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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 ONE

THE PEOPLE, Plaintiff and Respondent, v. MARC JAMALL ANDERSON et al., Defendants and Appellants.	B240219 (Los Angeles County Super. Ct. No. BA364260)

APPEAL from a judgment of the Superior Court of Los Angeles County, Fred Wapner, Judge. Affirmed.

Vanessa Place, under appointment by the Court of Appeal, for Defendant and Appellant Marc Jamall Anderson.

Edward H. Schulman, under appointment by the Court of Appeal, for Defendant and Appellant Lourdes Rosales Lepe.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Steven D. Matthews, Supervising Deputy Attorney General, and Zee Rodriguez, Deputy Attorney General, for Plaintiff and Respondent.

A jury convicted Marc Jamall Anderson and Lourdes Rosales Lepe of two counts of pandering. Both appeal, and we affirm.

BACKGROUND

A third amended information charged Anderson and Lepe with two counts of pandering by encouraging, in violation of Penal Code section 266i, subdivision (a)(2)[1] (counts 3 and 4),[2] and two counts of pandering by receiving or giving money or a thing of value, in violation of section 266i, subdivision (a)(6) (counts 5 and 6). Anderson and Lepe pleaded not guilty.

At trial, Los Angeles Police Department (LAPD) Officer Irma Garibaldi testified that late in the evening of November 5, 2009, she and fellow Officer Carlina Ortiz were working undercover near Washington and Alameda, dressed to look like street-walking prostitutes. The area was a "track," street vernacular for where prostitutes conducted their business. The officers were walking up and down, looking for lone male drivers and waiting to be approached by "johns." Backup officers were at different locations nearby; Officer Ortiz had a wire, a "one-way overhear," in her purse, so that the backup officers could hear what went on. The conversation was not taped; Officer Garibaldi did not have authority to tape-record.

Around 9:45 p.m., a blue car pulled up to the red-painted curb where Officer Garibaldi was standing, in front of an adult bookstore. Officer Ortiz approached the car, spoke to the driver, and the car drove away. A minute later the same car returned and parked nearby, and Anderson got out and approached the officers, saying, "'Hey girls, what's up?'" When the officers answered, "'Nothing much,'" Anderson continued, "'Are you guys out here making . . . money? Is it popping?'" (which Officer Garibaldi took to mean whether they were busy with customers). Officer Ortiz answered, "'We get by,'" and Anderson said, "'You guys are in the wrong place to make money.'" He asked if they traveled, and Officer Garibaldi said, "'Sure. We're down. Why?'" Anderson

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

[2] Counts 1 and 2 were dismissed pursuant to a motion under section 995.

explained that the women could make money in Utah and Arizona, and "it's too hard out here for a pimp, that there's too much heat in the area, and that's why he moved out there; and plus you make money." She interpreted "heat" to mean law enforcement. Anderson said that "for the same thing that we're doing out here in the corner, that we could be making about $800 a night." Anderson said he could put the women on the internet, pulled out a big wad of money, and said they could make that much. Officer Garibaldi asked "what was in it for him?" Anderson answered that he would keep all the money and would take care of the women, giving them a place to stay and clothes and whatever they needed. Officer Ortiz responded, "'Well, right now we keep everything.'" Anderson explained that he needed access to all their money in case something happened to them or they wound up in jail, so he could bail them out. If they did not stay with Anderson, the money "'would be 50/50.'"

A white car pulled up and two black men got out, with the driver aggressively asking: "'Hey, are you working?'" When the officers did not respond, the men drove away. Anderson said, "'See girls, if I was your pimp, I'd teach you the rules. First of all, you don't approach a car that comes out like that because that's how you get dragged into the car.'"

Officer Garibaldi told Anderson that the "'chitchatting'" was driving away customers. Anderson replied: "'I'll give you my number. Um, you know, when you guys are ready,'" and showed the officers pictures of scantily clad girls on his phone. He gave them his phone number. Before he left, Anderson said that he had a girl in Los Angeles that night, he would call her up to see if the undercover officers could make some money, and he would be back with the girl.

