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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE,

Plaintiff and Respondent,

v.

SHAUNTE GARDERE,

Defendant and Appellant.

B268229

(Los Angeles County
Super. Ct. No. NA100249)

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

Nancy L. Tetreault, 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, Shawn McGahey Webb, and Gary A. Lieberman, Deputy Attorneys General, for Plaintiff and Respondent.

Shaunte Gardere was convicted following a jury trial of pandering involving a minor 16 years old or older and human trafficking of a minor for a sex act. On appeal Gardere contends there was insufficient evidence to support her conviction on either charge. Gardere also contends the court erred by failing to instruct the jury on the lesser included misdemeanor offense of contributing to the delinquency of a minor. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

1. The Information

On November 6, 2014 Gardere was charged by information with one count of pandering involving a minor 16 years old or older (Pen. Code, § 266i, subd. (b)(i))¹ and one count of human trafficking of a minor for a sex act (§ 236.1, subd. (c)(1)).

2. Evidence at Trial

On September 10, 2014, as part of a human trafficking investigation, Detective Eduardo De La Torre of the Long Beach Police Department's vice unit visited a webpage advertising escort services. De La Torre noticed one advertisement in particular in which the woman pictured appeared to be a minor. The woman in the photograph was later identified as 16-year-old Aryanna F. The detective called the number listed in the advertisement. Aryanna answered and arranged a date with De La Torre for later that day at an upscale hotel. Aryanna told the detective it would cost \$250 for one hour.

When Detective De La Torre arrived at the hotel, he knocked on the door of the designated room while other officers

¹ Statutory references are to this code unless otherwise stated.

from his team waited nearby listening on a recording device worn by De La Torre. Aryanna answered the door and asked Detective De La Torre to touch her so she would know he was not a police officer. Detective De La Torre touched her below her shoulder, above her breast.

When Detective De La Torre proceeded into the main area of the room, he saw Gardere sitting on the bed. Aryanna said, “This is my friend, you wanted two girls.” Aryanna then asked if De La Torre had any more money, and he said he could give them an additional \$100. Both women agreed. Gardere asked De La Torre if he was a police officer and asked him to touch Aryanna’s “pussy.” Aryanna replied that he already had. De La Torre placed the agreed-upon amount of money on the dresser; Aryanna picked it up and took it to the closet. Gardere told Aryanna, “You’re a smart girl.” De La Torre interpreted this as praise for Aryanna for hiding the money. Gardere then asked De La Torre to show her his penis and watch pornography with her on her laptop. De La Torre asked if he could perform oral sex on both women. Aryanna stated “that’s extra.” De La Torre offered an additional \$100. Aryanna asked for \$120 so that the women would each get \$60. The detective agreed. Gardere then said to Aryanna, “Me and you are good together, huh?” At that point Gardere told the detective to disrobe, and the women also disrobed. De La Torre then gave the signal for his team to enter the room. The audio recording of De La Torre’s interaction with Aryanna and Gardere was played for the jury.

Detective De La Torre testified, based on his training and experience in investigating thousands of prostitution cases, he believed Gardere was “a lot more experienced than Aryanna because of the questions that she was asking She was

running through all of the—all of the hurdles, if you will, in trying to detect if I was a police officer.”

During the arrest and subsequent search of the hotel room, the police officers found a mobile phone belonging to Gardere. Four text message conversations were downloaded from the phone, and transcripts of them were admitted into evidence at trial. The first exchange on September 9, 2014 was between Gardere and a potential client in which Gardere negotiated the time and rate for a date and asked if the client would like “two girls or one.” When the client asked what the second girl looked like, Gardere sent the client a photograph of Aryanna.

In a subsequent series of text messages from September 9 and 10, 2014 between Gardere and a different client, after an initial greeting, Gardere, unprompted, sent pictures of Aryanna to the client. In yet another exchange between Gardere and a client from the early morning of September 10, 2014, Gardere asked the client how long he would want with two girls; and she sent photographs of herself and Aryanna. Finally, in an exchange of text messages between Gardere and a customer on the morning of September 10, the customer asked Gardere how much it would cost to receive oral sex from two women. Gardere replied it would cost \$200 and sent pictures of Aryanna. Gardere gave the client the address of the same hotel where the sting operation later occurred.

Gardere did not testify or present any witnesses in her defense.

