Filed 10/26/17 P. v. Labeaux CA2/2

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. CHARLES LABEAUX, Defendant and Appellant.	B279218 (Los Angeles County Super. Ct. No. LA080674)

APPEAL from a judgment of the Superior Court of Los Angeles County. Mildred Escobedo, Judge. Affirmed as modified with directions.

Edward J. Haggerty, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Michael C. Keller and Timothy L. O'Hair, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant and appellant Charles Louis Labeaux (defendant) appeals from the judgment entered after his conviction of crimes including pimping, pandering, and making a criminal threat. In his assignments of error, defendant contends: conviction on a theory not alleged in the operative information is without notice and resulted in a denial of due process; substantial evidence did not support the conviction of pandering in count 2; the jury instruction regarding pandering contained inapplicable information; the trial court erred in admitting certain telephone call evidence; the trial court erred in failing to give a proper jury instruction regarding accomplices; the trial court erred in failing to instruct the jury that battery is a lesser included offence of felony child abuse; the trial court erred in failing to instruct the jury that misdemeanor child abuse is a lesser included offense of felony child abuse; Penal Code section 422, defining criminal threats, is unconstitutionally vague; the jury instruction regarding criminal threats erroneously failed to include the elements of the threatened crime; the trial court erroneously imposed a domestic violence fee; any omission by trial counsel resulting in forfeiture of any issue on appeal violated defendant's right to effective assistance of counsel; and the trial court miscalculated presentence custody credits. Finding error regarding the fee imposed and the credits calculated, we modify the judgment to delete the domestic violence fee and add 33 days of additional presentence custody credits. Finding no merit to defendant's remaining contentions, we affirm the judgment as modified.

BACKGROUND

Defendant was charged in a second amended information as follows: pimping, in violation of Penal Code section 266h,

subdivision (a) (counts 1 & 7);[1] pandering by procuring, in violation of section 266i, subdivision (a)(1) (counts 2 & 8); possession of a firearm by a felon, in violation of section 29800, subdivision (a)(1) (count 3); possession of ammunition, in violation of section 30305, subdivision (a)(1) (count 4); assault with a firearm, in violation of section 245, subdivision (a)(2) (counts 9 & 10); criminal threats, in violation of section 422, subdivision (a) (count 11); child abuse, in violation of section 273a, subdivision (a) (count 12); injuring a cohabitant, spouse, or child's parent, in violation of section 273.5, subdivision (a) (count 13); misdemeanor contempt of court in violation of section 166, subdivision (c)(1) (count 14).[2]

It was also alleged that defendant personally used a firearm within the meaning of section 12022.5, subdivision (a), and that defendant had suffered two prior serious felony convictions within the meaning of section 667, subdivision (a)(1). It was alleged pursuant to the "Three Strikes" law (§§ 667, subd. (b)-(i) & 1170.12, subd. (a)-(d)), that defendant had suffered two prior serious or violent felony convictions.

A jury found defendant guilty of all counts except counts 7 and 8, on which it was deadlocked. The firearm use allegation was found to be true and defendant admitted the prior convictions. The trial court struck the strike allegations pursuant to *People v. Superior Court* (*Romero*) (1996) 13 Cal.4th 497. On November 17, 2016, the court sentenced defendant to an aggregate term of 30 years eight months in prison, plus a consecutive one-year term in county jail for the misdemeanor (count 14), and dismissed counts 7 and 8. The court imposed

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

[2] Counts 5 and 6 were dismissed prior to trial.

fines and fees, and awarded a combined total of presentence custody credit of 659 days.

Defendant filed a timely notice of appeal from the judgment.

Prosecution's trial evidence

The undercover investigation

Los Angeles Police Officer Christopher Phillips testified as an expert in crimes involving prostitution, and described his experience investigating and arresting prostitutes and pimps. He explained that pimps are those who recruit, employ, direct, and train prostitutes, and who set prices, rules, and locations for acts of prostitution, which can be any sexual act for compensation. A pimp typically seeks out women with low self-esteem, often a single parent. Some recruits have alcohol or drug problems, and most have had a rough life, due to sexual abuse or financial pressures. Although pimps are ordinarily friendly at first, if the recruit attempts to back away, the pimp may maintain control first with verbal threats, then intimidation, and often violence. It is rare to find a prostitute who does not have a pimp, and not unusual for women to remain with their pimps after having been treated badly.

In the Western San Fernando Valley, prostitutes rarely walk the streets, instead, pimps usually advertise on the internet, and arrange for clients to meet at a hotel room. A website known to be used by pimps and prostitutes is backpage.com, which has an escort section, with links to advertisements relating to different parts of the city. Though the ads do not explicitly offer sex, they contain photographs, suggestive text, and sometimes a list of prices, disguised as acronyms or slang, for example, "100 H.R." with no dollar sign, meaning one hour for $100. A pimp usually sets up the ads using the name and credit of one of his prostitutes, and sometimes uses

pseudonyms and false email addresses. Usually the client calls the telephone number in the ad, makes a "date," and then is led to the hotel by text messages or phone calls. This scheme allows the pimp the opportunity to watch the client go to the room while assessing whether the client is a police officer, another pimp, or potentially a problem, such as being under the influence of drugs or alcohol. Sometimes pimps observe from their vehicles, and sometimes remain hidden in the motel room, close enough to render aid if necessary. Pimps may either collect the money as soon as the client leaves, or if he trusts the prostitute, he might collect at the end of the day.

After a particular Super 8 Motel in Canoga Park became the site of many arrests for prostitution, Officer Phillips and a team of vice officers from two divisions of the Los Angeles Police Department (LAPD) mounted an undercover operation. On March 27, 2015, Officer Phillips began his investigation by perusing backpage.com. He found an ad for Canoga Park with sexually suggestive photographs, and "Your time with me is always slow and never rushed," and, "Intimate and satisfaction guaranteed." Posing as a prospective client, Officer Phillips twice called the telephone number in the ad, which ended 7730. Each time he reached voicemail with the message, "Text me, hon." Then by text messaging he arranged a date for about an hour later. A reply text directed him to the area of the targeted motel, where plain clothes officers in several unmarked vehicles parked in the motel parking lot before Officer Phillips, also wearing plain clothes and driving a plain vehicle, arrived. Once in the area, Officer Phillips was directed by text to room 104. As he walked from the parking lot the other officers watched, some from their cars and others on foot.

Another officer, Scott Kitahara, was parked on the north side of the motel to monitor the area for anyone who appeared to

be looking out for police officers. There, Officer Kitahara saw in the second parking stall from his, about 10 to 12 feet away, a black GMC SUV, with defendant in the driver's seat. Defendant appeared to be texting, and then looking up scanning the area, and checking his rear view mirror. When Officer Phillips approached room 104, defendant's car headed out of the parking lot. After Officer Kitahara notified the other officers that the SUV was on the move, Sergeant Pablo Monterrosa followed. Officer Kitahara also followed a few minutes later.

Officer Phillips's knock on the door of room 104 was answered by a woman wearing the same negligee as was depicted in one of the photographs on the internet. When the officer said, "Hi, Karla," the woman gave him a hug before they discussed the amount agreed upon in texts. Officer Phillips gave her $60. Once Officer Phillips concluded prostitution was being conducted in that room, he alerted the other officers, who entered the room, and identified themselves as law enforcement. After the woman consented to a search, the officers found multiple condoms in a drawer, as well as a white plastic tube of lubricant. Officer Phillips later explained that he based his opinion that motel room 104 was being used for prostitution due to the totality of the circumstances: the internet ad, the fact that the motel was known for having a problem with prostitution, the presence of condoms and lubricant, and the payment of money.

In the meantime, when Officer Kitahara reached the black SUV, defendant had been detained and Sergeant Monterrosa and Officer Dean Vukovic were there. From the motel room, and in the presence of the woman called Karla, Officer Phillips called the number he had earlier exchanged text messages with, to see if that phone might be located. Officer Phillips did not hear ringing in the motel room and no one answered his call. Initially Sergeant Monterrosa was aware of only one cell phone belonging

to defendant, which did not ring. Defendant told the sergeant there were other phones inside his car. Sergeant Monterrosa then walked to the passenger side of the SUV, looked through the window and saw two other phones. When Officer Phillips called the number again, Sergeant Monterrosa saw one of the phones inside the car blinking, so he opened the door, retrieved and answered the phone. Officer Phillips was on the other end.[3]

Cindy B.

