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SUPREME COURT COP.

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

SUPREME COURT
FILED

JUN 18 2009

THE PEOPLE OF THE STATE OF CALIFORNIA,)

Plaintiff and Respondent,)

v.)

JOMO ZAMBIA,)

Defendant and Appellant.)

) Crim. No. _____

) (Court of Appeal No. B207812

) Sup. Ct. No. LA055997)

PETITION FOR REVIEW

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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA,)
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 Plaintiff and Respondent,)
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 v.) Crim. No. _____
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QUESTION PRESENTED FOR REVIEW

Does solicitation of a person believed to be a prostitute to continue prostituting constitute pandering by encouragement?

NECESSITY FOR REVIEW

The Court should grant review to settle an important question of law and resolve a conflict in the appellate courts concerning whether evidence that a defendant solicited someone whom he believed was acting as a prostitute to “change management,” *i.e.*, to come work for him, constitutes the crime of pandering by encouragement or its attempt. (Cal. Rules of Cour, rule 8.500(b)(1).)

ARGUMENT

THERE IS CONSTITUTIONALLY INSUFFICIENT EVIDENCE TO CONVICT PETITIONER OF PANDERING BY ENCOURAGEMENT

The facts of petitioner's case are as set forth at pages 2 through 4 of the appellate opinion. In its opinion, the lower court found sufficient evidence to sustain petitioner's conviction based in part on its belief that the pandering proscription includes solicitation of someone believed to already be a prostitute to continue prostituting. (Opn., at pp. 4-6.) In so holding, the appellate court improperly broadened the definition of pandering: a crime specifically intended to address the evil of enlisting non-prostitutes into prostitution, not to discourage prostitutes from changing pimps. (*People v. Wagner* (2009) 170 Cal.App.4th 499, 506; Pen. Code § 266i(a)(2) [violation where person "encourages another *to become* a prostitute."].) Moreover, the Second District's published opinion conflicts with another published opinion in which the Fourth District held that the offense cannot be committed where the person solicited is already a prostitute. (*People v. Wagner, supra*, 170 Cal.App.4th at p. 506.) The question posed in petitioner's case is thus both simple and broad: what constitutes pandering by encouragement?

Penal Code section 266i, subdivision (a)(2) reads in pertinent part:

(a) Except as provided in subdivision (b), any person who does any of the following is guilty of pandering, a felony, and shall be punishable by imprisonment in the state prison for three, four, or six years: [¶] (2) By

promises, threats, violence, or by any device or scheme, causes, induces, persuades or encourages another person to become a prostitute.

Within the meaning of the statute, “active ‘encouragement’” means something more than simply urging someone to prostitution. (*People v. Hashimoto* (1976) 54 Cal.App.3d 862, 865.) In *People v. Bradshaw* (1973) 31 Cal.App.3d 421, relied upon by the lower court here, the defendant solicited an undercover police officer whom he believed was a prostitute to enter a brothel under his supervision. On appeal, the defendant argued that “encouragement” to pander implied success and that one could not encourage someone to become a prostitute who already was (or who was believed to already be) a prostitute. (*Id.*, at p. 424.) In its opinion in petitioner’s case, the Second District rejected the argument, holding that the crime of pandering does not require either that active encouragement lead to success in securing a prostitute or that the person pandered be new to prostitution. (*Id.*, at pp. 425-426; *see also, People v. Patton* (1976) 63 Cal.App.3d 211, 218 [noting potential for social harm in encouraging established prostitute to “alter her business relations.”].)

