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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE,

Plaintiff and Respondent,

v.

SANTOS F. ASCENCIO,

Defendant and Appellant.

A133182

(Alameda County
Super. Ct. No. C164638)

I.

INTRODUCTION

Appellant Santos F. Ascencio appeals after a jury convicted him of two counts of forcible rape in concert (Pen. Code, § 264.1).¹ He contends on appeal that the trial court prejudicially erred in: (1) excluding evidence that the rape victim previously had been arrested, but not convicted, for solicitation of another for prostitution (§ 647, subd. (a)); (2) failing to instruct the jury, sua sponte, on lesser included offenses of battery and assault with intent to commit rape; and (3) admitting medical records confirming that the rape victim had been impregnated as a result of the rapes. We affirm.

II.

FACTUAL BACKGROUND AND PROCEDURAL HISTORY

A criminal information was filed on October 4, 2010, charging appellant with three counts of forcible rape in concert (§§ 264.1, 261, subd. (a)(2), 262, subd. (a)(2)).

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

Appellant pleaded not guilty, and ultimately the case proceeded to a jury trial commencing on June 8, 2011.

The victim testified that on the afternoon of Sunday, August 23, 2009, she was at a bar in Oakland where she met a man who bought her a drink. She stayed in the bar until it was dark outside. She left the bar feeling very intoxicated and entered into the back of a car. At this point she lost her memory.

When the victim regained awareness of her surroundings, she found herself still intoxicated lying in a small room in the presence of appellant, Jorge Ramos, and a man later identified as Hosmin. She tried to walk out of the room, but the door was locked. At least one of the men told her she could not leave. One of the men removed her pants and underwear against her will. The three men then each penetrated her vagina with their penises while she screamed. The assailants told her they would beat her up if she continued screaming. She tried pushing each of them off of her, but was still intoxicated and not strong enough to move them. She specifically remembered appellant being on top of her, facing her as he raped her. She remembered him putting a shirt over her face so she would be quiet. She also recalled him saying, “[B]e quiet or I will beat you up.” The men eventually stopped raping her and left. The victim went outside screaming.

A neighbor living in the room upstairs testified that he heard the victim’s screams and telephoned his landlord and asked him to call the police. After calling the police, the landlord went outside. While outside, the landlord saw the victim wearing only a blouse. She ran to the landlord, and screamed in Spanish, “Jorge, malo muchacho,” which translates, “Jorge, bad boy.” Shortly thereafter, the police arrived and arrested Ramos.

The prosecution called Ramos to testify. He had pleaded guilty to raping the victim and at the time of trial was serving a state prison term. He testified to a different version of the facts than the victim’s testimony. Ramos stated that on August 23, 2009, at two or three o’clock in the afternoon, appellant arrived at his house in a car with Hosmin and the victim. After they got out of the car they drank together for several hours. Hosmin and appellant told the victim they were going to have sex with her, then threw her down and took her clothes off. Appellant held her down by her hand and foot

while Hosmin had vaginal sex with the victim. The victim tried to close her legs, but appellant punched at her legs to open them. The victim screamed during the rape so appellant forced a shirt over her mouth to muffle the sound. Hosmin told Ramos he ejaculated. After Hosmin was done, Ramos put his penis in the victim's vagina. During this rape, appellant was on top of the victim with his back to Ramos. Appellant held the victim with one hand and put his leg on her stomach. Ramos saw that she was crying, gave her her clothes, and let her go. Appellant made no attempt personally to rape the victim. Hosmin and appellant left in Hosmin's car. Then the victim went outside screaming.

The victim identified Ramos as one of the rapists to the responding officers. After the identification, she was taken to a hospital where a physician assistant performed a Sexual Assault Response Team examination (SART exam). The physician assistant documented injuries and collected potential evidence of the rapes from the victim. The physician assistant collected two oral swabs, four vaginal swabs and one cervical swab, as well as swabs from the victim's underwear, bra, top, tank top, and jeans.

