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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. MEI JUN WANG, Defendant and Appellant.	E065121 (Super.Ct.No. INF1301165) OPINION

APPEAL from the Superior Court of Riverside County. W. Charles Morgan, Judge. (Retired judge of the Riverside Super. Ct., assigned by the Chief Justice pursuant to art. VI, § 6, of the Cal. Const.) Affirmed.

Michael Anthony Hernandez for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Arlene A. Sevidal, Andrew S. Mestman, and Britton B. Lacy, Deputy Attorneys General, for Plaintiff and Respondent.

I

INTRODUCTION[1]

A jury convicted defendant Mei Jun Wang of one count of pimping (§ 266h) and one count of pandering (§ 266i). The court sentenced defendant to two concurrent prison terms of three years.

On appeal, defendant contends the trial court should have obtained a waiver of her constitutional right to testify and should have stayed the sentence for pandering. We reject both arguments and affirm the judgment.

II

FACTUAL BACKGROUND

In 2009, defendant was implicated in a sting operation conducted at an undercover massage parlor in Palm Desert.

On February 21, 2013, the Riverside County Sheriff's Department conducted a prostitution sting operation, using two adjoining rooms of a Palm Desert hotel. One room was occupied by an investigator posing as a client, and the second room was used by the arrest team for surveillance and for processing arrestees.

The investigator, "Bob," made phone calls to advertisements that had been placed on Backpage.com. One advertisement displayed a woman removing her shirt. The investigator called that number and spoke with a woman who identified herself as

[1] All statutory references are to the Penal Code unless stated otherwise.

"Jasmine." Bob and Jasmine negotiated a price for specific types of sex acts and he provided Jasmine with his hotel room number.

A deputy participating in the operation observed a silver Lexus approaching the hotel rooms. The driver, a woman later identified as Yunhua Lu, exited the Lexus and walked towards the investigator's room. The passenger moved into the driver's seat and drove away. Lu knocked on the hotel door and identified herself as "Vivian" and said Jasmine was in the car. Bob gave Vivian $340. Vivian tried to get Bob to shower with her, at which point he gave the "bust signal" to the other deputies to conduct an arrest. Following Lu's arrest, her purse was searched and contained $340 in cash, personal lubricant, and two Crown-brand prophylactics.

A while later, defendant knocked on the hotel door, identified herself as Jasmine, and asked for Vivian. Defendant was arrested and searched by a deputy in the hotel bathroom. The officer remembered seeing a cellular phone and a key fob on the bathroom counter but she did not personally confiscate those items from defendant.

Defendant was the owner of the Lexus, which was towed to the sheriff's station in Palm Desert. Inside the car was a brown purse on the passenger's seat, $220.25 in cash in the driver's door panel, and Crown-brand condoms in the center console. A further search of the Lexus found several guest passes for gated communities and resorts, condoms, personal lubricant, and about $12,800 in cash. Several index cards were "pay/owe" or "pay/client" sheets. One of the cards had the date of February 21, the names Vivian and Bob, a meeting time of 9:00 p.m., and the hotel building and room numbers.

In a search of defendant's residence, officers found Crown-brand condoms in the master bedroom and more pay/client sheets. The lot numbers for the Crown condoms in the bedroom and in Lu's purse were the same. The mobile phone's data was forensically extracted to retrieve the cellular phone number, contacts, emails, and calls.

III

WAIVER OF RIGHT TO TESTIFY

Defendant asserts that the trial court should have elicited her waiver of the fundamental right to testify. However, a trial court is not required to obtain an express waiver of a defendant's right to testify, and defendant does not demonstrate how the court's failure to do so constituted error. The trial court properly assumed defendant waived her right to testify. We hold any failure to obtain an explicit waiver was harmless.

At trial, the defense attorney twice announced defendant would not testify. At the close of the prosecution's case, defense counsel also stated, "Your honor, after hearing the evidence, Defense rests." Defense counsel then argued repeatedly there was no evidence to support the requisite elements of pimping and pandering.

