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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE,

Plaintiff and Respondent,

v.

ODONGA RUSH,

Defendant and Appellant.

B249671

(Los Angeles County
Super. Ct. No. NA091760)

APPEAL from a judgment of the Superior Court of Los Angeles County. Gary J. Ferrari, Judge. Reversed.

Victoria H. Stafford, 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, Yun K. Lee and Stephanie C. Santoro, Deputy Attorneys General, for Plaintiff and Respondent.

Odonga Rush appeals from a judgment entered after a jury found him guilty of three counts of pimping in violation of Penal Code section 266h, subdivision (a).¹ The trial court sentenced him to seven years and four months in prison. Rush contends, among other things, his trial counsel rendered ineffective assistance in conceding in closing argument that Rush was guilty of pimping. We agree with Rush's contention. Finding the error prejudicial, we reverse the judgment.²

BACKGROUND

The Undercover Prostitution Bust

Long Beach Police Detective Josh Rodriguez was investigating online prostitution on a Web site called backpage.com when he saw an advertisement posted for a woman in Long Beach named Nicole. On March 22, 2012, Detective Rodriguez responded to the ad, and a woman who identified herself as Nicole answered his telephone call. They arranged to meet that evening. Nicole told him 30 minutes of her time would cost him \$120, but she did not tell him what she would do for the money. Nicole gave him directions to her general location, and told him to call her back for more specific directions to the house where they would meet.

Detective Rodriguez was wearing a recording device when he called Nicole the second time. He recorded this second call, during which Nicole gave him directions to the house (Rush's house). He also recorded what happened at the house from the time he arrived to the time he identified himself as a police officer and other vice officers entered the house. The prosecution played the audio recording for the jury and a transcript of the recording is included in the record on appeal.

When Detective Rodriguez arrived at the house, Nicole—whose real name is Jimmetta Galloway—greeted him. Galloway agreed to engage in a sex act with Detective Rodriguez in exchange for \$200. Detective Rodriguez gave Galloway the

¹ All further statutory references are to the Penal Code unless otherwise indicated.

² Because we reverse Rush's convictions on this ground, we need not address the other contentions Rush raises on appeal.

money and she took it to the bathroom and left it there. Galloway undressed. At that point, other police officers broke down the door of the house, and Detective Rodriguez identified himself to Galloway as a police officer. Officers handcuffed Galloway. They found two other women in the garage who were identified as Amy Leisure, and Robyn Trousil. From a medicine cabinet in the bathroom, officers recovered a bundle of cash.

Rush and his codefendant, Silvia Persichetti, were not at the house at the time of the undercover bust, but officers were aware they lived there. Officers had seen Rush and Persichetti exit the house and drive away before Detective Rodriguez arrived for his date with Nicole (Galloway). After the bust, an officer instructed Amy Leisure to send a text message to Rush to try to get him to return to the house. Leisure complied, but Rush and Persichetti did not return.

On March 24, 2012, officers returned to the scene and arrested Rush and Persichetti after they exited the house and drove away together. Inside Persichetti's purse, officers found a notebook, or ledger, with entries listing dates, times, men's names, women's names, and amounts. The names Jimmetta Galloway, Amy Leisure and Robyn Trousil did not appear in the notebook.

When officers interviewed Persichetti, she told them she posted ads "for girls" on backpage.com. She also stated she answered telephone calls responding to the ads and "advised the girls a date was coming to the house." Persichetti further told officers "that Rush did not give her money but he allowed her to live with him," and he "provide[d] her with food and clothing." Finally, Persichetti stated, "she knew prostitution was illegal but she did not think she was doing anything wrong."