In *People v. Hashimoto, supra*, 54 Cal.App.3d 862, the defendant, a travel agent seeking to provide fuller service for his international customers, offered to regularly refer Japanese tourists to an undercover police officer posing as a prostitute. (*Id.*, at pp. 864-865.) Unlike Division Four, which had decided *Bradshaw*, Division Two of the Second District Court of Appeal in *Hashimoto* looked at the dictionary meaning of “encourage” (“to urge, foster, stimulate, to give hope or help”), relying upon at least one

of the reference works rejected by its fellow court. In so doing, Division Two found “active encouragement” lay in the defendant’s proposal to change the solicitee’s “business relations by reducing her price in exchange for volume,” noting that the pandering statute was intended to discourage prostitution by discouraging augmentation and expansion of a prostitute’s business, or increasing the supply of prostitutes.¹ (*Id.*, at pp. 866-867; *accord*, *People v. Almodovar* (1987) 190 Cal.App.3d 732, 736-738 [police officer turned prostitute pandered by setting up “date” for police officer she was encouraging to prostitute]; *People v. Patton, supra*, 63 Cal.App.3d at p. 213-215 [defendant pandered by encouraging 16-year-old runaway to work for him as a prostitute].)

As a prefatory matter, the appellate court in this case rejected petitioner’s argument that his encouragement was of the inactive variety, based on petitioner’s use of various tricks of the trade. (Opn., at pp. 4-5.) But the fact petitioner may have been in fact a pimp does not actually address whether his offer constituted “active” solicitation.

Petitioner promised the undercover police officer—whom he approached on the street,

¹ “**Error! Main Document Only.**Active,” according to www.dictionary.reference.com (citing the Random House Unabridged Dictionary (2006), means, in part: “1. engaged in action; characterized by energetic work, participation, etc.; busy: an active life. 2. being in a state of existence, progress, or motion: active hostilities. 3. involving physical effort and action: active sports... 5. characterized by action, motion, volume, use, participation, etc.: an active market in wheat; an active list of subscribers. 6. causing activity or change; capable of exerting influence (opposed to passive): active treason... 9. requiring or giving rise to action; practical: an active course.” These standard definitions compliment the aim of anti-pimping/pandering legislation: “to discourage prostitution by discouraging persons other than the prostitute from augmenting and expanding a prostitute’s operation, or increasing the supply of available prostitutes.” (*People v. Hashimoto, supra*, 54 Cal.App.3d at p. 867; *c.f.*, *People v. Hernandez* (1998) 46 Cal.3d 194, 201 [words and phrases to be construed in light of statutory scheme].)

believing her to be a working prostitute— no business augmentation, no expansion, no increase in either demand or supply. Though the lower court found substantial evidence of inducement/encouragement because petitioner had the accoutrements of a pimp and asked the undercover officer to come prostitute for him, under the usual terms and conditions (opn., at p. 5), there was no practical effort made or evidence adduced that petitioner could have actively encouraged anyone’s prostitution.² Unlike the defendants in *Bradshaw* and *Hashimoto*, petitioner didn’t promise opportunity for advancement, expansion or a profitable new market; unlike the defendants in *Patton* and *Almodovar*, petitioner was simply attempting to continue the prostitute’s status quo. More of the same is not more.³ (*People v. Bradshaw, supra*, 31 Cal.App.3d at p. 424.)

Contrary to the court’s opinion here, the appellate court in *People v. Wagner, supra*, 170 Cal.App.4th 499, rejected the Government’s argument that encouraging a change in business relationship qualified as pandering under *Bradshaw* and *Hashimoto*. The Fourth District found that *Bradshaw*, the first case to propose that pandering included soliciting someone to engage in prostitution who was already a prostitute did so “in an utterly unconvincing fashion.” (*People v. Wagner, supra*, 170

² It is useful in this regard to consider the difference between crimes of solicitation, in which the articulated offer completes the crime, and crimes of encouragement, which contemplate some present ability to effect the target offense. Note there is no proscription against solicitation in section 266i, subdivision (a)(2). (*See generally, In re Ryan N.* (2002) 92 Cal.App.4th 1359, 1377-1378.)

³ “Take some more tea,” the March Hare said to Alice, very earnestly. “I’ve had nothing yet,” Alice replied in an offended tone, “so I can’t take more.” (Carroll, Lewis, *Alice in Wonderland*, ch. 7, available at <http://www.cs.indiana.edu/metastuff/wonder/ch7.html>.)

