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CERTIFIED FOR PARTIAL PUBLICATION[1]

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE, Plaintiff and Respondent, v. ADARRYL L. FUTRELL, Defendant and Appellant.	D039474 (Super. Ct. No. SCD159441)

APPEAL from a judgment of the Superior Court of San Diego County, H. Ronald Domnitz, Judge. Affirmed.

Appellate Defenders, Inc. and Cynthia M. Sorman, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, Steven T. Oetting and Lise Jacobson, Deputy Attorneys General, for Plaintiff and Respondent.

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1 Pursuant to California Rules of Court, rule 976.1, this opinion is certified for publication with the exception of parts IB and II.

A jury convicted Adarryl L. Futrell of pimping (Pen. Code,[2] § 266h, subd. (a)) and possession of marijuana, a lesser included offense of possession of marijuana for sale (Health & Saf. Code, §§ 11357, subd. (b), 11359). After a bifurcated court trial, the court found true allegations Futrell had suffered priors which rendered him ineligible for probation and two prison priors (§§ 667.5, subd. (b), 668, 1203, subd. (e)(4)). The court sentenced Futrell to a total prison term of eight years.

Futrell appeals, contending the trial court prejudicially erred by not instructing the jury that the misdemeanor offense of aiding a prostitute in section 653.23 is a lesser included offense of the felony of pimping, by refusing to modify CALJIC No. 2.27 to inform the jury that the uncorroborated testimony of one witness "may be" sufficient to prove the truth of a fact, and by failing to instruct sua sponte with CALJIC Nos. 2.50, 2.50.1, and 2.50.2 regarding "other crimes" evidence. Alternatively, Futrell asserts the cumulative instructional errors in this case denied him a fair trial.

We reject Futrell's contentions and affirm, specifically finding in the published portion of this opinion that section 653.23 is not a lesser included offense of the felony offense of pimping defined in section 266h, subdivision (a) or alleged in the information.

FACTUAL BACKGROUND

At approximately 10:00 p.m., on April 7, 2001, San Diego Police Department Detective Edward Blum, who was working prostitution detail in plain clothes from an unmarked car near 6800 El Cajon Boulevard, saw a Black man, later identified as Futrell,

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

drive a white car into a parking lot with a 15-year-old White female passenger, later identified as Rayah W.[3] Blum, saw Rayah get out of the car, walk to a bus stop and sit down on a bus bench on El Cajon Boulevard, which the detective knew was a common place from which prostitutes attracted customers. Rayah then walked over to a Pep Boys parking lot next to the bus stop and disappeared from Blum's view. After a short time, Blum saw her return to the parking lot where Futrell was still parked and speak to him, before walking back to the bus bench.

Blum, who was in radio contact with other undercover vice detectives working in the area detail that night, notified them that he had decided to approach Rayah to attempt to negotiate a transaction for sexual services. Blum then drove up next to Rayah and asked if she wanted a ride, which is understood by prostitutes to mean he was looking to exchange sex for money. Rayah said she did not know and asked Blum if he were a cop. When Blum replied, "Certainly not," Rayah directed him to the Pep Boys parking lot. There she asked Blum to prove that he was not a police officer by showing her his penis, another common ploy used by prostitutes to determine whether a person is a police officer. When he told her that was too embarrassing and asked if there were some other way to prove he was not a police officer, Rayah walked to his driver's window and told him to touch her breast. Blum then briefly touched her breast with the back of his hand. When Rayah next got into the passenger side of the car, Blum told her he was "looking for a blow job." Rayah, said, "Okay," and accepted the $40 Blum handed her for it. At

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3 As at trial, we refer to Rayah by her first name.

this point, Blum signaled his fellow officers and a marked police car executed a traffic stop on his car. The officers arrested Rayah for prostitution, and she later made statements to the detectives investigating the incident.