A criminalist analyzed one of the victim's vaginal swabs and four samples from her underwear collected during the SART exam, along with a penile swab taken from Ramos. Appellant was eliminated as the source of any biological material in all samples the criminalist examined. The criminalist found sperm on underwear samples and on the vaginal swab that was not Ramos's but was all from one unknown individual. The unknown donor's sperm was also found on Ramos's penile swab. The victim could not be eliminated as a source of other biological material found on Ramos's penile swab. The criminalist also located DNA foreign to the victim and the unknown donor on underwear samples. Ramos could not be eliminated as the source of that DNA.

The victim testified that she abstained from sex prior to the rape and in the months following the rape. However, about four weeks after the rape she experienced signs of pregnancy. She went to her doctor and was referred to a family specialist. The family specialist confirmed that she was pregnant. An abortion was performed the following day.

About one month after the rape, the victim was driving with a friend and identified appellant standing outside on a street in Oakland. The victim abstained from reporting the incident because she was embarrassed. However, the victim saw appellant again on July 9, 2010, and this time waved down an officer. Officers apprehended appellant and showed him to the victim, who identified him. The police took appellant into custody.

Appellant testified on his own behalf at trial. He denied raping the victim or holding her down while she was being raped. He testified that on August 23, 2009, he went to manage a soccer team at 10:00 a.m. He watched matches on the field until around 5:00 p.m. He then went home to eat dinner and watch a Mexican soccer league game with his brother and his wife until about 8:00 p.m. He did not drink all day. He went to bed around 9:00 p.m., but before he could fall asleep he got a phone call from Ramos. Ramos told him he was alone and wanted him to come over to drink some beers.

Appellant walked over to Ramos's house where he saw Ramos, another man, and the victim. He grabbed a beer and sat down on some stairs next to a bathroom. The unidentified man, Ramos and the victim were all laughing together until Ramos picked up the victim and took her towards the bathroom. The victim told him to let her go. Appellant stood up and pulled Ramos's shirt. Ramos let go of the victim and called appellant a "fag." The victim and appellant went outside where appellant told her "she should leave because nothing good could happen there." She responded, "nobody messes with [me]," and she eventually walked back into Ramos's room. Appellant went home.

The trial continued from June 8, 2011, until the jury announced its verdict on June 28, 2011. The jury found appellant guilty of two counts of forcible rape in concert, and not guilty as to the third count, alleging vaginal penetration by appellant.

Sentencing took place on September 9, 2011. The trial court read and considered the probation report prepared in advance of sentencing, denied probation, and sentenced appellant to the midterm of seven years in state prison for each of the two forcible rape in concert counts. The seven-year terms were ordered to be served consecutively, for a total aggregate state prison term of fourteen years, less custody credits. Other sentencing conditions were also imposed by the court. This appeal followed.

IV.
DISCUSSION

A. The Trial Court Did Not Abuse Its Discretion In Excluding Evidence of the Victim’s Prior Arrest for Soliciting Another for Prostitution

The first issue raised by appellant concerns the granting of the prosecution’s in limine motion to exclude evidence that the victim had been arrested by the San Leandro police in 2006 for misdemeanor disorderly conduct in the solicitation of another for prostitution (§ 647, subd. (b)). Although arrested, the charge against the victim was ultimately dismissed. At the hearing on pending motions, appellant’s counsel confirmed that he wished to introduce evidence of the arrest, which was a crime of moral turpitude, to impeach the credibility of the victim, “not to show that she, in fact, engaged in that act of prostitution.”

