Filed 6/19/18 P. v. Godfrey CA2/7

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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. CHARLES WAYNE GODFREY, Defendant and Appellant.	B280875 (Los Angeles County Super. Ct. No. MA066354)

APPEAL from a judgment in the Superior Court of Los Angeles County, Lisa M. Strassner, Temporary Judge. (Pursuant to Cal. Const., art. VI, § 21.) Reversed in part.

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, Senior Assistant Attorney General, Steven D. Matthews and Ryan M. Smith, Deputy Attorneys General, for Plaintiff and Respondent.

Charles Wayne Godfrey was convicted following a jury trial of pimping and attempting to dissuade a witness from testifying. On appeal Godfrey contends the trial court erred by admitting improper opinion testimony from the prosecution's expert witness and giving incomplete jury instructions. He also contends his conviction for attempting to dissuade a witness from testifying was not supported by substantial evidence. We reverse Godfrey's conviction for attempting to dissuade a witness, vacate his sentence in its entirety and remand for retrial on that count or resentencing. We affirm Godfrey's conviction for pimping.[1]

FACTUAL AND PROCEDURAL BACKGROUND

1. *The Third Amended Information*

In a third amended information filed November 1, 2016 Godfrey was charged with one count of pimping (count 1) (Pen. Code, § 266h, subd. (a)),[2] one count of making a criminal threat (count 2) (§ 422, subd. (a)), one count of false imprisonment (count 3) (§ 236), one count of human trafficking (count 4) (§ 236.1, subd. (b)) and one count of attempting to dissuade a witness from testifying (count 5) (§ 136.1, subd. (a)(2)). As to count 5 it was specially alleged the offense was a serious felony and Godfrey had suffered two prior serious felony convictions within the meaning of section 667, subdivision (a); as to all counts it was specially alleged Godfrey had suffered two prior

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[1] Godfrey does not challenge his conviction for pimping. In fact, his trial counsel conceded during closing argument that Godfrey was guilty of pimping; on appeal Godfrey acknowledges the conviction "appears to be supported by the evidence."

[2] Statutory references are to the Penal Code unless otherwise stated.

serious or violent felony convictions within the meaning of the three strikes law (§§ 667, subds. (b)-(j), 1170.12).

2. *The Evidence at Trial*

Miqueda Washington testified she met Godfrey in January 2015 and began working for him as a prostitute. Washington was 22 years old at the time and had been working as a prostitute for approximately six years. Washington testified that, during her working relationship with Godfrey, he determined the dates and times she worked. Godfrey would take her to a designated area to solicit customers and drive around the neighborhood to monitor her activity while she worked. If Godfrey saw Washington do something he did not like, he would call her on a mobile telephone he had given her and reprimand her. If Washington wanted to take a break from working to get something to eat, she had to get Godfrey's permission. Washington turned over all the money she earned working as a prostitute to Godfrey.

On approximately five occasions Godfrey slapped or hit Washington after she told him she did not want to work on a particular day. At some point she told Godfrey she no longer wanted to work for him. He responded by sending her threatening text messages, including writing, "Bitch, you talk too much. Imma put you in the hospital."

In April 2015 Washington was arrested and spent a few weeks in custody. When she was released, Washington told Godfrey she no longer wanted to work as a prostitute. Godfrey became angry and hit Washington. At trial Washington did not recall whether Godfrey had hit her with a fist or an open hand, nor did she remember what part of her body was hit. Washington tried to leave the motel room in which they were

staying, but Godfrey told her she could not leave. Washington testified she believed Godfrey would hit her if she tried to leave and she was scared.

Godfrey was arrested in June 2015. At some point after Godfrey's arrest Washington received at least two telephone calls urging her not to testify against him.[3] The first call was from a man and a woman. Washington testified she recognized the woman's voice as Serena Vallier, the mother of Godfrey's child. Washington testified Vallier and the man were "both talking at the same time, and I don't really recall the conversation. And I hung up the call pretty quick." However, she remembered Vallier said "snitches get stitches." During another telephone call someone told Washington, "Don't go to court."

