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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. ANDREW EARL CHESHIRE, Defendant and Appellant.	B286902 (Los Angeles County Super. Ct. No. BA443099)

APPEAL from a judgment of the Superior Court of Los Angeles County, Robert J. Perry, Judge. Affirmed in part, and remanded with directions.

Elizabeth K. Horowitz, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters,

Assistant Attorney General, Shawn McGahey Webb and Shezad H. Thakor, Deputy Attorneys General, for Plaintiff and Respondent.

Appellant Andrew Earl Cheshire appeals his convictions for attempted murder, pimping and human trafficking of a minor. He contends the prosecutor committed misconduct during closing argument by misstating the law and evidence, and vouching for witnesses. He further contends the trial court erred by failing to instruct sua sponte on contributing to the delinquency of a minor as a lesser included offense of human trafficking of a minor, and by providing an additional instruction and dictionary definition of pimping in response to a jury question.

Appellant also raises issues pertaining to his sentence. He contends: (1) the Three Strike sentence imposed on the human trafficking offense was unauthorized because the prosecution failed to properly plead and prove, in accordance with recent amendments to the "Three Strikes" law, that the crime was a felony offense that results in mandatory registration as a sex offender pursuant to Penal Code section 290, subdivision (c);[1] (2) his custody credits were improperly calculated; and (3) the case must be remanded for

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[1] Undesignated statutory references are to the Penal Code.

resentencing under a recent enactment, generally referred to as Senate Bill No. 620 (S.B. 620), which granted trial courts the authority to strike weapon enhancements imposed under section 12022.53. (Stats. 2017, ch. 682, § 2.)

We remand the matter for correction of custody credits and reconsideration of the weapon enhancement; we otherwise affirm.

A. *Information and Amended Information*

Appellant was charged by amended information with one count of attempted murder (§§ 187, subd. (a) & 664, count one); one count of pimping (§ 266h, subd. (a), count four), described as "liv[ing] and deriv[ing] support and maintenance in whole and in part from the earnings and proceeds of [Shakeita J.'s] prostitution" and also as "solicit[ing] and receiv[ing] compensation for soliciting said prostitute"; and one count of human trafficking of a minor for a commercial sex act (§ 236.1, subd. (c)(1), count five), described as "induc[ing] and/or persuad[ing] Alea S., who was less than 18 years of age, to engage in a commercial sex act, with the intent to effect and/or maintain a violation of . . . section 266h."[2]

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[2] The amended information was filed November 7, 2017. The original information, filed November 21, 2016, had contained an additional count, charging appellant with "pandering" (§ 266i, subd. (b)(l), count three), described as encouraging, causing, inducing or persuading Alea S. to become a prostitute by way of "threats, violence, promises, a device, and scheme . . . ." The
(*Fn. is continued on the next page*.)

It was further alleged with respect to count one that appellant personally used a firearm within the meaning of section 12022.53, subdivision (b) and (e)(1), and that he personally and intentionally discharged a firearm which caused great bodily injury to Jameel Johnson within the meaning of section 12022.53, subdivision (d) and section 12022.7, subdivision (a) and caused the offense to become a serious felony under section 1192.7, subdivision (c)(8) and a violent felony under section 667.5, subdivision (c)(8). It was also alleged that prior to the commission of the offenses alleged in all three counts, appellant had been convicted of five robberies (§ 211) in 2007 that were serious and/or violent felonies as defined in section 667, subdivision (d) and section 1170.12, subdivision (b), and that he was thus "subject to sentencing pursuant to the provisions of . . . section 667(b)-(j) and . . . section 1170.12."

The first page of the amended information contained a summary of the charges and the potential sentence. The summary did not refer to section 667, and indicated the effect of section 1170.12 would be to double the basic sentence for each offense. Only the summary for count one

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original information stated that conviction of the offense in count three would require registration pursuant to "section 290 et seq." Count three was dismissed during trial, after Alea testified. There was no reference to section 290 in the amended information. There were also gang allegations in the original information that were omitted in the amended information.

indicated a potential sentence of 25-years to life, and that was said to be under section 12022.53, subdivision (d).

B. *Evidence at Trial*[3]

On December 4, 2015, Jameel Johnson was standing near the intersection of Western Avenue and 12th Street in Los Angeles, an area known for prostitution.[4] He was approached by a white car driven by a Black man, accompanied by a Black female passenger. The driver asked Johnson why he was "chasing hoes" and where he was from. The man got out of the car, said he was from "Grape Street," and shot Johnson twice with a handgun, once in the right arm and once in the buttocks. Johnson noticed that the gun had a brown handle. Johnson escaped to a nearby gas

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[3] All the witnesses were called by the prosecution. The defense did not present affirmative evidence.

[4] The details of the shooting were introduced through police officers and detectives who interviewed Johnson. Johnson was called to testify and stated that he did not want to be in court testifying against appellant. He claimed not to recall any specific facts about the shooting, other than where he was hit, about the man who shot him, or about the vehicle involved. Officer Jaime Corona, who interviewed Johnson at the hospital after the shooting and related his statements to the jury, recalled that even then, Johnson was reluctant to provide information and refused to sign a written statement.

station and asked someone to call 911.[5] The 911 call was received at approximately 3:30 a.m.

Three days later, December 7, 2015, LAPD Officer Jessica Cardenas, patrolling the area of the shooting, observed a woman identified at trial only as "Ashley" exit the passenger side of a vehicle and walk to a white Chevy Malibu parked nearby. Ashley handed the driver something and then walked away. Suspecting Ashley was engaged in prostitution, Officer Cardenas approached the Malibu and told the driver, later identified as appellant, to stand on the sidewalk. Appellant ran. Officer Cardenas could not pursue him until she ascertained no one else was in the car, but when appellant turned a corner and was out of sight, she heard a metallic clank. Searching the area, Officer Cardenas found a revolver with a wooden handle loaded with .22 caliber ammunition. She found a box of .22 caliber ammunition in the Malibu. Between the gun and the box, eight rounds were missing. The day before Officer Cardenas testified, she was shown a photographic lineup by the prosecutor and identified appellant as the man who ran away.

The Malibu was impounded. Appellant's prints were found on it. The woman who owned the Malibu came to claim it and said she had lent it to her boyfriend. She gave appellant's cell phone number as the number of her

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[5] The gas station attendant said the shooter's vehicle was red.

boyfriend. There were no prints on the gun found by Officer Cardenas. There were insufficient markings on a .22 caliber bullet taken from the victim's body to positively identify the gun as the weapon used by the shooter, but the analysis did not rule out that that the bullet could have come from that gun. Ashley's cell phone was impounded. There were texts between her phone and appellant's number.[6] An analysis of cell phone records determined that appellant's cell phone was in the vicinity of the shooting at 3:30 a.m. on December 4, 2015, calling or receiving a call from Shakeita J.

On December 29, 2015, LAPD Officer Nilo Martinez stopped appellant in the area of the shooting. Appellant was driving a silver Ford Mustang. There were two women in the car. Appellant told Officer Martinez he was a Grape Street gang member.

In his initial interview at the hospital, Johnson did not state that the shooter had any tattoos. On December 15, Johnson told Detective Maggie Sherman, who was investigating the shooting, that the Malibu impounded December 7 was the car the shooter was driving. He described the shooter as having a tattoo on the middle of his neck, and later said the tattoo was an upside-down Air Jordan logo, a symbol of Grape Street. On January 12, 2016, Detective Sherman re-interviewed Johnson, and showed him

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[6] A printout of the texts was entered into evidence, but is not in the record on appeal.

a photographic lineup. Johnson said that appellant and one other person looked like the shooter.[7]

On January 17, 2016, LAPD Officer Douglass Hall was working a joint prostitution task force targeting the area where the shooting occurred. He approached a woman, later identified as Alea S., who agreed to perform oral sex for $40. She told the officer it was her first night. The officer's team took her into custody. Shortly thereafter, the team arrested appellant.

