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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE, Plaintiff and Respondent, v. RODNEY LYDELL TILLIS, Defendant and Appellant.	D054245 (Super. Ct. No. SCD209842)

APPEAL from a judgment of the Superior Court of San Diego County, Robert F. O'Neill, Judge. Reversed in part, affirmed in part.

A jury convicted Rodney Lydell Tillis of human trafficking (Pen. Code, § 236.1, subd. (a)),[1] pandering by encouraging (§ 266i, subd. (a)(2)) and sexual penetration by a foreign object (§ 289, subd. (a)(1)). Thereafter, Tillis waived a jury trial on the priors and admitted two prior felony convictions, for which he had served one prior prison term

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1 All further statutory references are to the Penal Code unless otherwise specified.

(§§ 667.5, 668, 1203, subd. (e)(4)). The trial court sentenced Tillis to a total prison term of 15 years.

On appeal, Tillis contends his convictions should be reversed because of instructional errors, insufficiency of the evidence and various sentencing errors. We agree that the trial court prejudicially erred by failing to properly instruct the jury on the elements of pandering by encouraging. That error translated into prejudicial instructional error on the crime of human trafficking as well. We therefore reverse Tillis's convictions for pandering and human trafficking. In all other respects, we affirm the judgment.

I

FACTUAL AND PROCEDURAL BACKGROUND

A. *The Underlying Offenses*

In September 2007, Breanna B., a 21-year-old woman with no job, decided to try to make money by prostituting herself. Giving no thought to having a pimp, she asked a roommate to drop her off after midnight near El Cajon Boulevard in an area known as the "Blade," where numerous prostitutes offer their services in San Diego. Almost immediately, Breanna was picked up by a man in a Cadillac who called defendant Tillis and told him that he was bringing something "hot" for him. The man drove Breanna to a gas station where Tillis was parked.

Tillis asked Breanna where she was from, which she took to be a gang-related inquiry, and told her to get in his car. She did so because she was afraid and did not know what was going to happen. Tillis was in the driver's seat and asked Breanna if she

had money. She told him she did not. He told her to take off her clothes and began to unzip her jacket. Breanna told him she would rather do it herself, and took off her jacket. Tillis told her to take off her pants, and she did. Tillis then told her to take off her underwear and she hesitated, until Tillis started pulling them down. Breanna then took off her underwear. Tillis put his hands inside Breanna's bra and told Breanna to open up her legs. She did not do so initially and tried to tell Tillis she had her period. Tillis told her to shut up, and stuck his hands between Breanna's legs and forcefully put two fingers inside her vagina, stating, "This pussy is going to sell." Feeling the tampon Breanna was wearing, Tillis thought it was money, but Breanna told him it was a tampon. After removing his fingers, Tillis wiped menstrual blood on Breanna's chest, pulled Breanna's hair and forced her to wipe and then lick his fingers. Breanna feared something would happen to her if she did not comply with Tillis's commands. Tillis called Breanna "bitch" and slapped her.

Tillis drove away from the gas station with Breanna in the car, telling her she was going to be his "bitch," and that she needed to make him $1,000 that night before she could go home. Breanna responded she was not going to be his bitch, and Tillis slapped her face. Tillis told Breanna he would "get my bitch to fuck you up," and he picked up his girlfriend, codefendant Rosemary Bojorquez, who was dressed like a prostitute, near El Cajon Boulevard.

Over the next 24 hours, Tillis drove Breanna and Bojorquez to El Cajon Boulevard three times and had Breanna drive to the Harbor Boulevard prostitution area. At each

place, Tillis told Breanna and Bojorquez to "walk" the street as prostitutes and warned Breanna that if she tried to escape, he would "fuck [her] up." Breanna accompanied Bojorquez while Bojorquez serviced two customers but Breanna engaged in no acts of prostitution. At some point Breanna told Tillis and Bojorquez that she had prostituted before because she was trying to fit in and gain their trust. Breanna was frightened by Tillis's behavior toward her and toward other women, and did not want to cross him.

After napping at a motel, Tillis drove Breanna and Bojorquez back to El Cajon Boulevard, where Tillis allowed Breanna to walk by herself because she was holding Bojorquez back from making money. Breanna told a stranger she had been kidnapped and obtained a ride home; the next day she told the police what happened.

B. *Investigation and Interview of Tillis*

After Breanna identified him from a photo lineup, the police arrested Tillis at a parking lot on El Cajon Boulevard. In Tillis's car, the police found a laptop computer, computer discs, a digital camera, provocative women's clothing, and a receipt for the motel room Breanna had occupied with Tillis and Bojorquez.

During an interview at the police station, which was audiotaped, Tillis initially denied any involvement in the incident. However, after seeing a surveillance tape that showed him with Breanna, Tillis asked how much prison time he was looking at and stated he guessed he was going to jail. He also asked the vice detective interviewing him whether Breanna already had been out there prostituting, and whether she was of age.

During the interview process Tillis was allowed to converse with Bojorquez, and was surreptitiously taped. Bojorquez told Tillis that the police "have the evidence."

Tillis admitted that a man named "T" brought him Breanna as a present and had ordered her into his car. He continued to deny that he had sexually penetrated Breanna. Tillis stated that Breanna was on El Cajon Boulevard without knowing the rules of the game she "tried to jump herself into." He admitted he "laced her up," or bought her clothes for prostituting, and told her the rules of the game. He claimed it was obvious that she did not know what she was doing, so he told her what she needed to know to avoid getting hurt.

C. *Trial Proceedings*

The prosecution charged Tillis and Bojorquez with human trafficking and pandering by encouraging (§§ 236.1, subd. (a), 266i, subd. (a)(2)), and Tillis with an additional count of sexual penetration by a foreign object (§ 289, subd. (a)(1)). Bojorquez pleaded guilty to human trafficking in exchange for probation, local custody, and dismissal of the pandering charge.

At trial, the prosecution presented expert testimony about local prostitution from Lynda Oberlies, a San Diego police sergeant supervising prostitution investigations. Oberlies testified that El Cajon Boulevard in San Diego and Harbor Boulevard, in the Anaheim area, are well-known areas or "tracks" of prostitution where pimping and prostitution are known as "the game" and have their own language and rules. Prostitutes are told not to look at a Black male to avoid giving the impression they are available to

another pimp, or to get into a Black male's car lest he be a pimp. Pimps call their prostitutes "bitches," and "lace them up," or buy them clothes for prostituting. "Out of pocket" means that a prostitute disrespected a pimp or walked away from him, for which she could be struck or beaten. Pimps set hours and prices, take all of the money that their prostitutes make, and dole some money back to them for food or favors. Any prostitute who works without a pimp and tries to keep her money is called a "renegade." Renegades do not last long on the Blade, as they will be robbed until they are forced to get a pimp for protection.

Breanna testified as to the facts surrounding the offense, and the detective who interviewed Tillis after his arrest testified to Tillis's statements during the police interview.

At the close of the prosecution's case, Tillis moved for a judgment of acquittal under section 1118.1, arguing that because he had received no compensation from Breanna, there was at most a pandering attempt, not a completed crime. The court denied the motion without prejudice.

Testifying on his own behalf, Tillis stated that when Breanna was brought to him, she had been "out there trying" to "gig on the Blade" without knowing what she was doing. Tillis said he wanted to help her, and admitted he and Bojorquez bought her clothes and taught her the rules of prostitution.

Bojorquez testified for the defense and claimed that Breanna knew what she was doing. However, Bojorquez admitted she told police Breanna was innocent and fresh in

the game and further, that Breanna told her she had just started being a prostitute. On rebuttal, the prosecution presented police testimony that when Bojorquez was interviewed, she had not told them that Breanna was experienced or knew what she was doing. Instead, at that time Bojorquez told the police: Breanna looked scared; Tillis told Breanna it would cost $1,000 to get free; Bojorquez and Breanna discussed a lower figure that Bojorquez would try to persuade Tillis to accept; and Bojorquez had spoken to Tillis about setting Breanna free, but Tillis said she had to pay him back first.