3. The Verdict and Sentence

The jury found Gardere guilty of both offenses. The court sentenced Gardere to an aggregate state prison term of eight years: The court imposed the middle term of eight years for

human trafficking and the lower term of three years, to be served concurrently, for pandering. The court also imposed statutory fees, fines and assessments and ordered Gardere to register as a sex offender, as required by statute.

DISCUSSION

1. *Substantial Evidence Supports the Pandering and Human Trafficking Convictions*

a. *Standard of review*

In considering a claim of insufficient evidence in a criminal case, “we review the whole record to determine whether *any* rational trier of fact could have found the essential elements of the crime or special circumstances 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 prosecution and presume in support of the judgment the existence of every fact the jury could reasonably have deduced from the evidence. [Citation.] ‘Conflicts and even testimony [that] is subject to justifiable suspicion do not justify the reversal of a judgment, for it is the exclusive province of the trial judge or jury to determine the credibility of a witness and the truth or falsity of the facts upon which a determination depends. [Citation.] We resolve neither credibility issues nor evidentiary conflicts; we look for substantial evidence. [Citation.]’ [Citation.] A reversal for insufficient evidence ‘is unwarranted unless it appears “that upon no hypothesis whatever is there sufficient substantial evidence to support” the

jury's verdict.” (*People v. Zamudio* (2008) 43 Cal.4th 327, 357; accord, *People v. Manibusan* (2013) 58 Cal.4th 40, 87.)

b. *There was sufficient evidence Gardere committed the crime of pandering involving a minor*

“[P]andering comprises a broad range of conduct. The purpose of Penal Code section 266i is to “. . . cover all the various ramifications of the social evil of pandering and include them all in the definition of the crime” (*People v. DeLoach* (1989) 207 Cal.App.3d 323, 333.) In enacting section 266i the Legislature sought to “prevent prostitution ‘by discouraging persons other than the prostitute from augmenting and expanding a prostitute’s operation’” (*People v. Zambia* (2011) 51 Cal.4th 965, 973.) Pandering is a specific intent crime. (*Id.* at p. 980.)

Subdivision (a) of section 266i has six subparts that “define the different circumstances under which the crime of pandering may be committed.” (*People v. Leonard* (2014) 228 Cal.App.4th 465, 490.) Subdivision (b)(1) of section 266i imposes additional penalties when the defendant violated subdivision (a) and the victim was a minor age 16 or older. Gardere was convicted of violating subdivision (b)(1) by committing acts described in subdivisions (a)(2) and/or (a)(6) with a 16-year-old minor.

Section 266i, subdivision (a)(2), provides a person is guilty of pandering if he or she “[b]y promises, threats, violence, or by any device or scheme, causes, induces, persuades, or encourages another person to become a prostitute.” The Supreme Court has held causing, inducing, persuading or encouraging someone to “become a prostitute” under this statute includes behavior directed at “someone who is already an active prostitute.” (*People v. Zambia, supra*, 51 Cal.4th at p. 980 [this provision “places the

focus on the defendant's unlawful actions and intent, rather than making the targeted victim's character or occupation the determinative factors for conviction"].)

Subdivision (a)(6) of section 266i provides a person is guilty of pandering if he or she "[r]eceives or gives, or agrees to receive or give, any money or thing of value for procuring, or attempting to procure, another person for the purpose of prostitution" The term "procure" means "assisting, inducing, persuading or encouraging." (*People v. Schultz* (1965) 238 Cal.App.2d 804, 812 (*Schultz*); accord, *People v. Montgomery* (1941) 47 Cal.App.2d 1, 12 ["the term 'procure' as used in [section 266i] necessarily implies the use of persuasion, solicitation, encouragement and assistance"], disapproved on other grounds in *Murgia v. Municipal Court* (1975) 15 Cal.3d 286, 301, fn. 11; see *People v. Dillon* (1983) 34 Cal.3d 441, 454, fn. 2, *People v. Zambia, supra*, 51 Cal.4th at p. 981.)

Gardere argues there was no substantial evidence to support the jury's finding she was guilty of pandering because there was no evidence she had used promises, threats or violence to recruit Aryanna to become a prostitute or to encourage her to continue to be a prostitute. Gardere fundamentally misapprehends the scope of section 266i: An individual who has received or agreed to receive money in exchange for procuring another for prostitution is also guilty of pandering. (*Schultz, supra*, 238 Cal.App.2d at p. 812.) There is ample evidence to support a finding Gardere did just that.

