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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

JOSEPH SIGONA, JR.,

Defendant and Appellant.

D058655

(Super. Ct. No. SCD225851)

APPEAL from a judgment of the Superior Court of San Diego County, Bernard E. Revak, Judge. (Retired judge of the San Diego Sup. Ct. assigned by the Chief Justice pursuant to art. VI, § 6 of the Cal. Const.) Judgment affirmed.

Joseph Sigona appeals from a judgment entered upon his conviction of two counts of pandering Hannah B. and Bessie R. (counts 1, 2) and one count each of pimping (count 3) and attempted pimping (count 4). Sigona contends his pandering convictions must be overturned because the trial court improperly instructed the jury. He also asserts that the pandering conviction regarding Bessie must be

overturned because the trial court improperly excluded evidence. We reject his contentions and affirm the judgment.

### FACTUAL AND PROCEDURAL BACKGROUND

Because Sigona does not challenge the sufficiency of the evidence to support his convictions, we summarize the pertinent facts to provide background for our discussion of his contentions on appeal.

In February 2010, Bessie and Hannah, both 18 years old at the time, responded to online ads Sigona had placed for girls to perform escort services. Both women testified at trial under a grant of immunity and claimed that they never previously worked as a prostitute.

Bessie testified that Sigona took photographs of her and posted an ad on the internet for her services. He told her that "full service" referred to intercourse, "half service" was a "blow job" and that she would charge \$160 a half hour and \$200 an hour, of which she would get \$100 and Sigona would get the balance. Bessie later gave a client oral sex in exchange for \$200 and had vaginal intercourse with a second client for \$160 plus a \$40 tip. Bessie gave Sigona \$100 for the first client and \$60 for the second client.

Hannah testified that she responded to Sigona's ad and emailed him photographs so that he could place an ad for her. Sigona then picked Hannah up because people had started responding to the ad. He told her that she would be offering "full service" sexual intercourse to men at his condominium and that she would charge \$160 a half hour and \$200 an hour, of which she would keep \$100.

After Sigona received a call for Hannah's services, Hannah returned the call and had Sigona take her to a hotel in El Cajon. At the hotel, an undercover police officer exposed himself to Hannah and asked if she would give him a "blow job" and "full service." After Hannah said yes, the officer gave her \$200, and she was ticketed for prostitution. She later pleaded guilty to the offense.

### I. *Alleged Instructional Error*

#### A. Facts

A person may be guilty of pandering by procuring another person for the purpose of prostitution (Pen. Code, § 266i, subd. (a)(1), undesignated statutory references are to this code) or promising, threatening, using violence, or by any device or scheme, causing, inducing, persuading, or encouraging another person *to become* a prostitute (§ 266i, subd. (a)(2)). In counts 1 and 2, the People charged Sigona with pandering by procuring another person for prostitution in violation of subdivision (a)(1) of section 266i.

Thereafter, without objection, the trial court instructed the jury with a version of CALCRIM No. 1151 that included language for offenses under subdivisions (a)(1) and (a)(2) of the statute. The subdivision (a)(2) portion included an optional second element instruction on the required specific intent for the inducement offense, namely that Sigona intended to influence the women to "be" prostitutes. (See CALCRIM No. 1151, including Bench Notes.) Defense counsel, however, requested that the word "specifically" be included so that the instruction

read that: "The defendant specifically intended to influence Hannah B. to be a prostitute." The trial court denied the request.