The prosecutor objected under Evidence Code section 352. Counsel argued that admitting an arrest for this charge, when it was ultimately dismissed, would be “so incredibly prejudicial to suggest in a sex case that a crime of moral turpitude that is sex based that would not—I don’t see how any juror could separate in their minds [*sic*] that a former, alleged former prostitute was not somehow engaged in prostitution or that there were some allegations of prostitution on either side in an incident.” After appellant’s counsel reiterated that he intended to introduce the evidence solely for purposes of challenging the victim’s credibility, the trial court granted the motion to exclude. Noting that the misdemeanor allegation was based on simply an arrest and the charge was dismissed, the court concluded that the probative value of the evidence was outweighed by its prejudicial effect.²

As a preliminary matter, the Attorney General points out that appellant’s trial counsel did not comply with the procedural requirements of Evidence Code section 782

² In this case the record is silent as to the details regarding the dismissal. However, for the purpose of Evidence Code section 352 prejudice analysis, we see no meaningful distinction between an allegation of misconduct that was not charged and one that was charged but later dismissed.

for admission of a victim's prior sexual misconduct. The Attorney General urges us to conclude that appellant has forfeited any claim of error. (E.g., *People v. Sims* (1976) 64 Cal.App.3d 544, 554.) While we may agree with this contention, nevertheless, we choose to address appellant's argument on its merits in order to forego any ineffective assistance of counsel claim.

Evidence Code section 352 provides that: "The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will . . . create substantial danger of undue prejudice . . ." A trial court's determination under Evidence Code section 352 "must not be disturbed on appeal except on a showing that the court exercised its discretion in an arbitrary, capricious or patently absurd manner that resulted in a manifest miscarriage of justice. [Citations.]" (*People v. Jordan* (1986) 42 Cal.3d 308, 316, italics omitted (*Jordan*)). A miscarriage of justice occurs when it is reasonably probable that the defendant would have obtained a more favorable outcome absent the erroneously admitted evidence. (*People v. Watson* (1956) 46 Cal.2d 818, 836 (*Watson*)).

Our Supreme Court has stressed that "evidence of uncharged misconduct 'is so prejudicial that its admission requires extremely careful analysis.'" [Citations.]" (*People v. Lewis* (2001) 25 Cal.4th 610, 637; *People v. Medina* (1995) 11 Cal.4th 694, 748.) Since " 'substantial prejudicial effect [is] inherent in [such] evidence,' uncharged offenses are admissible only if they have substantial probative value. If there is any doubt, the evidence should be excluded. [Citation.]" (*People v. Thompson* (1980) 27 Cal.3d 303, 318, fn. omitted, overruled on another ground by *People v. Rowland* (1992) 4 Cal.4th 238, 260; see also *People v. Haston* (1968) 69 Cal.2d 233.)

Here, the dismissed allegation of solicitation of another for prostitution was conceded to be a crime of moral turpitude, and thus relevant to the victim's credibility. (*People v. Chandler* (1997) 56 Cal.App.4th 703, 708-709.) However, the trial court concluded that in a rape case, the prejudicial effect of the jurors hearing that the victim had been arrested as a suspected prostitute, even if a limiting instruction had been given, substantially outweighed the probative value of that evidence.

We conclude the trial court did not abuse its discretion in excluding this evidence under Evidence Code section 352. On the record in this case, any evidence that the victim had been arrested years earlier on suspicion that she was engaged in prostitution did not have any significant probative value. The defense did not contend that the victim was acting as a prostitute during the incident or that she engaged in consensual sex with appellant for money. Instead, the heart of appellant's defense was an acknowledgement that the victim had been raped but a denial that appellant had participated in the crime. The fact that the victim had been arrested for a prostitution-related offense years earlier was entirely tangential to the key issues at trial, and not likely to affect the outcome of the case.

Furthermore, the probative value of this evidence as it bears on the victim's credibility is weakened by the fact that this was not a "he said, she said" case. As detailed above, Ramos's testimony corroborated the victim's testimony on key points and described a forced, nonconsensual sexual encounter with multiple individuals actively participating, including appellant. Appellant did not contest the fact that the victim had been violently raped. He simply claimed that he left before any sexual activity took place. Consequently, considering the overwhelming uncontested evidence that the victim was raped, the evidence that the victim had been engaged in uncharged sexual misconduct several years earlier would have no proper bearing on appellant's guilt or innocence, but would only serve to impugn the victim's character and prejudice the jury.

