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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

JOSEPH RAYMOND GARCIA,

Defendant and Appellant.

G045300

(Super. Ct. No. 06HF2071)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Richard F. Toohey, Judge. Affirmed.

Randi Covin, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Peter Quon, Jr., and Anthony Da Silva, Deputy Attorneys General, for Plaintiff and Respondent.

A jury found Joseph Raymond Garcia guilty of six counts of forcible sodomy (Pen. Code, § 286, subd. (c)(2); counts 1, 2, 3, 4, 6 and 7)¹ and two counts of forcible rape (§ 261, subd. (a)(2); counts 5 and 8), and found true an allegation Garcia committed these offenses against more than one victim (§ 667.61 subds. (b) & (e)(4)). The trial court sentenced Garcia to a prison term of 45 years to life. Garcia asserts the judgment must be reversed for instructional errors and prosecutorial misconduct. We find no prejudicial errors or misconduct and affirm the judgment.

FACTS

A. *N.D. (counts 7 and 8)*

N.D. met Garcia in March 2004 at the Newport Beach Post Office where she worked as a clerk. Throughout 2004, they saw each other from time to time in or around the post office, exchanged telephone numbers and talked on the phone. At one point Garcia asked N.D. if she was interested in a “purely physical relationship” with him and she said, “no.” He told her that was all he had available because he was involved with someone else, and they agreed to just be friends.

In late January 2005, Garcia went into the post office and asked N.D. if she was doing anything that night. She said “no” and gave him her telephone number again. She was attracted to Garcia, and she hoped he would one day be available for a romantic relationship. She thought there was a “strong chemistry” between them, but she did not want a purely physical relationship.

Garcia called her that same evening and wanted to come to her house. N.D. suggested they meet at a coffee shop instead. They met at a coffee shop, but only stayed 5 or 10 minutes. Then they sat in Garcia’s car, talked and kissed, for about a half an hour to an hour. Garcia tried to touch N.D.’s breasts but she stopped him. He wanted to go back to his apartment, or to N.D.’s apartment, but she declined. Garcia said he wanted to

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

open a bottle of wine and get to know her better, but N.D. did not drink and did not want to get physical with Garcia until she got to know him better. Garcia asked, "Why don't you want to make love to me? Every time I see you, I want to make love to you." N.D. responded, "sex is very special to me and it's not something that I give to every guy that I go out with."

On March 3, 2005, N.D. called Garcia and they made plans to go to a movie together on Saturday, March 5. Garcia wanted to go to N.D.'s house but she said no. On March 5, Garcia called N.D. and asked if she was going to be "a nun again." She asked, "do I have to make that decision right now?" He said "if there was no chance of having sex with [her] that night, he would rather go out dancing by himself." N.D. said there was a chance and Garcia was satisfied. Later than night, they met at a coffee shop near the movie theater. There was no movie they wanted to see so they went out for dinner instead. After dinner they walked outside and kissed and N.D. agreed to go to Garcia's place and followed him to an apartment complex in her own car.

Once inside Garcia's apartment, they disrobed in the living room and had consensual vaginal intercourse on the couch. Garcia stood up and told N.D. to stand up. She complied and faced him, but Garcia quickly spun her around and inserted his penis in her anus. N.D. testified it was "extremely painful." She screamed "no" at least 50 times and begged him to "please let me go," but Garcia continued to sodomize her. He had her in a "chokehold." N. D. stopped struggling because she was "completely overpowered" and scared.

After Garcia reached orgasm, he allowed N.D. to go to the bathroom. She said her legs were "buckling" under her and she was bleeding from her anus, a condition that continued for four days afterward. When she started getting dressed and was ready to leave, Garcia asked, "only one time?" He told her he was "done with the anal thing" and would not "do that anymore."

N.D. sat down on the couch and talked to Garcia for about 20 minutes. During that time, he tried to push her head into his lap several times, but he stopped when she said she did not want to do that. He asked, “well, how are you going to get me excited again?” N.D. touched his penis with her hand and sat on his lap. He turned her to face away from him and penetrated her vagina with his penis. After a minute or so, he stood up and had her stand up. N.D. thought Garcia was going to sodomize her again so she directed his penis into her vagina. It hurt “really bad” when he bent her over so N.D. stopped struggling and objecting. She was afraid for her life, did not feel she could leave, and did not think it would make any difference whether she said “no” or not. When Garcia reached orgasm again, N.D. got dressed but then sat on the couch and talked to him some more. Finally, Garcia said it was getting late and N.D. should leave. He gave her “a little peck on the lips” and directions to the freeway.

