

**NOT TO BE PUBLISHED IN OFFICIAL REPORTS**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 This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.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 Respondent,

v.

EDWARD LORENZO MILLER, JR.,

Defendant and Appellant.

E059057

(Super.Ct.No. RIF145937)

OPINION

APPEAL from the Superior Court of Riverside County. Elisabeth Sichel, Judge.

Affirmed.

Barbara A. Smith, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Julie L. Garland, Assistant Attorney General, Anthony DaSilva and Peter Quon, Jr., Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted Edward Miller, Jr., defendant, of sexual penetration of a minor. (Pen. Code, § 288.7, subd. (b).)<sup>12</sup> In bifurcated proceedings, defendant admitted having suffered a prior conviction for which he served a prison sentence. (§ 667.5, subd. (b).) He was sentenced to prison for fifteen years to life plus one year and appeals, claiming evidence was erroneously admitted and because he did not waive preparation of a probation report, the matter should be remanded for preparation of one and resentencing. We reject his contentions and affirm.

### FACTS

Either six weeks or three to four months before September 18, 2008,<sup>3</sup> the victim and her four sisters and her brother, along with their mother, moved into the home of the mother's aunt and the aunt's husband, who was defendant. The children's great-aunt and defendant slept in one bedroom of the home and their mother slept in another. The children slept in the living room. The children got along well with defendant before September 18, 2009 and they had daily contact with him. Defendant was on parole at the time and appeared not to have a job that would take him away from the home for hours on end.

---

<sup>1</sup> All further statutory references are to the Penal Code unless otherwise indicated.

<sup>2</sup> This court has taken judicial notice of the file in this case.

<sup>3</sup> The children's great-aunt testified that it was six weeks. The victim's sister testified that it was three or four months.

The victim, who was six years old at the time of the crime, testified that she and her brother were lying on the living room floor next to each other the night of the crime when defendant entered the dark room (and the television was not on), picked up the victim and carried her into his bedroom. Once they were in his room, defendant removed the victim's pajama bottoms and underpants and used his finger to touch her genitals. He moved his finger around on her genitals and put his fingers inside her vagina. He put his penis on her genitals. It hurt a little bit. He put her pants and pajama bottoms back on, but did so incorrectly, and returned her to the living room. The next morning, she told her then 15-year-old sister about the incident, when her sister noticed the victim trying to adjust her underwear (the victim had one leg through both leg openings of her underwear). Then, the victim told her mother, who took the underwear. She denied that her mother had had a male guest over that night.

During a Riverside Child Assessment Team (RCAT) interview, a DVD of which was played for the jury, the victim said that defendant had taken her from the room where she was lying next to her brother, who saw what was happening, carried her into his room and put her on his bed on her back. The television had not been on in the room where the victim had been with her brother. There, defendant removed her pants and underpants, licked his fingers and rubbed her vagina with them. He then laid on her stomach and put his penis on her genitals. He moved his penis up and down and it hurt. A light or lights were on in defendant's room and the victim saw his face. Defendant stopped when the victim's mother came out of her bedroom to use the bathroom. Defendant put the victim's underpants and pajama bottoms back on her. He carried her back into the living

room, while her brother watched. When she awoke the next morning, the victim noticed that her underwear and pajama pants were twisted because defendant had put them back on her too fast. She told her sister what had happened, then her mother.

The victim's 15-year-old sister testified that their great-aunt was not there, but at work, the night of the crime. The children's mother's boyfriend was also not there, as they had had an argument two days before and he had left. No one broke into the home that night and the sister saw no other man there that night. The sister noticed that the victim's pants were tangled when she saw her in the bathroom the morning after the crime, which was a Monday or a Tuesday. The victim told her sister that defendant had touched her. The sister saw a reddish brown stain on the victim's underwear. She called her mother into the bathroom, and the mother examined the victim's genitals and put her underwear into a purse. That morning, the mother told the sister that she and her siblings should stay away from defendant. The sister told a detective that her mother had a new boyfriend, to whom she had been introduced a week before the crime. She could not recall telling this detective that the new boyfriend had come over to their home around midnight on the nights of Monday, September 15 and Tuesday, September 16, leaving the following mornings. However, she testified that he would come around 11:00 p.m. or midnight both nights, then leave around 1:00 a.m., entering and leaving through the mother's bedroom door that went into the backyard, but he would never spend the night. He was there the night of the crime, but only for one-to-two hours and she heard the screen door of her mother's bedroom door to the outside close loudly at 1:00 a.m. or 1:30 a.m. He did not resemble defendant.