Cindy B. testified that she was the woman in room 104 who Officer Phillips greeted as "Karla," a name defendant had given her. She met defendant about eight years earlier, when their children were in the same school and played on the same baseball team. In 2015, Cindy was in financial distress, did not have a job, was mentally ill with physical handicaps, and no source of income. Her children were living with her estranged husband, and she paid child support whenever she could. She began telling defendant about her financial and other problems after knowing him a few years. He told her that he could help her earn money because he knew a lot of men he thought would like her. In February 2015, when her husband pressured her for child support, Cindy called defendant. In March 2015, she agreed to go work for him. Defendant told her that she would make "a lot of money." They agreed she would meet with men for sex three

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[3] Searches of defendant and his SUV also turned up a set of handcuffs from the front passenger seat, a police-type light bar with red and blue flashing lights mounted on the front windshield, $3,700 in cash, another cell phone, a replica LAPD police badge, and a loaded Sig Sauer .40-caliber semiautomatic pistol, which was later discovered to be unregistered. In a later search of defendant's home officers recovered approximately 16 handguns and rifles, some from a garage safe and others from the bedroom.

days per week for one month, splitting the proceeds half and half. Cindy did not set up her own dates and did not know how to do so, although she occasionally spoke to clients on defendant's cell phone.

In March, Cindy had sex with approximately 24 men, an average of four men per day. The first time was in a bedroom at the home of Beth R. Thereafter she worked there or in motels. Beth gave Cindy clothes to wear, but no money. Beth never instructed her about arranging dates, conducting a transaction, performing sex, or avoiding arrest. Defendant was nearby whenever she engaged in these sex acts. The appointments were set up by telephone and backpage.com. Cindy did not set up the advertisement on backpage.com, did not draft the wording, and it was not her telephone number in the ad. Defendant took photographs of her from the neck down, as he did not want her face on the internet. When a call came in defendant would collect her, take her to the motel room, and wait there for another call. He would leave the room but remain close by. At Beth's house, defendant would remain inside the house. Defendant set the prices, usually a "donation" of $80 for a half hour and $160 for an hour. The clients paid at the beginning and once the client left, defendant collected all the money. Cindy never reserved the room, but when they left the motel, the motel fee was taken out of her share.

On the morning of March 27, 2015, Cindy told defendant that she wanted to stop working, but he told her she had to do it that day because he had already reserved the room, and that if she did not go, he would come to her AA meeting and drag her out. Frightened, she agreed to go. She and defendant arrived at the Super 8 motel between 11:00 and 11:30 a.m., and defendant was there with her most of the day. Beth was there until about 1:00 p.m. Officer Phillips was the fourth client. She did not send

any of the text messages on the phone ending in 7730. Defendant told Cindy the client was coming. Once he arrived they discussed time and price, and Officer Phillips placed $60 on the dresser. Then the door opened, a woman police officer came in and Officer Phillips identified himself as a police officer.

Beth R.

Beth R., who was divorced, lived in West Hills with her disabled son, Kevin, who required constant care. Beth did not work outside the home, though she was Kevin's caretaker when he was not at school. Beth's other son, Steven, had moved in with Beth's parents (who lived nearby), when he was 18. Beth knew defendant, his wife, and two children since they lived on the next street over for about 15 years. Until 2013, Beth would jog in the neighborhood. Defendant suggested that she would get a better workout walking up the hill near her house. So she did that and sometimes, as she came down the hill, defendant was parked in his black SUV near her car waiting for her. He told her he was a pimp and wanted her to start working for him. Initially she said she was not interested, that she had a sick child and a limited schedule, and did not need the money. Finally, near the end of October 2013, defendant became verbally aggressive, raised his voice in a mean, scary manner, and ordered her into the car. Beth, a five foot tall woman was afraid of six foot two inches tall defendant, who knew where she lived. Eventually she decided she had to become a prostitute. She felt nervous and frightened, did not want to do it and had no reason to do it, but did, because defendant was intimidating and had a bad temper. He told her he had guns for hunting, and he brought a handgun with him to her house.

For a year and a half, Beth exchanged sex for money with one to three clients a day, three to five days a week, while Kevin was in school. Defendant set the prices: $160 per hour; $80 per

half hour; and $50 or $60 for oral sex. The first time was at her house, in her bedroom, while defendant remained in the dining room, then at motels, including the Super 8 in Canoga Park. Defendant collected the money each time. When she worked at a motel, defendant paid for the motel in cash, or gave her the money to rent a room. Beth claimed that defendant never paid her or gave her clothes, food or gifts, except once, a watch. She hated working for him, but did not stop because he was mean and threatening, very physical, and she had a special needs son in the house. It was easier to do what he said to try to keep him under control.

Defendant directed Beth to place advertisements on backpage.com, using her own email address and credit card, and defendant reimbursed her in cash. For the ads she used photographs taken by defendant and wrote text using pseudonyms given to her by defendant. He would remain at her house while she posted them. Beth also set up ads for four or five other women, including Cindy, at defendant's direction. The women came to her house, where defendant took their photographs, and sometimes they used her home as a place to trade sex for money.

Defendant hit Beth while he was angry on three different occasions. He brought a gun, handcuffs, and a knife into her house. She told him several times that she did not want to work for him anymore, but he insisted she continue until other women were earning money for him. Beth did as defendant said, afraid that he would hurt or kill her.

One day in 2014, defendant called and asked her to meet him in her detached garage where he handed her money for a motel room. She did not want to get a room, so she took the money and threw it back through the open car window. Angry, defendant got out of his car, closed the garage door with both of

them inside, and shoved her against the wall, causing her to hit her head. She was too frightened of defendant to call police.

The last time Beth told defendant she no longer wanted to work for him was on March 3, 2015. Defendant had confronted her in her garage, closed the door, and followed her into the house. Since her older son Steven was in the house working on the computer, she screamed for him, and ran out to the front porch as Steven came into the hallway. Through the screen door, Beth saw defendant pointing a gun at Steven's nose and heard defendant yell, "Get down on your knees." Beth went back toward the front door and saw through a window that Steven had escaped into the bathroom. When she came back inside, defendant removed the magazine and a bullet from the gun, handed her the gun, and told her to show Steven that it was empty. Defendant left, and again, Beth was too frightened of defendant to call the police.

Beth finally stopped working for defendant in mid-March after a client pulled a knife. However, she continued posting the computer ads that defendant designed for Cindy, and would sometimes rent motel rooms for Cindy. Beth rented the room at the Super 8 Motel on the afternoon of March 27, but was home with her son when defendant was arrested. Beth had previously rented rooms, about 10 or 12 times, for Cindy. Defendant did not rent the rooms because he was wary of credit cards and did not want his wife to know what he was doing. Beth sometimes bought condoms for herself and the other women, but had nothing to do with supplying the condoms found in the motel room on March 27.

After his arrest, defendant called her and said simply "They caught me, dear." She felt relieved and happy it had finally ended.

Steven R.

Steven testified about the incident in March 2015, when defendant pointed a gun at him and told him to get on the floor, and then told Beth to get on the floor or her son was going to die. Steven was afraid for his life and afraid that defendant was going to shoot both of them.

Tonya'n L.

Tonya'n L. testified that she had been married to defendant 17 years, and was the mother of their two children, Jeremiah and Breonnah. During 2014 and 2015, their marriage was not going well and they often fought verbally and physically. Although he was violent, she did not call the police because she was afraid he would kill her. Defendant kept approximately 10 rifles and handguns in the house. Tonya'n recounted one fight in 2014, in the kitchen with the children present. During the argument defendant cornered Tonya'n in the kitchen, screamed into her face, blamed her for the children's misbehavior, and then choked her. Defendant stopped when the children cried and screamed, but then hit kitchen objects, called Tonya'n names and punched her in the mouth with his fist. Though Tonya'n asked the children to call 911, they were frozen with fear and did not do so. Defendant said, "Oh, you want to call 911, do you," and left the room, returning shortly. Jeremiah told Tonya'n not to say or do anything, and whispered, "He's got a gun." Tonya'n recalled several other times that defendant pointed a gun at her.

In May 2014, when Jeremiah was in the eighth grade, defendant beat Jeremiah after confronting him about an e-cigarette defendant had found in a car he had rented. When Jeremiah denied that it was his, defendant punched him in the chest and kidneys, beating him from one end of the room to the other, and causing him to urinate on himself. Tonya'n screamed at defendant to stop, but he did not. As Jeremiah began to pass

out, defendant picked him up and hit him in the chest, saying, "You'll not be like me. You will never do drugs. You will never smoke. I will kill you." As Jeremiah cried and said, "I didn't daddy. I didn't," defendant punched him at least 10 times in the chest and lower back. Tonya'n did not call the police because defendant had threatened to kill her if she ever took his kids away.

