Filed 4/26/17 P. v. Pitcher CA2/6

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

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

THE PEOPLE, Plaintiff and Respondent, v. BRANNON LAWRENCE PITCHER, Defendant and Appellant.	2d Crim. No. B262953 (Super. Ct. No. 1430741) (Santa Barbara County)

Brannon Lawrence Pitcher appeals after a jury convicted him on two counts of sex trafficking of a minor (Pen. Code,[1] § 236.1, subd. (c) (§ 236.1(c)); counts 1 and 2), one count of possession of a controlled substance (Health & Saf. Code, § 11377, subd. (a)), and 73 misdemeanor counts of disobeying a court order (§ 166, subd. (a)(4)). The jury also found that the offense charged in count 1 involved force, fear, fraud, deceit, coercion, violence, duress, menace, or threat of unlawful injury (§ 236.1(c)(2)). Appellant admitted suffering prior serious felony and strike convictions (§ 667, subds. (a)(1), (d)(1) & (e)(1), 1170.12, subds. (b)(1) & (c)(1)) and serving two prior prison terms (§ 667.5, subd. (b)). The trial court sentenced him to 36 years to life in state prison, consisting of 15

[1] All statutory references are to the Penal Code unless otherwise stated.

years to life on count 1 doubled by the strike prior, plus 5 years for the prior serious felony conviction and 1 year for one of the prison term priors. Concurrent terms were imposed on the remaining counts and the one-year enhancement on the other prison prior was stayed.

Appellant contends (1) the evidence is insufficient to support the true finding on the section 236.1(c)(2) allegation; (2) the court erred in instructing the jury with an unmodified version of CALCRIM No. 3184; (3) the court erred in failing to accept the jury's orally reported verdict of not guilty on count 2; (4) the court misinstructed the jury on count 2 by misstating the "acquittal-first" rule; (5) section 236.1(c) is unconstitutional; (6) counts 1 and 2 must be reduced to violations of section 266i pursuant to the *Williamson*[2] rule; (7) his separate convictions on counts 1 and 2 violate double jeopardy principles; (8) his sentence amounts to cruel and unusual punishment; and (9) cumulative error compels the reversal of his convictions. He also asks us to conduct an independent review of the in camera hearing on his *Pitchess*[3] motion. Pursuant to the People's request, we shall order that the abstract of judgment be corrected to reflect the correct sentence imposed on count 1. Otherwise, we affirm.

STATEMENT OF FACTS

Commercial Sex Trafficking of Doe

In May 2013,[4] 16-year-old Doe was working as a prostitute in Florida.[5] She began prostituting at age 12 or 13 and always had a pimp who received all of her income.

---

[2] *In re Williamson* (1954) 43 Cal.2d 651 (*Williamson*).

[3] *Pitchess v. Superior Court* (1974) 11 Cal.3d 531 (*Pitchess*).

[4] All unspecified date references are to the year 2013.

[5] Doe testified under a grant of immunity with regard to her testimony about prostitution and drug use. When she testified in

In early May, appellant texted Doe in response to an escort advertisement. Appellant was a known pimp and wanted Doe to work for him. In late May or early June, Doe met appellant in Maryland at his request. Doe stayed in a hotel with appellant and "Milky," another prostitute. Doe told appellant she was looking for a better situation because her current pimp was being physically and emotionally abusive. Doe and Milky met with "clients" in the hotel room they shared with appellant and gave him all of their earnings. During this period, appellant sent Doe texts discussing her prostitution, demanding her earnings, and expressing interest in being her pimp.

Appellant, Milky, and Doe subsequently went to Richmond, Virginia, where Doe and Milky continued to prostitute. Doe met customers by advertising online and always gave appellant whatever she earned, which was generally $160 to $200 for each "date." While they were in Richmond, Doe saw appellant hit Milky in the face hard enough to make her bleed. Appellant and Doe then spent a day or two in Alexandria, Virginia, followed by a week or two in Washington, D.C. Milky was left behind. Doe continued to prostitute and always gave appellant whatever she earned.

At the end of June, Doe and appellant took a bus to California and stayed for a few days at appellant's mother's house in San Francisco. During that time, Doe performed "outcalls" and appellant's mother acted as her driver. Doe paid appellant's mother for driving her and gave the remainder of her earnings to appellant. Appellant and Doe subsequently moved on to Oakland, where Doe

---

December 2014, she was in love with appellant and considered him to be her boyfriend.

continued to prostitute. She reluctantly "walked the track"[6] because appellant said they needed the money.

Over the next two months appellant and Doe travelled to Belmont, Santa Rosa, Sacramento, Salinas, San Luis Obispo, Santa Barbara, and Ventura. Doe prostituted in each city and always gave appellant all of her earnings. On one of two trips to Santa Barbara, Doe had more than 10 "dates." Doe and appellant were occasionally accompanied by Melissa, whom appellant had recruited for prostitution. Appellant also recruited another girl (Emily) in Belmont. Like Doe, Melissa and Emily gave all of their earnings to appellant. On numerous occasions, Melissa witnessed appellant post ads online for both Doe and herself.

Appellant physically assaulted Doe on numerous occasions throughout their relationship and called her derogatory names like "stupid" and "bitch." Melissa witnessed at least three such assaults. In one incident, appellant became angry because he thought Doe was not making enough effort to find "dates." He suddenly started slapping and choking her. Doe fell to the floor and appellant kicked her. Doe began crying. Appellant told her to stop crying, straddled her, and put her in a headlock.

Melissa advised Doe to seek medical treatment after the incident because Doe was bruised and had difficulty breathing. Doe refused to go to the hospital because she had a warrant. Melissa also called the police to report the assault. She reported the name of the motel where they were staying but did not disclose their room number. Appellant later told Melissa that Doe was a minor and Melissa threatened to report him to the police. Appellant responded by sending Melissa threatening text messages. Melissa called the police and reported that appellant was abusing Doe.