The victim's brother was 11 years 8 months after the crime. He testified that the night of the crime, defendant entered the living room where he and the victim were lying next to each other and picked up the victim and carried her to his room. Although the lights and the television in the living room were off, he was 100 percent sure it was defendant. None of his mother's three boyfriends were at the home that night. He did not recall hearing anyone come in his mother's bedroom through the door to the outside that night.

The children's great-aunt testified that she had been away from the home for eight days and nights preceding the crime, working as an around-the-clock healthcare provider to the elderly.<sup>4</sup> The children's mother had been in prison since six months before trial and the children lived with the great-aunt. The great-aunt had petitioned for a dissolution of her marriage to defendant, which was to become final the following month. She said her nieces and nephew did not lie and she had not coached them in what to say about the crimes.

A male senior criminalist from the Department of Justice with 19-20 years of experience testified that a female senior criminalist at the lab in Richmond, California, that does DNA analysis, authored a report in which the latter concluded that sperm found on the victim's genitals matched defendant's DNA and the likelihood that another person would have defendant's DNA profile is one in 35 quadrillion blacks, one in 5.5 quadrillion Caucasians and one in 200 quadrillion Hispanics, which greatly exceeds the

---

<sup>4</sup> Defendant confirmed this.

number of people who inhabit the earth.<sup>5</sup> He said the report also concluded that sperm found on the victim's underpants could not be excluded as having DNA matching the defendant's, which was not as strong an indicator as the sperm found on her genitals.

Additionally, the male criminalist testified that he can independently look at the DNA typing information that is in reports and make a conclusion as to whether or not the DNA matches. He said he did this in this case and came independently to the same conclusions the female criminalist had made—in fact, he concluded that the likelihood of someone else having defendant's DNA was one in a number greater than the number of people who had *ever* lived. He did not review the author's notes, or the electronic data from the genetic analyzer, but he relied on the accuracy of the report and reviewed it.

The criminalist was unable to say when the sperm was deposited on the victim's genitals and her panties. If not disturbed, a sperm cell can last for years on a pair of panties.

The defendant testified as the only substantive witness for the defense. To be frank, his testimony was fraught with holes. He denied that he had molested the victim. He claimed that for one month preceding the crime, the victim's mother was prostituting herself and using drugs in his home and because he was on parole, he needed to distance himself from her illegal activities. Consequently, he spent the night of Tuesday, September 16 and Wednesday, September 17 at the home of what he described as "a ho and a crackhead," not returning home until 5:00 or 6:00 a.m. He did not explain how

---

<sup>5</sup> He said that number was six billion.

spending time with this woman was different, in terms of the continuation of his parole, from being in a house with the victim's mother, who, according to him, was doing the same things his friend was doing. He also testified that despite his disapproval of what the victim's mother was doing, he had sex with her on Monday, September 15 and, thereafter, told her that if she did not stop her illegal actions or take them elsewhere, he would kick her out of the house as she was jeopardizing his parole. He also did not explain how his admitted use of marijuana during this time did not jeopardize his parole while the victim's mother's alleged activities did. He said the victim's mother responded to his threat by telling him that she was going to get him out of the house, which belonged to her aunt, not him. Defendant asserted that the victim's mother conspired with her children and his wife to frame him for the molestation in order to get him out of the house, and she planted his sperm, which she obtained from a condom he had used when he had sex with her, on her daughter's genitals. He claimed that the victim and her siblings were petrified of their mother, and lied at trial under her direction, despite the fact that she been in prison for six months at the time of trial. Ironically, he admitted that he had been accused of touching the vagina of an eight year old girl in 2007. However, he claimed that he had also been framed in this incident and the victim's mother had once again been involved in it because he had threatened to turn her in. He asserted that the victim's mother and others had been involved in a child care fraud ring, they had recruited him to join it, he had refused because he was on parole at this time also and they retaliated, first by claiming he had stolen money from a female member of the ring, then by framing him for molesting the stepdaughter of another member. Curiously, defendant

testified that this victim had, indeed, been molested, but not by him. He did not explain how he could have known that she had been molested. Nor did he explain why the ring could not just have accused him of stealing the money as a way of getting his parole revoked, rather than resorting to the story of the molestation. He testified that the victim's mother was aware that defendant's parole had been revoked in 2007 due to that molestation accusation, so she knew that framing him again for the same thing was a sure way to get rid of him.