The jury returned guilty verdicts on all counts. Tillis then waived jury trial on the priors and admitted he had two prior felony convictions for which he had served one prior prison term.

D. *Sentencing*

The trial court sentenced Tillis to prison for 15 years, including an upper term of eight years on the conviction for sexual penetration by a foreign object, which the trial court stated was the principal term; a fully consecutive upper term sentence of six years on the conviction for pandering; an upper term of five years on the human trafficking conviction, which was stayed under section 654; and a one-year consecutive term for the prison prior.

II

DISCUSSION

The Trial Court's Instructional Error Requires Reversal of the Pandering and Human Trafficking Convictions

Tillis contends each of his convictions should be reversed due to various instructional errors, which we address separately below, applying the de novo standard of review. (See *People v. Cole* (2004) 33 Cal.4th 1158, 1206 (*Cole*).)

A. *The Trial Court's Failure to Properly Instruct That the Pandering Offense Requires the Specific Intent to Influence Someone to "Become" a Prostitute Requires Reversal*

Tillis was charged with pandering by encouraging under section 266i, subdivision (a)(2), which criminalizes conduct that "[b]y promises, threats, violence, or by any device or scheme, causes, induces, persuades or encourages another person to become a prostitute." (§ 266i, subd. (a)(2).)[2] Tillis contends the trial court improperly expanded the scope of the offense of pandering by encouraging when it instructed the jury that it could find him guilty of pandering for influencing another person "'to be'" a prostitute, "which is materially different from the statutory requirement that the defendant influence another person 'to become' a prostitute." We agree.

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2 The offense was charged as "pandering by encouraging," but the information did not limit the allegations to "encouraging," as opposed to the other actions delineated in section 266i, subdivision (a)(2). In this opinion, we use the term "to influence [another person] to become a prostitute" as a shorthand term for the entire phrase "[b]y promises, threats, violence, or by any device or scheme, causes, induces, persuades or encourages another person to become a prostitute." (*Ibid*.)

As authority for his appellate position, Tillis relies on *People v. Wagner* (2009) 170 Cal.App.4th 499 (*Wagner*). In *Wagner*, the defendant approached a prostitute who was walking a prostitution track and asked her to "'come fuck with this pimp.'" (*Id*. at p. 503.) Wagner was charged with pandering by encouraging under section 266i, subdivision (a)(2), and was tried on the theory that he was a pimp and was soliciting the prostitute to work for him. (*Wagner*, at p. 502.) At trial, the court instructed the jury, as requested by the prosecution, that the crime of pandering "'applies to cases in which a defendant solicits one whom he *believes* presently to be a prostitute to change her business relations.'" (*Id.*, at p. 504, italics added.) On appeal, the *Wagner* court surveyed the previous case law interpreting the statute on which the challenged instruction was based, and found it did not "withstand scrutiny" when applied to a "situation in which the defendant encourages one he knows to already be a prostitute 'to change her business relations.'" (*Id.* at p. 502.) Focusing on the statutory word "become," the *Wagner* court held that "the crime defined by section 266i, subdivisions (a)(2) and (b)(1), does not occur when the person being 'induce[d], persuade[d], or encourage[d]' by the defendant is *currently* a prostitute." (*Id.* at p. 511.) *Wagner* thus found the plain language of the statute contradicted a long line of authority that held that a defendant could be guilty of pandering by encouraging under section 266i, subdivision (a)(2) for influencing one whom he believes presently to be a prostitute to change her business relationship. (*Wagner*, at pp. 506-508*;* see *People v. Cason* (2009) 179 Cal.App.4th 1419, 1431-1433 [discussing cases].) In *Wagner*, the undisputed evidence established that the victim was

already engaged in prostitution, and the defendant knew that fact at the time he encouraged her to work for him. (*Wagner*, at p. 502.) Given the undisputed facts and the instructional error, the *Wagner* court reversed. (*Id.* at pp. 510-511.)

In this case, which was tried prior to the *Wagner* decision, the trial court instructed the jury that in order to prove Tillis guilty of the crime of pandering by encouraging under section 266i, subdivision (a)(2), the prosecution "must prove that: One, the defendant persuaded Breanna B. *to be* a prostitute, and, two, the defendant intended to influence Breanna B. *to be* a prostitute." (Italics added.)

As the holding in *Wagner* and a plain reading of the statute make clear, the offense of pandering by encouraging requires that the defendant specifically intend to influence the victim "to become" (§ 266i, subd. (a)(2)) — not just "to be" — a prostitute. (*Wagner*, *supra*, 170 Cal.App.4th 499; see *People v. Mathis* (1985) 173 Cal.App.3d 1251, 1256 (*Mathis*).) The phrase "to *be* a prostitute" is broader than the phrase "to *become* a prostitute,"[3] and can encompass a situation in which a defendant influences someone he knows to be a prostitute to "continue to be" one. Thus, the trial court's instruction, which included the wording "to be," enabled the jury to convict Tillis even if they found he believed Breanna was already a prostitute, although such a finding would negate the

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3 To "be" means, inter alia, "to belong as an individual to the class of" whereas to "become" means to "pass from a previous state or condition and come to be" or to "grow or change into being through taking on a new character or characteristic." (Webster's 3d New Internat. Dict. (2002) pp. 189, 195.)

specific intent the statute requires for conviction. The use of the phrase "to be" in the instruction thus lessened the prosecution's burden to show Tillis violated the pandering by encouraging statute. We therefore conclude the instruction was erroneous.[4]

An error that misdescribes the prosecution's burden of proving each element of the offense requires reversal unless it is harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24 (*Chapman*); *People v. Huggins* (2006) 38 Cal.4th 175, 211-212.) In performing our analysis under this standard, we ask whether the state has demonstrated beyond a reasonable doubt that the error did not contribute to the verdict. (*Chapman*, at pp. 24, 26.)

Arguing that any instructional error was harmless, the Attorney General contends the evidence showed Breanna was *not* already a prostitute, so the jury must not have convicted on the erroneous interpretation of the statute contained in the instruction. While the record contains evidence from which the jury could have concluded Tillis did not believe Breanna was already a prostitute, the evidence is not as clear as the Attorney General suggests.

Among other things, the record shows Tillis was aware that Breanna was "out there" trying to "gig on the Blade," i.e., trying to walk as a prostitute on El Cajon

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4 The Attorney General contends that because Tillis failed to request a clarification of the instruction, he forfeited his claim of error. We disagree. The forfeiture rule does not apply where the instruction, as phrased, amounted to an incorrect statement of law, as it did here. (*People v. Hudson* (2006) 38 Cal.4th 1002, 1011.)

Boulevard, before she was brought to him, and that, at some later point, Breanna told him she had already been a prostitute. Had the jury been properly instructed to evaluate Tillis's specific intent to influence Breanna to "become a prostitute," it reasonably could have interpreted this evidence to mean Tillis believed Breanna was already a prostitute when he met her and could not have formed the specific intent to influence her to *become* one. The instruction as given, however, permitted a guilty verdict even if the jury found Tillis believed Breanna already was a prostitute, since it required only that the jury find Tillis intended to influence her "to be" (or continue to be) a prostitute. As the prosecution argued under the erroneous instruction, "[a] pimp can pander a prostitute who has been prostituting for 35 years[,] for three days, for three hours."

Because there was evidence supporting the erroneous interpretation of the statute contained in the challenged instruction, we cannot say beyond a reasonable doubt that the error did not affect the verdict. (E.g., *People v. Morgan* (2007) 42 Cal.4th 593, 612, 613 (*Morgan*) [reversing conviction where prosecution presented case to jury on alternate theories, only one of which was legally sufficient, and the other legally inadequate]; *Chapman, supra,* 386 U.S. at p. 26.)[5] We therefore conclude the error was not harmless, and reverse the conviction on this ground.