For the foregoing reasons, we reject appellant's argument that that the court's exclusion of this proffered evidence was "arbitrary, capricious or patently absurd," and thus an abuse of discretion. (*Jordan, supra*, 42 Cal.3d at p. 316.) The trial judge was justified in concluding that the slight probative value of this evidence in assessing the victim's credibility was substantially outweighed by its prejudicial effect, even if a limiting instruction had been given. (See *People v. Rioz* (1984) 161 Cal .App.3d 905, 916-917 [evidence of a past act of prostitution should generally be excluded under Evidence Code section 352 when a rape victim denies consent and the evidence is wholly

inconsistent with consensual sex]; accord, *People v. Casas* (1986) 181 Cal.App.3d 889, 895-896.)

B. The Trial Court Did Not Prejudicially Err in Failing to Instruct the Jury Sua Sponte on the Lesser Crimes of Battery and Assault With Intent to Commit Rape

Appellant next claims that the trial court erred in failing to instruct the jury sua sponte on two lesser included offenses to the charged offense; battery (§ 242), and assault with intent to commit rape (§ 220). By way of background, after the evidence was concluded the parties discussed jury instructions with the trial court. The People initially requested the jury be instructed with CALCRIM No. 890 regarding section 220, assault with intent to commit rape, but withdrew their request. Appellant’s trial counsel did not object, nor did he offer any instruction on any other lesser included offenses. When instructing the jury, the court did not mention any lesser included offenses.

“ ‘ “It is settled that in criminal cases, even in the absence of a request, the trial court must instruct” . . . 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. [Citations.] The obligation to instruct on lesser included offenses exists even when as a matter of trial tactics a defendant not only fails to request the instruction but expressly objects to its being given. [Citations.]’ ” (*People v. Breverman* (1998) 19 Cal.4th 142, 154-155 (*Breverman*)).

The Attorney General does not dispute that both crimes are lesser included offenses to the principal crime, but contends that there was no evidence supporting the lesser included offenses that did not also support the greater crime of aiding and abetting forcible rape in concert. We conclude that even assuming a duty to instruct the jury on these two lesser included offenses, any error was harmless.

“The erroneous failure to instruct on a lesser included offense generally is subject to harmless error review” under the standard of *Watson, supra*, 46 Cal.2d at pages 836-837. (*People v. Rogers* (2006) 39 Cal.4th 826, 867-868; *Breverman, supra*, 19 Cal.4th at

pp. 177-178.) “Such posttrial review focuses not on what a reasonable jury could do, but what such a jury is likely to have done in the absence of the error under consideration. In making that evaluation, an appellate court may consider, among other things, whether the evidence supporting the existing judgment is so relatively strong, and the evidence supporting a different outcome is so comparatively weak, that there is no reasonable probability the error of which the defendant complains affected the result.” (*Breverman*, at p. 177, italics omitted.) Thus, in reviewing for prejudice, the issue is whether it is reasonably probable that the jury would have convicted appellant of only [the lesser included offense] had it been instructed to that effect. (*Id.* at p. 178.)

In reviewing the record, we conclude the evidence at trial does not support the conclusion that, even if instructed as to the lesser included crimes, it was reasonably probable the jury would have convicted appellant only of either a battery or of aiding and abetting assault with intent to commit rape. The jury clearly rejected appellant’s defense that he was not present at the time the victim was raped. The evidence at trial was also unequivocal that the victim was indeed raped more than once that evening, and not simply assaulted.

Furthermore, the testimony of both Ramos and the victim established that *at a minimum*, appellant held the victim down, placed his shirt over her mouth, and threatened her to be quiet during the time that the rapes were taking place. In light of this evidence, even if the jury was instructed as to the lesser included crimes, it is inconceivable the jury would have concluded that appellant was a participant, but was only guilty of a simple battery or of an assault, and not aiding and abetting rape in concert. Thus, the evidence “supporting the existing judgment is so relatively strong, and the evidence supporting a different outcome is so comparatively weak, that there is no reasonable probability the error of which the [appellant] complains affected the result.” (*Breverman, supra*, 19 Cal.4th at p. 177, italics omitted.)