---

[6] The "track" is the area of a town where prostitutes solicit on the street.

Throughout her time with appellant, Doe exchanged text messages with her friend Sandra K., who was working as a prostitute in Florida. In July 2013 Doe texted, "I can't take it. I swear I'm going to kill myself before he kills me." That same day she texted, "[H]e goes out and hits me every time my eyes close." On another occasion she texted, "And I don't know what to do. I'm not walking the track. And I'm sick of verbal abuse and being beat for no reason."

An FBI agent met Sandra while conducting a prostitution sting. After viewing Doe's texts to Sandra, another agent tracked down Doe's location and contact information. The agent contacted Doe online and posed as a potential customer. On August 22, FBI agents and other law enforcement officers contacted Doe in a hotel room. Appellant left the room through a window and was apprehended shortly thereafter. Officers found 1.24 grams of methamphetamine in the room and a small amount of marijuana. They also found a list containing telephone numbers, times, and dollar amounts, three sex directories, and various sex toys. Appellant and Doe's phones were seized along with a third phone they both used.

Doe admitted to the police that she was acting as a prostitute yet claimed appellant was merely her boyfriend. Doe also said that appellant had told her not to say anything to the police about what was going on. She did not tell the FBI agents that she gave appellant money from her dates because she loved him and did not want him to be prosecuted.

After appellant was arrested, he maintained contact with Doe from jail by using a three-way call through his mother's phone. There were 60 to 70 recordings of such calls. During one of the calls, appellant directed Doe to go to the "track" in Oakland in order to make money to pay for his attorneys. He also said he did

not want to hear any excuses as to why she could or would not do so for him. Appellant also continued to tell Doe that he loved her and talked about getting married. He told her that perjury was not a serious offense and was only punishable by a year in jail. He also repeatedly blamed Doe for his situation.

After Doe testified at the preliminary hearing, she asked appellant's mother to put her in touch with appellant again. She felt that she had no other option than prostitution because she had no family or a place to stay. In December, the Los Angeles County Superior Court issued a temporary restraining order prohibiting appellant from having any contact with Doe. A permanent restraining order was issued in July 2104. In October 2014, a District Attorney investigator interviewed Doe to review 73 calls that took place between April 2014 and September 2014. Doe verified that the voices heard on the calls were hers and appellant's. The investigator ultimately found recorded calls between appellant and Doe that took place after the permanent restraining order was issued.

Jail inmate Charles Schmidt testified that he had repeatedly allowed appellant to use Schmidt's inmate identification number to make phone calls to Doe. Appellant told Schmidt that he had pending charges for pimping and pandering an underage girl and that he believed she would not testify against him because she was in love with him. Appellant said he was hopeful this girl would continue making money for him while he was in custody. Appellant also told Schmidt he would prey on girls who did not have any money and focused on Caucasian girls because they made the most money. He also emphasized that he got all of the money the girls earned.

Expert Testimony On The Exploitation Of Minors Through Commercial Sex Trafficking

Dr. Sharon Cooper, a developmental and forensic pediatrician, testified for the prosecution as an expert on the sexual exploitation of minors through commercial sex trafficking. Dr. Cooper explained that sex traffickers intentionally choose victims who appear to have certain vulnerabilities. Female victims are typically first targeted when they are between 12 and 14 years old and come from adverse backgrounds that include neglect, sexual and psychological abuse, domestic violence, substance abuse, and incarceration of family members. Sometimes the victims are given drugs to make them dependent on the trafficker. Runaways and "thrown-away children" face the greatest risk of being recruited into sex trafficking.

Commercial sex trafficking victims are most commonly recruited "under the guise of romance." A "Romeo pimp" is typically an older male who promises a romantic relationship or even marriage. Such a strategy renders the victim much more likely to bond with the pimp. The pimp then transitions to a controlling and abusive relationship in which the focus is placed on the victim's need to "contribute to [the] family." It is also common for victims to be used to recruit other victims. Pimps also frequently used competition or jealousy to manipulate and control their victims.

Dr. Cooper also explained that victims are often expected to make a certain amount of money and are punished if they fail to do so. For example, some victims will be taken to a "track" and ordered to continue working until they make their quota. Degradation and humiliation are part of the grooming process. A trafficker may also render victims dependent upon him through "trauma bonding," which the doctor described as "a psychological form of coercion" in which another victim is physically

abused in their presence. Victims often will not leave because they are convinced they have nowhere else to go. A pimp or trafficker may have to use less violence because the victim was previously conditioned to expect to be harmed in certain circumstances. Traffickers also teach their victims to deny that they work for a pimp and claim they are merely working for themselves. Most victims do so and usually minimize the abuse their traffickers inflict on them.

Anaheim Police Lieutenant Craig Friesen also testified as a prosecution expert on commercial sex trafficking. Pimps generally target vulnerable girls and lure them in with false promises of a better life. Prostitutes commonly have romantic relationships with their pimps, which gives them a false sense that they are not really in a business relationship. Pimps receive all of the prostitute's earnings and decide how the money will be spent. A prostitute who tried to keep the money would be physically or emotionally punished. Pimps remain in control even when they are in a different city or are incarcerated. It is common for trafficking victims to travel to various cities within a state or region. The victims and their pimps usually move around in order to avoid detection by law enforcement. Moving around also isolates the victims and removes them from any support network. It is also common for traffickers to dissuade their victims from testifying against them.

DISCUSSION

I.

Sufficiency of the Evidence - § 236.1(c)(2)

Appellant contends the evidence is insufficient to support the finding that the sex trafficking offense charged in count 1 involved force, fear, fraud, deceit, coercion, violence, duress,

menace, or threat of unlawful injury, as set forth in section 236.1(c)(2). We disagree.