Jeremiah L.

Jeremiah recalled the incident in the kitchen when defendant punched his mother in the face, which frightened and saddened him. When Tonya'n asked him to call 911, he was frozen in fear and could not comply. Jeremiah saw defendant go to his bedroom and get the gun he kept in his nightstand. When defendant returned to the kitchen he put the gun to the back of Tonya'n's head and said, "Call, I dare you to call 911." Jeremiah had seen defendant carrying a Sig Sauer .40-calibur handgun everyday in a holster on his left hip.

Jeremiah also testified about the 2014 beating, when he was 14 years old. After Jeremiah denied that the e-cigarette was his, defendant became angry, assuming it was a lie, and punched him four or five times in the rib cage and kidneys, and then in the lower back. The blow to the kidney caused Jeremiah to fall and urinate on himself. He was in pain, crying, and frightened, as he had seen defendant's violence with his mother before. Jeremiah did not see any bruises after the beating.

DISCUSSION

I. Unpleaded theory of pandering

Defendant contends that the trial court deprived him of his federal and state constitutional rights to notice and due process by allowing the jury to find defendant guilty of count 2 of the second amended information, on a theory of pandering that was not alleged in the information.

"The 'preeminent' due process principle is that one accused of a crime must be 'informed of the nature and cause of the accusation.' (U.S. Const., Amend. VI.) Due process of law requires that an accused be advised of the charges against him so that he has a reasonable opportunity to prepare and present his defense and not be taken by surprise by evidence offered at his trial. [Citation.]" (*People v. Jones* (1990) 51 Cal.3d 294, 317.) Adequate notice may be provided in all or part by the accusatory pleading, the preliminary hearing, demurrer to the complaint, or pretrial discovery procedures. (*Ibid*.)

Count two alleged that defendant committed "the crime of pandering by procuring, in violation of Penal Code section 266i(a)(1), . . . [in that he] unlawfully procure[d] Cindy B., another person, for the purpose of prostitution." Section 266i, subdivision (a), provides in relevant part that anyone who does any of the enumerated acts is guilty of pandering. The relevant enumerated acts are described as follows:

> "(1) Procures another person for the purpose of prostitution.
>
> "(2) By promises, threats, violence, or by any device or scheme, causes, induces, persuades, or encourages another person to become a prostitute.
>
> "(3) Procures for another person a place as an inmate in a house of prostitution or as an inmate of any place in which prostitution is encouraged or allowed within this state.
>
> "(4) By promises, threats, violence, or by any device or scheme, causes, induces, persuades, or encourages an inmate of a house of prostitution, or any other place in which prostitution is encouraged or allowed, to remain therein as an inmate.
>
> "(5) By fraud or artifice, or by duress of persons or goods, or by abuse of any position of confidence or authority,

procures another person for the purpose of prostitution, or to enter any place in which prostitution is encouraged or allowed within this state, or to come into this state or leave this state for the purpose of prostitution.

"(6) Receives or gives, or agrees to receive or give, any money or thing of value for procuring, or attempting to procure, another person for the purpose of prostitution, or to come into this state or leave this state for the purpose of prostitution."

Defendant complains that the trial court instructed the jury that it could find defendant guilty of pandering, not only if it found that he committed the act of procuring described not only in section 266i, subdivision (a)(1), but in the alternative, any of the acts described in subdivisions (a)(2), (a)(3), (a)(4), or (a)(6). The court instructed with CALCRIM No. 1151 as follows[4]:

"The defendant is charged in Counts 2 and 8 with pandering in violation of Penal Code section 266ia1 [*sic*]. [¶] To prove that the defendant is guilty of pandering, the People must prove that: [¶] [(a)(1)] The defendant successfully persuaded and or procured Cindy B and or Beth R to become a prostitute. [¶] [(a)(2)] Or in the alternative the defendant used threats or violence to cause Cindy B and or Beth R to become a prostitute. [¶] [(a)(3)] Or in the alternative, the defendant arranged for Cindy B and or Beth R to be a prostitute in either a house of prostitution or any other place where prostitution is encouraged or allowed. [¶] [(a)(4)] Or in the alternative, the defendant received money or something of value in exchange for persuading or procuring Cindy B and or Beth

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[4] The reading of the instructions was not transcribed. Neither party contends that the trial court did not read them correctly. We thus quote from the written instructions as set forth in the clerk's transcript.

> R to be a prostitute. [¶][(a)(6)] Or in the alternative, the defendant used threats and or violence to cause Cindy B and or Beth R to remain as a prostitute in a house of prostitution or any other place where prostitution is encouraged or allowed. [¶] AND [¶] The defendant intended to influence Cindy B and or Beth R to be a prostitute."[5]

Defendant contends that he had no notice that the prosecution intended to prove that the procurement of Cindy was accomplished by means of threats or violence, by the receipt of money, or by arranging for Cindy to work in a house of prostitution, because the information did not allege those specific activities.

Defendant bases his contentions on language in the following cases, to the effect that each clause of section 266i provides for a separate and distinct pandering offense: *People v. Montgomery* (1941) 47 Cal.App.2d 1, 23 (*Montgomery*), overruled on other grounds in *People v. Zambia* (2011) 51 Cal.4th 965; *People v. Cimar* (1932) 127 Cal.App. 9, 15; *People v. Burns* (1925) 75 Cal.App. 84, 85; and *People v. Lawlor* (1913) 21 Cal.App. 63, 65-66.

Respondent contends that the subparts merely state different theories of pandering, and counters defendant's language with the following contrary language in *People v. Lax* (1971) 20 Cal.App.3d 481, 486: "The subdivisions of [section 266i] do not state different offenses but merely define the different circumstances under which the crime of pandering may be committed."

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[5] The verdict form read: "We . . . find [defendant] guilty of the crime of PANDERING of Cindy B., on or between March 1, 2015 and March 27, 2015, in violation of Penal Code section 266i(a)(1), a felony, as charged in Count 2 of the Information."

Resolution of that dispute is not dispositive here, as even if "it is true that each enumerated alternative constitutes a separate offense, in the sense that commission of only one alternative act is sufficient to constitute the offense of pandering, it does not necessarily follow that each alternative enumerated is exclusive of the others." (*Montgomery*, *supra*, 47 Cal.App.2d at p. 24.) "The commission of any one of the acts described in [section 266i, subdivision (a)] constitutes the offense of pandering; may involve the commission of other acts separately described therein; and, for this reason, a description of the one act may include the others. [Citation.]" (*People v. Charles* (1963) 218 Cal.App.2d 812, 816, citing *Montgomery*, at pp. 23-26.) Thus, "the term 'procure' as used in the first clause of section 1 of the statute necessarily implies the use of persuasion, solicitation, encouragement and assistance in achieving the unlawful purpose" (*Montgomery*, *supra*, at p. 12.) There is no difference in the meaning of those terms. (*Ibid*.)

In sum, "procure" is a general term which includes acts of persuading, encouraging, solicitation, or assistance. Some form of the act of persuading or encouraging appears in each of the relevant subparts of section 266i, subdivision (a), except subdivision (a)(6); however, as that subpart uses the term "procuring," it also includes persuading or encouraging. The allegation in count 2 that defendant unlawfully procured Cindy for the purpose of prostitution thus put defendant on notice that the prosecution would seek to prove that the procuring was accomplished by some form of persuasion, encouragement, solicitation, or assistance.

The prosecutor did not argue to the jury that defendant persuaded Cindy to become a prostitute with threats or violence; the evidence of threats and violence came from Beth's testimony about her own relationship with defendant. On the second day of

the seven-day trial, Cindy testified that defendant procured for her a place to meet clients in which prostitution was encouraged or allowed. Although the challenged instruction's ambiguous "and/or" language failed to clearly limit threats or violence to the counts naming Beth as the victim, the jury was otherwise instructed that if one of the alternative pandering methods did not apply to one of the victims, the jury should not consider it as to that victim.

Moreover, the court and counsel discussed the issue, and defendant did not object to the pandering instruction. Indeed, defense counsel expressly agreed to the language suggested by the prosecutor, and after the trial court read the modified instruction, stated, "I believe that that would be correct." After counsel and the court discussed a different instruction, defense counsel asked whether the court intended to give a single pandering instruction naming both victims, and suggested that there could be "a risk the jury would infer that it is a straight up and down vote on each." Counsel was satisfied by the court's agreement to instruct the jury that it must make a determination as to each victim separately, and to provide separate verdict forms for each victim on each count.