Anderson left. Fifteen minutes later he drove back, parked his car, and walked over to the officers saying that he had his girl in the car. Officer Garibaldi told Anderson "why don't you tell her to come out so that we could talk to her." Anderson walked back to the car, had a short conversation with Lepe, and Lepe got out of the front passenger seat. Anderson walked to the front of the bookstore, and Lepe met the officers in the parking lot, about 20 feet away.

Lepe told the officers "'[o]h yeah, we could really make some money,'" and "'[y]ou guys look cute.'" Officer Garibaldi asked Lepe to explain "how the game works," and Lepe said Anderson was "'really cool'. . . . 'He'll take care of you.'" "'You see, right now you're out here by yourself. No one's watching out for you.'" "'We'll look out for each other.'" Anderson would make their bail if they ever were thrown in jail. Anderson and she would keep all the money, but the officers would have anything that they needed.

Officer Garibaldi asked "what do we have to do," and Lepe responded that she was a photographer, and would take pictures of them, put the pictures on the internet, and they would make money. Lepe said she is a photographer with a degree and her equipment was stolen. She added, "'You still walk the streets if you want to. There is money out there to be made.'" Lepe mentioned that one night she made "eight grand." She also told Garibaldi "you don't have to do everything." Officer Garibaldi told Lepe that she did not like to do certain things such as anal sex, and Lepe responded that was fine, adding, "'I don't like to do that either,'" and she did not like to kiss. Officer Ortiz asked if they had to have sex with Anderson, and Lepe said, "'Oh, no. That's why I'm here . . . . I'm his main girl . . . . [H]e only fucks me.'"

Officer Garibaldi told Lepe, "'Why don't you call him, and we'll just settle this deal.'" Lepe got back into the car, and Anderson came over, asking: "'Are you guys ready to do this?'" Officer Garibaldi answered, "'I'm down to do this,'" but told Anderson "'there[] [are] certain things that I don't like to do, like, I don't like to do anal.'" Anderson replied: "'Oh, that's fine. If you want to do straight sex, that's fine with me.'" Officer Garibaldi gave the prearranged signal to the covering officers, and Anderson and Lepe were arrested. The officers subsequently wrote the police report on the arrest, Officer Ortiz typed it, and Officer Garibaldi looked it over.

Officer Ortiz testified consistently with Officer Garibaldi, adding that when they were discussing the arrangements, Anderson told them, "'I'm a pimp. I'm a businessman,'" and stated that if the officers did not stay with him and got thrown in jail, and spent all their money, "'Don't expect me to come bail you out.'" Officer Ortiz also

stated that during the conversation with Lepe, "I also wanted to solidify that we were talking about a sex act. So at which point I said, 'So do we have to fuck?' [¶] . . . She was, like, 'Yeah, of course, you have to fuck.'" When Lepe went back to the car, Anderson returned to where the undercover officers were standing and stated, "'Straight sex is fine.'" Officer Ortiz believed Anderson was soliciting her to engage in prostitution in exchange for boarding, security and money during their initial conversation, although in that first conversation they did not discuss exactly what the sex acts would be.

The transcript of a September 8, 2005 preliminary hearing was read to the jury. The trial court first instructed the jury that the witness testifying at the hearing was unavailable,[3] and that the testimony could be considered only as to Anderson, and only as to whether he had a common scheme or plan and the intent to commit the pandering offenses before the jury.

At the preliminary hearing, LAPD Officer Monilackhena Ouahdi testified that she was working undercover on August 10, 2005, for a special prostitution task force. Officer Ouahdi was standing in front of a motel on the corner of Figueroa and 95th Street, a common location for prostitutes, when Anderson approached her, parking his silver Dodge on 95th Street, with his driver's window rolled down. Officer Ouahdi asked him, "'What are you looking for,'" and Anderson asked her, "what do [you] do." Officer Ouahdi replied, "'I'm working,'" which meant working as a prostitute. She told Anderson she needed money for a cell phone, and Anderson responded that he could give her a cell phone, a car, and a place to stay. He explained that he needed a Chinese girl to work for him, and when she asked what he meant, Anderson replied that he had "a place in Arizona . . . [with] some girls working for him, and now he just needed an Asian girl." The place was a strip club, but there was a back room where Officer Ouahdi would be working.

