Filed 7/7/17 P. v. Walker CA2/5

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, Plaintiff and Respondent, v. ROBERT WALKER, Defendant and Appellant.	B266706 (Los Angeles County Super. Ct. No. NA096265)

APPEAL from a judgment of the Superior Court of Los Angeles County, James D. Otto, Judge. Affirmed as modified.

David H. Goodwin, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Victoria B. Wilson, Supervising Deputy Attorney General, Jessica C. Owen, Deputy Attorney General, for Plaintiff and Respondent.

In this appeal from defendant Robert Walker's (defendant's) conviction on multiple counts of human trafficking and other charged offenses, the issues we consider require us to discuss the meaning of the word "sex"; the admissibility of video evidence depicting defendant congregating with another individual identified as a pimp; whether defendant's attorney was constitutionally ineffective by not seeking to exclude victim testimony as tainted by asserted governmental misconduct; and whether defendant can be found to have acted with separate objectives in sexually assaulting one of his victims and then forcing her to work for him as a prostitute.

I

The parties are familiar with the facts, and defendant challenges the sufficiency of the evidence against him only in one narrow respect (whether there was enough evidence to establish the human trafficking victims were "prostitutes" as that term was defined in the instructions given to the jury). We therefore summarize the factual and procedural background only as necessary to resolve the claims of error presented.

The evidence at trial established defendant exploited four underage girls for profit. He was their pimp, and the girls worked for him for varying periods of time, turning over to him all the money they made from engaging in sex (in varying forms) with their customers. All four victims—A.B., J.C., V.R., and M.H.—were designated material witnesses and held in custody to ensure their appearance as witnesses at trial.

A

A.B. testified defendant first approached her in late 2012 or early 2013 while she was already working as a prostitute on a stretch of Long Beach Boulevard in Compton (often referred to colloquially as the "track"). A.B. was 16 or 17 years old at the time, and she was a "renegade," meaning she was working as a prostitute without a pimp. In a subsequent conversation after that first encounter, defendant asked A.B. how old she was and she told him (falsely) that she was 18.[1] Defendant also asked A.B. if she had been "doing it" (i.e., prostituting) for some time and inquired as to whether she had a pimp. Defendant made it clear he wanted A.B. to work for him as a prostitute, and A.B. agreed she would start working for him.

A.B. explained at trial what it meant to work as a prostitute for defendant. She testified that working as a prostitute meant "having sex with people in exchange for money." She also agreed that she used the term "date" as a euphemism for "finding a man [and] having—committing a sex act, getting money for it." A.B. would charge "80" for a "blow job" and "for sex . . . a hundred." Defendant required A.B. to abide by certain "rules of the game," including (among others) spending a maximum of 15 minutes on each "date," giving him all of the money she made from prostitution, and "stay[ing] in pocket," which meant that if "another pimp comes up, you have to put your head down, turn away, just get away from where he is at."

---

[1] A.B. told defendant her real age later, after she began working for him. He continued using her as a prostitute and gave her an alias to use (the name belonging to another woman over 18) in case she was ever contacted by the police.

If A.B. broke defendant's rules, she would suffer varying punishments such as "a slap or a punch or [being made] to stay out for . . . the night."

J.C., another of the minor victims, testified she met defendant in or around February 2013 after she ran away from home. She first began working as a prostitute for another man, and defendant later persuaded her to work for him as her pimp. J.C. was asked what she did working as a prostitute, and she explained she would "sell [her] body" by having "sex with men" who paid her. At the time she began working as a prostitute for defendant, J.C. was 16 years old.

As he did with A.B., defendant told J.C. about various rules she would have to follow while prostituting for him. She had a "trap," or a certain amount of money she was expected to make each day; she was not to get "out of pocket" by talking to other men who might be pimps and try to steal her away; she was supposed to make sure her "dates" were not undercover police officers by "tell[ing] them to unzip their zipper and, like, reveal themselves to you"; and she was supposed to charge "no lower than 80" for "sex." J.C. was also required to give defendant all the money she received for committing sex acts with men. If J.C. failed to comply with the rules, she would "get chopped," which meant she would get in trouble. That trouble took several forms: defendant slapped J.C. hard in the face on one occasion, and he also made threats which scared her and caused her to obey the rules.[2]

---

[2] J.C. testified she witnessed defendant get violent with the other girls who worked for him, including choking one girl in a manner that made J.C. afraid the girl might get seriously hurt.

V.R. testified she was 14 years old when she first met defendant. She was outside her high school at the time, and another of her male friends introduced defendant to V.R. and to another girl she was with. V.R. and defendant later had a conversation in which defendant asked her to work for him as a prostitute. Defendant asked V.R. how old she was (she lied and said she was 16), and he told her the "things that [she] can and can't do" while working for him (including no use of social networking, no leaving the house on her own, and no talking to "squares," i.e., people who weren't part of what V.R. described as the "pimping and ho'ing game, prostitution").

V.R. moved in to defendant's house and started going out to work as a prostitute the same day she did so. V.R. explained she went on "dates," which meant engaging "in a sex act for money." Defendant instructed V.R. that her "dates" should be "no longer than this [i.e., a certain] amount of minutes," that she should "call when [she got] on, when [she got] off," and that she should use condoms. In addition, V.R. described one occasion on which she "performed oral sex" on defendant himself, which she did not want to do but performed anyway so she wouldn't get "a chopping," which meant "either like a slap or a sock to the stomach." V.R. gave all the money she made from prostitution to defendant.