Meanwhile, Futrell, who had remained parked in his car up until Rayah's arrest, made a U-turn and drove east on El Cajon Boulevard. An officer assisting in Rayah's arrest radioed another vice detective in the area, Eric Morales, that he should contact Futrell because Rayah appeared to be a juvenile. Morales, who had witnessed the events unfold that evening, followed Futrell in his unmarked patrol car until Futrell was stopped by a marked patrol car after going through a red light. When Futrell got out of his car, asking why he was being stopped, Morales told him he had been seen speaking with a prostitute who had just been arrested and appeared to be a juvenile. Futrell said he understood and wanted to help. When Futrell was asked whether he had anything illegal on him, he said yes, explaining he had some marijuana because he had recently had open heart surgery. Morales then searched Futrell, finding five baggies containing marijuana in his coat pocket, and $388 in his wallet.

Blum subsequently interviewed Futrell after advising him of his *Miranda*[4] rights. Futrell told Blum he had met Rayah a week earlier near Trojan Avenue when he offered to help her because a customer was harassing her. When Rayah said she was afraid to go back to her pimp because she did not have enough money, Futrell and his friend allowed her to come with them in their car to pick up some CD's and T-shirts that Futrell sold.

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4 *Miranda v. Arizona* (l966) 384 U.S. 436.

When they later dropped her off on El Cajon Boulevard, Futrell gave her his pager number and told her to call if she wanted to sell CD's and T-shirts for him. Rayah paged him later that evening and they got together the next day.

At that time, Rayah told Futrell she was 19 years old, had escaped from an out-of-state institution, and wanted to get away from her pimp. Futrell said he offered Rayah a place to live with him, his wife and children, telling her he would need $150 a week for room and board. Futrell knew Rayah was a prostitute and that her only means of making money was through prostitution. He stated he had driven her to El Cajon Boulevard and let her off that night because she wanted to work doing "tricks" to pay him back. After she had turned one trick, Rayah paid him $40 and went back to work again. Futrell claimed he did not force Rayah to do it, but that it was solely her idea to work as a prostitute to pay him back. He said he "knew that it was wrong but he needed the money."

Futrell was subsequently tried by a jury on charges he was pimping and possessed marijuana for sale on April 7, 2001. In addition to the above evidence, a narcotic's expert and Rayah testified in the prosecution case. The expert stated that the five baggies found on Futrell that night contained a total of 16 grams of marijuana.

Rayah, who was 15 years old at the time of trial, testified she had met Futrell, whom she knew as "Scandalous Joe," a week and a half to two weeks before her April 7, 2001 arrest. She was running away from a trick at the time she met Futrell and agreed to have oral sex with him and his friend in exchange for $80. On the way to the friend's house, they stopped by Futrell's shop to pick up some shirts and hats. When they later

arrived at the friend's home, she had sex with both men, but neither paid her, merely offering her marijuana instead, which she declined. When Rayah said she had a pimp with whom she had tired, Futrell gave her his pager number and told her to call him if she "wanted to get away from the person [she] was staying with" and to "come move in with [him] and his . . . 'baby's mama.'"

Rayah called Futrell the next day, and he and his wife brought her to their home. Rayah had sex with Futrell, whom she considered her boyfriend, several more times after she moved in with him. She believed Futrell when he told her that the two of them would get their own apartment once she had enough money. She went back out on El Cajon Boulevard, a "place known for prostitutes" to earn the money.

Rayah said she had an arrangement with Futrell to give him $100 of her earnings for rent, but that he continued to take more and more of her money. When he asked her if she wanted him to be her pimp, Rayah responded, "whatever." During the time she lived with Futrell, he took her out to work every night and stayed around while she "turn[ed] a couple of tricks" and collected at least half of her earnings after each trick.

The day before her arrest, Rayah found out the mother of Futrell's baby was really his wife. When Rayah confronted Futrell, telling him that "that's not cool," and that she would not have moved in with him if she had known he was married, Futrell became angry and grabbed her shirt, informing her that he still expected her to continue working for him and living with him.