Cal.App.4th at p. 506.) In its expansion of the statutory definition of pandering, the *Bradshaw* court had relied upon the opinion in *People v. Frey* (1964) 228 Cal.App.2d 33, 39, though the *Frey* opinion itself “*did not actually address the issue.*” (*People v. Wagner, supra*, 170 Cal.App.4th at p. 506, original emphasis.) The Fourth District could find no support for the proposition “anywhere else.” (*Ibid.*) Given the principle that “cases are not authority for propositions not considered” (*People v. Superior Court (Zamudio)* (2000) 23 Cal.4th 183, 198), and the rule of lenity (*People v. Avery* (2002) 27 Cal.4th 49, 57-58 [“[W]hen a statute defining a crime... is susceptible of two reasonable interpretations, the appellate court should ordinarily adopt the interpretation more favorable to the defendant.”]), it was clear to the Fourth District that the statute was to be read on its face. (*People v. Wagner, supra*, 170 Cal.App.4th at p. 888; *c.f.*, *Wooten v. Superior Court* (2002) 93 Cal.App.4th 422, 432.) And, like the statute says, the crime of pandering occurs when someone causes/induces/persuades/encourages someone else “*to become*” a prostitute, not by causing/inducing/persuading/encouraging someone to continue prostituting. (*People v. Wagner, supra*, 170 Cal.App.4th at p. 883; Pen. Code § 266i(a)(2).)

In petitioner’s case, the Second District, relying on *Bradshaw*, maintained *Wagner* was inapplicable because the individual solicited was not actually a prostitute, but an undercover police officer. (Opn., at p. 6.) With all due respect, this is hair-splitting as jurisprudence: as plainly put by the plain words of the statute, the crime of pandering is the crime of encouraging someone “*to become a prostitute.*” The anti-pandering

statute, targets the specific evil of “turning” women to prostitution, not that of playing pimp: if someone is already a prostitute, the crime of pandering by encouraging cannot be committed.⁴ By logical extension, this reasoning also extends to those situations where the person is not really a prostitute because the self-same illicit encouragement (trying to get someone “to become a prostitute”) is present, though the intent is similarly unable to be effectuated. In short, trying to get someone to become a prostitute who can’t or won’t become a prostitute because she is either already a prostitute or a police officer is not enough to sustain a pandering conviction. (*People v. Wagner, supra*, 170 Cal.App.4th at p. 507 [“We can certainly sympathize with the *Bradshaw* court....[T]hey were groping for a solution without any precedential illumination.”].)

But if the crime of pandering cannot be effected by the mere fact of soliciting someone to prostitute, the question becomes whether one is then guilty of attempted pandering? Again citing *People v. Bradshaw, supra*, 31 Cal.App.3d at p. 425, petitioner’s court said no, because success is not a necessary element of the offense. (Opn., at p. 7.) However, this conclusion does not address the issue at issue in this case: *i.e.*, what, if any, crime is committed when a person attempts to pander, but cannot, because the object of his attentions is not a prostitute? (*People v. Wagner, supra*, 170 Cal.App.4th at p..) And this is where the standard definition of attempt is most apropos.

⁴ The Second District footnoted that, although the Fourth District’s holding was factually inapplicable, the “strong weight of authority” is contra *Wagner*. (opn., p. 6, fn. 3) As the *Wagner* decision makes explicit, there is no “strong weight of authority” in this matter—the *Bradshaw* “rule” being built on nothing but notions, and the cases subsequently relying on *Bradshaw*, like petitioner’s case (and cited by petitioner’s court), built on top of the airy that. (*People v. Wagner, supra*, 170 Cal.App.4th at pp. 507-508.)