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5 Because the evidence on this issue was conflicting, this possibility is not inconsistent with our finding below that the evidence was also sufficient to permit a rational juror to find Tillis intended to influence Breanna to become a prostitute. Here, our inquiry is whether it is certain beyond a reasonable doubt that the erroneous instruction did not affect the verdict, that is, whether the jury may have convicted on the

B. *The Trial Court Failed to Properly Instruct on the Specific Intent Required for Human Trafficking*

Tillis also contends reversal is required because the jury was not instructed that human trafficking is a specific intent crime.

Human trafficking is defined in section 236.1, as "depriv[ing] or violat[ing] the personal liberty of another *with the intent to effect or maintain a felony violation* of Section 266 [enticement of female under age 18 for prostitution], *266h* [*pimping*], *266i* [*pandering*], 267 [abduction of person under age 18 for prostitution], 311.4 [child pornography], or 518 [extortion], or to obtain forced labor or services." (§ 236.1, subd. (a), italics added.) Here, the information alleged specifically that Tillis violated section 236.1 with "intent to effect and maintain a felony violation of . . . section[s] 266h [pimping] and [266]i [pandering]."

The trial court incorrectly instructed the jury that a person commits human trafficking with the required wrongful intent "when he or she intentionally does a prohibited act."[6] The Attorney General concedes the crime of human trafficking actually

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wrong theory. In evaluating the sufficiency of the evidence, on the other hand, "'the relevant question 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.'" (*People v. Johnson* (1980) 26 Cal.3d 557, 576, quoting *Jackson v. Virginia* (1979) 443 U.S. 307, 318-319.)

6 The trial court used a modified version of CALCRIM No. 252, "Union of Act and Intent: General and Specific Intent Together," which specified that with respect to both counts 1 (human trafficking) and 3 (sexual penetration), a person commits the prohibited act with the required wrongful intent "when he or she intentionally does a prohibited act,"

requires specific intent, not general intent, but contends the jury would have understood this from the separate instruction on human trafficking that stated Tillis must have "acted with the intent to effect or maintain a felony violation of" the pandering by encouraging statute.[7]

The instruction that the Attorney General contends clarified the intent required for human trafficking refers, correctly, to the defendant's intent to violate the pandering statute. However, that reference imports another instructional error, namely, that the specific intent required under the pandering by encouraging statute was intent to influence Breanna "to be," rather than "to become a prostitute." Thus, the jury was (a) wrongly instructed that human trafficking is a general intent crime, and (b) incorrectly instructed on the kind of specific intent required for human trafficking based on pandering.

Reading the instructions as a whole, it is reasonably likely that the jury misunderstood the intent required for it to find Tillis guilty of human trafficking.

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and that count 2 (pandering) required that a "person must not only intentionally commit the prohibited act, but must do so with a specific intent."

[7] The Attorney General also claims the human trafficking instruction properly referred to intent to obtain "forced labor or services." We disagree. The reference to "forced labor or services" concerns a second prong of the human trafficking statute that was not included in the charges against Tillis, was not addressed by either the prosecution or defense at trial, and therefore should not have been included in the instruction. (§ 236.1, subd. (a); see *People v. Thomas* (1987) 43 Cal.3d 818, 824 [due process requires defendant cannot be convicted of crime not encompassed within charging document].)

Therefore, we agree the trial court erred in instructing the jury with respect to the offense of human trafficking. (*People v. Hill* (1967) 67 Cal.2d 105, 118 ["Instructions which mislead the jury into believing that specific intent is automatically to be inferred from the intentional doing of the proscribed acts are erroneous."].)

Further, because the jury may have understood the instructions to remove the requirement that Tillis have the specific intent required to commit human trafficking, we apply the harmless error test applicable to constitutional error and determine whether the error might have affected the jury's verdict. (*People v. Chun* (2009) 45 Cal.4th 1172, 1201 ["Instructional error regarding the elements of the offense requires reversal of the judgment unless the reviewing court concludes beyond a reasonable doubt that the error did not contribute to the verdict."]; see also *People v. Maurer* (1995) 32 Cal.App.4th 1121, 1128 [when "conflicting instructions on the mental state element of an alleged offense can act to remove that element from the jury's consideration, the instructions constitute a denial of federal due process"].)

As we have explained, there was conflicting evidence concerning whether Tillis could have intended to influence Breanna to become a prostitute (or believed she was already a prostitute). To convict for human trafficking, the jury was required to find he had specific intent to effect a violation of the pandering law. Because that intent was subject to conflicting evidence, we cannot say without a reasonable doubt the jury would have reached its guilty verdict on human trafficking had it been properly instructed.

Therefore, we reverse Tillis's conviction for human trafficking based on this instructional error.

C. *The Trial Court Did Not Err by Failing to Instruct on the Meaning of "Substantial and Sustained Restriction of Liberty" as to the Human Trafficking Charge*

Tillis did not request that the trial court instruct the jury with definitions of the statutory terms "substantial" or "sustained," which describe the restriction of liberty required for conviction of human trafficking. He contends on appeal that the trial court had a sua sponte duty to instruct the jury on those definitions, claiming the jury otherwise had no guidance on how to decide the "restriction of liberty" element required for human trafficking. As support for this argument, Tillis points to definitions of "substantial" and "sustained" that are used in standard jury instructions relating to the offenses of kidnapping and making a criminal threat. (CALCRIM Nos. 1215, 1300; CALJIC Nos. 9.50, 9.50.1.) Although we reverse Tillis's conviction for human trafficking based on instructional error, we address this issue for the guidance of the trial court in the event of retrial.[8]

"The language of a statute defining a crime or defense is generally an appropriate and desirable basis for an instruction, and is ordinarily sufficient when the defendant fails to request amplification. If the jury would have no difficulty understanding the statute

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8 However, we need not address Tillis's contention that the trial court erred in not instructing the jury on false imprisonment. Because the instructions on lesser included offenses necessarily depend on the evidence introduced at trial, we are unable to provide guidance on that issue. (*People v. Moye* (2009) 47 Cal.4th 537, 548.)

without guidance, the court need do no more than instruct in statutory language." (*People v. Poggi* (1988) 45 Cal.3d 306, 327.) "When a word or phrase '"is commonly understood by those familiar with the English language and is not used in a technical sense peculiar to the law, the court is not required to give an instruction as to its meaning in the absence of a request."'" (*People v. Estrada* (1995) 11 Cal.4th 568, 574 (*Estrada*).)

Nothing in the human trafficking statute, which is fairly detailed in defining certain other terms, suggests that the terms "substantial" and "sustained" are used in any technical sense peculiar to the law. (§ 236.1, subd. (a).) "A dictionary is a proper source to determine the usual and ordinary meaning of a word or phrase in a statute." (*E. W. Bliss Co. v. Superior Court* (1989) 210 Cal.App.3d 1254, 1258, fn. 2.) The dictionary definition of the term "substantial" is "not seeming or imaginary," and "sustained" means "maintained at length without interruption." (Webster's 3d New Internat. Dict., *supra,* pp. 2280, 2304.) Utilizing such meanings, a reasonable juror should not have difficulty contemplating what constitutes a substantial or sustained restriction of liberty.

Tillis argues that because standard jury instructions define the terms in the context of the crimes of kidnapping and making a criminal threat, clarifying instructions were required in this case. Standard jury instructions "are not themselves the law, and are not authority to establish legal propositions or precedent." (*People v. Morales* (2001) 25 Cal.4th 34, 48, fn. 7; *People v. Salcido* (2007) 149 Cal.App.4th 356, 366 [dismissing defendant's "reliance on the CALCRIM user guide and CALCRIM No. 1400 itself as authority for his claims of error"].) The existence of instructions on defined terms,

likewise, is not an indication that the same words must be defined in other contexts where the words are used as they are commonly understood. (See, e.g., *People v. Solis* (2001) 90 Cal.App.4th 1002, 1014-1015 [where defense did not request further definition of "'sustained'" as used in criminal threat statute, "the court had no sua sponte obligation to define that word because it is a commonly understood word and was not being used in a technical sense peculiar to the law"].)[9]

We conclude that the terms "substantial" and "sustained" are commonly understood and have no different technical or legal meaning when used to describe the deprivation of liberty required under the human trafficking statute. Tillis requested no clarifying instruction. Therefore, the trial court did not err in not providing a definitional instruction. (*Estrada*, *supra*, 11 Cal.4th at p. 574.)