Washington also received messages on her social media account from Vallier. The messages accused Washington of lying about her involvement with Godfrey and setting him up with the police. One message stated, "Imma let it known that you set up ass bitch straight out." Washington interpreted this to mean Vallier would tell people Washington had "told on" Godfrey. Washington testified this scared her because, "if she was to tell other people, you know, then, like, they have their own thoughts about how they want to handle stuff. . . . I mean, some people fight about it. Some people might kill about it." Another message from Vallier stated, "If he going down, you going down

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[3] Washington could not remember exactly when she received these calls. Initially she testified she received two calls prior to testifying at the preliminary hearing in this case and one call after the preliminary hearing. However, later in her testimony she stated she did not "really remember" when she received the calls.

with him." Washington understood that to mean, if Godfrey went to jail, then something violent could happen to her.

In September 2015, while Godfrey was in custody awaiting trial, Washington and Vallier had a physical altercation. Washington was with her sister and a friend, who, unbeknownst to Washington, was Vallier's cousin. The friend took Washington and her sister to Vallier's house. Vallier and two female family members came out of the house, recognized Washington and began arguing with her. Eventually one of Vallier's relatives began punching Washington and a fight ensued, during which Vallier kicked Washington in the back. Once the fight was broken up, Washington left.

Detective Mike Davis of the Los Angeles County Sheriff's Department's safe streets bureau testified regarding his investigation into Godfrey's conduct. Davis testified he had been a police officer almost 17 years and in 2015 had been assigned to the human trafficking division of the major crimes bureau. That assignment lasted one year. Davis stated he became familiar with the terminology used by prostitutes and pimps by attending two week-long training classes and speaking with numerous victims of human trafficking, prostitutes and pimps.[4]

Detective Davis testified he had reviewed Godfrey's social media page and text messages exchanged between Godfrey and

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[4] Prior to trial the People requested Detective Davis be designated as an expert in human trafficking and permitted to "testify as to the meanings of certain terminology that is unique to pimping—and human trafficking-type cases." The court granted the request on the condition the People could establish Davis' expertise. Godfrey did not object to the People's request or the court's ruling.

Washington. Davis explained the meaning of certain words and phrases used by Godfrey and Washington on social media and in their text messages, and he testified they were terms commonly used by pimps and prostitutes. As for the text messages, Davis stated they contained "conversations about prostitution, trafficking, going to other states."

Detective Davis also testified regarding four telephone calls made by Godfrey while he was in custody. Recordings of the calls were played for the jury. The first telephone call took place on July 2, 2015 and was between Godfrey and an unidentified woman. On the call Godfrey said, "You need to holler at Brianna. You feel me? You need to holler at Brianna really really holler at her though like." The woman replied, "All she said when she hit me up." Godfrey then stated, "You know you like really just need to get up in her head like look bitch like." To which the woman replied, "I hit her up too and then I like finished a whole bunch of stuff she was talking about stuff like way back three months. . . . I think Brianna think to the pressure if I get in her head." Godfrey then stated, "If I can't get up outta here . . . it's gonna get worse for me. You feel me? It's not gonna get no better. That's how I feel it's gonna get worse." After playing the recording for the jury, the prosecutor asked Detective Davis what he believed the conversation was about. Davis replied, "It was about getting the victim's family in order to get her to stop testifying, and he explains that if they don't do something that it's going to get worse for him while he's in county jail."[5]

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[5] Detective Davis also testified Brianna was the name of Washington's sister. However, the answer was stricken after Godfrey's counsel objected based on lack of foundation.

The second telephone call took place on July 6, 2015 between Godfrey and an unidentified man. Godfrey told the man, "You gotta call baby moms right or text baby moms and you gotta um and then and then she gonna tell you feel me the whole little get down. . . . T gonna tell you the whole get down. You like feel me? And the tell T what's Brianna's sister's name. You feel me? And she gonna tell you Brianna's sister's name cuz. And then hit her up cuz. You feel me?" Later, Godfrey said, "But um its Brianna's sister cuz ask for her name and then holla at her however you can holla at her cuz. What's up what's going on what's the deal? You feel me? Like this shit weird." Detective Davis testified he believed this conversation was about the unidentified man getting in touch with Washington.