We agree with respondent that as the instruction was discussed, modified, and agreed upon before the prosecutor rested her case-in-chief and the defendant presented his case, defendant's claim that he was "ambushed" rings hollow.

We also agree that defendant's failure to object and his approval of the language of the instruction amounted to an implied consent to have the jury consider various acts of pandering, as set forth in section 266i, subdivisions (a)(1), (a)(2), (a)(3), (a)(4), and (a)(6). "[T]he so-called 'informal amendment doctrine' . . . which constitutes a judicial recognition that an information may be amended without written alterations to it.

[Citation.] Generally, the purpose of an accusatory pleading is "'to provide the accused with reasonable notice of the charges.'" [Citations.] Nonetheless, the Penal Code permits accusatory pleadings to be amended at any stage of the proceedings 'for any defect or insufficiency' (§ 1009), and bars reversal of a criminal judgment 'by reason of any defect or imperfection in matter of form which does not prejudice a substantial right of the defendant upon the merits' (§ 960). In view of these provisions, '[t]he proceedings in the trial court may constitute an informal amendment of the accusatory pleading, when the defendant's conduct or circumstances created by him amount to an implied consent to the amendment.' [Citation.]" (*People v. Whitmer* (2014) 230 Cal.App.4th 906, 919-920, fn. omitted; see also *People v. Sandoval* (2006) 140 Cal.App.4th 111, 133-134.) "[A] defendant [who] expressly or impliedly consents to have the trier of fact consider a nonincluded offense . . . 'cannot legitimately claim lack of notice . . . .' [Citations.]" (*People v. Toro* (1989) 47 Cal.3d 966, 973, disapproved on another ground in *People v. Guiuan* (1998) 18 Cal.4th 558, 568, fn. 3.) "[I]t has been uniformly held that where an information is amended at trial to charge an additional offense, and the defendant neither objects nor moves for a continuance, an objection based on lack of notice may not be raised on appeal. [Citations.] There is no difference in principle between adding a new offense at trial by amending the information and adding the same charge by verdict forms and jury instructions." (*Toro*, *supra*, at p. 976, fn. omitted.)

Defendant relies on *People v. Arias* (2010) 182 Cal.App.4th 1009, 1017-1019, where unlike here, there was no discussion with the trial court, that would have given defendant sufficient notice of a variance between the information and the instructions and verdict form. At the same time, defendant recognizes that the California Supreme Court has held that such discussions may be

sufficient to give a defendant the opportunity to object to a variance. (See *People v. Houston* (2012) 54 Cal.4th 1186, 1229-1230 [distinguishing *Arias*].) However, defendant attempts to minimize counsel's discussion with the court in this case by arguing only that consent cannot be implied from his failure to object. The discussion was not minimal; it covered three pages of transcript, and the modified instruction was read to counsel, clearly describing the various theories or offenses of pandering. Defense counsel suggested additional language which was added to the instruction. As the defense agreed to the proposed instruction and did not claim unfair surprise, or request a continuance or additional discovery, we conclude that defendant agreed to have the trial proceed on other theories or offenses of pandering.

Forfeiture notwithstanding, any variance between pleading and the proof should be disregarded unless it is a material variance. (*People v. La Marr* (1942) 20 Cal.2d 705, 711.) "The test of the materiality of a variance is whether the indictment or information so fully and correctly informs the defendant of the criminal act with which he is charged that, taking into consideration the proof which is introduced against him, he is not misled in making his defense, or placed in danger of being twice put in jeopardy for the same offense. [Citations.]" (*Ibid*; see also *People v. Maury* (2003) 30 Cal.4th 342, 427-428.)

Defendant rightly does not claim that the variance placed him in danger of double jeopardy, as a single pandering conviction may be based on one or more of the theories stated in section 266i, subdivision (a). (See *People v. Charles*, *supra*, 218 Cal.App.2d at p. 816.)

Defendant does contend, however, that he was denied the opportunity to formulate a credible defense. Defendant's defense was that the prosecution rested entirely on the statements of

Beth and Cindy, both of whom were not credible. Defendant does not suggest what defense he might have devised without the instruction, or just how he might have been misled into relying on an inapplicable defense. As the prosecution had not yet rested and the defense had not yet presented its case when the instruction was discussed, there was ample time to object, request a continuance and further discovery, and to reconsider the chosen defense. We conclude that the variance did not impede defendant's ability to mount a defense, and was thus immaterial.

Further, defendant did not suffer prejudice due to the inapplicability of some parts of the instruction. The trial court directed the jury to make a determination as to each victim separately, and the court further instructed as follows: "Some of these instructions may not apply, depending on your findings about the facts of the case. Do not assume just because I give a particular instruction that I am suggesting anything about the facts. After you have decided what the facts are, follow the instructions that do apply to the facts as you find them." (CALCRIM No. 200.) We presume the jury followed this instruction. (*People v. Sanchez* (2001) 26 Cal.4th 834, 852.)

II. Substantial evidence of procurement

Defendant claims that his conviction of count 2 must be reversed due to the absence of substantial evidence that defendant made any affirmative effort to procure Cindy as a prostitute. Defendant argues that the evidence showed only that Cindy approached defendant, told him of her financial troubles, and then, when her situation worsened, contacted defendant in order to enter the sex trade.

"The proper test for determining a claim of insufficiency of evidence in a criminal case is whether, on the entire record, a rational trier of fact could find the defendant guilty beyond a

reasonable doubt. [Citations.] On appeal, we must view the evidence in the light most favorable to the People and must presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence. [Citation.]" (*People v. Jones, supra*, 51 Cal.3d at p. 314.) "The same standard applies when the conviction rests primarily on circumstantial evidence. [Citation.]" (*People v. Kraft* (2000) 23 Cal.4th 978, 1053.) "An appellate court must accept logical inferences that the jury might have drawn from the circumstantial evidence. [Citation.]" (*People v. Maury, supra*, 30 Cal.4th at p. 396.) The testimony of a single witness is sufficient to support a conviction, so long as the testimony is not physically impossible or inherently improbable. (*People v. Young* (2005) 34 Cal.4th 1149, 1181.)

"[B]ecause 'we *must* begin with the presumption that the evidence . . . *was* sufficient,' it is defendant, as the appellant, who 'bears the burden of convincing us otherwise.' [Citation.]" (*People v. Hamlin* (2009) 170 Cal.App.4th 1412, 1430.) Reversal on a substantial evidence ground "is unwarranted unless it appears 'that upon no hypothesis whatever is there sufficient substantial evidence to support [the conviction].' [Citation.]" (*People v. Bolin* (1998) 18 Cal.4th 297, 331.)

Defendant, who was convicted of pandering, in violation of section 266i, subdivision (a)(1), by procuring Cindy for the purpose of prostitution, contends that "Cindy independently made that choice and merely solicited [defendant's] assistance in following through on her plan to achieve financial betterment through sex work." As defendant supports this contention by summarizing the evidence in the light most favorable to his arguments, it is first necessary to reject defendant's effort to redefine the word "procure" as "actively lure" or as "actively obtaining or acquiring an otherwise indifferent or disinclined individual and inducing that person into prostitution."

The meaning of the term "procure" is well established. It "means assisting, inducing, persuading or encouraging" a person to engage in prostitution. (*People v. Schultz* (1965) 238 Cal.App.2d 804, 812; *Montgomery*, *supra*, 47 Cal.App.2d at p. 11.) Our Supreme Court has discerned no legislative intent to narrowly define or to restrict the acts that constitute pandering, so long as they were committed with the specific intent to persuade or otherwise influence the victim to become a prostitute. (*People v. Zambia*, *supra*, 51 Cal.4th at p. 980.) Nor should "another person" be given a restrictive construction; thus, a person who is already a prostitute may be the victim of pandering. (*Id*. at p. 980.) "It is immaterial to a charge of pandering '"whether the [person] 'procured' is an innocent girl or a hardened prostitute of long experience; nor is it material that the procurement was either at her request or upon the defendant's own initiative."' [Citation.]" (*People v. Caravella* (1970) 5 Cal.App.3d 931, 933; *Montgomery*, *supra*, at p. 12.) Furthermore, the victim's willingness or consent is immaterial. (*Montgomery*, at pp. 10-11.) Contrary to defendant's arguments, it follows that the person procured need not be "otherwise indifferent or disinclined," and that the defendant need not "actively lure" the person into the sex trade. With these principles in mind, we turn to the evidence and the inferences reasonably drawn therefrom which support a finding that defendant assisted, induced, persuaded, or encouraged Cindy to engage in prostitution, with the specific intent to persuade or otherwise influence her to become a prostitute.

