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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

DAMARIS MARKYSE THOMPSON,

Defendant and Appellant.

G050905

(Super. Ct. No. 11NF3418)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Lance Jensen, Judge. Affirmed.

Christopher Love, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Melissa Mandel, Alana Cohen Butler and Laura Baggett, Deputy Attorneys General, for Plaintiff and Respondent.

* * *

A jury convicted defendant and appellant Damaris Markyse Thompson of pimping (Penal Code, § 266h, subd. (a))¹, and the trial court sentenced him to the middle term of four years. On appeal, he contends the prosecution failed to establish the essential element that he derived support or maintenance, in whole or in part, from the earnings of a known prostitute because the prosecution failed to show the money he received from a prostitute exceeded the amount he spent to provide her with food, clothing, and lodging. Thompson also contends the trial court prejudicially erred by failing to sua sponte instruct the jury on the purported lesser included offense of aiding a prostitute by collecting or receiving proceeds of prostitution activities (§ 653.23, subd. (a)(2)). According to Thompson, the evidence was weak that he derived support or maintenance from a prostitute's earnings, as opposed to merely receiving those earnings, and it is reasonably probable the jury would have convicted him of the lesser offense if it had been properly instructed.

We affirm. The support or maintenance element of pimping does not require the prosecution to establish the defendant expended the earnings he or she received from a known prostitute for the defendant's support or maintenance, and the amount of money the defendant received from prostitution activities is irrelevant. The prosecution need only show the defendant received at least some of a known prostitute's earnings and those earnings were available for the defendant to use for support or maintenance. Contrary to Thompson's contention, the crime of pimping is not limited only to those pimps who operate at a profit. As explained below, substantial undisputed evidence establishes Thompson directed a woman to work as a prostitute and he took everything she earned from her acts of prostitution.

Moreover, assuming arguendo that aiding a prostitute is a lesser included offense on which the trial court was required to instruct the jury, the court's failure to do

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All statutory references are to the Penal Code.

so was harmless error. Thompson failed to establish it is reasonably probable the jury would have convicted him of aiding a prostitute if it had been instructed on that lesser offense. Thompson's contention the evidence on the support or maintenance element was weak is based on the erroneous assumption the prosecution was required to show he received more money from the prostitute's earning than he spent for her food, clothing, and lodging. As stated above, the prosecution was not required to make that showing and substantial undisputed evidence establishes Thompson derived at least some support or maintenance from the earnings of a known prostitute. On the record presented, it is not reasonably probable the jury would have convicted him of aiding a prostitute instead of pimping.

I

FACTS AND PROCEDURAL HISTORY

On the morning of November 10 or 11, 2011, Brittany was walking to her sister's house in Hemet when Thompson drove by. The two made eye contact and Brittany walked up to his vehicle as Thompson pulled to the side of the road. They began talking and Brittany got into Thompson's vehicle. She explained she was looking to get out of Hemet, but she had no money and no permanent place to live. She also told him she had two children that lived with her mother and she would like to regain custody of them.

Thompson told Brittany he could help her. He explained he was driving to Los Angeles, but that he would be coming back to Hemet later. Brittany decided to go with Thompson and the two continued to talk. Thompson drove Brittany to a nearby hotel where she picked up a laundry basket full of her clothes. He also took her to a beauty supply store where he bought Brittany a wig before heading to Los Angeles. At some point, Thompson also bought Brittany some clothes.

Thompson first took Brittany to Long Beach Boulevard in Los Angeles County where he “directed” her to work as a prostitute. He told her to charge \$60 for oral sex and \$90 for intercourse. Brittany agreed and performed several acts of prostitution at Thompson’s direction. She gave him all of the money she received because he told her the money she made belonged to him.

Next, Thompson drove Brittany to a hotel on Beach Boulevard in Buena Park. He got a room for the two of them because Brittany did not have her identification with her. When the two got to the room, they had intercourse and afterward Thompson told Brittany, “I own you now.” He then told her to go down to Beach Boulevard and to make him some money by performing acts of prostitution, which she did.

Thompson provided Brittany with condoms and a cellphone that enabled him to track her location. She would text Thompson the number “9” when she picked up a “date”—that is, a customer with whom she would perform sex acts—and then she would text him the word “done” when the date was over. Thompson provided her with more condoms when she ran out and took charge of all the money she earned. He decided when she worked, how long she worked, and where she worked. He brought her food when she was hungry because she had no money. Thompson required Brittany to refer to him as “Daddy.” Brittany prostituted herself in this manner for a few days without getting much sleep or food.