Rayah admitted that on the night she was arrested she had been working as a prostitute, had gotten into Blum's car and had made an agreement to give him sex for

money. She also conceded she had not told the whole truth that night when she was interviewed by a detective. She lied to the detective to help Futrell, because she thought she would be able to avoid trouble and still "be with" him. Although she had admitted at that time she was a prostitute, she denied Futrell was her pimp or that she had done anything sexual with him. She said she merely gave Futrell some money for a ride and protection and to hold in case she got pulled over. On cross-examination, Rayah further admitted she had smoked marijuana with Futrell and his friend on another occasion other than on the night she had met them.

Rayah, who was then serving one year in girl's rehabilitation for her prostitution offense, testified she was telling the truth in court and that the prosecution had not suggested any benefits because of her testimony.

No affirmative defense was presented.

DISCUSSION

I

JURY INSTRUCTIONS

The general rule is that in a criminal case the trial court must instruct on the "principles of law relevant to the issues raised by the evidence [citations] and has the correlative duty 'to refrain from instructing on principles of law which not only are irrelevant to the issues raised by the evidence but also have the effect of confusing the jury or relieving it from making findings on relevant issues.' [Citation.]" (*People v. Saddler* (1979) 24 Cal.3d 671, 681.) With this preliminary rule in mind, we address Futrell's instructional error contentions in turn.

A. Section 653.23

Futrell contends the trial court prejudicially erred in not instructing the jury sua sponte on misdemeanor aiding a prostitute (§ 653.23, subd. (a)) as a lesser included offense of the felony pimping charge (§ 266h, subd. (a)). He argues the jury could have had a reasonable doubt as to whether the nature and extent of his involvement with Rayah's prostitution activities was sufficient to support the felony crime of pimping. He suggests the jury might have believed his conduct was less than felonious, that he was merely trying to aid Rayah in her prostitution activities because she testified she had only known him a week and had told the detective she merely gave him her money to hold in case she got arrested. Futrell asserts a properly instructed jury could have found such conduct did not amount to pimping, but instead constituted the act of aiding a prostitute within the meaning of section 653.23, subdivision (a). We conclude that, because section 653.23, subdivision (a), is not a lesser included offense of section 266h, subdivision (a), the court was not required to give instructions on the former offense sua sponte.

1. Sua Sponte Instructions on Lesser Included Offenses

The court has a duty to instruct the jury on lesser included offenses when the evidence "raises a question as to whether all of the elements of the charged offense are present and there is evidence that would justify a conviction of such a lesser offense. [Citations.]" (*People v. Ramkeesoon* (1985) 39 Cal.3d 346, 351.) As our Supreme Court has repeatedly stated, "A criminal defendant is entitled to an instruction on a lesser included offense only if [citation] 'there is evidence which, if accepted by the trier of fact, would absolve [the] defendant from guilt of the greater offense' [citation] *but not the*

lesser. [Citations]." (*People v. Memro* (1995) 11 Cal.4th 786, 871.) In other words, a court has a sua sponte duty to "instruct on a lesser offense necessarily included in the charged offense if there is substantial evidence the defendant is guilty only of the lesser." (*People v. Birks* (1998) 19 Cal.4th 108, 118.)

To decide whether a lesser offense is necessarily included in the charged offense, thereby triggering the court's sua sponte duty to instruct on such offense, "one of two tests . . . must be met. The elements test is satisfied when "'all the legal ingredients of the corpus delicti of the lesser offense [are] included in the elements of the greater offense." [Citation.]' [Citations.] Stated differently, if a crime cannot be committed without also necessarily committing a lesser offense, the latter is a lesser included offense within the former." (*People v. Lopez* (1998) 19 Cal.4th 282, 288 (*Lopez*).) Under the second accusatory pleading test, "a lesser offense is included within the greater charged offense "'if the charging allegations of the accusatory pleading include language describing the offense in such a way that if committed as specified the lesser offense is necessarily committed." [Citation.]' [Citations.]" (*Id*. at pp. 288-289.)