Officer Ouahdi told Anderson she did not want to go to Arizona because she had family in San Bernardino, and Anderson said that he was from Los Angeles and went to

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[3] The parties stipulated that the officer testifying at the 2005 hearing had died.

Arizona every Thursday through Sunday, and then returned to Los Angeles. Officer Ouahdi asked, "'Well, how am I going to know you're not going to kidnap me?'" and he responded that he had girls working for him, and she would "make more money over there and for me to be out on the street is very dangerous. I could get kidnapped." Anderson told Officer Ouahdi he was "'for real'" and a businessman, and offered to leave his driver's license with her while he went to get photographs of the girls who worked for him. She did not take his license, and Anderson left.

Anderson returned in 15 or 20 minutes in a black Chevrolet El Camino. Officer Ouahdi said, "'That's a nice car,'" and Anderson explained that he also bought and fixed cars. He told her if she made $3,000 and gave it to him, he would buy a car, fix it, sell it, give her back the $3,000, and he would "'keep the profit.'" Anderson showed her photographs of the women who worked for him. Officer Ouahdi told him she stayed in room 5 of a motel on Figueroa. She then signaled her backup officers, and they arrested Anderson.

On cross-examination, Officer Ouahdi explained she was not wearing a wire and her conversation with Anderson was not taped.

At trial and in her defense, Lepe presented testimony by a childhood friend that Lepe attended college and was interested in photography and filmmaking.

Anderson testified in his defense. He had attended various colleges and had worked as a bus and truck driver, and continued to work as a comedian. He met Lepe as a filmmaker, and she filmed some of his performances; the jury was shown part of one of his filmed performances, without sound. Anderson lived in Arizona and Los Angeles, and also worked as promoter for strip clubs and dance clubs. He recruited women to perform in strip clubs, to do lap dances and pole tricks for tips.

Anderson did not proposition anyone to work for him as a prostitute on November 5, 2009, or tell anyone that he was a pimp. Instead, he told the officers that "they look like they would be good dancers at this club I'm promoting in Arizona." On cross-examination, he explained that on that night, he had bought some "weed" at a strip club and was "trying to find a blunt" to wrap the weed up when he drove a borrowed blue

car to the corner where he met the undercover officers. His driver's license had been suspended over 20 times, and he had used different names on different licenses. He stopped to talk to Officers Garibaldi and Ortiz because one of them looked "good to stop;" he did not know if they were prostitutes. He realized they were prostitutes when they told him he was in the way of their customers. He then said, "'Well, if you all prostitutes, um, you ever thought about stripping?'" and asked them if they would travel. A car then pulled up and a man got out and asked, "'What you all bitches doing out there?'" Anderson told the officers they would not have to worry about that inside a strip club. He never told them how much they would make. He had rent money in his pocket.

Lepe was just a friend, although Anderson had some romantic feelings for her. They worked together on his comedy project, because he knew comedy and she knew filming. He had gone to get Lepe so she could vouch for him. He was 45–50 feet away and could not hear the conversation that Lepe had with the officers. He had never discussed sexual acts with the officers.

Anderson had recruited prostitutes to work at strip clubs a number of times before, including in 2005, although he "never turned a known prostitute into a stripper." He would get a percentage for every girl he could bring to a club. The back rooms were usually where VIP's would get private lap dances. In 2005, he had seen an Asian girl walking, and asked her what she was doing in the neighborhood. She told him she was staying at a hotel and had been kicked out of her house and had no phone. Anderson said, "if you don't have money to get a phone and you living out a—a hotel, what would you think about going to Arizona to work in a strip club." Officer Ouahdi said that for a couple of weeks she would "date a guy here, date a guy there." She asked him to come to her room to talk about the strip club, but he was arrested when they arrived at the hotel.

