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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

REGINALD EDWARD CHRISTOPHER,

Defendant and Appellant.

E052845

(Super.Ct.No. FWV802862)

OPINION

APPEAL from the Superior Court of San Bernardino County. Mary E. Fuller, Judge. Affirmed.

Michelle May, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Barry Carlton and Felicity Senoski, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant Reginald Edward Christopher approached Jane Doe in an area in San Bernardino County known for prostitution called the “track.” Defendant offered to be Doe’s pimp. For three weeks, defendant acted as Doe’s pimp, and she and defendant engaged in sexual acts with each other, including intercourse and oral copulation. Doe also prostituted herself with other customers and gave some of the money to defendant. Doe and defendant were found out when an undercover police officer posing as a prostitute was asked by Doe to also work for defendant. Doe was 13 years old at the time these events transpired.

Defendant was convicted of pimping a minor under the age of 14, three counts of committing lewd acts upon a minor under the age of 14, and three counts of oral copulation of a minor under the age of 14.

Defendant now contends on appeal as follows:

1. The trial court erred by failing to sua sponte instruct the jury on a mistake of fact defense due to defendant reasonably believing that Doe was 18 years old instead of 13 years old.

2. The instructions were deficient in that they failed to instruct the jury that they must find that defendant had knowledge that his act was unlawful or that he had wrongful intent, i.e., that he knew Doe was not 18 years old.

3. Since the trial court did not properly instruct the jury on mistake of fact, it was error to instruct the jury that it was not a defense that defendant may have thought that Doe was over 14 years of age.

4. Defendant received ineffective assistance of counsel for the failure to request instructions on mistake of fact and to fail to object to the given instructions.

5. There was insufficient evidence to support defendant's conviction of violating Penal Code section 266h, pimping for personal gain.

I

PROCEDURAL BACKGROUND

Defendant was found guilty by a jury of pimping a minor under the age of 16 years (Pen. Code, § 266h, subdivision (b); (count 1)),¹ three counts of committing a lewd act upon a child under the age of 14 years (§ 288, subd. (a); (counts 2, 3, & 4)), and three counts of oral copulation of a person under the age of 14 years (§ 288a, subd. (c)(1); (counts 5, 6, & 7)).

In a bifurcated proceeding, a jury found defendant had suffered three prior serious or violent felony convictions within the meaning of sections 667.61, subdivisions (a) and (d); 667, subdivisions (b) through (i); and 1170.12, subdivisions (a) through (d).

Defendant was sentenced to the indeterminate term of 325 years to life in state prison, plus the determinate term of 5 years.

¹ All further statutory references are to the Penal Code unless otherwise indicated.

II

FACTUAL BACKGROUND

In August 2008, Doe celebrated her 13th birthday and was living with her grandmother in San Bernardino. A week after her birthday, Doe ran away from home.² Doe needed to make money, so she turned to prostitution. She worked in an area known for prostitution, which included Montclair and Ontario in San Bernardino County.

In October 2008, Doe was working as a prostitute by a liquor store located at Holt and San Antonio Boulevards in Ontario. Around 8:00 p.m., defendant drove up in his black Cadillac and asked Doe how old she was. She told him she was 18 years old. She then got in defendant's car. Defendant asked Doe her real age. She told him that she was born on January 10, 1991, and was 17 years old.³

Defendant drove Doe to a barber shop in Ontario that he claimed he owned (but which was actually owned by his father). He had a key that he used to open the door. He spoke with her about working for him as a prostitute. He told her that he was a pimp and had other girls working for him in Las Vegas. He also told her that he would split the money she made with her and in return he would buy her clothes and protect her. Defendant told Doe that she should charge \$40 for oral copulation and \$60 for sex.

² At the time of trial, Doe was in custody at juvenile hall because she had run away from home again.

³ The jury was shown a photograph of how Doe appeared in November 2008.

After they had this discussion, Doe and defendant had sex, and they orally copulated each other. They had sex on a chair that she described as being like a couch in the back of the barbershop. Defendant took Doe back to the liquor store and dropped her off.

The next day, defendant arranged for Doe to stay with one of his friends for one night. Thereafter, Doe stayed with defendant in his car for three weeks. They had sex and engaged in oral copulation every day they were together. Doe specifically recalled having sex and engaging in mutual oral copulation with defendant at his friend's house, in his car, and at a motel. They did not use condoms, but he gave her condoms to use when she had a customer. Doe had three or four customers while she was with defendant. Defendant would park nearby observing Doe, and they would stay in contact by cellular telephone.⁴

Doe estimated that she gave defendant about \$100 during the three-week period. Defendant had bought Doe clothes with some of the money that she made for him. Defendant kept some of the money.

