Filed 4/18/17 P. v. Martinez CA2/4

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. JOSEPH MARTINEZ, Defendant and Appellant.	B270778 (Los Angeles County Super. Ct. No. NA098829)

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

J. Kahn, 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, Assistant Attorney General, Paul M. Roadarmel, Jr. and Stephanie A. Miyoshi, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant Joseph Martinez appeals from a judgment of conviction of pimping, pandering, and attempted pimping. (Pen. Code, §§ 266h, subd. (a), 266i, subd. (a)(1), 664.)[1] The judgment is affirmed.

FACTUAL AND PROCEDURAL BACKGROUND

On April 8, 2014, Long Beach Police conducted an undercover vice operation at a Best Western motel. Posing as a customer, Detective Eduardo De La Torre arranged to meet two women, Sarah and Randie, who were depicted in an Internet advertisement as "Two Hot Ebony Sisters." While wearing a transmitting device, De La Torre went to their motel room, paid $200 ($100 for each woman), and arranged to have vaginal intercourse with Sarah followed by oral sex with Randie.[2] As soon as the deal was struck, police officers entered the room and De La Torre identified himself as a police officer.

De La Torre concluded from Sarah's demeanor—she was shaking and crying—that a third person was involved in this case. His partner inquired at the motel office and ascertained that the room had been registered to defendant. After searching the area, police found defendant in his car behind the motel. Defendant was detained, and his laptop computer, handgun, and wallet were recovered from his car. One of defendant's credit cards matched the card used to pay for the motel room.

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

[2] A recording of De La Torre's conversation with Sarah and Randie was played at trial, and a transcript of the recording (court exhibit 12) was admitted into evidence.

Sarah's Interview. During her police interview,[3] Sarah explained that she first met defendant in 2013 while working as a prostitute on Long Beach Boulevard. On that occasion, defendant paid her $40 to have sex, and gave her his phone number. Soon after, Sarah left her pimp (a man named Fresh) and went to work for defendant, who became her new pimp. Defendant placed ads for Sarah on the Internet and set prices for her customers: 15 minutes for $80; 30 minutes for $100; and 1 hour for $160. Defendant charged Sarah for the ads, the motel room, and a daily fee of $160—which came to about $200 per day—and let her keep the rest. Defendant had Sarah send him text messages—"in" and "out"—at the beginning and end of each "date."

Sarah began working for defendant in June 2013, but quit in August 2013 after he twisted her arm. Sarah was afraid of defendant because he kept a handgun, ammunition, and collapsible baton in his car. She went to work for someone else in August 2013, but decided to go back to defendant in April 2014. On her first day back, April 8, 2014, the undercover operation occurred. On that day, defendant had placed an Internet ad for Sarah and Randie as "double-trouble." He was charging them each a $100 fee, plus one-half the cost of the ad and motel room.

Sarah showed detectives her cell phone and identified the saved text messages that were sent between her cell phone and defendant's cell phone. Detective Sean McGee used an electronic device which downloaded information from Sarah's cell phone

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[3] A recording of Sarah's interview was played at trial, and a transcript of the recording (defense exhibit B) was admitted into evidence.

and generated a report that listed her text messages and telephone numbers.[4]

Detective De La Torre obtained a search warrant and examined defendant's laptop computer. The computer contained the same photographs that De La Torre had seen in the "Two Hot Ebony Sisters" advertisement.

The Charges. Defendant was charged with five counts, but one was dismissed before trial.[5] For the initial period of Sarah's employment (June 1, 2013 to August 5, 2013), defendant was charged with pimping (§ 266h, subd. (a), count 1) and pandering (§ 266i, subd. (a)(1), count 2). For the incident at the Best Western motel on April 8, 2014, defendant was charged with pandering as to Sarah (§ 266i, subd. (a)(1), count 4), and attempted pimping as to Randie (§§ 664, 266h, subd. (a), count 5).

Prosecution's Evidence. Sarah, Detective De La Torre, and Detective McGee testified at trial to the facts described above.