The jury found Lepe and Anderson not guilty of pandering by receiving or giving money or a thing of value (counts 5 and 6), and found both defendants guilty of pandering by encouraging (counts 3 and 4). The trial court sentenced Lepe to the low term of three years on count 3, with a concurrent three-year term on count 4, as well as fines and fees. Anderson was sentenced to the midterm of four years on count 3, with a

concurrent term of four years on count 4, and fines and fees. Each filed a timely notice of appeal.

DISCUSSION

I. The crime of pandering prohibits a defendant from encouraging a person already engaged in prostitution to work as a prostitute for the defendant.

Anderson and Lepe point out that in *People v. Wagner* (2009) 170 Cal.App.4th 499 (*Wagner*), decided just under a year before their conversations with the officers, the Fourth Appellate District held that section 266i, subdivision (a)(2) does not prohibit a defendant from encouraging a woman currently engaged in prostitution to commence working as a prostitute for the defendant. They argue that despite the California Supreme Court's decision to the contrary in *People v. Zambia* (2011) 51 Cal.4th 965 (*Zambia*), they were entitled to the *Wagner* rule, and the application of the *Zambia* rule was an unconstitutional violation of the prohibition against ex post facto laws and a violation of due process.

This argument ignores that *Wagner*'s, *supra*, 170 Cal.App.4th 449 holding was distinctly a minority view at the time it was decided. As *Zambia*, *supra*, 51 Cal.4th 965 states, the statute's definition of pandering as behavior that "causes, induces, persuades, or encourages another person to become a prostitute" (§ 266i, subd. (a)(2)), is best interpreted so that "'to become a prostitute' means to 'engage in any future acts of prostitution,' regardless of the victim's status at the time of a defendant's encouragement. [¶] With a single exception, an unbroken line of cases . . . [citation] has rejected defendant's argument," which was, as defendants argue here, that "'to become a prostitute' does not include encouraging a person who is already a prostitute, or is posing as one." (*Zambia*, at p. 972.) The "lone exception" was *Wagner*, which the court in *Zambia* expressly rejected as "contrary to established principles of statutory construction" (*Zambia*, at p. 976), concluding "that the proscribed activity of encouraging someone 'to become a prostitute [citation] includes encouragement of someone who is already an active prostitute, or undercover officer," explicitly disapproving of *Wagner*. (*Id*. at p. 981.) No constitutional violation occurred.

II. The refusal to give a defense proposed instruction was not error.

Both Anderson and Lepe argue that the trial court erred in refusing to specifically instruct the jury as follows: "Recruiting an individual to work in a Strip Club does not constitute an act of prostitution and . . . an act of procuring a person solely for the purpose of working in a Strip Club does not violate the pimping and pandering statute." The trial court refused to give the instruction because it was too broad, as recruiting someone to work in a strip club *to engage in acts of prostitution* would violate the law. "I think it's very clear to the jury that if all Mr. Anderson did was say come and work as a stripper, don't—you don't have to have sex with anybody, just come and take your clothes off for money, that's not against the law. And we don't need this instruction to tell them that." To clarify, the trial court instructed the jury as follows, to explain what constituted lawful conduct and what would constitute prostitution in a strip club. The court first instructed the jury that pandering constituted using promises or any device or scheme to persuade, encourage, or induce the victim to become a prostitute, and: "A prostitute is a person who engages in sexual intercourse or any lewd act with another person in exchange for money or other compensation. [¶] A lewd act means physical contact of the genitals, buttocks, or female breasts of either the prostitute or customer with some part of the other person's body for the purpose of sexual arousal or gratification. [¶] The touching that occurs between a dancer and a customer inside a strip club during the performance of a dance is not a lewd act, unless the touching involves sexual intercourse or oral copulation. [¶] Oral copulation is any contact, no matter how slight, between the mouth of one person and the sexual organ or anus of another person. Penetration is not required."