Garcia asked, “am I too wild for you sexually?” N.D. “joked” and said, a “little bit.” She did not say more because she was afraid. Garcia was six foot two and weighed 250 pounds while N.D. was five foot three and weighed 115 pounds. N.D. got home around 10:00 p.m. She did not call the police. She just wanted to forget about it. She did not want to go through the humiliation and pain of being examined and questioned.

A few days later, Garcia went into the post office and asked N.D. to go out with him again. She did not confront him about what had happened because she was scared. Instead she said she had other plans. Garcia told her to cancel them and got a little angry when she refused. N.D. left work early because she felt “shaken up.” She called Garcia and left a message saying she did not want to see him anymore. She never spoke to Garcia again, but she saw him at the post office every week when he came to get his mail. A month or so later, in April 2005, N.D. reported the incident to law enforcement on the advice of her therapist.

B. C.G. (count 6)

C.G. lived in New Mexico and met Garcia through Millionairematch.com, which is an online dating service for “wealthy and beautiful” people.² C.G. denied choosing Millionairematch.com because she was looking for a rich man. She claimed this Web site was for her because she expected to be wealthy herself in the future from an invention she was then trying to market and because she was a model. In reality, C.G. did not have much money at that time, and she was living from paycheck to paycheck.

C.G. first contacted Garcia in August 2005. He responded, and they exchanged a few emails. C.G. saw photos of Garcia in places like Rome and Pisa, suggesting that he had the money to travel. About a year later, C.G. sent him a photograph and they communicated by email and telephone. Garcia offered to buy C.G. a plane ticket and pay her lost wages, which were about \$500, to come to California for a visit. She agreed, told her employer she needed time off for a family emergency, and flew to Orange County on August 22, 2006. She claimed she would not have made the trip if Garcia had not agreed to pay her, and conceded sex was a possibility.

Garcia met C.G. at the airport. He brought her roses, bought her lunch at a Mexican restaurant, and showed her around the area. He seemed very nice. Later that day, he took her to his condominium. She told him she was trained in martial arts and was capable of killing because she wanted him to know she could fight back if necessary. They went into Garcia’s bedroom and had consensual, vaginal intercourse. C.G. protested when Garcia attempted to insert his penis in her anus and he stopped. They had consensual, vaginal intercourse the following morning. When Garcia again tried to sodomize her, C.G. said “no” and he stopped.

Garcia and C.G. spent most of her second day in Orange County doing errands, which upset C.G. because she expected Garcia to take her to Disneyland and the

² C.G.’s testimony was preserved in a conditional examination presented at trial.

beach. He seemed “distant and cold,” and they argued a couple of times. She expressed displeasure at things he did and then they tried to work it out together. Eventually they went back to Garcia’s condominium, opened a bottle of wine, and cooked dinner. C.G. felt guilty about arguing with Garcia so she put on some lingerie to try to make it up to him. Garcia seemed surprised and happy. C.G. intended to have sex with Garcia that night as they had already had consensual sex seven or eight times since she arrived.

After dinner, C.G. went into the bedroom and lay on her stomach on the bed. Garcia came in and started kissing her back and neck. He took off his clothes, came up behind her, ripped her panties, and started to “slide his penis into [her] anus.” C.G. told Garcia to stop and tried to pull away, but he said, “shush, shush, it’s okay.” C.G. started “freaking out” when Garcia’s penis penetrated her anus. She struggled, but at a weight of 135 or 140 the much larger Garcia had her “pinned.” She was “screaming at the top of [her] lungs for [Garcia] to stop.” His legs were “locked” on hers and his arms were wrapped around her neck and right arm so she could not move. He paused for a moment, asked why she was screaming, and told her to be quiet before penetrating her anus over 40 times. He ejaculated and then released her.

