Affirmed and Opinion filed March 7, 2002.

In The

Fourteenth Court of Appeals

NO. 14-00-01221-CR

JUANITA MARISSELA TORRES, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the County Criminal Court at Law No. 1
Harris County, Texas
Trial Court Cause No. 0992003

O P I N I O N

Appellant was charged with the offense of prostitution. Over a plea of not guilty, the jury convicted appellant of the charged offense. The trial court assessed punishment at 180 days' confinement in the Harris County Jail, suspended the sentence, placed appellant on community supervision for one year, and fined her $200.00. In her sole issue for review, appellant complains "the trial court erred in denying a requested instruction on entrapment." We affirm the judgment of the trial court.

FACTS ADDUCED AT TRIAL

On the night of her arrest, appellant was working as a "hostess" at Catz Modeling Studio, an adult oriented business. Posing as a customer and wearing a concealed recording device, Officer Sistrunk of the Houston Police Department Vice Division went to the establishment to investigate allegations of prostitution. He testified that, upon his arrival, he paid an additional fee for appellant's services, which were to take place in a private area of the establishment. Appellant led Sistrunk to a back room and told him to undress and put on a towel. She left momentarily and reappeared with a "menu" of services from which he could make a selection. Appellant explained some of the menu items to Sistrunk. He ultimately chose the "Masturbation Show." The two then settled on a price of $300.00. When Sistrunk asked what the act entailed, appellant replied that she would be stimulating both herself and him. At this point, Sistrunk signaled for an arrest.

Appellant testified in her own defense. She claimed that she never agreed to stimulate Sistrunk. She also testified that while explaining the menu items to Sistrunk, he attempted to touch her, but she moved away. Furthermore, she claimed that Sistrunk repeatedly threatened to leave if appellant would not have sex with her. Appellant repeatedly testified that she never told Officer Sistrunk that she intended to masturbate him. She testified that she offered only to simulate masturbation by pretending to touch herself as part of the "Masturbation Show"offered on the menu.

DISCUSSION

A person commits the offense of prostitution if he or she solicits another in a public place to engage in sexual conduct for hire.[1] TEX. PEN. CODE ANN. § 43.02(a)(2) (Vernon

[1] The gravamen of the offense of prostitution, as charged here, is the solicitation of another in a public place to engage in "sexual conduct" for hire. The Penal Code defines "sexual contact" to mean, *inter alia*, any touching of any part of the genitals of another person with intent to arouse or gratify the sexual desire of any person. TEX. PEN. CODE ANN. § 43.01(3) (Vernon 1994). "Sexual conduct" is defined to include "sexual contact." *Id.* § 43.01(4). Thus, solicitation of "sexual conduct," the offense charged, includes solicitation of the sexual activities comprising "sexual contact."

1994). At trial, appellant requested a jury instruction on the defense issue of entrapment, but the trial court denied the request.

When a defensive theory is raised by the evidence and an instruction on the issue is properly requested, the issue must be submitted to the jury. *Reese v. State*, 877 S.W.2d 328, 333 (Tex. Crim. App. 1994). In determining whether a defensive issue has been raised, this Court must consider all of the evidence raised at trial, regardless of its strength or whether it is controverted. *Id*. For a defendant to raise the issue of entrapment, she must initially establish a prima facie showing of such a defense. *Id*.

To establish an entrapment defense, an accused must produce evidence that: (1) the conduct of the law enforcement agent, as viewed from the subjective standpoint of the defendant, induced the defendant to commit the crime; and (2) the inducement was such that it caused an ordinarily law-abiding citizen of average resistance to nevertheless commit the offense. *England v. State*, 887 S.W.2d 902, 913–914 (Tex. Crim. App. 1994).

However, if the defendant denies that she committed the offense, she will not be entitled to an entrapment instruction. *Norman v. State*, 588 S.W.2d 340, 345 (Tex. Crim. App. 1979). This rule was developed because entrapment assumes the offense was committed, so denial of that offense would be inconsistent with that defense. *Id*. The defendant is *not* required to plead guilty, but she cannot introduce positive evidence that she did not commit the act. *Becker v. State*, 840 S.W.2d 743, 746 (Tex. App.—Houston [1st Dist.] 1992, no pet.) (emphasis added). Here appellant denied that she solicited Officer Sistrunk to engage in any touching of his genitals. Specifically, when asked on direct examination what she told the officer, appellant replied, "That he could touch him and that I would touch me . . . that we wouldn't touch each other." Further, she agreed with her attorney's statement that she was absolutely not agreeing to any *sexual conduct* with the officer. Appellant also stated she had no intention of touching Officer Sistrunk's genitals.

Because appellant cannot both deny the offense and concurrently request an entrapment instruction, the trial court did not err in refusing the instruction. *Williams v. State*, 848 S.W.2d 777, 781 (Tex. App.—Houston [14th Dist.] 1993, no pet.).

Appellant's sole issue for review is overruled. The judgment of the trial court is affirmed.

/s/ John S. Anderson
Justice

Judgment rendered and Opinion filed March 7, 2002.

Panel consists of Justices Anderson, Hudson, and Edelman.

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