The fourth of the victims to testify at trial, M.H., met defendant when she was 12 years old. She was walking home from her middle school in Carson, and he started a conversation with her. M.H. got in defendant's vehicle after he told her he

---

Observing these beatings caused J.C. to fear the same thing would happen to her if she broke the rules.

would take her to get something to eat. Defendant drove M.H. to a public park instead. M.H. did not realize it at the time, but during the conversation in the park defendant was "basically candy coating me prostituting myself."

Defendant and M.H. left the park and he drove her to "this guy's house" who she knew only by the name "Wolf." While there, M.H. was forced to have sex with defendant against her will; as M.H. testified, "Wolf had a gun and [defendant] told me that he knew where I stayed, and—he was—at first, he told me to dry my crocodile tears, because I'm about to be a woman." M.H. said she "tried to fight him," but she relented because defendant "told me . . . he would kill my mama."

Defendant left "Wolf's" house with M.H. and took her to a motel. Defendant told M.H. to put on a black dress and a wig he gave her, and when M.H. refused, defendant pulled M.H. by her hair and hit her with a closed fist in her eye, which caused it to bleed. As a result of the beating, plus another threat to M.H.'s mother, M.H. again relented and put on the dress and wig. Defendant then instructed M.H. on how she should interact with "the Johns" (prostitution customers), including how much to charge. M.H. testified she did not "remember what [defendant] said for a blow job, but for sex it was a hundred."

Defendant drove M.H. to Figueroa Street and directed her to try to get "dates"—which meant "hav[ing] sex with a John" and getting money for it—by walking and waving at the cars driving by. Although defendant would occasionally drive by while she was standing on the corner, M.H. didn't really try to pick up any men. After a time, defendant took her back to the motel room because she "wasn't making no money."

Back at the motel room, another prostitute working for defendant arrived. She went by the name "Fancy," and when she saw M.H., she told defendant, "Daddy, she young." Defendant asked M.H. how old she was, and M.H. told him she was 12 and about to be 13. Defendant told Fancy to put makeup on M.H., and after she did so, Fancy gave M.H. further instructions on how to "speak to the Johns and how to walk like she was walking . . . ."

Later, defendant took M.H. and Fancy to Long Beach Boulevard to engage in prostitution. After Fancy told M.H. she would get a "chopping" if she failed to bring in any money, M.H. "caught one date." M.H. testified a "little Mexican guy" wanted her to "suck his dick," and when asked whether she did that, she responded "kind of." The man paid M.H. $65, which she later gave to defendant. M.H. continued to work for defendant and "started getting the hang of things," sometimes making $800 or $900 a day from doing "sex acts" and once making $1000. M.H. gave all the money she made to defendant, and he kept the money except for small amounts he gave her to purchase cigarettes and condoms.

B

When cross-examined by the defense, A.B., V.R., and M.H. were asked questions about the time they had been held in custody to ensure their appearance as witnesses at trial. All four girls had been held in the same detention facility. The defense asked the girls questions about conversations they had with each other and with Detective Satwan Johnson, the prosecution's investigating officer, when he visited the facility.

A.B. agreed she and the other girls discussed "what you're doing here" and their "individual stories," such that everyone knew everyone else's story. However, A.B. maintained she and the others had "not [been] talking about the case, but what can happen." In addition, A.B. testified Detective Johnson had visited the girls at the detention facility more than five times. When asked whether Detective Johnson talked to A.B. and the rest of the girls as a group at the same time, A.B. answered "no" and explained the conversations occurred "one by one" except for "one time that we did talk like in a group, but it wasn't like that."

V.R. and M.H. also answered cross-examination questions concerning their time in pre-trial custody. V.R. denied she had spoken to the other three girls "about [defendant] and the case and everything." When asked whether Detective Johnson "talk[ed] to you all at the same time," V.R. answered "yes." But she answered "no" when asked whether she talked to Detective Johnson about the case when he came to the facility. For her part, M.H. said she had talked to Detective Johnson while being held in custody, and that she did so with the other girls present. M.H. was not asked, however, to describe the substance of what she discussed.

Detective Johnson also testified as a witness at trial. He was not asked about meetings with the minor victims in pre-trial detention. Nor was Detective Johnson, or any other prosecution witness, asked to describe how witnesses held in pre-trial custody are assigned to particular facilities, or who makes those assignments.

C

In addition to presenting the victims' testimony, the prosecution sought to introduce video footage of defendant on Long Beach Boulevard in the company of three other men and, as the prosecution put it, a woman as to whom an "argument can be made . . . appear[ed] to be dressed as a prostitute." The trial court held a hearing outside the presence of the jury to determine whether the video would be admitted in evidence.

The video offered by the prosecution was obtained during an earlier criminal investigation of defendant and others that resulted in a robbery charge; that robbery case, however, was dismissed prior to trial. In arguing for admission of the video, the prosecution described it for the record: "The defendant is in the video. He is the individual in the white t-shirt with the baseball cap on his head. It's clearly a scantily clad female. The argument can be made she appears to be dressed as a prostitute. That's common in this area. [¶] This individual and the two other individuals appear to be cornering her. You see the defendant appear to block her to prevent her from getting away. They let her go just before the police arrive. [¶] This does paint a picture of the defendant and at least one other individual who has been identified as a pimp partner operating in a manner consistent with controlling a prostitute in an area where there's been testimony that they control the prostitutes."

The trial court asked whether the evidence was being offered under Evidence Code section 1101, subdivision (b) (which permits introduction of evidence of other uncharged acts for limited purposes, such as proving intent). The prosecution agreed "it does fit under that," but emphasized the video was admissible because it was probative of whether defendant was a

pimp that works in the area of the Long Beach Boulevard "track" and "corroborative of the conduct testified to by the victims in this case, putting the defendant on Long Beach Boulevard in association with other individuals that the girls testified they knew him to be associated with."

