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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. TIMOTHY JONES, Defendant and Appellant.	B234534 (Los Angeles County Super. Ct. No. TA115558)

APPEAL from a judgment of the Superior Court of Los Angeles County, Ricardo R. Ocampo, Judge. Affirmed.

Lisa Holder, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Marc A. Kohm and Tita Nguyen, Deputy Attorneys General, for Plaintiff and Respondent.

Timothy Jones appeals from the judgment entered following his conviction by jury on one count of kidnapping (Pen. Code, § 207, subd. (a)) and one count of pandering by encouraging (Pen. Code, § 266i, subd. (a)(2).) He was sentenced to a term of eight years on the kidnapping charge and a consecutive term of 1 year 4 months on the pandering charge. He contends that the trial court erred in admitting into evidence recordings of his jailhouse telephone calls. We disagree, and affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

Prosecution Evidence

On November 27, 2010, around 10:00 p.m., Charnell Birdine left a friend's house at 51st and Figueroa Streets in Los Angeles and took a bus to a restaurant at Manchester and Figueroa. After eating, she began walking on Flower Street to catch a bus home. She took Flower instead of Figueroa because she knew Figueroa was frequented by prostitutes.

While Birdine was walking, a car pulled up. Appellant got out and said, "get in the car, bitch." Birdine refused. As she tried to leave, another man got out of the car. He and appellant picked her up and put her in the back seat of the car. Appellant repeatedly told Birdine that she was going to be his "ho." Birdine replied that she was not a "ho" and was only trying to get home.

Appellant sat next to Birdine in the back seat while the other man drove. Birdine screamed, kicked, and tried to get out of the car, but the door would not open. Appellant told Birdine that she would be his "ho" and work for him. He told her to "choose up," which she understood to mean to choose him as a pimp. Appellant was sitting close to Birdine, holding her hands, his face only inches from

hers. He was wearing a royal blue beanie, royal blue shirt, and blue jeans. At trial, Birdine was certain of her identification of appellant.

They drove around for five to ten minutes. The driver told appellant they should let Birdine out. They eventually parked on 94th Street, and appellant said, "get out, bitch." Birdine got out of the car and called 911. While Birdine was on 94th Street talking to the police, she saw the men drive past two more times. She gave the police a description of the car, a silver Chevy Equinox with Nevada license plates.

Los Angeles Police Officer James Doull and his partner responded to the 911 call. They observed appellant, who was wearing clothes matching the description of the suspect, getting into the driver's seat of a silver Chevy SUV. They detained him and called for another unit to bring Birdine for a field showup. At the scene, Birdine identified appellant and the vehicle.

Officer Christopher Jordan testified about a separate incident involving appellant that occurred in August 2008. On that occasion, Officer Jordan was in an undercover vehicle on 95th Street near Figueroa, observing a woman, who he identified as Christine Phillingham, standing on the corner, waving at passing cars and occasionally talking with men who stopped at the curb. Appellant rode up to Phillingham on a bicycle and talked to her. Phillingham then walked away and crossed to the other side of the street, near where Officer Jordan was parked. Appellant crossed the street and started talking with Phillingham again. Officer Jordan heard appellant tell Phillingham that she looked good and "should join his team and choose sides of who she wanted to be with." Appellant said that he "ha[d] other girls working for him, and she look[ed] like a money maker to him." Appellant rode away on his bicycle, but he returned and gave Phillingham his phone number. Appellant and Phillingham were later arrested.

Officer Kristin Humphris, assigned to the vice division in the human trafficking and prostitution unit, testified that pimps sometimes recruit prostitutes by kidnapping someone off the street. She also defined terminology used by pimps and prostitutes, and she explained the meaning of various parts of the recorded jailhouse calls made by appellant which were played for the jury. We discuss contents of those calls below, in considering appellant's contention that the trial court erred in admitting them into evidence.

Charlene Toussain, also known as "Strawberry," testified that appellant was her boyfriend and the father of her two children. She denied that she had ever worked as a prostitute for him or given him any proceeds from prostitution, although she acknowledged that she had been convicted of prostitution in 2010. Toussain identified her voice in two of the recorded calls with appellant. She testified that appellant was angry in the phone calls because he was in custody.

