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CERTIFIED FOR PARTIAL PUBLICATION*

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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA**

**THIRD APPELLATE DISTRICT**

(Sacramento)

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| THE PEOPLE,<br><br>Plaintiff and Respondent,<br><br>v.<br><br>DWAYNE WARREN BOGAN,<br><br>Defendant and Appellant. | C052691<br><br>(Super. Ct. No. 05F01026) |

APPEAL from a judgment of the Superior Court of Sacramento County, Jack Sapunor, Judge. Judgment of conviction affirmed; portion of sentence vacated for resentencing proceedings.

Athena Shudde, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer and Edmund G. Brown, Jr., Attorneys General, Mary Jo Graves and Dane Gillette, Chief Assistant Attorneys General, Michael P. Farrell, Assistant Attorney General and John G. McLean, 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 sections 1 and 3 of the Discussion.

A jury convicted Dwayne Warren Bogan of single counts of pimping, pandering, conspiracy to solicit prostitution, and willful failure to appear. (Pen. Code, §§ 266h, subd. (a), 266i, subd. (a)(2), 182, subd. (a)(1), 1320.5, respectively.)[1]

On appeal, defendant contends: (1) the trial court erroneously admitted, in violation of hearsay and confrontation standards, the testimony of two detectives regarding statements made by two suspected prostitutes; (2) his conspiracy conviction was not based on substantial evidence because a prostitute cannot be a coconspirator with her pimp; and (3) he was denied his constitutional right to a jury trial when the trial court imposed the upper term under count one (pimping). We will affirm the judgment of conviction but remand for an appropriate resentencing proceeding.

In the published portion of this opinion, we discuss defendant's second contention and conclude that a pimp can be convicted of a conspiracy to solicit prostitution with his prostitutes as the uncharged coconspirators.

## BACKGROUND

In light of defendant's contentions on appeal, it is unnecessary to provide a lengthy recitation of the facts. We provide the following background information.

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

***Current Offenses***

On a February evening in 2005, Sacramento Police Department (SPD) Detective Ernest Lockwood was working street-level prostitution enforcement in an unmarked car. Posing as a "john," Detective Lockwood drove alongside a woman he suspected was a prostitute. After a brief conversation, the woman, later identified as Debrah Woods, entered the detective's vehicle.

Woods and the detective agreed on a price of $100 for a "half and half," which the detective had to pay up front. Then Woods made a call on her cell phone, saying she had a client and would be a while.

As they drove, Woods told the detective she was working with four other girls that evening. Once they reached a secluded area, Detective Lockwood gave his back-up team the signal to arrest Woods on prostitution charges. Detective Lockwood seized Woods's cell phone, which registered the outgoing call she had made to phone number 702-810-4183.

Meanwhile, as part of the same enforcement operation, SPD Detective Brian Jensen was parked undercover when he noticed two scantily clothed women walking along the street. The two women got into a parked white van, followed by a third woman.

Later, at Detective Jensen's direction, the van was pulled over. Inside were the three women and the defendant, who was the driver. Defendant was arrested; he carried $1,024 in cash. The bundle of money contained various denominations, including 32 twenty-dollar bills, an amount consistent with prostitution transactions.

During the search of the van, officers found three cell phones. One of the phones had the number 702-810-4183. That phone's memory showed the incoming call from Woods's cell phone that Detective Lockwood had overheard.

***Prior Acts***

On the night of January 21, 2005, Phoenix Police Detective Eric Murry was working street-level prostitution enforcement. While posing as a "john," Detective Murry picked up a woman who was later identified as Christina Peters (aka Jenkins). After they agreed on a price for her services, Peters immediately made a call from a cell phone and said she was with a client. The phone's memory showed an outgoing call that evening to 702-810-4183 (defendant's phone).

Two days later, defendant posted bail for Peters.

## DISCUSSION

### 1. *Admissibility of Prostitutes' Statements*

Defendant contends the testimony of SPD Detective Lockwood and Phoenix Detective Murry, recounting their respective conversations with suspected prostitutes Woods and Peters (aka Jenkins), was inadmissible hearsay and violated his confrontation rights. We disagree because the prostitutes' statements are verbal acts or operative facts, which are not hearsay, and the statements did not implicate defendant's confrontation rights.