### **ISSUE AND DISCUSSION**

#### *1. Admission of Evidence of DNA Found on the Victim's Panties*

Defendant claims that he made a foundational objection at trial to the admission of evidence concerning the DNA that was found on the victim's panties. He is mistaken. While the male criminalist was testifying, a side bench occurred during which the trial court said, "[T]here's at least two separate levels of . . . reliability that's inherent in th[e] DNA analysis [of the sperm found on the victim's genitals and in her panties]. One is, was it collected and handled in a . . . reliable fashion so that the analysis that resulted is definitely the analysis of the people it reports to be. [¶] And then . . . you have the issue of how statistically significant the results are. [¶] It seems like [defense counsel] is objecting to the first part of this [by objecting to the prosecutor's question whether the procedures used by the female criminalist, as to the accuracy of the match, were above and beyond those normally used]. [¶] And [the prosecutor is] eliciting questions about the second part as far as I can tell. [¶] And so I think [that] what [the prosecutor is] trying to ask is, ['Is it definitely the defendant, and, if so, why?'] to which the

prosecutor agreed. Defense counsel confirmed that he was objecting because the person who collected the data on the sperm and ran the analysis of it, i.e., the female criminalist, was not present to testify. The trial court told defense counsel that that issue had already been determined in the prosecutor's favor. After the trial court confirmed that the test result on the sperm found on the panties concluded only that defendant could not be excluded as a contributor of it, the court directed the prosecutor to ask his questions of the male criminalist "somewhat differently" than what he was then doing, but the court offered no further guidance in this regard. Defense counsel then said, which is the statement to which defendant now calls our attention, "And there's an objection I have—I haven't really raised yet—but to this in general, there's been no chain of custody evidence showing *that this has anything to do with my client*. The trial court agreed that "[w]e haven't elicited the testimony yet as to whom the samples were taken [from] and so forth and until we do, you're right. When the prosecutor resumed his examination of the male criminalist, he asked the latter whether the female criminalist analyzed a DNA exemplar from the victim. The trial court overruled defense counsel's foundational objection. Before the male criminalist had a chance to answer the question, the prosecutor asked him if the female criminalist also analyzed a DNA exemplar from the defendant. Defense counsel objected on the basis of foundation, which the trial court overruled, and counsel raised a continuing objection on that basis. Therefore, contrary to defendant's current claim, defense counsel below did not object to the chain of custody concerning the sperm found on the victim's panties, but to the chain of custody of the DNA exemplars from the victim and from defendant.

Defendant here claims that if his trial attorney did not object to evidence concerning the sperm found on the victim's panties on the basis that the chain of custody of it had not been established, he was incompetent. In so doing, defendant makes a series of assumptions and interpretations that are not supported by the record. The victim's sister testified that the victim's mother put the victim's panties into a purse and the sister identified a particular exhibit at trial as those panties. A police officer testified that on September 18,<sup>6</sup> he took the purse from the mother, put it in a paper bag and locked it in the trunk of his patrol car. Around 9:00 a.m. the same day, he contacted defendant, who was asleep in the apartment, detained him, and put the bag containing the purse in defendant's bedroom. He left, leaving another officer to guard the room.<sup>7</sup> A forensic technician testified that on September 18, after she photographed the apartment, she took

---

<sup>6</sup> The victim's sister testified that later on the day of the bathroom incident, a police officer pulled her out of class at school and she talked to him, then she talked to a female "investigator." Although there was no evidence that the victim's mother, or anyone else, had reported the molestation to the police, something had to have prompted the police officer to go to the sister's school and speak to her. The officer who took the purse from the victim's mother testified that he had been dispatched to the victim's home on September 18 and he contacted the defendant there around 9:00 a.m. Presumably, the police would not have waited a day or more to go to the victim's home concerning the molestation. The victim's brother testified that he thought the crime had occurred on Tuesday, September 16, and he had spoken to the police the next morning. A female detective who interviewed the sister testified that the interview occurred in the late morning of Thursday, September 18 and the sister reported to her that the bathroom incident had occurred on Wednesday, September 17. If this detective was the female "investigator" the sister testified about, there is a conflict between the sister's timeline and the detective's.