"When considering a challenge to the sufficiency of the evidence to support a conviction, we review the entire record in the light most favorable to the judgment to determine whether it contains substantial evidence—that is, evidence that is reasonable, credible, and of solid value—from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. [Citation.]" (*People v. Lindberg* (2008) 45 Cal.4th 1, 27.) We determine "whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. [Citation.]" (*Jackson v. Virginia* (1979) 443 U.S. 307, 319.) In so doing, a reviewing court "presumes in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence. [Citations.]" (*People v. Kraft* (2000) 23 Cal.4th 978, 1053.)

As relevant here, a person is guilty of commercial sex trafficking if he or she "causes, induces, or persuades, or attempts to cause, induce, or persuade, a person who is a minor at the time of commission of the offense to engage in a commercial sex act[.]" (§ 236.1(c).) The crime is punishable by 15 years to life in state prison and a fine of not more than $500,000 "when the offense involves force, fear, fraud, deceit, coercion, violence, duress, menace, or threat of unlawful injury to the victim or to another person." (§ 236.1(c)(2).) The statute defines "coercion" as "includ[ing] [any] scheme, plan, or pattern intended to cause a person to believe that failure to perform an act would result in serious harm to or physical restraint against any person; the abuse or threatened abuse of the legal process; debt bondage; or providing and facilitating the possession of [any] controlled substance to a person with the intent

to impair the person's judgment." (*Id.*, subd. (h)(1).) "Duress" in this context "includes a direct or implied threat of force, violence, danger, hardship, or retribution sufficient to cause a reasonable person to acquiesce in or perform an act which he or she would otherwise not have submitted to or performed[.]" (*Id.*, subd. (h)(4).)

The jury was instructed on the section 236.1(c)(2) allegation in accordance with CALCRIM No. 3184.[7] The allegation was attendant to count 1, which was based on appellant's conduct

---

[7] The jury was instructed as follows: "If you find the defendant guilty of the crime charged in Count 1, you must then decide whether the People have proved the additional allegation that when the defendant committed that crime, he used force, fear, deceit, coercion, violence, or duress against [Doe]. [¶] *Duress* means a direct or implied threat of serious harm, force, violence, danger, hardship, or retribution that is enough to cause a reasonable person to do or submit to something that he or she would not otherwise do or submit to. A threat may be verbal or physical. [¶] *Coercion* includes any scheme or plan, or pattern intended to cause a person to believe that failing to perform an act would result in serious harm to or physical restraint against [Doe], or providing or facilitating the possession of any controlled substance to impair [Doe's] judgment and cause [Doe] to perform a commercial sex act that she otherwise would not submit to. [¶] *Serious harm* includes any harm, either physical or nonphysical, including psychological, financial, or reputational harm, that is sufficiently serious, under all the circumstances, to force a reasonable person of the same background and in the same circumstances to perform or to continue performing commercial sex acts in order to avoid that harm. [¶] When you decide whether the defendant acted with duress or coercion, consider all of the circumstances, including the age of the other person, her relationship to the defendant, and the other person's handicap or disability, if any. [¶] The People have the burden of proving this allegation beyond a reasonable doubt. If the People have not met this burden, you must find that the allegation has not been proved."

from the time he met Doe until his arrest. In challenging the jury's finding, appellant focuses on the evidence that he used actual force and violence and claims the evidence compels a finding that Doe "had no fear of [appellant], and did not prostitute herself or act based on fear of him." This assertion effectively ignores the controlling standard of review, which compels us to review the evidence in the light most favorable to the jury's finding that appellant's sex trafficking of Doe prior to this arrest involved force, fear, fraud, deceit, coercion, violence, duress, menace, or threat of unlawful injury, as set forth in section 236.1(c)(2).

When viewed in the light most favorable to the judgment, the evidence supporting the true finding on the section 236.1(c)(2) allegation is overwhelming. Among other things, appellant once slapped, kicked, and choked Doe because "[s]he wasn't doing her job right." Appellant also spiked Doe's drink with methamphetamine, which contributed to her addiction to the drug. As Dr. Cooper testified, sex traffickers often make their victims dependent upon them by giving them drugs. Appellant also deceived Doe to believe he wanted to marry her. According to Dr. Cooper, a pimp often employs this very type of deceit as a means of inducing the victim to work for him. Doe also complained in text messages that appellant "hits me every time my eyes close" and "beat [her] for no reason." Dr. Cooper testified that sex traffickers often employ such abuse as a means of maintaining control over their victims. This evidence is sufficient by itself to support the finding that the sexual trafficking offense charged in count 1 involved force, fear, fraud, deceit, coercion, violence, duress, menace, or threat of unlawful injury as provided in section 236.1(c)(2).

Appellant's assertion is also erroneous to the extent it presumes that the section 236.1(c)(2) enhancement is necessarily premised upon a finding that Doe prostituted herself because she feared appellant. As we have explained, the instilling of fear is but one theory upon which the enhancement can be based. In any event, Doe's state of mind is essentially irrelevant to the jury's finding. Section 236.1(c)(2) does not require a finding that the victim acted out of fear or any other particular motivation. The relevant inquiry was whether appellant's sexual trafficking of Doe involved the use of force, fear, fraud, deceit, coercion, violence, duress, menace, or threat of unlawful injury, and not whether those tactics secured Doe's prostitution. As section 236.1 makes clear, "[c]onsent by a victim of human trafficking who is a minor at the time of the commission of the offense is not a defense to a criminal prosecution under this section." (§ 236.1, subd. (e); see also *In re M.V.* (2014) 225 Cal.App.4th 1495, 1517, fn. 16 ["[A] minor's status as a sexually exploited youth operates independently of any notion that the minor somehow consented to her own victimization"].)