D. *The Trial Court Did Not Err in Failing to Instruct on Simple Battery and Misdemeanor Sexual Battery as Lesser Included Offenses to Sexual Penetration by a Foreign Object*

Tillis contends the trial court prejudicially erred in failing to instruct the jury on simple battery and misdemeanor sexual battery, because those offenses are necessarily lesser included offenses of sexual penetration by a foreign object.

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9 In the context of the crime of kidnapping, "substantial" is used to describe the distance a kidnapping victim must be moved to satisfy the asportation element of kidnapping, and means "'a "significant amount" as contrasted with a distance that is "trivial."'" (*People v. Burney* (2009) 47 Cal.4th 203, 233, fn. 8, citing *Morgan*, *supra*, 42 Cal.4th at pp. 606-607.)

The trial court has an obligation to instruct sua sponte on lesser included offenses "'when the evidence raises a question as to whether all of the elements of the charged offense were present [citation], but not when there is no evidence that the offense was less than that charged.'" (*People v. Breverman* (1998) 19 Cal.4th 142, 154-155 (*Breverman*).) An offense is a lesser included offense if "either the statutory elements of the greater offense, or the facts actually alleged in the accusatory pleading, include all the elements of the lesser offense, such that the greater cannot be committed without also committing the lesser." (*People v. Birks* (1998) 19 Cal.4th 108, 117 (*Birks*).)

A trial court errs "if it fails to instruct, sua sponte, on all theories of a lesser included offense which find substantial support in the evidence." (*Breverman*, *supra*, 19 Cal.4th at p. 162.) No instruction is required, however, "on theories that have no such evidentiary support." (*Ibid*.) Consequently, an instruction on a lesser included offense is not required "when the evidence shows that the defendant is either guilty of the crime charged or not guilty of any crime." (*People v. Barton* (1995) 12 Cal.4th 186, 196, fn. 5 (*Barton*).)

Unlawful penetration with a foreign object is defined, in pertinent part, as "an act of sexual penetration when the act is accomplished against the victim's will by means of force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the victim." (§ 289, subd. (a)(1).) "Sexual penetration" is defined to include the "act of causing the penetration, however slight, of the genital or anal opening of any person . . . for the purpose of sexual arousal, gratification, or abuse by any foreign object . . . ."

(§ 289, subd. (k)(1).) Any "'[f]oreign object,' . . . include[s] any part of the body . . . ." (§ 289, subd. (k)(2).)

Simple battery is defined as "any willful and unlawful use of force or violence upon the person of another." (§ 242; *People v. Rocha* (1971) 3 Cal.3d 893, 899.) Sexual penetration by foreign object can be performed with, or without, the use of force or violence. (§ 289, subd. (a)(1) [sexual penetration may be accomplished "by means of force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the victim"].) Therefore simple battery is not a lesser included offense of sexual penetration by foreign object. (*Birks*, *supra*, 19 Cal.4th at p. 117 [offense is lesser included offense when greater offense cannot be committed without also committing the lesser].)

Misdemeanor sexual battery is defined, in pertinent part, as the "touch[ing of] an intimate part of another person, if the touching is against the will of the person touched, and is for the specific purpose of sexual arousal, sexual gratification, or sexual abuse." (§ 243.4, subd. (e)(1).) The word "'touches' means physical contact with another person, whether accomplished directly, through the clothing of the person committing the offense or through the clothing of the victim." (§ 243.4, subd. (e)(2).) The act of touching criminalized by section 243.4, subdivision (e)(1), therefore, must be performed by the person committing the offense, and not by a foreign object other than part of that person's body (clothed or not). (§ 243.4, subd. (e)(1), (2).)

Comparing these elements, the Attorney General contends that misdemeanor sexual battery cannot be committed without the defendant actually touching the victim,

unlike unlawful penetration with a foreign object. We agree. Sexual penetration by a foreign object can be committed by forcing a victim to penetrate him or herself. (*People v. Keeney* (1994) 24 Cal.App.4th 886, 889; see § 289, subd. (k)(1) [sexual penetration defined as "the act of causing the penetration, however slight, of the genital or anal opening of any person"].) Misdemeanor sexual battery, however, requires a touching by the perpetrator. (§ 243.4, subd. (e)(1), (2).) Therefore, one can commit a sexual penetration by foreign object without also committing misdemeanor sexual battery, and misdemeanor sexual battery is not a necessarily included offense. (*Birks*, *supra*, 19 Cal.4th at p. 117.)

Even assuming misdemeanor sexual battery were a necessarily included lesser offense of sexual penetration with a foreign object, the trial court did not err in failing to instruct on misdemeanor sexual battery because the evidence presented at trial did not support the instruction. If the jury believed Breanna, the elements of sexual penetration under section 289, subdivision (a) were established. On the other hand, Tillis maintained the touching never happened, and if his version of events were credited, he would be entitled to acquittal of any crime. If Tillis was guilty at all, he was guilty of sexual penetration. "A trial court need not . . . instruct on lesser included offenses when the evidence shows that the defendant is either guilty of the crime charged or not guilty of any crime . . . ." (*Barton*, *supra*, 12 Cal.4th at p. 196, fn. 5.) We therefore conclude that the trial court did not err by not instructing on battery or misdemeanor sexual battery as lesser included offenses.

We turn next to Tillis's challenge to the sufficiency of the evidence to support his convictions. Although we reverse the convictions for pandering and human trafficking, we nonetheless must resolve Tillis's challenges to the sufficiency of the evidence supporting those convictions to determine whether Tillis may be retried for those offenses. (*Burks v. United States* (1978) 437 U.S. 1, 15-16 [reversal of conviction for trial error does not bar retrial as does reversal for insufficiency of evidence]; *Morgan*, *supra*, 42 Cal.4th at p. 613 [despite reversing conviction on other grounds, court must address sufficiency of the evidence to determine if defendant may be retried].)

III

Substantial Evidence Supports Tillis's Convictions for Pandering, Human Trafficking and Sexual Penetration by a Foreign Object

Tillis contends there was insufficient evidence supporting his convictions for pandering (§ 266i, subd. (a)(2)), human trafficking (§ 236.1) and sexual penetration by a foreign object (§ 289, subd. (a)(1)). We therefore review the evidence in support of each count, after setting forth the applicable standard of review.

When determining whether the evidence is sufficient to sustain a criminal conviction, "we review the whole record in the light most favorable to the judgment below to determine whether it discloses substantial evidence — that is, evidence that is reasonable, credible and of solid value — from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt." (*People v. Snow* (2003) 30 Cal.4th 43, 66.) We presume in support of the judgment the existence of every fact the trier of fact

reasonably could deduce from the evidence. (*People v. Medina* (2009) 46 Cal.4th 913, 919.) Reversal is not warranted unless it appears "'that upon no hypothesis . . . is there sufficient substantial evidence to support [the conviction].'" (*People v. Bolin* (1998) 18 Cal.4th 297, 331.) "'If the circumstances reasonably justify the verdict of the jury, the opinion of the reviewing court that those circumstances might also reasonably be reconciled with the innocence of the defendant will *not* warrant interference with the determination of the jury.'" (*People v. Love* (1960) 53 Cal.2d 843, 850-851, italics added.)

