

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Appellant,

v.

VICTOR MANUEL GONZALES,

Defendant and Appellant.

E057702

(Super.Ct.No. INF1200166)

OPINION

APPEAL from the Superior Court of Riverside County. Ronald L. Johnson, Judge. (Retired judge of the Riverside Super. Ct. assigned by the Chief Justice pursuant to art. VI, § 6 of the Cal. Const.) Reversed.

Paul E. Zellerbach, District Attorney, and Alan D. Tate, Deputy District Attorney, for Plaintiff and Appellant.

Julie Sullwold, under appointment by the Court of Appeal, for Defendant and Appellant.

I. INTRODUCTION

The People appeal from an order of the trial court denying their motion¹ to reinstate a complaint against defendant under Penal Code² section 871.5, subdivision (f). The People contend the evidence at the preliminary hearing was sufficient as a matter of law to hold defendant Victor Manuel Gonzales to answer on a charge of violating section 288, subdivision (a) (lewd and lascivious conduct on a minor), and the trial court had no jurisdiction to accept defendant's guilty plea to a misdemeanor charge of violating section 647, subdivision (a) (disorderly conduct). Defendant appeals from the order vacating the misdemeanor judgment on his plea of guilty to the disorderly conduct charge, arguing the magistrate had the power to hold defendant to answer on that charge, and that the People forfeited any right to have the misdemeanor judgment vacated because they did not object to the entry of the misdemeanor plea.³ On that foundation, defendant responds to the People's appeal from the denial of the motion to reinstate, arguing that the proceedings under section 871.5 were barred by the misdemeanor judgment under principles of res judicata, collateral estoppel, and double jeopardy.

We conclude that the proceedings under section 871.5 were not barred, nor did the People forfeit their right to pursue review of the magistrate judge's ruling at the

¹ Although, as we discuss below, the trial court stated that it granted the motion, the practical effect of the trial court's ruling was to deny the motion, and accordingly, we will construe the ruling as a denial.

² All further statutory references are to the Penal Code.

³ Our order, allowing defendant to raise these issues here, despite having initially failed to cross-appeal or seek writ relief regarding the trial court's order vacating his misdemeanor plea, was filed on June 26, 2014.

preliminary hearing. We further conclude that the evidence was sufficient to hold defendant to answer on a charge of violating section 288, subdivision (a), so the trial court's denial of the People's section 871.5 motion must be reversed.

II. FACTS AND PROCEDURAL BACKGROUND

In case No. INF1101748, a felony complaint was filed charging defendant with a violation of section 288, subdivision (a) with allegations of a serious or violent prior felony conviction (§§ 667, subs. (c), (e)(1), 1170.12, subd. (c)(1)). On January 31, 2012, a preliminary hearing was held in that case. The alleged victim, Jane Doe, testified under a grant of immunity. She testified that defendant was her neighbor. In the evening of July 18, 2011, she was walking home from a store when defendant stopped his car and offered her a ride. She got in the car and they drove to Coachella at her request. She testified she did not ask defendant to take her home until later.

While in Coachella, defendant parked his car and she called an acquaintance named Ivan and then met Ivan "[j]ust up the street," while defendant remained in the car. She testified that she was there to buy marijuana from Ivan and had already paid for it, but they got into an altercation because he did not want to give it to her. Ivan tried to grab her arm and they struggled. Ivan grabbed her cell phone and threw it and hit and pushed her. Defendant saw the struggle and started walking over, and Ivan ran away.

Doe testified that when she returned to the car from where she had met Ivan, the hatch of the car was already open. She did not remember telling the investigator that defendant had grabbed her and kissed her. Almost immediately, the police arrived, and Doe felt "panick[ed] and frustrated" by the situation with Ivan. She started walking fast

to get away. A police officer chased her and grabbed her, and she was crying because she believed she was going to be arrested for buying marijuana. She did not tell Investigator Diaz about Ivan. She did not tell Investigator Diaz she felt uneasy as they approached the area where defendant stopped his car. She did not remember telling the officer that she did not want the police to tell her parents or defendant's wife what had happened, that she believed defendant was going to kill her, or that she did not want defendant to go to jail. She then testified she had told the police that defendant had grabbed her because she did not want the officers to know another person had been involved. She did not tell the investigator that defendant had pulled her shorts down and unbuttoned her blouse. She did not tell the investigator that defendant had offered to give her \$100 when he was done. She testified that her bra was unlatched, and she had her shoes on.