We review a trial court's hearsay ruling for abuse of discretion. (*People v. Fields* (1998) 61 Cal.App.4th

1063, 1067.) A hearsay statement is an out-of-court statement that is offered to prove the truth of the matter stated. (Evid. Code, § 1200, subd. (a).) Hearsay evidence is generally inadmissible. (Evid. Code, § 1200, subd. (b).) A statement that is not offered for the truth of the matter asserted is admissible as nonhearsay evidence. (*Fields*, *supra*, 61 Cal.App.4th at p. 1068.)

The trial court relied upon *People v. Dell* (1991) 232 Cal.App.3d 248 (*Dell*), to support its finding that the statements in question were admissible as nonhearsay evidence.[2]

In *Dell*, the trial court admitted the testimony of undercover police officers under the coconspirator exception to the hearsay rule. The testimony involved statements made by prostitutes during a negotiation for sex for money. (*Dell*, *supra*, 232 Cal.App.3d at p. 258.) On appeal, the court declined to consider the issue of whether a prostitute could be a coconspirator with her pimp, and instead held that the statements were admissible as "'verbal acts'" or "'operative facts'" of the crime of prostitution. (*Ibid.*) "Verbal acts"

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[2] The trial court also relied on *People v. Ambrose* (1986) 183 Cal.App.3d 136 (*Ambrose*) to find that the statements were admissible under the coconspirator exception to the hearsay rule. For simplicity, we will reserve discussion of the coconspirator issue until part 2 of this opinion. It is sufficient if there is at least one ground upon which the statements could have been properly admitted. (*Dell*, *supra*, 232 Cal.App.3d at p. 258.)

or “operative facts” are statements that are not offered into evidence for the truth of the matter stated, but because they have been stated, whether factually accurate or not. (*Id.* at p. 259.) In its discussion, *Dell* noted the dearth of California authority on this issue and that other jurisdictions have been unanimous in finding statements of solicitation by suspected prostitutes, testified to by others, to be admissible as “verbal acts.” (*Dell*, *supra*, 232 Cal.App.3d at pp. 258-262.)

Defendant does not cite any authority that contravenes *Dell*. Instead, defendant challenges its reasoning by inaptly focusing on the different standards of intent to prove crimes and contracts. Defendant’s argument distracts us from the central issue. At issue here is the admissibility of the statements, which is premised on the law of evidence, not on criminal or contract law.

The statements made by the prostitutes here relating to an exchange of money for sex were not offered for the truth of the matter asserted. The mere fact that the statements were made constituted circumstantial evidence of an element of the underlying charges of pimping and pandering, namely that these women were prostitutes and defendant knew they were prostitutes. (See § 266h, subd. (a), § 266i, subd. (a).) Whether or not the prostitutes would actually have performed the specified acts for the agreed-upon price is of no consequence. We conclude the trial court properly admitted the challenged statements of Woods and Peters as verbal acts or operative facts.

Defendant also contends that the admission of these statements violated his constitutional right to confrontation under *Crawford v. Washington* (2004) 541 U.S. 36 [158 L.Ed.2d 177] (*Crawford*). We disagree.

In *Crawford*, the Supreme Court was primarily concerned with the use of "*ex parte* examinations as evidence against the accused." (*Crawford*, *supra*, 541 U.S. at p. 50.) The Supreme Court referred to these statements as "testimonial," and included police interrogations in this category. (*Crawford*, *supra*, 541 U.S. at pp. 51-52.)

Defendant maintains that the statements made by Woods and Peters to undercover detectives Lockwood and Murry were testimonial under *Crawford*. This is incorrect. Woods and Peters did not know that these "johns" were police officers when they negotiated the act of prostitution. The statements were not made during an interrogation, nor were the statements given in response to structured police questioning. The statements of the prostitutes in this case simply do not fall under the category of "testimonial" statements as defined by the Supreme Court in *Crawford*. Therefore, the admission of the statements did not violate defendant's constitutional right of confrontation.[3]

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[3] Defendant additionally argues that admission of the statements deprived him of the right to present a defense. Defendant contends that the jurors must have used the statements for their truth because the judge gave an instruction that allowed them to do so if they found the existence of a conspiracy, which they did. For reasons that we will explain in our discussion of the

We conclude the statements of the prostitutes were properly admitted.

