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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. WILLIE EARL BUTLER, Defendant and Appellant.	F036844 (Super. Ct. No. 00CM1453) **O P I N I O N**

APPEAL from a judgment of the Superior Court of Kings County. Lynn C. Atkinson, Judge.

Ann Hopkins, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Acting Chief Assistant Attorney General, Mary Jo Graves, Acting Senior Assistant Attorney General, Michael J. Weinberger and Ruth M. Saavedra, Deputy Attorneys General, for Plaintiff and Respondent.

Appellant, Willie Earl Butler, was convicted of lewd and lascivious acts with a minor under the age of 14 (Pen. Code,[1] 288, subd. (a)), sexual battery (§ 243.4, subd. (d)), and attempted sexual penetration (§§ 664/289, subd. (i)). The trial court sentenced appellant to a total term of eight years and four months and ordered that he submit to AIDS testing pursuant to section 1202.1.

On appeal, appellant contends that his conviction for attempted sexual penetration must be reversed because the charge was barred by the statute of limitations. In addition, he claims that the trial court erred in instructing the jury with CALJIC Nos. 2.50.01 and 17.41.1. We find these claims without merit. Appellant further contends that the trial court improperly sentenced him to a one-year term for his sexual battery conviction, and that the trial court's imposition of an AIDS test was unauthorized. We agree with these claims and will modify appellant's sentence accordingly.

FACTS

Appellant's convictions stem from three separate incidents involving three separate victims. We will briefly relay the facts as they relate to each count.

Count One

Thirteen-year-old Cynthia B. was visiting a friend of her mother, John Shoyer, when appellant arrived at the house. Cynthia went home, but later returned to Shoyer's house after her father left for work. On the way to Shoyer's house, Cynthia saw appellant walking around and he accompanied her to the house. When they arrived at the house, Cynthia began watching television while appellant and Shoyer talked.

At some point, appellant began to whisper in Cynthia's ear, but she was unable to hear what he said. He told her to follow him to the bathroom and she complied, thinking he was going to tell her something. Once in the bathroom, appellant began fondling her

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[1] All further references are to the Penal Code unless otherwise indicated.

vagina. Cynthia was frightened and told appellant to stop, but he persisted and began touching her breasts. Appellant asked her if he could "suck on her titties" and she replied that he could not. Appellant stated that he would not force her and left the bathroom.

When Cynthia returned to the living room, Shoyer asked Cynthia if appellant had touched her. She said he had. After appellant left, Shoyer and Cynthia went to a neighbor's house and called the police.

Count Two

Appellant lived with his mother and his 20-year-old niece, Alfenna, at his mother's house. Alfenna slept on a sofa bed in the den next to the room in which appellant slept. One night Alfenna slept in her clothes with her two young children beside her. She awoke when she felt appellant's hand in her pants, and his fingers "messing" with her. She immediately began screaming and appellant ran to the doorway. Her grandmother came into the room and she told her what had happened.

Appellant told his mother that Alfenna was lying and that she must have been dreaming about him. He said that he had just been coming from the bathroom. Alfenna gathered her things and left the house. She reported the incident to the police the next day.

Count Three

Courtney K., another of appellant's nieces, recounted incidents that took place approximately 10 years prior to trial. When Courtney was 13 years old, she was living with her grandmother and appellant at her grandmother's house. One night while she was living there, she recalled waking up to find appellant rubbing her buttocks. She asked him what he was doing and he said that he was making sure she did not wet the bed. He then pulled her panties back up over her buttocks and left the room when Courtney's aunt knocked on the bedroom door. Courtney told her grandmother about the incident the following day.

Courtney went on to relay additional incidents where she was awakened by appellant touching her. She stated that she would yell or tell appellant to get away from her, and that her grandmother would come into the room, she would be called a liar and would be told to go back to sleep.

Regarding the charged incident, she noted that it occurred when she was 14 years old. She had been asleep and was awakened when she felt appellant pushing his finger into her anus. She called him a "sick bastard" and ordered him to leave the room. Appellant stated he was sorry and left.