The defense objected to admission of the video in evidence, arguing it was improper character evidence and unduly prejudicial under Evidence Code section 352. Defense counsel contended the video was irrelevant because the "woman that you see being talked to by the four black men is not one of our victims" and at the same time "exceptionally prejudicial" because it depicted defendant and another man, identified by the victims as one of defendant's "pimp partners," "doing bad things with a girl who looks like she may be a prostitute."

The trial court concluded the video was admissible. The court stated it would not permit the prosecution to make any reference to the dismissed robbery case or to play the portion of the video where police could be seen arriving on the scene. With those limitations, however, the court found persuasive the prosecution's argument that there was nothing going on in the video that depicted a crime taking place. The court ruled: "As long as we can stop [the video] at that point, I think it's relevant. It does not get excluded under [Evidence Code section] 352. I believe it's relevant as to the consistency [with the victims' testimony]. I believe it comes in under [Evidence Code section] 1101(b)."

After the court made its ruling, the prosecution played the video for the jury during the testimony of another detective involved in the human trafficking investigation. The detective identified the video as having been taken in the area of Long

Beach Boulevard and Euclid Avenue at 3:20 p.m. on December 5, 2012. The detective identified defendant as one of the individuals shown in the video, and she (the detective) identified another of the men as Daniel Gunther, also known as "T.R." (The victim witnesses had previously testified T.R. was one of defendant's "pimp partners.") There was no further reference to, or playing of, the video during trial—including during the lawyers' closing arguments.

D

Defendant testified in his own defense at trial. He asserted he made a living in the music business as a rapper. He explained he pursued a "too short, sugar free" image of rapping about women, which included writing lyrics about female prostitutes. Although some of his lyrics attested to being a pimp (which he defined in one song as a "professional in managing pussy"), he testified he never actually was a pimp.

Defendant specifically denied exploiting each of the four victims who testified at trial. He acknowledged he had met A.B., who he knew to be a prostitute, because she had purchased one of his CDs. Defendant claimed A.B. had been "kind of flirting" with him but he had "brushed her off" because "she wasn't really too attractive to me." Defendant admitted he had met J.C., but only because he gave her money for food and a hotel room when she said she had been left stranded by her boyfriend. Defendant testified he knew V.R. because he met her at his sister's house, and he admitted he came to learn V.R. was a prostitute. But defendant claimed he was not involved in her prostitution in any way. And as to M.H., defendant's testimony was quite

straightforward: he claimed, "I never met this girl before in my life."

E

The defense closing argument urged the jury to accept the same story defendant related during his testimony, that is, that defendant was just a rapper and not actually involved in prostitution. The defense contended the girls who testified against him had colluded with each other to get their stories straight and had been fed information by Detective Johnson that they then used to incriminate defendant in order to be released from custody.

The jury rejected the defense theory and found the prosecution proved defendant guilty on all counts charged. Specifically, the jury found defendant guilty of human trafficking of a minor (A.B.) for purposes of a commercial sex act, with the further finding he used force, deceit, or coercion to do so, as charged in count 1; human trafficking of a minor (J.C.) for purposes of a commercial sex act, with the further finding he used force, deceit, or coercion to do so, as charged in count 2; human trafficking of a minor (V.R.) for purposes of a commercial sex act as charged in count 3; and human trafficking of a minor (M.H.) for purposes of a commercial sex act as charged in count 4. The jury also convicted defendant on the two additional counts charged against him: dissuading a witness, as charged in count 5 pertaining to V.R., and committing a lewd act upon a child, as charged in count 6 pertaining to M.H.

After the jury returned the guilty verdicts, defendant filed a motion for a new trial. Among the contentions in the motion was the claim that the prosecution engaged in misconduct by

housing the victims together in the same custodial facility where they were visited by Detective Johnson.[3] The trial court denied the new trial motion and made an express finding there had been "absolutely no prosecutorial misconduct or error." In so finding, the court stated the testifying victims "were all given directions—I believe, at least, I directed the D.A.[,] and I understand the D.A. and the detective carried those directions out[,] not to discuss the case among themselves when they were not on the witness stand. [¶] Those directions were given to them back at the time of the preliminary hearing also."

The trial court sentenced defendant to an aggregate prison term of 42 years and 8 months to life. The aggregate sentence included two years in prison (one-third of six years, consecutive to the principal term) for the conviction on count 6, the count alleging defendant committed a lewd act on M.H.

II

As we will explain, each of the four arguments defendant makes for reversal is meritless. He claims there was no substantial evidence to support the human trafficking charges involving three of the victims because they only testified to engaging in "sex" for money, which is too vague a term to establish the girls were prostitutes. We, however, see no ambiguity in the record, especially under the applicable standard of review—the girls' testimony was more than sufficient for a rational jury to conclude they engaged in prostitution just as

---

[3] Defendant does not challenge the denial of the new trial motion on appeal. He does, however, present and expand on this misconduct argument independently as grounds for reversal.

defendant intended. Defendant argues the trial court erred in finding the Long Beach Boulevard video admissible, but we hold the trial court's decision was not an abuse of discretion, and certainly not prejudicial error entitling defendant to reversal. Defendant also argues, in uncommonly strident language, that "[s]omeone within the Government" engaged in outrageous misconduct by housing the victims together in custody and Detective Johnson engaged in "witness tampering" (a federal offense) because he met with the girls together before trial to discuss their anticipated testimony. Defendant forfeited his misconduct claims by failing to raise them in the trial court, and his effort to evade the consequences of forfeiture by arguing ineffective assistance of counsel fails because there is ample reason why a reasonably competent trial attorney would not have raised a governmental misconduct claim. Finally, defendant claims the sentence he received on count 6 (committing a lewd act on M.H.) constitutes impermissible double punishment, but we hold the sentence was proper because substantial evidence supports the conclusion defendant's human trafficking and lewd act offenses were committed with separate objectives.