2. Application of the Elements Test

Futrell was charged with and convicted of pimping in violation of section 266h, subdivision (a), which, in pertinent part, states a felony offense for any person who "knowing another person is a prostitute, lives or derives support or maintenance in whole or in part from the earnings or proceeds of the person's prostitution, or from money loaned or advanced to or charged against that person by any keeper or manager or inmate of a house or other place where prostitution is practiced or allowed, or who solicits or

receives compensation for soliciting for the person . . . ." In other words, pimping can be committed "in either of two basic ways: (1) by *deriving support* from the earnings of another's act of prostitution or (2) by *soliciting*." (*People v. McNulty* (1988) 202 Cal.App.3d 624, 630 (*McNulty*).) However, to violate section 266h, subdivision (a) by soliciting, "there must be *either* the receipt of compensation for soliciting for a prostitute *or* the solicitation of compensation for soliciting for a prostitute." (*McNulty, supra,* 202 Cal.App.3d at p. 630, citing *People v. Smith* (1955) 44 Cal.2d 77, 79 (*Smith*).) Both ways of committing section 266h, subdivision (a) require knowledge that the other person is a prostitute.

In addition, the statute defines a general intent crime (*McNulty, supra*, 202 Cal.App.3d at p. 630), and "does not require the earnings of a known prostitute to be directly paid by her to the accused person to make him guilty of pimping." (*People v. Coronado* (1949) 90 Cal.App.2d 762, 766 (*Coronado*).)

Futrell argues section 266h, subdivision (a) cannot be committed without also necessarily committing the lesser offense defined in section 653.23, subdivision (a). We disagree. Although we have found no published case discussing or construing section 653.23, our review of the plain language of the statute in light of its legislative history, supports the conclusion that section 653.23, subdivision (a) is not a necessarily lesser included offense of pimping.

As our Supreme Court has stated, """[w]e begin with the fundamental rule that our primary task in construing a statute is to determine the Legislature's intent. [Citation.]" [Citation.] "'The court turns first to the words themselves for the answer.' [Citations.]"

[Citation.] When the statutory language is clear and unambiguous, there is no need for construction and courts should not indulge in it. [Citation.] The plain language of the statute establishes what was intended by the Legislature. [Citations.]" (*People v. Statum* (2002) 28 Cal.4th 682, 689-690.)

Applying these principles here, subdivision (a) of section 653.23 states a misdemeanor offense for any person who does "either of the following: (1) Direct, supervise, recruit, or otherwise aid another person in the commission of a violation of subdivision (b) of Section 647 [disorderly conduct based upon soliciting or engaging in any act of prostitution] or subdivision (a) of Section 653.22 [loitering in any public place with the intent to commit prostitution]. [¶] (2) Collect or receive all or part of the proceeds earned from an act or acts of prostitution committed by another person in violation of subdivision (b) of Section 647."

Based solely on this language, under the elements test for lesser included offenses, the criminal conduct that section 266h, subdivision (a), prohibits could occur without necessarily also violating section 653.23, subdivision (a) (1) or (2). As noted above, section 266h, subdivision (a), requires deriving support from the earnings of a person's acts of prostitution, or receipt of compensation for soliciting for a prostitute or solicitation of compensation for soliciting for a prostitute. (*Smith, supra*, 44 Cal.2d at p. 79; *McNulty, supra*, 202 Cal.App.3d at p. 630.) Neither of these ways to violate the pimping statute requires a person to direct, supervise, recruit, or otherwise aid a prostitute as required by section 653.23, subdivision (a)(1). In other words, pimping can be committed without also committing subdivision (a)(1) of section 653.23.

Moreover, because pimping can be committed by deriving support from a prostitute's earnings collected by a third-party (*Coronado, supra*, 90 Cal.App.2d at p. 766), it can also be committed without committing subdivision (a)(2) of section 653.23, which requires the accused person has "[c]ollect[ed] or receive[d] all or part of the proceeds earned from an act or acts of prostitution committed by another person."

Futrell, however, argues the language of section 653.23, subdivision (a)(2) does not require the accused person "personally" collect or receive the proceeds from the prostitution activities and thus that person could receive the proceeds from a third party to derive support as in felony pimping defined by section 266h, subdivision (a). We reject this argument based on the plain language used consistently throughout section 653.23 and the legislative intent gleaned from the materials before the Legislature in enacting section 653.23.