Alea was born in April 1999 and was 16 and pregnant when she met appellant in December 2015. She told appellant she was 18. She testified that before she met appellant, she had already decided to become a prostitute to support her baby and herself, and "knew pretty much how it worked." She described appellant as her "manager" and "security guard" and "somewhat like a pimp." She expected appellant to "protect[]" her and "be[] there" when she met with customers or "John[s]." Appellant agreed to "be[] there" for her. Alea expected to obtain customers through calls to an ad on a Web site and did not expect to work "the blade," the slang term for a street where prostitutes wait for customers. She did not know how much of her earnings would go to appellant.

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[7] Appellant had several Grape Street tattoos, including the Air Jordan logo. His tattoos were obscured in the photograph used for the lineup.

Alea gave birth on December 16, 2015. On December 31, she received a text message from appellant saying he was going to pick up "Shakeita" or "Minnie" before picking up Alea, and inquired whether she was "going to try to get some dough" that night. Alea asked if she "had to." Appellant responded: "You want me to make you? I am asking." Alea told appellant she was dressed poorly, and appellant replied: "You can still get some dates, but it won't hurt to try." On January 4, 2016, appellant sent her a text saying: "I'm really confused what has changed from yesterday to today. You were just asking me to work. Now I'm saying I want to start, you're giving me the cold shoulder." Appellant further stated: "I am trying to help you out, and I ain't going to lie. Get dough myself. Every time I ask you to do something, it's always some . . . BS." [¶] . . . . He offered to buy her "some clothes to wear." Alea responded she was not "comfortable" with him "doing for [her]" because she was "not working yet," and said she did not need him to buy her clothing. Appellant replied: "Remember I run this shit not you. You are on my time, so get with it or fall back." Alea explained appellant was "mad" because when he would "hit [her] up to . . . work," she would not respond. When Alea reminded appellant she was "still bleeding [from childbirth]," appellant said "You got a mouth. You could start making money."

The night of Alea's arrest, appellant texted her when she was at her grandmother's house to tell her he was coming to get her to take her "out." Just prior to meeting

Officer Hall, Alea texted appellant that she was meeting a customer. Appellant told her to charge $40 for oral sex, $60 for vaginal sex and $100 for anal sex, and advised her to get the money before doing the "job." Alea denied performing any acts of prostitution prior to being taken into custody, although she acknowledged being in the car with appellant in the subject area several times.

The prosecutor, after asking Alea if she had gone out with appellant in early December 2015, said "I want to talk about a shooting that may have occurred." Alea responded: "I'm not talking about that. That's not why I was called to testify . . . and you guys didn't let me know. So that's not fair to me. So no, I'm not talking about that." The prosecutor stated: "I did tell you I was going to talk about everything." Alea repeated: "I'm not here for that, so you didn't tell me that I was going to have to testify about that." The prosecutor asked for a brief recess in order to talk to the witness. When court resumed, he asked Alea if she had ever ridden in the white Malibu impounded in December 2015. She denied that she had, stating she had only ridden with appellant in a black Mustang.

On redirect, the prosecutor asked Alea if she was "scared" of appellant. She said: "Yes. But . . . I'm scared because I know what he's capable of, but I'm not scared like scared to be around him." The court gave a limiting instruction, saying the jury could consider the answer "only as it relates to this witness'[s] state of mind and her

willingness and ability to testify" and not as "evidence against the defendant."

Shakeita testified that in December 2015 she was working as a prostitute for appellant, and that she worked for him for three months in total. She was working for him on January 17, 2016, the night appellant and Alea were arrested. She had been a prostitute before meeting appellant. Customers or "Johns" called her directly from a number she put on a Web site. Appellant would drive her to appointments with the customers and wait for her. When she was attempting to get customers on the street, appellant drove her to the location and would stay in communication or wait nearby. She had his cell phone number in her contacts. He did not tell her what to charge and did not arrange any "dates" or appointments with customers. She gave him all the money she made; he bought her clothing and other personal items. Appellant was never violent with her and she was not afraid of him. Shakeita was asked about working with Alea and denied "know[ing] her like that," claiming she had met Alea only once. On redirect, Shakeita denied being afraid of appellant and denied attempting to protect Alea.

C. *Pertinent Argument and Jury Instructions*

Defense counsel moved to dismiss the various counts under section 1118.1, pointing out that Shakeita had testified she made all her arrangements with customers herself, and that Alea had testified the decision to become a

prostitute was made before she met appellant. The motion was denied.

The jury was instructed that to prove appellant guilty of the crime of "pimping in violation of . . . section 266h," the prosecution must prove that: "1. [Appellant] knew that Shakeita J. was a prostitute; and [¶] 2. [Appellant] asked for payment or received payment for soliciting prostitution customers for Shakeita J."[8]

The jury was next instructed that to prove appellant guilty of causing, inducing, persuading or attempting to cause, induce or persuade a minor to engage in a commercial sex act under section 236.1, subdivision (c) the prosecution was required to prove that "1. [appellant] caused or induced or persuaded or attempted to cause or induce or persuade another person to engage in a commercial sex act; [¶] 2. When [he] acted, he intended to commit a felony violation of 266h[;] and [¶] 3. When [he] did so, the other person was under 18 years of age." The court explained that "266h" meant pimping as defined above, and that "[a] commercial sex act is sexual conduct that takes place in exchange for anything of value."

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[8] The instruction further stated: "A prostitute is a person who engages in sexual intercourse or any lewd act with another person in exchange for money. A lewd act means physical contact of the genitals, buttocks, or female breast of either the prostitute or customer with some part of the other person's body for the purpose of sexual arousal or gratification."

During closing argument, the prosecutor contended that with respect to the trafficking of a minor charge, "[u]ltimately it doesn't matter whether she [referring to Alea] says I want to do it, can you help me, or whether he's trying to kind of persuade her to do it because as soon as he teams up with her, he's guilty." He further stated: "[Appellant] must specifically intend to cause, induce or persuade or attempt to cause induce or persuade Alea to engage in a commercial sex act. [¶] Now this is important because he doesn't have to complete it. She doesn't actually have to engage in the sex act. He has to cause her, induce her, or persuade her to do it or he has to try to cause her or to induce her or to persuade her. . . . [¶] So the mere fact that she doesn't actually have sex, if we believe her, if she doesn't actually have sex on that day, the fact that she's out there, the fact that he's asking her to do it, the fact that they've talked about it, the fact that he's told her how much to charge, the fact that he spends all this time, that is enough." Later, he reiterated: "Whether she consented to the prostitution doesn't matter. Doesn't matter that she wanted to, that she agreed to, that . . . they had a meeting of the minds where they both decided, hey, you're going to go out there and she said, okay, I'll do that. It doesn't matter. [¶] Even if you say, okay, I think [appellant] . . . was . . . kind of trying to . . . get her out there and tempting her to do that, he doesn't have to. He doesn't have to. She could go up to him and say, I'm going to go out there and he could say, okay, let's go out and that would be enough. If they had a

meeting of the minds and the idea is for her to go out, that's all that's needed."

Referring to Johnson's testimony that he did not recall any details of the shooting, the prosecutor said: "Why is he saying that? Because he has [appellant] who is staring at him[,] who is from Grape Street[,] who just shot him. He's not going to get up there and tell you what happened." Defense counsel objected that it was "not based on the evidence," and the court overruled the objection.

