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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 FIVE

THE PEOPLE, Plaintiff and Respondent, v. CHANG YEOP SON, Defendant and Appellant.	B234532 (Los Angeles County Super. Ct. No. BA356476)

APPEAL from a judgment of the Superior Court of Los Angeles County, Stephen A. Marcus, Judge. Affirmed.

Flier & Flier, Andrew Reed Flier and Theodore S. Flier for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Steven D. Matthews, Supervising Deputy Attorney General, Timothy M. Weiner, Deputy Attorney General, for Plaintiff and Respondent.

The jury found defendant and appellant Chang Yeop Son guilty in counts 2 and 3 of pimping[1] (Pen. Code, § 266h, subd. (a)).[2] The trial court sentenced defendant to the low term of three years as to count 2 and a concurrent term of three years as to count 3.

Defendant argues that: (1) the admission of a police interview with his codefendant violated his right to confront witnesses; (2) his statement to officers was involuntary because he was coerced and not sufficiently advised of his right to have counsel appointed free of charge; (3) he was prejudiced by the admission of irrelevant testimony regarding "bandit taxis"; (4) the jury was improperly given conspiracy and aiding and abetting instructions when the facts did not support a theory of conspiracy and the prosecution did not proceed on an aiding and abetting theory; (5) his counsel rendered ineffective assistance by failing to request an instruction on the lesser included offense of attempted pimping; and (6) the evidence was insufficient to support the finding that the proceeds of the prostitution helped to support defendant.

We affirm the judgment.

FACTS

On March 18, 2009, Los Angeles Police Department Officer Jimmy Yoo participated in the undercover investigation of a massage parlor on Irolo Street in the Koreatown area, which was suspected of operating as a brothel. Officer Yoo telephoned the massage parlor posing as an employee of "25-Hour Taxi." He told the woman he spoke to that he had a customer. She answered that he should bring the customer to the massage parlor on Irolo Street.

Once at Irolo Street, Officer Yoo posed as the customer who had purportedly been brought to the location by "25-Hour Taxi." Won Kim[3] greeted Officer Yoo, asked if he

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1 The remaining charges did not apply to defendant.

2 Unless otherwise indicated, all statutory references are to the Penal Code.

3 Won Kim was not tried with defendant and codefendant.

wanted a "young girl" or a "pretty girl," and requested payment. Officer Yoo said that he had been told to pay $200, but Won Kim said the price had gone up to $250. Officer Yoo told Won Kim that he wanted a young girl to orally copulate him and have intercourse with him. She responded that she had a young girl who could provide the requested sexual services. Officer Yoo paid Won Kim $250.

Won Kim then escorted Officer Yoo to a room and asked him to wait. She returned with a very young looking girl named Ji Soo, who was wearing a mini skirt and bikini top. Won Kim told Ji Soo that she should "take good care of [Officer Yoo]" by orally copulating him and having intercourse with him.

Ji Soo requested that Officer Yoo take a shower before they engaged in sexual activities. Officer Yoo excused himself to use the restroom. When he returned, Ji Soo was reclining on the bed naked. Officer Yoo received a prearranged call from another officer, excused himself, and left immediately.

On April 30, 2009, Officer Yoo returned to the massage parlor, where he was again greeted by Won Kim, who remembered his previous visit. Officer Yoo told Won Kim that he wanted "to have a great time again." Won Kim told him that Ji Soo was no longer working there, but that she had another girl who would orally copulate him and have sex with him. She asked Officer Yoo for payment, and he gave it to her.

Officer Yoo was taken to the same room he had been taken to on his last visit. Won Kim brought Nana Park to the room and told her to give Officer Yoo oral copulation and sexual intercourse. Once Won Kim left the room, Officer Yoo told Nana Park that he was married to a Caucasian woman but longed for a Korean woman. He said that he did not want sexual services from her. He wanted to talk and get to know her.

When Officer Yoo left the room, Won Kim asked if the sexual services he received were satisfactory. He said they were and that he would return soon.