The Charges

An information charged Rush and codefendant Persichetti with three counts of pimping, one count for each alleged prostitute (Amy Leisure, Jimmetta Galloway, and Robyn Trousil). A person is guilty of pimping under section 266h, subdivision (a), when he or she, "knowing another person is a prostitute, lives or derives support or maintenance in whole or in part from the earnings or proceeds of the person's prostitution, or from money loaned or advanced to or charged against that person by any

keeper or manager or inmate of a house or other place where prostitution is practiced or allowed, or who solicits or receives compensation for soliciting for the person.” (§ 266h, subd. (a).)

Jimmetta Galloway

The prosecution called Jimmetta Galloway as a witness at trial (and also at the preliminary hearing). Galloway stated she had been a prostitute for 10 years and had admitted to charges of prostitution on eight occasions.

Galloway met Rush on the street in Long Beach in March 2012. He drove up to her and she entered the car. She asked him if he could get her crystal methamphetamine. He took her to his house and gave her the drugs she requested. She paid him for the drugs and left his house.

Shortly thereafter, Galloway contacted Rush by phone. At trial Galloway explained she “was getting kicked out [of her residence] and he [Rush] was trying to help [her].” Rush offered her “shelter, food, hot water.” Galloway stayed at Rush’s house for about three days before the undercover prostitution bust on March 22, 2012. The other persons staying at the house were Rush, Persichetti, Amy Leisure, and Robyn Trousil. Rush did not tell Galloway she needed to work as a prostitute in order to live at his house. She “just kind of knew” that is “what [she] had to do.”

On one occasion in March 2012, Rush drove Galloway to a motel. He told her there was “someone that wanted to see [her].” The man Galloway met wanted to engage in a sex act with her without contraception. Galloway declined. She called Rush to pick her up and he drove her back to his house.

On March 22, 2012, Persichetti called Galloway at Rush’s house and told Galloway “to get ready for a date” with a man who was coming to Rush’s house.³ When Persichetti and Rush arrived at the house, Galloway was not “not ready yet.” Rush told

³ It was Persichetti, not Galloway, who spoke on the phone with Detective Rodriguez and arranged the date.

Galloway “to ‘hurry up.’” Detective Rodriguez was the man who arrived to meet Galloway.

In response to a question at trial from the prosecutor, Galloway denied Rush acted as her “pimp.” Galloway stated she had never given Rush money and he had never given her money. When Detective Rodriguez gave her the \$200 on March 22, 2012, she planned to tell Rush the money was in the bathroom, so he could go get it.

At trial, Galloway stated the police and the district attorney intimidated her. She believed if she “didn’t comply with what they were trying to do,” she was going to be charged with a crime (prostitution).

Amy Leisure

Amy Leisure also testified for the prosecution at trial. Leisure met Rush in the summer of 2011 while visiting California from Ohio. She had just been released from jail in California after pleading guilty to felony possession of stolen property. She met a woman named Tamara and started staying with her at hotels in Hollywood. According to Leisure, Tamara “solicit[ed] men for money.” Tamara had at least five customers per day. Leisure would see Tamara hand Rush all of the money she earned. Leisure stayed with Tamara for two weeks and then returned to Ohio.

After working in Ohio for a month and saving her money, Leisure returned to California. While staying at a hotel in Hollywood in October 2011, she “ran into” Rush. He was with Persichetti. Leisure asked Rush if he could get her heroin. He said he could, and he left with Persichetti. Rush later returned to Leisure’s hotel room and gave her the drugs. At that time, Leisure and Rush mutually broached the subject of Leisure engaging in prostitution.

Leisure explained she “was running out of money” and wanted to “start doing dates” to make money. Rush told her he “would help [her] set them up and, then, deliver them to [her] room.” “He would run the ads” and he “had a girl that answered the phones.” Rush suggested they split the money Leisure earned, 60 percent to Leisure and 40 percent to Rush. Rush told Leisure he could supply her with heroin. Leisure’s first date arrived at her hotel room within two hours of this conversation with Rush.

