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CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

THE PEOPLE, Plaintiff and Respondent, v. DEMETRIUS LABARRIAN BRANCH, Defendant and Appellant.	C060225 (Super. Ct. No. 08F01404)

APPEAL from a judgment of the Superior Court of Sacramento County, Timothy M. Frawley, Judge. Affirmed as modified.

Kat Kozik, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Michael P. Farrell, Senior Assistant Attorney General, David A. Rhodes, Supervising Deputy Attorney General, Daniel B. Bernstein, Deputy Attorney General, for Plaintiff and Respondent.

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* Pursuant to California Rules of Court, rule 8.1110, this opinion is certified for publication with the exception of parts I, II, IV, V, and VI of the Discussion.

A jury convicted defendant of attempted pimping of a minor under the age of 16 (Pen. Code, §§ 664/266h, subd. (b)(2))[1] (count one); pandering of a minor under the age of 16 (§ 266i, subd. (b)(2)) (count two); pimping (§ 266h, subd. (a)) (count three); and pandering (§ 266i, subd. (a)(1)) (count four). The jury acquitted defendant of assault with a deadly weapon (§ 245, subd. (a)(1)) (count five) and corporal injury on a cohabitant (§ 273.5, subd. (a)) (count six), and failed to reach a verdict on a lesser offense to the assault charge and convicted him of simple battery (§ 243, subd. (e)) as a lesser to the domestic violence charge. The trial court found true the allegation that defendant had served a prison term (§ 667.5, subd. (b)). Defendant was sentenced to an aggregate prison term of 10 years and 8 months.

On appeal, defendant contends (1) the jurors were not properly sworn; (2) it was prejudicial error to admit evidence of a prior rape by defendant; (3) the trial court erred in failing to instruct that defendant's good faith belief the minor was 18 was a defense to attempted pimping and pandering of a minor under the age of 16; (4) consecutive sentences for pimping and pandering the same victim violate section 654; (5) it was error to impose two restitution fines under section 1202.4; and (6) the abstract of judgment must be corrected to show the

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[1] Hereafter, undesignated statutory references are to the Penal Code.

proper crime in count one. The Attorney General concedes the fourth and sixth errors. We accept those concessions and otherwise affirm.[2]

FACTS

Defendant lived with his girlfriend, Krista Armstrong, who worked as a prostitute. It was defendant's idea for her to work as a prostitute. Armstrong's earnings paid all the bills and defendant did not work. She gave defendant all the money she made and he sometimes drove her to work. During their relationship defendant used force and violence against Armstrong. Sometimes she did not want to work, but defendant would beat her if she did not work as a prostitute.

J.V., who was 15 years old, met defendant when he picked her up and gave her a ride. They exchanged phone numbers and she called him a week later. J.V. spoke with defendant about working as a prostitute. J.V. had worked selling drugs, but wanted to work as a prostitute for the easy money.

When defendant brought J.V. home, Armstrong thought she was young. She asked J.V. how old she was and J.V. said 18, but she

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[2] Pursuant to Miscellaneous Order No. 2010-002, we have considered whether defendant is entitled to additional presentence custody credit under recent amendments to section 4019. Due to his conviction under section 266i, subdivision (b), defendant is required to register as a sex offender. (§ 290, subd. (c).) Accordingly, he is not entitled to additional credit. (§ 4019, subd. (b)(2); Stats. 2009, 3d Ex. Sess., ch. 28, § 50.)

gave the wrong year as her birth date. Armstrong told defendant J.V. was only 15. During a fight, a friend of J.V. told defendant J.V. was 15. J.V. also told defendant her true age before she was arrested.

Armstrong caught defendant and J.V. having sex and was very angry. Armstrong and defendant fought and defendant beat Armstrong. Armstrong claimed defendant hit her with a Samurai sword.

Defendant drove Armstrong and J.V. to the stroll to work as prostitutes three times. The first two times J.V. had no business. The third time, on February 6, 2008, J.V. was picked up by an undercover vice detective. J.V. asked what he wanted and the detective replied half and half, meaning oral sex and intercourse. J.V. quoted him a price of $150. The detective said he had only $80 and J.V. said that would get him only sex. J.V. directed him to a park. There the detective asked for oral sex and J.V. said yes if he wore a condom. After the detective gave J.V. $80, he gave the signal and J.V. was arrested.

Armstrong did not return to defendant's that night after making $300-400 as a prostitute. The next day she called the police and reported defendant beating her. J.V. told the FBI she saw defendant hit Armstrong.