Officer Yoo identified a white Toyota van as being present during his April 30, 2009 visit. It was subsequently confirmed that the van was registered to defendant. Los Angeles Police Officer Vincent Chan followed defendant, who was driving a white 2006 Toyota Sienna van, to several locations in Koreatown as part of the investigation of the

massage parlor. He saw defendant pick up a man and a woman from different locations and take them to La Habra. In his opinion, defendant was "acting as a taxi service" at the time. Officer Chan observed the white Sienna van at the Irolo location on three occasions between April 7, 2009, and April 30, 2009. Officer Chan explained that "Korean taxis" were private, unmarked vehicles, which were used just as unlicensed cabs. Korean cabs did not typically pick up passengers on the street but, instead, passed out business cards to obtain referrals. In Officer Chan's experience, Korean cabs often serviced bars and brothels.

Da Hye Kim, who worked as a prostitute in the massage parlor, came to the United States from Korea to work at the Irolo Street location. She came to the United States on a three-month tourist visa in response to an internet ad seeking a part-time masseuse position.[4] Da Hye Kim contacted a person named "Brian" through the ad, and he paid for her airfare.

Da Hye Kim arrived in the United States on March 30, 2009. Defendant met her at the airport and drove her to the massage parlor. Da Hye Kim was introduced to codefendant, who instructed her in removing clothing, oiling her body, and putting a condom on a man. She told Da Hye Kim that "there would be intercourse." Da Hye Kim proceeded to have sexual intercourse with customers at the massage parlor on a regular basis. She was instructed to have intercourse with an average of five to six customers a day.

Da Hye Kim identified defendant as a taxi driver. She testified that she saw him at the massage parlor "almost once a day."[5] Defendant would sometimes drop people off at the massage parlor and leave, but other times he would come in and sit there. Defendant was sometimes inside the massage parlor when customers were present.

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[4] The visa prohibited Da Hye Kim from working in the United States.

[5] Los Angeles Police Detective Sean Kim testified that in an interview with him Da Hye Kim had stated that she had seen defendant at the massage parlor once or twice a week, in contradiction with her trial testimony.

On one occasion, defendant drove Da Hye Kim and Nana Park on an "out call" assignment to provide sexual services outside of the massage parlor. Defendant told the women to contact him when they were finished or if "something happen[ed]." He told them that he would be outside.

Ju Yi Hyun, who worked as a prostitute in the massage parlor, also responded to an internet ad for a part-time masseuse. She contacted a person named "Brian" through the ad, who paid her airfare from Korea to the United States. Upon arrival, she was taken to a coffee shop to meet codefendant. Afterward, she was transported from the coffee shop to the Irolo Street location by taxi, where she met Won Kim. Ju Yi Hyun was told to change into a tight low-cut dress and was then taken to a room where a man was waiting. She was instructed to have the man take a shower and then have sex with him.

Ju Yi Hyun did not want to have sex with the man and told codefendant that she wanted to return to Korea. Codefendant discouraged her, saying that it was only Ju Yi Hyun's first day and she still owed "the broker" for airfare. Because she had no money, Ju Yi Hyun stayed and provided sexual services to customers brought to her by codefendant.

Ju Yi Hyun knew defendant as "the taxi driver." All the women at the massage parlor "referred to [defendant] as a taxi driver." Ju Yi Hyun saw defendant at the massage parlor "almost every day." Defendant told Ju Yi Hyun that he was friends with codefendant.

Officer Yoo interviewed defendant after he was arrested. Defendant told him that he owned "25-Hour Limo Taxi." Defendant admitted that he had driven a woman named Soo to Irvine "for purpose[s] of prostitution." He also told Officer Yoo that he had picked Da Hye Kim up at the airport when she arrived in the United States and took her to the massage parlor.

DISCUSSION

Whether Admission of a Codefendant's Statement Violated Defendant's Right to Confrontation

Defendant challenges the trial court's ruling allowing portions of Detective Sean Kim's interview with nontestifying codefendant to be read into the record. Defendant argues the statements by codefendant implicated him, and therefore, admission of the statements against codefendant violated defendant's right to confront witnesses.

Defendant bases his contention on admission of the following portions of codefendant's statement to the police:

"[Detective Sean Kim]: And the taxi company . . . uh . . . how much for bringing in customers . . . how much of the cut do they get?

"[Codefendant]: $50.00.

"[Detective Sean Kim]: Then . . . from whom . . . do [they] get that from the customer?