Courtney's grandmother denied that Courtney had ever reported any touching incidents to her. She did state that Courtney had told her about an incident where appellant had peeked at her underneath the door.

In addition to the evidence relating to the charged counts, the prosecution was permitted to introduce evidence relating to appellant's prior sexual misconduct pursuant to Evidence Code section 1108. Jean J., Alfenna's and Courtney's sister, stated that one night when she was 17 she was awakened by appellant fondling her vagina over her clothing. She was very frightened by the incident and immediately left.

As a result of this incident, appellant's mother took appellant to "mental health" because he needed help. Appellant's mother forced appellant to move out of the house; however, she allowed him to move back in when he had no other place to stay. Appellant promised that he would not behave in such a manner anymore.

Defense Case

Appellant denied the allegations against him. Regarding Cynthia, he stated that she was lying to cover up for Shoyer. He claimed that Cynthia said she was Shoyer's girlfriend. Appellant also stated that Shoyer was naked when they were watching television, with only a little towel covering him up.

Appellant admitted going into the bathroom with Cynthia, but he claims that he asked her if she was having sex with Shoyer. Although she denied the accusation, she would not look him in the eye. When they left the bathroom, appellant went into the kitchen to get some water. When he returned, Shoyer accused him of touching Cynthia and ordered him to leave. He complied. He denied ever touching Cynthia.

Regarding the incident with Alfenna, appellant claimed that he tripped on a coffee table on his way to the bathroom and fell, with his hand inadvertently landing between Alfenna's legs.

Regarding the incident with Courtney, he claimed that he never touched her inappropriately, and claimed that she was covering for her grandmother's husband who was actually molesting her.

Appellant admitted to touching Jean. He said he could not explain why he did it. He felt like he was sick.

DISCUSSION

I. Appellant forfeited his right to a statute of limitations defense.

Appellant contends his conviction for attempted sexual penetration must be reversed because the crime was barred by the statute of limitations. Appellant was originally charged with committing lewd and lascivious acts with a minor (Courtney) under the age of 14. (§ 288, subd. (a).) The complaint, which was filed on June 26, 2000, alleged that the crime took place in 1990, four years after the statute of limitations[2] had run. The prosecution failed to allege any facts tolling the limitations period. In a trial brief filed the on the first day of trial, the prosecutor argued the charges were timely filed under the tolling provisions of section 803, subdivision (g). After the close of evidence, the prosecutor moved to amend the charge to one count of sexual penetration.

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[2] The statute of limitations for a violation of section 288 is six years. (§ 800.)

(§ 289, subd. (i).) This was based on evidence that Courtney was 14 years old at the time of the incident. The trial court subsequently instructed the jury, on the prosecutor's request, with the crime of sexual penetration, and the lesser included offense of attempted sexual penetration. Appellant did not object to the instructions. The jury ultimately convicted appellant of the lesser offense of attempted sexual penetration.

On appeal, appellant claims that the pleading was defective regarding the charged offense and further claims that his right to raise the statute of limitations regarding the lesser offense was not forfeited for failing to raise it in the trial court. We disagree with appellant and find he has forfeited any claim regarding the statute of limitations in this case.

In 1934, our Supreme Court was presented with the question of whether the statute of limitations was jurisdictional in nature or whether it was better characterized as an affirmative defense. (*People v. McGee* (1934) 1 Cal.2d 611, 612.) The court held that it was jurisdictional and explained that an "indictment or information which shows on its face that the prosecution is barred by limitations fails to state a public offense." (*Id*. at p. 613.) As a result, the courts have repeatedly held that a defendant could raise the statue of limitations at any time. (*People v. McGee*, *supra*, 1 Cal.2d at p. 613; *In re Demillo* (1975) 14 Cal.3d 598, 601; *People v. Chadd* (1981) 28 Cal.3d 739, 756-757; *People v. Rose* (1972) 28 Cal.App.3d 415, 417.)