For the next couple of months, Leisure moved from hotel to hotel in Hollywood, staying in each for one night, and paying for them with money she made from engaging in prostitution. Persichetti would call Leisure and tell her a date was on his way to her room. Rush told Leisure how much to charge for the dates. Leisure had two to five dates per day, seven days a week. Rush would come to her room every day and pick up his share of the money. He supplied her with heroin, which she smoked every four hours.

In late December 2011, after Rush's sister died, Leisure moved into Rush's sister's house in Long Beach with Rush and Persichetti. Tamara moved in a few days later. Rush and Persichetti slept in separate bedrooms. Leisure and Tamara slept together on a sofa bed in the living room. Rush and Persichetti were unemployed. They went to the gym every day. Rush told Leisure they could "use [the house] as a place of business instead of paying for hotels."

According to Leisure, Rush told Persichetti to post ads on backpage.com. Leisure saw Persichetti use her (Persichetti's) computer to post the ads. Leisure did not recognize the women in the photographs used in the ads. Persichetti kept a notebook, or ledger, in which she recorded the amounts Leisure, Tamara, and others earned for their dates. Per Rush's instruction, Persichetti used fake names in the notebook when referring to Leisure, Tamara and the other women.

Leisure's sessions with her customers occurred in the living room. Later, she would hand all of the money she made to Rush or place it in a drawer. While she was living at the house in Long Beach, Rush never gave her any of the money she earned. He provided her with food, shelter, hot water and heroin.

Rush was never present at the house when the dates occurred. Persichetti occasionally remained in the house, but she stayed in her bedroom upstairs. When another woman had a date in the living room, Leisure and the other women waited in the garage.

Leisure testified Rush raped her on February 14, 2012, after she declined his sexual advances. He told her "all his girls that work for him" are "supposed" to have sex with him. She also testified Rush once picked her up by her hair, dragged her through the

garage, threw a glass at her, choked her, and “threw [her] upstairs” when he believed she had missed a date. He told her he would “de-scalp” her if she ever missed a date again.

Sometime after February 14, 2012, Leisure was arrested for prostitution at the house in Long Beach and went to jail. On March 14, 2012, she admitted the charge in court. When she was released from jail the next day, Rush picked her up and brought her back to the house.

On March 22, 2012, Leisure was planning “to sneak away and leave” the house with Robyn Trousil while Galloway was in the living room with her date (who turned out to be Detective Rodriguez). Leisure and Trousil were waiting in the garage with their bags packed when police officers broke down the door. According to Leisure, Rush always locked the women inside the house, and the only time the gate was unlocked was when a customer came to the house.

Robyn Trousil

Robyn Trousil did not testify at trial or at the preliminary hearing. Leisure testified Trousil moved into Rush’s sister’s house in Long Beach on February 15, 2012, and slept on the large sofa bed with her and Tamara. Prior to that time, Rush told Leisure he had “set her [Trousil] up in a hotel” in Hollywood and she was working for him as a prostitute. Rush would go collect money from her. Persichetti handled the phone calls to set up Trousil’s dates. Leisure would hear Persichetti talking to Trousil on the telephone.

According to Leisure, when Trousil moved into the house in Long Beach she started having her dates in the living room like Leisure and Tamara. On a “great day” each of them had three customers. Leisure testified that Rush supplied Trousil with heroin.

Verdicts and Sentencing

The jury found Rush guilty on the three charged counts of pimping. The trial court sentenced Rush to seven years and four months in prison: the upper term of six years on count 1 (Amy Leisure), plus a consecutive term of 16 months (one-third the middle term of four years) on count 2 (Jimmetta Galloway). On count 3 (Robyn Trousil), the court imposed a concurrent term of three years (the low term).

DISCUSSION

Rush contends his trial counsel, Steve Kwon, rendered ineffective assistance in conceding in closing argument that Rush was guilty of pimping, requiring reversal of his convictions. We agree, for the reasons explained below.

