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**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**



IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

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| THE PEOPLE,<br><br>Plaintiff and Respondent,<br><br>v.<br><br>JOSHUA BROWN,<br><br>Defendant and Appellant. | B279769<br><br>Los Angeles County<br>Super. Ct. No. BA447360 |

APPEAL from a judgment of the Superior Court of Los Angeles County, Ronald S. Coen, Judge. Affirmed.

David M. Thompson, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Scott A. Taryle and David W. Williams, Deputy Attorneys General, for Plaintiff and Respondent.

## INTRODUCTION

Defendant Joshua Brown appeals from convictions on one count of human trafficking (Pen. Code, § 236.1, subd. (c))[1] and one count of pandering (§ 266i, subd. (b)), both involving a minor. Defendant asserts neither conviction is supported by substantial evidence. In addition, he contends the trial court prejudicially erred in failing to instruct the jury sua sponte on the lesser-included offense of contributing to the delinquency of a minor, and in allowing the People's expert on prostitution to render an opinion as to his guilt. None of these arguments has merit and we therefore affirm the judgment.

## FACTUAL BACKGROUND

Danielle, who was 17 years old during the relevant time period, maintained a Facebook profile using a pseudonym. Roughly five months before the events at issue here, defendant began messaging Danielle. According to the People's prostitution expert, defendant's Facebook profile contained language and symbols consistent with pimping.

Danielle didn't meet defendant in person until the day she decided to run away from home. On that day, Danielle was exchanging messages on Facebook with her friend Dejoney, who she had known since elementary school. In the course of the online conversation, Danielle learned that Dejoney was working as a prostitute for a pimp named Dinero. Dejoney said she was making good money and that "you don't even have sex with guys," and you "let them jack-off to you and they pay a hundred dollars." Danielle was interested in perhaps becoming a

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1 All undesignated statutory references are to the Penal Code.

prostitute, so Dejoney recommended Danielle contact defendant via Facebook "[s]o he could be [her] pimp." Danielle also knew Dinero and defendant were friends. But Danielle believed no sex would be involved.

Danielle messaged defendant via Facebook and asked what he was doing. He responded that he was trying to make some money and asked whether she was also trying to make some money. Specifically, he said "[w]hat do you think I mean by getting dough? It's like you want me to be your pimp," which Danielle understood as an invitation to become his prostitute. She suggested they use the term "business partners" instead. Defendant asked where she was so he could "scoop [her] up." He arrived at her parents' home at approximately 1:00 a.m. and she snuck out of the house after her parents were asleep. Defendant was accompanied by Dejoney, her pimp Dinero, Jasmine, and Adrienne, who was driving the truck.

The group drove to an area in South Los Angeles well known as an area where prostitution is rampant. During the car ride, Danielle told everyone she was 17 years old and said she didn't know what to do or what to say. Defendant said she should talk to the men and "just be sweet," gave her some condoms, told her what to charge for particular sex acts, and said that if she saw the police she should pretend she was walking toward a bus stop.[2] When the truck reached the destination, Danielle and Dejoney stood on a street corner, where they remained for

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[2] This information was provided to investigating officers at the time of the initial interview, one day after these events. Danielle later denied making those statements and testified at trial that Adrienne and Jasmine gave her condoms and instructions the day after she spent her first night on the street.

approximately five hours while Adrienne drove the truck around in the area with defendant inside. Although Dejoney had sex with at least one person that night, Danielle did not engage in any sexual activity. Danielle believed, however, that she was working for defendant that night. Danielle and Dejoney returned to the truck. Adrienne then dropped Dejoney, Dinero, and defendant at different locations, then Adrienne and Jasmine took Danielle with them to a garage where they all slept for the night. Danielle didn't see defendant again after that first evening.

The next morning, Jasmine and Adrienne took Danielle to get something to eat, then purchased her a dress, shoes, jewelry, took her to get her eyebrows done, and did her hair to make her " 'attractive for the men.' " That evening, they took Danielle out again and this time she engaged in approximately 10 acts of sexual intercourse or oral copulation. Meanwhile, Adrienne and Jasmine stayed in the truck in a nearby alley sleeping or using their cellphones. Danielle made about $160 and gave almost all of the money to Jasmine and Adrienne. After a few days, and with the help of a nearby security guard, Danielle made her way to a police station and was later reunited with her family.