Defense Evidence

Appellant's defense was alibi. He testified that he was at a party at his friend Paris' house on the night in question. He was dropped off there by a friend between 12 and 1 and stayed until midnight, when he was arrested. He did not have a car there, and he never left. Around 11:15 p.m., he and two friends were in the front yard when some officers pulled up. The officers asked them to lift their shirts to check if they had guns and then left after a few minutes. Forty-five minutes later, appellant was walking to a friend's house down the street when he was arrested by different officers. The officers said they arrested him because he was walking by a vehicle that fit the description of a vehicle involved in a crime.

Appellant denied being a pimp and kidnapping Birdine. He testified that he was upset during the recorded conversations with Toussain because he thought she

was involved in prostitution instead of taking care of their children. He explained that some of the recorded conversations involved him trying to get his witnesses to come to court to testify on his behalf, saying that he did so at the request of his attorney, who was unable to locate them based solely on their nicknames.

Irma Dubon testified that she was with appellant at the party at Paris' house. She saw appellant walk down the street to his friend's house sometime after 10:00 p.m., and about 30 minutes later, she heard that he had been arrested.

Appellant's brother, Theo, also known as Check or Checkmate, testified that he was at the party with appellant from about noon to midnight. He saw the police officers talk with appellant around 11:00 p.m. and then leave. Theo saw appellant start walking down the street to his friend's house after that, and then he saw the police stop appellant and detain him. Theo testified that appellant had not left the party before that and had not been in a vehicle.

Lorenzo Cyprian, appellant's cousin, testified that he was also at the party with appellant. Cyprian arrived around 6:00 p.m. and left around 12:30 a.m., after appellant was arrested. He testified that appellant did not leave the party at all before he was arrested. Cyprian saw appellant get arrested when he left to walk down the street.

DISCUSSION

Appellant contends that the trial court erred in admitting into evidence recordings of five telephone conversations he had while in jail pending trial. We are not persuaded.

On the recorded calls, appellant discussed prostitution activities and his alibi defense. Defense counsel objected, arguing that defendant was merely organizing witnesses and that his discussions about prostitution, which were laced with

vulgarity and comments demeaning to women, did not suggest that he was a pimp or that he kidnapped Birdine.

The court reviewed transcripts of the five calls and concluded that the conversations were "referring to women in a business." The court cited references in the conversations to moving motel rooms because of traffic or locations; discussions of women not obeying orders; and the use of the words "bitch," "ho," and "pimps." The court also noted that the fifth call was relevant to the issue of whether appellant recruited witnesses to support his alibi. The court ordered the People to redact portions in which appellant said he would "fuck . . . up" certain women, because the prejudicial effect of this threat of violence substantially outweighed its probative value, but the court otherwise found the phone calls relevant and admissible. The court reasoned that other threats to women heard in the calls were relevant because they involved "threats to bitches because they are not, I guess, following what they are supposed to be doing." The calls were redacted as ordered and played for the jury.

Evidence Code[1] "[s]ection 352 provides: 'The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury.' We review a challenge to a trial court's choice to admit or exclude evidence under section 352 for abuse of discretion. [Citation.] We will reverse only if the court's ruling was 'arbitrary, whimsical, or capricious as a matter of law. [Citation.]' [Citation.]" (*People v. Branch* (2001) 91 Cal.App.4th 274, 281-282 (*Branch*); see also *People v. Geier* (2007) 41 Cal.4th 555, 585 ["A

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[1] All further statutory references are to the Evidence Code unless otherwise specified.

trial court's decision to admit or exclude evidence is a matter committed to its discretion '"and will not be disturbed except on a showing the trial court exercised its discretion in an arbitrary, capricious, or patently absurd manner that resulted in a manifest miscarriage of justice."'"].)

"It is important to keep in mind what the concept of 'undue prejudice' means in the context of section 352. '"Prejudice" as contemplated by section 352 is not so sweeping as to include any evidence the opponent finds inconvenient. Evidence is not prejudicial, as that term is used in a section 352 context, merely because it undermines the opponent's position or shores up that of the proponent. The ability to do so is what makes evidence relevant. The code speaks in terms of *undue* prejudice. . . . '"The "prejudice" referred to in Evidence Code section 352 applies to evidence which uniquely tends to evoke an emotional bias against the defendant as an individual and which has very little effect on the issues. In applying section 352, "prejudicial" is not synonymous with "damaging."' [Citation.]" [Citation.]