C. The Trial Court Did Not Violate Appellant’s Right Of Confrontation In Admitting Records Of The Victim’s Abortion

At trial, the prosecution sought the admission of medical records indicating that some time after the rapes, the victim had become pregnant, and thereafter sought an abortion. The prosecution offered the medical records concerning the abortion into evidence under the official record exception to the rule against hearsay to corroborate that vaginal penetration occurred. Appellant’s trial court counsel objected on grounds of relevance, Evidence Code section 352, and hearsay under both the federal and state constitutions. Counsel clarified that the hearsay objection was “based on confrontation grounds” and cited “*Crawford v. Washington* [(2004) 541 U.S. 36, 53-54 (*Crawford*)], a United States Supreme Court case.” He claimed appellant had a right to cross-examine the custodian of record of the abortion documents. The court responded that a custodian’s testimony was not necessary because the records fell under the official records exception to hearsay. The court further responded, and the prosecution agreed, that the victim testified about the abortion and was available for cross-examination on the issue. The court admitted the evidence.

On appeal, appellant does not challenge the relevance of these records, but instead contends the abortion records were testimonial hearsay. Therefore, appellant argues that admitting the records without providing appellant an opportunity to cross-examine the person or persons who prepared the records violated appellant’s right of confrontation.

The confrontation clause of the Sixth Amendment provides: “In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him”³ (U.S. Const., 6th Amend.) This clause prohibits the “admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had had a prior opportunity for cross-examination.” (*Crawford, supra*, 541 U.S. at pp. 53-54.) Thus, the confrontation clause applies to witnesses who “bear[] testimony” against the accused. (*Id.* at p. 51.)

³ The California and federal confrontation rights are identical. (*People v. Contreras* (1976) 57 Cal.App.3d 816, 820.)

The United States Supreme Court in *Crawford* declined to comprehensively define which documents are “testimonial” and thus subject to the strictures of the Sixth Amendment. The court explained that among the “core class” of testimonial statements are: “ ‘ex parte in-court testimony or its functional equivalent—that is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially,’ [citation]; ‘extrajudicial statements . . . contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions,’ [citation]; ‘statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial,’[citation].” (*Crawford, supra*, 541 U.S. at pp. 51-52, italics omitted.)

A subsequent California decision, *People v. Geier* (2007) 41 Cal.4th 555, held that statements contained in a report of DNA test results were not “testimonial” under *Crawford*. (*Id.* at p. 607.) Therefore, its admission without the defendant’s ability to cross-examine the analyst who prepared it, did not conflict with *Crawford* or violate the defendant’s Sixth Amendment rights. (*Ibid.*) The *Geier* court concluded that the DNA test results were not testimonial, notwithstanding their possible use at trial, because the report was prepared in the scope of employment as part of a “standardized scientific protocol,” and “not in order to incriminate” the defendant. (*Ibid.*) *Geier* pointed out that DNA test results are neutral in that they “can lead to either incriminatory or exculpatory results.” (*Ibid.*)

After *Geier* was decided, the United States Supreme Court decided *Melendez-Diaz v. Massachusetts* (2009) 557 U.S. 305 (*Melendez-Diaz*). In a 5-4 decision, the plurality determined that “ ‘three certificates of analysis’ . . . sworn to before a notary public,” displaying results of a forensic analysis performed on substances seized from the defendant to prove defendant’s distributing and trafficking cocaine charges were testimonial. (*Id.* at p. 308.) As *Melendez-Diaz* observed, not only would an objective witness believe the certificates showing the test results would be available for trial, but in fact they were prepared to be used at trial. (*Ibid.*)