Doe called defendant "daddy." Defendant told Doe that if they were ever caught by the police, she was to lie and tell them she was his daughter and that she was 17 years old. Doe asked defendant to buy her a car. They looked at cars together. Doe thought

⁴ Doe's nickname on her phone was "Baby Face 13." When Doe would call or text defendant, her name would appear as Baby Face.

defendant had bought a car, but she never received it. Defendant also promised her a condominium in Riverside if she kept working for him.

Doe explained that defendant had her recruit other girls who were walking the streets. One night, defendant thought that Doe had run off one of the girls. He grabbed her throat and choked her. She could not breathe and was very afraid of defendant. Defendant told her not to run off a girl again or he would do something to her.

On October 23, 2008, Doe had been with a customer in Pomona who gave her \$80. She gave the money to defendant. While Doe and defendant were driving back to the barbershop so she could get washed up, defendant stopped in Montclair, where a woman was walking on the street. Defendant told Doe to try to recruit her to work for him. Doe approached the woman and told her what it would be like to be on defendant's "team."

Montclair Police Officer Courtnie Mair was working undercover as a prostitute that day. She and other officers had set up a sting operation in an effort to get rid of the prostitutes in the Montclair area. While Officer Mair was walking the streets, a black Cadillac approached her. Doe, who was the passenger, exited the car and approached her. Doe asked Officer Mair if she was working. Officer Mair said she was and asked Doe if she was working. Doe told her she was a prostitute but did not work the streets; she claimed she advertised on the Internet. Doe asked Officer Mair if she had a "daddy," and Officer Mair responded that she did not. Officer Mair asked Doe if the person who dropped her off in the Cadillac was her pimp, and Doe responded that he did not like to

be called a pimp. Doe claimed that “if she made \$1500 that [defendant] would get \$700 and she would only get \$500 [*sic*].” Doe was arrested, and defendant drove off.

Montclair Police Officer Eric Cholly was working with Officer Mair on the prostitution sting. Officer Cholly apprehended defendant after Doe was detained. Defendant told Officer Cholly that he was in the area because he dropped off his daughter at a pizza place. Officer Cholly told defendant he did not believe him. Defendant then stated that he dropped off a friend. Defendant was arrested.

Montclair Police Sergeant Deborah Camou was also involved in the prostitution sting. Sergeant Camou spoke with Doe when she was detained. Doe was shaking and very scared. She asked for defendant several times. She called defendant “Felix” and claimed that she only met him that day. She said that she was 18 years old. When Sergeant Camou told her she did not believe her, Doe admitted that she was 13 years old. Doe said her nickname was Baby Face 13 because she looked young. She finally admitted that defendant was her pimp. She initially denied that she had sex with defendant but then admitted that they had sex every day. Doe knew that defendant was at least 45 years old.

Defendant was also interviewed by Sergeant Camou. The jurors heard the interview and were given transcripts. Defendant first claimed that Doe was a friend of one of his friends and had told him she was 19 years old. He denied that he was her pimp. He initially denied that he had sex with her and claimed she was pregnant by someone else. Defendant expressed disbelief that Doe was 13 years old. He then

admitted that he had sex with Doe two times. She also orally copulated him two times. Defendant then stated they had sex three times.

Defendant maintained throughout the interview that Doe told him she was 18 or 19 years old. He insisted that Doe told him she was 19 years old but looked 17. Defendant claimed that Doe looked 18 years old when she was wearing makeup. Defendant took Doe in because she claimed that she had been kicked out of her brother's house. He used the money Doe made to buy her things.

Defendant was carrying \$84 in cash when he was arrested. Doe had no money on her person. Girl's clothing was found in defendant's trunk. Doe claimed to be in love with defendant.

Doe admitted that she lied to the arresting detective. She also lied to defendant about her age. Doe lied to defendant about the amount of money she made with customers. Doe lied to the undercover officer that she was not working "the streets." As Doe's pimp, defendant did not have to pay her for sex.