The prosecutor argued that Shakeita was trying to protect Alea by denying knowing her, and that Alea was likely the female in the car at the time of the shooting. He went on to state: "She's [referring to Alea] not going to get up there and testify against him on the shooting. And I asked her why. What did she say? She was scared about the shooting. . . . She's not going to get up there and say, this guy, I was watching him shoot. Because he's a gang member. He probably knows some facts about her, right, because she's been with him for a while. Maybe he knows where she lives, maybe he knows other people that she knows and she's scared." Defense counsel again objected to "argument not based on evidence." The court overruled the objection, stating it was a "reasonable inference." After the objection was overruled, the prosecutor added: "And she's scared. So she's not going to get up and she's not going to finger him. She was probably in that car. Could have been someone else. Can't say for sure it was her. But regardless

of whether it was her, she kn[e]w that [appellant] was in the car based on all this evidence in front of you."

During defense counsel's closing, he questioned why, if Shakeita had been working with appellant for three months, no evidence of text messages between Shakeita and appellant had been presented. He contended the second component of pimping -- "ask[ing] for payment or receiv[ing] payment for soliciting prostitution customers for Shakeita" -- was not proven because "Shakeita said she did it all herself. She made the phone calls, she sent the texts, she put out the advertisements, she made the arrangements, she picked the addresses, the location, the money. Basically all she said is that [appellant] drove her and she said she gave him money." He asked the jury to "look at this language and consider it" because "there's not evidence in this case that [appellant] received payment for soliciting prostitution customers. Shakeita did that on her own." Counsel further contended that the evidence established that Alea knew what she wanted to do before meeting appellant, and that prostitution was not "something that [appellant] talked her into . . . ."

After defense counsel's closing argument, the prosecutor asked the court to give an additional instruction defining a pimp as someone who "live[s] and derive[s] support and maintenance in whole [or] in part from the

earning and proceeds of said person's prostitution."[9] The court declined, asking what evidence supported that any money Shakeita gave appellant supported him, and expressing concern that the issue was raised after the defense concluded closing argument.

In his rebuttal, the prosecutor stated with respect to text messages between appellant and Shakeita: "[T]here's no evidence that there w[ere] any text messages. The only evidence that we presented was what we were able to download from the phone which were her contacts. So why aren't there any text messages? Maybe she deleted them because she knew the police were about to detain her; we don't know. But the fact that she didn't have text messages, that doesn't mean that she wasn't pimping. We heard her testimony, we saw the text messages from the other girls." With regard to the pimping charge in general, he stated: "We know that Shakeita is out on the street and she's clearly

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[9] Part one of CALCRIM No. 1150, the form instruction for pimping, provides that the prosecution must prove "the defendant knew that [name of prostitute] was a prostitute." For establishing part two of the offense, there are three alternatives provided: (2A) "The (money/proceeds) that [name of prostitute] earned as a prostitute supported defendant, in whole or in part"; (2B) "Money that was (loaned to/advanced to/charged against) [name of prostitute] by a person who (kept/managed/was a prostitute at) the house or other place where the prostitution occurred, supported the defendant in whole or in part"; and (2C) "The defendant asked for payment or received payment for soliciting prostitution customers for [name of prostitute]."

working. [¶] The statement that [appellant] is just driving her around and I think he said that . . . we shouldn't judge [him] for driving these girls around because that's all he's doing. [¶] And then you combine that with an argument about the definition of pimping which is that the defendant asked for payment or received payment for soliciting prostitution customers for Shakeita. Clearly what they had was a meeting of the minds. If we believe that the defendant and Shakeita agreed to the prostitution activity, then they were working together. [¶] Who ultimately posts the [Web site] ad doesn't matter because they're working together, because [appellant] is driving her and receiving payment, because he's putting her out on the blade, he's putting her on the track, he's texting her after each date, 'date, date.' We can assume, just like he does with the other two girls, he's clearly met the definition. Otherwise, such a definition would be very tortured and we could never prove up pimping in these cases because this is how pimps act; right? [¶] They put them on the blade, the guys come up to the girls and they receive payment. So he's not just driving her around. . . . What he's doing is he's taking . . . a 16-year-old girl, he's taking this 21-year-old girl and he's putting her out on the street and he's preying on her and he's getting her to sell her body. So clearly that element has been met."

In concluding, the prosecutor stated: "Ultimately, I think what this case comes down to is the witnesses. I do these cases. These are my cases. This is what I do. You hear these girls get up there and they testify and they're

mixed. They have a bunch of mixed feelings; right? [¶] Because they have to testify that some guy that they may have been in love with or they have very strong feelings for, some guy that had been in a position of power over her at a young age, that they have either been scared of, in fear of, or whether he hit them or not, or they have to look up to him because he has a position of dominance over them, they were in a position of inferiority and now they're asked to testify again him in court. So they have these mixed feelings. [¶] . . . [¶] And then they feel . . . angry because they know that [appellant] has been taking advantage of them and I'm pointing that out. I'm asking them questions like, . . . what did you do with the money? Well, I gave it all to him and that makes them [feel] dumb. [¶] They sit there and they feel ashamed." "It's one thing when they're actually on the streets doing it around other people and they can kind of say, okay, this is . . . how everybody is, but now they have to come into court and they have to explain it to strangers and that's something they feel ashamed about. [¶] So what do they do? They get angry, they kind of rebel. When they're walking out of the courtroom, they say little statements about how they don't want to be here. And it looks to the jury, it looks to me as if they're kind of arrogant or they're not real likeable, but they're 16. They're still a kid."

D. *Jury Deliberations and Verdict*

Shortly after deliberations began, the jurors sent out a note: "We would like clarification for the phrase, [']for

soliciting prostitution customers.[’] [¶] If there is one, could we have a legal definition of [‘]pimping[’] . . . like the one the prosecutor used in his closing argument slide.”[10] The court proposed reading the additional part of CALCRIM No. 1150 the prosecutor had previously requested, and providing a dictionary definition of pimp. Defense counsel did not object to the proposed dictionary definition of pimp, but objected to the additional instruction. The court overruled the objection. The jury was recalled and the court stated: “The defendant is charged in count 4 with pimping in violation of Penal Code section 266h. [¶] To prove that the defendant is guilty of this crime, the People must prove that: [¶] 1. The defendant knew that Shakeita J. was a prostitute; and [¶] 2-A. The defendant asked for payment or received payment for soliciting prostitution customers for Shakeita J. [¶] That’s the definition that was originally given to you. And now there is another definition that I am giving to you and this is: [¶] 2-B. The money that Shakeita J. earned as a prostitute supported the defendant in whole or in part.” The court also read the jury the following dictionary definition of pimp: “A pimp is a man who is an agent for a prostitute or prostitutes and lives off their earnings.”

Because it had provided a new instruction, the court gave both sides a chance to re-argue. Defense counsel contended that Shakeita might not have been truthful when she stated that she gave some or all of her money to

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10 The slide is not in our record.

appellant, and pointed out there was no corroborating evidence that she worked for him. The prosecutor argued that establishing the money Shakeita earned as a prostitute supported appellant in whole or in part "doesn't mean he has to live off the money" or that it "has to be his only source of income."

The jury found appellant guilty of attempted murder, pimping and human trafficking of a minor as charged. The jury found not true the allegation that the attempted murder was willful, deliberate and premeditated. It found true that appellant personally and intentionally discharged a firearm which caused great bodily injury within the meaning of section 12022.53, subdivisions (c) and (d).

E. *Verdict on Priors and Sentence*

After the verdict was read, the court asked the prosecutor whether the case was a single or multiple strike case. The prosecutor said he would have to research whether the robbery priors counted as separate strikes. He subsequently submitted a sentencing memorandum stating that "assuming [appellant] has five prior strikes as alleged by the People," the minimum term for count five under the Three Strikes law would be either 36 years (the highest base term, tripled) or 25 years.

Appellant admitted the prior convictions. His counsel moved pursuant to *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497 to strike one or more of the strikes, claiming they arose from a single occasion, when appellant was 19.