Doe testified that she had provided a declaration to an investigator at the public defender's office stating that she did not want to press charges against defendant because the charges were not true, and defendant had not kissed her or touched her in sexual way. She testified that the declaration had been true.

Doe testified she was on probation from other juvenile charges and she did not want to get in trouble, so she tried to "pin it" on defendant. Defendant did nothing but drive her to Coachella. He did not engage in any improper conduct with her, grab her arms, try to restrain her, touch her in any inappropriate way, or touch her breasts or pubic area. He did not remove any of her clothing. She stated that her statements to the police had been lies.

Deputy Sheriff Brent Emerson testified that he had arrived to see defendant's car with defendant standing outside near the rear bumper. He could not see the lower portion of defendant's body, but he saw defendant reach down as if he was pulling up his pants. The deputy called defendant to come over, and as defendant approached he was trying to straighten his pants. The deputy then saw a young girl "in a hunched-over position" at the back of defendant's car. The girl started running, and the deputy saw that her shirt was open and her breasts were exposed. She was wearing thong underwear and holding her shorts in her hand, and she did not have shoes on. Deputy Emerson ran after the girl and caught up with her. She was crying and screaming. She said she was 13 years old, and she had been brought there against her will. She said defendant had offered to give her \$100 when he was done with her. The deputy stated he never actually saw defendant refasten his pants.

Following the preliminary hearing, the magistrate found insufficient probable cause, discharged all charges, and struck the priors.

On February 17, 2012, the People filed a felony complaint in the instant case, again charging defendant with a violation of section 288, subdivision (a) with allegations of a serious or violent prior felony conviction (§§ 667, subds. (c), (e)(1), 1170.12, subd. (c)(1)). On October 3, 2012, the preliminary hearing in the instant case took place.

Doe again testified under a grant of immunity. She testified that her date of birth was November 16, 1997. Defendant was her neighbor, and his son was her friend. In the evening of July 18, 2011, when she was 13 years old, she was walking down the street when defendant stopped his car to speak to her. She said she was going to the store and

he offered her a ride. She got into the car. Defendant drove on a “really long road, desert.” They had a friendly conversation, and she thought they were just taking a ride.

At some point, they both got in the back seat and “were kissing and stuff.” They did not say anything to each other. Defendant unbuttoned her shorts and pulled them down and unbuttoned her shirt, but he never touched her bra. They “just continued kissing.” Doe saw the police arrive, and she “panicked and got out and stood up and started like trying to get away”; she thought they were going to try to arrest her. When she was running, her bra, which opened in the front, “snapped open.” An officer caught up with her, and she told him what had just happened with defendant. She was scared, upset, and crying. She testified that defendant had never offered to give her money, and she denied telling the officer that defendant had offered to pay her \$100 when it was over.

She acknowledged that in the first preliminary hearing she had talked about someone named Ivan, but she stated that had been a lie, and there never had been anyone who met her outside the car to sell her marijuana. She made up “Ivan” “to try to get out of this, to try to get out of like feeling responsible for somebody else getting locked up and having to show up in court and everything.” When the incident occurred, she had active criminal cases pending and was nervous about what would happen in those cases when she saw the police. Those cases had involved drugs and theft. She testified that she was currently telling the truth. She was currently in a “rehab program” that the district attorney had agreed to and was paying for.

Deputy Sheriff Emerson testified that on July 18, 2011, he saw a car parked at the end of a dirt road in Coachella. Defendant was standing near the rear bumper, and the deputy saw a girl “hunched over in front of him, facing away from him.” The girl saw him and ran off into the desert. She was wearing “a button-up shirt that was completely open in the front, and her bra was completely open as well[,] exposing her bare breasts.” She was wearing “thong-type underwear,” and she was holding jeans shorts in her hands. She was not wearing shoes. She appeared to be young. Deputy Emerson caught up to the girl, who was scared and crying and said she wanted to go home.

