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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

ENRIQUE VENEGAS BARAJAS,

Defendant and Appellant.

A140189

(Alameda County
Super. Ct. No. H54026)

Defendant Enrique Venegas Barajas was charged with three counts of lewd conduct with a child under 14, occurring on October 30, 2010, March 10, 2011, and August 20, 2012, respectively (Pen. Code,¹ § 288, subd. (a); counts 1, 2 and 3), continuous sexual abuse of a child (§ 288.5, subd. (a); count 4), and contacting a minor with intent to commit a sex offense (§ 288.3, subd. (a); count 5). Defendant was found guilty on counts 2, 3 and 5, and the other counts were dismissed after the jury was unable to reach a verdict on those counts. Defendant was sentenced to prison for the middle term of six years on count 2, with concurrent terms of six years on counts 3 and 5. In addition to imposing certain fines and ordering defendant to register as a sex offender, the court ordered defendant to “submit to [AIDS] testing pursuant to section 1202.1.” Defendant does not challenge his conviction but raises four issues concerning his sentence, two of which the Attorney General acknowledges require correction. We agree with defendant that correction is also necessary with respect to the other two issues presented.

¹ All statutory references are to the Penal Code.

Background

We adopt the summary of the prosecution's evidence in the Attorney General's brief.

Thirteen-year-old Jane Doe testified that she was sexually molested by defendant on three occasions between October 2010 and August 2012. Defendant was a friend of Jane's stepfather, and Jane and her family often visited defendant's home for dinners and parties. Jane was a friend of defendant's daughter, W., who was age 15 at the time of trial.

On October 30, 2010, Jane went with her parents to defendant's home for a birthday party. The party was held in the back yard, and at one point Jane went into the house toward W.'s bedroom. When Jane reached the door of the bedroom, defendant grabbed her from behind and pulled her into his bedroom. Defendant kissed Jane and moved his hands over her breasts and bottom. Jane pushed defendant away and went into W.'s room, where other girls were playing. Jane did not say anything because she was confused and scared.

On March 11, 2011, Jane's family went to defendant's house for dinner. W. invited Jane to spend the night, and she accepted. After Jane's parents left the house, Jane and W. watched television in W's bedroom. Jane asked W. to accompany her to the kitchen to get a drink of water, but W. told Jane to go alone. Jane went into the kitchen, and defendant grabbed her from behind and pulled her onto a couch in the living room. Defendant positioned Jane on his lap and grabbed her hands and rubbed her breasts. Jane's mother entered the house, having forgotten to give Jane spending money for the next morning, and the mother saw Jane on defendant's lap. Defendant stood up and walked out of the living room without speaking. Jane's mother told Jane to collect her belongings, and they left the house.

On August 20, 2012, Jane and her family went to defendant's house to celebrate W.'s birthday. During the party, Jane left the group to go to the bathroom next to W.'s bedroom. When Jane came out of the bathroom, defendant grabbed her arm and pulled her into his bedroom. Defendant sat on his bed and moved his hands over Jane's bottom

and tried to kiss her. Jane pushed defendant away and ran to the back yard, where the others were partying.

Discussion

1. *The order requiring defendant to submit to AIDS testing is not supported by substantial evidence.*

Defendant contends that the trial court erred in ordering him to submit to AIDS testing pursuant to section 1202.1 because the record contains no evidence establishing probable cause to believe that he transferred bodily fluid capable of transmitting HIV to the victim, Jane Doe.

Section 1202.1, subdivision (a) provides in relevant part: “[T]he court shall order every person who is convicted of . . . a sexual offense listed in subdivision (e) . . . to submit to a . . . test for evidence of antibodies to the probable causative agent of acquired immune deficiency syndrome (AIDS).” The designated offenses in section 1202.1, subdivision (e)(6), which include lewd conduct with a child, require an AIDS test only if the trial court finds “probable cause to believe that blood, semen, or any other bodily fluid capable of transmitting HIV has been transferred from the defendant to the victim.” If the court orders testing for a defendant convicted of one or more of the crimes designated in subdivision (e)(6), the court is required to note its finding of probable cause on the court docket and minute order, if a minute order is prepared. (§ 1202.1, subd. (e)(6)(B).)

In the trial court the defendant did not object to the order requiring him to be tested, and the court failed to note a finding of probable cause as required by the statute. By failing to object, the defendant forfeited any objection to the court’s failure to make the finding required by section 1202.1, subdivision (e)(6) (*People v. Stowell* (2003) 31 Cal.4th 1107), but despite the absence of an objection he may challenge on appeal the absence of probable cause to support the testing order. (*People v. Butler* (2003) 31 Cal.4th 1119, 1123.)

The only evidence in the record that the Attorney General contends provides probable cause to believe that defendant may have transferred bodily fluids to Jane Doe is Jane Doe’s brief testimony that during the October 30, 2010 incident defendant kissed

her.² This incident was the basis for the charge in count 1, for which defendant was not convicted. No evidence relevant to any of the counts on which defendant was convicted that might arguably support a finding of probable cause has been brought to our attention. Defendant contends that section 1202.1 authorizes testing only “if there is probable cause to believe that, as to at least one of the incidents that led to a conviction, there is probable cause to believe that a transfer of the AIDS virus took place.” The Attorney General argues that the statute requires only that “(1) the defendant has been convicted of a designated sex crime; and (2) the trial court finds probable cause that the defendant transferred bodily fluid capable of transmitting HIV to the victim.” In the Attorney General’s view, it is not necessary “that the transmission occur in the commission of one or more of the underlying offenses” for which the defendant is convicted. We need not resolve this difference because, even accepting the Attorney General’s broader reading of the statute, we do not believe the brief mention of a “kiss” during the October 2010 incident provides probable cause to believe that defendant’s bodily fluid was transmitted to Jane Doe.