The court denied the motion, stating: "[Appellant's] criminal record is extensive. The probation report author writes . . . [that appellant] is a 28-year-old man who has [an] extensive criminal history with sustained petitions as a juvenile since the age of 12 for burglary, grand theft and robbery. [Appellant] continued his criminal behavior into his adulthood with convictions for burglary, obstructing and resisting a peace officer, attempted robbery and robbery. He is currently on a grant of summary probation and is on active parole and this has not deterred [him] from further engaging in criminal activity. [His] level of criminal sophistication has escalated. [¶] I feel that [appellant] is the kind of person who is deserving of a very lengthy sentence . . . for the purpose of protecting society. So I do understand that I have the discretion to strike one or more of the five strikes and I choose not to do so."

The court then stated that it did not appear count five (the human trafficking count) should be considered a third strike under the Three Strikes law but was persuaded otherwise by the prosecutor, who pointed out that the crime was a "registerable offense" and recommended 36 years or three times the highest base term. The court stated: "I'm not inclined to triple the high term of 12 years on count 5. I'm going to impose 25 to life. I think that would be more than sufficient. And it is my understanding under the Three Strikes law that would have to be consecutive to the sentence imposed on count 1 [the attempted murder count]."

The court imposed a 50-year-to-life sentence on count one "because of the operation of law by the three strikes finding" -- 25 years to life for attempted murder and 25 years to life for personally discharging a firearm and causing great bodily injury. Imposing a 25-year-to-life sentence on count five, the court described the trafficking of a minor offense as "horrendous" and "one of those things that you can't believe really happens in society." Finally, the court selected six years -- the high term -- for count four (the pimping count), stating "[t]here are no mitigating . . . circumstances in this case that the court could find." That term was doubled under the Three Strikes law. Various fines were imposed and appellant was awarded 794 days of custody credit.

DISCUSSION

A. *Prosecutorial Misconduct*

Appellant accused the prosecutor of multiple instances of misconduct during argument, including misstating the law and evidence and impermissibly vouching for witnesses. Before we address the specific contentions, we briefly discuss the applicable legal principles.

There is no dispute that a prosecutor has """wide latitude""" during argument, and that his or her argument may be """vigorous as long as it amounts to fair comment on the evidence . . . ."""" (*People v. Williams* (1997) 16 Cal.4th 153, 221.) The prosecutor is permitted to draw """reasonable inferences [and] deductions""" from the evidence presented. (*Ibid*.) Additionally, he or she may """state matters not in

evidence, but which are common knowledge or are illustrations drawn from common experience, history or literature.'"'" (*Ibid.*) The use of "'colorful terms'" is not prohibited, such as calling the defendant and his companions "'laughing hyenas.'" (*Ibid.*) A prosecutor may not, however, misstate the law (*People v. Centeno* (2014) 60 Cal.4th 659, 666) or refer to matters outside the record, unless they are of common knowledge (*People v. Dickey* (2005) 35 Cal.4th 884, 915).

"Impermissible vouching occurs when 'prosecutors [seek] to bolster their case "by invoking their personal prestige, reputation, or depth of experience, or the prestige or reputation of their office, in support of it." [Citation.]'" or '"'"suggest that evidence available to the government, but not before the jury, corroborates the testimony of a witness.'" [Citations.]" (*People v. Linton* (2013) 56 Cal.4th 1146, 1207.) "A prosecutor is prohibited from vouching for the credibility of witnesses or otherwise bolstering the veracity of their testimony by referring to evidence outside the record. [Citations.] Nor is a prosecutor permitted to place the prestige of [his or] her office behind a witness by offering the impression that [he or] she has taken steps to assure a witness's truthfulness at trial. [Citation.] However, so long as a prosecutor's assurances regarding the apparent honesty or reliability of prosecution witnesses are based on the 'facts of [the] record and the inferences reasonably drawn therefrom, rather than any purported personal knowledge or belief,' [his or] her comments cannot be characterized as

improper vouching." (*People v. Frye* (1998) 18 Cal.4th 894, 971, disapproved of in part on other grounds in *People v. Doolin* (2009) 45 Cal.4th 390; see *People v. Stansbury* (1993) 4 Cal.4th 1017, 1059, revd. on other grounds in *Stansbury v. California* (1994) 511 U.S. 318 ["The argument that [a prosecution witness] was a believable witness who had done a great deal of soul searching was a proper comment on the evidence, not an attempt on the part of the prosecutor to personally vouch for the witness's credibility."].)

"When attacking the prosecutor's remarks to the jury, the defendant must show that, '[i]n the context of the whole argument and the instructions [citation], there was 'a reasonable likelihood the jury understood or applied the complained-of comments in an improper or erroneous manner. [Citations.] In conducting this inquiry, we "do not lightly infer" that the jury drew the most damaging rather than the least damaging meaning from the prosecutor's statements. [Citation.]' [Citations.]" (*People v. Centeno, supra,* 60 Cal.4th at p. 667.) "Generally, a claim of prosecutorial error is not cognizable on appeal unless the defendant made a timely objection and requested an admonition." (*People v. Doolin*, *supra*, 45 Cal.4th at p. 444.)

1. *Argument Pertaining to Section 236.1 Offense*

Appellant contends the prosecutor committed misconduct when he suggested the crime of trafficking of a minor occurred when appellant and Alea "team[ed] up" or reached a "meeting of the minds," and asserts that "merely

agreeing to something that a minor suggests would not be sufficient, without more, to sustain a conviction under this statute." By failing to object to the comments or to request clarification or an admonition, appellant forfeited his right to raise this issue on appeal. (*People v. Doolin*, *supra*, 45 Cal.4th 444.) Appellant claims the failure to object establishes ineffective assistance of counsel. "'[A]n attorney may choose not to object for many reasons, and the failure to object rarely establishes ineffectiveness of counsel . . . .'" (*People v. Williams, supra,* 16 Cal.4th at p. 221, quoting *People v. Kelly* (1992) 1 Cal.4th 495, 540.)

In any event, we do not view the argument as inappropriate. In between the quoted comments, the prosecutor twice stated that appellant must have specifically intended to cause, induce or persuade or attempt to cause, induce or persuade Alea to engage in a commercial sex act. Taken in context, the points being made were that Alea need not have actually completed a commercial sex act for the charge to be established, and the fact that she had purportedly made up her mind to be a prostitute prior to meeting appellant was not determinative. The prosecutor was essentially arguing that "a meeting of [their] minds," combined with a plan "to go out there" and "team[] up" to put her plan of becoming a prostitute into action, supported the inference that appellant was attempting to cause, induce or persuade Alea to become a prostitute. This was not an inaccurate description of the elements of the crime.

Moreover, any error in this regard was harmless. (*People v. Gonzales and Soliz* (2011) 52 Cal.4th 254, 319 ["A defendant's conviction will not be reversed for prosecutorial misconduct unless it is reasonably possible that the jury would have reached a result more favorable to the defendant had the misconduct not occurred."]; see *People v. Watson* (1956) 46 Cal.2d 818, 836.) The text messages between appellant and Alea established that appellant was aggressively attempting to induce or persuade Alea to transform her vague goal of earning a living as a prostitute into action. Alea repeatedly expressed reluctance, claiming she did not have the right clothing and was still recovering from childbirth. Appellant did not passively wait for her to take affirmative steps on her own, but offered to buy clothing for her and otherwise "help her out." He further cajoled her to begin to at least "try" to "get some dates" even if it meant "[using her] mouth." At one point he implicitly threatened to "make [her]" begin, and at another suggested the decision was his, not hers, because he "run[s] this shit" and wanted to "get some dough." Indeed, the evidence was clear that Alea did not want to work "the blade" and would not have been out on the street the night she offered sex to Officer Hall had appellant not texted her, picked her up from her grandmother's home, and taken her to the location. This unequivocal and undisputed evidence established that appellant "cause[d], induce[d], or persuade[d], or attempt[ed] to cause, induce or persuade" Alea to engage in a commercial sex act, and any argument suggesting the prosecution need

only prove a "meeting of the minds" could not have caused the jury to focus on inappropriate or irrelevant matters.