III

MISTAKE OF FACT

Defendant's first four contentions are inextricably connected and all are based on his premise that his belief that Doe was 18 years old was a defense to counts 2 through 7 and that the jury should have been instructed he had to have knowledge she was under 14 when he committed his crimes. He contends in his first argument it was error for the trial court to fail to sua sponte instruct the jury that he mistakenly believed the victim was 18

years old, i.e. with a mistake of fact defense. In his second argument, he insists that since such a defense was applicable, the jury was improperly instructed on wrongful intent. He claims that, based on the combination of both errors, he was prejudiced and his federal constitutional rights were violated, requiring reversal of counts 2 through 7. In his third claim he maintains that the trial court's instruction to the jury that a mistaken belief that Doe was over 14 years old was not a defense was improper. Finally, his fourth argument is that counsel was ineffective for failing to object to the instructions or request the mistake of fact instruction. Despite defendant's voluminous argument, our California Supreme Court has made it clear that for those who engage in lewd conduct with victims under the age of 14, public policy dictates that the victims be protected, and no mistake of defense instruction should be given.

““[E]ven in the absence of a request, the trial court must instruct on the general principles of law relevant to the issues raised by the evidence. [Citations.] The general principles of law governing the case consist of those principles closely and openly connected with the facts before the court and which are necessary for the jury's understanding of the case.” [Citation..]” (*People v. Russell* (2006) 144 Cal.App.4th 1415, 1424.)

Here, defendant was convicted of violating sections 288, subdivision (a) and 288a, subdivision (c)(1). Both require that the victim be under the age of 14. Defendant insists

that a mistake of fact defense is available for these crimes.⁵ He claims that preventing him from asserting a mistake of age defense to counts 2 through 7 is contrary to the general rule that criminal conduct requires the existence of a mens rea. This principle is reflected in sections 20 and 26. Section 20 provides, “In every crime or public offense there must exist a union, or joint operation of act and intent, or criminal negligence”; and section 26 provides, “Persons who committed the act or made the omission charged under an ignorance or mistake of fact . . . disproves any criminal intent.” Defendant also relies upon *People v. Hernandez* (1964) 61 Cal.2d 529, 535-536 (*Hernandez*), in which the California Supreme Court held that the defendant’s good faith, reasonable belief that a defendant’s sex partner was 18 or older (but was actually underage) can be a defense in statutory rape prosecutions under former section 261, subdivision (1) (now section 261.5).

In *People v. Olsen* (1984) 36 Cal.3d 638, 644-649 (*Olsen*), our Supreme Court held that a good faith, reasonable mistake of age is not a defense to a prosecution under section 288, subdivision (a) when the victim is under 14 years old. In so holding, the court declined to extend the rule in *Hernandez* that a reasonable but mistaken belief that the victim was at least 18 years old could provide a defense to statutory rape. In distinguishing *Hernandez*, the *Olsen* court explained: “There exists a strong public policy to protect children of tender years. . . . [S]ection 288 was enacted for that very

⁵ Defendant contends such instruction must be given sua sponte as he did not request an instruction in the trial court.

purpose. [Citations.] Furthermore, even the *Hernandez* court recognized this important policy when it made clear that it did not contemplate applying the mistake of age defense in cases where the victim is of ‘tender years.’” (*Olsen*, at p. 646.)⁶ The *Olsen* court cited a number of legislative provisions demonstrating “[t]ime and again, the Legislature has recognized that persons under 14 years of age are in need of special protection. This is particularly evident from the provisions of section 26. That statute creates a rebuttable presumption that children under the age of 14 are incapable of knowing the wrongfulness of their actions and, therefore, are incapable of committing a crime. A fortiori, when the child is a victim, rather than an accused, similar ‘special protection,’ not given to older teenagers, should be afforded. By its very terms, section 288 furthers that goal.” (*Olsen*, at pp. 647-648, fn. omitted.)

Defendant’s argument focuses on the fact that he believed that Doe was 18 years old, which would make his actions “innocent” since having sex with an 18-year-old person is not a crime. In *Olsen*, the victim was believed to be 16 years old by the perpetrator; however, having sex with a 16 year old would still have constituted a crime. (*Olsen, supra*, 36 Cal.3d at p. 641.) However, this misses the point of *Olsen*. In *Olsen*, the court did not focus on the perpetrator. Rather, the court focused on the public policy

⁶ In *Hernandez*, the victim was three months short of her 18th birthday. The court recognized, “No responsible person would hesitate to condemn as untenable a claimed good faith belief in the age of consent of an ‘infant’ female whose obviously tender years preclude the existence of reasonable grounds for that belief.” (*Hernandez, supra*, 61 Cal.2d at p. 536.)

of protecting those under the age of 14. (*Id.* at p. 646.) As noted, the *Olsen* court focused on, “a strong public policy to protect children of tender years.” (*Ibid.*) As noted by the People, defendant’s claim that he believed that Doe was 18 years old, as opposed to believing she was 14, 15, 16, or 17 years old, is a distinction without a difference. The fact remains, as *Olsen* noted, “[t]ime and again, the Legislature has recognized that persons under 14 years of age are in need of special protection.” (*Id.* at p. 647.)