The third telephone call took place later in the day on July 6, 2015 between Godfrey and Vallier. On the call Godfrey said he was going to court that week and did not plan on accepting any plea agreement offered by the prosecution. He stated, "I already said I'm not taking nothing man I'm a speedy trial it you feel me. But I gotta see what they talking about. I'm gon try and call you back though you feel me so I can talk to you cause you already know the deal like I can't you know what I'm saying. . . . If you get any collect calls you gotta answer you already know the deal, everything what's up you feel me. You should get in contact with a mother fucker, with a mother fucker, what a mother fucker really doing you feel me that's what you should do." Vallier responds, "Yeah I am baby daddy, don't trip. Don't trip." After playing the recording the prosecutor asked Detective Davis to "explain the context of the series of statements made by the defendant when it says, 'You should get in contact with the mother fucker.'" Davis responded, "Prior to that

statement he talks about his upcoming court date. He also talks about she already knows the deal, and then, based off those statements with upcoming court date saying that, 'You need to get in touch with the mother fucker' and she already knows, I believe they're referencing [Washington]." Further, when Vallier responded, "Yeah I am baby daddy," Davis believed that meant Vallier "either has or is going to" contact Washington.

The fourth telephone call took place on September 10, 2015 between Godfrey and an unidentified woman. The woman told Godfrey, "[Y]our baby mama, her ass did some crazy shit." When Godfrey asked what happened, the woman said, "I don't really wanna say cause you on the phone. Just know she talked to the girl. . . . If you can read in between the lines." Godfrey then asked, "Oh yeah, oh yeah—she, she, she uh talked to Twany?" The woman answered, "Yes. . . . She got into it with Twany last night." Godfrey responded, "That's weird cause they was already saying—they was already saying that shit like you feel me. They was already saying that shit like, they were already saying it. You feel me like." The woman then said, "That's what I was saying like that was a no go. They could have just waited for that." Detective Davis testified that, based on the context of the conversation, he believed "Twany" referred to Washington. As to Godfrey's statements that "they was already saying it," Davis said he believed, "Based on the prior calls that were heard, that there were already things in motion to get at [Washington] and that the word was already out that if they saw her, they could get her."

Throughout Detective Davis's testimony concerning the telephone calls, Godfrey's counsel repeatedly objected based on

foundation, speculation and relevance. The majority of those objections were overruled.

Godfrey did not testify or present any witnesses in his defense.

3. *The Verdicts and Sentencing*

After the conclusion of the People's evidence, Godfrey moved for dismissal of count 3 (false imprisonment) pursuant to section 1118.1 on the ground that the only evidence supporting the charge of false imprisonment was an act that took place in San Bernardino County, outside the jurisdiction of the trial court. The court granted the motion and entered a judgment of acquittal on count 3.

After deliberating on the remaining charges for one and a half days, the jury informed the court it had reached a verdict on count 1 (pimping), but was at an impasse on count 2 (making criminal threats), count 4 (human trafficking) and count 5 (attempting to dissuade a witness). The court urged the jury to continue deliberating, which it did for an additional 90 minutes. At that point, the jury announced verdicts of guilty as to counts 1 and 5 and stated it could not reach unanimous verdicts on counts 2 and 4. The trial court declared a mistrial on counts 2 and 4.

Prior to sentencing, Godfrey admitted he had suffered the two prior serious felony convictions alleged in the third amended information. On February 3, 2017 the trial court sentenced Godfrey to an aggregate state prison term of 43 years to life.[6]

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[6] On count 1 the court imposed a determinate term of eight years: the middle term of four years doubled pursuant to the three strikes law. On count 5 the court imposed an

The court also imposed statutory fines, fees and assessments and awarded Godfrey 1,180 days of presentence custody credits.