2. *Argument Pertaining to Pimping Offense*

Appellant points out that the prosecutor made a similar "meeting of the minds" argument with respect to the pimping charge: "Clearly what they had was a meeting of the minds. If we believe that [appellant] and Shakeita agreed to the prostitution activity, then they were working together. [¶] Who ultimately posts the [Web site] ad doesn't matter because they're working together, because [appellant] is driving her and receiving payment, because he's putting her out on the blade, he's putting her on the track, he's texting her after each date, 'date, date.' We can assume, just like he does with the other two girls, he's clearly met the definition [of pimping]." Here, the prosecutor appeared to confuse the elements of pimping and the elements of pandering which, like sexual trafficking of a minor, requires the perpetrator to "cause[], induce[], persuade[], or encourage[]" another person to act as a prostitute. (§ 266i, subd. (a)(2); see *People v. Zambia* (2011) 51 Cal.4th 965, 977 [encouraging one who is already a prostitute to engage in further acts of prostitution constitutes pandering under section 266i].) Proving the crime of pimping requires evidence that the perpetrator solicited customers for the prostitute or obtained financial support from the earnings of the prostitute. (§ 266h; CALCRIM No. 1150.) In suggesting that by merely driving Shakeita or encouraging her to "go

out on the blade" or "date," appellant committed the crime of pimping, the prosecutor misstated the law. However, it was a mistaken argument that defense counsel could have resolved with an objection and request for admonition or clarification. Failure to do so forfeited the issue.

Moreover, we are not persuaded that "'[i]n the context of the whole argument and the instructions [citation], there was 'a reasonable likelihood the jury understood or applied the complained-of comments in an improper or erroneous manner.'" (*People v. Centeno*, *supra*, 60 Cal.4th at p. 667.) The court gave the standard instructions, including the instruction stating that the jurors "must follow the law as I explain it to you . . . . If you believe that the attorneys' comments on the law conflict with my instructions, you must follow my instructions." The jurors clearly focused on the court's instructions rather than the prosecutor's comments, as they zeroed in on whether the evidence established that appellant had solicited customers for Shakeita, asking for a definition of the term. It was only when the court reinstructed the jurors and clarified that a pimp could also be one who was supported by the money earned by a prostitute that the jurors were able to reach a verdict on the pimping charge. Accordingly, the improper argument did not prejudice appellant.

3. *Comments Regarding Alea's Fear of Appellant*

Appellant contends that the prosecutor's argument that Alea was "probably" the passenger in the car the night

of the shooting, and that she did not testify about the shooting because she was afraid of appellant because he was a "gang member," and knew "some facts about her," such as "where she live[d]" was speculative and based on matters outside the record. When appellant's counsel objected, the court stated it was a reasonable inference from the evidence presented. We agree. The evidence established that a Black female was with appellant in the car on the night of the shooting, and that Alea accompanied appellant in his car during this period. When asked about the shooting, Alea did not say she knew nothing about it, but that she was not there to testify about the shooting and was not going to talk about "that." She did not say her refusal to testify was due to fear of appellant, but later, in response to a question on redirect, said she was afraid of him because she knew what he was "capable of." In addition, the evidence established that appellant was a gang member and knew where Alea's grandmother lived, and that Alea sometimes stayed there. As the prosecutor's comments were a proper inference from the evidence, there was no misconduct.[11] In any event, the

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[11] The prosecutor said he had asked Alea why she was not going to testify against appellant on the shooting, and then posed the question, "What did she say?" This was followed by the statement "[s]he was scared about the shooting . . . ." Although difficult to determine on a written record, it is likely the prosecutor was asking the jurors to recall what Alea had said when he tried to ask her about the shooting -- "I'm not talking about that" -- and then positing his theory that her evasive response was due to her later acknowledged fear of appellant,
(*Fn. is continued on the next page*.)

jurors were instructed that "[n]othing the attorneys say is evidence." We presume they followed the instructions. (See *People v. Avila* (2009) 46 Cal.4th 680, 719.)

4. *Comments Regarding Johnson's Testimony and Appellant's Demeanor*

Appellant contends the prosecutor's explanation for Johnson's claim to remember nothing -- "because he has the defendant who is staring at him who is from Grape Street who just shot him" -- was an improper comment on matters outside the record. Defense counsel's objection to the comment as "not based on the evidence," was overruled. Generally, "prosecutorial references to a nontestifying defendant's demeanor or behavior in the courtroom" is improper. (*People v. Heishman* (1988) 45 Cal.3d 147, 197, disapproved in part on another ground in *People v. Diaz* (2015) 60 Cal.4th 1176.) However, we do not believe the prosecutor intended or the jurors viewed the comment as a literal description of appellant's demeanor during Johnson's testimony, but as a hyperbolic reminder that when Johnson was on the witness stand, he was a few feet away from defendant, and that being in appellant's presence likely unnerved Johnson and caused him to feel intimidated. Accordingly, we conclude the comment, though ill advised, was not prejudicial.

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rather than suggesting she testified she was scared to talk about the shooting.

5. *Comments on Shakeita's and Alea's Demeanor as Witnesses*

During rebuttal argument, the prosecutor stated that he did "these cases," presumably referring to cases involving prostitutes, and that the women involved had "a bunch of mixed feelings," including "ang[er]" and "ashamed" because "the defendant has been taking advantage of them and I'm pointing that out." Appellant contends this was improper commentary that amounted to vouching. We agree the prosecutor went too far in suggesting that due to his experience, he had inside knowledge concerning the workings of a prostitute's mind. We do not, however, interpret it as vouching for the witnesses' credibility. Nor do we believe it unduly influenced the jurors. The prosecutor was offering an explanation for the witnesses' demeanor on the stand and in the courtroom by pointing out that the events they had testified to -- selling sexual services, being used by the defendant and getting little to nothing out of it -- were likely to generate both anger and shame which, in turn, could make them appear "arrogant" or "[un]likeable." Moreover, even were we convinced that the comments amounted to improper vouching, appellant's counsel's failure to object and request admonition constituted a forfeiture.

6. *Comments on the Absence of Texts on Shakeita's Cell Phone*

Finally, appellant challenges the prosecutor's statement that text messages from Shakeita's cell phone

were not presented because "[t]he only evidence . . . presented was what we were able to download from the phone which were her contacts" and that "[m]aybe she deleted them . . . ." Because there was no evidence presented concerning the absence of text messages on Shakeita's phone or the reason for their absence, these comments were improper.[12] However, as appellant's counsel failed to object, the issue was forfeited. Moreover, for the reasons already discussed, we do not believe on this record that the jury was misled about the nature of the crime of pimping or the evidence necessary to support it.

B. *Lesser Included Offense*

"A trial court has a sua sponte duty to 'instruct on a lesser offense necessarily included in the charged offense if there is substantial evidence the defendant is guilty only of the lesser.' [Citation.]" (*People v. Shockley* (2013) 58 Cal.4th 400, 403.) Appellant contends the court erred in failing to instruct the jury sua sponte on contributing to the delinquency of a minor as a lesser included offense of

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[12] Respondent contends this was "appropriate rebuttal" because defense counsel had argued that the prosecution had not "'presented a single text message between [Shakeita and appellant].'" A prosecutor may not explain an absence of evidence by relating facts known to the prosecutor but not presented at trial. There was no evidence presented concerning Shakeita's text messages, and nothing to suggest prosecution experts had been unable to download them.

trafficking of a minor under section 236.1, subdivision (c). We disagree.

To determine if an offense is necessarily included, we look at both the elements of the offenses and the accusatory pleading: "'If the statutory elements of the greater offense include all of the statutory elements of the lesser offense, the latter is necessarily included in the former'"; "'if the facts actually alleged in the accusatory pleading include all of the elements of the lesser offense, the latter is necessarily included in the former.' [Citation.]" (*People v. Shockley*, *supra*, 58 Cal.4th at p. 404.)