At trial, J.V. claimed it was Armstrong who instructed her on how to be a prostitute.[3] She told the FBI, however, that defendant provided the instruction. He told her what to charge and to never give his name to the police. The night she was arrested, defendant wanted her to make $300 to $400. At trial, J.V. confirmed her statements to the FBI were true.

The police arranged for J.V. to make a pretext call to defendant, instructing her to call defendant by name. In the call, J.V. tells defendant she is locked up; the trick was the police. J.V. tells defendant, "I ain't doing this no more." Defendant responds he does not want her to. She told him she was picked up by the police right after he dropped her off.

A phone call from defendant in jail to his mother was played for the jury. Defendant told his mother he did not hit Armstrong that night. "I probably kicked her ass probably a--a couple weeks before that but that week, that night, no." Defendant cautioned his mother, "if they ask you anything about [J.V.], you don't know nothing . . . . [¶] . . . [¶] [S]o from here on out, no, you don't know nothing about no [J.V.] and I don't know nothing about no mother-fucking [J.V.]." At the end of the call, defendant said, "I don't give a fuck how much time they give me, when I get up out of here, something happening to that bitch. Watch. As soon as I get up out of here."

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[3] At trial, both J.V. and Armstrong testified under grants of immunity.

Pursuant to Evidence Code section 1109, the trial court admitted evidence of defendant's prior acts of violence against L.C. who lived with defendant on and off for four years and had a child with him. In December 2001, defendant came over and wanted sex. L.C. told the police he dragged her to the bedroom and had intercourse with her without her consent. She was involved in a custody battle with defendant and recanted the rape story at the preliminary hearing. In response to the trial court's question whether the recanting was the truth or a lie, L.C. said, "It was a lie. Some of it was true."

L.C. also testified about an incident in July 2002, where she and defendant got into an argument in a car and hit each other. Defendant hit her in the face; he kicked her out of the car and drove away.

DISCUSSION

I.

The Corrected Record Shows the Jurors Were Properly Sworn

Defendant contends the judgment must be reversed because the original reporter's transcript indicates the jurors were not properly sworn. Defendant contends the wrong oath, that for witnesses rather than that for jurors, was administered.

On July 28, 2009, this court granted the Attorney General's motion to correct the record.[4] The corrected record shows the

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[4] On October 16, 2009, the Supreme Court denied defendant's petition for review.

jury was administered the following oath: "You do, each of you, understand and agree that you will well and truly try the cause now pending before this court, and a true verdict rendered according only to the evidence presented to you and to the instructions of the Court?" The jury panel responded, "Yes." This oath is substantially similar to that set forth in Code of Civil Procedure section 232, subdivision (b). The jury was properly sworn.

II.

The Trial Court did not Prejudicially Err in Admitting Evidence of Defendant's Prior Rape

Defendant contends the trial court prejudicially erred in permitting, over his objection, the prosecution to introduce evidence that defendant raped L.C. in 2001. He contends the admission of this evidence violated Evidence Code section 352 because the rape was much more inflammatory than the domestic violence charges of assault with a deadly weapon and corporal injury on a cohabitant and it was unnecessary to the People's case. He further contends the prejudicial effect of this evidence spilled over to the pimping and pandering charges.

The People sought to introduce evidence of three instances of uncharged domestic violence by defendant against L.C., including the 2001 rape. Defendant objected only to evidence of the rape, arguing it was highly inflammatory and more prejudicial than probative. The trial court ruled evidence of the rape was admissible. The court found the defense's point

well taken, but concluded the rape was not inflammatory because it was not between strangers, but individuals who had had a sexual relationship and a child. The court concluded it was part of a domestic violence incident and not likely to inflame the jury and cause the jurors to react emotionally.

At trial, L.C. testified defendant "could have been" making overtures that he wanted sex and she "probably wasn't" receptive. She confirmed she told the police defendant wanted to have sex and she did not. He grabbed her around the neck, dragged her to the bedroom, shut the door and had sexual intercourse with her without her consent. On cross-examination, she testified she had recanted the rape story. She told the court the recantation was a lie; "some of it was true." L.C. admitted she was sometimes the aggressor.

The officer who responded to the rape report testified L.C. described a history of physical violence by defendant. She claimed defendant once hit her with a croquet mallet. The officer testified he saw no bruising or discoloration to L.C.'s neck.

Under Evidence Code section 1109, in a criminal trial involving domestic violence, evidence of defendant's commission of other domestic violence may be admitted if the evidence is not inadmissible under Evidence Code section 352. (Evid. Code, § 1109, subd. (a).) The term domestic violence includes rape, a similar act of control. (*People v. Poplar* (1999) 70 Cal.App.4th

1129, 1139.) Rape is a higher level of domestic violence. (*Ibid*.)