As discussed, text messages containing photographs of Aryanna were downloaded from Gardere's mobile telephone and admitted into evidence. In one message Gardere, while negotiating the price for a date, asked if the client would like to

have “two girls or one.” When the client inquired about the appearance of the second girl, Gardere sent him a picture of Aryanna. In another exchange a client asked what it would cost to receive oral sex from two women. Gardere answered it would cost \$200 and sent the client pictures of Aryanna. Those text messages are reasonably interpreted as an agreement for Gardere to receive money in exchange for offering Aryanna to clients for sex. That is, Gardere was being paid to assist Aryanna in obtaining clients and expanding her operation.

Gardere argues merely offering Aryanna for sex is not pandering, contending “assistance” of another in plying the prostitution trade may be “pimping,” but does not qualify as “procuring.” Although she purports to ground her argument on amendments to section 266i subsequent to the 1965 decision in *Schultz, supra*, 238 Cal.App.2d 804, Gardere does not explain how any amendment changed the definition of “procure,” nor has she offered an alternative definition of the term that supports her argument. In fact, alternative definitions of “procure” support Gardere’s conviction. (See *People v. Dixon* (2011) 191 Cal.App.4th 1154, 1159-1160 [“pandering’ means the business of recruiting a prostitute, finding a place of business for a prostitute, or soliciting customers for a prostitute”]; see also *People v. Jennings* (2005) 128 Cal.App.4th 42, 54 [defining “procure” in context of insurance as “to get or to obtain”]; Black’s Law Dict. (10th ed. 2014) [defining “procure” as “[t]o obtain (something)” or “[t]o obtain a sexual partner for another, esp. an unlawful partner such as a minor or a prostitute”]; Oxford Dictionaries Online <<http://www.oxforddictionaries.com>> (as of February 15, 2017) [defining “procure” as “[o]btain (someone) as a prostitute for another person”]; Merriam-Webster Online

<<http://www.merriam-webster.com>> (as of February 15, 2017) [defining “procure” as “to get and make available for promiscuous sexual intercourse”].)

Similarly Gardere’s argument she cannot be guilty of pandering because there is no evidence the text messages resulted in actual transactions is unavailing. A proposed transaction need not be completed to qualify as pandering under the statute. (*People v. Hashimoto* (1976) 54 Cal.App.3d 862, 866 [“neither success nor consummation of the proposal was a necessary element of a violation of the pandering statute”]; *People v. Maita* (1984) 157 Cal.App.3d 309, 319 [same].) To the contrary, subdivision (a)(6) explicitly prohibits an agreement to receive money for merely “attempting to procure another person for the purposes of prostitution.” (§ 266i, subd. (a)(6).)

Finally, Gardere contends she could not have pandered Aryanna because Aryanna was the more experienced prostitute. Ignoring the deferential standard of review, Gardere urges us to disregard Detective De La Torre’s expert opinion testimony to the contrary. Whether Aryanna was the more experienced prostitute, however, has no bearing on Gardere’s culpability, because, as discussed, a person can be guilty of pandering even when the other individual is already a prostitute. (*People v. Zambia, supra*, 51 Cal.4th at p. 981.) Whether the panderer is a more or less experienced prostitute, or not a prostitute at all, is immaterial. Likewise, the purported lack of evidence of an agreement between Aryanna and Gardere is irrelevant. The crime of pandering does not require proof the second person has agreed to or acquiesced in the defendant’s scheme, and Gardere cites no authority such evidence is necessary. In any event, the interaction between Detective De La Torre and the women at the

hotel reasonably supports the inference Gardere and Aryanna had an established working relationship.

c. There was sufficient evidence Gardere committed the crime of human trafficking of a minor for a sex act

Section 236.1, subdivision (c), provides “[a] person who 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, with the intent to effect or maintain a violation of Section . . . 266i . . . is guilty of human trafficking.”

Gardere concedes sufficient evidence supports a finding she caused, induced, persuaded or attempted to cause, induce or persuade, Aryanna to engage in a commercial sex act. However, she argues there was insufficient evidence to support a finding she intended to violate section 266i, that is, to commit the act of pandering. For the reasons discussed, substantial evidence supports the jury’s finding Gardere acted in violation of the pandering statute. Accordingly substantial evidence also supports her conviction under the human trafficking statute.