Over 60 years after *McGee* was decided, our Supreme Court addressed the issue of whether a defendant could waive[3] a statute of limitations defense to an offense when it was to the defendant's benefit. In *Cowan v. Superior Court* (1996) 14 Cal.4th 367, the defendant was charged with murder, but agreed to plead guilty to the time-barred lesser

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[3] In the context of statute of limitations discussions, the term "waiver" means the intentional relinquishment of a known right and the term forfeiture means the loss of a right by the failure to assert it.

offense of voluntary manslaughter and receive a sentence of no more than four years in prison. (*Id*. at p. 370.) The prosecutor moved to set aside the plea on the grounds that the trial court was without jurisdiction to proceed on the time-barred offense. (*Ibid*.) Although the defendant was willing to waive the statute of limitations, the trial court found the parties could not stipulate to jurisdiction of the court, and granted the motion to set aside the plea and reinstate the original charges. (*Ibid*.) The Court of Appeal upheld the trial court's decision, and the Supreme Court reversed.

The Supreme Court began its analysis by acknowledging its decision in *People v. McGee*, *supra*, holding that the statute of limitations is jurisdictional in nature. (*Cowan v. Superior Court*, *supra*, 14 Cal.4th at pp. 371-372.) *Cowan* explained that the prior decisions regarding the statute of limitations involved whether a defendant could forfeit the statute by failing to timely assert it. (*Id*. at p. 372.) The court found that a defendant should be allowed to expressly waive the statute of limitations for his benefit. (*Id*. at pp. 372-373.) In addition, the court reconsidered its prior opinion in *McGee* overruling it to the extent that it held that the court lacks fundamental subject matter jurisdiction to proceed against a time-barred offense. (*Id*. at p. 374.)

In dissent, Justice Brown argued that the jurisdictional approach to the statute of limitations has had unanticipated consequences with regard to lesser included offenses. (*Cowan v. Superior Court*, *supra*, 14 Cal.4th at p. 385, dis. opn. of Brown, J.) As an illustration, Justice Brown pointed to *People v. Rose*, supra, 28 Cal.App.3d 415. In *Rose*, the defendant was charged with murder and was convicted of voluntary manslaughter. On appeal, the court, on its own motion, reversed the conviction explaining the manslaughter conviction was barred by the statute of limitations. (*Id*. at p. 417.) Although the court recognized that the "state of the record may be the result of defense strategy pointed at preventing the jury from having to choose between murder and acquittal," the court nevertheless reversed finding the conviction jurisdictional defective. (*Ibid.*) Such a result was a direct consequence of *McGee's* holding. Justice Brown stated

that she would overrule *McGee* and hold that the statute of limitations constitutes an affirmative defense. (*Cowan v. Superior Court*, *supra*, 14 Cal.4th at p. 387, dis. opn. of Brown, J.)

A few years later, in *People v. Williams* (1999) 21 Cal.4th 335, our high court was confronted with the question of whether it should overrule *McGee* entirely and hold that the statute of limitations is an affirmative defense which is forfeited if a defendant fails to raise it before or at trial. The court declined to entirely overrule prior precedent and held that where a charging document indicates on its face that the action is barred by the statute of limitations, a person convicted of the charged offense may raise the statute of limitations at any time. (*Id*. at p. 341.) This rule is preferable, in part, because a forfeiture rule would "be an exercise in futility." (*Id*. at p. 342.) As the court explained, if it adopted a forfeiture rule, defendants would simply claim ineffective assistance of counsel when the statute of limitations was not raised at trial. Such claims would normally be meritorious and would therefore only "add a step to the litigation." (*Ibid*.)

In addition, the court found unpersuasive the respondent's argument that imposing a forfeiture rule would require the defendant to raise the statute of limitations at trial thereby developing an adequate record on the matter. The court pointed out that the prosecutor has control over the charging document and can easily allege facts that toll the limitations period. Therefore, any failure in the record is partly the fault of the district attorney. (*People v. Williams*, *supra*, 21 Cal.4th at p. 345.) Finally, the court found it improbable that that a forfeiture rule would reduce the possibility that the defendant would engage in "'gamesmanship'" in the trial court. (*Id*. at p. 346.) If an action was in fact time-barred, a defendant would reap no benefit by waiting to assert the limitations period until appeal thereby reducing the possibility of gamesmanship.