A. *Substantial Evidence Supports Tillis's Conviction for Pandering*

Proof of pandering by encouraging under section 266i, subdivision (a)(2) "requires the defendant to cause, induce, persuade or encourage another person to become a prostitute; and the causing, inducing, encouraging or persuading must be accomplished *by* promises, threats, violence or any device or scheme. Implicit in the necessity of both of these elements of the crime is the inference of a specific intent to influence a person to become a prostitute." (*Mathis, supra,* 173 Cal.App.3d at p. 1256; § 266i, subd. (a)(2).)

Applying the appropriate standard of review, we are satisfied the evidence is sufficient to convict Tillis of pandering.

First, the evidence shows Tillis used threats, violence, a promise, and a scheme of intimidation to control Breanna and have her walk the streets as a prostitute. Tillis forcefully penetrated Breanna's vagina; pulled her hair; slapped her and threatened to

have his girlfriend "fuck [her] up"; made his own threats to "fuck [her] up" if she escaped; and made a promise that she would be able to go home if she made him $1,000.

Second, the evidence shows Tillis thus encouraged, or urged, Breanna "to become" a prostitute. Recognizing that Breanna did not know what she was doing and was "trying to jump into" the prostitution game, Tillis informed Breanna (and had Bojorquez show her) the rules she must follow, bought her clothes ("laced her up") and compelled her to walk as a prostitute by telling her that she had to make $1,000 for him before he would let her go home. Tillis thereby demonstrated he had the specific intent to influence Breanna to become a prostitute. Reviewing the record in the light most favorable to the judgment, we conclude, based on this evidence, that a rational jury could find Tillis intended by these actions to influence Breanna "to become a prostitute." Tillis's conviction for pandering by encouraging was supported by sufficient evidence.[10]

Tillis argues that the evidence shows only that he helped Breanna engage in prostitution and was therefore insufficient to convict him of pandering by encouraging. Tillis relies on *Mathis*, *supra*, 173 Cal.App.3d 1251, 1256, which he states recognized that "where a woman has already decided on her own to become a prostitute, the

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10 Likewise, based on our review of the evidence at the close of the prosecution's case, there was substantial evidence supporting the elements of pandering by encouraging. Therefore, we conclude the trial court did not err in denying Tillis's section 1118.1 motion for acquittal. (*Cole*, *supra*, 33 Cal.4th at pp. 1212-1213 [§ 1118.1 motion made at the close of the prosecution's case-in-chief is determined by sufficiency of the evidence as it stood at that point under same standard as review of sufficiency of the evidence to support a conviction].)

defendants' assisting acts do not meet the specific intent requirement of the statute." We disagree.

Contrary to Tillis's contention, *Mathis* does not hold as a matter of law that where a defendant assists a person who has already decided to become a prostitute, the specific intent required for pandering cannot be satisfied. Rather, the *Mathis* court held that the question of the defendants' specific intent to affirmatively influence the person to become a prostitute was for the jury to decide, under a proper instruction. (*Mathis*, *supra*, 173 Cal.App.3d at p. 1256.) In *Mathis*, as here, it was undisputed that the victim had not engaged in any acts of prostitution before meeting the defendants, and the *Mathis* court held there was sufficient evidence supporting the conviction for pandering by encouraging under section 266i, subdivision (a)(2), including specific intent. (*Mathis*, at p. 1256, fn. 6.)

The *Mathis* court reversed and remanded for retrial of the pandering charges because the trial court had erroneously instructed the jury that defendants could be convicted if they "'*assisted*, induced, persuaded or encouraged another person to become a prostitute.'" (*Mathis*, *supra*, 173 Cal.App.3d at p. 1255.) Because the instruction added the word "assisted" to the statutory terms, the jury could have convicted even if it found the defendants did not specifically intend to affirmatively influence the victim to become a prostitute, but only helped her begin a new career. (*Mathis*, *supra*, 173 Cal.App.3d at p. 1256 & fn. 7.) *Mathis* instructs that while the specific intent required for pandering by encouraging "may well be inferred from acts of assistance, 'we cannot extrapolate

therefrom, as a matter of law, that the inference *must* be drawn. Intent [to influence] is what must be *proved* . . . .'" (*Id.* at p. 1256, quoting *People v. Yarber* (1979) 90 Cal.App.3d 895, 916.) Here, as in *Mathis*, the question of Tillis's specific intent is a question for the jury because there is sufficient evidence, based on Tillis's statements, actions, threats and promises, to infer that he specifically intended to affirmatively influence Breanna to become a prostitute. (§ 266i, subd. (a)(2).)

Tillis also contends the pandering statute requires that the victim not currently be a prostitute. Assuming, without deciding, that the statute so requires,[11] the evidence and jury instructions in this case would have permitted a finding that Breanna was not a prostitute when she met Tillis. The jury was instructed a prostitute is "a person who engages in sexual intercourse or any lewd act with another person in exchange for money or other compensation." There was no evidence Breanna ever engaged in any sexual or lewd act in exchange for money before meeting Tillis. Therefore, the jury could have

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11 We disagree with Tillis's contention that *Wagner* should be read to hold that the statute also requires as an "essential element" of the prosecution's case that the victim not currently be a prostitute. (Relying on *Wagner*, *supra*, 170 Cal.App.4th at p. 511 [stating that "the crime defined by section 266i, subdivisions (a)(2) and (b)(1), does not occur when the person being 'induce[d], persuade[d] or encourage[d]' by a defendant is *currently* a prostitute"].) As we have explained, *Wagner* involved uncontroverted evidence that the defendant knew the victim was a prostitute, and there was thus no possibility of establishing the defendant's intent that she "'become'" a prostitute. (*Wagner*, at pp. 502, 505, 507, 511.) Here, on the other hand, the record contains conflicting evidence regarding whether Breanna was, and whether Tillis believed she was, already a prostitute before he met her. The evidence thus presented a question for the jury.

found Tillis had the specific intent required for pandering by encouraging, and that he, by "promises, threats, violence, or by any device or scheme," "encourage[d Breanna] to become a prostitute." (§ 266i, subd. (a)(2).) Tillis's conviction was therefore supported by substantial evidence.

B. *Substantial Evidence Supports Tillis's Conviction for Human Trafficking*

Tillis contends his conviction for human trafficking is not supported by substantial evidence for a variety of reasons. We address each separately below.

1. The Federal "Commercial Sex Act" Requirement Is Not an Element of the Human Trafficking Offense.

Tillis first contends his human trafficking conviction was not supported by evidence that Breanna actually completed a commercial sex act for remuneration, which Tillis argues is required by the federal definition of "a severe form of trafficking" mentioned in the California statute.[12] As we will explain, we disagree that for conviction of human trafficking, the prosecution was required to prove a completed commercial sex act, but even if it were, the evidentiary showing was made.

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12 Tillis relies on section 236.1, subdivision (f), which states: "The Legislature finds that the definition of human trafficking in this section is equivalent to the federal definition of a severe form of trafficking found in Section 7102(8) of Title 22 of the United States Code." The federal statute, in turn, defines severe human trafficking, in relevant part, as "sex trafficking in which a commercial sex act is induced by force, fraud, or coercion, or in which the person induced to perform such act has not attained 18 years of age." (22 U.S.C. § 7102(8)(A).) For the purposes of the federal statute, a "commercial sex act" is defined as "any sex act on account of which anything of value is given or received by any person." (22 U.S.C. § 7102(3).)