Justice Thomas, the decisive fifth vote, wrote a concurrence based on narrower grounds than the rest of the plurality. (*Melendez-Diaz*, *supra*, 557 U.S. at pp. 329-330.) His concurrence stated that the Sixth Amendment is only concerned with out-of-court statements “contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions. [Citations.]” (*Id.* at p. 329, conc. opn. of Thomas, J.) He joined in the court’s opinion because the documents at issue were “ ‘quite plainly affidavits,’ [citation]. As such, they ‘fall within the core class of testimonial statements’ governed by the Confrontation Clause. [Citation.]” (*Id.* at p. 330.)⁴

Most recently, in *Bullcoming v. New Mexico* (2011) ___ U.S. ___, 131 S.Ct. 2705 (*Bullcoming*), the court found a report recording the defendant’s blood-alcohol level was similar to the certificate in *Melendez-Diaz* in all “material respects,” particularly in formality and in purpose. (*Id.* at pp. 2716-2717.) The majority (including Justice Thomas) applied the *Melendez-Diaz* ruling and held the certified blood-alcohol analysis report was testimonial. (*Ibid.*) Thus, *Bullcoming* reiterated the principle stated in *Melendez-Diaz*, that a document created solely for an evidentiary purpose in aid of a criminal investigation is testimonial. (*Bullcoming*, at p. 2717.) Even though the analyst’s certificate was not signed under oath, as occurred in *Melendez-Diaz*, the two documents were similar in all material respects. (*Ibid.*)

Appellant argues the abortion records, like the sworn “certificates” attesting an analyzed substance was cocaine in *Melendez-Diaz*, and the certified blood-alcohol analysis report in *Bullcoming*, were “testimonial” and that admitting such records prepared by witnesses not subjected to cross-examination violated appellant’s right of

⁴ The California Courts of Appeal are in disagreement as to whether *Geier* remains good law after *Melendez-Diaz*. This issue is currently pending before the California Supreme Court in numerous cases. (See, e.g., *People v. Rutterschmidt*, S176213; *People v. Gutierrez*, S176620; *People v. Dungo*, S176886; *People v. Lopez*, S177046.) One of the cases pending review is particularly noteworthy. In *People v. Davis*, S198061 [formerly (2011) 199 Cal.App.4th 1254], the appellate court held that medical records generated for evaluation and treatment purposes do not constitute testimonial evidence triggering a constitutional right of confrontation.

confrontation. However, there is no evidence in this record that the victim’s medical records were sufficiently formal for confrontation clause purposes; nor is there any evidence that the records were made for purposes other than to facilitate her medical treatment. Indeed, it appears no certificates or affidavits were created in association with the abortion records. There is nothing in the record suggesting that the victim’s medical records were signed under penalty of perjury. Further, there is no indication that the records were “ ‘made under circumstances which would lead an objective witness reasonably to believe that the statement[s] would be available for use at a later trial’ [citation].” (*Crawford, supra*, 541 U.S. at pp. 51-52.)⁵

Additionally unfavorable to appellant’s position is the fact that on no less than three occasions since *Crawford*, the United States Supreme Court has characterized statements made to medical providers for purposes of diagnosis or treatment as nontestimonial and, therefore, not subject to a confrontation clause objection. (See *Michigan v. Bryant* (2011) ___ U.S. ___, 131 S.Ct. 1143, 1157-1158, fn. 9 [statements made for purpose of medical diagnosis are “by their nature, made for a purpose other than use in a prosecution”]; *Melendez-Diaz, supra*, 557 U.S. at p. 312, fn. 2 [“medical reports created for treatment purposes . . . would not be testimonial under our decision today”]; *Giles v. California* (2008) 554 U.S. 353, 376 [“[O]nly *testimonial* statements are excluded by the Confrontation Clause. Statements to . . . physicians in the course of receiving treatment would be excluded, if at all, only by hearsay rules” (original italics)].)