We review the trial court's ruling on the admission of evidence under Evidence Code section 352 for an abuse of discretion. (*People v. Watson* (2008) 43 Cal.4th 652, 684.) "In general, the trial court is vested with wide discretion in determining relevance and in weighing the prejudicial effect of proffered evidence against its probative value. Its rulings will not be overturned on appeal in the absence of an abuse of that discretion. [Citations.]" (*People v. Cooper* (1991) 53 Cal.3d 771, 816.) We find no abuse of discretion.

In determining whether to admit prior uncharged acts as propensity evidence, the court must balance the probative value of the evidence against its inflammatory nature, the possibility of confusion, its remoteness in time, and the amount of time involved in introducing and refuting the evidence. (*People v. Harris* (1998) 60 Cal.App.4th 727, 737-741.) Here the trial court undertook the proper balancing test and determined the evidence of the rape was not prejudicial in the sense of uniquely provoking an emotional bias against the defendant while having little effect on the issues. (See *People v. Karis (*1988) 46 Cal.3d 612, 638.)

Further, we find no prejudice to defendant from the admission of this evidence. The evidence of the prior rape was not strong, lessening any prejudicial effect. L.C. did not seem

to recall it until prompted by the prosecutor and admitted she had recanted the accusation. She testified her recantation was a lie, ambiguously stating, "some of it was true." The jury acquitted defendant on the two felony counts of domestic violence, convicting him only of simple battery. That charge was amply supported by: the photographs of bruising on Armstrong; defendant's admission to his mother that he had "kicked her ass"; his threats to retaliate against "that bitch" when he was released; J.V.'s statement to the FBI that she had witnessed defendant hit Armstrong; and other unchallenged evidence of defendant's prior acts of domestic violence against L.C.

Defendant contends the evidence of the rape may have unfairly affected the pimping and pandering convictions. We are not persuaded. The jury was instructed to use the prior uncharged acts of domestic violence only in determining counts five and six or lesser offenses. "We presume that jurors understand and follow the court's instructions." (*People v. Gray* (2005) 37 Cal.4th 168, 231.) There was ample evidence, the sufficiency of which defendant does not challenge, to support the convictions for attempted pimping, pimping and pandering.

III.

A Good Faith Belief the Minor is 18 is not a Defense to Pimping or Pandering a Minor

Defendant contends the trial court erred in refusing the defense request to instruct the jury that defendant's good

faith, reasonable belief J.V. was 18 was a defense to the charges of attempted pimping and pandering of a minor under the age of 16. Instead, the court instructed the jury that to convict, it must find J.V. was under the age of 16 at the time of the crimes alleged in counts one and two.

In *People v. Hernandez* (1964) 61 Cal.2d 529 (*Hernandez*), the California Supreme Court held a charge of unlawful sexual intercourse could be defended on the basis defendant lacked criminal intent because in good faith he had a reasonable belief the prosecutrix was 18 years or more of age. The court relied on the common law rule that an honest and reasonable belief in the existence of circumstances which, if true, would make the act innocent, was a good defense. (*Id.* at p. 535.) The Legislature had adopted this rule in section 20, requiring criminal intent for a crime, and section 26, which provides that one who commits an act under a mistake of fact that disproves criminal intent has not committed a crime. (*Hernandez, supra,* at pp. 532, 535.) The court indicated, however, this defense would not be available where the victim was a child of tender years. (*Id.* at p. 536.)

In a very short opinion, without any discussion of the facts, the court followed *Hernandez* in *People v. Atchison* (1978) 22 Cal.3d 181 (*Atchison*), finding the trial court erred in instructing the jury it was immaterial whether defendant knew the age of the minor for purposes of the crime of contributing

to the delinquency of a minor. (*Id.* at p. 183.) The court also reversed the charge of annoying or molesting a child under the age of 16 (§ 647a), finding the improper instruction may have misled the jury. (*Atchison, supra,* at p. 183.)

In *People v. Olsen* (1984) 36 Cal.3d 638 (*Olsen*), the high court held a good faith, reasonable mistake as to age was not a defense to a charge of lewd or lascivious conduct with a minor under the age of 14 (§ 288, subd. (a)). The court found allowing the defense would contradict the "strong public policy to protect children of tender years." (*Olsen, supra,* at p. 646.) Recognizing the defense would also nullify the effect of section 1203.066, which permitted probation for defendants who honestly and reasonably believed the minor was 14 years of age or older. (*Olsen, supra,* at p. 647.)