**2. *Conspiracy to Solicit Prostitution***

Defendant contends that his conviction for conspiring to solicit prostitution with his prostitutes (count three) was not supported by substantial evidence because a prostitute cannot be a coconspirator with her pimp; therefore, a conspiracy could not legally exist here. We disagree. Although phrased as a substantial evidence contention, the issue is actually one of legal interpretation.

Conspiracy requires two or more persons agreeing to commit a crime, along with the commission of an overt act, by at least one of these parties, in furtherance of the conspiracy. (*People v. Swain* (1996) 12 Cal.4th 593, 600; see § 182, subd. (a)(1), § 184.) A conspiracy requires: (1) the intent to agree, and (2) the intent to commit the underlying substantive offense. (*Swain*, *supra*, 12 Cal.4th at p. 600.) These elements may be established through circumstantial evidence. (*People v. Herrera* (2000) 83 Cal.App.4th 46, 64.) "They may . . . '"be inferred from the conduct, relationship,

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conspiracy charge, defendant was not deprived of his right to present a defense through the use of the statements for the truth of the matters asserted therein. This is because the jury properly convicted defendant of conspiracy to solicit prostitution with his prostitutes as the uncharged coconspirators. Consequently, the jury could properly use the prostitutes' statements for the truth of the matter asserted under the coconspirator exception to the hearsay rule. (See *Ambrose, supra,* 183 Cal.App.3d 136.)

interests, and activities of the alleged conspirators before and during the alleged conspiracy.”’” (*Ibid.*)

Defendant was convicted of conspiracy to solicit prostitution with his prostitutes as the uncharged coconspirators. (§§ 647, subd. (b), 182, subd. (a)(1).) The crux of defendant’s argument is that a prostitute cannot be a coconspirator with her pimp unless the prostitute assists in the exploitation of another person. For this point, defendant cites *People v. Pangelina* (1981) 117 Cal.App.3d 414 (*Pangelina*), *Williams v. Superior Court* (1973) 30 Cal.App.3d 8 (*Williams*), *People v. Frey* (1964) 228 Cal.App.2d 33 (*Frey*), and *People v. Berger* (1960) 185 Cal.App.2d 16 (*Berger*).

These cited cases, for our purposes, stand for the principle that an act of prostitution, a misdemeanor, cannot be elevated to a felony merely by charging the act as a conspiracy by the prostitute and her pimp to commit prostitution. (*Pangelina*, *supra*, 117 Cal.App.3d at p. 422; *Williams*, *supra*, 30 Cal.App.3d at p. 14; see *Frey*, *supra*, 228 Cal.App.2d at p. 52; *Berger*, *supra*, 185 Cal.App.2d at pp. 19-20.) These cases recognize that the statutory scheme covering prostitution and related crimes reveals an affirmative legislative intent to punish prostitutes as misdemeanants and to punish pimps and panderers as felons. (*Pangelina*, *supra*, 117 Cal.App.3d at pp. 422, 424.) This is because prostitutes, “rather than being accomplices or coconspirators of those charged with felony pimping or pandering, . . . are criminally exploited by such persons.” (*Id.* at p. 422.)

We recognize that the statutory scheme dealing with prostitution and related crimes, as a whole, reveals a legislative intent to punish prostitutes less harshly than the people who exploit them. However, we conclude that a pimp can be legally convicted of conspiracy to solicit prostitution with his prostitutes as the uncharged coconspirators. Three reasons support our conclusion.

First, the plain language of section 647, the solicitation statute, and section 182, the conspiracy statute, encompass the offense of a pimp conspiring to solicit prostitution with his prostitutes. The introductory language of section 647 states that "[e]very person" who commits one of the listed acts, which includes solicitation of prostitution, is guilty of a misdemeanor. (§ 647.) Section 182, subdivision (a)(1), applies to "two or more persons" who conspire to commit "any crime." Both statutes apply equally to any person who violates them. Therefore, the legislative distinction between prostitutes as misdemeanants and pimps as felons is not adversely affected by convicting a pimp of felony conspiracy to solicit prostitution.[4]

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[4] We do note that in one of the cases upon which defendant relies, *Williams*, *supra*, 30 Cal.App.3d 8, the prostitute and her pimp were both charged with conspiracy to commit prostitution. On a petition by the prostitute, the appellate court dismissed the conspiracy charge as to both the prostitute and her pimp. The court focused on the prostitute's role in the conspiracy, with no analysis regarding the pimp's role.