A

In counts one through four, defendant was convicted of violating California's human trafficking statute, Penal Code section 236.1. Subdivision (c) of the statute makes it a crime for a person to "cause[ ], induce[ ], or persuade[ ] . . . a person who is a minor at the time of commission of the offense to engage in a commercial sex act, with the intent to effect or maintain a violation of" several other enumerated penal statutes including sections 266h and 266i. Penal Code section 266h proscribes

pimping, i.e., deriving support from the proceeds of another's prostitution, and Penal Code section 266i proscribes pandering, which is (among other things) procuring another person for purposes of prostitution. (Pen. Code, §§ 266h, subd. (b), 266i, subd. (a)(1).)

Consistent with applicable authority, including Penal Code section 647, subdivision (b)(4) and *People v. Hill* (1980) 103 Cal.App.3d 525, 534-535, the instructions given to the jury defined a prostitute as "a person who engages in sexual intercourse or any lewd act with another person in exchange for money." "Lewd act" was further defined as "physical contact of the genitals, buttocks, or female breast of either the prostitute or customer with some part of the other person's body for the purpose of sexual arousal or gratification." Defendant challenges the sufficiency of the evidence as to counts two through four, i.e., the counts pertaining to J.C., V.R., and M.H., because "[n]one of the witnesses testified they engaged in sexual intercourse or lewd acts[,] as that term was defined in the instructions, in exchange for money." Even assuming defendant were correct that proof the victims actually engaged in prostitution was required,[4] the testimony given by J.C., V.R., and M.H. was sufficient.

---

[4] Under the statutory scheme, the prosecution was not required to prove the victims actually engaged in prostitution. Rather, the prosecution had to prove defendant caused or induced the victims to engage in a "commercial sex act" (defined in Penal Code section 236.1, subdivision (h)(2) as "sexual conduct on account of which anything of value is given or received by a person") and that defendant did so with the *intent* to effect or maintain a violation of the pimping and pandering statutes (that do include prostitution as an element). (See, e.g., CALCRIM No. 1244.)

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.] 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.] 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." [Citation.]'" (*People v. Williams* (2015) 61 Cal.4th 1244, 1281.) When undertaking a substantial evidence inquiry, "the testimony of a single witness that satisfies the standard is sufficient to uphold the finding" even if there is a significant amount of countervailing evidence. (*People v. Barnwell* (2007) 41 Cal.4th 1038, 1052; see also Evid. Code, § 411 ["Except where additional evidence is required by statute, the direct evidence of one witness who is entitled to full credit is sufficient for proof of any fact"]; *People v. Robertson* (1989) 48 Cal.3d 18, 44.)

Under this standard of review (and really, even in our independent judgment), the testimony of J.C., V.R., and M.H. established both that defendant intended the girls to engage in prostitution for his benefit and that they in fact did so. Each of the girls repeatedly agreed when asked if they had worked as prostitutes (the questions explicitly used that term or a variant thereof) at defendant's behest. These three victims also specifically testified they had "sex" (or in V.R.'s case, engaged in "sex acts") with men in exchange for money and gave the money

they made to defendant. While we agree the ordinary understanding of the word "sex" is susceptible to varying nuances (intercourse, oral sex, anal sex), all of those nuances fit comfortably within the definition of prostitution the jury was given. Thus, even considered in isolation, the "sex" references by the victims when testifying were sufficient for the jury to conclude they engaged in intercourse or physical contact of the genitals, buttocks, or female breast for the purpose of sexual arousal or gratification. Defendant's argument to the contrary—that the references to "sex" do not suffice because it is possible some people or a fictional alien from the television show Star Trek might have in mind an idiosyncratic understanding of the word—is inconsistent with both the applicable standard of review and persuasive authority. (See *People v. Gilbert* (1963) 217 Cal.App.2d 662, 665-667 [ordinary and accepted meaning of the words "testify" and "testimony" is the concept of a statement made under oath; the trial witnesses' use of those terms therefore overcame the argument that evidence for perjury charge was insufficient because there was no proof an oath was administered to the defendant].)

Moreover, reviewing the victims' testimony in its full context leaves no question that the girls were referring to genital contact (whether intercourse or oral sex) when describing the "sex" or "sex acts" they engaged in at defendant's behest. In addition to testifying that she had "sex with men," J.C. testified defendant instructed her to verify her "dates" were not undercover police officers by "tell[ing] them to unzip their zipper and, like, reveal themselves to you." This, of course, leaves little doubt that J.C. was talking about to genital contact when she described the "sex" and "prostitution" she engaged in for

defendant. V.R. testified defendant instructed V.R. that her "dates" (meaning a sex act with a man for money) should be no longer than a certain amount of minutes and that she should use condoms. Again, the reference to condoms leaves little doubt that defendant intended V.R. to engage in sexual contact with her customers' genitals, and that she in fact did so. And M.H.'s testimony, considered in its entirety, was even more explicit. She testified defendant told her how much to charge for "a blow job" but she couldn't remember the amount. She testified about her first "date" after defendant forced her to be his prostitute: a man who wanted her to "suck his dick," which she "kind of" did and received $65. M.H. also testified (similar to V.R.'s testimony on this point) that defendant gave her money to purchase condoms.

There was ample evidence for the jury to find defendant intended to pimp or pander the minor victims and that they engaged in prostitution as defined in the jury instructions. We accordingly reject defendant's challenge to the sufficiency of the evidence supporting the human trafficking convictions.