II.

CALCRIM No. 3184

As we noted *ante*, the jury was instructed on the section 236.1(c)(2) allegation pursuant to CALCRIM No. 3184. Appellant claims that the jury's true finding on the allegation must be reversed because the instruction "incorrectly permitted jurors to find the special allegation true based on any *unrelated* force, fear, or violence. So, if [appellant] used force, fear, or violence to make [Doe] iron his shirts, jurors incorrectly could have found the force allegation true." He further claims that "without quantifying the amount of force, fear, or violence, jurors incorrectly could have found the allegation true based on some minor amount of force, that

was *inadequate to have caused [Doe] to engage in commercial sex acts*." Neither point has merit.

First, the instruction plainly stated that in order for the allegation to be true, the People had to prove "that *when the defendant committed the crime*, he used force, fear, deceit, coercion, violence, or duress against [Doe]." (Italics added.) In light of this statement, no reasonable juror would have concluded the allegation could be found true based on evidence that appellant used force that was unrelated to his commission of the crime. (See *People v. Sanchez* (2001) 26 Cal.4th 834, 852 ["Jurors are presumed able to understand and correlate instructions and are further presumed to have followed the court's instructions].)

Although appellant correctly notes that CALCRIM No. 3184 expressly defined duress, coercion, and serious harm, "[t]he requirement of use of force or fear has no technical meaning which must be explained to jurors[.]" (*People v. Sullivan* (2007) 151 Cal.App.4th 524, 544; see also *People v. Griffin* (2004) 33 Cal.4th 1015, 1022-1024 (*Griffin*) [the term "force" as used in the forcible rape statute (§ 261, subd. (a)(2)) "ha[s] a common usage meaning, rather than a specialized legal definition, and . . . hence there is no sua sponte duty to specially instruct the jury in a rape case on the definition of that term"].) Moreover, that "the Legislature . . . saw fit to expressly and specifically define the terms 'menace' and 'duress' . . . , [yet] has not seen fit to do the same for the term 'force,' . . . supports a conclusion that no specialized legal meaning was ever intended for that term. [Citation.]" (*Griffin*, *supra*, at p. 1023 [discussing § 261].)

Second, a finding that a defendant used force as provided in section 236.1(c)(2) does not require a finding that the force was sufficient to cause the victim to do what he or she otherwise would not have done. In arguing otherwise, appellant

misplaces his reliance on *Griffin* at is progeny. In *Griffin*, the court held "that 'in order to establish force within the meaning of section 261, subd. (2) [forcible rape], the prosecution need only show the defendant used physical force of a degree sufficient to support a finding that the act of sexual intercourse was against the will of the [victim.]' [Citation.]" (*Griffin*, *supra*, 33 Cal.4th at p. 1024.) In so holding, the court faulted the Court of Appeal for relying on *People v. Cicero* (1984) 157 Cal.App.3d 465 (*Cicero*), disapproved in *People v. Soto* (2011) 51 Cal.4th 229 (*Soto*), which held that conviction of forcible lewd acts on a minor (§ 288, subd. (b)(1)) requires proof of "'physical force substantially different from or substantially greater than that necessary to accomplish the lewd act[.]'" (*Griffin*, at pp. 1021-1022, quoting *Cicero*, at p. 474.) The court reasoned among other things that "[t]here is considerable difference between the crime of lewd acts by force on a child under the age of 14, with which *Cicero* was directly concerned [citation], and the crime of forcible rape." (*Griffin*, at p. 1026.)

Griffin is inapposite here. Section 236.1(c)(2), unlike section 261, does not require a finding that the crime was committed against the victim's will if the victim is a minor. As subdivision (e) of section 236.1 makes clear, "[c]onsent by a victim of human trafficking who is a minor at the time of the commission of the offense is not a defense to a criminal prosecution under this section." The same distinction was made in *Soto*, *supra*, 51 Cal.4th 229, in which the court distinguished *Griffin* and recognized that consent is not a defense to the crime of aggravated lewd conduct on a child under age 14 (§ 288, subd. (b)(1)). (*Soto*, at p. 248.) Because consent is not a defense to the crime, "the prosecution need not prove that a lewd act committed by use of force, violence, duress, menace or fear was also against the victim's will." (*Ibid.*) We discern no legitimate reason for concluding otherwise here.

III.

Verdict on Count 2

Appellant contends the court erred in failing to accept the jury's orally reported verdict of not guilty on the greater offense of human trafficking charged in count 2. We disagree.

Appellant's contention is based on discussions that took place in response to a note the court received from the jury during its deliberations. The note stated, "Can't all agree on Count 2—lesser verdict pimping." The court brought the jury into the courtroom and stated: "[T]he question is a little bit ambiguous, so we brought you out here to inquire a little bit further and to seek some clarification in terms of where you're at on deliberations. So the question is, you can't all agree on Count 2, dash, lesser verdict, pimping. [¶] So typically,—well, the instructions indicate that . . . you don't get to the question of deciding whether or not a defendant is guilty of a lesser until you've all agreed one way or the other as to the greater, that is, you all agree that the defendant is not guilty of the greater offense, in this case, on Count 2, it's human trafficking."

The court asked the jury foreperson, "has the jury all agreed as to the greater count on Count 2?" The foreperson responded, "Yes." The court then stated: "So you've all agreed the defendant is not guilty of the greater on Count 2, because you don't get to the greater—hold on a second. You don't get to the lesser count until you've all agreed that he's not guilty of the greater count, and on Count 2, the greater count is human trafficking. So have you all agreed on a verdict as to the offense of Count 2, human trafficking?" The foreperson replied, "Yes. On the greater counts, yes." The court then asked, "You all agreed or not agreed [*sic*]?"