C.G. ran to the bathroom. She sat on the toilet and cried for 15 or 20 minutes then went out to the living room and sat on the couch. She apologized to Garcia and tried to “make it right” because she was afraid. Garcia showed her something that looked like a handgun but turned out to be a taser gun. Garcia said he was “protecting himself” because “he was afraid [she was] gonna possibly kill him.” C.G. “tried to play it off as if it wasn’t a big deal” because she was afraid, and her flight home was the next afternoon. They watched a movie and she helped him clean the condominium. At bedtime, she put pillows on the bed, as a divider. When Garcia saw the pillows, he asked, “so, you’re not going to have sex with me, huh?” He said something like “if you don’t want to have sex just tell me,” and C.G. said she did not want to have sex because she was tired.

C.G. stayed with Garcia all night, but she could not sleep because she was “afraid for [her] life.” In the morning they got up and went to a restaurant. C.G. argued with Garcia in the parking lot about where they should park and ultimately refused to go inside the restaurant. After about an hour, C.G. walked next door to a gas station to buy cigarettes. She had a cell phone but did not call the police because her belongings were still at Garcia’s condominium and she just “didn’t think to call.” When she returned from the gas station she realized that Garcia’s car was gone. She “freaked out.” She was crying and told some “concerned citizens” that Garcia had left her there. She did not mention that Garcia had sexually assaulted her.

C.G. tried calling Garcia several times but he did not answer. When a taxicab pulled up, C.G. finally reached Garcia on the phone. He had sent the taxi, but said he would not pay for the fare. C.G. did not have any money so she begged Garcia to come pick her up. He agreed after she assured him she would not “do anything to [him].”

An hour and a half later, Garcia retrieved C.G. and took her to the airport. He threw her bags to the sidewalk and refused to give her the \$500 as promised. Instead, he gave C.G. \$40 and said, “this is what you’re worth.” C.G. took the money. When Garcia drove off, she started crying. Someone asked if she needed help and called airport security when she said “yes.” Newport Beach Police Officer Joseph Jun interviewed C.G. at John Wayne Airport. C.G. identified a photograph of Garcia as “the person who raped [her].” She was taken to a hospital for a sexual assault examination.

Jan Hare, a certified forensic nurse and sexual assault examiner, testified she examined C.G. on August 24, 2006. Hare could neither confirm nor negate C.G.’s reports because there were no visible anal tears, bruising, or redness. However, Hare also testified there is a 50-50 chance of seeing anal injuries after anal intercourse, whether or not it was consensual. Forensic scientist, Danielle Weiland, tested C.G.’s anal swab and clothing for DNA, but his findings were negative for semen or foreign DNA.

After the medical examination, the police officers had C.G. make a recorded phone call to Garcia to try “to get him to admit that he raped [her].” The recording was played during the trial and a transcript was provided to the jury.

C. M.J. (counts 1- 5)

In October 2006, M.J. met Garcia through Millionairematch.com. She liked Garcia’s apparent adventurousness and the fact that he was African-American. They had a pleasant telephone conversation and agreed to meet for dinner and drinks. M.J. met Garcia at a jazz club. He seemed charming and personable and M.J. found him attractive. However, they did not seem to have much to say to each other. Garcia slipped the waitress his telephone number and also talked to the female lead singer in the band. M.J. thought it was rude of Garcia to behave that way but she was not jealous or mad, and she did not take it personally. She just figured he was not attracted to her. M.J. commented about it to Garcia as they were leaving the club. She told him, “obviously there’s nothing – there’s no chemistry between us and I understand I’m probably not your cup of tea. You’re obviously attracted to the waitress, who looked to be in her early 20s.” By contrast, M.J. was an overweight, 39-year-old mother of two.

Garcia apologized and asked if he could walk M.J. to her car. Then he asked her to go back to his place and talk. He said he did not want to leave her with a bad impression of him. Once they “cleared the air,” M.J. felt more comfortable with him, and she followed him home with the intention of talking, but not having sex. As soon as they entered Garcia’s condominium, he wrapped his arm around her chest from behind, “grabbed [her] butt and started pushing [her] towards the bedroom.” He tried to kiss her. She told Garcia to stop but he continued to push her into the bedroom. He pushed her onto the bed, hiked up her skirt, and grabbed her underwear. He had his knee in her back. She tried to get out from under him but could not. M.J. struggled and tried to scream, but Garcia told her to “shut the fuck up.” Garcia retrieved a condom while he held M.J. down. When he started to insert his penis in her anus, M.J. cried and said, “No. Stop. It

hurts.” Garcia inserted his penis in her rectum, and M.J. started screaming. Garcia again told her to “shut the fuck up” and threatened to “tase” her if she did not calm down.