Williams did not address the question presented in this case, namely, what rules to apply where a defendant is convicted of a time-barred lesser offense when the charged offense is not time-barred. However, the First District, in *People v. Stanfill* (1999) 76

Cal.App.4th 1137, was confronted with this very issue. In *Stanfill*, the defendant was charged with one count of felony embezzlement, and was convicted of the time-barred lesser offense of misdemeanor embezzlement. (*Id*. at p. 1139.) On appeal, the court held that a defendant forfeits his right to assert the statute of limitations when he is convicted of a time-barred lesser offense where the charged offense was timely and the defendant either requested or acquiesced in the giving of instructions on the lesser offense. (*Id*. at p. 1150.)

In reaching this conclusion, the court emphasized the likelihood of gamesmanship or sandbagging. Without a forfeiture rule, a defendant would have an incentive to remain quiet about a statute of limitations problem in order to secure an instruction on a lesser offense in the trial court without expressly waiving the limitations problem, then "as an ace up his sleeve, secure reversal on the theory that he never expressly waived." (*People v. Stanfill*, *supra*, 76 Cal.App.4th at p. 1148.) Such a result is "unconscionable." (*Ibid*.) In addition, a forfeiture rule would encourage the parties to focus on the statute of limitations at the trial court where the issue could be fully developed. Although *Williams* noted that the prosecution could bring the issue into focus by pleading any tolling period in the charging document, the argument is less forceful in the case of a time-barred lesser offense. The prosecution does not charge lesser offenses in the accusatory pleading, and there would be no reason for the prosecutor to include tolling provisions for lesser offenses. (*Id*. at p. 1149.) Additionally, the concern in *Williams*, that a forfeiture rule would simply lead to an increased number of ineffective assistance of counsel claims, does not have the same force in this context. *Williams* explained that most ineffective assistance of counsel claims would have merit when the charged offense is barred by the limitations period on the face of the pleading. (*People v. Williams*, *supra*, 21 Cal.4th at p. 342.) Not so in the case of a time-barred lesser offense. Defense counsel could have a tactical reason for failing to raise the limitations bar as it would give the jury a choice of

something between the greater offense and acquittal. (*People v. Stanfill*, *supra*, 76 Cal.App.4th at pp. 1149-1150.)

Appellant argues this court should not follow the decision in *Stanfill* because it is premised on the "absurd assumption … that the jury would have *convicted* the defendant of the charged offense were it not for the trial court's unnecessary instruction on the lesser offense." He claims that it is equally, if not more likely, that the jury would have acquitted him had the lesser instruction been omitted. Appellant fails to note that the United States Supreme Court has recognized that it is to a defendant's benefit to be presented with the option of a lesser included offense. (*Beck v. Alabama* (1980) 447 U.S. 625, 633-637; *Keeble v. United States* (1973) 412 U.S. 205, 213.) Indeed, the high court has acknowledged that where a jury is presented with an all or nothing choice regarding a charged offense, and the evidence demonstrates that the defendant is plainly guilty of some offense, "the jury is likely to resolve its doubts in favor of conviction." (*Keeble v. United States* (1973) 412 U.S. 205, 213.)

Relying on *People v. Miller* (1859) 12 Cal. 291 appellant argues that *Stanfill* goes against long standing Supreme Court precedent. In *Miller*, the court held a defendant charged with murder could not be convicted of the lesser included offense of manslaughter when manslaughter was barred by the statute of limitations. (*Id*. at pp. 294-295.) The court provided little analysis, simply noting that a defendant could not be convicted of a charged offense that was barred by the limitations period. This holding appears to be based on the idea that the court had no jurisdiction over the offense. However, *Cowan* overruled a long line of cases holding that the statute of limitations is jurisdictional, and noted that the court does have the power to proceed over time-barred offenses. Thus we find that *Miller* provides little guidance here.