By information filed in August 2016, defendant was charged with one count of human trafficking of a minor (§ 236.1, subd. (c)(1)) and one count of pandering by procuring a minor for prostitution (§ 266i, subd. (b)(1)). At trial, Officer Vanessa Rios, the investigating officer from the Los Angeles Police Department and a member of a special human trafficking unit, testified for the prosecution. Rios confirmed that during the initial interview, which took place within a few days after Danielle returned to her home, Danielle said that defendant told her how much to charge

for various sex acts, what to do if she saw any law enforcement while she was on the street, and gave her condoms.

With respect to her expert testimony, Rios explained the street where Danielle worked was in the center of an area well known for prostitution. She also told the jury that pimps sometimes identify vulnerable young women on Facebook and "groom" them by telling them they are pretty or saying they like a girl's profile. Danielle was naïve and was going through some emotional difficulty at the time she ran away from home, which made her a perfect target for a pimp.

Rios reviewed defendant's Facebook page and told the jury that the language and imagery on his profile page were consistent with the pimp subculture. She also answered several lengthy hypothetical questions based on the evidence adduced during the trial concerning the behavior of and relationship between pimps and the prostitutes under their control.

The prosecutor also played several recorded telephone calls between defendant and his mother which took place while defendant was in jail, prior to trial. In those calls, defendant and his mother discussed the case and what defendant should tell the investigators about his activities.

The jury convicted defendant on both counts. The court later sentenced defendant to the upper term of 12 years on count 1, to be served in state prison, and to the upper term of six years on count 2. The sentence on count 2 was stayed under section 654. Defendant was assessed various fines and fees, awarded presentence custody credits, and was ordered to provide identifying physical evidence under section 296. Defendant timely appeals.

## CONTENTIONS

Defendant contends: (1) the convictions for human trafficking of a minor and pandering are not supported by substantial evidence; (2) as to both counts, the court prejudicially erred in failing to instruct the jury sua sponte on the lesser-included offense of contributing to the delinquency of a minor; and (3) the court erred by allowing the People's prostitution expert to testify as to defendant's guilt.

## DISCUSSION

### 1. Substantial evidence supports the convictions for human trafficking of a minor and pandering.

Defendant argues neither of the two convictions is supported by substantial evidence. We disagree.

"In assessing the sufficiency of the evidence, we review the entire record to determine whether any rational trier of fact could have found defendant guilty beyond a reasonable doubt. [Citation.] 'The record must disclose substantial evidence to support the verdict—i.e., evidence that is reasonable, credible, and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt.' [Citation.] In applying this test, we review the evidence in the light most favorable to the verdict and presume in support of the judgment the existence of every fact the jury could reasonably deduce from the evidence. [Citation.] The same standard applies where the conviction rests primarily on circumstantial evidence. [Citation.] We may not reweigh the evidence or resolve evidentiary conflicts. [Citation.] The testimony of a single witness can be sufficient to uphold a conviction—even when there is significant countervailing evidence, or the testimony is subject to justifiable

suspicion. [Citation.] Accordingly, we may not reverse for insufficient evidence unless it appears ' "that upon no hypothesis whatever is there sufficient substantial evidence to support …" ' " the verdict. (*People v. Valenti* (2016) 243 Cal.App.4th 1140, 1157–1158.)

Because the facts and circumstances of the two offenses are intertwined, we address defendant's challenges together, as he does in his appellate briefing.

To convict a defendant of pandering by procuring a minor over the age of 16 for prostitution, the People must prove defendant used promises, threats, violence or any device or scheme to cause, induce, persuade, or encourage a minor to become a prostitute. (§ 266i, subd. (b)(1).) To convict a defendant of human trafficking of a minor, the People must prove defendant "cause[d], induce[d], or persuade[d], or attempt[ed ] to cause" a minor "to engage in a commercial sex act," with intent to violate one of the enumerated statutes, including section 266h, which criminalizes pimping. (§ 236.1, subd. (c); *People v. Hicks* (2017) 17 Cal.App.5th 496, 508.) Section 266h, subdivision (a), defines pimping as follows: "Except as provided in subdivision (b), any person who, knowing another person is a prostitute, lives or derives support or maintenance in whole or in part from the earnings or proceeds of the person's prostitution ... is guilty of pimping, a felony, and shall be punishable by imprisonment in the state prison for three, four, or six years." Both human trafficking and pandering are specific intent crimes.