Sarah's Trial Testimony. Sarah provided additional information at trial. She was introduced to prostitution at age 11 when her mother gave her to her sister's grandfather. She began working as a paid prostitute when her mother kicked her out of the house; she did not finish high school. When she met defendant, she was tired of working on the streets. He provided her a motel room each week from Monday through Friday, and she stayed with her mother on weekends. Defendant claimed to

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[4] The printout was admitted into evidence at trial over a defense objection regarding chain of custody.

[5] Count 3, pimping (§ 266h, subd. (a)), was dismissed before trial. (§ 995.)

be a former "cop" and told her to have her "dates" "pull their penis out or touch [her]" in order to see if they are police officers.

When she first began working for him, defendant helped her obtain a birth certificate, identification card, and bank account. He kept her birth certificate and identification card. He took her photographs, placed ads for her on the Internet every day, and provided her with motel rooms. During the period that she worked for him, between June and August 2013, she averaged six "dates" per day, and paid defendant $100 for the motel room and $100 as his fee for the day. She also reimbursed him for the Internet ads, condoms, and lubricant he provided. During this period, defendant received "over $3,000" from her earnings as a prostitute.

Sarah stopped working for defendant in August 2013, and went to work as a prostitute for someone else. She resumed working for defendant on April 8, 2014, the day of the undercover vice operation. The terms of their agreement were the same as before, except defendant wanted Sarah to work with Randie. Defendant promised to pay Sarah if she persuaded Randie to work with her. Defendant went to lunch with Sarah and Randie to discuss their working arrangement: Sarah and Randie would be working together; and Randie would be doing "[t]he same thing [Sarah] was doing, working, having sex in exchange for money." Because Detective De La Torre was their first customer that day, Sarah did not pay defendant for the motel room on April 8, 2014.

Defendant's Violation of No-Contact Order. Sarah testified that several weeks before trial, defendant contacted her in violation of a no-contact order. She stated that he drove up while she was working as a prostitute on Western Avenue and told her

to get in the car. She testified that she complied because she knew he kept a gun in his car and was afraid of what he might do. When Sarah got in the car, defendant told her that he owed "'so much in lawyer fees,' and . . . '[y]ou're going to start paying me back [on] the house.'" Defendant drove around the corner, parked, and made her have unprotected sex in the rear seat. Defendant used Sarah's cell phone to place a call to his cell phone and told her what to say. She complied and left him a voice mail message stating: "Hi Joe. I just saw you driving down Fig. I am sorry for lying to you and lying to the cops about everything; and um was just wondering if you could call me. All right. Bye."

In addition to Sarah's testimony regarding the voice mail message, the jury was provided with a joint stipulation that when Sarah discussed the voice mail message with the deputy district attorney, she indicated that "she was forced to do it, she was scared and she just started crying."

Defense Evidence. Defense witness Norma Tellez, defendant's girlfriend, testified that she had trained Sarah for several days in September 2013 on the rules of their escort business: "Any time we see a person or a man comes to our room, we have strict rules to not perform any sex acts, that there not be any kind of sex." The services they provided included talking, dancing, drinking, and massages, but touching of genitalia was not allowed.

Defendant testified that several years before, he had paid to have sex with Sarah, who was working as a prostitute on Long Beach Boulevard. He urged her to come work for his escort service because she would be safer and better paid. After Sarah came to work for him, Tellez trained her on the no-sexual contact rule. Defendant helped Sarah obtain the documents she

needed—a birth certificate and California identification card—to open a bank account and rent her own motel rooms. He never rented a room for Sarah. After taking Sarah's photographs for her Internet ads, he gave her ownership of the photos. He charged her $50 a day per ad. They worked together from July 2013 to August 5, 2013, when they had an argument, during which she hit him and he used a wrestling move to push her down and hold her there. He did not hit her.