(Pen. Code § 21a [“An attempt to commit a crime consists of two elements: a specific intent to commit the crime, and a direct but ineffectual act done towards its commission.”]; *People v. Superior Court (Decker)* (2007) 41 Cal.4th 1, 7-8 [attempt to murder proved by retaining assassin].) By soliciting one to “become” a prostitute, who, by virtue or vice cannot “become” a prostitute, one has successfully attempted to pander—there has been, as there must be, “some appreciable fragment of the crime committed, (and) it must be in such progress that it will be consummated unless interrupted by circumstances independent of the will of the attempter.” (*People v. Camodeca* (1959) 52 Cal.2d 142, 145, quoting *People v. Buffum* (1953) 40 Cal.2d 709, 718; Pen. Code § 663 [a defendant may be found guilty of an attempt to commit any offense necessarily included in the offense for which he was charged].)

Pandering is established when the evidence shows that the accused has succeeded in inducing his victim to become an inmate of a house of prostitution. [Citations.] Attempted pandering is proved by evidence of the acts of the accused which have failed to accomplish the actor’s purpose by reason of its frustration by extraneous circumstances rather than by virtue of a change of heart on the part of the one who made the attempt.

(*People v. Charles* (1963) 218 Cal.App.2d 812, 819, quoting *People v. Mitchell* (1949) 91 Cal.App.2d 214, 217-218; *see also*, *People v. Grubb* (1914) 24 Cal.App. 604, 608; *People v. Matsicura* (1912) 19 Cal.App. 75, 78.) More precisely, that the woman in question is an undercover police officer is one such extrinsic circumstance, and a common one at that. (*People v. Mitchell, supra*, 91 Cal.App.2d at pp. 217-219.)

In *People v. Mitchell, supra*, 91 Cal.App.2d 214, police surveillance

indicated the defendant was apparently keeping a house of prostitution. An undercover police officer was telephoned by the defendant, who inquired as to whether the officer had worked “in a house” before. During their subsequent in-person appointment, the defendant told the officer that she had been working for 12 years; had four girls working for her; her girls made \$100 a night, halved with the defendant; she had been arrested many times, but done no time; and would take care of negotiating with customers. A customer arrived during the meeting, the defendant escorted him to another room, and then asked the officer to handle the trick; the officer declined. There was a follow-up telephone conversation, and a work start-date was set. The defendant was later convicted of attempted pandering. (*Id.*, at pp. 216-218.) Affirming the conviction, Division Two found substantial evidence of overt acts, coupled with the impossibility of success, necessary to constitute an attempt.⁵ (*Id.*, at p. 219; *see generally, In re Ryan N., supra*, 92 Cal.App.4th at pp. 1377-1378 [discussion of distinction between crimes of solicitation and attempts]; Pen. Code § 21a.)

Similarly, in *People v. Grubb, supra*, 24 Cal.App. 604, the defendant could be found properly guilty of attempted pandering because he put prosecutrix into house of prostitution, where she “was importuned to engage in sexual intercourse by visitors to the brothel, but refused all such importunities.” (*Id.*, at p. 606; *see also, People v. Charles, supra*, 218 Cal.App.2d at p. 819.) And in *People v. Petros* (1914) 25 Cal.App. 236, the

⁵ In *People v. Frey* (1964) 228 Cal.App.3d 33, 44-45, 50, the defendants were convicted of a number of counts of pandering, some involving an undercover police officer; Division One did not consider the application of attempt principles relative to those counts.

defendant's planned prostitution of the prosecutrix was thwarted when a known prostitute took the woman away and called the police. (*Id.*, at pp. 241-243.) That the prosecutrix did not become a prostitute was due to the timely and unexpected intervention of another:

And it was this most commendable and humane intervention in the malodorous transaction by the fallen woman, Teddie Smith, that constituted the 'extraneous circumstances' – circumstances arising independently of the will of the accused –which frustrated or prevented the execution of his purpose to place her in a house of prostitution as an inmate thereof.

(*Id.*, at p. 246; *People v. Matsicura*, *supra*, 19 Cal.App. at pp. 77-78 [defendant arranged for woman to prostitute in house, no evidence she ever did so]; *People v. Snyder* (1940) 36 Cal.App.2d 258, 533-534 [*idem*].)