"[Codefendant]: No, it's [*sic*] just depends on the situation."

Defendant asserts that the statements implicate him because they relate to codefendant splitting profits with "the taxi driver." He argues the error is highly prejudicial because it is the only direct evidence that he derived support from the earnings of the women's prostitution, a required element for conviction under section 266h.

The Attorney General counters that the statements did not facially incriminate defendant because they did not refer to him by name, and because other taxi companies were mentioned in the course of the trial. Alternately, the prosecution argues that any error was harmless given the overwhelming evidence against defendant.

The Sixth Amendment of the United States Constitution grants criminal defendants "the right . . . to be confronted with the witnesses against [them]." The Confrontation Clause requires that a defendant have an opportunity to cross-examine witnesses against him, but also applies to out-of-court statements introduced at trial, regardless of admissibility of statements under the laws of evidence. (*Crawford v.*

Washington (2004) 541 U.S. 36, 50-51.) Accordingly, "where two defendants are tried jointly, the pretrial confession of one cannot be admitted against the other unless the confessing defendant takes the stand." (*Richardson v. Marsh* (1987) 481 U.S. 200, 206 (*Richardson*).)

An out-of-court statement by a nontestifying codefendant is generally admissible against the codefendant under Evidence Code section 1220, but unless the defendant has had an opportunity to cross-examine the codefendant, the statement is inadmissible for use against defendant under the hearsay rule (Evid. Code, §1200) and the Confrontation Clause. (*People v. Fletcher* (1996) 13 Cal.4th 451, 455 (*Fletcher*).) "Ordinarily, a witness whose testimony is introduced at a joint trial is not considered to be a witness 'against' a defendant if the jury is instructed to consider that testimony only against a codefendant." (*Richardson*, *supra*, 481 U.S. at p. 206.) However, where the codefendant's statement is either "powerfully incriminating" or "facially incriminating," a limiting instruction will not avoid violation of the Confrontation Clause. (*Id*. at p. 207.) The Supreme Court has reasoned that in such instances, "the risk that the jury will not, or cannot, follow instructions is so great, and the consequences of failure so vital to the defendant, that the practical and human limitations of the jury system cannot be ignored. [Citations.]" (*Bruton v. United States* (1968) 391 U.S. 123, 135.)

Redaction may be employed as an alternative to severance if the references implicating the defendant can be deleted without prejudicing the codefendant. (*People v. Aranda* (1965) 63 Cal.2d 518, 530 (*Aranda*), partially abrogated by constitutional amendment as stated in *People v. Fletcher* (1996) 13 Cal.4th 451, 465.) Such redaction must include deletions of "not only direct and indirect identifications of [the defendant] but any statements that could be employed against [the defendant] once [his] identity is otherwise established." (*Ibid*.) In *Fletcher*, our Supreme Court held that the replacement of the defendant's name with a neutral pronoun or symbol may not be sufficient to satisfy the Confrontation Clause in all instances. (*Fletcher*, *supra*, 13 Cal.4th at p. 456.) The *Fletcher* court concluded that when a neutral pronoun or symbol is substituted, a "bright-line" rule cannot be applied. (*Ibid*.) "The editing will be deemed insufficient to avoid a

confrontation violation if, despite the editing, reasonable jurors could not avoid drawing the inference that the defendant was the coparticipant designated in the confession by symbol or neutral pronoun." (*Ibid*.)

Where error has occurred, we evaluate whether the error was harmless beyond a reasonable doubt under *Chapman v. California* (1967) 386 U.S. 18. (See *Lilly v. Virginia* (1999) 527 U.S. 116, 139-140.) Error is harmless beyond a reasonable doubt where "'a rational jury would have found the defendant guilty absent the error[.]' [Citation.]" (*People v. Geier* (2007) 41 Cal.4th 555, 608.)