B

Defendant argues the trial court erred in admitting into evidence the Long Beach Boulevard video (depicting him, the young woman, and at least one other man the victims identified as defendant's "pimp partner"), and he contends the error warrants reversal. We hold to the contrary on both points. The trial court's ruling was not error under the applicable standard of review, and even assuming the contrary, the error did not result in prejudice requiring reversal.

As he did in the trial court, defendant argues the video should have be excluded under Evidence Code section 352. That

statute provides: "The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury." A "trial court enjoys broad discretion in determining the relevance of evidence and in assessing whether concerns of undue prejudice, confusion, or consumption of time substantially outweigh the probative value of particular evidence. [Citation.] 'The exercise of discretion is not grounds for reversal unless "'the court exercised its discretion in an arbitrary, capricious or patently absurd manner that resulted in a manifest miscarriage of justice."'" [Citation.]" (*People v. Clark* (2016) 63 Cal.4th 522, 572.)

The trial court found the video relevant because it tended to establish some objective "consistency" with the victim witnesses' accounts while testifying. Further, with the redaction and limitation ordered by the trial court (to stop the video before the police were shown arriving and to refrain from mentioning that the video was associated with a dismissed robbery case against defendant), the trial court found the video should not be excluded as unduly prejudicial under Evidence Code section 352. Neither determination represents an abuse of discretion.

We would not describe the video as highly relevant evidence, but it does have some probative value in connection with the charges at issue and the victims' credibility: the video tends to prove, as the victims testified, that defendant frequented the "track" area of Long Beach Boulevard and associated with at least one man (T.R.) the victims identified as one of defendant's

pimp partners.[5] As prior cases have held, the video is not made irrelevant simply because the People introduced, or could have introduced, other evidence that tended to establish the same facts. (*People v. Watson* (2008) 43 Cal.4th 652, 684 [photographs admissible even if offered to prove an issue not in dispute and even if repetitive of other evidence, provided their probative value is not substantially outweighed by their prejudicial effect]; see also *People v. Valdez* (2012) 55 Cal.4th 82, 134 [citing *People v. Scheid* (1997) 16 Cal.4th 1 for the proposition that "'it is immaterial for purposes of determining the relevance of evidence that other evidence may establish the same point'"].)

Regarding the other side of the Evidence Code section 352 coin, we agree the video's relevance was not substantially outweighed by a danger of undue prejudice. "The prejudice referred to in Evidence Code section 352 applies to evidence which uniquely tends to evoke an emotional bias against the defendant as an individual and which has very little effect on the issues. In applying section 352, prejudicial is not synonymous with damaging. . . . In other words, evidence should be excluded as unduly prejudicial when it is of such nature as to inflame the emotions of the jury, motivating them to use the information, not to logically evaluate the point upon which it is relevant, but to reward or punish one side because of the jurors' emotional reaction." (*People v. Doolin* (2009) 45 Cal.4th 390, 439, internal quotation marks and citations omitted.)

---

[5] We need not address the correctness of the trial court's finding that the video was also admissible as relevant to one or more issues identified in Evidence Code section 1101, subdivision (b).

Under this standard, and keeping in mind the restrictions the trial court ordered, there was little, if anything, about the video that can be considered to have created a danger of undue prejudice. As defendant's opening brief acknowledges, the trial court viewed the video and observed "there's nothing going on . . . that is a crime." Defendant nonetheless argues the video was prejudicial because it gave the jury "the opportunity to see [defendant], together with three other men, two of whom were known [pimps], on Long Beach Boulevard where the trafficking allegedly occurred, crowding around a scantily clad unidentified female of questionable age, cornering her for a few minutes before they let her get away." If that is the claim of undue prejudice—evidence depicting defendant associating with known pimps and a possible prostitute—it is both insufficient and not without irony: the defense at trial, in its opening statement and later during defendant's testimony, affirmatively introduced video evidence that presents a comparable potential for prejudice, so understood.[6] Insofar as the Long Beach Boulevard video

---

[6] The defense played for the jury a "Capricorn Bash" video that defense counsel described as "uncomfortable, and . . . [maybe] even detestable." It depicted defendant and two other men identified as his "pimp partners" rapping about being pimps (among other topics) while in the company of women, some of whom defendant conceded were prostitutes. A transcript of the lyrics states, in part: "I pimp hard (6x) [¶] You pimp hard (6x) [¶] We pimping now stay the fuck outta my business [¶] Polo sippin pezu [¶] Drink syrup with a (unintelligible) [¶] Gotta bitch who think she's a brainiac [¶] Blow that dick like it's Nintendo [¶] And when we high off Indo [¶] She be sloppy drunk in limos [¶] Wood grain all in the ride [¶] I call it rollin incogneto.

created any danger of undue prejudice at all, the trial court was within its discretion to conclude such a danger did not substantially outweigh the video's probative value.

In any event, we are convinced defendant cannot show that it is reasonably probable he would have achieved a more favorable result if the trial court had excluded the Long Beach Boulevard video.[7] (*People v. Marks* (2003) 31 Cal.4th 197, 227 ["[T]he application of ordinary rules of evidence like Evidence Code section 352 does not implicate the federal Constitution, and thus we review allegations of error under the 'reasonable probability' standard of [*People v. Watson* (1956) 46 Cal.2d 818, 836]"].) The video played a quite minor role during the trial. The prosecution played it only once, and the detective's testimony concerning the video was limited to identifying certain individuals depicted and describing the time and place where the video was recorded.