“Probable cause is an objective legal standard—in this case, whether the facts known would lead a person of ordinary care and prudence to entertain an honest and strong belief that blood, semen, or any other bodily fluid capable of transmitting HIV has

² The entirety of Jane Doe’s testimony in this regard was as follows: “He was standing there in front of the door. And what happened was that he got -- he grabbed me like if he was going to hug me, but like he had his hands on my back and then he put it on my butt. He put his hands on my butt and he squeezed my butt, and I tried to push him away but I couldn’t. And he tried to kiss me. [¶] Q. He tried to kiss you on that day? [¶] A. Yes. [¶] Q. Have you ever told anyone that on that day he tried to kiss you. [¶] A. No. [¶] Q. Is that something you remember now? [¶] A. Yes. [¶] Q. Did he kiss you? [¶] A. Yes. [¶] Q. How long did that last? [¶] A. I have no idea.”

On cross-examination, Jane Doe was asked several questions about whether she had previously told anybody that defendant had “tried to kiss” her; she confirmed that she had told only the District Attorney in the presence of an investigator, and following an objection to another question the court interposed: “I think, clearly, the witness testified that as far as her testimony about defendant trying to kiss her or kissing her, that this was the first time she’s talked about that. Certainly in court, in any event.”

been transferred from the defendant to the victim. [Citations.] Under the substantial evidence rule, a reviewing court will defer to a trial court's factual findings to the extent they are supported in the record, but must exercise its independent judgment in applying the particular legal standard to the facts as found." (*Butler, supra*, 31 Cal.4th at p. 1127.)

The Attorney General cites *Johnetta J. v. Municipal Court* (1990) 218 Cal.App.3d 1255, 1279-1286 in support of the contention that the possibility of HIV being transmitted in saliva is sufficient to justify an order requiring AIDS testing. The court there held that although the "theoretical possibility of saliva transfer" of HIV "is extremely low, the majority of the experts agreed that the possibility cannot be categorically ruled out" and under the then-current state of medical knowledge was sufficient to justify the testing order. (*Id.* at pp. 1279-1280.) However, in that case the defendant had assaulted a deputy sheriff, "inflicting a deep bite on the deputy's arm which penetrated the skin and drew blood." (*Id.* at p. 1261.) Whatever may be known today about the possible transmission of HIV in saliva, in *Johnetta J.* there was at least reason to believe that saliva had been transmitted to the victim by means of a subcutaneous bite. In the present case, in contrast, the slight evidence of a "kiss" provides no reason for such a belief. There is no indication that defendant kissed Jane Doe on the mouth, and the context of her testimony seems to suggest that the kiss, which she resisted, was brief, possibly on her cheek, and was unlikely to have transferred any saliva. This is not substantial evidence sufficient to establish probable cause that bodily fluid was transferred to Jane Doe.

The Attorney General argues alternatively that "[i]f this court should find that the trial evidence did not support the AIDS testing order, the matter should be remanded to the trial court." We agree that this is the proper remedy prescribed by our Supreme Court in *Butler*. "Given the significant public policy considerations at issue, we conclude it would be inappropriate simply to strike the testing order without remanding for further proceedings to determine whether the prosecution has additional evidence that may establish the requisite probable cause." (*People v. Butler, supra*, 31 Cal.4th at p. 1129.)

2. Defendant is entitled to two additional days of presentence custody credit.

Defendant was awarded credit for 161 actual days of presentence custody, plus 24 days of good time credits, for a total of 185 days of credit. He contends that he is in fact entitled to credit for 163 actual days plus 24 days of good time credits, for a total of 187 days of credit. The Attorney General argues that defendant has not carried his burden of establishing that the number awarded is incorrect, suggesting that there may be a difference between the date defendant was arrested and the date he was jailed. The Attorney General acknowledges that there is conflicting authority as to whether the contention is forfeited for failure to have objected in the trial court, and as to which date starts the calculation of credits under sections 2900.5 and 2933.1. We do not believe the contention has been forfeited (*People v. Johnson* (2007) 150 Cal.App.4th 1467, 1485), and it is unnecessary to pass on the correct starting date because the record discloses that defendant was jailed on the date of his arrest.

The probation report states that defendant was arrested on April 25, 2013 and that as of September 17 (146 days later, counting the first and last days), he had been in jail 146 days. Defendant was sentenced on October 4, 2013, 17 days after September 17th. Therefore, defendant is entitled to credit for 146 plus 17, or 163, actual days of time served, plus 24 days good time credit, or a total of 187 days of presentence credit.

3. Acknowledged errors

Defendant was sentenced to a concurrent prison term of six years under count 5 for the violation of section 288.3, subdivision (a). The court indicated that it wished to impose the midterm but mistakenly stated the midterm to be six years, when in fact it is three years. The Attorney General acknowledges that “[b]ecause the trial court stated its intent to impose the midterm for count 5 . . . , we agree that the appropriate term for that count is three years.”

The Attorney General also agrees that the trial court’s minute order should be corrected to show that the court recommended, but did not order, that defendant participate in a sex offender program while in prison.

Disposition

Defendant's conviction is affirmed but the judgment is modified in the respects indicated above. The order directing defendant to submit to testing pursuant to section 1202.1 is vacated, without prejudice to the right of the People to apply for an order compelling defendant to submit to such testing upon a further showing of probable cause. The concurrent prison term imposed under count 5 is reduced to three years. Defendant's presentence custody credits are increased to 187 days. The trial court's minute order should be corrected to show that the court recommended, but did not order, that defendant participate in a sex offender program while in prison.

Pollak, Acting P. J.

We concur:

Siggins, J.

Jenkins, J.