In *People v. Bradshaw*, *supra*, 31 Cal.App.3d 421, Division Four distinguished *Matsicura* on grounds that the earlier opinion “does not mention the word ‘encourage.’” However, the *Bradshaw* court did not consider whether a conviction for attempt would properly lie – nor did it need to, because the question before the court was whether a section 995 motion had been properly granted on a theory of entrapment when the defendant had “willingly and enthusiastically entered into negotiations for the [undercover] police woman's services.” (*Id.*, at p. 423.) Too, the *Bradshaw* opinion did not address the fact that the version of section 266i, subdivision (a)(2) applied in *People v. Mitchell*, *supra*, 91 Cal.App.2d at p. 216, fn. 1, included a proscription against pandering by encouraging. Thus, contrary to the implication made by the opinion in this case, the *Bradshaw* opinion does not suggest that attempted pandering cannot be a lesser included offense to pandering, and numerous earlier cases held that convictions for

attempted pandering were proper where unforeseen circumstance thwarted the intended procurement. (*Accord, People v. Mitchell, supra*, 91 Cal.App.2d at pp. 217-219;) *People v. Siu* (1954) 126 Cal.App.2d 41, 43; *People v. Petros, supra*, 25 Cal.App. at p. 245; *see generally*, 1 Witkin, Cal.Crim.Law 3d (2000) Elements, § 61, p. 269.)

Given all the evidence indicated petitioner fully believed, as the police encouraged him to believe, that the undercover officer was currently a prostitute at the time he approached her, and that at most he approached her with an offer to “change management” (*id.*, at p. 888), petitioner’s conduct does not fall within the purview of the anti-pandering statute, and there is thus constitutionally insufficient evidence to sustain his conviction for pandering. (*People v. Wagner, supra*, 170 Cal.App.4th at p. 889; U.S. Const., Fourteenth Amend.; Cal. Const., art. I, § 15; *Jackson v. Virginia* (1979) 443 U.S. 307, 319; *People v. Johnson* (1980) 26 Cal.3d 557, 576-578.) Given, as attested to in this case, that law enforcement will continue to habitually use undercover officers as decoy prostitutes, and given that pimps will continue to solicit prostitutes to change management, this issue will continue to schism appellate courts, confuse trial courts, and invite arbitrary enforcement by prosecutors and police. (*Contra, People ex rel. Gallo v. Acuna* (1997) 14 Cal.4th 1090, 1144; U.S. Const. Fifth and Fourteenth Amends.) In order to clarify what constitutes the crime of pandering by encouragement, review should be granted. (Cal. Rules of Court, rules 8.500(a)(b)(1).)

CONCLUSION

For the foregoing reasons, review should be granted.

Dated: May 29, 2009

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'VANESSA PLACE', written over a horizontal line.

VANESSA PLACE
Attorney for Petitioner

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA,)
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Plaintiff and Respondent,)
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v.) Crim. No. _____
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) (Court of Appeal No. B207812
) Sup. Ct. No. LA055997)
JOMO ZAMBIA,)
)
Defendant and Appellant.)
_____)

CERTIFICATION

Pursuant to California Rules of Court, rule 8.504, I certify that the
foregoing petition for review contains 3,202 words.



Vanessa Place
Attorney for Petitioner

EXHIBIT A

Filed 5/12/09

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE,

Plaintiff and Respondent,

v.

JOMO ZAMBIA,

Defendant and Appellant.

B207812

(Los Angeles County Super. Ct.
No. LA055997)

APPEAL from a judgment of the Superior Court of Los Angeles County, Dennis E. Mulcahy, Judge. Affirmed.