## B. Analysis

In *People v. Wagner* (2009) 170 Cal.App.4th 499 (*Wagner*), the court concluded that the pandering statute did not apply when the victim was already working as a prostitute, because a person could not "become" a prostitute if that person was already a prostitute. (*Id.* at p. 510.) Relying on *Wagner*, Sigona contends his pandering convictions must be overturned because the trial court improperly instructed the jury that he merely had to intend that the girls "be" prostitutes rather than "to become" prostitutes as required by the pandering allegation under section 266i, subdivision (a)(2). He asserts use of the wording "to be" rather than "to become" in CALCRIM No. 1151 enabled the jury to convict him even if they found that Bessie or Hannah were already prostitutes or that he believed that they were already prostitutes. Sigona argues the error is not harmless because the jury received evidence from which they could have concluded that Bessie and Hannah were already prostitutes. (*People v. Flood* (1998) 18 Cal.4th 470, 503-507 [Instructions that omit an element of the offense are reviewed under the harmless error standard announced in *Chapman v. California* (1967) 386 U.S. 18.])

Sigona filed his opening brief prior to our Supreme Court publishing *People v. Zambia* (2011) 51 Cal.4th 965 (*Zambia*). In *Zambia*, our Supreme Court expressly disapproved *Wagner*, concluding that "the proscribed activity of

encouraging someone 'to become a prostitute,' as set forth in section 266i, subdivision (a)(2), includes encouragement of someone who is already an active prostitute . . . ." (*Zambia, supra*, at p. 981.) Sigona conceded in his reply brief that *Zambia* disapproved *Wagner*, and relied on the dissent in *Zambia* to essentially argue the case was wrongly decided. (See *Zambia, supra*, at pp. 982-988 (dis. opns. of Kennard, J. & Werdegar, J.) His reliance on the dissenting opinion in that case is not persuasive as we are bound by the majority opinion. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.) Accordingly, we reject Sigona's argument that the version of CALCRIM No. 1151 given to the jury misstated the law.

## II. *Alleged Evidentiary Error*

### A. Facts

At the preliminary hearing, Bessie testified that *after* working with Sigona, she personally placed escort ads for the purpose of selling sex. At trial, defense counsel sought to present this evidence as character evidence. Defense counsel also argued that the evidence was relevant to the pandering charge by showing that Bessie decided to become a prostitute before she contacted Sigona, to impeach her testimony that she made up an excuse for a client to leave after 10 or 15 minutes because "it was gross," and that excluding the evidence, among other things, violated his right to due process and to confront witnesses. The trial court excluded the evidence as inflammatory and irrelevant under Evidence Code section 352.

Defense counsel later renewed his request, but the trial court did not sway from its earlier ruling.

## B. Analysis

A defendant's constitutional right to a fair trial includes the right to present all relevant evidence that is of significant value to the defense case. (*People v. Cunningham* (2001) 25 Cal.4th 926, 999.) Relevant evidence means evidence, including evidence relevant to credibility, that has any tendency to prove or disprove any disputed material fact. (*People v. Boyette* (2002) 29 Cal.4th 381, 428.) We review a trial court's evidentiary rulings for abuse of discretion. (*People v. Vieira* (2005) 35 Cal.4th 264, 292.) Application of the ordinary rules of evidence does not impair a defendant's right to present a defense. (*People v. Boyette, supra*, at pp. 427-428.) Although completely excluding evidence of an accused's defense theoretically could infringe on his right to present a defense, excluding defense evidence on a minor or subsidiary point does not. (*Ibid.*)

Here, Sigona contends the trial court erred by excluding evidence of Bessie's subsequent acts of prostitution because the evidence was relevant to the pandering charge as it suggested she worked as a prostitute before meeting him and impugned her credibility regarding her innocence. We disagree.

Whether Bessie acted as a prostitute *before* she met Sigona was irrelevant to the pandering charge. (*Ante*, part I.) Additionally, acts of prostitution Bessie may have committed *after* she worked with Sigona do not defeat the charge, nor do such acts conclusively prove that Bessie lied at trial when she testified that she had never

worked as a prostitute *before* meeting Sigona. To the extent the evidence had any probative value regarding Bessie's character and credibility by suggesting Bessie has always been a prostitute, we cannot conclude that the trial court abused its discretion.

#### DISPOSITION

The judgment is affirmed.

McINTYRE, J.

WE CONCUR:

McCONNELL, P. J.

BENKE, J.