On cross-examination, Deputy Emerson testified that he was familiar with the term “humping,” and that did not appear to be what defendant and the girl had been doing when he drove up. The girl told him that “she had been taken to that location against her will, and [defendant] said he wanted to—I believe he wanted to kiss her or touch her or something, and he told her that if she let him do it to her he would give her a hundred dollars.” She told the deputy that she had asked defendant to take her home, and he “told her he would not take her home until she kissed him.” She said defendant had told her to go to the back of his car, and they began kissing. Defendant took off her shirt and bra while kissing her and pulled her shorts down.

The magistrate found Doe’s testimony not credible and relied instead on the testimony of Deputy Emerson. However, the magistrate also stated he believed Doe that the encounter was consensual. The magistrate further found there was sexual contact. The prosecutor argued that section 288 does not require sexual touching, but “[i]t’s touching of any part of the victim’s body—clothing. It could be touching of her hair. It

could be touching of her arms, anything as long as the intent is a sexual intent.” He argued that it could be inferred from Officer Emerson’s observation’s of Doe’s semi-clad state that “defendant is the person who assisted with undoing her clothing, that touching technically satisfies all the elements of the [section] 288. It’s a touching of her clothes. It doesn’t require touching of her breasts or vagina or any sexual part. It’s any touching so long as it’s coupled with a lewd or lascivious intent.”

Defense counsel responded that no evidence established that a touching of private parts had occurred or indicated what defendant’s intent had been. The magistrate stated he did not believe that Doe’s bra had “unsnapped itself”; rather, either defendant or Doe herself undid her bra. The magistrate found the evidence was insufficient to issue a holding order as to the violation of section 288, subdivision (a). The magistrate instead held defendant to answer on a misdemeanor violation of soliciting lewd conduct in a public place (§ 647, subd. (a)).

Later on October 3, 2012, defendant entered a plea of guilty to the misdemeanor offense. The trial court sentenced him to 36 months of summary probation and 36 days in custody with credit for time served.

On October 12, 2012, before a different judge, the People filed a motion to reinstate the complaint under section 871.5, and defendant filed a motion to block the People’s motion to reinstate, claiming the misdemeanor disorderly conduct judgment barred reinstatement. The trial court denied defendant’s motion, held the taking of the disorderly conduct guilty plea was erroneous, and vacated the guilty plea and judgment;

the trial court also “decline[d]” to hold defendant to answer for lewd conduct (§ 288, subd. (a)), denying the People’s motion to reinstate.⁴

Additional facts are set forth in the discussion of the issues to which they pertain.

III. DISCUSSION

A. Effect of Defendant’s Misdemeanor Plea

We first address defendant’s arguments on his appeal from the order vacating the misdemeanor judgment based on his guilty plea to disorderly conduct. His argument in his appeal provides the necessary foundation for his response to the People’s appeal, because without a valid misdemeanor judgment defendant cannot argue that the proceedings under section 871.5 were barred by principles of res judicata, collateral estoppel, and double jeopardy. The sum of all of these arguments is that defendant’s misdemeanor plea was valid and barred all further criminal proceedings based on the underlying events. We disagree.

First, the magistrate lacked the power to hold defendant to answer on a misdemeanor violation of section 647, subdivision (a). “A magistrate’s powers at a felony preliminary hearing are purely statutory. [Citations.]” (*People v. Superior Court*

⁴ At the close of the hearing, the trial court ruled, “The request under [section] 871.5 is granted in that the People are at liberty to pursue again any charges they think appropriate against the defendant in a timely basis; however, at this juncture, the Court declines to hold [defendant] to answer on a [section] 288[, subdivision] (a).” Similarly, the minute order for the hearing states that the People’s motion was granted. However, the minute order further states, “Motion [b]y the People Regarding motion to hold Defendant to answer is called for hearing. [¶] Motion denied.” It appears that the trial court misspoke to the extent it stated the motion was granted, because the practical effect of the ruling was to deny the People’s motion.