Vanessa Place, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Paul M. Roadarmel, Jr. and Rama R. Maline, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant and appellant Jomo Zambia was convicted of pandering in violation of Penal Code section 266i, subdivision (a)(2),¹ by encouraging Officer Erika Cruz to become a prostitute. He was sentenced to the middle term of four years in prison. In his timely appeal, defendant contends there was constitutionally insufficient evidence to support his conviction. Alternatively, he argues the evidence only supported a conviction for attempted pandering. We disagree and affirm.

STATEMENT OF FACTS

On the evening of June 8, 2007, Officer Cruz was conducting an undercover investigation in an area known for prostitution activity on Sepulveda Boulevard in Van Nuys. Defendant drove past her in a Ford pickup truck, looked in her direction, made a U-turn, and stopped next to her at the corner of Sepulveda and Valerio. In her experience, this was typical of how pimps and “johns” (prostitution customers) drive in that area. Defendant rolled down his window and asked the officer to get into his vehicle. Officer Cruz asked defendant, “what for?” and “he said that he was a pimp.” The officer told him to back up so they could talk.

Officer Cruz saw cell phones on the pickup’s center console.² Defendant again told her to get into his car. When the undercover officer asked why, defendant repeated that he was a pimp. She asked what he meant. Defendant said he would “take care of” her. Defendant asked how much money she had with her. Hearing that she had \$400, defendant told her that if she gave it to him, defendant would provide her with housing and clothing. When Officer Cruz expressed some misgivings about getting into

¹ All further statutory references are to the Penal Code.

² Officer Kathryn Paschal testified that when she arrested defendant, she found three cell phones, some condoms, and a business card on the pickup’s center console. It is common for pimps to carry condoms, which they provide to their prostitutes. Pimps will typically have more than one cell phone.

defendant's car, he said he was "a legit business man," waived a business card at her, and said he would not "strongarm" her. In her experience, pimps, prostitutes, and their customers use the term "strongarm" to mean the forceful taking of a prostitute's cash.

Defendant used a very aggressive tone of voice and demeanor during this conversation. Based on Officer Cruz's training and experience, defendant was behaving like a "gorilla pimp"—persons who used "verbal threats and violence to get their way and to scare prostitutes into working for them." Officer Cruz asked if she could continue to work in the Sepulveda area. Defendant said, "yes, and that he would just take care of [her]." At that point, Officer Cruz directed defendant to drive across the street. She signaled to her partners, who arrived and arrested defendant.

Officer Paschal testified that in her experience, pimps place their prostitutes on the street, where they perform sex acts for money. The prostitute will turn the money over to the pimp, who will provide the prostitutes with food, clothing, and other services. Sergeant Alan Kreitzman was in charge of the investigation that night. In his experience, pimps carry business cards for legitimate businesses, which they provide to their prostitutes to give the false appearance of being involved in a legal trade. Where a john will be very circumspect in approaching a prostitute, pimps typically approach them in a direct, aggressive manner.

Defense

According to defendant's mother, Barbara Zambia, her son lived at home with her and her husband at the time of the incident. The family owned a janitorial business, First Class Building Maintenance. Defendant was employed in the business as a janitor. Although his hours varied, defendant usually worked 40-hour weeks, on evenings from approximately 6:00 p.m. to 12:30 a.m. Defendant carried one working cell phone, but had a broken one in the car, along with one he had borrowed from a friend. Two of the phones found in his car were purchased by defendant's father.

Defendant had recently become engaged to Celina Payano. They have an infant daughter. Payano works for the Los Angeles County Probation Department. Payano confirmed that defendant's work hours varied along the lines described by his mother, but Payano also added that defendant often returned to the jobsite to pick up equipment in the morning hours. She recognized all three cell phones found in defendant's pickup truck. She had no reason to think defendant also worked as a pimp.