We do not express any views on the viability of convicting a prostitute for conspiracy to solicit prostitution with her pimp.

The Legislature has classified defendant's behavior (pimping and pandering) as felonious; the addition of a felony conspiracy charge to solicit prostitution reinforces that classification.

Second, there is California case law that recognizes the offense of a pimp conspiring to solicit prostitution involving one of his prostitutes. In *People v. Hobson* (1967) 255 Cal.App.2d 557, the court upheld, with little analysis for our purposes, a pimp's conviction for conspiracy to solicit prostitution that involved the pimp, his prostitute, and others. (*Hobson*, *supra*, 255 Cal.App.2d at pp. 559-562; see *Williams*, *supra*, 30 Cal.App.3d at pp. 10-11.) The prostitute in *Hobson* was not formally charged with the conspiracy; the pimp and the "others" were.

More significantly, in *People v. Ambrose* (1986) 183 Cal.App.3d 136 (*Ambrose*), the court expressly rejected the notion that a prostitute cannot conspire with her pimp to commit prostitution. (*Id.* at p. 139.) In *Ambrose*, the defendant was convicted of five counts of pimping and one count of pandering. (*Id.* at p. 137.) The *Ambrose* defendant was not charged with conspiracy, but the court upheld the admission of statements made by the defendant's suspected prostitutes under the coconspirator exception to the hearsay rule. (*Id.* at p. 139 [*Ambrose* also noted the "well established" principle that a defendant need not be charged with conspiracy to apply the coconspirator exception to the hearsay rule].) The *Ambrose* court rejected the defendant's contention, based on *Berger*, that because a prostitute cannot be an accomplice of her pimp, she

also cannot conspire with her pimp. (*Ibid.*) The court reasoned that the "relevant conspiracy . . . is one of prostitution," not pimping, and noted that the prosecution had presented sufficient evidence to establish that the defendant and his suspected prostitutes were engaged in a conspiracy to commit acts of prostitution. (*Ibid.*)

Similarly, in the instant case, not only was defendant charged with pimping and pandering, but he was also charged with conspiracy to solicit prostitution. The underlying conspiracy, then, was one of soliciting prostitution, not pimping. Furthermore, none of the cases that defendant relies on analyzed the same issue that confronts us. The issue here is whether a pimp can be convicted of conspiracy to solicit prostitution when his coconspirators are his prostitutes. *Pangelina* and *Williams* involved situations where the prostitute herself was prosecuted for conspiracy to commit prostitution; and *Frey* and *Berger* involved pimps who were convicted of pimping, pandering, and/or conspiracy to pimp and pander, not conspiracy to commit or solicit prostitution. (*Pangelina*, *supra*, 117 Cal.App.3d at p. 416; *Williams*, *supra*, 30 Cal.App.3d at p. 10; *Frey*, *supra*, 228 Cal.App.2d at pp. 38-39; *Berger*, *supra*, 185 Cal.App.2d at p. 17.) In the instant case, the pimp, not the prostitute, was prosecuted for conspiracy to solicit prostitution, not pimping. Therefore, we find *Ambrose* to be more persuasive and on point.

And third, upholding the conspiracy conviction in the present case furthers the rationale underlying the crime of conspiracy. The rationale for making conspiracy a crime,

independent from the underlying substantive offense, is that "'collaborative criminal activities pose a greater potential threat to the public than individual acts.'" (*People v. Alleyne* (2000) 82 Cal.App.4th 1256, 1261, quoting *People v. Tatman* (1993) 20 Cal.App.4th 1, 8.) In *Williams*, the court expressly rejected the defendant's argument that conspiracy to commit prostitution is no more serious than the actual act of prostitution. (*Williams*, *supra*, 30 Cal.App.3d at p. 11.) Said *Williams*: "Some of the sordid aspects of the commercial exploitation of prostitutes are too well known to require the citation of any authority." (*Ibid.*)

In the instant case, an agreement between defendant and his prostitutes made it more likely that they would commit the underlying offense. The group could pressure a reluctant individual into going through with the plan, and it would be difficult for that individual to convince the rest of the group to abandon their plans. The increased danger posed by this type of collaborative criminal activity reasonably justifies upholding the conspiracy conviction in the present case.