(*Feinstein*) (1994) 29 Cal.App.4th 323, 328-329 (*Feinstein*.) These powers do not extend to reducing a felony charge to a misdemeanor of another offense that is not a lesser included offense of the felony. (*Id.* at pp. 329-330.) Thus, in *Feinstein*, the magistrate could have reduced a felony charge of sexual battery (§ 243.4) to a misdemeanor sexual battery charge—section 243.4 is a “wobbler,” chargeable either as a felony or misdemeanor—but lacked the power to reduce the offense to a different crime, simple battery (§ 242). (*Feinstein, supra*, at p. 330.) Similarly, the magistrate here acted in excess of its power by purporting to reduce the felony charged offense (§ 288, subd. (a)) to a misdemeanor of a different crime (§ 647, subd. (a)). It follows from this conclusion that it was also in excess of the magistrate’s power to accept defendant’s plea of guilty to the misdemeanor offense, so the plea was null and void. (See *People v. Massie* (1998) 19 Cal.4th 550, 564 (*Massie*) [“[A]n unlawful guilty plea is null”].)⁵

We disagree with defendant’s suggestion that *People v. Hensel* (1965) 233 Cal.App.2d 834 (*Hensel*) compels a different conclusion regarding the scope of the magistrate’s power. In *Hensel*, the defendant waived jury trial, and the case was submitted to the trial court for decision based only on the preliminary hearing transcript. (*Id.* at p. 835.) The trial court initially found defendant guilty of the charged offense (former § 288a, oral copulation), but on posttrial motions reduced the offense to a lesser

⁵ We note defendant’s effort to distinguish *Massie* on its facts, but these are distinctions that do not make a difference. We cite to *Massie* not because it is similar to this case on the facts, but because *Massie* recites general principles that are relevant and applicable here.

offense that is not a necessarily included offense of the charged offense (§ 647, subd. (a).) (*Hensel, supra*, at p. 837.) The Court of Appeal affirmed the conviction, treating the reduction in charge as an “informal amendment of the information to include a charge which was supported by the evidence although not in the original information,” and holding the defendant to his decision to “knowingly allow[] the case to proceed to judgment on the information as thus amended.” (*Id.* at p. 840.) Here, however, it was not the trial judge, but rather a magistrate, that acted to reduce the offense. As noted, the magistrate’s powers at a felony preliminary hearing are limited to those explicitly granted by statute, and the power to informally amend the information is not included. (See *Feinstein, supra*, 29 Cal.App.4th at p. 329.)

Second, defendant’s misdemeanor plea was not the product of a “plea bargain,” in the sense of “an agreement negotiated by the People and the defendant and approved by the court.” (*People v. Orin* (1975) 13 Cal.3d 937, 942.) The plea form was not signed by a representative of the People; in the space for the district attorney’s signature, defense counsel wrote “plea to court.” Nor does anything else in the record demonstrate the People affirmatively agreed to a plea bargain. Indeed, defendant’s briefing implicitly concedes as much, suggesting only that the People “acquiesced and participated in” defendant’s guilty plea, not that the defendant and the People entered into an agreement, approval of which the prosecution and defense jointly sought and received from the court. Because defendant’s plea was not the result of a plea bargain, authority he relies on in which a plea bargain is upheld because the plea was to a reasonably related (albeit not a

lesser included offense) to the charged offense is inapposite. (Cf. *People v. West* (1970) 3 Cal.3d 595, 600 [district attorney consented to plea].)

Third, the People adequately preserved their right to seek review of the magistrate's reduction of the charged felony offense. Defendant makes much of the circumstance that the prosecution did not interpose a specific objection when the magistrate issued its decision to hold defendant to answer for a violation of section 647, subdivision (a), but not section 288, subdivision (a). Nor did the prosecution object at defendant's sentencing before the magistrate, later the same day. The prosecution participated in discussions with the magistrate and defense counsel off the record regarding sentencing, and appropriate conditions of probation, in particular. The prosecution also confirmed that it did not "intend to file any additional charges related to the conduct that the Court heard" during the preliminary hearing.

Nevertheless, the People explicitly argued to the magistrate that section 288, subdivision (a) was the appropriate charge for the conduct the court heard during the preliminary hearing. Once the magistrate rejected that position, and effectively dismissed the felony charge by holding defendant to answer on a misdemeanor violation, section 871.5 provides the prosecutor an opportunity to challenge that ruling: a period of 15 days within which to file a motion in the superior court to compel the magistrate to reinstate the complaint on the ground that the magistrate erroneously dismissed the action. (§ 871.5, subs. (a), (b).) Defendant cites no authority, and we are aware of none, holding that to preserve its right to seek review pursuant to section 871.5, the prosecution must specifically raise its objections to the magistrate's ruling not only in its section

871.5 motion, but also in any further proceedings the magistrate may conduct during that 15-day period. Indeed, to hold that the prosecution *could* forfeit the issue of whether the magistrate acted in excess of its powers—whether by acquiescence, or even by actively supporting the magistrate’s ruling—would be in tension, to say the least, with the general principle that jurisdictional arguments cannot be waived. (See *Petty v. Manpower, Inc.* (1979) 94 Cal.App.3d 794, 798-799 [“questions of jurisdiction are never waived and may be raised for the first time on appeal”].)