DISCUSSION

In reviewing a challenge of the sufficiency of evidence, we “consider the evidence in a light most favorable to the judgment and presume the existence of every fact the trier could reasonably deduce from the evidence in support of the judgment. The test is whether substantial evidence supports the decision, not whether the evidence proves guilt beyond a reasonable doubt.” (*People v. Mincey* (1992) 2 Cal.4th 408, 432, fn. omitted; *People v. Hayes* (1990) 52 Cal.3d 577, 631.) Our sole function is to determine if “any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” (*Jackson v. Virginia* (1979) 443 U.S. 307, 319; *People v. Bolin* (1998) 18 Cal.4th 297, 331 (*Bolin*); *People v. Marshall* (1997) 15 Cal.4th 1, 34.) The standard of review is the same in cases where the prosecution relies primarily on circumstantial evidence. (*People v. Rodriguez* (1999) 20 Cal.4th 1, 11; *People v. Stanley* (1995) 10 Cal.4th 764, 792; *People v. Bloom* (1989) 48 Cal.3d 1194, 1208.) The California Supreme Court has held, “[r]eversal on this ground is unwarranted unless it appears ‘that upon no hypothesis whatever is there sufficient substantial evidence to support [the conviction].’” (*Bolin, supra*, 18 Cal.4th at p. 331, quoting *People v. Redmond* (1969) 71 Cal.2d 745, 755.)

As is relevant in this appeal, a person is guilty of pandering if he or she “causes, induces, persuades or encourages another person to become a prostitute” by “promises, threats, violence, or by any device or scheme.” (§ 266i, subd. (a)(2).) Defendant initially argues that his statements were too nebulous to be considered as encouragement under

the statute because he neither offered the undercover officer anything concrete in terms of remuneration nor detailed the scope of her prospective prostitution activities. The record shows otherwise. Defendant, who carried with him some of the accoutrements typical of a pimp, represented himself as a “pimp” to a person posing as a prostitute in a location known for prostitution activity. He repeatedly requested that the undercover officer come along with him and told her that he would provide her with housing and clothing in exchange for her cash. This is consistent with the typical pimp/prostitute relationship whereby a prostitute turns over money to the pimp, who provides the prostitute with food, clothing, and other services in return. This was substantial evidence of inducement, persuasion, or encouragement for Officer Cruz to engage in prostitution on defendant’s behalf.

“The pandering statute and Penal Code section 266h (pimping) are both designed to discourage prostitution by discouraging persons other than the prostitute from augmenting and expanding a prostitute’s operation, or increasing the supply of available prostitutes.” (*People v. Hashimoto* (1976) 54 Cal.App.3d 862, 867.) In that context, to encourage “means to urge, foster, stimulate, to give hope or help.” (*Ibid.*) “[S]uccess is not a necessary element of the offense proscribed by the word ‘encourage’ as used in subdivision (b) of section 266i.” (*People v. Bradshaw* (1973) 31 Cal.App.3d 421, 425; *People v. Hashimoto, supra*, at p. 866 [“neither success nor consummation of the proposal was a necessary element of a violation of the pandering statute”].)

Nor does pandering require proof of a remuneration scheme. “The fact that the defendant apparently was not to receive any money from the venture directly is not fatal to the conviction. The purpose of the anti-pandering statute [citation] is to ‘cover all the various ramifications of the social evil of pandering and include them all in the definition of the crime, with a view of effectively combating the evil sought to be condemned.’ [Citations.]” (*People v. Hashimoto, supra*, 54 Cal.App.3d at p. 866.) As our colleagues in Division Two of this District have explained, “we know of no statutory or case law requiring that payment be made to the person actually providing sexual favors. Neither can we conceive of any basis for so limiting the definition of prostitution. It is doubtless not

uncommon for prostitutes associated with pimps or panderers to be denied the proceeds of their labors. To permit those exploiting these individuals to escape prosecution merely by diverting the fees paid for their services would severely undermine efforts to combat commercial endeavors in which the government has been found to have a legitimate and substantial interest.” (*People v. Bell* (1988) 201 Cal.App.3d 1396, 1400.)