Officer Phillips testified that pimps typically seek out women who have low self esteem, substance abuse problems, or financial pressures. Cindy fit that profile. She had no job, no means of income, and was under pressure to pay child support, struggled with alcohol, and was mentally ill with physical

handicaps. After knowing defendant for several years Cindy told him about her financial problems, but did not ask his advice. Over the years prior to 2015, defendant told her that he could help her earn money, because he had some men he thought would really like her, or something to that effect. In early 2015, she called defendant and agreed to meet with men to have sex in exchange for money, and to share 50 percent of the proceeds with defendant. Defendant set the prices, arranged her dates, and delivered her to the motel. When Cindy decided to stop the practice defendant induced her to return to the motel to engage in acts of prostitution by threatening to drag her out of her AA meeting.

Defendant summarizes the facts of several published opinions in order to demonstrate either that the evidence was stronger in those cases than here, or if weaker, that the facts are distinguishable. "When we decide issues of sufficiency of evidence, comparison with other cases is of limited utility, since each case necessarily depends on its own facts. [Citation.]" (*People v. Thomas* (1992) 2 Cal.4th 489, 516.) On the particular facts of this case, we conclude that defendant encouraged Cindy to engage in prostitution, and we infer from his encouragement that he did so with the specific intent to persuade or otherwise influence her to become a prostitute.

III. Modified CALCRIM No. 1151

Defendant contends that the trial court erred in instructing the jury regarding the alternate theory of pandering set forth in section 266i, subdivision (a)(6), which provides that pandering may consist of "[r]eceiv[ing] or giv[ing], or agree[ing] to receive or give, any money or thing of value for procuring, or attempting to procure, another person for the purpose of prostitution."

The instruction, a modified version of CALCRIM No. 1511, is the instruction we have discussed above in part I. Defendant

challenges that portion of the instruction which reads, "To prove that the defendant is guilty of pandering, the People must prove that . . . [¶] . . . in the alternative, the defendant received money or something of value in exchange for persuading or procuring Cindy B and or Beth R to be a prostitute." Relying on *People v. Charles*, *supra*, 218 Cal.App.2d at page 818, which involved a similar provision under former section 266i, subdivision (f), defendant argues that the evidence must show that the money or something of value was received from a third person, not the prostitute.

The instruction was given as an alternative to other theories of pandering. Defendant relies on *People v. Guiton* (1993) 4 Cal.4th 1116, 1129, in which the Supreme Court held that it is error to give an instruction which, although correctly stating the law, has no application to the facts of the case. However, the court also held that the error does not call for reversal "unless a review of the entire record affirmatively demonstrates a reasonable probability that the jury in fact found the defendant guilty solely on the unsupported theory." (*Id.* at p. 1130.)

Defendant contends that the jury most likely relied on the inapplicable theory, because the evidence showed that defendant did not procure Cindy, but rather, Cindy sought him out. Defendant also argues that the threat to drag her out of an AA meeting did not count because the motel was not a house of prostitution, and because the prosecutor argued in summation: "'Or, the defendant received money in exchange for persuading, procuring Cindy B. to be a prostitute.' Cindy was so desperate, so unbelievably desperate for money that she essentially entered into a business deal with [defendant]. Okay. I'll do what you say. 50/50, that sounds great."

Our review of the record demonstrates that substantial evidence supports a pandering conviction on multiple theories other than the unsupported theory set forth in section 266i, subdivision (a)(6), thus eliminating any reasonable probability that the jury relied solely on the inapplicable theory. We have already rejected defendant's substantial evidence contention in part II above, and here we reject it again. Ample evidence showed that defendant procured Cindy within the meaning of section 266i, subdivision (a)(1). And as respondent aptly observes, if the jury found that defendant received the agreed 50/50 share, it necessarily found that his promise to share the proceeds successfully accomplished the procurement of Cindy for prostitution under the theory found in subdivision (a)(1).[6]

We reject defendant's contention that the threat to drag Cindy out of her AA meeting unless she went to the motel was insufficient to prove he used a threat to cause her to remain in a house of prostitution. (See § 266i, subd. (a)(4).) Defendant's contention is based upon his own unsupported definitions of "inmate" and "house of prostitution." In fact, this theory applies to any place where prostitution is encouraged or allowed, and an "inmate" need not live there, but need only enter for purposes of prostitution. (See *People v. Jan You* (1914) 26 Cal.App. 148, 149.) Thus, it can be someone's home, a motel or hotel room, or even a taxicab or tent, among other places. (*People v. Schultz, supra*, 238 Cal.App.2d at pp. 812-813.) Defendant's contention that

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[6] In addition, the theory set forth in section 266i, subdivision (a)(2), is supported by evidence of defendant's promises that Cindy would make a lot of money and that he would share half the proceeds with her. However, the trial court omitted "promises" from that part of the modified instruction, stating only, "Or in the alternative the defendant used threats or violence to cause Cindy B and or Beth R to become a prostitute."

prostitution was not encouraged at the motel or in Beth's home is refuted by the evidence that clients were invited there for elicit appointments with Cindy.

Further, the trial court also instructed the jury with regard to the theory of pandering set forth in section 266i, subdivision (a)(3), as follows: "Or in the alternative, the defendant arranged for Cindy B and or Beth R to be a prostitute in either a house of prostitution or any other place where prostitution is encouraged or allowed." Beth testified that she rented the motel room for Cindy with her credit card at the direction of defendant, who later reimbursed her with cash.

In sum, three of the five statutory theories as instructed by the trial court were established by substantial evidence. It is not reasonably probable that the jury relied solely on a theory that was unsupported by substantial evidence, particularly in view of the court's instruction to make a determination as to each victim separately, as well as the court's instruction with CALCRIM No. 200, to follow only those instructions which apply to the facts found by the jury to be true. We presume the jury followed this instruction. (*People v. Sanchez*, *supra*, 26 Cal.4th at p. 852.)

Finally, we reject defendant's contention that *all* instructional error must be reviewed under the test of *Chapman v. California* (1967) 386 U.S. 18, 24 (harmless beyond a reasonable doubt). Defendant does not contend or show that the instruction omitted an element of the offense of pandering, and therefore his reliance on *Neder v. United States* (1999) 527 U.S. 1, is misplaced. (See *People v. Palmer* (2005) 133 Cal.App.4th 1141.) The test which applies to misdirection of the jury not amounting to federal constitutional error is the test of *People v. Watson* (1956) 46 Cal.2d 818, 836 (*Watson*), which asks whether there was a reasonable probability of a different result absent the error. (*Palmer*, at p. 1141.) We conclude there was no such

reasonable probability here, as the testimony of Cindy, coupled with Officer Phillips's expert testimony and the evidence revealed in the undercover operation, provided overwhelming evidence that defendant pandered by procuring Cindy for prostitution, encouraging her to become a prostitute with promises, and persuading her by means of a threat to remain in a place where prostitution is encouraged or allowed.

IV. Motion to suppress cell phone evidence

Defendant contends that the trial court erred in denying his pretrial motion to suppress evidence under section 1538.5, specifically the statements made by defendant at the time of his detention, as well as the evidence found on his person or in his automobile, to wit: a cellular telephone and its contents; a semiautomatic Sig Sauer handgun; handcuffs; and a windshield mounted police-type light bar. On appeal, defendant challenges only the testimony regarding the conversation between Sergeant Monterrosa and Officer Phillips after the sergeant answered Officer Phillips's call to defendant's cell phone.

"'The standard of appellate review of a trial court's ruling on a motion to suppress is well established. We defer to the trial court's factual findings, express or implied, where supported by substantial evidence. In determining whether, on the facts so found, the search or seizure was reasonable under the Fourth Amendment, we exercise our independent judgment. [Citations.]' [Citations.]" (*People v. Redd* (2010) 48 Cal.4th 691, 719.)

At the motion hearing, three LAPD officers testified regarding defendant's detention. Officer Vukovic, who was in uniform, working alone in a marked black-and-white patrol car, was aware that another unit was following defendant's black SUV, when he saw the SUV parked at a curb in front of a church. He then saw defendant emerge from the car onto the sidewalk. Officer Vukovic parked nearby and recognized defendant as he

walked toward the officer, as they had many friendly encounters over the years.