⁵ A copy of the admitted report is not contained in the record on appeal. “It is axiomatic that it is the burden of the appellant to provide an adequate record to permit review of a claimed error, and failure to do so may be deemed a waiver of the issue on appeal. [Citations.]” (*People v. Akins* (2005) 128 Cal.App.4th 1376, 1385.) “ ‘Failure to provide an adequate record on an issue requires that the issue be resolved against the [appellant].’ [Citation.]” (*People v. Seneca Ins. Co.* (2004) 116 Cal.App.4th 75, 80.) The medical records were described only as “abortion records.” The record on appeal does not mention any certificates, affidavits, or any other marks of “ ‘formalized testimonial materials’ ” associated with those records. (*Crawford, supra*, 541 U.S. at pp. 51-52.) In conformity with the cases cited above, we will not presume the abortion records contained any “formalized testimonial materials.” (*Ibid.*)

California authority is in accord. (See *People v. Cage* (2007) 40 Cal.4th 965, 987 (*Cage*) [“[W]e cannot imagine that an informal statement to a person not affiliated with law enforcement, such as a medical doctor, solely for the nonevidentiary purpose of diagnosis and treatment, would be deemed testimonial”].)

Furthermore, we conclude that even if the trial court erred in admitting the records, the error was harmless beyond a reasonable doubt. (*Cage, supra*, 40 Cal.4th at p. 991 [alleged violations of the confrontation clause are reviewable under a harmless beyond a reasonable doubt standard]; citing *Chapman v. California* (1967) 386 U.S. 18, 23-24.) First, appellant did not dispute the victim’s testimony that she became pregnant as a result of the rapes and sought an abortion. Thus, the abortion records only corroborated the victim’s testimony regarding an uncontested issue, and in that capacity, it was cumulative. (*People v. Houston* (2005)130 Cal.App.4th 279, 296 [“The admission of cumulative evidence, particularly evidence that is tangentially relevant to establishing a defendant’s guilt has been found to be harmless error”], citing (*People v. Jenkins* (2000) 22 Cal.4th 900, 1015-1016.)

Second, the abortion records only documented that an abortion had occurred and could not speak to the critical issue at trial—whether or not appellant was one of the perpetrators of the sexual assault. Therefore the records had negligible, if any, value in helping the jury determine whose testimony was more persuasive on this point; appellant’s testimony or the victim’s testimony. In fact, when the prosecutor argued in his closing argument that the jury should believe the victim’s testimony, he evidently did not feel the need to rely on these records at all, making only a passing reference to “the aborted pregnancy.”

Third, to the extent the victim’s general credibility was at issue, we reiterate that this was not a “he said, she said” case. Ramos’s eyewitness testimony corroborated the victim’s testimony in substantial detail and described appellant taking an active role in aiding and abetting the rapes in concert. Appellant’s trial counsel had ample opportunity to, and repeatedly did cast doubt on the victim’s credibility. He pointed out that she had been drinking and had trouble remembering much of the night. Consequently, even if the

abortion records were erroneously admitted, they had only marginal significance on the jury's assessment of the victim's credibility because they only served to corroborate the victim's testimony on an uncontested issue.

Accordingly, for the foregoing reasons, we conclude any conceivable error stemming from the admission of the abortion records was harmless beyond a reasonable doubt. (See, e.g., *People v. Houston, supra*, 130 Cal.App.4th at p. 295 [even if hearsay statements to police and hospital personnel were "erroneously admitted, it was a harmless error in light of the overwhelming evidence of appellant's guilt and the cumulative nature of the evidence involved"]; see also *People v. Doolin* (2009) 45 Cal.4th 390, 439 [even assuming evidentiary error, error would be harmless due to overwhelming evidence against plaintiff].)

V.

DISPOSITION

The judgment is affirmed.

RUVOLO, P. J.

We concur:

RIVERA, J.

SEPULVEDA, J.*

* Retired Associate Justice of the Court of Appeal, First Appellate District, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.