As it is undisputed Danielle engaged in prostitution when she was 17 years old, we need only consider whether there is sufficient evidence that defendant intended for Danielle to become a prostitute, took some action that encouraged or caused

her to do so, and (with respect to the human trafficking count) intended to be Danielle's pimp.

First, there was evidence that defendant was a pimp. Officer Rios testified that the language and symbols on defendant's Facebook page were distinctive and consistent with the pimp subculture. She also indicated it is not uncommon for pimps to groom and then recruit potential prostitutes by reaching out to young women via social media. Here, Danielle could not recall exactly when defendant first contacted her via Facebook but estimated it was approximately five months prior to the events at issue. And at the first sign that Danielle might be interested in making some money, defendant responded, "What do you think I mean by getting dough? It's like you want me to be your pimp."

There was also evidence defendant intended for Danielle to engage in prostitution. After Danielle hinted that she would like to make some money, defendant came to her parents' house (with another pimp and Danielle's friend Dejoney, a prostitute) at approximately 1:00 a.m. to collect her and then immediately took her to an area well known for prostitution. And in Danielle's initial statement to law enforcement, she indicated defendant gave her condoms, told her how much to charge for various sex acts, told her to "talk sweet" to the men and "get the money," and then dropped her on a street corner with another prostitute, leaving her there to work for approximately five hours.

This evidence sufficiently supports the jury's verdict on the pandering charge. The jury could reasonably conclude from these facts that defendant used "promises, threats, violence, or ... any device or scheme" to "cause[ ], induce[ ], persuade[ ], or

encourage[ ]" Danielle to become a prostitute. (§ 266i, subd. (b)(1).)

With respect to human trafficking, the evidence is also sufficient to support the conviction. The facts just mentioned with respect to the pandering charge plainly support the jury's conclusion that defendant "cause[d], induce[d], persuade[d], or attempt[ed ] to cause" Danielle "to engage in a commercial sex act." (§ 236.1, subd. (c).) On the remaining element, intent to violate section 266h (pimping), there is no evidence defendant ever received any money from Danielle's endeavors, as would be required to establish a violation of section 266h. But the People were only required to prove defendant *intended* to violate section 266h, not that he successfully did so. (See *People v. Hicks*, *supra*, 17 Cal.App.5th at p. 508.) Here, at a minimum, defendant's online messaging with Danielle ("It's like you want me to be your pimp") provides a sufficient basis for the jury's conclusion that defendant intended to violate section 266h.[3]

Defendant's challenge to the two convictions consists primarily of a restatement of the evidence and possible inferences from it in the light most favorable to him. For example, defendant acknowledges the evidence that he told Danielle to talk to men who approached her and to "be sweet," but argues those statements could not reasonably be construed as evidence that he encouraged or instructed her regarding prostitution. Instead, defendant asserts, "[h]e most likely simply was providing advice based on his prior experience." Given the overall context of the

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[3] Even if defendant did not intend to become Danielle's pimp himself—i.e., Jasmine and Adrienne were to be Danielle's pimps—defendant would still be guilty of both crimes under an aider-and-abettor theory.

relationship and the setting of the conversation—at 1:00 a.m. inside a vehicle headed for a well-known area of prostitution and in the company of another pimp and a prostitute—we are pressed to understand what advice defendant provided and what prior experience defendant intended to share that did not relate to prostitution.

Along the same lines, defendant disregards the evidence that Danielle told Officer Rios he gave her condoms and told her how much to charge for various sex acts, and instead relies on Danielle's contradictory trial testimony, in which she said she was confused and that it was Jasmine and Adrienne who gave her those instructions. In doing so, defendant disregards the familiar, and compulsory, standard of review. Defendant also emphasizes that it was Adrienne and Jasmine, not him, who took charge of Danielle after her first unsuccessful night as a prostitute, buying her clothing and grooming her hair and eyebrows to make her " 'attractive for the men.' " But Officer Rios testified that pimps will sometimes rely on others to help train their prostitutes and may work with other pimps to keep tabs on them. On the basis of that testimony, and the fact that defendant arrived at Danielle's house with Adrienne and Jasmine on the first night and the three stayed together throughout the evening and early morning hours to monitor Danielle, the jury could have concluded that Adrienne and Jasmine worked for defendant, or that they were all working together.