“‘To establish a violation of the constitutional right to effective assistance of counsel, a defendant must show both that his counsel’s performance was deficient when measured against the standard of a reasonably competent attorney and that counsel’s deficient performance resulted in prejudice to defendant in the sense that it “so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.”’” (*People v. Thompson* (2010) 49 Cal.4th 79, 122.)

“Reviewing courts defer to counsel’s reasonable tactical decisions in examining a claim of ineffective assistance of counsel [citation], and there is a ‘strong presumption that counsel’s conduct falls within the wide range of reasonable professional assistance.’” (*People v. Lucas* (1995) 12 Cal.4th 415, 436-437.) “Reviewing courts will reverse convictions on the ground of inadequate counsel only if the record on appeal affirmatively discloses that counsel had no rational tactical purpose for his act or omission.” (*People v. Zapien* (1993) 4 Cal.4th 929, 980.) Where “‘there simply could be no satisfactory explanation’” for the challenged action or inaction, and prejudice is shown, we reverse. (*People v. Bolin* (1998) 18 Cal.4th 297, 333.)

“Defense counsel must not argue against his or her client [citation], but it is settled that it is not necessarily incompetent for an attorney to concede his or client’s guilt of a particular offense” while arguing his client’s innocence of other charges or a defense to the charges or a factor which mitigates the charges. (*People v. Lucas, supra*, 12 Cal.4th at pp. 446, 447 [“We cannot say on this record counsel made an incompetent tactical choice to admit that defendant was at the scene and probably committed the homicides, but to argue his intoxication negated the mental elements necessary for felony murder or premeditated murder”], citing *People v. Cain* (1995) 10 Cal.4th 1, 31 [where the defendant “admitted to the police on tape he was inside the victims’ residence when they

were murdered and he entered the residence with the intent to steal money,” appellate court concluded his trial counsel was not “ineffective for candidly admitting defendant’s guilt” on burglary and felony murder charges “while vigorously arguing against defendant’s guilt of the special circumstances”], and *People v. Mayfield* (1993) 5 Cal.4th 142, 177 [“It was not unreasonable to seek to avoid the death penalty by seeking a conviction on one count of second degree murder and one count of involuntary manslaughter on a plausible theory, when the prosecution’s evidence put defendant at grave risk of two first degree murder convictions”].)

“[A] defense attorney’s concession of his client’s guilt, lacking any reasonable tactical reason to do so, can constitute ineffectiveness of counsel.” (*People v. Gurule* (2002) 28 Cal.4th 557, 611; *People v. Moore* (1988) 201 Cal.App.3d 51, 57 [“Reversals for ineffective assistance of counsel during closing argument rarely occur; when they do, it is due to an argument against the client which concedes guilt, withdraws a crucial defense, or relies on an illegal defense”].)

Rush’s trial counsel spent the beginning of his closing argument asserting the prostitutes were not “sex slaves” and were not locked inside Rush’s home. He also spent time attacking the credibility of Amy Leisure’s claim in her trial testimony that Rush raped her. The charges in this case, however, did not include false imprisonment or rape.

Next, Rush’s trial counsel brought up the notebook law enforcement recovered and asserted: “Obviously, Miss Persichetti is keeping that record because she believes she had to be paid and has to keep records to be paid by these prostitutes.”

Immediately thereafter, Rush’s trial counsel stated: “Also, what we have here is not the sex slaves that was presented to you.^[4] What you have are several prostitutes who

⁴ The prosecution introduced text messages from Rush’s cellular telephone received from and sent to someone named “Tshea.” Based on witness interviews, officers believed “Tshea” is Tamara. In one of the text messages, Tshea wrote: “You are only a pimp not a business man, slave owner of white girls.” In other messages, Tshea discussed what it was like working as a prostitute for Rush and “living under [his] command.”