In addition, neither the prosecution nor the defense made any reference to the video during closing argument. For its part, the prosecution focused almost exclusively on the girls' testimony as evidence of defendant's guilt, telling the jury: "[I]f you believe the girls, the defendant is guilty of everything he's charged with. Bottom line. . . . [¶] If you do not believe the girls . . . send the defendant home." When the defense argued the prosecution

---

[7] "[T]he admission of evidence, even if erroneous under state law, results in a due process violation only if it makes the trial *fundamentally unfair*." (*People v. Partida* (2005) 37 Cal.4th 428, 439.) We see no fundamental unfairness resulting from admission of the video, and we therefore reject defendant's suggestion that the *Chapman v. California* (1967) 386 U.S. 18 standard of prejudice applies.

didn't "have any surveillance" or other corroboration for the girls' testimony, the prosecutor did not reference the Long Beach Boulevard video in rebuttal; rather, she argued "the testimony of one witness that you believe is enough. So corroboration isn't required." An examination of all the testimony and argument at trial accordingly leaves us convinced the video was a relatively insignificant portion of the prosecution's case, and when combined with the implausibility of defendant's "I'm just a rapper" defense, we believe there is no chance the jury would have acquitted defendant (or failed to reach a verdict) but for having seen the video.

C

Defendant's next assertion of error is best described by quoting his own description of the contention. His heading for the pertinent section of his opening brief states: "THE GOVERNMENT'S OUTRAGEOUS CONDUCT OF HOUSING THE WITNESSES TOGETHER FOR WEEKS BEFORE TRIAL, PERMITTING THEM TO JOINTLY REVIEW THEIR EXPERIENCES AND ANTICIPATED TESTIMONY, COMPOUNDED BY DETECTIVE JOHNSON INTERVIEWING THE WITNESSES AS A GROUP AMOUNTED TO WITNESS TAMPERING, CONSTITUTED POLICE AND GOVERNMENTAL MISCONDUCT AND TAINTED EACH WITNESS'S TESTIMONY DESTROYING THE DEFENSE'S ABILITY TO EFFECTIVELY CROSS-EXAMINE EACH WITNESS ON HER INDIVIDUAL VIEW OF THE FACTS AND HER OBSERVATIONS WHICH DENIED THE DEFENSE ITS CONSTITUTIONAL RIGHT TO DUE PROCESS AND A FAIR AND UNBIASED TRIAL. AND, TRIAL COUNSEL WAS

INEFFECTIVE FOR FAILING TO OBJECT[.]" For abbreviation's sake, we describe the claim as one of "governmental misconduct"; we hold it was forfeited for failure to object in the trial court; and we reject the claim of ineffective assistance of counsel because a competent attorney could have appropriately decided against raising a meritless misconduct claim.

Defendant concedes he did not object to the victim witnesses testifying at trial on the basis of any asserted governmental misconduct, nor did he ask the court to give a jury instruction addressing the purported misconduct. We accordingly hold defendant forfeited his governmental misconduct claim by failing to raise an appropriate objection. (*People v. Low* (2010) 49 Cal.4th 372, 393, fn. 11 [outrageous government conduct argument forfeited for failure to timely raise it]; *People v. Riggs* (2008) 44 Cal.4th 248, 298 [a defendant may not complain of prosecutorial misconduct on appeal unless the defendant made a timely objection in the trial court and asked that the jury be admonished to disregard the impropriety]; see also *People v. Adams* (2014) 60 Cal.4th 541, 577 [forfeiture rule applies to prosecutorial misconduct claim raised only in a post-verdict motion for new trial].) Application of the forfeiture rule is particularly appropriate here because the absence of any objection results in an undeveloped record—forcing defendant to merely speculate that it was "[s]omeone within the [g]overnment (likely either Detective Johnson or the prosecutor) [that] made the decision to house the four witnesses together" and depriving the prosecution of an opportunity to introduce evidence to rebut the government misconduct claim. (See, e.g., *People v. Welch* (1993) 5 Cal.4th 228, 236 ["Traditional objection and waiver

principles encourage development of the record and a proper exercise of discretion in the trial court"].)

Defendant argues that in the event we hold his government misconduct claim forfeited by the absence of an objection in the trial court, his trial attorney's failure to object constituted constitutionally deficient representation. We have indeed held the government misconduct claim forfeited, and his ineffective assistance of counsel claim is also unavailing.

"'In assessing claims of ineffective assistance of trial counsel, we consider whether counsel's representation fell below an objective standard of reasonableness under prevailing professional norms and whether the defendant suffered prejudice to a reasonable probability, that is, a probability sufficient to undermine confidence in the outcome. (*Strickland v. Washington* (1984) 466 U.S. 668, 694 [ ]; *People v. Ledesma* (1987) 43 Cal.3d 171, 217 [ ].)" (*People v. Carter* (2005) 36 Cal.4th 1114, 1189 (*Carter*).) "[W]e begin with the presumption that counsel's actions fall within the broad range of reasonableness, and afford 'great deference to counsel's tactical decisions.' [Citation.] Accordingly, we have characterized defendant's burden as 'difficult to carry on direct appeal,' as a reviewing court will reverse a conviction based on ineffective assistance of counsel on direct appeal only if there is affirmative evidence that counsel had ""no rational tactical purpose"" for an action or omission. [Citation.]" (*People v. Mickel* (2016) 2 Cal.5th 181, 198.)

"If the record on appeal sheds no light on why counsel acted or failed to act in the manner challenged," a reviewing court on direct appeal must reject a claim of ineffective assistance of counsel "unless counsel was asked for an explanation and failed to provide one, or there simply could be no satisfactory

explanation." (*Carter*, *supra*, 36 Cal.4th at p. 1189; see also *People v. Jones* (2003) 29 Cal.4th 1229, 1262-1263 [rejecting claim an attorney provided ineffective assistance by failing to object to alleged prosecutorial misconduct because the record on appeal did not reveal why no objection was made].)