<sup>7</sup> Defendant ignores this in claiming that the paper bag and its contents were "apparently unattended" in defendant's bedroom before the forensic technician took them to the police station.

the brown bag to the forensic lab at the police station. There, she took the panties out of the purse, put them on a piece of butcher paper, photographed them and repackaged them in paper. She did the same with the pajama bottoms that were in the purse. She then turned the items into the property unit to be booked into evidence. The forensic technician responded affirmatively to the prosecutor's question, "Was this black purse with apparently a plastic bag in the brown paper bag?" From this, defendant jumps to the conclusion that the victim's mother had handled the panties after receiving them from the victim by putting them inside the plastic bag. The record does not support such an assumption, as it does not describe whether the plastic bag encased the purse or the panties. Defendant here asserts that there were "huge gaps" in the chain of custody of the panties, but the only one revealed by the evidence was whatever happened to them while they were in the mother's custody.<sup>8</sup> Defendant cites no authority holding that he could have been successful in having all evidence concerning the panties excluded from trial on the basis that the mother somehow mishandled or contaminated the panties while they were in her custody. We are confident that the trial court, if presented with such an argument, would have ruled that this went to weight, not admissibility. (See *People v. Williams* (1989) 48 Cal.3d 1112, 1134.) Although defendant claimed that the mother, who did not testify at trial, put his sperm on the victim's genitals in an effort to frame him

---

<sup>8</sup> We do not agree with defendant that the period during which the purse and its contents were in defendant's bedroom was such a gap. We cannot fathom defendant being left alone in the bedroom once he was accosted there by the arresting officer. Moreover, what motive would he have to do anything to the panties that would end up incriminating him?

for the crime, if the jury believed this, it would have also inferred that the mother put his sperm on the panties as well.

There simply is insufficient evidence in the record before this court for us to accept defendant's other argument that the manner in which the panties were handled allowed for contamination by the environment. Aside from there being no evidence to factually support such a claim, there was no expert testimony about how such contamination would occur.<sup>9</sup>

More importantly, defendant cannot possibly carry his heavy burden of showing a reasonable probability that he would have enjoyed a better outcome had he been successful in having the evidence of the sperm on the victim's panties excluded. (see *Strickland v. Washington* (1984) 466 U.S. 668.) As we said in our previous opinion, when discussing this trial apart from *any* of the expert testimony about the sperm on the victim's panties and on her genitals, "It is rare to see a molestation case of a young child in which the evidence of guilt is stronger than that here. All three children—the victim, her 15-year-old sister and her 11-year-old brother testified consistently as to what occurred that night and that it was defendant, and no one else, who took the victim into his bedroom. The victim's RCAT interview was entirely consistent with her trial testimony and neither she nor her siblings were impeached with contradictory pretrial statements about the important events surrounding the crimes. . . . [D]efendant's testimony, unlike that of the prosecution witnesses, defied belief." (*People v. Miller*,

---

<sup>9</sup> See footnote 11, *post*, page 13.

E049206, filed 8/20/10, p. 18.) Additionally, the DNA expert's testimony about the sperm found on the victim's genitals was much stronger inculpatory evidence than the evidence about the sperm found on the panties.<sup>10</sup> Even had the jury heard nothing about the panties, we are absolutely convinced it would have found defendant guilty.

## 2. *Waiver of Probation Report*

After the jury returned its verdict, defense counsel agreed to schedule sentencing and the trial on the prior allegation for the same day. Counsel also agreed that defendant was not eligible for probation. The trial court stated its belief that if defendant was eligible for probation, the court would have to order a probation report prepared, but if he is not, such an order is not required. However, the court said it would order one for calculation of credits. The court said it was going to order a probation report and defense counsel said, "Just on the c[redit for] t[ime] s[erved] calculation; right?" to which the court answered, "That's essentially what it would be and [to] make sure that he's statutorily [ineligible] for probation." Defense counsel asked that the probation officer who would be interviewing defendant for the report be told not to ask defendant about the crime if defendant is ineligible for probation. The court said defendant should tell the probation officer that he doesn't want to discuss the case with him or her. The court set

---

<sup>10</sup> Defendant suggests that even the sperm found on the victim's genitals could have been caused by her having her laundry washed with defendant's or by her coming in contact with something in the house which he had ejaculated on or touched with his hand containing his ejaculate. However, as with defendant's contention that it was possible that the sperm on the victim's panties resulted from contamination, the record offers no support whatsoever for this. The fact that defense counsel argued it to the jury as a possible alternative to his client's highly doubtful defense does not make it so.