2. The Trial Court Had No Sua Sponte Obligation To Instruct the Jury on Contributing to the Delinquency of a Minor

The trial court has a duty to instruct the jury sua sponte on all lesser included offenses if there is substantial evidence from which a jury can reasonably conclude the defendant committed the lesser, uncharged offense, but not the greater. (*People v. Whalen* (2013) 56 Cal.4th 1, 68; *People v. Rogers* (2006) 39 Cal.4th 826, 866-867; *People v. Breverman* (1998) 19 Cal.4th 142, 155.) This instructional requirement “prevents either party, whether by design or inadvertence, from forcing an all-or-nothing

choice between conviction of the stated offense on the one hand, or complete acquittal on the other. Hence, the rule encourages a verdict, within the charge chosen by the prosecution, that is neither “harsher [n]or more lenient than the evidence merits.”” (*People v. Smith* (2013) 57 Cal.4th 232, 239-240; accord, *People v. Banks* (2014) 59 Cal.4th 1113, 1160; *People v. Campbell* (2015) 233 Cal.App.4th 148, 162.)

“[T]he existence of “*any* evidence, no matter how weak” will not justify instructions on a lesser included offense’ [Citation.] Such instructions are required only where there is ‘substantial evidence’ from which a rational jury could conclude that the defendant committed the lesser offense, and that he is not guilty of the greater offense.” (*People v. DePriest* (2007) 42 Cal.4th 1, 50; accord, *People v. Whalen, supra*, 56 Cal.4th at p. 68.) Substantial evidence is defined for this purpose as “evidence sufficient to ‘deserve consideration by the jury,’ that is, evidence that a reasonable jury could find persuasive.” (*People v. Barton* (1995) 12 Cal.4th 186, 201, fn. 8.) “In deciding whether evidence is ‘substantial’ in this context, a court determines only its bare legal sufficiency, not its weight.” (*People v. Breverman, supra*, 19 Cal.4th at p. 177.) Further, “[i]n deciding whether there is substantial evidence of a lesser offense, courts should not evaluate the credibility of witnesses, a task for the jury.” (*Id.* at p. 162.)

We review the trial court’s failure to instruct on a lesser included offense de novo (see *People v. Licas* (2007) 41 Cal.4th 362, 367; *People v. Manriquez* (2005) 37 Cal.4th 547, 581), considering the evidence in the light most favorable to the defendant (*People v. Brothers* (2015) 236 Cal.App.4th 24, 30; *People v. Millbrook* (2014) 222 Cal.App.4th 1122, 1137).

Pursuant to section 272, subdivision (a)(1), it is a misdemeanor to cause, encourage or contribute to the dependency or delinquency of a minor, that is, to render the minor subject to the jurisdiction of the juvenile court under sections 300, 601 or 602 of the Welfare and Institutions Code. The People concede contributing to the delinquency of a minor is a lesser included offense to both the human trafficking and pandering charges in this case.² Nonetheless, the People argue the trial court had no duty to instruct the jury on the lesser offense because there was no substantial evidence Gardere was guilty only of contributing to the delinquency of a minor.

Gardere, on the other hand, argues the evidence she and Aryanna were arrested together for selling sexual services provided a basis for finding Gardere guilty only of contributing to the delinquency of a minor. However, the content of the text messages on Gardere's telephone, as discussed, unequivocally established the elements of pandering. Nothing in the record permitted the jury to disregard that evidence—there was no conflicting testimony, alternative explanation for the text messages or challenge to their authenticity. “[A]n unexplainable rejection of the prosecution’s evidence” does not constitute substantial evidence the defendant is guilty only of a lesser included offense. (*People v. Kraft* (2000) 23 Cal.4th 978, 1063.) Accordingly, there was no substantial evidence from which the

² “While contributing to delinquency [of a minor] is not [a lesser included offense] of pandering in the abstract—the pandered prostitute need not be a minor[,]” where, as here, the information alleged the victim was under the age of 18, contributing to the delinquency is a lesser included offense. (*People v. Mathis* (1985) 173 Cal.App.3d 1251, 1257.)

jury could find Gardere guilty *only* of contributing to the delinquency of a minor, but not guilty of pandering and human trafficking.

DISPOSITION

The judgment is affirmed.

PERLUSS, P. J.

We concur:

ZELON, J.

KEENY, J.*

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