There is little if any support in the record for defendant's claim that the victim witnesses "coordinated their testimony." When asked directly, V.R. denied she spoke to the other victims about the case. M.H. acknowledged she talked to Detective Johnson with the other girls present, but she was not asked whether those discussions concerned her trial testimony.[8] A.B. testified she and the other girls had "not [been] talking about the case," but rather "what can happen."

Notwithstanding the victims' testimony denying they discussed the case, defendant argues A.B. at least must have discussed *some* facts bearing on the issues at trial because her testimony that J.C. spent four days at defendant's apartment was based on J.C. having mentioned that period of time when the girls talked while in custody prior to trial.[9] This falls far short of substantiating defendant's accusation that all of the victims

---

[8] There is no basis to assume that the nature of the conversation must have concerned the substance of the girls' anticipated testimony, particularly when A.B. testified Detective Johnson generally met with the girls in custody "one by one" except for "one time that we did talk like in a group, but it wasn't like that."

[9] Defendant's attorney at trial also argued "Detective [Johnson] fed these girls information" because V.R. testified defendant drove a Range Rover that he didn't own at the relevant time.

"coordinate[d] their testimony" or that "individuality [in the victims' accounts] was lost, and in its place a collective was formed . . . ." Indeed, each of the victims had been interviewed by the police on an individual basis prior to being housed in the same pre-trial detention facility, and defendant's trial attorney used those individual statements to significant effect in impeaching aspects of their trial testimony.

Even if we read the record to indicate there must have been some discussion of the facts of the case among the victims prior to trial, defendant points to no persuasive authority suggesting such discussions would have been a basis for excluding the entirety of the girls testimony (or granting a mistrial or dismissal of the charges). Defendant cites Evidence Code section 777, the rule that provides for exclusion of witnesses, but the citation hurts, rather than helps, his argument. Defendant claims the rule is proof that a witness's testimony is impermissibly tainted by hearing the testimony of another witness. But as prior decisions have held, a party is not entitled to exclusion of witnesses as a matter of right, but rather solely at the discretion of the trial judge. (*People v. Hanson* (1961) 197 Cal.App.2d 658, 665 ["A motion to exclude witnesses during the trial is not a matter of right, but rests in the sound discretion of the trial court"]; see also Evid. Code, § 777, subds. (b), (c) [parties to an action cannot be excluded]; *People v. Rogers* (1912) 163 Cal. 476, 481.) If the Evidence Code does not automatically prohibit a witness from testifying in any instance in which the witness has heard the testimony of another witness, the Code provides no support for defendant's contention that the victims' testimony was necessarily tainted and inadmissible if there was some discussion

among them about the facts of the case prior to trial.[10] Defendant also cites cases that hold it is impermissible for law enforcement to ask witnesses to identify a suspect in a group setting such that the identification by one witness might influence the other witnesses. (See, e.g., *People v. Nation* (1980) 26 Cal.3d 169, 179-180.) These identification cases are inapposite here where the victims were undisputedly interviewed separately by law enforcement and provided their own accounts of defendant's actions long before they were housed together in custody, which poses no equivalent danger of impermissible suggestion.

More to the point, and still assuming there was pre-trial discussion of the case between the witnesses in custody, the record does not indicate any such discussion occurred at the behest of the prosecution team or with the prosecution team's tacit encouragement. The testimony as to whether Johnson talked to the girls as a group is somewhat conflicting. A.B. testified there were no group discussions except for one time that "wasn't like that." V.R. and M.H. testified they did talk to Detective Johnson while the other victims were present. But there is no evidence as to what the substance of any such discussions was, and certainly no testimony, as defendant asserts, that there was an "opportunity [for the victims] to discuss their testimony in group meetings chaired by Detective

---

[10] Such discussion would, of course, provide ammunition for cross-examination, and that is why witnesses are routinely encouraged not to discuss issues bearing on their testimony with other witnesses. The defense pursued precisely that line of cross-examination in seeking to discredit the victims in this case.

Johnson."[11] To the contrary, the trial court in ruling on defendant's new trial motion found that there had been "absolutely no prosecutorial misconduct" and that the prosecutor and Detective Johnson instead instructed the witnesses not to discuss the case among themselves when they were not on the witness stand. That is a finding entitled to deference on appeal. (*People v. Uribe* (2011) 199 Cal.App.4th 836, 857-858.) In addition, defendant cites no authority holding it is misconduct for the government to house witnesses in the same custodial facility, nor any facts in the record that establish the housing decision was made by a member of the prosecution team. (See *United States v. Smith* (9th Cir. 1990) 893 F.2d 1573, 1583 [no misconduct found for housing witnesses together where the defendant provided no support for the assertion that the prosecutor had any control over where the inmate witnesses were housed and there was no "concrete evidence" the witnesses colluded in their testimony].)