the date for sentencing and the trial of the prior allegation and “refer[ed] it to probation for a c[redit for] t[ime] s[erved] calculation and just to make sure that he’s statutorily ineligible for probation.” The clerk asked the court if it was ordering a 288 report.<sup>11</sup> The court replied that if defendant is statutorily ineligible for probation, one was not needed. Thereafter, defendant submitted a motion for a new trial, which was granted by the trial court. The same day, a probation report addressing only defendant’s credits and confirming that he was ineligible for probation was filed. However, the reason stated in the probation report for defendant’s assumed ineligibility for probation was incorrect.<sup>12</sup> The People appealed the granting of the new trial and we reversed the trial court’s order.

By the time proceedings resumed in the trial court, almost four years had passed since the above-mentioned exchange between the trial court and defense counsel. Defendant was then represented by a different attorney. Defense counsel requested a one

---

<sup>11</sup> It is apparent the clerk was referring to section 288.1, which provides, “Any person convicted of committing any lewd or lascivious act including any of the acts constituting other crimes provided for in Part 1 of this code upon or with the body, or any part or member thereof, of a child under the age of 14 years shall not have his or her sentence suspended until the court obtains a report from a reputable psychiatrist, from a reputable psychologist who meets the standards set forth in Section 1027, as to the mental condition of that person.”

<sup>12</sup> The probation report stated that defendant was ineligible under section 1203.065, subdivision (a)’s provision prohibiting probation when a defendant “engage[s] in . . . sexual penetration against the victim’s will by means of force, violence, duress, menace or fear of bodily injury . . . .” However, defendant was convicted of a violation of section 288.7, which was not, at the time of the commission of his offense, listed in 1203.065 (it was added, effective January 1, 2009), and which was, at the time of the offense, defined, in pertinent part, as “engag[ing] in . . . sexual penetration . . . with a child who is ten years of age or younger[.]” A forcible act is not required for a violation of section 288.7.

week continuance for sentencing and the trial of the prior allegation so defendant could visit his mother. After granting it, the trial court said, “I wanted to ask if we could just waive a probation report because . . . the sentencing is what it is. I would perhaps request a credit calculation.” Defense counsel replied, “I think that’s already been done. I have a credit memorandum from probation for July 24, 2009 [(the aforementioned probation report)]. I have also spoken to [the prosecutor] and we’re just going to add the additional time onto that.”

On the day scheduled for trial of the prior allegation and sentencing, the attorney specially appearing for defendant’s attorney said defendant was waiving his right to the former and admitting the prior. The trial court then asked if there was any cause why sentencing could not go forward. Defendant’s attorney said there was no legal cause and she submitted the matter. She waived arraignment on behalf of defendant. The court noted that defendant was ineligible for probation “either entirely or . . . unless it’s an unusual case, and the [c]ourt does not find this to be an unusual case . . . .” The court then sentenced defendant. The trial court then asked if there was anything further and defense counsel said no.

Defendant here contends that he did not waive a probation report and the matter should be remanded so one can be prepared. First, not only the trial court, but both parties, were under the mistaken notion that defendant was ineligible for probation. As the People correctly state, “the applicable statutory restriction to a grant of probation for a person convicted of violating section 288.7 was . . . section 288.1” which states that such a defendant may not be granted probation until the court obtains a report from a

psychiatrist or a psychologist as to the defendant's mental condition. The People wish us to view this as rendering defendant ineligible for probation, but they cite no authority so holding and we are not persuaded. Section 288.1 merely states that if the trial court is considering granting probation, it must order a psychiatric or psychological report before doing so. If, as the People assert, defendant is ineligible for probation, 288.1 does not even come into play. There were *no other* restrictions on the granting of probation to a defendant convicted of violating section 288.7, where the crime was committed, as here, before January 1, 2009.<sup>13</sup> Therefore, the sentencing options facing the trial court were a grant of probation or the mandatory 15-years-to-life term. Thus, the People's reliance on cases holding that a probation report is discretionary where a defendant is ineligible for probation or section 1203's requirement of a preparation of a probation report applies to those eligible for probation, but not to this defendant, is misplaced.

The People assert that because section 288.7 sets forth the mandatory punishment of 15 years to life, preparation of a probation report was not necessary, citing *People v. Dobbins* (2005) 127 Cal.App.4th 176, 180 (*Dobbins*) and *People v. Tatlis* (1991) 230 Cal.App.3d 1266, 1272, 1273 (*Tatlis*). However, neither case supports their assertion.