M.J. pleaded for her release and said she needed to get home, but Garcia accused her of lying. When he finally withdrew his penis, M.J. tried to get up but Garcia held her down. She started to cry and again asked to be released. Garcia continued to push her down and resumed penetrating her anus. M.J. cried and told Garcia to “stop,” but Garcia increased the speed of his thrusts until M.J. stopped screaming. M.J. said that she needed to go to the bathroom to urinate and because she was bleeding. Garcia then pulled her legs apart, penetrated her vaginally and climaxed. Then, he penetrated her anus for a fourth time.

When Garcia finally released her, M.J. went to the bathroom. Garcia followed her, removed the condom, and placed it on top of the sink in the bathroom. The condom had blood and semen on it. After M.J. used the toilet, Garcia asked why there was so much blood on her anus and on the toilet seat. M.J. told him she had she never had anal sex before.

Garcia sprayed and cleaned the toilet while M.J. got dressed. She thought Garcia was not going to let her leave because he asked her to “come, sit down in the living room.” On the way into the living room, M.J. picked up her cell phone and tried to call friends, although she told Garcia she was checking with her babysitter. He asked her to “sit down and []talk,” and he told her, “I know you didn’t get what you wanted, but maybe you got what you needed.” M.J. “thought it was weird” because Garcia went from being mean to being charming again, “like a switch went on” She asked him what he meant. He said, “you know, you do porn.” M.J. had never done “porn,” but 10 years earlier she had posted nude photographs of herself on a website called “Southern Charms.” M.J. said she had never discussed the nude photographs with Garcia and had not mentioned them in her Millionairematch.com listing.

Garcia said he was getting tired and walked M.J. to the door. She ran downstairs, got in her car, and locked the car doors because she feared Garcia would prevent her from leaving. When she did decide to leave, she realized she did not know where she was so she called her best friend, Teresa O’Keefe, for help. According to M.J., O’Keefe said she should not report the incident because “they’re going to bring up your past.” According to O’Keefe, she told M.J. to call the police, but M.J. hesitated because of the nude photographs. She was afraid the police would think she had “invited something.”

When she got home, M.J. called a few other friends to talk about what had happened and figure out what to do. After a couple of hours, she took a shower. Then she called the rape crisis center. On their instructions, she put her clothes in a paper bag. She did not call the police until the next day because she had to do her daughter’s makeup for a show.

The next day, Police Officer Derek Hawkins interviewed a tearful M.J. and had her identify a photograph of Garcia and where he lived. Hawkins also took M.J. to the hospital for a sexual assault examination. Hare testified M. J. cried throughout the exam and complained of pain in her anus, neck, back, and thighs. Hare observed a small bruise on M.J.’s arm and some swelling on the back of her neck. She noted multiple small lacerations and bruises inside M.J.’s anus that were visible in photographs taken during the exam. Hare testified the physical findings were consistent with M.J.’s report, but also consistent with consensual anal intercourse. Garcia’s DNA was not found on M.J.’s samples or clothing, nor was M.J.’s DNA found on Garcia’s penile swab or in his bathroom.

DISCUSSION

A. Instructional Issues

Garcia contends the trial court erred by refusing to instruct the jury with one of the optional clauses of CALCRIM No. 226 (No. 226-O), and with Alternative B of

CALCRIM No. 316 (No. 316-B), both of which concern witness conduct or misconduct as it relates to credibility. We agree the court erred. However, these errors do not warrant reversal of the judgment. Garcia also contends the trial court erred by failing to give CALCRIM No. 357 (No. 357) concerning adoptive admissions, but we find this contention meritless.