We conclude it was error for the trial court to admit the challenged portion of codefendant's statement. The identifying language used by codefendant was more damaging than that of the pronouns used in *Fletcher*, because it was specific to defendant. A reasonable juror could not avoid drawing the inference that "the taxi driver" she referred to was defendant. Officer Yoo testified defendant told him that he owned "25-Hour Limo Taxi," that he had driven a woman named Soo to Irvine "for purpose[s] of prostitution," and that defendant had picked Da Hye Kim up at the airport when she arrived in the United States. Da Hye Kim identified defendant as the taxi driver and testified that she saw him at the massage parlor "almost once a day." She stated that defendant would sometimes drop people off at the massage parlor. Ju Yi Hyun testified that she knew defendant as "the taxi driver" and that all the women at the massage parlor "referred to [defendant] as [the] taxi driver." Although there were other taxi companies mentioned in testimony, defendant was the only taxi driver on trial with codefendant. He admitted to driving at least one of the women to a location for purposes of prostitution, he was widely known by the prostitutes as "the taxi driver," and he visited the Irolo Street location regularly. The unavoidable inference is that defendant is the person to whom codefendant was referring.

Although it was error to admit the statement, any error was harmless under the *Chapman* standard of review, because a rational jury would have concluded defendant knowingly derived income from prostitution activity. Pimping, as charged in this case, is committed when "any person who, knowing another person is a prostitute, lives or

derives support or maintenance in whole or in part from the earnings or proceeds of the person's prostitution . . . ." (§ 266h, subd. (a); see *People v. Grant* (2011) 195 Cal.App.4th 107, 117.)

It cannot be seriously disputed that defendant was aware of the prostitution activity, and the record contains convincing evidence that defendant derived support from the earnings of the prostitution. Defendant admitted to owning a taxi company, and a reasonable trier of fact would infer defendant received compensation for his work. He admitted driving a woman to Irvine for purposes of prostitution and to transporting a woman from the airport to the Irolo Street location, where she prostituted herself later the same day. A reasonable jury could infer defendant was paid for these services, which involved driving a significant distance. Da Hye Kim testified that defendant took her and Nana Park on an "out call" assignment to provide sexual services, told them to contact him when they were finished or if "something happen[ed]," and said he would wait for them outside. The typical taxi driver does not instruct his passengers to contact him, nor provide them protection if "something happens." A rational juror could infer that defendant was being paid for services associated with the women's prostitution and not just for their transportation. Moreover, defendant was known to be present at the massage parlor on an almost daily basis and to bring people to the location. The rational inference to be drawn is that he derived a financial benefit from the association. We hold that any error was harmless beyond a reasonable doubt.

Whether Defendant's Admission to Police was Voluntary

Prior to his interview with police, defendant was advised of his rights, including the right to counsel. The interview was conducted in the Korean language and then transcribed into English. The transcription states in pertinent part:

"If you do not have the ability to hire an attorney, one will be appointed for you, if you want. Understand? Do you understand?"

At trial, Officer Yoo testified that he personally gave defendant the warnings and the English translation was incorrect to the extent that it omitted that appointment of counsel would be free of charge.

The interview also reflected that defendant requested a glass of water, but did not indicate whether the request was granted. During the interview, the officers advised defendant that he could lose his green card if he did not tell the truth, but indicated that this might not happen if he was honest.

Defendant argues that his statement to officers was involuntary because the warnings given did not sufficiently advise him of his right to appointed counsel free of charge under *Miranda v. Arizona* (1966) 384 U.S. 436 (*Miranda*). He additionally argues he was coerced to give a statement through deprivation of nutrients (refusal of his request for a glass of water) and threats relating to his green card.

The Attorney General argues that *Miranda* warnings are not required to be given in a specific form, and the warnings given to defendant were sufficient to advise him of his right to have counsel appointed free of charge. Moreover, the specific warning was given, as Officer Yoo later testified. The prosecution also argues there is no evidence in the record that defendant's request for a glass of water was denied, and no case law holding that refusal of a single request for a glass of water is coercion. With respect to the issue of defendant's green card, the government asserts the admission was not rendered involuntary by the officers pointing out a benefit that would naturally flow from a truthful course of conduct.

"In *Miranda*, . . . the United States Supreme Court 'recogniz[ed] that any statement obtained by an officer from a suspect during custodial interrogation may be potentially involuntary because such questioning may be coercive' and 'held that such a statement may be admitted in evidence only if the officer advises the suspect of both his or her right to remain silent and the right to have counsel present at questioning, and the suspect waives those rights and agrees to speak to the officer.' [Citation.] The *Miranda* safeguards apply to confessions and 'statements which amount to "admissions" of part or all of an offense' regardless of whether they are exculpatory or inculpatory in nature.