Defendant relies on the recent decision in *People v. Wagner* (2009) 170 Cal.App.4th 499 (*Wagner*), which held as a matter of statutory construction that section 266i, subdivision (b)(1), does not apply where the person solicited to engage in prostitution is known to be an active prostitute currently plying his or her trade for someone else. According to the *Wagner* court, the statutory “language defining the crime as occurring when a defendant induces or encourages someone else to ‘become a prostitute,’ seems fairly clear in its exclusion of efforts to importune someone currently engaged in that profession to change management.” (*Id.* at p. 509.) It therefore concluded that “the crime defined by section 266i, subdivisions (a)(2) and (b)(1), does not occur when the person being ‘induce[d], persuade[d] or encourage[d]’ by a defendant is *currently* a prostitute.” (*Id.* at p. 511.) Whatever the merits of *Wagner*’s rationale and holding might be³—and we have no occasion to assess them—that decision has no application to defendant’s appeal. The determinative and undisputed evidence in *Wagner* established “that the young woman whom Wagner was accused of encouraging to become a prostitute was already engaged in prostitution” (*Ibid.*) Here, in contrast, there was no evidence that Officer Cruz was already engaged in prostitution, and she testified on cross-examination, “I don’t have a pimp.”

³ We note, however, that the strong weight of authority is contrary to *Wagner*. (See *People v. Bradshaw*, *supra*, 31 Cal.App.3d at p. 426 [“subdivision (b) . . . covers also cases where a defendant has solicited one whom he believes to be a former prostitute to reenter the profession and a defendant who solicits one whom he believes presently to be a prostitute to change her business relations”]; *People v. Patton* (1976) 63 Cal.App.3d 211, 216-218; *People v. Hashimoto*, *supra*, 54 Cal.App.3d at p. 867.)

Nor is defendant correct in asserting he could be convicted of nothing more than the inchoate offense of attempted pandering because Officer Cruz had no intention of prostituting herself on behalf of defendant. As the plain wording of the statute makes clear, the crime of pandering is complete when, as relevant here, the accused “encourages another person to become a prostitute” by “promises, threats, violence, or by any device or scheme.” (§ 266i, subd. (a)(2).) It follows that “success is not a necessary element of the offense proscribed by the word ‘encourage’ as used in subdivision (b) of section 266i.”⁴ (*People v. Bradshaw*, *supra*, 31 Cal.App.3d at p. 425; *People v. Hashimoto*, *supra*, 54 Cal.App.3d at p. 866.) This is consistent with the statute’s policy aims: “A substantial potential for social harm is revealed even by the act of encouraging an established prostitute to alter her business relations. Such conduct indicates a present willingness to actively promote the social evil of prostitution.” (*People v. Patton* (1976) 63 Cal.App.3d 211, 218.)

DISPOSITION

The judgment is affirmed.

KRIEGLER, J.

We concur:

TURNER, P. J.

ARMSTRONG, J.

⁴ To the extent prior opinions such as *People v. Mitchell* (1949) 91 Cal.App.2d 214, 217-218 imply that the crime of pandering remains inchoate unless “the evidence shows that the accused has succeeded in inducing his victim to become an inmate of a house of prostitution,” we follow the *Bradshaw* and *Hashimoto* line of cases as properly effectuating the plain meaning of section 266i, subdivision (b).

Proof of Service

I am a citizen of the United States, over the age of 18 years, employed in the County of Los Angeles, and not a party to the within action; my business address is Post Office Box 18613, Los Angeles, California 90018. I am a member of the bar of this court.

On June 1, 2009, I served the within

PETITION FOR REVIEW

in said action, by placing a true copy thereof enclosed in a sealed envelope, addressed as follows, and deposited the same in the United States Mail at Los Angeles, California.

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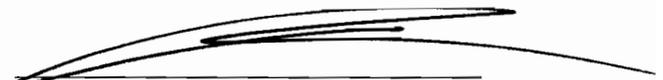
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I declare under penalty of perjury that the foregoing is true and correct.

Executed this 29th day of June, 2009 at Los Angeles, California.


Vanessa Place