At one point, Brittany texted Thompson stating she wanted to return to Hemet, and he responded by telling her to come back to the hotel room. When she arrived at the room, the two began arguing and Thompson forcefully put his hands around Brittany’s neck, but he did not choke her. Thompson told her, “Like I said, I own you; so there is really nothing you can say about it,” and “I just want you to go out there and go get my money.” Thompson also told Brittany, “I’ll be driving around. So don’t think you can go anywhere, and I’ll stop you before you get to where you’re trying to go.” Frightened, Brittany followed Thompson’s orders.

On the morning of November 14, 2011, Brittany was walking on Beach Boulevard in Anaheim wearing a sleeveless short red dress and high heels, and waving at men as they drove by. Officer Steven Craig of the Anaheim Police Department observed Brittany and suspected she may be engaging in prostitution activities because prostitution was common in that area and her clothes were not appropriate for the weather conditions. Craig stopped Brittany and began talking to her. She admitted she was working as a prostitute and she was staying with a man called “Bad Luck” or “D. Money” at a nearby hotel. She told Craig she would give “Bad Luck” or “D. Money” \$100 per week. As Brittany spoke with Craig she saw Thompson drive by and she became frightened. Craig eventually arrested Brittany.

After her arrest, Brittany spoke with Investigator Michael Cunha. She again acknowledged she was working as a prostitute and identified “Bad Luck” or “D. Money” as her pimp. She explained how she would text Thompson when she picked up a date and when the date was over, and he would bring her more condoms when she needed them and take the money she received. Brittany told Cunha she had 44 dates in one night, three for intercourse and the rest for oral sex. He told her that would be more than \$2,600 she received at the rates she identified.

During their interview, Cunha downloaded the messages from Brittany’s cellphone. The phone, however, only had messages starting on November 13, 2011—the day before her arrest—because Brittany had lost another phone Thompson previously gave her when one of her dates tried to grab her as she exited his car. These messages showed Brittany had texted Thompson the number “9” six times between 8:44 p.m. on November 13 and 2:28 a.m. on November 14, suggesting she had at least six dates during that time period.

Cunha began texting Thompson using Brittany’s cellphone and also asked Brittany to place three recorded phone calls to Thompson. Posing as Brittany, Cunha arranged a meeting with Thompson, and arrested him when he arrived for the meeting.

In Thompson's car, the police found the laundry basket with Brittany's clothes, her purse, and a cellphone box with a serial number that matched the serial number on the cellphone Brittany had.

The prosecution charged Thompson with one felony count of pimping and one felony count of pandering (§ 266i, subd. (a)(1)).² At trial, Brittany testified to the foregoing facts, except she testified she could not remember telling Cunha she had 44 dates in one night, explaining she gave him only an estimate because she could not remember how many dates she had. She did not remember a lot of details about her arrest and could not count the number of dates she had because she had not slept or eaten very much during the three days leading up to her arrest.³ Cunha, however, testified in detail about Brittany telling him she had 44 dates.

Following closing arguments, the trial court instructed the jury on the crimes of pimping, attempted pimping, pandering, and attempted pandering. The parties did not request the court to instruct the jury on any other crimes. The jury convicted Thompson of both pimping and pandering. The trial court sentenced Thompson to the middle term of four years for pimping and stayed the sentence for pandering. This appeal followed.

² The District Attorney also charged Thompson with one felony count of human trafficking (§ 236.1, subd. (a)), but the trial court dismissed that count before trial.

³ Brittany testified at trial based on an order compelling her to testify and a use immunity agreement that prohibited her testimony from being used against her in any other proceeding. This order and agreement arose out of Brittany being charged in Los Angeles County with attempting to cash a fraudulent check less than a year before she met Thompson.

II

DISCUSSION

A. *Substantial Evidence Supports Thompson's Pimping Conviction*

Thompson contends we must reverse his conviction for pimping because the record lacks substantial evidence to establish the essential elements of the crime. According to Thompson, the pimping charge required the prosecution to prove he derived support or maintenance, in whole or in part, from Brittany's earnings as a prostitute, but the prosecution failed to establish that essential element because there was no evidence showing the amount Thompson received from Brittany's prostitution earnings exceeded the amount he spent on Brittany's food, clothing, and lodging. In other words, Thompson contends the prosecution must establish Thompson's pimping enterprise had a positive cash flow, and the prosecution failed to do so. Thompson misconstrues the elements of the offense and the evidence presented.

When reviewing a claim of insufficient evidence, we review the trial court record in the light most favorable to the judgment rendered below to decide whether substantial evidence exists to support the verdict. (*People v. Johnson* (1980) 26 Cal.3d 557, 578.) This inquiry “does not require a court to “ask itself whether *it* believes that the evidence at the trial established guilt beyond a reasonable doubt.” [Citation.] Instead the relevant question is 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 beyond a reasonable doubt.” (*Id.* at p. 576, quoting *Jackson v. Virginia* (1979) 443 U.S. 307, 318-319.)