As noted, section 236.1 provides in relevant part: "(c) A person who causes, induces, or persuades, or attempts to cause, induce, or persuade, a person who is a minor at the time of commission of the offense to engage in a commercial sex act, with the intent to effect or maintain a violation of Section . . . 266h [pimping] . . . is guilty of human trafficking." Contributing to the delinquency of a minor is statutorily defined as committing an act or omission which "causes or tends to cause or encourage any person under the age of 18 years to come within the provisions of Section 300, 601, or 602 of the Welfare and Institutions Code." (§ 272 (a)(1).) "Thus, one contributes to the delinquency of a minor by bringing a minor within the reach of section 300, 601, or 602 of the Welfare and Institutions Code." (*People v. Vincze* (1992) 8 Cal.App.4th 1159, 1163.) Section 602 of the Welfare and Institution Code confers juvenile court jurisdiction over minors who commit crimes, and engaging in an act of

prostitution is ordinarily a crime under section 647. However, in 2015, the Legislature amended section 647 so that the subdivision "does not apply to a child under 18 years of age who is alleged to have engage in conduct to receive money or other consideration that would, if committed by an adult, violate this subdivision." (§ 647, subd. (b)(5).) Instead, "[a] commercially exploited child under this paragraph may be adjudged a dependent child of the court pursuant to paragraph (2) of subdivision (b) of Section 300 of the Welfare and Institutions Code." (*Ibid.*)

As acknowledged by appellant, section 300, subdivision (b)(2) of the Welfare and Institutions Code applies to "a child who is sexually trafficked, as described in Section 236.1 of the Penal Code" *and* "whose parent or guardian failed to, or was unable to, protect the child . . . ." (Welf. & Inst. Code, § 300, subd. (b)(2).) As there is no such requirement for section 236.1, appellant attempts to persuade us that "a minor [who] engage[d] in sexually deviant behavior, . . . necessarily has a parent or guardian who has failed to, or was unable to, protect her," citing *People v. Bobb* (1989) 207 Cal.App.3d 88, 95-96 in support of this proposition. In *Bobb*, the issue was whether an adult who engaged in unlawful sexual intercourse with a minor on one occasion was entitled to an instruction on contributing to the delinquency of a minor as a lesser included offense. The court rejected that contention, concluding that "a minor [who engages] in a single act of sexual intercourse" does not necessarily have a parent unwilling to exercise or incapable of exercising care

and control because the minor may have engaged in the act "without her parents' knowledge or consent" or "in violation of their express orders . . . ." (*Bobb, supra,* 207 Cal.App.4th at p. 96.) In so holding, the court accepted for the sake of argument "that a minor who leads a promiscuous life . . . is also a minor who has 'no parent . . . willing to exercise or capable of exercising care or control, or has no parent . . . actually exercising care or control.'" (*Id.* at p. 95.)

Here, the evidence established that Alea met appellant in December 2015 and attempted to engage in an act of prostitution on one occasion in January 2016. Establishing the section 236.1, subdivision (c) violation did not require the prosecution to present any evidence concerning her parents and their efforts, if any, to protect her, and none was presented. Accordingly, there is no basis to conclude that Alea fell under section 300, subdivision (b) of the Welfare and Institutions Code.

Moreover, a trial court has no obligation to instruct on a lesser included offense unless there is "'substantial evidence' from which a rational jury could conclude that the defendant committed the lesser offense, and that he is not guilty of the greater offense." (*People v. DePriest* (2007) 42 Cal.4th 1, 50; accord, *People v. Shockley*, *supra*, 58 Cal.4th at pp. 403-404.) Appellant contends that because Alea testified she had already made up her mind to become a prostitute, the jury could reasonably find that he "contributed" to her behavior rather than "caused, induced or persuaded" her to engage in that illicit occupation. (Italics omitted.) The

evidence does not support a lesser culpability. Although Alea testified she had decided to support herself and her child through prostitution, she took no steps toward that end until she met appellant. She said she needed appellant, or someone like him, to drive her, "protect" her and "be there" for her in order to engage in the pursuit, and that appellant had agreed to "be[] there" for her. As previously discussed, the text messages between appellant and Alea demonstrated his persistent efforts to overcome her reluctance to begin offering sex to strangers, that Alea had no desire to "work[] the blade" and that Alea would not have been out on the street the night she offered sex to Officer Hall had appellant not persuaded her, picked her up and driven her to the location. Where, as here, the evidence points to only one conclusion, the court need not give an instruction for a lesser included offense.

C. *Instructions on Pimping and Response to Jury Question*

Appellant contends the court erred by giving a new instruction, a dictionary definition of pimp, and reopening argument when the jury asked for a definition of "soliciting." We conclude the court appropriately addressed the question by recognizing that the original instruction was misleading and giving an additional instruction that better fit the evidence presented. While giving a dictionary definition of a legal term is generally inappropriate, here, the court did not

err because defense counsel agreed the definition would be helpful and should be given.

Section 1093 prescribes the order of proceedings in a criminal trial, and states that "from time to time during the trial . . . the trial judge may give the jury such instructions on the law applicable to the case as the judge may deem necessary for their guidance on hearing the case." (§ 1093, subd. (f).) Section 1093.5 provides: "[I]f, during the argument, issues are raised which have not been covered by instructions given or refused, the court may, on request of counsel, give additional instructions on the subject matter thereof." Moreover, section 1094 gives the court discretion to depart from the order of proceedings prescribed in section 1093 "in any . . . case, for good reasons . . . ." (See *People v. Smith* (2008) 168 Cal.App.4th 7, 14 ["With regard to the timing of jury instructions on the law . . . , trial courts are vested with wide discretion as to when to instruct the jury."].) Accordingly, courts have agreed that a trial court does not err by giving new instructions during jury deliberations. (*People v. Ardoin* (2011) 196 Cal.App.4th 102, 127; *People v. Bishop* (1996) 44 Cal.App.4th 220, 231-235; see Rules of Court, rule 2.1036 [after jury reports an impasse, judge may "[g]ive additional instructions"].) Indeed, it is said that the trial court has "a duty to reinstruct if it becomes apparent that the jury may be confused on the law." (*People v. Chung* (1997) 57 Cal.App.4th 755, 758, citing *People v. Valenzuela* (1977) 76 Cal.App.3d 218, 221.)

In *People v. Ardoin* the prosecution advanced the theory that the defendant was the perpetrator of a murder, and that the co-defendant was guilty as an aider and abettor under the felony-murder rule (the victim was also robbed). The jury was specifically instructed that the felony-murder instruction applied only to the co-defendant. (*People v. Ardoin, supra,* 196 Cal.App.4th at pp. 123, 125, fn, 8.) During deliberations, the jury asked: "'If we believe that [the defendant] was not the perpetrator of the murder, can we still find him guilty under a theory of felony murder, or otherwise?'" (*Id.* at p. 124.) Over defense counsel's protests concerning "'the lateness of the application of the theory of liability to him,'" the trial court gave the jury a new felony-murder instruction, stating "'[a]ll the defendants may be guilty of murder under a theory of felony murder, even if another person did the act that resulted in the death,'" and telling the jurors that the "'new and revised'" instruction "'replace[d] the instruction that was given to [them] originally.'" (*Id.* at p. 125, italics omitted.) The Court of Appeal held the defendant was not deprived of his notice or due process rights: "Although the prosecution pursued what it viewed as the strongest case against [the defendant] by arguing that he was the actual killer, the evidence presented at trial also suggested the jury might find him guilty under the felony-murder rule as a perpetrator of the robbery and aider and abettor of the crime committed by another. Despite the focus of the prosecution and defense theories of the case, the court properly modified the felony-murder

instruction in accordance with the evidence presented by including a reference to both defendants. . . . [U]pon the jury's inquiry[,] . . . the trial court acted properly by reading the modified felony-murder instruction to dispel confusion and correctly advise the jury on the law governing the case." (*Id.* at p. 128.)