'"The prejudice that section 352 is designed to avoid is not the prejudice or damage to a defense that naturally flows from relevant, highly probative evidence.' [Citations.] 'Rather, the statute uses the word in its etymological sense of "prejudging" a person or cause on the basis of extraneous factors. [Citation.]' [Citation.] . . . In other words, evidence should be excluded as unduly prejudicial when it is of such nature as to inflame the emotions of the jury, motivating them to use the information, not to logically evaluate the point upon which it is relevant, but to reward or punish one side because of the jurors' emotional reaction. In such a circumstance, the evidence is unduly prejudicial because of the substantial likelihood the jury will use it for an illegitimate purpose. [Citation.]" (*Branch*, *supra*, 91 Cal.App.4th at p. 286.)

In the present case, the recordings contain language that is highly offensive. However, that language is inseparable from the powerfully incriminating evidence contained in the recordings, and actually enhances the probative value of the evidence by its obvious authenticity. Appellant was charged with pandering by encouraging in violation of Penal Code section 266i, subdivision (a)(2). That statute provides, in pertinent part, that "any person who does any of the following is guilty of pandering . . . : [¶] (2) By promises, threats, violence, or by any device or scheme, causes, induces, persuades, or encourages another person to become a prostitute." The recorded calls contained extensive evidence that appellant was a pimp. In one call, appellant asked Toussain, "How do you only got what you got and you said you fucking – the room only cost $45, man, so you have $47." Toussain interrupted, "No, we moved to the Best Western because they was trippin' talking about traffic and shit." Interpreting this conversation, Officer Humphris said that "whatever hotel they were at was noticing that they were bringing in clientele. Because most – most of the clientele are going to be lone male motorists so that's going to be rather obvious having multiple men drive in, go to the same hotel room. So probably the management noticed that they were possibly prostituting out of that room and asked them to leave."

Later in the conversation, appellant told Toussain, "I don't see why you fucking ended up again with different bitches and shit though. How you end up with a different ho – I swear to God all these bitches you out there you act like they ain't got no fucking pimps." Toussain replied, "You know this promise renegade crew," and appellant said, "Man, you all renegades gonna get fucking smashed on, swear to God that shit gonna happen to you 'cause you right with their bitch ass. Why you running around with them faggots? . . . you stay running with a pack of

faggots, like you not a faggot too, . . . fucking must be since you running with them."

Officer Humphris testified that her interpretation of this discussion was that Toussain was "not operating by the rules laid down by her pimp because he's not there to enforce them. . . . [H]e assumes she is going renegade which is working without a pimp." She defined the term "faggot" as "a girl that is not going along with the program. She is not playing by the rules. She's not doing what she's told. Anybody who's not complying is a faggot." She explained that this was different from a renegade "because renegade is working with no pimp at all and that's kind of rare here in Los Angeles because we have so many kidnappings. If a pimp sees a girl in the street who thinks that she's a renegade, he'll, most of the time, kidnap her."

In the same conversation, appellant told Toussain, "you've been going with her for like a fucking whole – fucking two weeks almost and only got $500, that's not fucking – even fucking – that ain't no type of fucking, handling no business . . . . You've been with that bitch for like at least 10 to 12 days and you ain't only got $500." Toussain said that she had more, but appellant interrupted, "you should have a thousand in your pocket." He later added, "a bitch supposed to give a nigga $500 or better a day anyway."

In a second call, appellant asked Toussain, "why the fuck you didn't get – put the money up, man?" She replied, "because I only have one something left and then what if I don't make no money at the room?" Appellant said that Toussain "made $300 yesterday."

In yet another call, appellant told someone named Rizo, "keep them at a little spot where they could do a little something." He later said, "I already fucking know that's what I tell Checkmate, he just have them bitches fucking, let Babydoll

drive them, he fucking needs to stay out of the dodge. He don't even need to be in the same room with the mother fucker, 'cause if popo comes to the fucking door." Officer Humphris testified that this conversation meant "you don't have to have the girls walking on the track or the street where they commit prostitution constantly. . . . [¶] Get a little motel right there off the track and work out of there." She testified that the last part of the conversation meant "he's telling them to let the bottom girl, which is terminology for the most senior prostitute, to shuttle the other ones around because he doesn't want to be seen with them if the police happen to show up wherever they're at."