Defendant contends the reasoning of *Hernandez* and *Atchison* should control because J.V. was 15 and not a child of tender years, as in *Olsen*. We disagree. In *Hernandez*, the court relied on the fact that defendant would have had no criminal intent if the minor was older. (*Hernandez, supra*, 61 Cal.2d 529, 535-536.) Without discussion, *Atchison* simply relied on *Hernandez*.[5] (*Atchison, supra,* 22 Cal.3d at p. 183.) The present

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[5] We recognize that in *Atchison*, the charge of contributing to the delinquency of a minor was based on the conduct of furnishing marijuana to the child. In a concurring and dissenting opinion, Justice Clark notes this conduct would be criminal regardless of defendant's belief concerning age.

case is distinguishable because defendant's conduct would be criminal regardless of J.V.'s age.

In that regard, this case is similar to *People v. Williams* (1991) 233 Cal.App.3d 407 (*Williams*), which we find controlling. In *Williams*, defendant was charged with selling controlled substances to a minor. The trial court refused to instruct that a reasonable, good faith belief the minor was over 18 was a defense to the charge. The appellate court affirmed. "The specific intent for the crime of selling cocaine to a minor is the intent to sell cocaine, not the intent to sell it to a minor. [Citations.] It follows that ignorance as to the age of the offeree neither disproves criminal intent nor negates an evil design on the part of the offerer. It therefore does not give rise to a 'mistake of fact' defense to the intent element of the crime. [Citations.]" (*Id.* at p. 411.) Here the criminal intent for the crimes of attempted pimping and pandering of a minor is the attempt to pimp and pander; the age of the victim only affects the severity of the sentence, not the criminality of the conduct. Regardless of his belief as to J.V.'s age, defendant acted with criminal intent.

The *Williams* court also rejected the argument, similar to defendant's here, that under *Olsen, supra*, 36 Cal.3d 638, the

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(*Atchison, supra,* 22 Cal.3d at p. 185 (conc. & dis. opn. of Clark, J.).) We note only that the majority opinion does not discuss the conduct at issue and speaks only of the crime charged.

Hernandez mistake of age defense is unavailable only where the child is under 14. Instead, the *Williams* court read *Olsen*, as we do, to conclude "that a *Hernandez* defense is not available when its application would violate a strong public policy." (*Williams*, *supra*, 233 Cal.App.3d at p. 412.)

The trial court did not err in refusing defendant's proposed instruction on defendant's mistake as to J.V.'s age.

IV.

The Sentences on Counts One and Four Must be Stayed Pursuant to Section 654

Defendant contends the trial court violated section 654 by imposing consecutive sentences for counts one and two, the attempted pimping and pandering of J.V., and by imposing consecutive sentences on counts three and four, pimping and pandering of Armstrong. He contends the pandering was incidental to the pimping and thus both acts were part of an indivisible course of conduct. He acted with the same objective as to each female: to prostitute her for financial gain.

The Attorney General concedes the error. The Attorney General argues pimping is not necessarily incidental to pandering; there may be multiple acts of pandering or a significant time break between the initial act of pandering and subsequent pimping. In this case, however, both crimes were alleged to have occurred in the same time period, between January 1 and February 7, 2008, and the charges of pandering were not based on any specific acts. We accept the concession.

Section 654 provides that "an act or omission that is punishable in different ways by different provisions of law" shall not "be punished under more than one provision." In imposing consecutive sentences on counts one and two, and counts three and four, the trial court noted the separate conduct of pandering and pimping.

While the language of section 654 speaks only of multiple statutory violations produced by the same "act or omission," the protection of the statute has been extended to cases in which there are several offenses committed during "'a course of conduct deemed to be indivisible in time.' [Citation.]" (*People v. Harrison* (1989) 48 Cal.3d 321, 335.) "Whether a course of criminal conduct is divisible and therefore gives rise to more than one act within the meaning of section 654 depends on the intent and objective of the actor. If all of the offenses were incident to one objective, the defendant may be punished for any one of such offenses but not for more than one." (*Neal v. State of California* (1960) 55 Cal.2d 11, 19.) In selecting consecutive sentences, the trial court focused on only the separate acts, and did not consider whether defendant had separate objectives.

At sentencing the prosecutor argued there were multiple criminal objectives. For pimping, he argued the objective was to profit from or derive support from a prostitute. The objective for pandering was to persuade others to join the

profession for defendant's benefit. These are the same objective: to benefit financially from Armstrong's and J.V.'s work as prostitutes. Since there was a single objective, the trial court erred in imposing separate sentences on counts one and two, and counts three and four.