The court in *People v. Ardoin* went on to state that "once the trial court decided to clarify the felony-murder instruction to include both defendants, fairness dictated that the court also reopen the case for the limited purpose of granting [the defendant's] counsel the right to offer rebuttal argument. [Citation.] To prevent unfair prejudice, if a supplemental instruction introduces new matter for consideration by the jury, the parties should be given an opportunity to argue the theory. [Citation.]"[13] (*People v. Ardoin, supra,* 196 Cal.App.4th at p. 129.)

Here, the evidence supported that Shakeita's income from prostitution was supporting appellant, as she testified she gave it all to him, and it may be inferred that he used some or all of it for his support. (See *People v. Giambone* (1953) 119 Cal.App.2d 338, 340 ["In order to establish that the accused lived and derived support and maintenance from

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[13] The Court of Appeal concluded the trial court erred in refusing to reopen for re-argument, but found the error harmless, as defense counsel had addressed the absence of evidence to support the defendant's guilt as either a perpetrator or aider and abettor in his original argument. (*People v. Ardoin, supra,* 196 Cal.App.4th at pp. 131-134.)

the earnings of prostitution it is not necessary for the prosecution to prove that the money was expended for that purpose."]; *People v. Coronado* (1949) 90 Cal.App.2d 762, 766 ["There is no merit in the contention that the appellant may not be held to have acquired support or maintenance, in part, for the alleged reason that his income from other legitimate sources was adequate to support him, and that the earnings of the prostitute were not applied to his necessary support or maintenance."], italics omitted.) The court realized when the jury raised its question concerning solicitation that the CALCRIM No. 1150, 2A alternative should have been given, as the prosecutor had previously contended. The court acknowledged this was introducing a different theory of guilt, albeit one that was supported by the evidence presented, and provided counsel an opportunity to reargue. Under these circumstances, it was proper to give the instruction.

Appellant claims that giving the instruction late in the proceeding "[i]mproperly [h]ighlighted" it. This is inevitable when the court realizes during deliberations that the jury is confused due to the absence of an applicable instruction. However, it does not relieve the court of its responsibility to properly instruct the jury, or to "reinstruct if it becomes apparent that the jury may be confused on the law." (*People v. Chung*, *supra*, 57 Cal.App.4th at p. 758.)

Appellant contends the court erred in providing the dictionary definition of "pimp," telling the jury that "[a] pimp is a man who is an agent for a prostitute or prostitutes and

lives off their earnings." His counsel agreed to giving that definition, and "counsel's affirmative agreement with the court's reply to a note from the jury forfeits a claim of error." (*People v. Salazar* (2016) 63 Cal.4th 214, 248, 249.) Appellant insists trial counsel could have no reason to refrain from objecting to the definition and that we must presume incompetence. As noted, "'[a]n attorney may choose not to object for many reasons, and the failure to object rarely establishes ineffectiveness of counsel . . . .'" (*People v. Williams*, *supra,* 16 Cal.4th at p. 221.) In any event, the definition added a new element -- that the pimp be "an agent for [the] prostitute" -- and counsel may have perceived it to be to his client's advantage to have that definition before them. Accordingly, we find no error or obvious incompetence in the actions of counsel.

D. *Three Strike Sentence on Count Five*

As amended by the Three Strikes Reform Act of 2012 (Proposition 36), the Three Strikes law provides in pertinent part that "[i]f a defendant has two or more prior serious and/or violent felony convictions as defined in subdivision (c) of Section 667.5 or subdivision (c) of Section 1192.7 that have been pled and proved, and the current offense is not a felony described in paragraph (1) of subdivision (b) [essentially reiterating that a prior serious and/or violent offense is an offense defined in section 667, subdivision (c) or section 1192.7, subdivision (c)], . . . the defendant shall be sentenced pursuant to paragraph (1) of subdivision (c) of this section

[doubling the term for the current conviction], unless the prosecution pleads and proves . . . [¶] . . .[¶] . . .The current offense is . . . any felony offense that results in mandatory registration as a sex offender pursuant to subdivision (c) of Section 290 [with certain exceptions not relevant here]." (§ 1170.12, subd. (c)(2)(C)(ii); § 667, subd. (e)(2)(C)(ii).) Section 290, subdivision (c) provides that a person who has been convicted of a violation of 236.1, subdivision (c), as appellant was here, must register.

Here, the amended information indicated that appellant's sentence for count five would be the base term doubled. Although the information cited the Three Strikes law -- section 667, subdivisions (b) through (j) and section 1170.12 -- it did not state that appellant would be subject to a sentence of 25-years to life under the Three Strikes law if convicted on count five. Nor did it expressly state that conviction of the section 236.1, subdivision (c) offense would require registration as a sexual offender under section 290. Appellant contends that as a result of these omissions, the prosecution failed to "'plead[] and prove[]'" that the offense was one that would result in mandatory registration as a sex offender as required by section 1170.12, subd. (c)(2)(C)(ii) and section 667, subdivision (e)(2)(C)(ii), and that the third strike sentence imposed was, therefore, improper and unauthorized.

To support that the failure to precisely plead precludes the prosecution from seeking to sentence a defendant as a third-striker and renders such sentence unauthorized,

appellant relies on *People v. Wilford* (2017) 12 Cal.App.5th 827 (*Wilford*) and *People v. Sawyers* (2017) 15 Cal.App.5th 713 (*Sawyers*). Respondent cites *People v. Torres* (2018) 23 Cal.App.5th 185 (*Torres*) in support of the sufficiency of the information. Our analysis of the pertinent statutes and authorities leads us to conclude the information was adequate and the sentence was not unauthorized.

In *Wilford*, the defendant was charged with two counts of willfully inflicting corporal injury to a cohabitant under section 273.5, subdivision (a), a crime punishable by imprisonment in the state prison for two, three or four years, imprisonment in a county jail for up to one year, or by a fine of up to $6,000. The information pled an enhancement under section 273.5, subdivision (h)(1), which provides that if probation is granted or the sentence suspended for a defendant who has been convicted of a prior similar offense within the prior seven years, the defendant must serve a minimum 15-day sentence. At the sentencing hearing, the prosecutor prevailed upon the trial court to instead sentence the defendant under a different subdivision -- subdivision (f) -- which required a higher state prison sentence -- two, four or five years -- and a slightly higher fine -- $10,000. The appellate court reversed the sentence, holding that "a defendant has a right to fair notice of the specific sentence enhancement allegations that will be relied upon to increase punishment for his crimes." (*Wilford, supra,* 12 Cal.App.5th at p. 837.)