Under section 266h, subdivision (a), the essential elements of pimping require evidence showing (1) the defendant knew the victim was a prostitute, and (2) the defendant derived support or maintenance, in whole or in part, from the victim's earnings

as a prostitute.⁴ (§ 266h, subd. (a); CALCRIM No. 1150; CALJIC No. 10.70; *People v. Grant* (2011) 195 Cal.App.4th 107, 115.)

Case law “make[s] clear that the amount of money which [the] defendant receives from the prostitute is irrelevant for purposes of a pimping conviction.” (*People v. Jackson* (1980) 114 Cal.App.3d 207, 210 (*Jackson*)). ““In order to establish that the accused lived and derived support and maintenance from the earnings of prostitution it is not necessary for the prosecution to prove that the money was expended for that purpose.”” (*Ibid.*; see *People v. Kennedy* (1962) 200 Cal.App.2d 814, 817 (*Kennedy*); *People v. Courtney* (1959) 176 Cal.App.2d 731, 740 (*Courtney*); *People v. Jackson* (1954) 128 Cal.App.2d 506, 508-509; *People v. Giambone* (1953) 119 Cal.App.2d 338, 340 (*Giambone*), disapproved on another ground in *People v. Smith* (1955) 44 Cal.2d 77, 80-81; *People v. Navarro* (1922) 60 Cal.App. 180, 182.) The support or maintenance element is satisfied when the evidence shows the defendant received some or all of a prostitute’s earnings for use as the defendant saw fit. It is not a defense that the accused had a sufficient income from other sources, and therefore did not need the prostitute’s earnings to pay some or all of the defendant’s support or maintenance. (*Ibid.*)

For example, in *Jackson*, the Court of Appeal held evidence showing the defendant received a prostitute’s earnings from a single act of prostitution was sufficient to establish the defendant derived support or maintenance in part from the prostitute’s earnings. Similar to this case, the defendant in *Jackson* met the victim at a bus station in Oregon and convinced her to travel with him to San Francisco where he directed her to work as a prostitute. The victim performed a single act of prostitution and gave the \$33

⁴ “[S]ection 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.) Here, we are concerned only with pimping based on deriving support from the earnings of another’s acts of prostitution.

she received to the defendant; there was no evidence of what the defendant did with that money. (*Jackson, supra*, 114 Cal.App.3d at pp. 208-209.) On appeal, the defendant argued the evidence was insufficient to support his pimping conviction as a matter of law. (*Id.* at p. 209.) Based on the foregoing authorities, the *Jackson* court rejected that contention, explaining “The evidence produced by the prosecution showed that, in the words of the statute, appellant ‘derive[d] support or maintenance . . . in part’ from the earnings of the young woman whom he had induced to become a prostitute.” (*Id.* at p. 210; see *Courtney, supra*, 176 Cal.App.2d at p. 739 [pimping conviction upheld based on two acts of prostitution for which defendant received \$20 for the first and an undisclosed amount for second].)

Here, Thompson does not dispute that Brittany performed multiple acts of prostitution at his direction and she gave him the money she received for performing those acts. Indeed, the evidence shows Thompson met Brittany in Hemet and drove her to Los Angeles County where she performed multiple acts of prostitution and gave Thompson the money she received. Next, Thompson drove Brittany to Orange County where she performed multiple acts of prostitution over two or three days and again gave Thompson the money she earned.

Cunha testified Brittany told him shortly after her arrest that she performed 44 acts of prostitution. At trial, Brittany backtracked from that number, testifying she could not remember the number of dates she had and the number she gave Cunha was only an estimate. Thompson nonetheless concedes Brittany performed at least six acts of prostitution in Orange County, in addition to the multiple acts she performed in Los Angeles County, and that she gave all of her earnings to Thompson. This is substantial evidence supporting the conclusion Thompson derived support or maintenance in part from Brittany’s earnings as a prostitute because she gave him the money she earned for him to use however he wanted.

Contrary to Thompson's contention, the prosecution was not required to establish Thompson received more from Brittany's acts of prostitution than he spent in paying for her food, clothing, and lodging. As explained above, the amount of money Thompson received from Brittany's earnings as a prostitute is irrelevant. (*Jackson, supra*, 114 Cal.App.3d at p. 210.) The evidence shows he received all of Brittany's earnings and those earnings were available to him to pay at least a portion of his support or maintenance. Nothing more was required. (*Ibid.*; *Courtney, supra*, 176 Cal.App.2d at p. 739.) The prosecution was not required to show Thompson actually used the earnings for that purpose or that he needed the money to pay his support or maintenance. (*Jackson*, at p. 210; *Kennedy, supra*, 200 Cal.App.2d at p. 817; *Courtney*, at p. 740.)