Based on the record, defendant waived her right to testify and the trial court's acceptance of her implied waiver was proper. According to the United States and California Constitutions, every criminal defendant is privileged to testify or not to testify in her own defense and the decision is made "after consultation with counsel" but a trial court need not "obtain an affirmative waiver on the record whenever a defendant fails to testify at trial." (*People v. Carter* (2005) 36 Cal.4th 1114, 1198; see *People v. Bradford*

(1997) 14 Cal.4th 1005, 1053 [“No such personal waiver is expressly required for a defendant to waive his right to testify.”].) A defendant may not await the outcome of the trial and then seek reversal based on being deprived of the opportunity to testify. (*People v. Alcala* (1992) 4 Cal.4th 742, 805-806.) Instead, the trial court “‘may safely assume’” that a defendant who does not testify is “““exercising his Fifth Amendment privilege against self-incrimination and is abiding by his counsel’s trial strategy; . . .””” (*Carter,* at p. 1198.)

Here, defendant was ably represented by counsel and defendant never sought to take the stand. There is also no evidence of any conflict between defendant and her trial counsel about her testifying. Therefore, the court did not need to obtain a waiver of defendant’s right to testify, instead properly assuming defendant made a deliberate decision not to testify. (*People v. Bradford, supra*, 14 Cal.4th at p. 1053; *People v. Alcala, supra*, 4 Cal.4th at pp. 805-806.) In any event, as the court noted in *Bradford,* “[i]f that assumption is incorrect, defendant’s remedy is not a personal waiver in open court,” but rather “a claim of ineffective assistance of counsel.” (*Ibid.*) There is no support in the record for a claim of ineffective assistance of counsel.

Finally, any purported error regarding defendant’s denial of her right to testify was harmless. (*People v. Allen* (2008) 44 Cal.4th 843, 870, citing *Arizona v. Fulminante* (1991) 499 U.S. 279, 306.) Specifically, because the denial of defendant’s right to testify affects only her ability to present personal testimony, the error is “trial error rather than

structural error," and therefore subject to harmless error analysis under *Chapman*.[2] (*Allen*, at p. 871; see *People v. Johnson* (1998) 62 Cal.App.4th 608, 634-636 [rejecting the argument that improper denial of a defendant's right to testify is structural error and applying the *Chapman* standard].)

Here, even if defendant was denied the right to testify, any error was harmless beyond a reasonable doubt. The jury heard testimony from nine current or former police officers, detailing defendant's involvement in two different undercover investigations of prostitution. In light of their testimony, the audio recordings of the undercover operations, and the evidence of condoms, lubricant, cash, and client sheets found in defendant's vehicle and residence, the outcome would have been no different had defendant testified. Defense counsel tried to discredit the prosecution's evidence but the jury deliberated for less than two and a half hours before returning guilty verdicts on both counts. Accordingly, any error was harmless beyond a reasonable doubt. (See *People v. Allen*, *supra*, 44 Cal.4th at pp. 871-872.)

III

SENTENCING FOR PIMPING AND PANDERING

Defendant argues section 654 should apply to bar dual punishment for both pimping and pandering. However, the sentences for counts 1 and 2 did not violate section 654 because substantial evidence supports the trial court's finding that defendant

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[2] *Chapman v. California* (1967) 386 U.S. 18, 24.

harbored separate objectives in committing the independent crimes and that defendant's course of conduct was divisible in time.

At the sentencing hearing, defense counsel argued that defendant engaged in one continuous act that should be punished by a single three-year sentence. The prosecutor responded that a single incident may be charged in various ways but the required elements are different for sections 266h and 266i. The court agreed the crimes were independent and sentenced defendant to two separate but concurrent three-year terms.

Section 654 prohibits multiple punishments for a single act or an indivisible course of conduct. (*People v. Latimer* (1993) 5 Cal.4th 1203, 1208.) Thus, if the crimes committed were merely incidental to or were the means of accomplishing or facilitating a single objective, the defendant may receive only one punishment. (*Ibid*.) However, if defendant had several, independent criminal objectives, she may be punished for each crime that was committed in pursuit of separate objectives, even where those crimes shared common acts or were parts of an otherwise indivisible course of conduct. (*People v. Harrison* (1989) 48 Cal.3d 321, 335.) Furthermore, "a course of conduct divisible in time, although directed to one objective, may [also] give rise to multiple violations and punishment." (*People v. Beamon* (1973) 8 Cal.3d 625, 639, fn. 11; see *Latimer*, at p. 1212.) If a separation in time afforded defendant an opportunity to reflect and to renew her intent before committing the next crime, a new and separate crime was committed. (*People v. Louie* (2012) 203 Cal.App.4th 388, 399.)