In *People v. Paz* (2000) 80 Cal.App.4th 293 (*Paz*), the defendant raised a similar argument. There, the defendant argued that notwithstanding *Olsen* he was entitled to present a mistake of age defense to a prosecution under section 288, subdivision (c)(1), on the ground that a victim who is 14 or 15 years old “does not warrant the same public policy child protection given by the law to victims *under* the age of 14.” (*Paz*, at p. 295.) After reviewing the legislative history of subdivision (c)(1),⁷ the appellate court disagreed and concluded that a mistake of age defense would undermine the Legislature’s objective “to protect 14- and 15-year-olds from predatory older adults to the same extent children under 14 are protected by subdivision (a) of section 288. [Citation.]” (*Paz*, at p. 297.)

The *Paz* court concluded that “the public policy rationale of *Olsen* for rejecting good faith mistake of age in section 288 cases involving victims under age 14 holds true

⁷ The Legislature amended section 288 after *Olsen* was decided to add subdivision (c) (now (c)(1)), to criminalize lewd or lascivious acts when the victim is 14 or 15 years old. (See *Paz, supra*, 80 Cal.App.4th at p. 301, fn. 15.)

for victims of ages 14 and 15 as well -- ‘to protect children against harm from amoral and unscrupulous [adults] who prey on the innocent.’ [Citation.]” (*Paz, supra*, 80 Cal.App.4th at p. 298.) The *Paz* court also noted, “The courts have regularly refused to extend *People v. Hernandez, supra*, 61 Cal.3d at page 529, to section 288 crimes” and highlighted the *Olsen* court’s observation that the analysis that applies to prosecutions for child molestation is “entirely different” from the analysis that applies to statutory rape. (*Id.* at pp. 300, 301.) The trial court did not have a sua sponte duty to give a mistake of fact instruction in this case.

Defendant additionally claims that the trial court improperly instructed the jury on the elements of knowledge because he did not commit a wrongful act if he believed that Doe was 18 years old. The jury only was required to find that he committed a lewd touching or an act of oral copulation.⁸ Defendant’s argument is essentially the same as his first argument: he must have knowledge that Doe was 13 years old in order to possess the wrongful intent to commit a violation of sections 288, subdivision (a) and 288a, subdivision (c)(1). Again, this ignores the holding in *Olsen*. We cannot ignore *Olsen*. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455-456.)

⁸ The jury was instructed that the crimes charged required proof of act and wrongful intent. It was instructed that section 288a, subdivision (c)(1), required general intent, that is, “A person acts with wrongful intent when or she intentionally does a prohibited act” They were instructed that section 288, subdivision (a) required specific intent, which required “[t]hat [a] person must not only intentionally commit the prohibited act, but must do so with a specific intent.” It required that defendant “willfully touched any part of a child’s body either on the bare skin or through the clothing[.]”

Defendant claims that by following *Olsen* section 288 essentially amounts to a strict liability offense. The cases cited by defendant do not address crimes involving children or discuss *Olsen*. If the *Olsen* court had intended an exception for a defendant who reasonably believed the child was 18 years of age or older, it certainly would not have expressed its views in such categorical terms. Indeed, while the law may disfavor strict liability crimes, in the case of the exploitation or victimization of children and young teens exceptions are not unusual. Furthermore, the charged crimes are not “strict liability” crimes. Although the People were not required to prove defendant knew the victim’s age when he committed the crimes, proof of general or specific intent was required. Defendant’s claim that his case presents a unique factual circumstance due to his belief that he was having sex with an 18-year-old girl simply does not warrant relief in this case, where Doe was 13 years old.

Moreover, since we have rejected defendant’s first two contentions, his additional claims that the jury was improperly instructed that they could not consider as a defense that defendant believed that Doe was over 14 years old and that he received ineffective assistance of counsel based on his claimed instructional errors also fail.

Moreover, even if we were to consider that there was some mistake of fact instruction available to defendant, or that the jury was given improper instructions on intent, such error would be harmless in this case as the jury would not have concluded that defendant had a reasonable belief that Doe was 18 years old. Defendant claims that the error is assessed under *Chapman v. California* (1967) 386 U.S. 18, 24 [87 S.Ct. 824,

17 L.Ed.2d 705], the beyond a reasonable doubt standard, because his right to present a defense was infringed and his trial was fundamentally unfair in violation of the Sixth and Fourteenth Amendments of the federal Constitution.⁹ However, instructional errors are usually assessed under the prejudice standard of *People v. Watson* (1956) 46 Cal.2d 818, 836. We reverse only if there is a reasonable probability that had the court given a mistake of fact instruction the result would have been more favorable to the defendant. (See *People v. Whisenhunt* (2008) 44 Cal.4th 174, 214.) Regardless, under either standard, reversal would not be warranted.