Defendant testified that he prepared and posted the Internet advertisement for Sarah and Randie on April 8, 2014. He also rented their room, but only because Sarah's mother had stolen her identification card and Randie did not have her identification card that day. The only services Sarah and Randi were supposed to provide that day were the ones that Sarah had been trained to provide: "You bring them in, you welcome them, you get the money up front and you have them relax, they can take off their clothes, the girls can dance for them, take off their clothes and strip." Defendant testified that he never provided condoms or lubricant.

Jury Verdict, Sentence, and Appeal. The jury convicted defendant as charged on counts 1, 2, 4, and 5. The trial court imposed an eight-year prison sentence. On count 1 (pimping of Sarah), the court imposed the upper term of six years based on the vulnerability of the victim. On count 2 (pandering of Sarah), defendant received a concurrent four-year term. On counts 4 (pandering of Sarah) and 5 (attempted pimping of Randie), defendant received consecutive terms of 16 months as to Sarah and eight months as to Randie. Defendant filed a timely appeal from the judgment.

DISCUSSION

I

Defendant contends his conviction on count 5, attempted pimping of Randie, must be reversed for insufficient evidence. The record does not support his contention.

A. Relevant Law and Undisputed Jury Findings

Pimping in violation of section 266h, subdivision (a) occurs when a defendant, knowing the person is a prostitute, either "lives or derives support or maintenance in whole or in part from the earnings or proceeds of the person's prostitution," or "solicits or receives compensation for soliciting for the person." (§ 266h, subd. (a).)

Pandering in violation of section 266i, subdivision (a)(1) occurs when a defendant "[p]rocures another person for the purpose of prostitution." (§ 266i, subd. (a)(1).)

As to Sarah, defendant does not challenge his convictions under sections 266h, subdivision (a), and 266i, subdivision (a)(1). It therefore is undisputed that from June to August 2013, defendant knew Sarah was a prostitute and derived support or maintenance from a portion of her earnings from prostitution (count 1), and procured her for the purpose of prostitution (count 2). It also is undisputed that defendant procured Sarah for the purpose of prostitution on April 8, 2014 (count 4).

Because defendant does not challenge his conviction on counts 1, 2, and 4, he necessarily concedes that the following evidence is sufficient to support his conviction of pimping in violation of section 266h, subdivision (a) and pandering in violation of section 266i, subdivision (a)(1): placing Internet ads for Sarah's services, establishing a pricing schedule, procuring a motel room, supplying condoms and lubricant, instructing on how

to determine whether a customer is a police officer, requiring text messages at the beginning and end of each date, and collecting a share of Sarah's earnings as a prostitute ($100 for the motel room, $100 for his daily fee, and reimbursement for the ads, condoms, and lubricant).

B. Terms of Randie's Employment

Sarah testified that when she resumed working for defendant on April 8, 2014, the terms of her employment were the same as before, except she would be working with another prostitute, Randie.[6] Defendant promised to pay Sarah for procuring Randie as a prostitute. The three had agreed that Sarah and Randie would each pay defendant $100 per day and split the cost of the motel room and Internet ad. This would financially benefit defendant—he would make twice his daily fee of $100—and Sarah would pay only half the cost of the room and Internet ad.

There is no allegation that Sarah was an accomplice,[7] and even if she were, her testimony was amply corroborated by defendant's false testimony that he was running an escort service. "A defendant's own testimony may be sufficient corroborative testimony, and false or misleading statements made to authorities may constitute corroborating evidence.

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[6] Defendant concedes in his opening brief that there is evidence he knew Randie was a prostitute.

[7] "In a prosecution under section 266h of the Penal Code, the prostitute whose earnings are taken is not an accomplice [citation]; and under section 266i of the Penal Code, the woman who is induced or procured to become an inmate of a house of ill-fame is not an accomplice [citation]." (*People v. Frey* (1964) 228 Cal.App.2d 33, 52.)

(*People v. Ruscoe* (1976) 54 Cal.App.3d 1005, 1012; see *People v. Santo* (1954) 43 Cal.2d 319, 327 ['False and contradictory statements of a defendant in relation to the charge are themselves corroborative evidence'].)" (*People v. Vu* (2006) 143 Cal.App.4th 1009, 1022.)