“The purpose of section 266h is ‘to discourage any . . . person from soliciting or receiving material gain from the practice of prostitution.’ [Citation.] The provision discourages prostitution ‘by discouraging persons other than the prostitute from augmenting and expanding a prostitute’s operation, or increasing the supply of available prostitutes.’ [Citation.] Penal statutes are to be construed ‘according to the fair import of their terms, with a view to effect [the Penal Code’s] objects and to promote justice.’” (*Jackson, supra*, 114 Cal.App.3d at p. 210.)

Under Thompson's interpretation of section 266h, the prosecution must prove the pimping enterprise was profitable. To prosecute under the pimping statute, Thompson's interpretation would require the police to allow the pimp to continue operating his prostitution enterprise until the police believed the prostitutes had brought in enough money to offset all expenses the pimp incurred. A prosecution for pimping would become an accounting exercise. That is not the law. Both the profitable and unprofitable pimps are guilty of the offense. (See *Kennedy, supra*, 200 Cal.App.2d at p. 817; *Giambone, supra*, 119 Cal.App.2d at p. 340.)

B. *The Trial Court Did Not Prejudicially Err By Failing to Sua Sponte Instruct the Jury on Aiding a Prostitute as a Lesser Included Offense*

Thompson contends aiding a prostitute by collecting or receiving all or a part of the proceeds earned from acts of prostitution is a lesser included offense of pimping, and the trial court therefore had a duty to sua sponte instruct the jury on that lesser offense. According to Thompson, the court should have instructed on the lesser included offense because the evidence he derived support or maintenance from Brittany's prostitution earnings was weak, and therefore it was reasonably probable the jury would have found him guilty of merely aiding a prostitute by receiving the proceeds of the prostitution activities. We disagree. The parties cite no published case deciding whether aiding a prostitute is a lesser included offense of pimping, but we need not decide that question because, assuming the trial court had a duty to instruct the jury on aiding a prostitute as a lesser included offense, we conclude that error was harmless.

“In noncapital cases, ‘the rule requiring sua sponte instructions on all lesser necessarily included offenses supported by the evidence derives exclusively from California law.’ [Citation.] As such, ‘in a noncapital case, error in failing sua sponte to instruct, or to instruct fully, on all lesser included offenses and theories thereof which are supported by the evidence must be reviewed for prejudice exclusively under [*People v. Watson* [(1956) 46 Cal.2d 818, 836].’ [Citations.] “[M]isdirection of the jury, including incorrect, ambiguous, conflicting, or wrongly omitted instructions that do not amount to federal constitutional error are reviewed under the harmless error standard articulated” in *Watson*.’ [Citations.] ‘[U]nder *Watson*, a defendant must show it is reasonably probable a more favorable result would have been obtained absent the error.’” (*People v. Beltran* (2013) 56 Cal.4th 935, 955; see *People v. Ngo* (2014) 225 Cal.App.4th 126, 158.)

In comparison to section 266h, subdivision (a), which makes it a felony for any person to derive support or maintenance, in whole or in part, from the earnings of a known prostitute, section 653.23, subdivision (a)(2), makes it a misdemeanor for any

person to “[c]ollect or receive all or part of the proceeds earned from an act or acts of prostitution committed by another person in violation of subdivision (b) of Section 647.”

Here, the evidence establishes Thompson met Brittany in Hemet and convinced her to come to Los Angeles with him. He purchased her a wig and some clothes, and then drove her to Los Angeles County where she performed multiple acts of prostitution at Thompson’s direction and gave him all of the money she earned. Thompson next drove Brittany to Orange County where she again performed multiple acts of prostitution at Thompson’s direction and gave him all of the money she earned. Thompson does not dispute any of this evidence. Instead, he argues there is no substantial evidence to support his pimping conviction because the prosecution failed to establish the amount of money he received from Brittany’s prostitution earnings exceeded the amount he spent on Brittany’s food, clothing, and lodging. As explained above, however, the prosecution was not required to make that showing and substantial evidence supports his pimping conviction.

On this record, it is not reasonably probable the jury would have found Thompson guilty of aiding a prostitute instead of pimping if it had been instructed on aiding a prostitute as a lesser included offense. As explained above, the evidence showed Thompson derived support or maintenance in part from Brittany’s prostitution earnings because she gave him everything she earned as a prostitute and he used that money as he saw fit. It is undisputed Thompson repeatedly told Brittany to work as a prostitute and all the money she earned belonged to him. That is much more than merely aiding a prostitute by collecting or receiving the proceeds from prostitution activities, and it is not reasonably probable that instructing the jury on aiding a prostitute would have led to a more favorable result for Thompson.

III

DISPOSITION

The judgment is affirmed.

ARONSON, J.

WE CONCUR:

O'LEARY, P. J.

THOMPSON, J.