Sergeant Monterrosa, who arrived as defendant was getting out of the SUV and Officer Vukovic was parking, saw Officer Vukovic conversing with defendant, who was detained but not in handcuffs. Sergeant Monterrosa explained that he was conducting a prostitution investigation and asked defendant whether he had any cell phones with him. After defendant replied that he had one on him, Sergeant Monterrosa contacted Officer Phillips at the motel. Officer Phillips then called the number of the cell phone that had been used to make the appointment and to give him directions to the motel. When the phone in defendant's possession did not ring, Sergeant Monterrosa asked defendant about other phones, and was directed by defendant to other phones in his car. At defendant's car, the sergeant saw through the window, two phones on either the passenger seat or the center console. He asked Officer Phillips to again call the number. As he continued to look through the closed window from outside the car, Sergeant Monterrosa saw one of the phones flashing an incoming call. He then opened the unlocked passenger door, answered the phone and spoke to Officer Phillips, who confirmed he had again entered the same number used earlier. Sergeant Monterrosa retrieved the phone and remained next to the SUV. Although the police helicopter was overhead, no other officers had yet reached Officer Vukovic and Sergeant Monterrosa. Defendant, who continued to be detained, was neither handcuffed nor under arrest.

Officer Vukovic then approached Sergeant Monterrosa with the information from defendant that there was a weapon inside the car. Sergeant Monterrosa then recovered a loaded .40-caliber handgun, and while retrieving it, saw the other seized items in

plain view. By then other officers had arrived, and Officer Francis De La Victoria placed defendant under arrest. Defendant was then handcuffed and searched, incident to the arrest. In defendant's pockets were a replica police badge, two bundles of United States currency, and a wallet.

The court denied the motion to suppress. The court found that Sergeant Monterrosa saw the ringing cell phone in plain view while standing on a public street, and the fact that he saw it ringing inside the car just after Officer Phillips was told to enter the number, provided exigent circumstances justifying the immediate preservation of the evidence.

Defendant acknowledges Sergeant Monterrosa observed the cell phones in plain view through the passenger window from a position where he had the right to be, and agrees that such conduct does not constitute a search. (See *Minnesota v. Dickerson* (1993) 508 U.S. 366, 375; *People v. Lomax* (2010) 49 Cal.4th 530, 564.) Once Sergeant Monterrosa saw the ringing or flashing cell phone at the moment he knew that Officer Phillips was calling, the incriminating character of the phone was apparent and justified its warrantless seizure. (See *Horton v. California* (1990) 496 U.S. 128, 135-136.)

Though defendant does not challenge the seizure of the cell phone, he contends that the officers should have obtained a warrant before answering Officer Phillips's call on that phone. He relies primarily on *Riley v. California* (2014) __ U.S. __ [134 S.Ct. 2473, 2494-2495], which held that, absent exigent circumstances, warrantless searches of digital data stored in the memory of a cell phone, or of telephone numbers stored in an analog phone, violate the Fourth Amendment prohibition against unreasonable searches, even when a cell phone has been seized incident to arrest. Here, since Sergeant Monterrosa did not

search electronic data or numbers stored in defendant's cell phone, *Riley* is inapplicable.

Nevertheless, when police answer another person's telephone, it is a search. (*People v. Ledesma* (2006) 39 Cal.4th 641, 705.) The failure to obtain a warrant is excused however, where the officers have specific information indicating that the phone is being used for illicit activity and there are exigent circumstances such as the need to preserve evidence. (*Id*. at p. 704; *People v. Sandoval* (1966) 65 Cal.2d 303, 307-308.) A lawfully seized object may be subject to a brief perusal not amounting to an "'exploratory rummaging in a person's belongings.' [Citations.] If no probable cause arises within a reasonable time, the property must be returned. [Citation.]" (*People v. Clark* (1989) 212 Cal.App.3d 1233, 1239.) Here, defendant was detained but not under arrest and not in handcuffs, and had not yet informed the officers of the firearm in his car. Though the officers had a reasonable suspicion that the call came from Officer Phillips, it was not a certainty. As defense counsel argued, the call could have been from anyone. Answering the phone thus provided probable cause for defendant's arrest for pimping. If Sergeant Monterrosa had not answered the phone, there would be little basis to arrest defendant, the phone would have been returned, and the evidence could have been destroyed.

Regardless, we agree with respondent that if error, the admission of the answered call was harmless under any standard. The ringing of the phone just as Officer Phillips was calling that number would still have been admissible, providing circumstantial evidence of its use in the illicit operation. Cindy had been detained and she and Beth were cooperating with police. Their testimony, Officer Phillips's testimony, and the evidence revealed by the undercover operation prior to the answering of the phone call provided overwhelming evidence of

defendant's guilt of pimping and pandering. Contrary to defendant's claim, Cindy's testimony needed no corroboration. (*People v. Young*, *supra*, 34 Cal.4th at p. 1181.) And as we determine below, it amply corroborated Beth's testimony.[7] Far from weakening Cindy's credibility, as defendant argues, her mental health issues and alcoholism showed her to be precisely the sort of victim who would become prey to a pimp. We conclude beyond a reasonable doubt that a rational jury would have found defendant guilty absent admission of Sergeant Monterrosa's act of answering the cell phone.

V. Accomplice instruction

Defendant contends that the trial court should have instructed the jury, sua sponte, with CALCRIM No. 334, which tells the jury that the defendant may not be convicted on the testimony of an accomplice alone, without some corroborating evidence connecting him to the crime, and to view accomplice testimony with caution.[8]

"'If there is evidence from which the jury could find that a witness is an accomplice to the crime charged, the court must instruct the jury on accomplice testimony. [Citation.] But if the evidence is insufficient as a matter of law to support a finding that a witness is an accomplice, the trial court may make that

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[7] See section V, *post*.

[8] The instruction is derived from section 1111, which provides: "A conviction cannot be had upon the testimony of an accomplice unless it be corroborated by such other evidence as shall tend to connect the defendant with the commission of the offense; and the corroboration is not sufficient if it merely shows the commission of the offense or the circumstances thereof. An accomplice is hereby defined as one who is liable to prosecution for the identical offense charged against the defendant on trial in the cause in which the testimony of the accomplice is given."

determination and, in that situation, need not instruct the jury on accomplice testimony.' [Citation.]" (*People v. Gonzales* (2011) 52 Cal.4th 254, 302 (*Gonzales*).)

Defendant contends that Beth was an accomplice, and that her testimony was "critical" in the pimping and pandering counts involving Cindy. Respondent counters that evidence that Beth was an accomplice was insufficient to justify the giving of the instruction, and that assuming she was an accomplice, there was sufficient corroborating evidence to prove the pimping and pandering counts involving Cindy.

However, "[a] trial court's failure to instruct on accomplice liability under [Evidence Code] section 1111 is harmless if there is sufficient corroborating evidence in the record.' [Citation.] 'Corroborating evidence may be slight, may be entirely circumstantial, and need not be sufficient to establish every element of the charged offense.' [Citation.] The evidence is 'sufficient if it tends to connect the defendant with the crime in such a way as to satisfy the jury that the accomplice is telling the truth.' [Citation.]" (*Gonzales*, *supra*, 52 Cal.4th at p. 303.) Indeed, this harmless error analysis is less stringent than the test of *Watson*, which would require a determination of whether a different result would have been reasonably probable absent the alleged error. (*Gonzales*, at p. 303.)

Assuming that the trial court was required to give the instruction, its failure to do so was harmless under any standard. Beth's testimony was not "critical" to the proof of the counts involving Cindy, as defendant argues. Beth gave no testimony relating to defendant's initial procurement of Cindy for prostitution, or his threat to drag her from her AA meeting if she did not work at the motel. Beth's testimony regarding Cindy related only to the pimping count. Pimping is committed when a "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 the person's prostitution . . . ." (§ 266h, subd. (b).) Beth's testimony regarding these elements was minimal. Indeed, defendant concedes that "the prosecution's case rested almost exclusively on Cindy's testimony." During cross-examination, Beth stated she rented a motel room for Cindy on 10 or 12 occasions, but did not use the phone for Cindy's appointments. Since Cindy did not work the phone well, defendant took care of it. Beth rented the room on March 27 and approximately two or three times that month, whenever told to do so by defendant. Beth denied that Cindy worked for her.

Although unnecessary, Beth's testimony was amply corroborated by Cindy's extensive testimony that defendant made her appointments, and in March, approximately 24 men, a average of four men per day, paid to have sex with her, while defendant remained nearby and collected the money afterward. Cindy's testimony was in turn bolstered by the circumstances of defendant's arrest, his presence in the motel parking lot and his possession of the cell phone used to arrange the appointment with Officer Phillips. We thus conclude beyond a reasonable doubt that if the jury had viewed Beth's testimony with caution or rejected it altogether, the result would have been no different.