C. The Evidence Was Sufficient to Prove Count 5

Defendant testified that on April 8, 2014, he placed an ad on the Internet for "Two Hot Ebony Sisters" and procured the motel room for Sarah and Randie. Sarah testified to the financial terms of their arrangement as previously discussed. These facts were sufficient to support defendant's conviction of attempted pimping of Randie (count 5).

Defendant argues that even assuming he knew Randie was a prostitute, there was no substantial evidence he "specifically intended to benefit from Randie engaging in these acts." He asserts that "the only thing he did for Randie was post ads for her in exchange for $50 an ad . . . ." He argues that on the day of the undercover operation, Sarah was the only person who paid for the room and communicated with him about her solicitation. He never received any money from Randie. He maintains that the mere fact he had a discussion with Randie and Sarah about "performing sexual acts for money" does not show that he specifically intended to benefit from the proceeds of Randie's prostitution.

Defendant's argument is unavailing. The underlying crime, pimping in violation of section 266h, subdivision (a), is a general intent crime that may be violated in two ways. As to the first, "deriving support with knowledge that the other person is a prostitute is all that is required for violating the section in this manner. No specific intent is required. [Citation.]" (*People v.*

McNulty (1988) 202 Cal.App.3d 624, 630.) As to the second, pimping by soliciting (receiving compensation), "if the accused has solicited for the prostitute and has solicited compensation even though he had not intended to receive compensation, he would nevertheless be guilty of pimping. [¶] Pimping in all its forms is not a specific intent crime." (*Id.* at pp. 630–631.)

All that is needed to be convicted under the attempt statute is "a specific intent to commit the crime and a direct but ineffectual act done toward its commission. [Citation.] The act must go beyond mere preparation, and it must show that the perpetrator is putting his or her plan into action, but the act need not be the last proximate or ultimate step toward commission of the substantive crime. [Citation.]" (*People v. Kipp* (1998) 18 Cal.4th 349, 376.)

This case is similar to *People v. Osuna* (1967) 251 Cal.App.2d 528, 531. In *Osuna*, a defendant, Dobbins, challenged the sufficiency of the evidence to support his conviction of attempted pimping. In affirming his conviction, the appellate court stated: "[S]ection 266h, covers solicitation or receiving compensation for solicitation on behalf of a prostitute. Dobbins drove [his co-defendant] Miss Osuna and one of her prostitutes to the assignation at the Arroyo Motor Inn. With Miss Osuna he later drove to pick up two other prostitutes who had lost their way to the motel. Dobbins received and locked in his car a purse containing money which Miss Osuna had collected as payment for the services of the prostitutes brought by them to the motel. This evidence, in conjunction with the actual solicitation conducted by Miss Osuna, supported Dobbins' conviction for attempted pimping." (*Id.* at p. 531.)

Here, the evidence of defendant's intent to benefit from the proceeds of Randie's prostitution is much stronger than in *Osuna*. Contrary to defendant's assertion that "the only thing he did for Randie was post ads for her in exchange for $50 an ad," the evidence showed that he procured the motel room, provided condoms and lubricant, and arranged for Randie to pay him a daily fee of $100. His conviction on count 4—procuring Sarah for prostitution on April 8, 2014—which he does not contest, established that he was operating a prostitution service rather than an escort service, and, therefore, knew the $100 fee was to be derived from Randie's earnings as a prostitute. The mere fact that Randie was unable to pay the $100 fee because the client was an undercover officer does not absolve defendant of attempted pimping in violation of sections 664 and 266h, subdivision (a).

II

Defendant challenges the introduction of a printout of text messages downloaded by Detective McGee from Sarah's cell phone. He argues the text messages, which contained graphic sexual terms, were inadmissible for lack of a proper chain of custody. The record does not support this contention.