"When confronted with offenses within the purview of section 654, the proper procedure is to *stay* execution of sentence on all but one of the offenses subject to this section. [Citation.] . . . Where a trial court erroneously fails to stay terms subject to section 654, the appellate court must stay sentence on the lesser offenses while permitting execution of the greater offense consistent with the intent of the sentencing court. [Citation.]" (*People v. Pena* (1992) 7 Cal.App.4th 1294, 1312.)

Accordingly, we order the one-year sentence on count one stayed because it is less than the six-year sentence on count two. Both the sentences on counts three and four are the same: one year and eight months. We order the sentence on count four stayed.

V.

The Trial Court did not Err in Imposing Separate Restitution Fines on the Felonies and the Misdemeanor

At sentencing the trial court imposed a $2,000 restitution fine under section 1202.4 and a suspended parole revocation fine in the same amount under section 1202.45 for the felony convictions in counts one through four. It also imposed a $100

restitution fine under section 1202.4 for the misdemeanor conviction in count six.

Defendant contends the trial court erred in imposing two restitution fines, arguing only one restitution fine may be imposed in each case. We disagree.

As the parties recognize, this court has twice addressed the proper procedure as to restitution fines in cases involving both felony and misdemeanor convictions. In *People v. McElroy* (2005) 126 Cal.App.4th 874, the trial court imposed a restitution fine of $600 and a suspended parole revocation fine in the same amount. In setting the amount at $600, the court indicated it was $200 for each of two felonies and $100 for each of two misdemeanors. (*Id.* at p. 884.) Defendant argued that since the court assigned $200 to the misdemeanors and since he would not be placed on parole for the misdemeanors, the parole revocation fine must be reduced by $200. (*Id.* at pp. 884-885.) We disagreed. "Regardless of the trial court's reasoning in setting the restitution fine at $600, the court imposed and the statute authorizes only a single restitution fine in each case. Thus, there was *one* fine of $600 imposed pursuant to section 1202.4. Defendant was sentenced to state prison and, therefore, his sentence allows for parole. Since the parole revocation fine must be in the same amount as the section 1202.4 restitution fine, it was properly set at $600." (*McElroy, supra,* at p. 885.)

In *People v. Holmes* (2007) 153 Cal.App.4th 539, the trial court imposed separate restitution fines for the felony and misdemeanor convictions. The Attorney General suggested the imposition of two restitution fines in one proceeding was unauthorized. We disagreed.[6] "Here, the court could not impose a restitution fine in the amount of $500 to cover both the felony and the misdemeanor because the parole or probation revocation restitution fine had to be in the same amount. In view of sections 1202.4, 1202.44 and 1202.45, we conclude that the trial court did not err in imposing the restitution fines separately for the felony and misdemeanor. We also note that the total amount of the separate fines did not exceed the statutory maximum." (*Holmes, supra,* at pp. 547-548.)

McElroy and *Holmes* indicate this court has approved two ways of handling restitution fines in cases involving both felony and misdemeanor convictions, as long as the statutory maximum is not exceeded. Here the trial court followed the procedure approved in *Holmes*; we find no error.

VI.

The Abstract Must Be Corrected to Reflect the Conviction in Count One of Attempted Pimping of a Minor

In count one, defendant was convicted of attempted pimping of a minor under the age of 16 in violation of sections 664 and

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[6] The panel in *Holmes* included the author of *McElroy* and one of the concurring justices in *McElroy*.

266h, subdivision (b)(2). The abstract of judgment incorrectly describes the crime as attempted pandering of a minor under the age of 16. Defendant and the Attorney General agree this court should order the abstract of judgment corrected to reflect the correct crime. (*People v. Mitchell* (2001) 26 Cal.4th 181, 188 [where evident discrepancy between abstract and judgment, appellate court should order trial court to correct abstract].) We order the trial court to correct the abstract of judgment.

DISPOSITION

The judgment is modified to stay the sentences on counts one, attempted pimping of a minor, and four, pandering. As so modified, the judgment is affirmed. The trial court is directed to amend the abstract of judgment to reflect that the crime in count one is attempted pimping of a minor under the age of 16, not attempted pandering of a minor under the age of 16, and the terms imposed for count one and four are stayed pursuant to section 654. The trial court is further directed to send a certified copy of the amended abstract to the Department of Corrections and Rehabilitation.

CANTIL-SAKAUYE, J.

We concur:

SCOTLAND, P. J.

HULL, J.