(*Miranda*, *supra*, 384 U.S. at pp. 444, 476-477.)" (*People v. Guerra* (2006) 37 Cal.4th 1067, 1092 (*Guerra*).) "*Miranda* holds that '[t]he defendant may waive effectuation' of the rights conveyed in the warnings 'provided the waiver is made voluntarily, knowingly and intelligently.' [Citation.] The inquiry has two distinct dimensions. [Citations.] First, the relinquishment of the right must have been voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion, or deception. Second, the waiver must have been made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it. Only if the 'totality of the circumstances surrounding the interrogation' reveals both an uncoerced choice and the requisite level of comprehension may a court properly conclude that the *Miranda* rights have been waived." (*Moran v. Burbine* (1986) 475 U.S. 412, 421.) The state must demonstrate both the validity of the defendant's *Miranda* waiver and the voluntariness of the defendant's statements to police by a preponderance of the evidence. (*People v. Bradford* (1997) 14 Cal.4th 1005, 1033.)

"On appeal, we review independently a trial court's ruling on a motion to suppress a statement under *Miranda*. [Citation.] In doing so, however, 'we accept the trial court's resolution of disputed facts and inferences, and its evaluations of credibility, if supported by substantial evidence.' [Citation.]" (*Guerra*, *supra*, 37 Cal.4th at pp. 1092-1093.) "We review independently a trial court's determinations as to whether coercive police activity was present and whether the statement was voluntary. [Citation.] [Similarly,] [w]e review the trial court's findings as to the circumstances surrounding the confession, including the characteristics of the accused and the details of the interrogation, for substantial evidence. [Citation.] '[T]o the extent the facts conflict, we accept the version favorable to the People if supported by substantial evidence.' [Citation.]" (*Id.* at p. 1093.)

Officer Yoo testified that the transcription of his interview with defendant erroneously omitted language stating that appointment of counsel would be free of charge. He testified that this specific warning was given to defendant. Officer Yoo's testimony provides substantial evidence the warning given was proper. Moreover, even

ignoring the testimony of Officer Yoo, as defendant urges, we conclude the warning was sufficient. The Supreme Court has "never insisted that *Miranda* warnings be given in the exact form described in that decision." (*Duckworth v. Eagan* (1989) 492 U.S. 195, 202; *California v. Prysock* (1981) 453 U.S. 355, 359 (per curiam) (*Prysock*) ["the 'rigidity' of *Miranda* [does not] extend[] to the precise formulation of the warnings given a criminal defendant," and "no talismanic incantation [is] required to satisfy its strictures"].) We conclude that the words "[i]f you do not have the *ability to hire* an attorney" encompass the ability to pay for an attorney, and "fully conveyed to [defendant] his rights as required by *Miranda*." (*Prysock, supra,* at p. 361.)

Defendant's contention that his request for a glass of water was denied is unsupported by the record. The record contains no evidence that the request was denied, and defendant does not affirmatively assert that he was deprived of water. Defendant's argument that he was coerced because officers threatened that he might lose his green card if he was untruthful is also without merit. """[M]ere advice or exhortation by the police that it would be better for the accused to tell the truth when unaccompanied by either a threat or a promise does not render a subsequent [statement or admission] involuntary." [Citation.] In terms of assessing inducements assertedly offered to a suspect, "'[w]hen the benefit pointed out by the police . . . is merely that which flows naturally from a truthful and honest course of conduct,' the subsequent statement will not be considered involuntarily made. [Citation.]" [Citations.]' [Citation.]" (*People v. Esqueda* (1993) 17 Cal.App.4th 1450, 1484.) The officers made no promises to defendant, but instead encouraged him to tell the truth and pointed out the consequences of being dishonest. Having reviewed the totality of the circumstances independently, we conclude defendant's admission was voluntary.

Whether Defendant Was Prejudiced by the Admission of Testimony Regarding "Korean Cabs"

Defendant argues that Officer Chan's testimony regarding unlicensed "Korean cabs" was irrelevant and highly prejudicial. He contends that the inference to be drawn

from Officer Chan's testimony is that defendant was illegally operating an unlicensed cab, but that evidence of this had not been presented at trial. Defendant asserts that the testimony amounted to evidence of an uncharged crime for the purpose of showing his criminal disposition and is therefore prohibited under Evidence Code section 1101, subdivision (b).