Nothing in the California law defining human trafficking requires proof of a completed sex act. (§ 236.1, subd. (a).) No completed act is required to establish pandering by encouraging — which formed the basis for Tillis's conviction of human trafficking. (*Wooten v. Superior Court* (2001) 93 Cal.App.4th 422, 437 [pandering does not require a completed act of prostitution]; see § 266i, subd. (a)(2).) Tillis provides no authority for the proposition that satisfying the definition of severe trafficking under the federal statute is an element of the crime under California law. Any argument unsupported by citation to relevant authority is deemed waived. (See *People v. Williams* (1997) 16 Cal.4th 153, 215.)[13]

Assuming, without deciding, that the federal requirement is incorporated by reference into the California offense, Tillis's conviction is supported by substantial evidence of such an act. Tillis's act of sexual penetration of Breanna's vagina meets both requirements for a "commercial sex act" as defined by federal law. First, Tillis's act qualifies as "*any* sex act, on account of which *anything of value* is given to or received by *any person.*" (22 U.S.C. § 7102(3), italics added; see, e.g., *United States v. Marcus*

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13 The legislative declaration regarding the federal statute in section 236.1, subdivision (f) has not been applied in any reported cases. The federal definition was created as part of the Traffic Victims Protection Act of 2000 to "protect victims of severe forms of human trafficking" who may receive particular nonimmigrant visas under certain circumstances. (Garber, *Chapter 240: Human Trafficking — Combating the Underground Slave Industry in California* (2006) 37 McGeorge L.Rev. 190 & fn. 6, 192.) The federal definition therefore appears to be unrelated to the criminal penalties under the California human trafficking statute.

(2007) 487 F.Supp.2d 289, 304 [commercial sex act does not require exchange of money], reversed on other grounds in *United States v. Marcus* (2008) 538 F.3d 97.) Tillis's insertion of his fingers into Breanna's vagina was a sex act, "on account of" which Tillis received what he considered to be valuable information (22 U.S.C. § 7102(3)), as evidenced by his pronouncement that "this . . . is going to sell." Second, as we further explain in our determination that the sexual penetration offense was supported by substantial evidence, Tillis's penetration was "induced by force" and coercion, as set forth in the federal statute. (22 U.S.C. § 7102(8)(A).) We therefore reject Tillis's contention that the prosecution presented no substantial evidence of a completed commercial sex act, were one required.

2. Substantial Evidence Showed Tillis Subjected Breanna to a Substantial and Sustained Restriction of Liberty Through Violence, Menace or Threat of Unlawful Injury.

Section 236.1, subdivision (d)(1) defines the restriction of liberty required for conviction of the crime of human trafficking as including "a substantial and sustained restriction of another's liberty accomplished through fraud, deceit, coercion, violence, duress, menace, or threat of unlawful injury to the victim or to another person, under circumstances where the person receiving or apprehending the threat reasonably believes that it is likely that the person making the threat would carry it out." (*Ibid.*)

Tillis contends insufficient evidence supports his conviction for human trafficking because the prosecution failed to show he used (a) violence, menace or threat of unlawful injury or (b) coercion or duress, to effect a (c) substantial and sustained restriction of

Breanna's liberty, (d) with intent to effect a violation of the pandering law. We address each contention in turn.

a. *Substantial Evidence Shows Tillis Employed Menace and Violence*

Neither the human trafficking statute, which was enacted relatively recently, nor any cases decided under it define what menace or violence is required to prove an unlawful deprivation or violation of personal liberty. (See § 236.1, subd. (d)(1).) In such circumstances, we turn to prior judicial interpretations of the same words in analogous contexts. It is a well-established principle of statutory construction that when enacting statutes, the Legislature is presumed to be aware of, and is presumed to intend to employ, the well-settled meaning of such words, unless it expressly states otherwise. (*Estate of Sax* (1989) 214 Cal.App.3d 1300, 1304.) In deciding this issue, we therefore turn to the definitions of the terms "menace" and "violence" established by the law of felony false imprisonment, which contains the same elements and provides a useful analogy.[14]

The trial court instructed the jury that "[m]enace means a verbal or physical threat of harm. The threat of harm must be express or implied." This instruction appropriately defined "menace" in a way that is consistent with the law of false imprisonment. (*People v. Reed* (2000) 78 Cal.App.4th 274, 280 (*Reed*); accord, *People v. Wardell* (2008) 162

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14 Compare section 236.1, subdivision (a) (human trafficking applies where person "deprives or violates the personal liberty of another") with section 236 (false imprisonment is "the unlawful violation of the personal liberty of another"); see *Reed, supra*, 78 Cal.App.4th at page 280 (false imprisonment is a felony if it is achieved "'by violence, menace, fraud, or deceit'").

Cal.App.4th 1484, 1490.) The trial court did not define violence. However, in false imprisonment cases, the term "violence" is defined in accordance with its dictionary definitions as "'[u]njust or unwarranted exercise of force'" and "'exertion of any physical force so as to injure or abuse.'" (*People v. Babich* (1993) 14 Cal.App.4th 801, 807, fn. 2; see Webster's 3d New Internat. Dict., *supra*, p. 2554 ["violence" defined as "exertion of any physical force so as to injure or abuse"].)

Here, Tillis forcefully inserted his fingers into Breanna's vagina, pulled her hair and slapped her. He stated she was going to make him money and be his prostitute, and when she balked, said his girlfriend would "fuck [her] up." Tillis later warned her not to escape or he would "fuck [her] up." He had his girlfriend stay with her on the street to guard her and make sure she did not go home or contact the police. Breanna testified she did not run away from Tillis or Bojorquez because she was afraid of what Tillis might do. We conclude the jury could reasonably find from this evidence that Tillis restricted Breanna's liberty by using menace (including express threats) and violence.

Tillis's reliance on *People v. Matian* (1995) 35 Cal.App.4th 480, 484, also a false imprisonment case, is misplaced. In *Matian*, after sexually assaulting his victim, the defendant kept her in a chair in a nearby room by glaring at her and getting up to approach her when she tried to leave. (*Id*. at p. 485.) The *Matian* court concluded the evidence did not support felony false imprisonment because the defendant did not use a deadly weapon or threats, apart from his earlier sexual assaults and grabbing the victim's arm to restrain her. (*Id.* at pp. 486-487.) *Matian* is inapposite, because here, unlike

Matian, the jury could infer that Tillis used violence apart from his sexual penetration — including slapping and pulling her hair — to restrict Breanna's liberty by intimidating her. Tillis also made express threats to commit future violence against Breanna if she left before making him $1,000. Accordingly, *Matian* does not support a conclusion that there was insufficient evidence of violence and menace in this case.[15]

b. Substantial Evidence Showed Tillis Restricted Breanna's Liberty in a Substantial and Sustained Way

Tillis contends the evidence was insufficient to show Breanna suffered a "substantial and sustained" restriction of her liberty, as required for a conviction of human trafficking. He argues Breanna "willingly" walked the streets with Bojorquez and drove Tillis's car to the Harbor Boulevard prostitution track while he slept. We disagree. The evidence was sufficient for the jury to conclude Breanna only accompanied Tillis and Bojorquez because Tillis threatened to hurt her if she did not comply, and the restriction imposed on Breanna lasted nearly 24 hours, which was sufficient for the jury to find it was "substantial and sustained." (See, e.g., *People v. Allen* (1995) 33 Cal.App.4th 1149, 1150-1151, 1156 [15 minutes of fear sufficient to find "'sustained fear'" required for criminal threat].)

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15 Because the evidence establishes Tillis used violence and menace, we need not determine whether he also used coercion and duress to restrain Breanna's liberty. Likewise, because we conclude that substantial evidence supports the finding Tillis acted with the requisite intent to commit pandering, we need not address his contention that the evidence was insufficient to show sufficient specific intent to support his conviction for human trafficking.

3. Substantial Evidence Shows Tillis Deprived Breanna of Her Personal Liberty with Specific Intent to Effect a Violation of the Pandering Law.

Tillis next argues that insufficient evidence supports his human trafficking conviction because the evidence showed Breanna was working as a prostitute or Tillis believed she was working as a prostitute when he met her.