1. Standard of Review and Applicable Principles

The trial court must instruct “sua sponte on general principles of law that are closely and openly connected with the facts presented at trial. [Citations.]” (*People v. Ervin* (2000) 22 Cal.4th 48, 90.) “In other words, ‘[t]he court should instruct the jury on every theory of the case, but only to the extent each is supported by substantial evidence.’ [Citation.]” (*People v. Flannel* (1979) 25 Cal.3d 668, 684-685, superseded by statute on another ground as noted in *In re Christian S.* (1994) 7 Cal.4th 768, 777; see also *People v. Prince* (2007) 40 Cal.4th 1179, 1265.) “There is no error in a trial court’s failing or refusing to instruct on one matter, unless the remaining instructions, considered as a whole, fail to cover the material issues raised at trial. As long as the trial court has correctly instructed the jury on all matters pertinent to the case, there is no error. The failure to give an instruction on an essential issue, or the giving of erroneous instructions, may be cured if the essential material is covered by other correct instructions properly given. [Citations.]” (*People v. Dieguez* (2001) 89 Cal.App.4th 266, 277.)

An appellate court reviews a defendant’s claims of instructional error de novo. (*People v. Johnson* (2009) 180 Cal.App.4th 702, 707.) “In conducting this review, we first ascertain the relevant law and then “determine the meaning of the instructions in this regard.” [Citation.] [¶] . . . [¶] “In determining whether error has been committed in giving or not giving jury instructions, we must consider the instructions as a whole [Citation.]” [Citation.] “Instructions should be interpreted, if possible, so as to support the judgment rather than defeat it if they are reasonably susceptible to such interpretation.” (*People v. Johnson, supra*, 180 Cal.App.4th at p.

707; see also *People v. Ramos* (2008) 163 Cal.App.4th 1082, 1088.) Furthermore, we “must consider the arguments of counsel in assessing the probable impact of the instruction on the jury.” (*People v. Young* (2005) 34 Cal.4th 1149, 1202.)

2. *Jury Instruction Conference*

Referring to C. G.’s agreement to visit Garcia as long as he paid her \$500, defense counsel requested No. 226-O, which states the jury may consider whether “the witness engaged in [other] conduct that reflects on his or her believability[.]” The prosecutor argued No. 226-O was not applicable because “we haven’t talked about any misdemeanor conduct that usually [*sic*] what that applies to.” The trial court said, “That’s the only thing I can think of that would go specific to this instruction.” Defense counsel stated he wanted to use No. 226-O to argue “not for any other criminal conduct but any conduct that would tend to negate the credibility with regard to [not] reporting the crime right away.” The prosecutor replied the instruction “only refers to misdemeanor conduct for credibility.” The trial court said, “That’s what I’m talking about. Engaging in prostitution is exactly what I said it’s arguably appropriate. I’ll leave it in.”

Later, defense counsel also requested No. 316-B, which states, “If you find that the witness has committed a crime or other misconduct, you may consider that fact [only] in evaluating the credibility of the witness’s testimony. The fact that the witness may have committed a crime or other misconduct does not necessarily destroy or impair a witness’s credibility. It is up to you to decide the weight of that fact and whether that fact makes the witness less believable.” Defense counsel asked for No. 316-B specifically with regard to C. G. The prosecutor again objected and argued that both instructions, Nos. 226-O and 316-B, applied only to prior conduct, not conduct that occurred at the same time or subsequent to the charged offenses.

The trial court eventually agreed with the prosecutor, stating, “I think you either strike [the optional clause] out of 226 and don’t give [Alternative B of] 316 or you

give them both, but I don't think you give one and not the other. Ultimately the trial court refused both Nos. 226-O and 316-B.³ We disagree with the trial court's conclusion.

3. Analysis

Conduct involving moral turpitude is generally admissible for impeachment purposes, even if it did not result in a felony or misdemeanor conviction. (*People v. Wheeler* (1992) 4 Cal.4th 284, 295-297 (*Wheeler*)). And, conduct involving moral turpitude is equally relevant and therefore equally admissible for impeachment purposes, regardless of whether it occurred before, on or even after the offense date. (*People v. Halsey* (1993) 21 Cal.App.4th 325, 328.) Insofar as these governing principles concern evidence of misdemeanor conduct admitted for impeachment purposes, with or without a conviction, they are embodied in Nos. 226-O and 316-B. Ordinarily, if No. 226-O is given, the court should also consider giving No. 316-B. (See Judicial Council of Cal. Crim. Jury Instns. (2012) CALCRIM No. 226, Bench Notes, at p. 64.)

Garcia argues Nos. 226-O and 316-B should have been given based upon evidence that all three victims delayed reporting the incidents to the police. However, delayed reporting of a crime is not conduct involving moral turpitude. It follows delayed reporting is simply not "other conduct" within the meaning of No. 226-O or "a crime or other misconduct" within the meaning of No. 316-B. Thus, we find no error in refusing to give Nos. 226-O and 316-B vis-a-vis the evidence of delayed reporting.