In general, evidence is admissible if its probative value is not substantially outweighed by the probability that it will unduly consume time, "create substantial danger of undue prejudice," confuse the issues, or mislead the jury. (Evid. Code, § 352.) Evidence is probative if it "tends 'logically, naturally, and by reasonable inference' to establish material facts such as identity, intent, or motive. [Citations.]" (*People v. Garceau* (1993) 6 Cal.4th 140, 177, overruled on another ground in *People v. Yeoman* (2003) 31 Cal.4th 93, 117-118.) Evidence is not unduly prejudicial solely because it implicates defendant. "'[A]ll evidence which tends to prove guilt is prejudicial or damaging to the defendant's case. The stronger the evidence, the more it is "prejudicial." The "prejudice" referred to in Evidence Code section 352 applies to evidence which uniquely tends to evoke an emotional bias against the defendant as an individual and which has very little effect on the issues. In applying section 352, "prejudicial" is not synonymous with "damaging."' [Citation.]" (*People v. Karis* (1988) 46 Cal.3d 612, 638.) "[T]he decision on whether evidence . . . is relevant, not unduly prejudicial and thus admissible, rests within the discretion of the trial court." (*People v. Albarran* (2007) 149 Cal.App.4th 214, 224-225 (*Albarran*).) We therefore review the trial court's ruling for abuse of discretion. (*Id*. at p. 225.)

Evidence Code section 1101, subdivision (b) prohibits the admission of "evidence that a person committed a crime, civil wrong, or other act" that is *solely* relevant to prove defendant's disposition to commit the charged crime. However, where evidence of uncharged criminal activity is relevant to prove some fact at issue, evidence of the uncharged criminal activity may be admitted. (*People v. Spector* (2011) 194 Cal.App.4th 1335, 1373.)

Here, the trial court admitted the evidence of "Korean cabs" because such evidence tended to show the workings of defendant's business. As the trial court explained: "[Operating a taxi without a license] is part and parcel of the scheme. I mean, [defendant is] using a cab service that is outside the regulatory processes, and as part of his business, he's doing these sort of shady things, because it would be more difficult for him to get a regular person [to transport for a fare] . . . ." Moreover, defense counsel elicited testimony from Officer Chan that he had observed defendant picking up several persons in a private van and appeared to be operating a taxi service. The prosecution's introduction of Officer Chan's testimony concerning "Korean cabs" was in response to this testimony.

We hold that the trial court did not abuse its discretion because it allowed the evidence to be admitted to prove a fact at issue and not solely for the purpose of showing defendant's disposition for pimping, and as rebuttal evidence to testimony presented by defendant. (See *People v. Hart* (1999) 20 Cal.4th 546, 653 [trial court's discretion to admit rebuttal evidence will not be disturbed absent "palpable abuse"].)

Whether Defendant's Objection to the Conspiracy and Aiding and Abetting Instruction Should Have Been Sustained

Defendant argues that the trial court erred in instructing the jury under Judicial Council of California Criminal Jury Instructions (2009-2010) CALCRIM Nos. 400 ("Aiding and Abetting: General Principles"), 401 ("Aiding and Abetting: Intended Crimes"), 416 ("Evidence of Uncharged Conspiracy"), and 418 ("Coconspirator's Statements"). Defendant contends that the trial court erred in giving CALCRIM Nos. 400 and 401 because the prosecution was not proceeding on an aiding and abetting theory. He asserts that CALCRIM Nos. 416 and 418 did not apply to him because he was a "bit player," rather than a conspirator.

"In criminal cases, even absent a request, a trial court is obligated to instruct the jury on all general principles of law relevant to the issues raised by the evidence." (*People v. Booker* (2011) 51 Cal.4th 141, 179.) """"[A] single instruction to a jury may

not be judged in artificial isolation, but must be viewed in the context of the overall charge.'" [Citations.]' [Citation.]" (*People v. Richardson* (2008) 43 Cal.4th 959, 1028.) We review a claim of instructional error de novo. (*People v. Posey* (2004) 32 Cal.4th 193, 218.)