"In a chain of custody claim, '"[t]he burden on the party offering the evidence is to show to the satisfaction of the trial court that, taking all the circumstances into account including the ease or difficulty with which the particular evidence could have been altered, it is reasonably certain that there was no alteration. [¶] The requirement of reasonable certainty is not met when some vital link in the chain of possession is not accounted for, because then it is as likely as not that the evidence analyzed was not the evidence originally received. Left to such

speculation the court must exclude the evidence. [Citations.] Conversely, when it is the barest speculation that there was tampering, it is proper to admit the evidence and let what doubt remains go to its weight." [Citations.]' [Citations.] The trial court's exercise of discretion in admitting the evidence is reviewed on appeal for abuse of discretion. [Citation.]" (*People v. Catlin* (2001) 26 Cal.4th 81, 134.)

During her police interview, which was played at trial, Sarah confirmed the authenticity of the text messages that were saved on her phone. In his testimony, Detective McGee confirmed that the printout produced at trial was the same printout he had created while downloading the information from Sarah's cell phone. We conclude that the trial court did not abuse its discretion in overruling defendant's objection based on chain of custody.

Because Sarah and Detective McGee were trial witnesses, each was subject to cross-examination. We therefore do not agree with defendant's contention that the admission of the downloaded text messages violated his right to confrontation.

Defendant argues that an affidavit from the custodian of records for the cell phone service provider was necessary for the admission of the text messages. Assuming the objection was not forfeited, defendant has not shown the relevance of any records from the cell phone service provider. In contrast with *People v. Vu*, *supra*, 143 Cal.App.4th at pages 1016-1017, in which records from a cell phone service provider were used to establish the geographic location from which calls were made, there is no indication how such records would be relevant in this case.

Finally, we do not agree with defendant's contention that the admission of the printout of text messages containing graphic

sexual language was unduly prejudicial. There were explicit references to vaginal and oral sex in the recording of Detective De La Torre's conversation with Sarah and Randie in the motel room, implicit references to sex in the Internet advertisement for "Two Hot Ebony Sisters," and explicit references to sex throughout Sarah's testimony and interview statements. Moreover, defendant's false testimony—that he was running an escort service and had instructed Sarah not to engage in sexual activities with her clients—also referred to sex. We conclude that under these circumstances, the admission of the printout of text messages containing graphic sexual language was not unduly prejudicial under either *People v. Watson* (1956) 46 Cal.2d 818, 836 or *Chapman v. California* (1967) 386 U.S. 18, 24.

III

Defendant argues the trial court abused its discretion by imposing the high term of six years on count 1. He contends that he has no prior convictions, and the victim, Sarah, was not particularly vulnerable. He states that Sarah "was an adult and a prostitute when [he] met her, and she had chosen prostitution on her own. [He] did not find her as a child; nor did he coerce or enjoin her to start turning tricks."

"Case law has explained that for purposes of finding the aggravating factor of particular vulnerability, '"[p]articularly . . . means in a special or unusual degree, to an extent greater than in other cases. Vulnerability means defenseless, unguarded, unprotected, accessible, assailable, one who is susceptible to the defendant's criminal act." [Citation.]' [Citation.] Thus, a crime victim can be deemed particularly vulnerable as an aggravating factor 'for reasons not based solely on age, including the victim's relationship with the defendant and his abuse of a position of

trust.' [Citations.]" (*People v. DeHoyos* (2013) 57 Cal.4th 79, 154.)

Here, the record demonstrates that Sarah was particularly vulnerable. The adults in her life did not protect her as a child. She was introduced to prostitution by her mother, who gave her to an older family member at age 11, and was forced to earn a living by prostituting herself while still a minor. She was unable to complete high school because of the lack of a stable home and parental support, and became dependent on defendant to provide her with legal documents, a bank account, and housing. He took advantage of her vulnerability by twisting her arm, displaying a firearm and collapsible baton, contacting her in violation of the no-contact order to demand payment of his legal fees by forcing her to have unprotected intercourse, and making her leave a voice mail message stating she was sorry for lying to police. The record contains ample support for the imposition of the high term based on vulnerability of the victim.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

EPSTEIN, P. J.

We concur:

WILLHITE, J. COLLINS, J.