DISCUSSION

1. *The Trial Court Abused Its Discretion by Admitting Detective Davis's Opinion Testimony Regarding the Meaning of the Telephone Calls*

a. *Governing law and standard of review*

An expert witness may provide opinion testimony on matters "[r]elated to a subject that is sufficiently beyond common experience that the opinion of an expert would assist the trier of fact . . . ." (Evid. Code, § 801.) However, expert opinion testimony will be excluded """when it would add *nothing at all* to the jury's common fund of information, i.e., when 'the subject of inquiry is one of such common knowledge that men of ordinary education could reach a conclusion as intelligently as the witness.'"""" (*People v. Jones* (2012) 54 Cal.4th 1, 60; accord, *Amtower v. Photon Dynamics, Inc.* (2008) 158 Cal.App.4th 1582, 1598 [""""expert opinion is not admissible if it consists of inferences and conclusions which can be drawn as easily and intelligently by the trier of fact as by the witness""""].)

Further, exclusion of expert opinion testimony is proper when the opinion """"rest[s] on guess, surmise or conjecture."""" (*People v. Vang* (2011) 52 Cal.4th 1038, 1046.) This proposition """"is an inherent corollary to the foundational predicate for admission of the expert testimony: will the testimony assist the

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indeterminate term of 25 years to life pursuant to the three strikes law, plus two consecutive five-year terms for the prior serious felony convictions pursuant to section 667, subdivision (a)(1).

trier of fact to evaluate the issues it must decide?'" [Citation.] Expert testimony *not* based on the evidence will not assist the trier of fact." (*Ibid.*) While an expert may express opinions that embrace the ultimate issue to be determined by the trier of fact (Evid. Code, § 805), an expert may not express an opinion about the defendant's guilt or his or her subjective knowledge or intent. (*Vang*, at pp. 1048, 1051.)

We review the trial court's admission of expert testimony for abuse of discretion. (*People v. Robinson* (2005) 37 Cal.4th 592, 630; *People v. Smith* (2003) 30 Cal.4th 581, 627.)

b. *Detective Davis's testimony regarding the telephone calls was improper opinion*

Godfrey contends Detective Davis's testimony regarding the four telephone calls was improper opinion testimony that Godfrey was guilty of attempting to dissuade Washington from testifying.[7] In response, the Attorney General argues Davis's opinion testimony was necessary to assist the jury in understanding "the habits of prisoners" or the "meaning of particular coded verbiage, especially coded verbiage that is constantly evolving to evade detection."

The Attorney General's articulation of this argument provides the reason for its failure. Contrary to the Attorney

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[7] Godfrey also argues Detective Davis's opinions were improper because he was qualified as an expert only on human trafficking and not on interpreting jail telephone calls. The Attorney General contends Godfrey forfeited this argument by failing to raise it in the trial court. We need not decide these issues because we find, even if Davis was shown to have the requisite expertise, his opinions fell outside the scope of permissible expert testimony.

General's contention, Davis's opinion testimony regarding the telephone calls was not based on any description of the habits of prisoners, nor did Davis give any explanation of the meaning of any specific coded verbiage. For example, when asked what he believed the July 2 conversation was about, Davis answered, "It was about getting the victim's family in order to get her to stop testifying." Davis did not interpret or define a specific word or phrase, nor did he explain which words or phrases caused him to believe Godfrey was discussing an attempt to dissuade Washington from testifying. Davis did not articulate how his particular training or experience enabled him to form his opinion. Likewise, Davis did not explain any basis for his opinion that "Brianna" referred to Washington's sister or that "Twany" referred to Washington. Absent any explanation of how or why Davis formulated his opinions, his testimony was "purely conclusory and essentially of no use to the fact finder." (*People v. Prunty* (2015) 62 Cal.4th 59, 85; accord, *Jennings v. Palomar Pomerado Health Systems, Inc*. (2003) 114 Cal.App.4th 1108, 1120, fn. 12 ["[w]e are convinced the expert must provide some articulation of how the jury, if it possessed his or her training and knowledge and employed it to examine the known facts, would reach the same conclusion as the expert"].)