In *Dobbins*, the defendant was sentenced, but execution of the sentence was suspended and he was placed on probation. (*Dobbins, supra*, 127 Cal.App.4th at p. 178.) Eight months later, his probation was revoked and the original sentence was imposed without an updated probation report having been prepared. (*Id.* at p. 180.) The appellate

---

<sup>13</sup> See footnote 12, *ante*, page 14.

court noted cases holding that a probation report is not necessarily required if a defendant is statutorily ineligible for probation, but found them inapplicable because the defendant could have been given a second grant of probation. (*Ibid.*) The appellate court noted that California Rules of Court, rule 4.41(c) provided that the trial court shall order a supplemental probation report for sentencing proceedings that occur a significant period of time after the original report was prepared. (*Id.* at p. 180.) It concluded that eight months was a significant period, therefore, the trial court's failure to order a supplement report was error. (*Id.* at p. 181.) In response to the People's assertion that the defendant's failure below to request a supplemental probation report waived the matter, the appellate court pointed to section 1203's requirement that preparation of a report or its consideration by the sentencing court may be waived only by a written stipulation of both attorneys filed with the trial court, to which it must consent, or an oral stipulation in open court that is recorded in the court minutes, to which the court must consent. The appellate court concluded that to view defendant's silence below as forfeiture would circumvent the clear intent of section 1203. As is apparent, *Dobbins* does not support the People's position.

In *Tatlis*, the defendant was originally sentenced in 1987, but the appellate court reversed his sentence. (*Tatlis, supra*, 230 Cal.App.3d at pp. 1268-1269.) During a 1990 resentencing, the trial court denied the defendant's request for an updated sentencing report, including information about the interim period, which he spent in prison. The appellate court held that just because the defendant was statutorily ineligible for probation did not mean that the trial court should not have ordered an updated probation

report, as the information in the report would have assisted the trial court in structuring defendant's sentence, i.e., in doing more than deciding between probation and the term prescribed by law. (*Id.* at pp. 1270-1271.) The appellate court noted that there was no statutory requirement that a trial court obtain a probation report except when the defendant is eligible for probation and that such an act was discretionary where the defendant was statutorily ineligible for probation. (*Id.* at pp. 1272-1273.) The appellate court concluded that the trial court had abused its discretion in rejecting the defendant's request for an updated probation report and it pointed to circumstances such a report might have uncovered that would affect how the defendant's sentence should be structured. (*Id.* at p. 1274.) Here, in contrast, the only decision facing the trial court was between probation and the 15-years-to-life term set forth by section 288.7.

We now turn to the issue presented by defendant, i.e., whether he waived preparation of a report. The People concede that when a defendant is eligible for probation, preparation of a probation report may be waived only expressly and on the record under the provisions of section 1203, subdivision (b)(4).<sup>14</sup> Although they assert that section 288.1's requirement of a psychiatric or psychological report before probation is granted rendered defendant ineligible for probation, we had already rejected this interpretation of the statute.

---

<sup>14</sup> That subdivision provides, "The preparation of the report or the consideration of the report by the court may be waived only by a written stipulation of the prosecuting and defense attorneys that is filed with the court or an oral stipulation in open court that is made and entered upon the minutes of the court, except that . . . a waiver shall not be allowed unless the court consents thereto." (§ 1203, subd. (b)(4).)

Thus, we turn to the issue of prejudice due to the trial court's failure to order the preparation of a probation report. Reversal is not required unless there is a reasonable probability of a result more favorable to defendant had a report been authored. (*Dobbins, supra*, 127 Cal.App.4th at p. 182.) Apparently, defendant concedes, sub silentio, that there is little chance that he would have been granted probation, in that he asserts only that the trial court retained discretion to dismiss his prison prior. Given the sentencing court's remarks, after having presided over this trial, that this was not an unusual case, we are not persuaded that the trial court would have dismissed defendant's prison prior in the event that a probation report would have revealed that he had been a model prisoner. To the extent defendant also suggests that perhaps there was a miscalculation as to his presentence credits, there are means less disruptive to the process to correct this than preparation of a probation report and resentencing.

**DISPOSITION**

The judgment is affirmed.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

RAMIREZ  
P. J.

We concur:

HOLLENHORST  
J.

McKINSTER  
J.