need a place to do their business, of a man with a house and no job and no other income. They had -- there is obviously a match and that's what they did. This is not a pimp and sex slave situation, *this is prostitutes who need a place to do their business and a man who has a house but can't make any money out of it, who is making money off of it by letting these prostitutes do their business there.* This is not a pimp and prostitute situation. [¶] What this is, as you get instructions about aiding and abetting, this is Mr. Rush and Miss Persichetti aiding and abetting the prostitutes to commit prostitution. Okay. It's not the prostitutes working for them. Okay. They are helping the prostitutes commit prostitution. And that's what this is, this is not a pimp and prostitutes case. [¶] . . . [¶] [T]hese are prostitutes and this is people provide housing, people pass out cards." (Italics added.) Counsel later asserted the prostitutes "were the ones in charge and *getting most of the money* and they have these folks [Rush and Persichetti] *working with them . . .*" (Italics added.)

In wrapping up his closing argument, Rush's trial counsel argued: "Whether you believe this is the sex slaves of America story that [the prosecutor] has painted for you or that you actually believe that to be true or that whether you have doubts about that, whether you think this was in fact the prostitutes and Mr. Rush and Miss Persichetti actually working together on this business. Okay. This does not make them a pimp and prostitute. This does not make them a pimp, it makes them aiding and abetting these prostitutes"

Rush's trial counsel told the jury, in no uncertain terms, Rush made money from the prostitutes' acts of prostitution. By admitting Rush derived support from the prostitutes' earnings, Rush's trial counsel conceded Rush was guilty of multiple violations of section 266h—the only acts charged in the case.

Counsel's sole argument in Rush's defense was the prostitutes "were the ones in charge" and Rush was "working with them." A violation of section 266h, however, does not require the defendant be in charge. If the defendant "derives support or maintenance in whole or in part from the earnings or proceeds of the person's prostitution," and the defendant knows the person is working as a prostitute, the defendant has committed an

act of pimping. (§ 266h, subd. (a).) Counsel told the jury Rush made money when the prostitutes involved in this case engaged in prostitution.

Counsel's closing argument could not have helped Rush's cause. Counsel asserted Rush was not guilty of pimping, but then admitted Rush engaged in conduct which was the very definition of pimping, as spelled out in the instructions the jury received—that Rush derived support from earnings of prostitution by women he knew were prostitutes.⁵ Counsel asserted Rush was guilty only of aiding and abetting prostitution, but the trial court did not instruct the jury on that crime, and the jury did not have the option of finding Rush guilty of aiding and abetting prostitution. Moreover, what counsel described as aiding and abetting prostitution—working with prostitutes and making money from their acts of prostitution—is pimping as defined in section 266, subdivision (a).

The trial court did instruct on a lesser included offense—attempted pimping—but Rush's trial counsel did not mention it to the jury. It was the prosecutor who encouraged the jury to find Rush guilty of attempted pimping in the event it did not believe Rush engaged in a completed act of pimping with regard to Jimmetta Galloway during the two or three days Galloway lived with Rush prior to her arrest.

In conceding Rush made money from the prostitution of multiple prostitutes, Rush's trial counsel made no attempt to distinguish the strength of the evidence supporting the three charges of pimping. Robyn Trousil did not testify in this case. The prosecutor conceded the sufficiency of the evidence supporting the charge related to

⁵ CALJIC No. 10.70, which the trial court used to instruct the jury provides, in pertinent part: "Every person who, knowing another person is a prostitute, lives or derives support or maintenance in whole or in part from the earnings or proceeds of that other person's prostitution, or from money loaned or advanced to or charged against that other person by any keeper or manager or inmate of a house or other place where prostitution is practiced or allowed or solicits or receives compensation for soliciting for the person, is guilty of the crime of pimping in violation of Penal Code section 266h, subdivision (a)."

Trousil was an issue for the jury to “talk about.”⁶ Yet Rush’s trial counsel admitted Rush derived support from the earnings of prostitutes—plural—without highlighting the weaknesses in the evidence supporting the charges related to Trousil and Galloway.