On the other hand, Nos. 226-O and 316-B would be relevant to evidence of prostitution because prostitution is conduct involving moral turpitude admissible for impeachment purposes under *Wheeler*. (*People v. Alvarez* (1996) 14 Cal.4th 155, 201, fn. 11.) Prostitution is defined as sexual intercourse and certain other lewd acts between persons for money or other consideration. (§ 647, subd. (b); *People v. Hill* (1980) 103 Cal.App.3d. 525, 534-535.) According to C.G.'s testimony, Garcia offered to buy a

³ The trial court did give CALCRIM No. 226 omitting only No. 226-O and certain other optional clauses relating to character evidence not relevant here.

plane ticket and pay her about \$500 to come to California. She characterized the payment as reimbursement for lost wages, but a reasonable juror could have disagreed and accepted the defense theory she knowingly engaged in prostitution. She acknowledged the trip could possibly include sexual relations with Garcia, and she stated she would not have come if he had not agreed to pay her. Finally, while she denied that sex was part of her agreement with Garcia, she expected him to request sex.

Here, the instructions given only partially informed the jury how to evaluate the credibility of C. G. in light of this evidence. The court did give CALCRIM No. 226, which states, “In evaluating a witness’s testimony, you may consider anything that reasonably tends to prove or disprove the truth or accuracy of that testimony.” But this instruction was not sufficiently specific, and none of the other instructions addressed the issue.

The problem was exacerbated by the closing arguments of counsel on this point. The prosecutor argued C. G. was not a prostitute because she was only promised \$500, which is about \$12 an hour considering the length of her stay, and no one brings flowers for prostitutes. She also asserted “prostitutes don’t go to police when they get ripped off, they chalk it up to a business expense.” When defense counsel asserted C. G.’s failure to report a sexual assault at the earliest opportunity and before Garcia handed her \$40 instead of the \$500 constituted evidence of prosecution, the prosecutor retorted, there was “just nothing here on prostitution. *No instruction on prostitution.* No feeling by any officer involved in this case that C.G. was involved in prostitution. Nothing whatsoever.” (Italics added.) Under these circumstances it was error to refuse the defense pinpoint instruction on the issue.

The court’s refusal to give Nos. 226-O and 316-B does not automatically warrant reversal of the judgment. We must also assess prejudice. In so doing, this court “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.’ [Citation.]” (*People v. Lee* (1999) 20 Cal.4th 47, 62.)

Garcia contends the instructional errors violate the federal Constitution and reversal is required, unless the prosecution can show beyond a reasonable doubt that the errors did not contribute to the jury’s verdict. (*Chapman v. California* (1967) 386 U.S. 18, 22-24; see also *People v. Sengpadychith* (2001) 26 Cal.4th 316, 324-325.) The Attorney General asserts no federal Constitution violation occurred; therefore, reversal is not required, unless there is a “reasonable probability” Garcia would have obtained a more favorable outcome had the error not occurred. (*People v. Watson* (1956) 46 Cal.2d 818, 836; see also *People v. Breverman* (1998) 19 Cal.4th 142, 165, 171.) We conclude the court’s instructional errors do not warrant reversal under either standard.

Examining the record as a whole, it is highly likely Garcia would have been convicted even if the refused instructions had been given. The evidence of Garcia’s guilt is simply overwhelming. It is true, as Garcia contends, the prosecution depended almost entirely on the complaining witnesses’ testimony, and only the testimony of M.J. was corroborated by physical evidence. However, it is also true that “conviction of a sex crime may be sustained upon the uncorroborated testimony of the prosecutrix.” (*People v. Poggi* (1988) 45 Cal.3d 306, 326.)

Furthermore, the testimony of each complaining witness here is more than sufficient to sustain the individual convictions, and considered together the testimony of all three complaining witnesses gives rise to an inference of propensity, which is cross-admissible to sustain the convictions collectively. (See Evid. Code, § 1108; *People v. Medina* (2003) 114 Cal.App.4th 897, 903.) The remarkable similarity of the complaining witness’s testimony regarding Garcia’s conduct at the point where each admittedly consensual encounter became nonconsensual by use of force, duress and menace, substantiates the testimony of the other complaining witnesses.