The foreperson did not respond. The record indicates that the "Jury confers amongst themselves." The court then added, "So maybe I confused you a little bit. . . . [T]he jury instructions

indicate you can deliberate in whatever order you want. So you can discuss Count 2 as it's alleged, which is human trafficking; you can begin with the lesser charge of pimping and pandering as to Count 2 and discuss that; but on the question of reaching a verdict on the lesser, you all have to first agree that the defendant—and the lesser is pimping—you all have to agree that the defendant is not guilty of the charged count in Count 2, which is human trafficking."

The foreperson interjected, "Is that the lesser or the greater?" The court replied, "Let me just finish. There's an element of Count 2 which is pimping or pandering, okay? Is that where you're having some issues, that you can't all agree?" The foreperson replied, "Yes." After reiterating that pimping or pandering was an element of the offense of human trafficking, the court asked, "Is that why the jury is having some issues, or are you having an issue as to the lesser included offense of pimping as to Count 2" The foreperson replied, "The lesser." The court then asked if the jury had "all agreed as the human trafficking charge in Count 2" and the foreperson replied, "Not on the lesser."

The court continued: "Okay. So here is what we're going to do. I'm going to have you go back into the jury deliberation room. I want you to carefully review the jury instructions again. So read very carefully the jury instructions for Count 2, of which pimping and pandering is an element of Count 2, okay? If you all agree on a verdict as to Count 2, if it's not guilty, then you go to the lesser offense or Count 2, which is pimping and/or pandering, but you can't get to the lesser offense as to Count 2 until you all agree the defendant is not guilty of the greater offense of human trafficking. So hopefully that's helpful, and with that, I'm not going to say anymore, but I'm going to send you back into the jury deliberation room and again review the instruction."

After the jury left the courtroom, the court asked the attorneys if they had any comments. Defense counsel stated: [T]hey're clearly perplexed. It appears there's some misunderstanding even amongst the jurors, just looking at the body language . . . , so I think we leave them to deliberate and try to figure out better what their questions and problems are before we can help them any further."

About 10 minutes later, the court indicated it had received another note that stated, "We accidentally signed count 1 & 2 of the lesser crime. What do we need to do, if anything. We have reached agreement [*sic*]." The court asked the foreperson if the jury had reached a verdict on each count and the foreperson replied in the affirmative. The court then asked all of the jurors "do you feel you need any further time to deliberate?" They all responded, "No."

According to appellant, the foregoing exchanges reflect that "[t]he jury multiple times reported a general verdict of acquittal within the meaning of section 1151." He claims that "[u]nder . . . section 1164, subdivision (a), the verdict was 'complete' when the foreperson reported (multiple times) that the jury had reached a verdict on the greater offense, and could not agree on the lesser."

The record does not support appellant's assertion. The foreperson never stated that the jury had reached a verdict of not guilty on the offense of human trafficking charged in count 2. When construed in their entirety, the foreperson's comments reflect nothing more than confusion about the manner in which the jury was to decide the charges. At one point, the foreperson even expressed confusion whether sex trafficking was the greater offense. Even defense counsel agreed that the jury was simply confused and that further deliberations were warranted. Moreover, the jury

returned shortly thereafter with guilty verdicts on all counts and the jurors all agreed that no further deliberations were needed. Contrary to appellant's claim, nothing in the subject discussions compelled the court to reject the jury's guilty verdict on count 2.[8]

IV.

Alleged Instructional Error On Count 2

Appellant contends that the judgment on count 2 must also be reversed on the ground that the court's response to the jury's question (as discussed *ante*) misstated the "acquittal-first" rule. We are not persuaded.

"Under the acquittal-first rule, a trial court may direct the order in which jury verdicts are returned by requiring an express acquittal on the charged crime before a verdict may be returned on a lesser included offense. [Citation.]" (*People v. Bacon* (2010) 50 Cal.4th 1082, 1110.) Jurors are free, however, to deliberate on the charges in any order and may thus discuss a lesser included offense before returning a verdict on the greater offense. (*People v. Kurtzman* (1988) 46 Cal.3d 322, 335-336.) The jury in this case was instructed pursuant to CALCRIM No. 3517 as follows: "It is up to you to decide the order in which you consider each crime and the relevant evidence, but I can accept a verdict of guilty of a lesser crime only if you have found the defendant not guilty of the corresponding greater crime."

---

[8] The cases appellant cites in support of his claim are inapposite. In each of those cases, the issue was whether the trial court had the authority to reconvene the jury after it had been discharged in order to alter the verdict. (E.g., *People v. Lee Yune Chong* (1892) 94 Cal. 379, 380-381; *People Thornton* (1984) 155 Cal.App.3d 845, 851-852; *People v. Peavey* (1981) 126 Cal.App.3d 44, 49.)

Appellant asserts that the court disregarded the acquittal-first rule when it told the jury: "If you all agree on a verdict as to Count 2, if it's not guilty, then you go to the lesser offense of Count 2, which is pimping and/or pandering, but you can't get to the lesser offense as to Count 2 until you all agree the defendant is not guilty of the greater offense of human trafficking." This is an impermissibly selective quoting of the court's instructions. "We determine the correctness of the jury instructions from the entire charge of the court, not from considering only parts of an instruction or one particular instruction. [Citation.]" (*People v. Smith* (2008) 168 Cal.App.4th 7, 13.) Here, the court's instructions also made clear that "you can deliberate in whatever order you want. So you can discuss Count 2 as it's alleged, which is human trafficking; you can begin with the lesser charge of pimping and pandering as to Count 2 and discuss that; but on the question of reaching a verdict on the lesser, you all have to first agree that the defendant—and the lesser is pimping—you all have to agree that the defendant is not guilty of the charged count in Count 2, which is human trafficking." Appellant's claim of instructional error fails.