Even if Detective Davis had articulated his opinions in a less conclusory fashion, they would still be inadmissible. The Attorney General has not identified any words or phrases used in the telephone calls that were sufficiently beyond common experience as to require expert testimony for the jury to comprehend their meaning. The jury was as able as Detective Davis to listen to the recordings and determine for itself what they meant. (See *People v. Smith, supra,* 30 Cal.4th at p. 628

[jury was as able as expert to listen to taped recordings of defendant and decide how to interpret them]; *People v. Torres* (1995) 33 Cal.App.4th 37, 47 [expert testimony improper when "jury clearly was competent to determine from the evidence and the court's instructions whether defendant intended to rob or extort [victims]"].) As such, Detective Davis's "opinions about the evidence in this case did not offer the jury anything 'more than the lawyers can offer in argument.'" (*Kotla v. Regents of the University of California* (2004) 115 Cal.App.4th 283, 294; accord, *Summers v. A.L. Gilbert Co.* (1999) 69 Cal.App.4th 1155, 1183 ["when an expert's opinion amounts to nothing more than an expression of his or her belief on how a case should be decided, it does not *aid* the jurors, it *supplants* them"].) While Davis's conclusion that Godfrey was trying to prevent Washington from testifying might be an appropriate inference to be drawn from the evidence, it was not an appropriate subject of expert testimony.

2. *The Erroneous Admission of Detective Davis's Opinion Testimony Regarding the Telephone Calls Was Not Harmless*

People v. Watson (1956) 46 Cal.2d 818 provides the appropriate standard for determining whether the erroneous admission of expert testimony requires reversal. (*People v. Prieto* (2003) 30 Cal.4th 226, 247.) Under *Watson*, reversal is warranted only if "it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error." (*Watson*, at p. 836.)

The Attorney General argues admission of Detective Davis's opinion testimony regarding the telephone calls was harmless because there was "overwhelming evidence that appellant intended to try to prevent Washington from testifying

against him." While there was considerable evidence that Washington had been contacted by various individuals who attempted to dissuade her from testifying, the only evidence linking Godfrey to those attempts was the four recorded jail telephone calls and Davis's interpretation of them. The actual language of the telephone calls was open to more than one interpretation. While it was certainly possible the jury would have concluded from the calls that Godfrey was discussing attempts to dissuade Washington from testifying, the jury was not given the opportunity to evaluate them unguided by Davis's improper opinion testimony. Particularly because Washington had difficulty recalling the timing of the threatening calls to her, which makes it uncertain when these calls occurred in relation to Godfrey's jail conversations, it is far from clear the jury would have reached the same verdict without the improper influence of Davis's expert testimony. (See *Summers v. A.L. Gilbert Co., supra,* 69 Cal.App.4th at p. 1182 ["there is a substantial danger the jury simply adopted the expert's conclusions rather than making its own decision"].) It is reasonably probable, based on the language of the calls alone, that at least one juror would have concluded Godfrey's statements did not prove his guilt beyond a reasonable doubt. (See *People v. Soojian* (2010) 190 Cal.App.4th 491, 520 ["[i]t appears that under the *Watson* standard a hung jury is considered a more favorable result than a guilty verdict"]; see also *People v. Sanchez* (2014) 228 Cal.App.4th 1517, 1535 [quoting *Soojian*].)