Appellant further argues that *Stanfill* is unpersuasive in this case because appellant would have been entitled to a reversal of his conviction if he had been convicted of the charged offense. His argument is premised upon *Williams* holding that a defendant may

raise the statute of limitations at any time when the charging document indicates on its face that the charged offense is barred by the statute of limitations. (*People v. Williams*, *supra*, 21 Cal.4th at p. 338.) Appellant's argument assumes this court would have reversed his conviction if he had been convicted of the greater offense. Not so. Although the facts supporting the tolling provision in this case were not alleged in the complaint as required by *Williams*, appellant received notice of those facts when the prosecutor filed her trial brief. We see little difference between alleging the facts in the accusatory pleading and alleging them in a trial brief. In each case, the defendant would receive notice of the facts and could chose whether or not to contest them. Furthermore, it is clear that appellant in fact had notice of the prosecution's reliance on section 803, subdivision (g), as defense counsel moved for an acquittal on those grounds immediately after the jury was discharged from its service. Because appellant had notice of the prosecution's theory and chose not to contest the statute of limitations at trial, we find that a forfeiture rule as to the lesser offense is appropriate in this case.

For the reasons stated above, we find the reasoning of *Stanfill* persuasive and follow it here. When appellant acquiesced to the time-barred lesser offense instruction, he forfeited his right to raise the statute of limitations on appeal. This rule is especially appropriate in this case, where appellant was clearly aware of the problem, yet chose to wait until after the verdict to raise the issue. Allowing appellant to secure a reversal on the lesser offense after allowing him the benefit of receiving instructions on that offense would lead to an unconscionable result.

II. The jurors were properly instructed pursuant to CALJIC No. 2.50.01.

Appellant argues that the 1999 revision to CALJIC No. 2.50.01 impermissibly lowered the prosecution's burden of proof and violated his due process rights. We disagree.

The trial court instructed the jury pursuant to CALJIC No. 2.50.01 as follows:

"Evidence has been introduced for the purpose of showing that the defendant engaged in a sexual offense on one or more occasions other than that charged in this case.

"'Sexual offense' means a crime under the laws of the state or of the United States involving any of the following:

"A. Any conduct made criminal by Penal Code Section 647.6. The elements [*sic*] of this crime is set forth elsewhere in the next instruction….

"B. Contact, without consent[,] between any part of the defendant's body or an object and the genitals or anus of another person.

"If you find that the defendant committed a prior sexual offense, you may, but are not required to, infer that the defendant had a disposition to commit the same or similar type sexual offenses. If you find that the defendant had this disposition, you may, but are not required to, infer that he was likely to commit and did commit the crime or crimes of which [he is] accused.

"However, if you find by a preponderance of the evidence that the defendant committed a prior sexual offense, that is not sufficient by itself to prove beyond a reasonable doubt that he committed the crimes charged.

"The weight and significance of the evidence, if any, are for you to decide. Unless you are otherwise instructed, you must not consider this evidence for any other purpose."

Appellant contends that this jury instruction is unconstitutional because it permits the jury to draw the "irrational conclusion" that a defendant committed the charged crime based upon evidence of uncharged sexual misconduct. He bases his argument upon the language of the instruction which permits the jury to infer that the defendant "was likely to commit and did commit" the charged crimes if they find the defendant had a disposition to commit similar sex offenses based upon evidence that he had previously committed a sexual offense. (CALJIC No. 2.50.01.) We find appellant's claim without merit.

Appellant's argument seems to be based upon a statement made in *People v. James* (2000) 81 Cal.App.4th 1343. In a footnote, the *James* court noted that the 1999

amendments to CALJIC No. 2.50.01 were "an improvement." (*James*, at p. 1357, fn. 8.) However, the court went on to state:

> "to the degree it still suggests other offense evidence is relevant only to infer guilt from propensity, we believe the instruction simultaneously overstates and unduly limits the use of such evidence. The *Falsetta* court acknowledged that other crimes evidence may be considered for a variety of purposes 'such as establishing defendant's motive, intent, or identity (if those issues remain contested), or bolstering the young victim's credibility.' [Citation.] We believe an instruction in general terms would be more appropriate, leaving particular inferences for the argument of counsel and the jury's common sense. At a minimum, deleting the words 'and did commit' from the standard instruction would remedy many of the concerns addressed above." (*Ibid*.)

