit" in the instructions.

IV.

Defendant next argues that the prosecutor engaged in misconduct requiring reversal of her conviction by (1) making a civic duty argument; (2) shifting the burden of proof to defendant; and (3) making inappropriate inflammatory argument. We disagree.

Because defendant failed to object to the prosecutor's statements that allegedly shifted the burden of proof, that issue is not preserved for review and this Court will not address it absent manifest

injustice. See *People v Stanaway,* 446 Mich 643, 687; 521 NW2d 557 (1994). After reviewing the record, we find no injustice.

Next, defendant argues that the following statements by the prosecutor constituted an improper civic duty argument:

> Oh, but there were no victims. Do you really believe that? What about the families of the women that were involved in the prostitution? What about the families of the men that are calling and having hookers come over to their houses while their wives are gone to the grocery store? Is that what we want in our communities? There are victims?

We believe that the prosecutor's statement did not constitute an improper civic duty argument since the prosecutor did not call on the jury's civic duty to convict defendant or stop prostitution. *People v Bahoda,* 448 Mich 261, 282-283; 531 NW2d 659 (1995). Rather, she simply pointed out that, contrary to defendant's assertions, prostitution is not a victimless crime.

Defendant further argues that the following statements by the prosecutor constituted inappropriate inflammatory argument:

> This woman [defendant], who is so sophisticated and such a shrewd business operator that she has a document drawn up by her attorney ahead of time, expects you to believe that she is so stupid that she doesn't know what's going on. If you folks believe that, I've got a bridge in California, swamp land in Florida and --

A prosecutor may not intentionally inject inflammatory arguments with no apparent justification except to arouse prejudice. *People v Lee*, 212 Mich App 228, 247; 537 NW2d 233 (1995). We hold that the prosecutor's statements did not constitute inappropriate inflammatory argument since it does not appear that she made those statements with no apparent justification except to arouse prejudice. *Id*. Rather, we believe the prosecutor statement's were intended to call into question the credibility of defendant's testimony, which was proper. See *People v Guenther,* 188 Mich App 174, 177-178; 469 NW2d 59 (1991).

V.

Defendant next argues that the cumulative effect of the numerous trial errors denied her a fair trial. We disagree. Defendant's argument is without merit because, as discussed under the previous issues, the trial court did not commit error at trial. See *People v Kvam*, 160 Mich App 189, 201; 408 NW2d 71 (1987).

Affirmed.

/s/ Peter D. O'Connell
/s/ Michael R. Smolenski
/s/ Thomas G. Power