In short, defendant asks us to reweigh the evidence, credit those facts and inferences most favorable to him, and substitute our judgment for that of the jury in order to reverse his convictions. In light of the well-established standard of review, we decline defendant's invitation. Viewing the evidence in the

light most favorable to the judgment, we conclude sufficient evidence supports defendant's convictions of pandering (§ 266i, subd. (b)(1)) and human trafficking of a minor (§ 236.1, subd. (c)).

**2. The court's failure to instruct on lesser-included offenses was not prejudicial.**

Defendant contends the court erred in failing to instruct the jury sua sponte on the crime of contributing to the delinquency of a minor as a lesser-included offense of both pandering and human trafficking of a minor. We conclude the failure to give such instructions was not prejudicial.

Defendant did not request instructions on this lesser-included offense. Nevertheless, the trial court is obligated to instruct sua sponte on lesser-included offenses for which substantial evidence exists. (*People v. Breverman* (1998) 19 Cal.4th 142, 154–155 (*Breverman*).) We review de novo the trial court's failure to instruct on a lesser-included offense. (*People v. Cook* (2006) 39 Cal.4th 566, 596.) In a noncapital case, the failure to instruct on a lesser-included offense is reviewed under *People v. Watson* (1956) 46 Cal.2d 818, 836. (*Breverman*, at p. 178.)

"We have applied two tests in determining whether an uncharged offense is necessarily included within a charged offense: the 'elements' test and the 'accusatory pleading' test. [Citation.] The elements test is satisfied if the statutory elements of the greater offense include all of the statutory elements of the lesser offense, such that all legal elements of the lesser offense are also elements of the greater. [Citation.] In other words, ' "[I]f a crime cannot be committed without also necessarily committing a lesser offense, the latter is a lesser included offense within the former." ' [Citations.] Under the accusatory pleading test, a lesser

offense is included within the greater charged offense if the facts actually alleged in the accusatory pleading include all of the elements of the lesser offense. [Citations.]" (*People v. Bailey* (2012) 54 Cal.4th 740, 748.) The court must instruct on any lesser-included offense for which there is substantial evidence to support a conviction. (*Breverman, supra*, 19 Cal.4th at p. 162.) " 'In deciding whether evidence is "substantial" in this context, a court determines only its bare legal sufficiency, not its weight.' " (*People v. Moye* (2009) 47 Cal.4th 537, 556.)

As we have said, to convict a defendant of pandering (§ 266i, subd. (b)), the People must prove the defendant used promises, threats, violence or any device or scheme to cause, induce, persuade, or encourage a minor to become a prostitute. (§ 266i, subd. (a)(2).) As pertinent here, to convict a defendant of contributing to the delinquency of a minor, the People must prove the defendant committed an act which causes or tends to cause or encourage a minor to come within the provisions of section 300, 601, or 602 of the Welfare and Institutions Code. (§ 272, subd. (a)(1).)

Here, however, even if the court erred in not providing the instruction, the error was harmless because there is no reasonable probability that the result of defendant's trial would have been different if the court had instructed on the lesser-included offense of contributing to the delinquency of a minor.

The jury was asked to convict defendant of both human trafficking and pandering, and the human trafficking charge in particular required the jury to focus on the precise role defendant played in Danielle's activities. Specifically, defendant argued he played a passive role in the entire endeavor and that it was Danielle's affirmative actions coupled with assistance from

Adrienne and Jasmine that led to Danielle's prostitution experiment. Had the jury believed defendant's story and perceived that he played a passive role, it would have convicted only on the pandering charge and not on the human trafficking charge. But the jury convicted on both charges, which indicates the jury did not believe defendant played a passive role. Instead, in order to convict on the charge of human trafficking, the jury necessarily concluded defendant intended to be Danielle's pimp, or aided and abetted Jasmine and Adrienne in their pimping efforts. In light of that specific finding, it is not reasonably probable that the jury would have convicted defendant only of contributing to the delinquency of a minor, had the jury been given the opportunity to do so. The court's failure to instruct on the lesser-included offense was therefore not prejudicial.