We conclude that the trial court did not err in giving the conspiracy instructions or the aiding and abetting instructions. Substantial evidence supported a finding of guilt on both theories. The jury could reasonably conclude defendant intentionally and knowingly aided and assisted others engaging in pimping by the support services he provided for the prostitution activity. The prosecution advanced the theory that defendant was guilty based on an aiding and abetting theory in closing argument. Similarly, there was abundant evidence that defendant agreed to be a player in a prostitution enterprise with the specific intent that earning be derived from the acts of prostitution. "Where the prosecutor did not charge conspiracy as an offense, but introduced evidence of a conspiracy to prove liability, the court had a sua sponte duty to give uncharged conspiracy instructions. (Bench Notes to CALCRIM No. 416, p. 200, citing *People v. Pike* (1962) 58 Cal.2d 70, 88; *People v. Ditson* (1962) 57 Cal.2d 415, 447.)" (*People v. Williams* (2008) 161 Cal.App.4th 705, 709.)

Whether Trial Counsel Rendered Ineffective Assistance by Failing to Request an Attempt Instruction

Defendant argues that trial counsel rendered ineffective assistance by failing to request an attempted pimping instruction, because in doing so he presented the jury with an "all or nothing choice," thereby subjecting defendant to a mandatory three-year sentence for pimping.

"To secure reversal of a conviction upon the ground of ineffective assistance of counsel under either the state or federal Constitution, a defendant must establish (1) that defense counsel's performance fell below an objective standard of reasonableness, i.e., that counsel's performance did not meet the standard to be expected of a reasonably competent attorney, and (2) that there is a reasonable probability that defendant would

have obtained a more favorable result absent counsel's shortcomings." (*People v. Cunningham* (2001) 25 Cal.4th 926, 1003 (*Cunningham*), citing *Strickland v. Washington* (1984) 466 U.S. 668, 687-694 (*Strickland*); *Williams v. Taylor* (2000) 529 U.S. 362, 391-394; *People v. Kraft* (2000) 23 Cal.4th 978, 1068.) "'A reasonable probability is a probability sufficient to undermine confidence in the outcome.' (*Strickland . . . , supra,* at p. 694; *People v. Riel* (2000) 22 Cal.4th 1153, 1175.)" (*Cunningham, supra,* at p. 1003.)

"The Sixth Amendment guarantees competent representation by counsel for criminal defendants[, and reviewing courts] presume that counsel rendered adequate assistance and exercised reasonable professional judgment in making significant trial decisions." (*People v. Holt* (1997) 15 Cal.4th 619, 703, citing *Strickland . . . , supra,* 466 U.S. at p. 690; *People v. Freeman* (1994) 8 Cal.4th 450, 513.) "A defendant who raises the issue on appeal must establish deficient performance based upon the four corners of the record. 'If the record on appeal fails to show why counsel acted or failed to act in the instance asserted to be ineffective, unless counsel was asked for an explanation and failed to provide one, or unless there simply could be no satisfactory explanation, the claim must be rejected on appeal.'" (*Cunningham, supra,* 25 Cal.4th at p. 1003, citing *People v. Kraft, supra,* 23 Cal.4th at pp. 1068-1069; *People v. Mendoza Tello* (1997) 15 Cal.4th 264, 266-267.) Given the presumption of reasonableness proper to direct appellate review, our Supreme Court has "repeatedly emphasized that a claim of ineffective assistance is more appropriately decided in a habeas corpus proceeding. [Citations.] The defendant must show that counsel's action or inaction was not a reasonable tactical choice, and in most cases '"'the record on appeal sheds no light on why counsel acted or failed to act in the manner challenged . . . .'"' [Citations.]" (*People v. Michaels* (2002) 28 Cal.4th 486, 526.)

Here, there is nothing on the record to indicate defense counsel's motivation, so we evaluate only whether there is a satisfactory explanation for his actions. We agree with the Attorney General that the facts of this case do not support a conviction for attempted pimping. As the government points out, there is no evidence that an act was

attempted but not completed. The jury was faced with the decision of either finding the prosecution's evidence credible and sufficient, and convicting defendant of pimping, or finding it not credible and insufficient, and acquitting defendant. A reasonably competent attorney could decide not to engage in the futile pursuit of an attempt instruction that is not supported by the evidence. (See *People v. Price* (1991) 1 Cal.4th 324, 387 ["Counsel does not render ineffective assistance by failing to make motions or objections that counsel reasonably determines would be futile."].)