On the record as we find it, defendant's trial attorney could have concluded—rightly—that a government misconduct claim would be rejected by the trial judge, especially because making such a claim would give the prosecution an opportunity to directly rebut it (for instance, by showing the decision to house

---

[11] Defendant's brief also makes an unfounded allegation (the brief provides no citation to the record) that the prosecutor was personally aware the victims' testimony was "tainted" by joint discussion and thereby "effectively encouraged perjury and solicited false testimony at trial by having each of the witnesses testify under such conditions." Vigorous advocacy is essential, but leveling a charge of suborning perjury that finds no foundation in the record is not.

the victims in the same facility was made by someone who was not part of the prosecution team). At the same time, trial counsel may have believed the suggestion of collusion among the victims might provide fertile ground for cross-examination and a basis to argue the jury should acquit defendant, which is precisely what counsel did. Because we "indulge in a presumption that . . . counsel's actions and inactions can be explained as a matter of sound trial strategy," we presume defendant's attorney made a tactical decision not to seek to exclude the victims' testimony (or obtain other relief) based on what is by all appearances a meritless misconduct claim. (*Carter*, *supra*, 36 Cal.4th at p. 1189; see also *People v. O'Malley* (2016) 62 Cal.4th 944, 1010, fn. 12 [finding no misconduct and concluding counsel's failure to object was therefore not ineffective assistance].) We therefore reject defendant's claim that his trial attorney was ineffective for failing to object on grounds of governmental misconduct. (*People v. Mendoza Tello* (1997) 15 Cal.4th 264, 266.)

D

Defendant next argues the trial court wrongly sentenced him to a prison term on both count 4, human trafficking of M.H., and count 6, committing a lewd act on M.H. He contends imposing sentence on both counts violates Penal Code section 654.

Section 654 prohibits punishment for multiple crimes arising from a single indivisible course of conduct. (*People v. Latimer* (1993) 5 Cal.4th 1203, 1207-1208.) The application of section 654 "turns on the *defendant's* objective in violating" multiple statutory provisions rather than temporal proximity.

(*People v. Britt* (2004) 32 Cal.4th 944, 951-952 (*Britt*).) If all of the crimes for which the defendant was convicted were merely incidental to or were the means of accomplishing or facilitating one objective, he may be punished only once. (*Ibid*.) Multiple punishment, by contrast, is proper if the defendant entertained multiple independent criminal objectives. (*People v. Harrison* (1989) 48 Cal.3d 321, 335.) As our Supreme Court explained in *Britt*, "cases have sometimes found separate objectives when the objectives were either (1) consecutive even if similar or (2) different even if simultaneous." (*Britt*, *supra*, at p. 952.)

The question of whether Penal Code section 654 applies in a given case is a question of fact for the trial court, which is vested with broad discretion to resolve the question; its findings will not be reversed on appeal if there is any substantial evidence to support them. (*People v. Jones* (2002) 103 Cal.App.4th 1139, 1143 (*Jones*).) This review for substantial evidence applies to implied and express findings alike. (*People v. McCoy* (2012) 208 Cal.App.4th 1333, 1338; *Jones*, *supra*, at p. 1143.) On appeal, "[w]e review the trial court's determination in the light most favorable to the [People] and presume the existence of every fact the trial court could reasonably deduce from the evidence." (*Jones*, *supra*, at p. 1143.)

Here, we have no trouble finding substantial evidence that supports the trial court's implicit finding that defendant acted with separate objectives in committing the human trafficking and lewd act upon a minor crimes.[12] Indeed, the elements of both

---

[12] The trial court's finding was implicit, rather than explicit, because defendant made no argument at sentencing that punishing him for the count 4 conviction and the count 6 conviction would run afoul of Penal Code section 654.

crimes (which were proven by substantial evidence at trial) make clear the separate objectives that support multiple punishment. To be guilty of committing a lewd act on M.H. as charged in count 6 of the information, the prosecution was required to prove defendant committed a lewd or lascivious act, e.g., the forcible sex M.H. testified to, "with the intent of arousing, appealing to, or gratifying [his] lust, passions, or sexual desires . . . ." (Pen. Code, § 288, subd. (a); CALCRIM No. 1110.) To be guilty of human trafficking, as charged in count 4 pertaining to M.H., defendant must have had the intent to effect or maintain a violation of the pimping or pandering statutes, neither of which requires proof of an act done by a defendant to satisfy his own lust or sexual desires. (Pen. Code, §§ 236.1, subd. (c), 266h, 266i.)

Defendant nevertheless argues he harbored the same objective in committing both offenses because he forced himself upon M.H. simply as a means of procuring her to work for him as a prostitute. We think the argument fails on the facts and the law. M.H. testified that during their discussion at the park, defendant mentioned the "track" and was "basically candy coating me prostituting myself," even though she did not know it at the time. But that does not prove his later sexual assault at "Wolf's" house was committed in aid of grooming M.H. to be a prostitute rather than for his own sexual gratification.[13] In other words, regardless of whether there could be some support for the idea defendant may have been motivated by a single objective if we viewed the evidence in the light most favorable to him, there

---

[13] It is worth recalling that V.R. testified defendant told her to perform oral sex on him even after she had already been working for him as a prostitute.

was obviously substantial evidence supporting the trial court's implicit finding to the contrary—and that is what matters. (*People v. Valli* (2010) 187 Cal.App.4th 786, 794 [when reviewing claim of error under Penal Code section 654, evidence is viewed in the light most favorable to the People].) Penal Code section 654 therefore posed no bar to imposing sentence on both counts.

E

Defendant argues he is entitled to one additional day of presentence custody credit and the abstract of judgment wrongly calculates his conduct credits as 78, rather than 79, days. The Attorney General agrees defendant's presentence credit calculation requires correction. We concur defendant is entitled to an additional day of custody credit and the abstract of judgment should be corrected to give defendant an additional day of conduct credit.

DISPOSITION

The clerk of the superior court shall prepare an amended abstract of judgment that gives defendant 608 days of presentence credit, consisting of 529 days of actual custody credit and 79 days of conduct credit, and deliver the amended abstract to the Department of Corrections and Rehabilitation. The judgment is affirmed in all other respects.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

BAKER, J.

We concur:

KRIEGLER, Acting P.J.

DUNNING, J.*

---

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