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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

BRANDON DAWKINS,

Defendant and Appellant.

D058352

(Super. Ct. No. SCD225904)

APPEAL from a judgment of the Superior Court of San Diego County, David M. Gill, Judge. Affirmed.

A jury convicted defendant Brandon Dawkins of one count of pimping (Pen. Code,<sup>1</sup> § 266h, count 1) and found true the allegation the prostitute was a minor over the age of 16 (§ 266h, subd. (b)(1)), but acquitted him of unlawful sexual intercourse with a minor (§ 261.5). In a bifurcated proceeding, Dawkins admitted he had two prison priors (§ 667.5, subd. (b)). The court sentenced Dawkins to six years in prison. On appeal,

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<sup>1</sup> All further statutory references are to the Penal Code unless otherwise specified.

Dawkins argues the court erred by rejecting an instruction that his good faith belief the prostitute was over 18 years of age was a defense to the special allegation appended to the section 266h charge.

### FACTUAL BACKGROUND

In February 2010 Alexis C. was 16 years old and had a pattern of running away from home and working as a prostitute, and then returning home. She met Dawkins when he intervened to break up a fight between Alexis and another prostitute. He then gave Alexis a ride to another location. During the ride, she told Dawkins she was 19. They exchanged telephone numbers before she left his car.

On February 16, 2010, Alexis decided to again run away from home. She called Dawkins and he agreed to pick her up; she expected that he would take her to a hotel room. When he arrived, the conversation made it clear that he expected she would prostitute herself and give him the money. She resumed prostituting herself and gave Dawkins the money she received. Over the next two weeks, she gave Dawkins the money she earned from prostitution and he paid for their hotel room. They also began having sex together. On March 1, 2010, Alexis was arrested for prostitution.

### ANALYSIS

The court instructed Dawkins's good faith belief that Alexis was age 18 or over was a defense to the section 261.5 sexual intercourse charge. Dawkins requested the same instruction be given with respect to the special allegation under section 266h that his pimping involved a minor within the meaning of section 266h, subdivision (b). The

court refused the requested instruction. Dawkins argues this was error under *People v. Hernandez* (1964) 61 Cal.2d 529.

In *Hernandez*, our Supreme Court held a charge of unlawful sexual intercourse with a minor could be defended on the basis defendant lacked criminal intent because in good faith he had a reasonable belief that the victim was 18 years or more of age. The court relied on the common law rule that an honest and reasonable belief in the existence of circumstances that, if true, would make the act innocent, was a good defense (*People v. Hernandez, supra*, 61 Cal.2d at p. 535), although the court indicated this defense would not be available where the victim was a child of tender years. (*Id.* at p. 536.) The reasoning in *Hernandez* has been extended to other crimes involving minor victims. (See *People v. Atchison* (1978) 22 Cal.3d 181, 183 [defense available to crimes of contributing to the delinquency of a minor and annoying or molesting a child under the age of 18]); *People v. Peterson* (1981) 126 Cal.App.3d 396, 397 [defense available to crime of committing oral copulation on minor]; *People v. Goldstein* (1982) 130 Cal.App.3d 1024, 1036 [*Hernandez* defense available to charge that defendant " 'did willfully and unlawfully solicit, induce, encourage, and intimidate a minor' " to use drugs in violation of Health & Saf. Code, §§ 11361 & 11353 because "[i]t is *not* a criminal offense to so 'solicit, induce, encourage, and intimidate' adult persons"]; *In re Jennings* (2004) 34 Cal.4th 254, 281 [person charged with furnishing alcohol to minor in violation of former Health & Saf. Code, § 25658, subd. (c), may defend against the charge by claiming an

honest and reasonable belief that the person for whom he or she purchased alcohol was 21 years of age or older].)

However, numerous courts have declined to import the *Hernandez* defense when the conduct would have been a crime regardless of the victim's age, and the age of the victim only made the penal consequences more severe. In *People v. Lopez* (1969) 271 Cal.App.2d 754, the court declined to apply the *Hernandez* defense to the crime of furnishing narcotics to a minor, reasoning that the act is an offense regardless of the mistake, and the mistake only makes the punishment more severe. (*Lopez*, at p. 760.) Similarly, in *People v. Williams* (1991) 233 Cal.App.3d 407, which involved a sale of cocaine to a minor in violation of Health and Safety Code section 11353, the court followed *Lopez* and held that, because it *is* a crime to sell narcotics to any person regardless of age, *Hernandez* did not apply. (*Williams*, at pp. 411-412.)

In *People v. Branch* (2010) 184 Cal.App.4th 516, the court reviewed the reasoning of *Hernandez* and *Atchison* to determine whether the *Hernandez* defense should apply to a charge of pimping a minor. The court concluded *Hernandez* turned on the fact that the defendant would have had no criminal intent were the minor older. *Branch* therefore concluded the *Hernandez* defense was unavailable because the defendant's conduct of pimping involved culpable intent, even were the prostitute an adult, and followed the reasoning in *Williams*. *Branch* reasoned that:

"The present case is distinguishable [from *Hernandez*] because defendant's conduct would be criminal regardless of J.V.'s age. [¶] In that regard, this case is similar to [*Williams*], which we find controlling. In *Williams*, defendant was charged with selling

controlled substances to a minor. The trial court refused to instruct that a reasonable, good faith belief the minor was over 18 was a defense to the charge. The appellate court affirmed. "The specific intent for the crime of selling cocaine to a minor is the intent to sell cocaine, not the intent to sell it to a minor. [Citations.] It follows that ignorance as to the age of the offeree neither disproves criminal intent nor negates an evil design on the part of the offerer. It therefore does not give rise to a 'mistake of fact' defense to the intent element of the crime. [Citations.]" [(Quoting *Williams, supra*, 233 Cal.App.3d at p. 411.)] Here the criminal intent for the crimes of attempted pimping and pandering of a minor is the attempt to pimp and pander; the age of the victim only affects the severity of the sentence, not the criminality of the conduct. Regardless of his belief as to J.V.'s age, defendant acted with criminal intent." (*Branch*, at pp. 521-522.)

Dawkins argues we should reject *Branch* because it wrongly relied on *Williams* to reach its conclusion. He asserts that because *Williams* turned on an examination of the legislative intent underlying the drug laws considered in *Williams*, it has no application to the pimping laws. However, Dawkins does not explain *why* the distinction among the different statutes requires a different result, and does not point to any legislative language or history suggesting the Legislature intended to import the *Hernandez* defense into the pimping statute.<sup>2</sup> Under *Branch*, the trial court did not err in refusing Dawkins's proposed instruction on his mistake as to Alexis's age.

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<sup>2</sup> Indeed, when the age of a victim is an enhancing element for a crime and the Legislature has *intended* to require that the defendant have subjective knowledge of the age of the victim to demonstrate that element, the Legislature has demonstrated its ability to express that intent. (See, e.g., § 667.9, subd. (b).) No similar language is found in the pimping statute.

DISPOSITION

The judgment is affirmed.

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McDONALD, J.

WE CONCUR:

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BENKE, Acting P. J.

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O'ROURKE, J.