V.

Constitutionality of Section 236.1(c)

For the first time on appeal, appellant asserts that section 236.1(c) is unconstitutional because it (1) violates the separation of powers doctrine by delegating the judicial branch's sentencing authority to the prosecution; and (2) violates his right to equal protection. Both claims are forfeited (*People v. Fuiava* (2012) 53 Cal.4th 622, 670), and in any event lack merit.

The separation of powers doctrine provides that "[t]he powers of state government are legislative, executive, and judicial. Persons charged with the exercise of one power may not exercise

either of the others except as permitted by this Constitution." (Cal. Const., art. III, § 3.) Appellant's claim that section 236.1(c) violates this doctrine is based on the premise that the statute essentially proscribes the same conduct as the pimping and pandering statutes (§§ 266h, 266i), yet provides for a substantially greater punishment.[9] Appellant argues that this disparity violates the separation of powers doctrine because it delegates to the prosecutor (i.e., the executive branch) the authority to dictate the defendant's range of punishment. He contends that "[s]electing the crime to prosecute falls within the executive's discretion, but not to the extent that doing so infringes upon the judiciary's core power of determining and fashioning a sentence within the parameters, all parameters, set by the Legislature."

Appellant fails to sufficiently allege a violation of the separation of powers doctrine. "[T]he separation of powers doctrine prohibits the legislative branch from granting prosecutors the authority, *after* charges have been filed, to control the legislatively specified sentencing choices available to a court. A statute conferring upon prosecutors the discretion to make certain decisions *before* the filing of charges, on the other hand, is not invalid simply because the prosecutor's exercise of such charging discretion necessarily affects the dispositional options available to the court. Rather, such a result generally is merely incidental to the exercise

---

[9] The crimes of pimping and pandering are punishable by three, four, or six years in state prison when the person engaged in prostitution is 16 years of age or older. (§§ 266h, subd. (b)(1), 266i, subd. (b)(1).) Sex trafficking of a minor is punishable by five, eight, or twelve years in state prison and a fine of up to $500,000. (§ 236.1(c)(1).) The crime is punishable by 15 years to life and a fine of up to $500,000 when (as here) the offense involves force, fear, fraud, deceit, coercion, violence, duress, menace, or threat of unlawful injury to the victim or another person. (§ 236.1(c)(2).)

of the executive function—the traditional power of the prosecutor to charge crimes." (*Manduley v. Superior Court* (2002) 27 Cal.4th 537, 553.)

By enacting section 236.1(c)(2), the electorate chose to increase the punishments for those who engage in sex trafficking of minors. "'"[S]ubject to the constitutional prohibition against cruel and unusual punishment, the power to define crimes and fix penalties is vested exclusively in the legislative branch." [Citations.]' [Citation.]" (*Manduley v. Superior Court*, *supra*, 27 Cal.4th at p. 552.) Moreover, "'[t]he power of the people through the statutory initiative is coextensive with the power of the Legislature.' [Citation.]" (*Ibid.*) The fact that the enactment of these statutes gives prosecutors the discretion to pursue charges for sex trafficking rather than pimping and/or pandering does not run afoul of the separation of powers doctrine; on the contrary, this discretion is a hallmark of the doctrine. (*Ibid.*)

Appellant's equal protection claim is equally unavailing. Our Supreme Court has recognized that "neither the existence of two identical criminal statutes prescribing different levels of punishments, nor the exercise of a prosecutor's discretion in charging under one such statute and not the other, violates equal protection principles. [Citation.]" (*People v. Wilkinson* (2004) 33 Cal.4th 821, 838, citing *United States v. Batchelder* (1979) 442 U.S. 114, 124-125.) This authority, which appellant fails to address, plainly disposes of his equal protection claim.

VI.

Williamson

Appellant asserts that his convictions on counts 1 and 2 must be reduced to pandering (§ 266i) pursuant to the *Williamson*

rule. This claim is forfeited because it was not raised below[10] and in any event lacks merit.

"Under the *Williamson* rule, if a general statute includes the same conduct as a special statute, the court infers that the Legislature intended that conduct to be prosecuted exclusively under the special statute. In effect, the special statute is interpreted as creating an exception to the general statute for conduct that otherwise could be prosecuted under either statute." [Citation.] (*People v. Murphy* (2011) 52 Cal.4th 81, 86.) "[T]he *Williamson* preemption rule is applicable (1) when each element of the general statute corresponds to an element on the face of the special statute, or (2) when it appears from the statutory context that a violation of the special statute will necessarily or commonly result in a violation of the general statute. [Citation.]" (*People v. Watson* (1981) 30 Cal.3d 290, 295-296.)

The *Williamson* rule does not apply here. Appellant labels section 266i as "more specific" than section 236.1(c), yet he fails to explain how this is so. In any event, application of the *Williamson* rule in the manner contemplated by appellant would effectively render section 236.1(c) a nullity. A violation of section 266i is an element of section 236.1(c). Moreover, in enacting section 236.1(c), the electorate expressed its intent to increase punishment for defendants, like appellant, who engage in sex trafficking of

---

10 A motion to dismiss is the proper method for a defendant to challenge prosecution under a general statute if a more specific statute is factually applicable. (See, e.g., *People v. Jenkins* (1980) 28 Cal.3d 494, 499; *People v. York* (1998) 60 Cal.App.4th 1499, 1502-1503.) Failure to file the motion at trial forfeits the issue on appeal. (See *In re S.B.* (2004) 32 Cal.4th 1287, 1293, fn. 2 ["[A] person who fails to preserve a claim forfeits that claim"], superseded by statute on other grounds as noted in *In re T.G.* (2015) 242 Cal.App.4th 976, 984.)

minors. The *Williamson* rule is simply a means of determining and effectuating legislative intent, and should never be applied to defeat such intent. (See *People v. Jenkins*, *supra*, 28 Cal.3d at p. 502; *People v. Salemme* (1992) 2 Cal.App.4th 775, 783.) Section 236.1(c) was enacted to create the offense of sex trafficking of minors, and in this context section 266i is an express element of that offense. Concluding that section 266i effectively trumps section 236.1(c) here "would be absurd, and we must 'presume that the Legislature did not intend absurd results.' [Citation.]" (*Salemme*, at p. 784.) Because it is clear that a section 266i was not intended to create an exception to section 236.1(c), the *Williamson* rule does not apply. (See *People v. Murphy*, *supra*, 52 Cal.4th at p. 86.)