This instruction as given informed the jury that Anderson and Lepe could not be convicted of pandering if they recruited the officers to dance in a strip club *without* performing sexual intercourse or oral copulation. In other words, the officers must have been recruited to perform acts of intercourse or oral copulation, either inside or outside of a strip club, before Lepe and Anderson could be guilty of encouraging the officers to engage in prostitution. The court's instruction was therefore consistent with the

statement in *People v. Hill* (1980) 103 Cal.App.3d 525, that "the trial court should have instructed the jury that nude modeling does not constitute an act of prostitution and that an act of procuring a person *solely* for the purpose of nude modeling does not violate either the pimping or pandering statute." (*Id*. at p. 537, italics added.) It was clear from the instruction that procuring a person solely for the purpose of working in a strip club did not violate the pandering statute, unless working in the club included performing acts of intercourse or oral copulation. To the extent that the proposed instruction stated that as long as Anderson and Lepe encouraged the officers to work in a strip club, they could not be found guilty of pandering, the proposed instruction was incorrect, as prostitution could occur in a strip club if a dancer engaged in sexual intercourse or oral copulation with a customer. A pinpoint instruction that misstates the law is not warranted or required. (See *People v. Earp* (1999) 20 Cal.4th 826, 903.)

III. The admission of the preliminary hearing testimony did not violate Anderson's sixth amendment right to confrontation.

The trial court granted the prosecution's motion to introduce Officer Ouahdi's 2005 preliminary hearing testimony over Anderson's opposition. On appeal, Anderson argues that the reading of Officer Ouahdi's preliminary hearing testimony violated his right to confrontation under the Sixth Amendment, as he did not have a constitutionally meaningful opportunity to examine the officer.

"Although defendants generally have the right to confront their accusers at trial, this right is not absolute. 'If a witness is unavailable at trial and has testified at a previous judicial proceeding against the same defendant and was subject to cross-examination by that defendant, the previous testimony may be admitted at trial.' [Citations.] The defendant 'must not only have had the *opportunity* to cross-examine the witness at the previous hearing, he must also have had "an interest and motive similar to that which he has at the [subsequent] hearing."' [Citation.] Under these rules, 'we have routinely allowed admission of the preliminary hearing testimony of an unavailable witness.' [Citation]. *Crawford v. Washington* (2004) 541 U.S. 36 [124 S.Ct. 1354, 158 L.Ed.2d 177], although changing the law of confrontation in some respects, left these

principles intact." (*People v. Seijas* (2005) 36 Cal.4th 291, 303; *People v. Williams* (2008) 43 Cal.4th 584, 618–619; *People v. Hollinquest* (2010) 190 Cal.App.4th 1534, 1547–1549.)

Anderson does not argue that he did not have the opportunity to cross-examine Officer Ouahdi at the prior preliminary hearing, or that he did not have a similar interest and motive as he did at his trial in this case. Instead, he argues that the rule as stated in *Seijas, supra*, 36 Cal.4th 291 is incorrect, an argument we of course reject, as we are bound by the decisions of the California Supreme Court. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.) At the 2005 preliminary hearing, Anderson's attorney cross-examined Officer Ouahdi. As is clear from the preliminary hearing testimony, Anderson's interaction with Officer Ouahdi was similar to the conversation he had with Officers Garibaldi and Ortiz in this case, making his interest in cross-examination similar. The preliminary hearing testimony was properly admitted.

IV. The evidence was sufficient to support Lepe's conviction.

Lepe argues that the evidence was insufficient to support her conviction because the crime of pandering was complete before Lepe arrived on the scene, and there was no evidence that Lepe was complicit in Anderson's actions before she appeared. To evaluate whether substantial evidence supported Lepe's conviction, we review the record in the light most favorable to the judgment to determine whether evidence exists that is reasonable, credible, and of solid value, so that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. (*People v. Prince* (2007) 40 Cal.4th 1179, 1251.) We do not ask whether we believe that the evidence established guilt beyond a reasonable doubt, but whether any rational jury could have found the elements of the crime beyond a reasonable doubt. (*Jackson v. Virginia* (1970) 443 U.S. 307, 334–335 [99 S.Ct. 2781, 61 L.Ed.2d 560].)