Defendant’s reliance on *People v. Superior Court (Pipkin)* (1997) 59 Cal.App.4th 1470 (*Pipkin*) for the proposition that the People waived their right to pursue relief under section 871.5 is misplaced. *Pipkin* does not involve proceedings under section 871.5 at all. In *Pipkin*, the trial court, after trial resulted in a hung jury, struck a serious prior felony conviction allegation, after which the defendant entered a plea of no contest. (*Pipkin, supra*, at pp. 1474-1475.) The court then found a prior conviction allegation true, but struck the allegation “in the interest of justice,” and sentenced the defendant to probation. (*Id.* at 1475-1476.) The People sought writs of mandate to reverse the orders striking the enhancement allegations. (*Id.* at p. 1472.) The People included in their petitions arguments that the orders striking the enhancement allegations were the result of improper judicial plea bargaining, which had not been raised “at anytime” in the trial court. (*Id.* at p. 1476, fn. 3.) In a footnote, the court of appeal noted the People had waived any arguments based on improper plea bargaining, but nevertheless concluded the challenged orders must be reversed on another basis. (*Ibid.*; see *id.* at p. 1478 [reversing for violation of standards set out in *People v. Superior Court (Romero)* (1996) 13 Cal.4th

497].) Here, too, the issue of whether defendant's misdemeanor plea was the product of improper plea bargaining is no more than a footnote to the dispositive question of whether the magistrate had the power to reduce the charged offense to the offense to which defendant pleaded guilty. *Pipkin* provides no support for the notion that the People forfeited the opportunity to seek review pursuant to section 871.5 on that more fundamental issue; neither does any other authority cited by defendant, or any other authority of which we are aware.

In short: The magistrate's decision to hold defendant to answer on a misdemeanor violation of section 647, subdivision (a) was unlawful, because it was in excess of the magistrate's statutory powers at a felony preliminary hearing. As such, defendant's plea to the misdemeanor charge was unlawful, and a nullity. (*Massie, supra*, 19 Cal.4th at p. 564.) It therefore could have no preclusive effect with respect to any further proceedings in the case. Nor did the prosecution forfeit its right to seek review pursuant to section 871.5 of the magistrate's ruling effectively dismissing the felony charge of violating section 288, subdivision (a), and holding defendant to answer only for a misdemeanor violation of section 647, subdivision (a). We therefore turn now to the merits of the People's appeal of the trial court's ruling on their section 871.5 motion.

B. Review Under Section 871.5

"A magistrate's function at a felony preliminary hearing is to determine whether or not there is 'sufficient cause' to believe a defendant guilty of the charged offense. [Citations.] The term 'sufficient cause' means "'reasonable and probable cause'" or 'a state of facts as would lead a [person] of ordinary caution or prudence to believe and

conscientiously entertain a strong suspicion of the guilt of the accused.’ [Citations.] In performing this function, the magistrate may ‘weigh the evidence, resolve conflicts, and give or withhold credence to particular witnesses.’ [Citations.] ‘A charge will not be dismissed for lack of probable cause “if there is some rational ground for assuming the possibility that an offense has been committed and the accused is guilty of it.”’

[Citation.]” (*People v. Dawson* (2009) 172 Cal.App.4th 1073, 1087.)

The review procedure under section 871.5⁶ has the same nature as an appeal, including jurisdictional limitations. (*People v. Dethloff* (1992) 9 Cal.App.4th 620, 625.) “In a proceeding under . . . section 871.5 to reinstate a complaint, the superior court sits as a reviewing court and is bound by the magistrate’s findings of fact if they are supported by substantial evidence. [Citation.]’ [Citation.] The only ground for a motion for reinstatement of a complaint is that ‘as a matter of law, the magistrate erroneously dismissed the action or a portion thereof.’ [Citation.]” (*People v. Nottoli* (2011) 199 Cal.App.4th 531, 544.) “[I]f the magistrate dismisses a charge when the evidence provides a rational ground for believing that defendant is guilty of the offense, his ruling is erroneous *as a matter of law*, and will not be sustained by the reviewing court.”