VII.

Double Jeopardy

Appellant contends he was convicted on both counts 1 and 2 in violation of the state and federal double jeopardy clauses because the crimes involved the same victim and took place over the same timeframe. This contention was not raised below and is thus forfeited. (*In re Henry C.* (1984) 161 Cal.App.3d 646, 648-649.) In any event, the claim is both factually and legally inaccurate. Count 1 related to appellant's conduct from May through August 2013, while count 2 related to the conduct following his arrest in November 2013. Moreover, "While the Double Jeopardy Clause may protect a defendant against cumulative punishments for convictions on the same offense, the Clause does not prohibit the State from prosecuting respondent for such offenses in a single prosecution." (*Ohio v. Johnson* (1984) 467 U.S. 493, 500.)

VIII.

Cruel and Unusual Punishment

Appellant contends that his sentence of 36 years to life amounts to cruel and unusual punishment in violation of the state and federal Constitutions. We are not persuaded.

The Eighth Amendment to the United States Constitution and article I, section 17 of the California Constitution prohibit cruel and/or unusual punishment. Both clauses prohibit punishment that is disproportionate to a defendant's personal responsibility and moral culpability. (*Enmund v. Florida* (1982) 458 U.S. 782, 801.) Under the federal Constitution, noncapital sentences are subject only to a narrow proportionality review, if any. (See *Ewing v. California* (2003) 538 U.S. 11, 23.) A punishment violates the state Constitution only if "it is so disproportionate to the crime for which it is inflicted that it shocks the conscience and offends fundamental notions of human dignity. (Fn. omitted.)" (*In re Lynch* (1972) 8 Cal.3d 410, 424.)

Appellant's claim of cruel and unusual punishment focuses upon section 236.1(c)(2), which was enacted in 2012 pursuant to Proposition 35. Although he does not assert that the dictated sentence of 15 years to life is facially unconstitutional, he claims that "[t]he facts of this case represent the bare minimum of conduct that meets the elements of human trafficking." The record belies this assertion. Moreover, federal courts have repeatedly rejected Eighth Amendment challenges to the federal human trafficking law (18 U.S.C. § 1591), upon which the state law is patterned.[11] (See, e.g., *United States v. Alaboudi* (8th Cir. 2015)

---

[11] The federal law, entitled "Sex trafficking of children or by force, fraud, or coercion," provides in pertinent part: "(a) Whoever knowingly-- [¶] (1) in or affecting interstate or foreign commerce, or within the special maritime and territorial jurisdiction of the

786 F.3d 1136, 1146; *United States v. Flanders* (11th Cir. 2014) 752 F.3d 1317, 1343; *United States v. Mozie* (11th Cir. 2014) 752 F.3d 1271, 1290.)

Appellant also complains that "the gravamen of the criminal conduct in counts 1 and 2 is essentially the same offense as pimping and pandering. Yet, the punishments are shockingly

---

United States, recruits, entices, harbors, transports, provides, obtains, advertises, maintains, patronizes, or solicits by any means a person; or [¶] (2) benefits, financially or by receiving anything of value, from participation in a venture which has engaged in an act described in violation of paragraph (1), [¶] knowing, or, except where the act constituting the violation of paragraph (1) is advertising, in reckless disregard of the fact, that means of force, threats of force, fraud, coercion described in subsection (e)(2), or any combination of such means will be used to cause the person to engage in a commercial sex act, or that the person has not attained the age of 18 years and will be caused to engage in a commercial sex act, shall be punished as provided in subsection (b). [¶] (b) The punishment for an offense under subsection (a) is-- [¶] (1) if the offense was effected by means of force, threats of force, fraud, or coercion described in subsection (e)(2), or by any combination of such means, or if the person recruited, enticed, harbored, transported, provided, obtained, advertised, patronized, or solicited had not attained the age of 14 years at the time of such offense, by a fine under this title and imprisonment for any term of years not less than 15 or for life; or [¶] (2) if the offense was not so effected, and the person recruited, enticed, harbored, transported, provided, obtained, advertised, patronized, or solicited had attained the age of 14 years but had not attained the age of 18 years at the time of such offense, by a fine under this title and imprisonment for not less than 10 years or for life." (18 U.S.C. § 1591.) A person who "obstruct[s], or in any way interferes with or prevents the enforcement of this section, shall be fined under this title, imprisoned for a term not to exceed 20 years, or both." (*Id.*, subd. (d).)

different." He adds that "[i]t was not until voters passed Proposition 35 . . . in November 2012, that a sentence could include 15 years to life and fines of up to $1,500,000." Appellant fails to recognize, however, that the enactment of section 236.1(c)(2) reflects the electorate's intent to increase the punishment for such offenses when the victim is a minor and the offense involves force, fear, fraud, deceit, coercion, duress, menace, or threat of unlawful injury to the victim or another person.[12] "'It is the prerogative of the Legislature, and the electorate by initiative, to recognize degrees of culpability and penalize accordingly. [Citations.]'