Subdivision (b) of section 653.23 provides that:

> "Among the circumstances that may be considered in determining whether a person is in violation of subdivision (a) are that *the person does* the following: [¶] (1) Repeatedly speaks or communicates with another person who is acting in violation of subdivision (a) of Section 653.22. [¶] (2) Repeatedly or continuously monitors or watches another person who is acting in violation of subdivision (a) of Section 653.22. [¶] (3) Repeatedly engages or attempts to engage in conversation with pedestrians or motorists to solicit, arrange, or facilitate an act of prostitution between the pedestrians or motorists and another person who is acting in violation of subdivision (a) of Section 653.22. [¶] (4) Repeatedly stops or attempts to stop pedestrians or motorists to solicit, arrange, or facilitate an act of prostitution between pedestrians or motorists and another person who is acting in violation of subdivision (a) of Section 653.22. [¶] (5) Circles an area in a motor vehicle and repeatedly beckons to, contacts, or attempts to contact or stop pedestrians or other motorists to solicit, arrange, or facilitate an act of prostitution between the

> pedestrian or motorists and another person who is acting in violation of subdivision (a) of Section 653.22. [¶] (6) Receives or appears to receive money from another person who is acting in violation of subdivision (a) of Section 653.22. [¶] (7) Engages in any of the behavior described in paragraphs (1) to (6), inclusive, in regard to or on behalf of two or more persons who are in violation of subdivision (a) of Section 653.22. [¶] (8) Has been convicted of violating this section, subdivision (a) or (b) of Section 647, subdivision (a) of Section 653.22, Section 266h, or 266i, or any other offenses relating to or involving prostitution within five years of the arrest under this section. [¶] (9) Has engaged, within six months prior to the arrest under subdivision (a), in any behavior described in this subdivision, with the exception of paragraph (8), or in any other behavior indicative of prostitution activity."

Subdivision (c) of section 653.23 notes that the circumstances in subdivision (b) are "not exclusive," but "should be considered particularly salient if they occur in an area that is known for prostitution activity." In addition, subdivision (c) provides that other relevant factors may be considered, that no one factor or combination of factors "is in itself determinative," and a "violation of subdivision (a) shall be determined based on an evaluation of the particular circumstances of each case." (§ 653, subd. (c).)

When the above language of section 653.23 is reviewed as a whole, it is noted that in addition to section (a) describing two categories of activity that a person can "do" to commit that offense, i.e., either "to direct, supervise, recruit, or otherwise aid a prostitute in the commission of [prostitution] or [in loitering with the intent to commit prostitution], or to "[c]ollect or receive" the proceeds from the acts of prostitution,[5] the non-exhaustive

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5 Subdivision (a)(1) of section 653.23 essentially lists activities that are similar to those found in the felony crime of pandering (§ 266i), while the activities in subdivision (a)(2) mirror pimping activities (§ 266h).

list of circumstances of subdivision (b) of section 653.23 which provide evidence of committing section 653.23, subdivision (a) also describes actions on the part of the person that may be observed by law enforcement or others before the person is arrested for that crime. The totality of this language reasonably suggests section 653.23 requires a person "personally" commit the conduct it defines as a misdemeanor crime, so that contrary to Futrell's arguments otherwise, subdivision (a)(2) of section 653.23 only applies to persons who are actually or personally observed collecting or receiving proceeds from the acts of prostitution.[6]

The legislative history concerning the enactment of section 653.23, subdivision (a) additionally supports this conclusion. (See Stats. 1998, ch. 460, § 1, pp. 2693-2694.) Section 653.23, originally patterned after section 653.22 which made it a crime to loiter in any public place with the intent to commit prostitution, was amended in the Senate to delete provisions regarding loitering with the intent to commit the acts made criminal in that section. (Assem. vote, Assem. Bill No. 1695 (1997-1998 Reg. Sess.) as amended June 22, 1998.) As enacted in 1998, it created a new misdemeanor crime targeting street level pimps by enabling law enforcement to arrest more easily those persons observed on the street directing, supervising, recruiting, otherwise aiding, or receiving earnings of another person engaging in prostitution or loitering with intent to commit prostitution. (Knox, com. on Assem. Bill No. 1695 (1997-1998 Reg. Sess.) Aug. 10, 1998; Assem.