Whether section 654 applies is a factual determination within the trial court's broad discretion. (*People v. Jones* (2002) 103 Cal.App.4th 1139, 1143; see *People v.*

Harrison, supra, 48 Cal.3d at p. 335.) A reviewing court is to view the evidence in a light most favorable to the court's express or implied factual determinations and presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence. (*People v. Tarris* (2009) 180 Cal.App.4th 612, 627.) A trial court's determination that two crimes were separate, involving separate objectives, must be upheld on appeal if supported by substantial evidence. (*People v. Brents* (2012) 53 Cal.4th 599, 618.) We hold substantial evidence supports the trial court's finding that defendant harbored multiple independent objectives when she encouraged and facilitated Vivian's illicit encounter with the investigator and when she sought to obtain payment for Vivian's prostitution.

Pandering and pimping are distinct crimes which may be committed separately. (*People v. Zambia* (2011) 51 Cal.4th 965, 981.) Pandering is a specific intent crime (*id.* at p. 980) and pimping is a general intent crime. (*People v. McNulty* (1988) 202 Cal.App.3d 624, 630-631.) Pandering criminalizes "the *knowing and purposeful* conduct of any person seeking to encourage 'another person' to work with the panderer or another pimp in plying the prostitution trade." (*Zambia*, at pp. 980, 981.) Pimping, however, is prohibited "to discourage any . . . person from . . . receiving material gain from the practice of prostitution." (*People v. Smith* (1955) 44 Cal.2d 77, 80.)

Defendant's first objective here was to facilitate Vivian's illicit encounter with the investigator. Defendant answered Bob's phone call and negotiated the encounter. Defendant transported Vivian to the location. Defendant's next objective, when she showed up at the hotel, was to obtain Vivian's earnings as a prostitute. Because

defendant had different objectives in accomplishing the distinct crimes of pandering and pimping, the court properly sentenced her for each independent crime. (*People v. Harrison, supra*, 48 Cal.3d at p. 335; *People v. Beamon, supra*, 8 Cal.3d at p. 639.)

Even if defendant's combined actions had one objective, the court's imposition of multiple punishment was proper because defendant's course of conduct was divisible in time. (See *People v. Beamon, supra*, 8 Cal.3d at p. 639, fn. 11.) More than an hour passed after defendant dropped off Vivian at the hotel. The passage of time gave defendant the "opportunity to reflect and to renew [her] intent before committing the next crime," such that "a new and separate crime [was] committed." (*People v. Louie, supra*, 203 Cal.App.4th at p. 399 [a pause of 15 minutes between a verbal threat and arson was sufficient time for defendants to reconsider and reflect upon their actions].) Even if defendant harbored only one objective, substantial evidence demonstrated that a sufficient amount of time elapsed between the pandering and pimping offenses. (*Ibid.*; *Beamon*, at p. 639, fn. 11.)

Although defendant contends she is entitled to a single punishment under section 654 for her pimping and pandering convictions because her actions constituted a continuing course of conduct with the sole objective of achieving financial gain, the Supreme Court has rejected such an argument as "akin to an assertion of a desire for wealth as the sole intent and objective in committing a series of separate thefts," which would "preclude punishment for otherwise clearly separate offenses" and "would violate [section 654's] purpose to insure that a defendant's punishment will be commensurate with his culpability." (*People v. Perez* (1979) 23 Cal.3d 545, 552.) The intent and

objective of achieving financial gain is "much too broad and amorphous to determine the applicability of section 654." (*Ibid*.)

Ultimately, defendant's efforts to conflate her pandering and pimping offenses lack merit. Defendant committed the offense of pandering when she answered the investigator's phone call and negotiated the price before transporting Vivian to the hotel equipped with condoms and lubricant. Defendant pimped Vivian by receiving her earnings. Because defendant pursued separate objectives and her conduct was divisible in time, the trial court did not sentence defendant in violation of section 654.

V

DISPOSITION

Defendant was not denied her right to testify and was properly sentenced for the separate crimes of pimping and pandering. We affirm the judgment.

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CODRINGTON
J.

We concur:

MILLER
Acting P. J.

SLOUGH
J.