As we have explained, the evidence rationally supports a finding that Tillis had the specific intent to influence Breanna to become a prostitute. The evidence also supports the inference that Tillis restricted Breanna's liberty for the express purpose of making money through her becoming a prostitute: Breanna testified Tillis told her repeatedly that she could not leave until she made him $1,000. This testimony was corroborated by Bojorquez's statements to the police, including her statements that Tillis told Breanna it would cost $1,000 to get free, that Bojorquez had spoken to him about letting Breanna go and that Tillis continued to insist that she pay him back before she could go. We therefore conclude the human trafficking conviction is supported by substantial evidence.

C. *Substantial Evidence Supports Tillis's Conviction for Sexual Penetration by a Foreign Object*

Tillis next contends his conviction for sexual penetration by a foreign object must be reversed because there was insufficient evidence supporting the elements of the crime, namely, that the sexual penetration by a foreign object was accomplished: (1) against Breanna's will; (2) by means of force, violence, duress, menace or fear of immediate and unlawful bodily injury; and (3) for purpose of sexual arousal, gratification or abuse. (§ 289, subd. (a)(1).) As we will explain, we disagree.

1. Substantial Evidence Supports the Jury's Determination Tillis Accomplished Sexual Penetration by a Foreign Object Against Breanna's Will.

Tillis contends there was no substantial evidence that Tillis put his fingers into Breanna's vagina against her will, because she did not resist and because she "had come to him as a working prostitute and made no statements or other indications that she did not want to do what he asked." Based on his position that Breanna had implicitly consented to his sexual penetration by "working as a prostitute," Tillis argues she was required to "convey to the defendant her lack of consent or withdrawal of consent" in order to demonstrate the act was done against her will. We disagree.

The evidence showed Breanna was initially taken to Tillis against her will, causing her to think she was going to be raped. When Tillis told her to get into the car, Breanna did so only because she was afraid and did not know what was going to happen. Tillis asked Breanna for money and when she told him she did not have any, he ordered her to take her clothes off. When she hesitated, he swore at her and began doing it himself. Because she was scared and did not want him touching her, she complied. Tillis then told her to open her legs, she refused, and tried to tell him she was menstruating. He told her to shut up, and stuck his hand between her legs and his fingers into her, forcefully. Nothing in the evidence permits the inference that Breanna impliedly consented to Tillis's sexual penetration.

Because there is no evidence of any initial consent in this case, the cases upon which Tillis relies are factually distinguishable. (*In re Jose P.* (2005) 131 Cal.App.4th

110, 117 [involving victim who consensually engaged in foreplay]; *In re John Z.* (2003) 29 Cal.4th 756, 758 [involving victim who consented to sexual intercourse].) Here, Tillis did not offer to pay Breanna as a prostitute, and there was no evidence she participated willingly or did anything but resist his attempts to undress or penetrate her. We conclude there was sufficient evidence that Tillis sexually penetrated Breanna against her will.

2. Substantial Evidence Supports the Jury's Determination Tillis Accomplished Sexual Penetration by a Foreign Object of Breanna with Force.

The degree of force required to show sexual penetration by a foreign object is the same as that required in rape cases — force sufficient to overcome the victim's will. (*In re Asencio* (2008) 166 Cal.App.4th 1195, 1204-1205 [the requisite amount of force for a rape conviction is the amount sufficient to overcome the victim's will].) As the California Supreme Court has held, the *kind* of physical force applied is immaterial and may consist of "'"'taking of indecent liberties with a woman or laying hold of and kissing her against her will.'"'" (*People v. Griffin* (2004) 33 Cal.4th 1015, 1024, 1025 ["under the modern rape statute, the jury no longer evaluates the element of force in terms of whether it physically prevents the victim from resisting or thwarting the attack"].)

Using this standard, the record contains substantial evidence upon which a jury reasonably could find Tillis forcibly penetrated Breanna. (*In re Asencio, supra*, 166 Cal.App.4th at pp. 1204-1205 [sexual penetration committed by force in violation of § 289, subd. (a)(1) does not require physical force greater than that inherent in the act of sexual penetration].) Although Breanna testified the penetration did not hurt — which

Tillis contends shows insufficient evidence of force — she also testified Tillis just stuck his hand between her legs and forcefully into her vagina. If credited, Breanna's testimony is sufficient for a reasonable jury to find that Tillis used force to overcome Breanna's will and accomplish the act of sexual penetration with a foreign object. (See *People v. Young* (2005) 34 Cal.4th 1149, 1181 ["unless the testimony is physically impossible or inherently improbable, testimony of a single witness is sufficient to support a conviction"].)

3. Substantial Evidence Supports the Jury's Finding Tillis Performed the Sexual Penetration by a Foreign Object by Duress.

"Duress" is the "'direct or implied threat of force, violence, danger, *hardship* or retribution sufficient to coerce a reasonable person of ordinary susceptibilities to (1) perform an act which otherwise would not have been performed or, (2) acquiesce in an act to which one otherwise would not have submitted.'" (*People v. Leal* (2004) 33 Cal.4th 999, 1004 (*Leal*), quoting *People v. Pitmon* (1985) 170 Cal.App.3d 38, 50; see also *People v. Senior* (1992) 3 Cal.App.4th 765, 775.) Duress can arise from physical control or psychological coercion under various circumstances, including the relationship between the defendant and the victim and their relative ages and sizes. (*Pitmon*, at pp. 50, fn. 9 & 51 [noting also that duress need not be accompanied by force].)

Here, the jury had before it multiple pieces of evidence pointing to duress. Breanna was a young and naive woman, confronted by an older male who was apparently a pimp and gang member, who swore at her and told her to shut up when she resisted his

orders to take off her clothes and spread her legs, and when she tried to tell him she was menstruating.[16] We conclude this evidence is sufficient for a rational juror to find a reasonable person in Breanna's position would have been coerced to acquiesce in an act to which she otherwise would not have submitted. (*Leal*, *supra*, 33 Cal.4th at p. 1004.) While Tillis claims there was no "apparent protest," the pertinent question is *not* whether Breanna protested but whether the evidence showed a threat "of force, violence, danger, hardship or retribution" (*Leal*, at p. 1004) by Tillis sufficient for the jury to conclude Breanna acted under duress. We conclude it does.

Having concluded that the evidence is sufficient to establish that Tillis accomplished the sexual penetration by a foreign object against Breanna's will and by means of force or duress, we next determine whether Tillis's penetration of Breanna meets the final element of sexual penetration by a foreign object, namely, that it was accomplished for the purpose of sexual abuse.

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16 This evidence shows an implied threat of danger or retribution, and therefore distinguishes this case from *People v. Espinoza* (2002) 95 Cal.App.4th 1287 upon which Tillis relies. In *Espinoza*, there was insufficient evidence of duress used to accomplish a series of molestations of a stepdaughter, where the perpetrator never threatened or said anything with the exception of two expressions of love to the victim during the acts. (*Id.* at p. 1295.) Unlike Breanna, the victim in *Espinoza* "made no oral or physical response to his acts." (*Id.* at p. 1320.)

4. Substantial Evidence Supports the Jury's Finding Tillis Performed the Sexual Penetration by a Foreign Object for the Purpose of Sexual Abuse.

The offense of sexual penetration by a foreign objection must be accomplished "for the purpose of sexual arousal, gratification or abuse." (§ 289, subds. (k)(1) & (a)(1).) In this case, the prosecution argued Tillis committed the penetration of Breanna's vagina for the purpose of sexual abuse, specifically, to cause Breanna "pain, discomfort and shame."

The requirement that the penetration be for the purpose of "sexual abuse" is met where a defendant intends to cause discomfort, injury or pain by mistreatment directed to a victim's sexual parts. (*People v. White* (1986) 179 Cal.App.3d 193, 203-206 (*White*).) In the related context of sexual battery, conduct intended to insult or humiliate or intimidate a person is also "sexual abuse." (*In re Shannon T.* (2006) 144 Cal.App.4th 618, 622 (*Shannon T.*).)