In the same conversation, appellant said, "niggas supposed to be in benz' have big ass chains like pt got or bigger . . . fucking major money. All the niggas sit around . . . and play with a little faggot, the nigga don't get nothing. . . . [¶] go buy yourself some fucking chains and shit you need . . . a bitch supposed to make at least $1,000 a day on me, or at least five."

Obviously, the vulgarity in the conversations was integral to their probative value: these are the words of a pimp attempting to run his business from jail. The conversations provided extensive evidence that the jury could use "'to logically evaluate the point upon which it is relevant,'" namely, whether appellant, as a pimp, encouraged Birdine to become a prostitute. (*Branch*, *supra*, 91 Cal.App.4th at p. 286.) The trial court did not err in admitting these and other like conversations into evidence.

Moreover, several portions of other calls were relevant to show that appellant manufactured his alibi defense. In one call, appellant and Theo discussed the night of his arrest. Appellant asked, "Hey, you forgot what time it was that night or something?" Theo replied, "it was like . . . 9:00 or 10:00." Appellant said, "she said you said like 6:00 or 7:00 then the police came – came at

6:00 or 7:00 and then another one came about 15 to 30 minutes after, but, I mean, like 8:30, I got arrested at 12:01, fool. The police had to be on the block – the first police had to be on the block about either 10 something almost 11:00 or something like that, 10:30 had to be like – it had to be in between 10:00 . . . and 11:00 . . . . You know, first police car came, it was – we was still outside posted for a minute and then the fucking – what's name talk to – talk to YG, man, he fucking – he was on point. Him and Irma's shit – they remember what time it was what. What time is it?" Theo replied, "Probably like – I ain't sure yet. . . . I'll let you know." Appellant added, "Well, Irma and YG, their shit was fucking, they remember the time and all that, their shit right."

Later in the conversation, appellant told Theo, "fucking Paris shit was off and your shit was fucking off, I think Paris shit was kind of on but the lady was like your shit off. . . . He must have been drunk as fuck that night, . . . she was reading the statements, Paris said we had a BBQ, people playing dominos, cards and hanging out. And T said his time was kinda off when the police came too, I think. I think those two niggas, fucking either faded or forgot what time it was or something. Irma and Rizo's shit was fucking right on the money."

In another call, appellant told Theo that he would be released soon and "[t]hat's why all the witnesses got to be fucking cool, you feel me? . . . [T]ell Rizo, his shit – his story was fucking on point, man. . . . [¶] . . . tell him to talk to PD so he'll know – so he'll know what's up. . . . [¶] Tell Rizo I said he got to remember what – what he said too, and not to forget." Theo asked, "what time you feel like 11:00 or 12:00 (unintelligible)?" Appellant replied, "I went to jail at 12:01, so the police came on the block at like probably like 10:00, then they came at like 11:00 something and got me, 12:00, 12:01, so you know."

From these conversations, the jury could reasonably infer that appellant was doing more that merely trying to organize his witnesses. He was coaching so as to manufacture consistent alibi testimony among his witnesses.

In short, the probative value of the recordings was not substantially outweighed by the probability of undue prejudice, confusion of the issues, or misleading of the jury. "On the prejudice side of the scale, we are concerned only with the possibility of an emotional response to the proposed evidence that would evoke the jury's bias against defendant as an individual unrelated to his guilt or innocence. [Citation.]" (*People v. Gunder* (2007) 151 Cal.App.4th 412, 417.) Although the recordings contain contemptuous and demeaning references toward women, racial slurs, and other vulgarities, such language is integral to the probative value of the evidence, constituting candid and unvarnished statements by appellant proving him to be a pimp and proving his alibi to be fabricated. The trial court did not abuse its discretion in admitting the recordings.

DISPOSITION

The judgment is affirmed.

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WILLHITE, Acting P. J.

We concur:

MANELLA, J.

SUZUKAWA, J.