Specifically with respect to the credibility of C.G., the jury was instructed to consider anything that reasonably tends to prove or disprove the truth or accuracy of her testimony. We presume the jury understood and followed that instruction when evaluating her credibility even considering the evidence of prostitution. (*People v. Hovarter* (2008) 44 Cal.4th 983, 1005.) Both parties extensively argued the credibility of the witnesses without objection. As a result, it does not appear the jury failed to consider any constitutionally relevant evidence.

Therefore, after an examination of the entire cause, we are persuaded the errors complained of are harmless under any standard.

Garcia next contends the trial court had a sua sponte obligation to instruct the jury on the foundational requirements for adoptive admissions when such evidence is admitted. In support of this proposition he cites *People v. Humphries* (1986) 185 Cal.App.3d 1315, 1335-1336, and *People v. Vindiola* (1979) 96 Cal.App.3d 370, 381. However, those cases have been overruled on this point, and there is no longer any sua sponte duty to instruct on the foundational requirements for adoptive admissions. (*People v. Carter* (2003) 30 C4th 1166, 1197-1198.) Consequently, the trial court did not err in this regard.

Furthermore, while Garcia's trial counsel could have requested the court to give No. 357, his failure to do so does not appear to be unreasonable. No. 357 relates to adoptive admissions under Evidence Code section 1221, which states, "Evidence of a statement offered against a party is not made inadmissible by the hearsay rule if the statement is one of which the party, with knowledge of the content thereof, has by words or other conduct manifested his adoption or his belief in its truth." No. 357 describes the foundational requirements for adoptive admissions.

Garcia contends No. 357 should have been given based upon the following exchange between C.G. and Garcia during the recorded telephone: "[C.G.]: I just need to know exactly why last night, you did not respect me? And you continued to proceed

on having sex with me. When I told you not to, when I begged you to stop.

[¶][GARCIA]: Sweetheart why did you come when you knew that would be a precondition? [¶] [C.G.]: I knew that was a precondition, but you know, you going in

the backdoor and me asking you to stop. Why did you keep going last night? [¶]

[GARCIA]: Sweetheart, it's been nice. It was nice knowing you. It was nice meeting you. I enjoyed ah you while you were here. Now it has come to an end. And I wish you the best of luck in life."

In contrast to what the prosecutor argued to the jury, the Attorney General contends the foregoing exchange does not constitute an adoptive admission because Garcia "was not silent, equivocal or evasive when [C. G.] discussed appellant proceeding to have anal sex with her when she told him to stop."⁴ We are not persuaded.

"A party's words that manifest his or her belief in the truth of another's hearsay statement frequently consist of equivocal or evasive replies to another's accusatory statement directed to the party." (1 Jefferson, Cal. Evidence Benchbook (Cont.Ed.Bar 4th ed. 2012) *Admissions and Confessions*, § 3.27, p. 107.) This is what we have here. C.G. asked Garcia why he kept "going in the backdoor" after she asked him to stop. His reply was evasive. There is simply no other way to characterize it.

Moreover, the parties' closing arguments emphasized the issue. Garcia's counsel argued there was no adoptive admission, stating, "But what is also clear when she starts talking about, you know, going in the back door against my wishes, Mr. Garcia says, you know what, sweetheart, it's been fun, it's been nice, now our time has come to

⁴ Curiously, Garcia now seems to agree with this characterization. Elsewhere in the appellant's opening brief he argues, "Appellant's failure to expressly deny her accusation that he continued having sex with her after she asked him to stop *cannot reasonably be construed as an adoptive admission*. Appellant did not continue talking to C.G. as if what she had said was true. He immediately ended the phone call and the relationship, wishing her the best. The fact that appellant did not "dignify" C.G.'s question with a response *cannot reasonably be construed as an implied admission . . .*" (Italics added.)

an end. I must fair thee well a bid [sic] ado. I don't remember the exact words, but that's how he responded. He doesn't dignify it, right."