---

[12] Section 236.1(c) is part of the Californians Against Sexual Exploitation Act (CASE Act), which was amended pursuant to Proposition 35. "The purpose of the act was stated as follows: [¶] 'The people of the State of California find and declare: [¶] 1. Protecting every person in our state, particularly our children, from all forms of sexual exploitation is of paramount importance. [¶] 2. Human trafficking is a crime against human dignity and a grievous violation of basic human and civil rights. Human trafficking is modern slavery, manifested through the exploitation of another's vulnerabilities. [¶] 3. Upwards of 300,000 American children are at risk of commercial sexual exploitation, according to a United States Department of Justice study. Most are enticed into the sex trade at the age of 12 to 14 years old, but some are trafficked as young as four years old. Because minors are legally incapable of consenting to sexual activity, these minors are victims of human trafficking whether or not force is used. [¶]. . .¶] 'The [P]eople of the State of California declare their purpose and intent in enacting the CASE Act to be as follows: [¶] 1. To combat the crime of human trafficking and ensure just and effective punishment of people who promote or engage in the crime of human trafficking. [¶] 2. To recognize trafficked individuals as victims and not criminals, and to protect the rights of trafficked victims.' [Citation.]" (*In re Aarica S.* (2014) 223 Cal.App.4th 1480, 1485-1486.)

[Citation.]" (*People v. Doyle* (2013) 220 Cal.App.4th 1251, 1267.) Appellant's complaint that a violation of section 236.1(c)(2) is subject to the same punishment as second degree murder (§ 190) is similarly unavailing and downplays the significance of his offenses.

Appellant fares no better in comparing his sentence under section 236.1(c)(2) with the sentences imposed in other states for similar crimes. As we have noted, it is questionable whether a proportionality review even applies here. (*Ewing v. California*, *supra*, 538 U.S. at p. 23.) In any event, virtually all of the states he identifies allow similarly substantial punishments. (See, e.g., Minnesota, M.S.A. § 609.322 [15 to 25 years of imprisonment]; Maryland, CR § 11-303 [imprisonment not exceeding 25 years]; Rhode Island, § 11-67-3 [up to 20 years imprisonment].)

Appellant's claim of cruel and unusual punishment also fails to the extent he relies upon the enhancements that were imposed as result of his recidivism. States do not run afoul of the Eighth Amendment by enacting law that more harshly punish recidivists who either cannot or will not conform their conduct to social norms. (*Rummel v. Estelle* (1980) 445 U.S. 263, 284-285).) In *Rummel*, the United States Supreme Court upheld a mandatory life sentence under a Texas recidivist statute even though the defendant had been convicted of obtaining $120.75 by false pretenses and his prior convictions consisted of two nonviolent felonies. The Court reasoned that the sentence under a recidivist statute is "based not merely on that person's most recent offense but also on the propensities he has demonstrated over a period of time during which he has been convicted of and sentenced for other crimes." (*Id.* at p. 284.) The statute serves the legitimate goal of deterring repeat offenders and of segregating the recidivist "from the rest of society for an extended period of time." (*Ibid.*)

Appellant's sentence was enhanced by 21 years as a result of his recidivism, which includes prior strike and serious felony convictions for armed robbery and a prior prison term. As the People accurately note, "[a]ppellant spent almost all of his entire adult life either in prison or on parole and he violated his parole over and over again." He was actually on parole for committing false imprisonment by violence when he committed the instant offenses. Appellant has failed to "overcome [his] 'considerable burden' in convincing us his sentence was disproportionate to his level of culpability. [Citation.]" (*People v. Weddle* (1991) 1 Cal.App.4th 1190, 1197.) His claim of cruel and unusual punishment accordingly fails.

IX.

Pitchess

Prior to trial, appellant filed a *Pitchess* motion seeking disclosure of the personnel files of Chief District Attorney Investigator Dave Saunders. Defense counsel's declaration stated that Saunders was in a relationship with Doe's attorney and added, "It is my belief that . . . Saunders was involved in improper conduct related to [appellant's] case and that conduct [*sic*] has been documented by members of the District Attorney [*sic*]." In opposing the motion, the prosecution offered among other things that Saunders had no involvement in the case. After conducting an in camera hearing, the court ordered that one of the documents in Saunders's life be provided to the defense subject to a protective order.

Appellant asks us to review the sealed transcripts of the in camera proceedings to determine if the court followed the proper procedure and whether all relevant documents were disclosed. We have reviewed the sealed transcripts and conclude there was no

error. (*People v. Hughes* (2002) 27 Cal.4th 287, 330; *People v. Mooc* (2001) 26 Cal.4th 1216, 1232.)

X.

Cumulative Error

Appellant contends the cumulative effect of the alleged errors requires reversal. We reject this contention because there was no error to cumulate. (*People v. Avila* (2009) 46 Cal.4th 680, 718; *People v. Bolin* (1998) 18 Cal.4th 297, 335.)

XI.

Correction of Judgment

The People ask us to order that the judgment be corrected to reflect that appellant was sentenced on count 1 to 30 years to life, rather than 15 years to life. Appellant does not dispute the error, and we shall accordingly order it corrected.

DISPOSITION

We order that the judgment be corrected to reflect that appellant was sentenced to an indeterminate term of 30 years to life on count 1 (irrespective of the enhancements that were also imposed), rather than a term of 15 years to life. The superior court clerk shall prepare an amended abstract of judgment and forward a certified copy to the Department of Corrections and Rehabilitation. As so modified, the judgment is affirmed.

NOT TO BE PUBLISHED.

PERREN, J.

We concur:

GILBERT, P. J.

YEGAN, J.

Brian E. Hill, Judge
Superior Court County of Santa Barbara

Susan K. Shaler, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Kamala D. Harris, Attorneys General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Scott A. Taryle, Supervising Deputy Attorney General, David A. Wildman, Deputy Attorney General, for Plaintiff and Respondent.