“Closing argument may be waived in an appropriate case as a matter of tactics. [Citations.] However, having chosen to make a closing argument, counsel cannot argue against his client.” (*People v. Diggs* (1986) 177 Cal.App.3d 958, 970.) That is precisely what Rush’s trial counsel did. He admitted Rush engaged in conduct which constitutes multiple violations of section 266h with multiple prostitutes. In Rush’s “defense,” he made an argument which was obviously legally incorrect based on the instructions the jury received—that Rush was not guilty of pimping if he *worked with* the prostitutes and made money from their business, but was not *in charge* of their business. And Rush’s counsel did not make any of the viable arguments Rush had available to him in defending against the charges—attacking Amy Leisure’s credibility; emphasizing Robyn Trousil did not testify; highlighting Jimmetta Galloway’s denial that Rush engaged in conduct with regard to her that constitutes pimping; pointing out Galloway felt pressure from law enforcement to incriminate Rush; and arguing, if the evidence supported the commission of any crime with regard to Galloway, it was attempted pimping at most.

We can conceive no tactical reason for Rush’s trial counsel conceding the entire case against Rush while asking the jury for nothing in return (e.g., a not guilty verdict on a certain charge or a guilty verdict on a lesser charge of attempted pimping).

Accordingly, we find counsel’s performance was deficient.

⁶ Outside the presence of the jury, the trial court indicated it had reservations about the strength of the evidence supporting the charge related to Robyn Trousil. When Rush made a motion to dismiss the charges at the close of the prosecution’s case, the court denied the motion as to the counts related to Amy Leisure and Jimmetta Galloway, but took the motion under submission as to Trousil. Ultimately, the court denied the motion as to all counts. In sentencing Rush, the court imposed a concurrent low term on the count related to Trousil, commenting, “we never heard from that victim, she never testified.”

To reverse Rush's convictions due to his counsel's deficient performance, we must find "“there is a reasonable probability that, but for counsel's failings, the result would have been more favorable to [Rush]. [Citations.] “A reasonable probability is a probability sufficient to undermine confidence in the outcome.””” (*In re Jones* (1996) 13 Cal.4th 552, 561.)

Rush's trial counsel's concession of his client's guilt “so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.” (*People v. Thompson, supra*, 49 Cal.4th at p. 122.) Even if the jury had doubts about Amy Leisure's credibility, or believed the prosecution did not prove Rush engaged in an act of pimping with regard to Trousil or Galloway, there was no reason to acquit Rush of any of the charges when his counsel admitted he made money from the earnings of the prostitutes. We have no confidence the jury seriously considered the strength of the evidence supporting each of the charges against Rush once Rush's counsel conceded the entire case by admitting Rush worked with the prostitutes and derived support from their acts of prostitution. By the time Persichetti's counsel argued and pointed out weaknesses in the prosecution's case, Rush's counsel already had inflicted irreparable damage to Rush's defense by arguing: “[T]his is prostitutes who need a place to do their business and a man who has a house but can't make any money out of it, who is making money off of it by letting these prostitutes do their business there.”

We find Rush's trial counsel's deficient performance was prejudicial. Regardless of whether the prosecution presented evidence demonstrating Rush engaged in multiple acts of pimping, the prosecution had to prove Rush committed the offenses charged in this case—one count of pimping related to Leisure, one count of pimping related to Galloway, and one count of pimping related to Trousil. Given the state of the evidence, we find it is reasonably probable the result would have been more favorable to Rush if his trial counsel had not conceded Rush engaged in acts establishing his guilt of the charged offenses.

DISPOSITION

The judgment is reversed.⁷

NOT TO BE PUBLISHED.

CHANEY, J.

I concur:

MILLER, J.*

I concur in the judgment:

ROTHSCHILD, P. J.

⁷ Pursuant to Business and Professions Code section 6086.7, subdivision (a)(2), we are required to report our reversal of the judgment for ineffective assistance of counsel to the State Bar of California for investigation of the appropriateness of initiating disciplinary action against attorney Steve Kwon.

* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.