"[T]he crime of pandering is complete when the defendant 'encourages another person to become a prostitute' by 'promises, threats, violence, or by any device or scheme . . . .'" (*Zambia, supra*, 51 Cal.4th at p. 981, fn. 8, quoting § 266i, subd. (a)(2).) The evidence showed that Lepe, with Anderson out of hearing range, told the officers

"'we could really make some money'" because "'[y]ou guys look cute.'" She and Anderson would look after the women, and Anderson would make their bail if they were thrown in jail. Lepe and Anderson would keep the money, and give the officers anything they needed. Lepe would take pictures of them and put them on the internet, although they could still walk the streets; one night Lepe made eight thousand dollars. Lepe told the officers they did not have to do everything, although "'of course, you have to fuck,'" and it was fine if they did not want to provide anal sex, which Lepe also did not like to do. Lepe also assured the women they did not have to have sex with Anderson.

This evidence shows that Lepe encouraged the officers to become prostitutes for Anderson and Lepe by promising more money, protection, and bail, and by assuring them they would not have to perform sex acts they disliked. Separate from Anderson's conversation with the officers, Lepe's actions were therefore substantial evidence of pandering. It is immaterial that Anderson's actions before Lepe arrived on the scene were also sufficient evidence that Anderson committed pandering. There was sufficient evidence that Lepe engaged in pandering on her own.

V. The denial of Lepe's new trial motion on the basis of the failure to give a unanimity instruction was not an abuse of discretion.

After the verdict, Lepe moved for a new trial based on the absence of a unanimity instruction. The trial court denied the motion. Lepe now argues that her conviction must be reversed because the trial court did not give a unanimity instruction to the jury. She contends that the jury could have disagreed whether she was guilty based only on the theory that she aided and abetted Anderson's behavior before she arrived on the scene, or based only on her separate conversation with the officers once she arrived, and that therefore an instruction was required telling the jury that they must unanimously agree which of those two discrete criminal events was the basis for her conviction.

"As a general rule, when violation of a criminal statute is charged and the evidence establishes several acts, any one of which could constitute the crime charged, either the state must select the particular act upon which it relied for the allegation of the information, or the jury must be instructed that it must agree unanimously upon which act

to base a verdict of guilty. [Citation.] There are, however, several exceptions to this rule. For example, no unanimity instruction is required if the case falls within the continuous-course-of-conduct exception, which arises "when the acts are so closely connected in time as to form part of one transaction" [citation], or 'when . . . the statute contemplates a continuous course of conduct or a series of acts over a period of time.' [Citation.] There also is no need for a unanimity instruction if the defendant offers the same defense or defenses to the various acts constituting the charged crime. [Citation.]" (*People v. Jennings* (2010) 50 Cal.4th 616, 679.) Pandering is one of the crimes to which the second category of the continuous-conduct exception applies. (*People v. Funes* (1994) 23 Cal.App.4th 1506, 1526.) In this case, however, the crime was neither charged nor litigated as a continuous course of conduct offense. Lepe was charged with two counts of pandering, one for each of the officers, occurring on a single date.

The only conduct for which Lepe could be liable was her conversation with the undercover officers. To the extent that the evidence would support a jury conclusion that Lepe aided and abetted Anderson's pandering occurring *after* Lepe's appearance on the scene, California law has "settled that as long as each juror is convinced beyond a reasonable doubt that defendant is guilty of [an] offense [as] defined by statute, it need not decide unanimously by which theory he is guilty." [Citations.] More specifically, the jury need not decide unanimously whether defendant was guilty as the aider and abettor or as the direct perpetrator. [Citations.]" (*People v. Santamaria* (1994) 8 Cal.4th 903, 918–919.) Further, "[n]ot only is there no unanimity requirement as to the theory of guilt, the individual jurors themselves need not choose among the theories, so long as each is convinced of guilt." (*Id.* at p. 919.) "'Jurors need not unanimously agree on whether the defendant is an aider and abettor or a principal even when different evidence and facts support each conclusion.' [Citations.]" (*People v. Jenkins* (2000) 22 Cal.4th 900, 1026.)

No unanimity instruction was required, and the trial court did not abuse its discretion in denying the motion for a new trial.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED.

JOHNSON, J.

We concur:

MALLANO, P. J.

ROTHSCHILD, J.