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6 This also would include a person who is observed receiving or collecting the funds of a prostitute from another who had earlier been seen taking the money from a prostitute.

vote, Assem. Bill No. 1695 (1997-1998 Reg. Sess.) as amended June 22, 1998.) This new law was deemed necessary to ensure the arrest and conviction of those predatory individuals known as "pimps," because the felony crime of pimping generally required the cooperation of a prostitute in order to arrest and convict the person as it often included activity not observable directly by law enforcement or others. (Assem. vote, Assem. Bill No. 1695 (1997-1998 Reg. Sess.) as amended June 22, 1998.) The purpose of section 653.23 was to help provide law enforcement with "additional tools to clean up neighborhoods and business areas blighted by pimping and prostitution." (Knox (author of Assem. Bill No. 1695), letter to Governor, Aug. 27, 1998; Knox, com. on Assem. Bill No. 1695 (1997-1998 Reg. Sess.) Aug. 10, 1998.)

We believe this legislative intent expressed before the enactment of section 653.23 clarifies any purported ambiguity in the language of that section. We conclude the only reasonable inference from such intent and language is that the misdemeanor crime defined in subdivision (a)(2) of section 653.23 requires that the accused person be personally or directly observed "collecting or receiving" the proceeds from the prostitution activities.[7] Because the felony crime of pimping can be committed by a person indirectly deriving support from the earnings of a prostitute or from the actions of

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[7] We need not consider here whether at some future date the People's position regarding the requirement of personal action on the part of a defendant charged with section 653.23, subdivision (a)(2) might change under circumstances not present in this case. Although the issue was mentioned at the time of oral argument, it is not before us in the present case.

a third party not observable by law enforcement or others, section 653.23, subdivision (a)(2) is not a necessarily included offense of section 266h, subdivision (a).

Our conclusion that neither subdivision (a)(1) or (a)(2) of section 653.23 is a necessarily included offense of section 266h, subdivision (a), is further bolstered by subdivision (d) of section 653.23, which provides that "[n]othing in this section shall preclude the prosecution of a suspect for a violation of Section 266h . . . , or for a violation of this section in conjunction with a violation of Section 266h . . . ." This language unambiguously evidences the Legislature's intent to make criminal certain lesser conduct related to, but independent of, the crime of felony pimping.

3. Application of the Accusatory Pleading Test

Futrell alternatively argues the accusatory pleading in this case described conduct that necessarily would have violated section 653.23, subdivision (a). We disagree. The language of the information on which Futrell relies alleges he "did unlawfully and knowing RAYAH W. to be a prostitute, live and derive support and maintenance in whole or in part from the earnings and proceeds of said person's prostitution and from money loaned and advanced to and charged against said prostitute by a keeper, manager, and inmate of a house and other place where prostitution was practiced and allowed, in violation of . . . SECTION 266h[, subdivision] (a)." This language, which mirrors the language of the statute except for the use of the conjunctive "and" rather than the disjunctive "or," does not, even with such modification, necessarily allege that Futrell directed, supervised, recruited or otherwise aided Rayah or collected or received all or part of the proceeds earned from her act or acts of prostitution. A defendant, such as

Futrell, can violate section 266h, subdivision (a) by deriving "support or maintenance, . . . in part" even though the earnings of a known prostitute are not paid directly to him. Therefore, the conduct described in the accusatory pleading does not necessarily violate section 653.23, subdivision (a).

4. Summation

We therefore conclude that section 653.23, subdivision (a), is not a lesser included offense of section 266h, subdivision (a), under either the elements test or the accusatory pleading test. Accordingly, the trial court had no sua sponte duty to instruct on such lesser offense. In light of our holding, we need not address the People's alternative argument that the evidence did not warrant instructions on the lesser offense. (See *Lopez, supra*, 19 Cal.4th at p. 294.)