The evidence showed Tillis forced Breanna to strip and spread her legs, swore at her, told her to shut up, pulled her hair, called her "bitch," smeared her menstrual blood on her chest and forced her to wipe and then lick his fingers. Based on this evidence, a reasonable juror could find Tillis performed the sexual penetration to insult, humiliate or intimidate Breanna.

Tillis contends that sexual abuse requires acts that are intended to physically hurt or injure the victim, and that he did not act with such intent. (Citing *White*, *supra*, 179 Cal.App.3d 193.) To the contrary, *White* held, "'[t]o "abuse" someone is to hurt them by

treating them badly, *or* to cause pain or injury through mistreatment. When such mistreatment is directed to a victim's sexual or "private" parts, the resulting conduct would certainly be considered sexual abuse.'" (*Id.* at p. 205, italics added.)[17] As later explained in *Shannon T.*, sexual abuse also occurs when sexual mistreatment is intended to cause psychological pain or injury, i.e., to insult, humiliate or intimidate. (*Shannon T.*, *supra*, 144 Cal.App.4th at p. 622.)[18] Likewise, here, we conclude the evidence supports an inference Tillis intended to mistreat, intimidate and humiliate Breanna and committed the act for the purpose of sexual abuse.

We conclude Tillis's challenges to the sufficiency of the evidence lack merit, and next turn to his claims of sentencing error and ineffective assistance of counsel.

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17 *White* involved the defendant's contention that "sexual abuse," like sexual arousal or gratification, required a sexual motive. The court rejected this argument, stating that the purpose of sexual abuse was to cause pain or injury, not lewdness. (*White*, *supra*, 179 Cal.App.3d at p. 205.) *White* did not, however, state that no abuse could be found in the absence of resulting pain or injury.

18 Tillis also argues that he was just looking for money. We disagree that the evidence supports an inference that Tillis's only intent was to search for money. His actions before and after the actual penetration bespeak an intent to insult, humiliate or intimidate Breanna, and the jury was entitled to consider those actions as circumstantial evidence of his intent to abuse. (E.g., *People v. Smith* (2009) 178 Cal.App.4th 475, 479 ["Because intent can seldom be proven by direct evidence, it typically is inferred from the circumstances."].)

IV

The Sentencing Error Was Harmless and Provides No Grounds for an Ineffective Assistance of Counsel Claim

Although we reverse Tillis's convictions for pandering by encouragement and human trafficking for prejudicial instructional error, we must nevertheless address his claim of sentencing error with regard to his remaining conviction for sexual penetration by a foreign object.[19] Tillis claims the trial court committed error by not stating on the record the reasons for its imposition of an upper term sentence as to that conviction. The trial court simply adopted the aggravating factors set forth in the prosecution's sentencing memorandum. The Attorney General tacitly concedes the failure to state reasons was error, but contends any error was harmless. As set forth below, we determine the claim is forfeited; Tillis's counsel did not render ineffective assistance by failing to object to the error in the trial court; and, in any event, the error is harmless.

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19 Because we reverse his convictions for pandering and human trafficking, we need not reach Tillis's contention the trial court imposed an unauthorized sentence with respect to his pandering conviction. If Tillis were retried and convicted, the trial court "is entitled to reconsider the entire sentencing scheme," including the sentence for the sexual penetration conviction upon which Tillis bases his argument (in part) that the full term sentence for pandering is unauthorized. (*People v. Burbine* (2003) 106 Cal.App.4th 1250, 1257-1258 & fn. 6 [holding trial court has jurisdiction to revise sentence on conviction, including sentence on principal term, despite fact that only subordinate term conviction was reversed]; *People v. Begnaud* (1991) 235 Cal.App.3d 1548, 1551-1552.)

A. *Tillis Forfeited the Claim That the Trial Court Erred by Failing to State Reasons for Its Sentencing Decision*

Tillis contends the trial court's failure to specify its reasons on the record for imposing upper terms on all counts is fatal and requires reversal and remand for a new sentencing hearing. The contention lacks merit. Under well-established principles of waiver or forfeiture, a defendant may not generally complain for the first time on appeal about sentencing error. (*People v. Scott* (1994) 9 Cal.4th 331, 353 [applying waiver doctrine "to claims involving the trial court's failure to properly make or articulate its discretionary sentencing choices," including cases in which the court purportedly erred because it "failed to state any reasons"].) Tillis failed to object in the trial court. Had this been done, the trial court could have stated its reasons for the upper term sentence on the record rather than incorporating by reference the aggravating factors in the prosecution's sentencing memorandum. The failure to object thus forfeited any claim of error on appeal.

B. *Ineffective Assistance of Counsel, If Any, Did Not Prejudice Tillis*

Tillis contends his counsel was ineffective for failing to object that the trial court stated no reasons for imposing the upper term sentences.

To establish ineffective assistance of counsel, "a defendant must show that counsel's representation fell below an objective standard of reasonableness under prevailing professional norms, and that counsel's deficient performance was prejudicial, i.e., that a reasonable probability exists that, but for counsel's failings, the result would

have been more favorable to the defendant." (*In re Resendiz* (2001) 25 Cal.4th 230, 239.) "In determining whether an attorney's conduct so affected the reliability of the trial as to undermine confidence that it 'produced a just result' [citation], we consider whether 'but for' counsel's purportedly deficient performance 'there is a reasonable probability the result of the proceeding would have been different.'" (*People v. Sapp* (2003) 31 Cal.4th 240, 263.) The futility of an objection or motion that counsel is accused of neglecting provides a valid explanation for counsel's conduct. (*People v. Price* (1991) 1 Cal.4th 324, 387 (*Price*) [counsel does not render ineffective assistance by failing to make motions or objections that counsel could have determined would be futile under applicable precedent].)

Here, Tillis himself argues that any objection to the trial court's adoption of the factors cited by the People in their sentencing memorandum would have been futile. Tillis thus apparently concedes (a) there was a valid explanation for his counsel's conduct (*Price*, *supra*, 1 Cal.4th at p. 387) and (b) an objection would not have resulted in a different outcome. We agree an objection at the trial stage would not have changed the result.

Thus, Tillis has failed to show a reasonable probability the outcome would have been different had his counsel objected to the trial court's failure to state sentencing reasons on the record. We therefore conclude Tillis has failed to show ineffective assistance of counsel. (*Strickland v. Washington* (1984) 466 U.S. 668, 697 [court may

dispose of ineffectiveness claim where defendant makes insufficient showing of prejudice.)

C. *The Sentencing Error Is Harmless*

As we stated above, in imposing an upper term sentence for Tillis's sexual penetration conviction, the trial court failed to state its reasons on the record and instead adopted the aggravating factors in the prosecution's sentencing memorandum. The upper term sentence was thus supported by multiple reasons Tillis does not contest, such as that his prior convictions are numerous and of increasing seriousness; the manner in which he carried out his crime indicated planning and sophistication; and his prior performance on probation or parole was unsatisfactory. It is settled that "[o]nly a single aggravating factor is required to impose the upper term." (*People v. Osband* (1996) 13 Cal.4th 622, 728 (*Osband*); see *People v. Black* (2007) 41 Cal.4th 799, 813.)

We therefore conclude any error in failing to state reasons for imposing an upper term sentence for sexual penetration on the record was harmless. (*Osband*, *supra*, 13 Cal.4th at p. 729 [holding trial court's error in using the same reason for imposing the upper term and for imposing the full consecutive sentence under § 667.6 not prejudicial where it was reasonably probable court would have reached same result by other reasoning].) Even under the standard for constitutional error urged by Tillis, we conclude beyond a reasonable doubt the trial court would have found at least one of these aggravating factors true beyond a reasonable doubt in support of the upper term imposed for the sexual penetration conviction. (*Chapman, supra,* 386 U.S. at p. 24.)

V

DISPOSITION

Tillis's convictions for pandering and human trafficking are reversed and the matter is remanded. The judgment with respect to sexual penetration is affirmed.

IRION, J.

WE CONCUR:

MCCONNELL, P. J.

NARES, J.