We conclude that a pimp can be convicted of a conspiracy to solicit prostitution with his prostitutes as the uncharged coconspirators. Consequently, we uphold defendant's conviction for count three.

**3. *Imposition of Upper Term***

Defendant lastly contends that the trial court's imposition of the upper term sentence on count one (pimping) violated his federal constitutional right to a jury trial. In light of the

recent United States Supreme Court decision in *Cunningham v. California* (2007) 549 U.S. ___ [166 L.Ed.2d 856] (*Cunningham*), we will vacate defendant's sentence on count one (pimping) and remand for whatever resentencing proceeding is appropriate.

In *Apprendi v. New Jersey* (2000) 530 U.S. 466, 490 [147 L.Ed.2d 435] (*Apprendi*), the Supreme Court held, based on the constitutional right to a jury trial, that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." In *Cunningham*, the Supreme Court applied the *Apprendi* rule to California's Determinate Sentencing Law (DSL). (*Cunningham*, *supra*, 549 U.S. at p. ___ [166 L.Ed.2d at p. 873].)

The *Cunningham* court explained that, under the DSL, the prescribed statutory maximum sentence is the middle term. (*Cunningham*, *supra*, 549 U.S. at p. ___ [166 L.Ed.2d at p. 873].) Under the DSL, the presence of aggravating circumstances to impose an upper term sentence beyond this maximum is determined by the trial judge by a preponderance of the evidence. (*Cunningham*, *supra*, 549 U.S. at p. ___ [166 L.Ed.2d at p. 873].) Consequently, the *Cunningham* court held California's DSL violates the constitutional right to a jury trial. (*Cunningham*, *supra*, 549 U.S. at p. ___ [166 L.Ed.2d at pp. 875-876].)

In the present case, the trial judge sentenced defendant to the upper term of six years for his section 266h (pimping) conviction. The judge found no mitigating factors but two aggravating factors: (1) a "high degree of sophistication and

professionalism in the manner in which this case was carried out"; and (2) defendant had "numerous" prior adult convictions.

Defendant argues that whether his conduct involved a high degree of sophistication and professionalism was an issue for the jury to decide. In light of *Cunningham*, we agree.

Defendant also argues that *Cunningham* applies to the aggravation of his sentence based on his "numero[us]" prior convictions, because characterizing his prior convictions as "numero[us]" goes beyond the mere fact of a prior conviction. We disagree. Since the determination of the fact of "a prior conviction" is within the trial judge's domain under *Apprendi* (530 U.S. at p. 490), it follows that the determination of the fact of the number of prior convictions is within that realm too. Consequently, it is for the trial judge to determine whether a defendant's prior convictions are "numerous."

The Attorney General maintains that because the trial judge could properly have imposed the upper term based on the fact of the prior convictions, any error in finding a high degree of professionalism and sophistication was harmless. However, we cannot say, beyond a reasonable doubt, that the trial judge would have imposed the upper term sentence based solely on the fact of defendant's prior convictions. (See *Chapman v. California* (1967) 386 U.S. 18, 24 [17 L.Ed.2d 705].)

A single aggravating circumstance is sufficient to support the imposition of an upper term. (*People v. Osband* (1996) 13 Cal.4th 622, 728.) It is not clear from the record, however, whether the trial judge would have imposed the upper

term in this case based solely on the fact of defendant's prior convictions. On remand for resentencing, the trial judge has the discretion to impose the upper term based on the fact of defendant's prior convictions alone, but we cannot make that call on appeal.

We conclude that the trial judge's finding of sophistication and professionalism as an aggravating circumstance violated defendant's constitutional right to a jury trial, and we remand for whatever resentencing proceeding is appropriate on count one.

## DISPOSITION

The judgment of conviction is affirmed. The sentence for count one (pimping) is vacated and the case is remanded to the trial court for an appropriate resentencing proceeding on that count.

DAVIS, J.

We concur:

BLEASE, Acting P.J.

RAYE, J.