Here, defendant was told by Doe that she was 18 years old. However, he disbelieved her, and she told him she was 17 years old. Defendant contradicted Doe by claiming she told him she was 19 years old. However, Doe had a cellular telephone with the name Baby Face that would have shown each time she called defendant. Defendant did not dispute that he received phone calls from her. The jury reasonably could have disbelieved defendant's testimony that she told him she was 18 or 19 years old. Moreover, we have reviewed the photograph shown to the jury taken at the time the crimes occurred. No juror viewing those photographs could conclude it was reasonable for defendant to believe that Doe was 18 or 19 years old at that time. As such, even if the

⁹ Defendant was not without a defense. His counsel described Doe as "flippant" and a liar. Defense counsel also argued the evidence was insufficient that defendant received any money from Doe; defendant's confession was coerced; there was no scientific evidence that the sexual acts occurred; and defendant and Doe were coerced into making untruthful statements.

jury had been instructed on mistake of fact (which would have required the jury to conclude that defendant believed Doe was 18 years or older), the results of defendant's trial would not have been different.

IV

SUFFICIENCY OF THE EVIDENCE

Defendant claims that the evidence was insufficient to support his conviction of violating section 266h. Specifically, he contends there was no evidence that he used any of the proceeds from Doe's prostitution for his own support as required by that section.

“In reviewing a claim [regarding the] sufficiency of the evidence, we must determine whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime or special circumstance beyond a reasonable doubt. We review the entire record in the light most favorable to the judgment below to determine whether it discloses sufficient evidence — that is, evidence that is reasonable, credible, and of solid value — supporting the decision, and not whether the evidence proves guilt beyond a reasonable doubt.

[Citation.] We neither reweigh the evidence nor reevaluate the credibility of witnesses.

[Citation.] We presume in support of the judgment the existence of every fact the jury reasonably could deduce from the evidence. [Citation.] If the circumstances reasonably justify the findings made by the trier of fact, reversal of the judgment is not warranted simply because the circumstances might also reasonably be reconciled with a contrary finding. [Citation.]” (*People v. Jennings* (2010) 50 Cal.4th 616, 638–639.)

“Because ‘we review the entire record in the light most favorable to the judgment to determine whether it contains substantial evidence . . .’ [citation], the effect is that on appeal ‘a defendant challenging the sufficiency of the evidence to support her conviction “bears a heavy burden,” [citation] . . .’ [citation] of showing insufficiency of the evidence and must do so in accordance with well-established standards [citation].” (*People v. Powell* (2011) 194 Cal.App.4th 1268, 1287.)

Section 266h, subdivision (b) provides in pertinent part as follows: “Any person who, knowing another person is a prostitute, lives or derives support or maintenance in whole or in part from the earnings or proceeds of the person’s prostitution, or from money loaned or advanced to or charged against that person by any keeper or manager or inmate of a house or other place where prostitution is practiced or allowed, or who solicits or receives compensation for soliciting for the person, when the prostitute is a minor, is guilty of pimping a minor, a felony”

The defendant must know that the money from which he lives or derives support or maintenance was the earnings or proceeds of prostitution. (*People v. Tipton* (1954) 124 Cal.App.2d 213, 217-218.) “Thus, section 266h can be violated in either of two basic ways: (1) by deriving support from the earnings of another’s act of prostitution or (2) by soliciting.” (*People v. McNulty* (1988) 202 Cal.App.3d 624, 630, italics omitted.) “In regard to the first basic way to violate the statute, deriving support with knowledge that the other person is a prostitute is all that is required” (*Ibid.*)

Here, there was ample evidence that defendant received proceeds that Doe made while she was working as a prostitute under his tutelage. Doe testified that she gave defendant at least \$100 while they were together. Defendant was found with \$84 on his person when Doe had just been with a customer and had been paid \$80. Doe had no money on her person. Doe indicated that defendant bought her some clothes but also that he kept some of the money. Defendant had no known income and slept in his car. The jury could reasonably conclude the defendant used at least a portion of the money given to him by Doe to buy food and gas for the car. As such, sufficient evidence supported that defendant derived support from Doe's work as a prostitute.

V

DISPOSITION

The judgment is affirmed.

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RICHLI
J.

We concur:

RAMIREZ
P.J.

McKINSTER
J.