Our conclusion the erroneous admission of Detective Davis's opinion testimony was not harmless is reinforced by the fact the jury reported it could not reach a unanimous verdict on count 5 after deliberating for more than a day. (See *People v.*

Sergill (1982) 138 Cal.App.3d 34, 41 [erroneous admission of expert testimony not harmless where prior trial resulted in deadlocked jury].) We find it is reasonably probable a result more favorable to Godfrey would have been reached had that testimony not been allowed. The conviction on count 5 must be reversed.[8]

3. *Substantial Evidence Supports Godfrey's Conviction for Attempting To Dissuade a Witness*

Although we reverse Godfrey's conviction for attempting to dissuade a witness because of the improper admission into evidence of Detective Davis's opinion testimony, we must also evaluate his claim the conviction, as tried, is not supported by substantial evidence. "The Double Jeopardy Clause forbids a second trial for the purpose of affording the prosecution another opportunity to supply evidence which it failed to muster in the first proceeding." (*Burks v. United States* (1978) 437 U.S. 1, 11 [98 S.Ct. 2141, 57 L.Ed.2d 1].) To avoid placing a defendant in double jeopardy, a reviewing court that reverses a conviction due to legal error must assess the defendant's challenge to the sufficiency of the evidence to determine whether the defendant may be retried for the offense. (See *People v. Morgan* (2007) 42 Cal.4th 593, 613; *People v. Hayes* (1990) 52 Cal.3d 577, 631.) "[T]he defendant . . . may preserve for himself whatever double jeopardy benefits accrued in his first trial notwithstanding some

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[8] Because we reverse Godfrey's conviction for attempting to dissuade a witness based on the improper admission of Detective Davis's testimony, we need not address Godfrey's additional argument the jury was not properly instructed on the elements of the offense.

fatal defect in the proceedings." (*People v. Superior Court* (*Marks*) (1991) 1 Cal.4th 56, 72, fn. 14.)

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, 75; accord, *People v. Manibusan* (2013) 58 Cal.4th 40, 87.)

In applying this deferential standard of review to determine whether a retrial is permissible, "the reviewing court must consider *all* of the evidence presented at trial, including evidence that should not have been admitted. '[W]here the evidence offered by the State and admitted by the trial court—

whether erroneously or not—would have been sufficient to sustain a guilty verdict, the Double Jeopardy Clause does not preclude retrial.' [Citation.] Accordingly, 'a reviewing court must consider all of the evidence admitted by the trial court in deciding whether retrial is permissible under the Double Jeopardy Clause.'" (*People v. Story* (2009) 45 Cal.4th 1282, 1296-1297; accord, *People v. Lara* (2017) 9 Cal.App.5th 296, 328, fn. 17.)

The evidence presented to the jury was sufficient to support Godfrey's conviction for attempting to dissuade a witness. As discussed, there was considerable evidence Washington was repeatedly contacted and warned not to testify. Washington testified that, at least some of those warnings, were delivered by Vallier, who was the mother of Godfrey's child and who spoke to Godfrey on the telephone on July 6, 2015. While Washington was not positive of the dates of the threats she received, she testified she thought she received two of the calls prior to testifying at the preliminary hearing on July 9, 2015. This timing coincides with three of Godfrey's jail telephone calls that took place in early July.

On the jail telephone calls Godfrey is heard telling various individuals to contact Washington's sister and Washington herself to find out "what's going on." On one call the unidentified woman says she can "get up in her head." On another call Godfrey told the unidentified man that someone else would tell him "the whole get down." On the final call the unidentified woman indicated she was hesitant to discuss Washington on the telephone. While these conversations could have more than one reasonable interpretation, Detective Davis testified unequivocally that in his opinion Godfrey was discussing plans to keep Washington from testifying. On this record there was substantial

evidence from which a reasonable trier of fact could find Godfrey guilty of attempting to dissuade a witness from testifying.

DISPOSITION

The conviction for attempting to dissuade a witness is reversed. The conviction for pimping is affirmed. Godfrey's sentence is vacated in its entirety, and the matter is remanded for possible retrial on count 5, attempting to dissuade a witness. If the prosecutor elects not to retry Godfrey, or at the conclusion of any retrial, the court is to resentence Godfrey.[9]

PERLUSS, P. J.

We concur:

ZELON, J.

SEGAL, J.

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[9] Godfrey contends, and the Attorney General concedes, the trial court erred in calculating Godfrey's presentence custody credits. At resentencing the court will have the opportunity to address that issue.