Whether There Was Sufficient Evidence to Support the Jury's Finding That Defendant Derived Support from the Earnings or Proceeds of Prostitution

Defendant's final contention is that his conviction for pimping must be reversed because there was insufficient evidence to support the jury's finding that the proceeds the prostitutes earned helped support him. He specifically argues that "the evidence was not the credible type necessary to sustain the conviction on either count beyond a reasonable doubt." He contends that absent the evidence contained in Young He Seo's statement, which should have been excluded, there was no evidence that proceeds of the prostitution went to support him. We reject defendant's argument.

The Fifth and Sixth Amendments, which apply to the states through the Fourteenth Amendment, require the prosecution to prove all elements of a crime beyond a reasonable doubt. (*Sullivan v. Louisiana* (1993) 508 U.S. 275, 277-78.) A conviction supported by insufficient evidence violates the Due Process Clause of the Fourteenth Amendment and must be reversed. (*Jackson v. Virginia* (1979) 443 U.S. 307, 319.) "'In reviewing the sufficiency of evidence . . . the question we ask is "whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt."' [Citations.] . . . 'In determining whether a reasonable trier of fact could have found defendant guilty beyond a reasonable doubt, the appellate court "must . . . presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence."' [Citation.] The same standard also applies in cases in which the prosecution relies primarily on

circumstantial evidence. [Citation.]" (*People v. Young* (2005) 34 Cal.4th 1149, 1175 (*Young*).)

We review the record in the light most favorable to the prosecution to determine whether the challenged conviction is supported by substantial evidence, meaning "evidence which is reasonable, credible, and of solid value." (*People v. Johnson* (1980) 26 Cal.3d 557, 578.) "[M]ere speculation cannot support a conviction. [Citations.]" (*People v. Marshall* (1997) 15 Cal.4th 1, 35.) Nor does a finding that "the circumstances also might reasonably be reconciled with a contrary finding . . . warrant reversal of the judgment." (*People v. Proctor* (1992) 4 Cal.4th 499, 528-29.) The reviewing court does not reweigh the evidence, evaluate the credibility of witnesses, or decide factual conflicts, as these are the province of the trier of fact. (*People v. Culver* (1973) 10 Cal.3d 542, 548; *In re Frederick G*. (1979) 96 Cal.App.3d 353, 367.) "Moreover, unless the testimony is physically impossible or inherently improbable, testimony of a single witness is sufficient to support a conviction. [Citation.]" (*Young*, *supra*, 34 Cal.4th at p. 1181.)

As noted earlier, section 266h, subdivision (a) provides that with certain exceptions not relevant here, "any person who, knowing another person is a prostitute, lives or derives support or maintenance in whole or in part from the earnings or proceeds of the person's prostitution, or from money loaned or advanced to or charged against that person by any keeper or manager or inmate of a house or other place where prostitution is practiced or allowed, or who solicits or receives compensation for soliciting for the person, is guilty of pimping, a felony, and shall be punishable by imprisonment in the state prison for three, four, or six years."

Viewing the evidence in the light most favorable to the prosecution, we hold that there is sufficient evidence to sustain defendant's conviction for pimping. Defendant does not dispute that he was aware of the prostitution, and there is ample circumstantial evidence that defendant derived support from the earnings of the prostitution. As we discussed at greater length above, defendant admitted that he owned a taxi company, drove a woman to Irvine for purposes of prostitution, and transported a woman who testified to prostituting herself later the same day from the airport to the massage parlor.

Da Hye Kim testified that defendant took her and Nana Park on an "out call" assignment to provide sexual services, told them to contact him when they were finished or if "something happen[ed]," and told them that he would wait outside.

The record supports the inference that defendant was paid for his work and therefore derived support from the proceeds of the prostitution. Accordingly, we hold that the evidence was sufficient to sustain defendant's conviction for pimping.

DISPOSITION

The judgment is affirmed.

KRIEGLER, J.

We concur:

TURNER, P. J. ARMSTRONG, J.