In *Wilford*, "[n]othing in the amended information gave any hint that the prosecution . . . sought to make [the defendant] subject to the provisions of section 273.5, subdivision (f)(1), which would increase the applicable sentencing range." (*Wilford, supra,* 12 Cal.App.5th at pp. 838, 840.) It was "undisputed that the amended information did not warn [the defendant] that a finding of a prior qualifying conviction under section 273.5, subdivision (h)(1) would increase his sentence range under counts 5 and 6 from two, three, or four years to two, four, or five years [under section 273.5, subd. (f)(1)]," a "critical shortcoming" where the defendant was offered and rejected a plea bargain prior to trial. (*Id.* at p. 840.) The court was not persuaded otherwise by the contention that "the facts necessary to impose the sentence under section 273.5, subdivision (f)(1) are the same as were alleged under section 273.5, subdivision (h)(1)" because there was "no indication in the amended information of the possibility of this increased punishment." (*Ibid.*)

In *Sawyers*, the defendant was convicted of murder, attempted murder and shooting at an occupied dwelling. (*Sawyers, supra,* 15 Cal.App.5th at p. 715.) The information alleged that he had suffered two prior convictions, one for first degree burglary (a strike) and one for receiving stolen property, but did not make any reference to the Three Strikes law or its sentencing scheme. (*Id.* at p. 718.) The Three Strikes law was raised for the first time in the post-trial sentencing memorandum, where the prosecution

requested that the defendant's sentence be doubled. (*Sawyers,* at p. 719.) The defendant admitted the priors and was sentenced in accordance with the sentencing memorandum; his counsel raised no objection. (*Ibid.*) The Court of Appeal concluded the sentence was improper: "[T]he Three Strikes scheme includes a pleading and proof requirement. (§§ 667, subd. (c); 1170.12, subd. (a).) . . . . [The defendant] had notice that the burglary was alleged to be a serious or violent felony for purposes of section 1170, subdivision (h)(3). But, because the information did not allege section 667, subdivisions (b) through (i) or section 1170.12, subdivisions (a) through (d), or otherwise reference the Three Strikes law, [the defendant] had insufficient notice that the People would seek sentencing under the Three Strikes law if he admitted the prior, a 'critical shortcoming.'" (*Id.* at p. 726, quoting *Wilford*, *supra*, 12 Cal.App.5th at p. 840.) The court acknowledged that the sentencing memorandum had been filed before the defendant admitted the prior strike, but was unconvinced that "a sentencing memorandum is an adequate substitute for a proper pleading." (*Sawyers, supra,* at pp. 726, 727.)

In *Torres*, the defendant was charged with and found guilty of sexual battery by restraint (§ 243.5, subd. (a)), a nonviolent felony. He had two prior strikes. As in *Sawyers*, the issue was whether the Three Strikes law as amended by Proposition 36 required that the defendant be sentenced as a second strike offender. The issue turned on whether the prosecution "'ple[d] and prove[d]'" that "'the current offense

is a felony sex offense . . . that results in mandatory registration as a sex offender pursuant to subdivision (c) of Section 290.'" (*Torres, supra,* 23 Cal.App.5th at p. 194, see § 1170.12, subd. (c)(2)(C)(ii).) The information gave notice that a conviction on the count would require registration under section 290, but did not specifically state that "the prosecution would seek to exempt [the sexual battery count] from Proposition 36" or expressly reference section 1170.12, subdivision (c)(1)(C). (*Torres, supra,* at p. 194.) The court concluded "section 1170.12 only requires the prosecution to plead and prove the current offense is one as to which section 290 registration is required," and that section 1170.12 did not need to be "specifically pleaded to trigger [the] exemption from Proposition 36." (*Torres, supra,* at p. 194.) In other words, "the information and amended information -- which expressly pled that a conviction of sexual battery . . . would require section 290 registration -- was sufficient under Proposition 36." (*Id*. at p. 195.)

We believe the reasoning of *Torres* applies to the present situation. The amended information pled and proved a current offense that requires registration under section 290. Although the amended information did not specifically plead that the section 236.1, subdivision (c) offense would require registration under section 290, there is no dispute that it does, that the registration requirement applies automatically when a person is convicted of one of the listed offenses, and that neither the prosecutor nor the court has discretion to exempt a defendant from the

registration requirement. (See *People v. McClellan* (1993) 6 Cal.4th 367, 380.) Thus, the prosecution met the requirements of section 1170.12, subdivision (c)(2)(C)(ii) and 667, subdivision (e)(2)(C)(ii), and was not required to specifically cite those subdivisions. Unlike the defendants in *Wilford* and *Sawyers*, appellant cannot claim that nothing in the amended information gave any hint that the prosecution sought to subject him to a third strike sentence or that the Three Strikes law would not be applicable. The priors were clearly pled, the offense charged was clearly one requiring registration, and the Three Strikes law was cited.

We find further support for our conclusion in *People v. Tennard* (2017) 18 Cal.App.5th 476, where the defendant was convicted of a nonstrike felony: "inflicting corporal injury resulting in a traumatic condition upon his cohabitant girlfriend . . . ." (*Id.* at p. 480.) The defendant had two prior strikes, including a conviction for forcible rape -- a "'super strike'" -- and was therefore sentenced as a third strike offender. (*Ibid.*) On appeal, the defendant contended "the information was insufficiently specific because it did not reference Penal Code section 667, subdivision (e)(2)(C) or expressly allege that his prior forcible rape conviction was a sexually violent offense and a disqualifying factor within the meaning of Penal Code section 667, subdivision (e)(2)(C)(iv)(I) [the provision excluding violent sexual offenders] . . . ." (*Id.* at p. 485.) The question required the appellate court "to determine the level of specificity that is required to plead that an exception to second strike

sentencing eligibility applies." (*Id*. at p. 486.) The court concluded "[t]he allegation of the forcible rape conviction, which was identified by its code section number, Penal Code section 261, subdivision (a)(2), and as 'RAPE BY FORCE,' sufficiently notified defendant that the prosecution would seek to disqualify him from second strike sentencing eligibility, pursuant to Penal Code section 667, subdivision (e)(1), based on the forcible rape conviction. Although Penal Code section 667, subdivision (e)(2)(C) was not referenced in the information, it was not required to be." (*Id*. at p. 487.)

Here, the amended information pled that appellant had five prior strikes and that he violated a provision that requires registration. Accordingly, although the amended information did not specifically cite section 290 or state that appellant would be subject to sentencing as a third strike offender, we believe the pleading was sufficient to authorize the sentence.

E. *Custody Credit Calculation*

The parties are in agreement that appellant is entitled to one more day of custody credit.

F. *Discretion to Strike Weapon Enhancement*

Appellant was sentenced to 25-years to life pursuant to section 12022.53, subdivision (d) for personally discharging a firearm and causing great bodily injury to the victim. Under the law applicable when appellant was sentenced, the trial court had no discretion to strike the enhancement. Effective

January 1, 2018, S.B. 620 amended section 12022.53 to remove the prohibition on striking firearm enhancements. (See *People v. Woods* (2018) 19 Cal.App.5th 1080, 1090-1091; *People v. McDaniels* (2018) 22 Cal.App.5th 420, 424-425.)

Respondent does not dispute that S.B. 620 amended the applicable law and applies retroactively to all cases not yet final. (See *ibid.*) Respondent contends, however, that remand is unnecessary because the trial court clearly indicated that it would not have dismissed the enhancement even if it had the discretion. (See *People v. McVey* (2018) 24 Cal.App.5th 405, 418-419.) We disagree. The court refused to strike any strikes due to appellant's "extensive" criminal record, and in so doing, stated that appellant was "the kind of person . . . deserving of a very lengthy sentence . . . ." However, the court also rejected the prosecutor's proposal to lengthen the sentence on count five to 36 years, stating that 25-years to life "would be more than sufficient," and stated it imposed a 50-year to life sentence on count one and consecutive sentences on all counts because of "the operation of [the Three Strikes] law . . . ." The court was not so adamant about the appropriateness of the sentence that no purpose would be served by remand. (See *People v. Almanza* (2018) 24 Cal.App.5th 1104, 1110 ["Remand is required unless the record reveals a clear indication that the trial court would not have reduced the sentence even if at the time of sentencing it had the discretion to do so."].)

DISPOSITION

The matter is remanded to the trial court to consider whether to exercise its discretion to strike the firearm enhancement pursuant to S.B. 620 and to issue a new abstract of judgment correcting the custody credits by adding one day. The judgment is otherwise affirmed. At the remand hearing, appellant shall have the right to the assistance of counsel and, unless he chooses to waive it, the right to be present. (See *People v. Rodriguez* (1998) 17 Cal.4th 253, 258-260.) If the court elects to exercise its discretion, appellant shall be resentenced and the abstract of judgment further amended to reflect that change.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

MANELLA, P. J.

We concur:

WILLHITE, J.

COLLINS, J.