B. CALJIC No. 2.27

Futrell also asserts the trial court erred in refusing to instruct the jury with his suggested modification to CALJIC No. 2.27 that the testimony of one witness "may be" sufficient to prove a fact. We disagree.

The court instructed the jury with CALJIC No. 2.27 as follows:

> "You should give the uncorroborated testimony of a single witness whatever weight you think it deserves. Testimony by one witness which you believe concerning any fact whose testimony about that fact does not require corroboration is sufficient for the proof of that fact. You should carefully review all the evidence upon which the proof of that fact depends."

Before giving this instruction, defense counsel requested the "is" in the instruction be replaced with the words "may be," arguing the standard version of the instruction

improperly directs jurors to find the testimony of one witness, whom they believe, "is" sufficient to establish a fact. When defense counsel could not provide the court with any case authority to support the request, the court declined to give the modification on the ground it was not supported by case law.

In his opening brief on appeal, Futrell concedes CALJIC No. 2.27 is a correct statement of law, but argues that his proposed slight word change to the instruction was basically a proper pinpoint instruction requested to inform the jury of his defense evidentiary theories that he "did not act as Rayah's pimp, but that she was testifying to garner favor with the prosecution for her own case," and "that even if it found Rayah honest, her testimony alone did not conclusively establish the facts to which she testified, but 'may have' established those facts." Futrell, however, did not present such arguments to the trial court. Rather, he merely claimed, without supporting authority, that the modification would correct improper directions inherent in CALJIC No. 2.27 regarding the establishment of a fact.

Then, in his reply brief, Futrell again changes his theory of why the modification was necessary in this case. He argues that because Rayah is not legally an accomplice to a pimping charge which would provide him the benefit of an accomplice instruction telling the jury to view the accomplice's testimony with caution and require corroboration, the court's reading of CALJIC No. 2.27 without his suggested modification "vested Rayah's testimony with a false aura of veracity." In essence, Futrell is arguing that CALJIC No. 2.27 singles out Rayah's testimony and gives it undue

prominence before the jury, thereby lessening the prosecution's burden of proof and violating his due process rights.

Futrell, however, provides no authority on appeal for his newly raised theories of why the trial court was required to modify CALJIC No. 2.27 as he suggested. Instead he recites facts and general law which, if thoroughly reviewed, refutes rather than supports his position. He notes our Supreme Court has held that CALJIC No. 2.27 properly states the law and should be given "in every criminal case in which no corroborating evidence is required" (*People v. Rincon-Pineda* (1975) 14 Cal.3d 864, 885); that the defense is entitled to request pinpoint instructions "'relating particular facts to any legal issue"' (*ibid*.); that no corroboration of Rayah's testimony was required because she is not an accomplice in his pimping charge; and that a trial court has discretion under the California Constitution "to make . . . 'such comment on the evidence and testimony and credibility of any witness as in its opinion is necessary for the proper determination of the cause.' [Citation.]" (*Ibid*.)

Here, in addition to Futrell not requesting a pinpoint instruction concerning CALJIC No. 2.27, or to raising his other theories of why this instruction should have been modified below, he has not shown how the trial court abused its discretion in not "commenting on the evidence" as he suggested the modification would do. Contrary to Futrell's arguments otherwise, CALJIC No. 2.27 does not lessen the prosecutor's burden of proof or direct the jurors it must conclusively presume a fact; it only focuses on how a jury should "evaluate a fact . . . proved solely by the testimony of a single witness." (*People v. Gammage* (1992) 2 Cal.4th 693, 700; see also *People v. Noguera* (1992) 4

Cal.4th 599, 634; *People v. Bunyard* (1988) 45 Cal.3d 1189, 1228.) In doing so, the instruction informs the jurors to give the testimony of a witness whatever weight they think it deserves, to carefully review the evidence when a fact depends upon the testimony of a single witness, and, along with other instructions such as CALJIC Nos. 2.20 (believability of witness), 2.21.1 (discrepancies in testimony), 2.21.2 (witness willfully false), and 2.22 (weighing conflicting testimony), advises the jury how to engage in the fact-finding process. (*Gammage, supra*, 2 Cal.4th at p. 700.)