VI. Battery instruction

Defendant contends that battery is a lesser included offence of felony child abuse, and that the trial court erred in failing to give a sua sponte jury instruction on that point.

"'We apply the independent or de novo standard of review to the failure by the trial court to instruct on an assertedly lesser included offense. [Citation.] A trial court must instruct the jury sua sponte on a lesser included offense only if there is substantial evidence, "'that is, evidence that a reasonable jury could find persuasive'" [citation], which, if accepted, "'would absolve [the]

defendant from guilt of the greater offense' [citation] *but not the lesser*" [citations].' [Citation.] "[A] lesser offense is necessarily included in a greater offense if either the statutory elements of the greater offense, or the facts actually alleged in the accusatory pleading, include all the elements of the lesser offense, such that the greater cannot be committed without also committing the lesser. [Citations.]' [Citation.]" (*People v. Licas* (2007) 41 Cal.4th 362, 366.)

Defendant was charged in count 12, with a violation of section 273a, subdivision (a), in May 2014, which provides that felony child abuse is committed by anyone "who, under circumstances or conditions likely to produce great bodily harm or death, willfully causes or permits any child to suffer, or inflicts thereon unjustifiable physical pain or mental suffering, or having the care or custody of any child, willfully causes or permits the person or health of that child to be injured, or willfully causes or permits that child to be placed in a situation where his or her person or health is endangered . . ." (§ 273a, subd. (a).)

"A battery is any willful and unlawful use of force or violence upon the person of another." (§ 242.) "[A] battery cannot be accomplished without a touching of the victim. [Citation.]" (*People v. Marshall* (1997) 15 Cal.4th 1, 38.) Thus, battery cannot be a lesser included offense of a greater crime unless it is *impossible* to commit the greater crime without also committing battery. (*Ibid.*) "[A] violation of [section 273a, subdivision (a)] can occur in a wide variety of situations: the definition broadly includes both active and passive conduct, i.e., child abuse by direct assault and child endangering by extreme neglect." (*People v. Smith* (1984) 35 Cal.3d 798, 806.) The statute "'intended to protect a child from an abusive situation in which the probability of serious injury is great.' [Citation.] '[T]here is no requirement that the actual result be great bodily injury.' [Citation.]" (*People*

v. Sargent (1999) 19 Cal.4th 1206, 1216.) Thus, felony child abuse can be committed by means of a battery, but it may also be committed without a touching, for example, by keeping dangerous chemicals within a child's reach, or a failure to provide proper nutrition or medical care. (See *People v. Valdez* (2002) 27 Cal.4th 778, 784-786, 789.) Battery is thus not a lesser included offense of felony child abuse, and the trial court was under no duty to give a battery instruction sua sponte.

VII. Misdemeanor child abuse instruction

Defendant contends that the trial court erred in failing to give a sua sponte jury instruction on misdemeanor child abuse as a lesser included offense of felony child abuse.

It is misdemeanor child abuse when the conduct described in section 273a, subdivision (a), is committed "under circumstances or conditions *other than* those likely to produce great bodily harm or death." (§ 273a, subd. (b), italics added.) Misdemeanor child abuse is a lesser included offense of felony child abuse. (*People v. Moussabeck* (2007) 157 Cal.App.4th 975, 980.) Thus, the trial court was required to give an instruction on misdemeanor child abuse if the theory was supported by substantial evidence. (*People v. Licas*, *supra*, 41 Cal.4th at p. 366.)

"[T]he 'substantial' evidence required to trigger the duty to instruct on . . . lesser offenses is not merely '*any* evidence . . . no matter how weak' [citation], but rather '"evidence from which a jury composed of reasonable [persons] could . . . conclude[]"' that the lesser offense, but not the greater, was committed. [Citations.]" (*People v. Cruz* (2008) 44 Cal.4th 636, 664; see also *People v. Breverman* (1998) 19 Cal.4th 142, 154, 162.) Thus, the court was required to instruct on misdemeanor child abuse in this case only if there was substantial evidence from which the jury could find that the circumstances or conditions of the beating

defendant gave Jeremiah were *not* such that the beating was likely to produce great bodily harm or death.

It is well established that the use of hands or fists alone may be found to constitute a "'means of force likely to produce great bodily injury.'" (*People v. Aguilar* (1997) 16 Cal.4th 1023, 1028.) Defendant used his hands and fists to punch Jeremiah in the chest and the kidneys up to 10 times, with such force that it knocked him from one end of the room to the other. A blow to the kidney caused Jeremiah to fall, urinate on himself, and start to lose consciousness. Nevertheless, defendant continued to hit him, causing Jeremiah pain and fear. Jeremiah was 14 years old at the time, and thus most likely much smaller than defendant, a grown man. Defendant had a violent temper that sometimes led him to draw a firearm on the object of his anger. As defendant beat Jeremiah, he said, "I will kill you." We cannot conclude that beating a child under such circumstances was unlikely to produce great bodily harm or death.

Defendant points to the absence of visible bruises and argues that Jeremiah had no need for medical care. Neither Tonya'n nor Jeremiah testified that Jeremiah did not need medical care; Tonya'n testified only that her motivation for not seeking help was her fear for her life. The absence of visible bruises was "some evidence" but not substantial evidence that Jeremiah was not injured internally, or that the manner of the battery was unlikely to produce great bodily injury.

As no substantial evidence demonstrates that the circumstances or conditions of the beating were of a kind *not* likely to produce great bodily harm or death, the trial court was not required to instruct sua sponte on misdemeanor child abuse. Further, if the trial court had erred, we would find the error harmless under any standard, as we conclude beyond a reasonable doubt that no rational jury, after hearing the

overwhelming evidence summarized above, would fail to find that the brutality of that beating created circumstances likely to produce great bodily harm or death.

VIII. Criminal threats

Defendant contends that "section 422 is unconstitutionally vague because it provides insufficient guidelines for law enforcement and risks arbitrary and discriminatory enforcement," and that his conviction of making a criminal threat to Steven R., as charged in count 11, must therefore be reversed.

"A law is void for vagueness only if it 'fails to provide adequate notice to those who must observe its strictures' and '"impermissibly delegates basic policy matters to police [officers], judges, and juries for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application."' [Citations.]" (*People v. Rubalcava* (2000) 23 Cal.4th 322, 332.) "A statute is presumed to be constitutional unless its unconstitutionality clearly and unmistakably appears, all intendments favor its validity, and . . . the burden of overcoming the presumption of constitutionality is upon the assailant [citation] . . . ." (*People v. Aguiar* (1968) 257 Cal.App.2d 597, 601.) To meet his burden, defendant "'must do more than identify some instances in which the application of the statute may be uncertain or ambiguous; he must demonstrate that "the law is impermissibly vague *in all of its applications*."' [Citation.]' [Citation.] Stated differently, "'[a] statute is not void simply because there may be difficulty in determining whether some marginal or hypothetical act is covered by its language." [Citation.]' [Citation.]" (*People v. Morgan* (2007) 42 Cal.4th 593, 605-606.)

A violation of section 422 is committed by "[a]ny person who willfully threatens to commit a crime which will result in death or great bodily injury to another person, with the specific

intent that the statement, made verbally, . . . is to be taken as a threat, even if there is no intent of actually carrying it out, which, on its face and under the circumstances in which it is made, is so unequivocal, unconditional, immediate, and specific as to convey to the person threatened, a gravity of purpose and an immediate prospect of execution of the threat, and thereby causes that person reasonably to be in sustained fear for his or her own safety or for his or her immediate family's safety." (§ 422, subd. (a).)

Defendant argues that the definition of criminal threat "as one that threatens commission of a crime 'which will result in death or great bodily injury to another person,'. . . is unconstitutionally vague because it calls upon law enforcement to evaluate the nature of threats and to determine, on a case by case basis, and under a myriad of circumstances, whether a threat is of the type which will result in great bodily injury or death." Defendant also reasons that "by linking the threat to a crime causing death or great bodily injury, it is unclear to the general public what type of threats are illegal, because of uncertainties as to what threatened crimes are of the type to result in death or great bodily injury."