**3. Expert testimony was within permissible bounds.**

Officer Rios testified both as a fact witness (as the investigating officer) and as an expert on pimping, pandering, and human trafficking. During her testimony, Rios answered several hypothetical questions based on the facts adduced during the trial. Defendant contends that in answering these questions, Rios impermissibly offered an opinion regarding his guilt, thereby violating his rights under the Fifth, Sixth and Fourteenth Amendments to the United States Constitution. We disagree.[4]

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[4] In light of our conclusion that Officer Rios's testimony was proper, we need not reach defendant's argument that his counsel's failure to object to Rios's testimony constituted ineffective assistance of counsel.

Under California law, a person with "special knowledge, skill, experience, training, or education" in a particular field may qualify as an expert witness (Evid. Code, § 720), and give testimony in the form of an opinion (Evid. Code, § 801). A trial court generally has "broad discretion in deciding whether to admit or exclude expert testimony [citation], and its decision as to whether expert testimony meets the standard for admissibility is subject to review for abuse of discretion." (*People v. McDowell* (2012) 54 Cal.4th 395, 426.)

Expert opinion testimony is admissible only if the subject matter of that testimony is "sufficiently beyond common experience that the opinion of an expert would assist the trier of fact." (Evid. Code, § 801, subd. (a).) " 'Generally, an expert may render opinion testimony on the basis of facts given "in a hypothetical question that asks the expert to assume their truth." [Citation.]' " (*People v. Vang* (2011) 52 Cal.4th 1038, 1045 (*Vang*).) " 'Such a hypothetical question must be rooted in facts shown by the evidence. ...' " (*Ibid.*)

"Testimony in the form of an opinion that is otherwise admissible is not objectionable because it embraces the ultimate issue to be decided by the trier of fact." (Evid. Code, § 805.) However, " '[a] witness may not express an opinion on a defendant's guilt. [Citations.] The reason for this rule is not because guilt is the ultimate issue of fact for the jury, as opinion testimony often goes to the ultimate issue. [Citations.] "Rather, opinions on guilt or innocence are inadmissible because they are of no assistance to the trier of fact. To put it another way, the trier of fact is as competent as the witness to weigh the evidence and draw a conclusion on the issue of guilt." ' " (*Vang, supra*, 52 Cal.4th at p. 1048)

In this case, Officer Rios testified as an expert on pimping, prostitution, and human trafficking. She explained some terminology, symbols, and other aspects of the pimp-prostitute subculture in general. In addition, she testified that the location where defendant took Danielle was in the middle of an area well known for prostitution. Rios also answered several lengthy hypothetical questions based on the evidence presented at trial.

Defendant argues that in her responses, Rios "crossed the line into opinions regarding appellant's guilt." For example, he argues that "Officer Rios's testimony about the content of appellant's precise Facebook page cannot be construed in any way other than as expressions of appellant's predilection to solicit minors for prostitution, and therefore an opinion as to his guilt." We disagree. Rios testified that certain symbols and words on defendant's Facebook page were commonly used by and consistent with other pimp Facebook accounts. And in response to a proper hypothetical question from the prosecutor, Rios stated that in her opinion a person using those symbols and words on his Facebook page and engaging in other conduct (such as picking up a young girl in the middle of the night, telling her how to act, and dropping her on a corner in the middle of a known prostitution area) was acting as a pimp.

Defendant's objection to this opinion testimony seems to be that the facts of the hypothetical mirrored the facts of the instant case so closely that Rios's response constituted an opinion on *his* guilt, rather than on the possible guilt of the hypothetical defendant. This argument has been repeatedly rejected by our courts. (See, e.g., *Vang, supra*, 52 Cal.4th at pp. 1050–1051 [stating "thinly disguised" hypothetical questions are permissible and that "it is not a legitimate objection that the questioner failed

to disguise the fact the question was based on the evidence"].) In fact, hypothetical questions asked of expert witnesses *must* closely track the evidence admitted because otherwise they are irrelevant and of no help to the jury. (*Id*. at p. 1046.)

In short, Officer Rios's expert testimony stayed within constitutionally permissible bounds.

## DISPOSITION

The judgment is affirmed.

**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**

LAVIN, J.

WE CONCUR:

EDMON, P. J.

DHANIDINA, J.*

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