The prosecutor argued there was an adoptive admission, stating, "An innocent person when confronted with that type of conduct denies it. To say to someone, you forced me to have anal sex and I begged you to stop, I begged you, I kept telling you no. I don't care if you're never going to see the person again . . . you're going to say, listen, I know things didn't work out with us, I know we didn't get along but don't you ever say that to me because I would never do that, because I would never force you. You know that all the contact we had together was consensual. You would deny it. That's what an innocent person does . . . [t]his is an accusation of rape, and he doesn't deny it twice."

However, under the circumstances of this case, trial counsel's failure to request No. 357 could have been based on tactical considerations. "The instruction is largely a matter of common sense – silence in the face of an accusation is meaningful, and hence may be considered, only when the defendant has heard and understood the accusation and had an opportunity to reply. Giving the instruction might cause the jury to place undue significance on bits of testimony that the defendant would prefer it not examine so closely." (*People v Carter, supra*, 30 C4th at 1198.) Thus trial counsel's failure to request No. 357 "might be considered sound trial strategy." [Citations.] [Citation.]" (*People v. Mendoza* (2000) 24 Cal.4th 130, 158.).

B. Prosecutorial Misconduct

During closing argument, defense counsel asserted the complaining witnesses were lying about Garcia having non-consensual anal intercourse with them. The prosecutor countered, "What other defense is there besides the victims are lying and the evidence just doesn't work? I want you to believe [sic] that the evidence is good when it's good for me, and I want to believe it's bad when it's bad for me. Those are just the arguments you have to make in a defense." The prosecutor also argued, "Yeah, not a

good decision, but did you see [C.G.'s] eyes light up on that tape when he talked about coming to Orange County when she was four and she went to the Disneyland? She was like a little kid. She still was, 24 when she testified, 22 when this happened. She's a kid. *He worked her over and he's doing it again. That's what this is.*" (Italics added.) She also stated, "When police officers and professionals do an investigation, just like anytime in life, they are looking for things to corroborate. But you didn't just receive evidence that corroborates, you received everything. So yeah, they're not going to disregard something and say, oh, I'm not going to look for DNA evidence because I don't want to find anything that corroborates the victim. Of course they're going to look for things to corroborate. It would be asinine to do otherwise. *So to criticize police officers or professionals for doing their job, if they didn't do that, the opposite criticisms would be the defense.*" (Italics added.)

Garcia contends the prosecutor committed misconduct by attacking the integrity of defense counsel in closing argument. "As a general rule a defendant may not complain on appeal of prosecutorial misconduct unless in a timely fashion — and on the same ground — the defendant made an assignment of misconduct and requested that the jury be admonished to disregard the impropriety. [Citation.]' [Citation.]" (*People v. Hill* (1998) 17 Cal.4th 800, 820, overruled on other grounds in *Price v. Superior Court* (2001) 25 Cal.4th 1046, 1069, fn. 13.) A defendant may be excused from a failure to object and request for a curative admonition if (1) such an objection and request would have been futile, (2) an objection was made without opportunity to request a curative admonition, or (3) a timely admonition would not have cured the harm. (*Ibid.*)

Garcia admits trial counsel failed to timely object to the prosecutor's statements, but he argues the issue was not forfeited because an objection and request for admonition would not have cured the harm. Although we find Garcia's trial counsel failed to preserve the issue for appeal, he did not suffer any prejudice as a result of counsel's decision to remain silent.

“The applicable federal and state standards regarding prosecutorial misconduct are well established. “A prosecutor’s . . . intemperate behavior violates the federal Constitution when it comprises a pattern of conduct so “egregious that it infects the trial with such unfairness as to make the conviction a denial of due process.”” [Citations.] Conduct by a prosecutor that does not render a criminal trial fundamentally unfair is prosecutorial misconduct under state law only if it involves ““the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury.”” [Citation.]” (*People v. Navarette* (2003) 30 Cal.4th 458, 506.)

The prosecutor’s statements were not egregious, deceptive, or reprehensible. In each instance, the prosecutor merely rebutted defense counsel’s challenges to the evidence and the credibility of prosecution witnesses, topics properly discussed during closing argument. Furthermore, we disagree with Garcia’s assertion the prosecutor’s statements amount to an improper suggestion the defense fabricated evidence. To the contrary, the prosecutor emphasized the proper role of the jury, which is to determine the evidence and fairly apply the law.

DISPOSITION

The judgment is affirmed.

THOMPSON, J.

WE CONCUR:

O’LEARY, P. J.

MOORE, J.