Division 5 of this court rejected nearly identical contentions in *People v. Maciel* (2003) 113 Cal.App.4th 679 (*Maciel*), when it held that the statute was not unconstitutionally vague, as the phrase "'willfully threatens to commit a crime which will result in death or great bodily injury'" must be construed in context, "taking into account the other elements that must be established in order for the statute to be triggered." (*Id.* at p. 685.) Like *Maciel*, defendant relies on *State v. Hamilton* (Neb. 1983) 340 N.W.2d 397 (*Hamilton*), a Nebraska case which found that state's criminal threat statute to be unconstitutionally vague. (See *Maciel*, *supra*, at p. 686, fn. 3.) The *Maciel* court found that

although the Nebraska statute contained language similar to the language in section 422, it did not require the victim to take the threat seriously, or include any intent element; and the court pointed out that after the statute was amended to include such language, the Nebraska Supreme Court concluded that this revised statute was not unconstitutionally vague. (*Maciel, supra*, at p. 686, fn. 3, citing *State v. Schmailzl* (1993) 243 Neb. 734, 735.)

Defendant argues that *Maciel*'s analysis was flawed because section 422 closely resembles the former Nebraska statute, and because the Nebraska Supreme Court did not base its decision on the addition of the language cited in *Maciel*. We disagree. The Nebraska statute was vague because it did not contain an intent element. (See *Hamilton*, *supra*, 340 N.W.2d at pp. 399-400.) The Nebraska Supreme Court held that the additional element of intent ("intent to terrorize another") saved the revised statute from its previous defect. (*State v. Schmailzl* , *supra*, 243 Neb. at p. 737.)

Section 422 includes not only an intent element ("the specific intent that the statement . . . is to be taken as a threat"), it includes other detailed requirements. Thus, "taking into account the other elements that must be established," the *Maciel* court explained: "[S]ection 422 does not criminalize all threats of crimes that will result in death or great bodily injury, leaving to law enforcement to determine those threats that will result in arrest. Instead, the statute criminalizes only those threats that are 'so unequivocal, unconditional, immediate, and specific as to convey to the person threatened, a gravity of purpose and an immediate prospect of execution of the threat, and thereby cause[] that person reasonably to be in sustained fear for his or her own safety or for his or her immediate family's safety.' This language means that not all threats of crimes that will result in

great bodily injury are criminalized, but only serious threats, intentionally made, of crimes likely to result in immediate great bodily injury. Moreover, the statute also includes a specific intent element: 'with the specific intent that the statement . . . is to be taken as a threat.' A statute that criminalizes threats of crimes that will result in [death or] great bodily injury with the intent to place the victim in sustained fear for personal safety or the safety of immediate family members adequately advises an individual and law enforcement of the conduct prohibited by the statute. One who willfully threatens violence against another, intending that the victim take the threat seriously and be fearful, cannot reasonably claim to be unaware that the conduct was prohibited." (*Maciel*, *supra*, 113 Cal.App.4th at p. 685.) We agree with *Maciel*, and conclude that defendant has failed to meet his burden to demonstrate that section 422 is impermissibly vague.

IX. Elements of the threatened crime

Defendant contends that the trial court erred in using CALCRIM No. 1300, to instruct the jury with regard to the elements of a violation of section 422, because the instruction does not state the elements of the allegedly threatened crime.

Defendant recognizes that an identical claim was addressed and rejected in *People v. Butler* (2000) 85 Cal.App.4th 745, 755 (*Butler*), but invites us to disagree with *Butler* because there are many other crimes requiring instruction on a target offense, such as felony murder, burglary, and assault with intent to commit rape. "Target offense" means "intended crime." (*People v. Medina* (2009) 46 Cal.4th 913, 920.) The specific intent required by section 422 is not an intent to carry out the threatened crime, but an intent that the victim receive and understand the threat

as such. (*People v. Wilson* (2010) 186 Cal.App.4th 789, 806.)[9] Thus, the threatened crime is not a target offense.

Butler observed that as it is immaterial whether defendant intends to carry out his threat, instructing on any intent element of the threatened crime would most likely serve only to confuse the jury. (*Butler*, *supra*, 85 Cal.App.4th at p. 759.) We agree. Here, defendant demanded at gunpoint that Beth get on her knees or her son would die. This was clearly a threat to intentionally kill Steven. Steven understood it as such and was afraid that defendant would kill them both. Defendant thus threatened express-malice murder, an element of which is intent to kill. (See *People v. Gonzalez* (2012) 54 Cal.4th 643, 653.) Where an element of the threatened offense is the specific intent to kill, a jury cannot be expected to understand the suggestion that a person can simultaneously have a specific intent to kill but no actual intention of killing when that person unlawfully threatens to kill another. (*Butler*, *supra*, at pp. 759-760.)

Defendant also compares CALCRIM No. 1300 with CALJIC No. 9.94, and points out that a use note in a prior version of the CALJIC instruction stated that "'[t]he court must instruct on the elements of the threatened crime. It is the fact that a crime is threatened which along with the other elements, makes the utterance criminal.'" We see no reason to part with *Butler* on this basis. The *Butler* court considered the CALJIC Committee's use note, reviewed the legislative history of section 422, and determined that the statute was carefully crafted to broadly protect individuals from the fear of violence and the disruption such fear engenders, while punishing only such threats that would fall outside the protection of the First Amendment. (See

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9 "Someone who intends that a statement be understood as a threat does not have to actually intend to carry out the threatened act." (CALCRIM No. 1300.)

Butler, *supra*, 85 Cal.App.4th at pp. 756-757.) The court concluded that the Committee's suggestion was unsupported by case law or legislative history, and was baseless. (*Ibid*.)

Defendant has provided no authority or persuasive argument that would convince us to disagree with *Butler*. The omission of the elements of murder cannot have prejudiced defendant under any standard, as a different verdict would be due to the jury's confusion caused by an instruction that the court was not required to give, that defendant did not request, and that would have been erroneous under established authority.

X. Domestic violence fund fee

Defendant contends that the imposition of a domestic violence fee under section 1203.097 was unauthorized, as probation was denied and defendant was sentenced to prison. Respondent agrees and joins in defendant's request that we strike the $700 fee imposed at sentencing. As section 1203.097 provides for the imposition of such a fee only when probation is granted, we will strike the fine. (See § 1203.097, subd. (a)(5)(A); *People v. Kirvin* (2014) 231 Cal.App.4th 1507, 1520.)

XI. Effective assistance of counsel

Defendant advances a blanket challenge, on the ground of ineffective assistance of counsel, to any failure by the trial counsel to raise an issue, if the failure resulted in forfeiture.

The Sixth Amendment right to assistance of counsel includes the right to the effective assistance of counsel. (*Strickland v. Washington* (1984) 466 U.S. 668, 686; see also Cal. Const., art. I, § 15.) It is defendant's burden to demonstrate that trial counsel was inadequate and that prejudice resulted. (*People v. Vines* (2011) 51 Cal.4th 830, 875-876.) Defendant has failed to identify any specific error or to provide an analysis of any claimed error to demonstrate the inadequacy of counsel or resulting prejudice. We do not reach undeveloped claims. (See *People v.*

Freeman (1994) 8 Cal.4th 450, 482, fn. 2.) In particular, we do not reach ineffective assistance claims in which the defendant, as here, has failed to make a prejudice argument. (See *Strickland*, at p. 687; *People v. Rodrigues* (1994) 8 Cal.4th 1060, 1126.) Thus, we do not reach defendant's claim of ineffective assistance of counsel.

XII. Custody credit

Defendant contends that he is entitled to 33 days of additional presentence custody credits. Defendant was given 659 total credits, comprised of 573 actual days plus 86 local conduct credits calculated at 15 percent of actual time served. (See § 2933.1.) When defendant was sentenced on November 17, 2016, the trial court recited that defendant was taken into custody on March 27, 2015, miscalculating that time period as 573 days instead of 602 days. Respondent agrees that the total award should have been 692 days, comprised of 602 actual days, plus conduct credit of 15 percent rounded down to 90 days. (See *People v. Smith* (1989) 211 Cal.App.3d 523, 526-527.) The judgment will be modified accordingly.

DISPOSITION

The judgment is modified to delete the $700 domestic violence fee and to award an additional 33 days of presentence custody credit, comprised of 29 days of additional actual days served plus 4 additional days of conduct credit, for a new total combined award of 692 days. In all other respects, the judgment is affirmed. The trial court is directed to prepare an amended abstract of judgment reflecting the modified presentence custody credit and deletion of the domestic violence fee, and to forward a copy of the amended abstract to the Department of Corrections and Rehabilitation.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, Acting P. J.
CHAVEZ

We concur:

_____, J.
HOFFSTADT

_____, J.*
GOODMAN

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