⁶ Section 871.5 provides:

“(a) When an action is dismissed by a magistrate pursuant to [listed statutory provisions] . . . the prosecutor may make a motion in the superior court within 15 days to compel the magistrate to reinstate the complaint or a portion thereof and to reinstate the custodial status of the defendant under the same terms and conditions as when the defendant last appeared before the magistrate.

“(b) Notice of the motion shall be made to the defendant and the magistrate. The only ground for the motion shall be that, as a matter of law, the magistrate erroneously dismissed the action or a portion thereof.” (§ 871.5, subds. (a), (b).)

(*People v. Slaughter* (1984) 35 Cal.3d 629, 639-640.) A magistrate’s order purporting to reduce a charge from a felony to a misdemeanor is properly treated as a dismissal of the felony charge and subject to review pursuant to section 871.5. (*Feinstein, supra*, 29 Cal.App.4th at p. 331.)

On appeal from an order denying a motion to reinstate a criminal complaint, we disregard the trial court’s ruling and directly examine the magistrate’s ruling to determine if the dismissal of the complaint was erroneous as a matter of law. (*People v. Love* (2005) 132 Cal.App.4th 276, 282.) To the extent the magistrate’s decision to dismiss a complaint rests on factual findings, this court must draw every legitimate inference in favor of the magistrate’s ruling. We cannot substitute our judgment on the credibility or weight of the evidence for that of the magistrate. (*People v. Massey* (2000) 79 Cal.App.4th 204, 211.)

C. Elements of Violation of Section 288, Subdivision (a)

Section 288, subdivision (a) establishes felony punishment for “any person who willfully and lewdly commits any lewd or lascivious act . . . upon or with the body, or any part or member thereof, of a child who is under the age of 14 years, with the intent of arousing, appealing to, or gratifying the lust, passions, or sexual desires of that person or the child” In *People v. Martinez* (1995) 11 Cal.4th 434, 452, the court held that “section 288 is violated by ‘any touching’ of an underage child accomplished with the intent of arousing the sexual desires of either the perpetrator or the child.” The defendant’s intent may be inferred from all the circumstances. (*Ibid.*)

The defendant need not touch the victim to violate section 288. Thus, in *People v. Austin* (1980) 111 Cal.App.3d 110 (*Austin*), the court held that when the defendant compelled the child victim to remove her own pants while he watched, he was guilty of violating section 288, subdivision (a) even though he did not himself touch the child. (*Austin, supra*, at pp. 114-115.) More recently, in *People v. Lopez* (2010) 185 Cal.App.4th 1220, 1231 [Fourth Dist., Div. Two] (*Lopez*), the court stated that “[A] “lewd or lascivious act” is defined expansively to include contact “upon or with the [victim’s] body, or any part or member thereof.” (§ 288, subd. (a).) Nothing in this language restricts the manner in which such contact can occur or requires that specific or intimate body parts be touched. Rather, a touching of “any part” of the victim’s body is specifically prohibited.’ [Citation.] This definition would encompass any touching committed while a victim disrobed or changed his or her clothes.”

The People contend the magistrate’s statements on the record constitute findings of fact, whereas defendant asserts those statements were merely “musings” that do not constitute findings. (See, e.g., *People v. Bishop* (1993) 14 Cal.App.4th 203, 214.) The magistrate stated he did not see “any other rational explanation but that there was sexual contact between” Doe and defendant. The magistrate found that either defendant had undone Doe’s bra or that Doe had done so herself. Although defendant argues the magistrate did not find the intent required for a violation of section 288, subdivision (a), the circumstances of the incident amply provide a rational basis for believing defendant was guilty of the offense. Based on *Austin* and *Lopez*, the evidence was sufficient to hold

defendant to answer on a charge of violating section 288, subdivision (a). The superior court therefore erred in denying the People's petition under section 871.5.

IV. DISPOSITION

The superior court's order denying the People's motion under section 871.5 is reversed.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

HOLLENHORST

Acting P. J.

We concur:

MCKINSTER

J.

CODRINGTON

J.