Futrell's assertions regarding CALJIC No. 2.27 as applied to Rayah's testimony were merely areas for argument on her credibility. The record reflects defense counsel fully argued them in closing. No instructional error is shown regarding CALJIC No. 2.27.

C. CALJIC Nos. 2.50, 2.50.1 and 2.50.2

Futrell additionally claims the trial court had a sua sponte duty to instruct the jury with CALJIC Nos. 2.50 (evidence of other crimes), 2.50.1 (evidence of other crimes by the defendant proved by a preponderance of the evidence) and 2.50.2 (definition of preponderance of the evidence) because Rayah testified she had consensual sex and smoked marijuana with Futrell when she was 15 years old. We again disagree.

Our Supreme Court has long held that "in general, the trial court is under no duty to instruct *sua sponte* on the limited admissibility of evidence of past criminal conduct." (*People v. Collie* (1981) 30 Cal.3d 43, 64.) Although the court in *Collie* recognized the possibility there might be "an occasional extraordinary case in which unprotested evidence of past offenses is a dominant part of the evidence against the accused, and is

both highly prejudicial and minimally relevant to any legitimate purpose" (*ibid*.), this is not such a case.

Futrell did not object to the admission of the now complained of "other acts" evidence or request instructions on them. Although the evidence Rayah smoked marijuana with Futrell and had sex with him was relevant to elements of the crimes of which Futrell was charged, such was neither a dominant part of the evidence against him, nor highly prejudicial. The evidence regarding the marijuana was relevant to establishing Futrell's knowledge of the narcotic nature of the marijuana found in his jacket, an element of the charged possession of marijuana for sale, and was no more prejudicial than the dominant evidence against him, which consisted of the five baggies found in his pocket at the time of his arrest.

The evidence Futrell had had sex with Rayah was probative on the issues of whether Futrell knew Rayah was a prostitute, which is an element of pimping, and the nature of their relationship, which was also relevant to the pimping charge in general. Such evidence also explained why Rayah may have lied to the detectives about Futrell on the night she was arrested, i.e., so she could still be with him. This evidence, however, was minimally prejudicial in light of the overwhelming evidence of Futrell's pimping elicited through vice detectives' observations, Rayah's other testimony and Futrell's own statements.

Under the circumstances, Futrell cannot show that this is the type of extraordinary case for which the court would have a sua sponte duty to instruct on other crimes evidence. No error is shown in this regard.

II

CUMULATIVE ERROR

Futrell finally argues that even if the multiple errors in this case were not sufficient in and of themselves to require reversal, the cumulative effect of such errors requires reversal of the judgment. Because we have determined that none of Futrell's claimed errors are error, "they cannot constitute cumulative error that somehow affected the . . . verdict." (*People v. Beeler* (1995) 9 Cal.4th 953, 994.) Therefore, contrary to his assertion otherwise, the cumulative error doctrine is inapplicable to this record.

DISPOSITION

The judgment is affirmed.

CERTIFIED FOR PARTIAL PUBLICATION

HUFFMAN, Acting P. J.

I CONCUR:

NARES, J.

McIntyre, J., Concur

I fully concur in section I— parts B and C and section II of the majority opinion. As to section I part A, I concur in the result only.

Based on Adarryl L. Futrell's admissions to the police and Rayah W's trial testimony, the jury could only conclude that either Futrell "live[d] or derive[d] support or maintenance . . . from the earnings or proceeds of [Rayah's] prostitution" in violation of Penal Code section 266h, or that he committed no crime at all. In the absence of evidence to support a conclusion that Futrell merely violated Penal Code section 653.23, the trial court was not required, sua sponte, to instruct the jury regarding the misdemeanor offense. (*People v. Breverman* (1998) 19 Cal.4th 142, 162.) On this basis, I agree with the majority's conclusion that Futrell's pimping conviction is not subject to reversal based on the trial court's failure to give the misdemeanor instructions. I would not reach the more difficult issue of whether aiding a prostitute in violation of section 653.23 is a lesser included offense of pimping in violation of 266h.

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McINTYRE, J.