This dicta does not imply the instruction was constitutionally infirm but merely that it could be improved. Furthermore it appears that the court's only caveat about the instruction is that it ignored the fact that other crimes evidence may properly be considered for a variety of other purposes. (*Ibid*.) Therefore, we find the opinion unpersuasive.

In addition, we note that appellant's argument was made and rejected in *People v. Van Winkle* (1999) 75 Cal.App.4th 133. In that case, this court held the pre-1999 version of CALJIC No. 2.50.01 did not violate the defendant's due process rights because it contained permissive, rather than mandatory, inferences that allowed the jury to find the defendant was likely to commit, or did in fact commit, the charged crime. (*Id*. at p. 143.) If the jury found, by a preponderance, that the defendant committed a prior sexual offense, the jury was allowed, but not required, to infer the defendant had a disposition to commit the same or similar type of offense. If the jury made the first inference, then the jury was allowed to make two additional inferences: that the defendant was likely to commit and that the defendant did in fact commit the charged crime. (*Ibid*.) *Van Winkle* further held a trier of fact could rationally infer that (1) a defendant who has previously committed sexual offenses against young girls has a disposition toward committing this

type of offense; (2) that being predisposed to committing such acts increases he likelihood of repeat offenses; and (3) that such disposition increases the likelihood that he did commit the current offense. (*Id*. at p. 144.)

Likewise, *People v. Jeffries* (2000) 83 Cal.App.4th 15, 21-22, rejected the defendant's claim that the inferences contained in CALJIC No. 2.50.01 violated due process because there was no rational connection between the circumstances of the earlier sexual offenses and the defendant's guilt of the present charges. The court there noted that our Supreme Court, in *People v. Falsetta* (1999) 21 Cal.4th 903, explained that evidence that the defendant committed prior sexual offenses is relevant to the issue of his disposition or propensity to commit the current offense. (*Ibid.*; see also *People v. O'Neal* (2000) 78 Cal.App.4th 1065, 1076-1078.)

We agree with these rulings and conclude that the permissible inferences in CALJIC No. 2.50.01 do not violate appellant's due process rights. To the extent that appellant argues that the instructions allows the jury to base a finding of guilt solely upon the fact that he had previously committed a sexual offense, we note that the jury was expressly instructed that if it found appellant had committed the previous offense, "that is not sufficient by itself to prove beyond a reasonable doubt that he committed the crimes charged." We presume the jury followed this instruction as given and also applied CALJIC No. 2.90 (defining reasonable doubt) in determining that the prosecution proved each element of the current crimes beyond a reasonable doubt. (*People v. Holt* (1997) 15 Cal.4th 619, 622; *People v. Delgado* (1993) 5 Cal.4th 312, 331.)

Appellant also seems to argue that the instruction lessened the prosecution's burden of proof. We are not writing on a clean slate when we consider whether CALJIC No. 2.50.01 (1999 rev.) allows a jury to convict a defendant on proof less than beyond a reasonable doubt. The Supreme Court, in *People v. Falsetta*, *supra*, 21 Cal.4th 903, cited this version of CALJIC No. 2.50.01 with approval. Admittedly, this reference is not binding precedent since the court made the comment in dictum. However, we note that

"even dictum from our Supreme Court is considered 'highly persuasive.' [Citations.] We believe it is improbable that the California Supreme Court would suggest an instruction 'adequately sets forth the controlling principles' for considering other crimes evidence, and then find that same instruction to be constitutionally defective. [Citation.]" (*People v. Brown* (2000) 77 Cal.App.4th 1324, 1336.)

This court has previously considered this instruction in two published opinions, *People v. Van Winkle*, *supra*, 75 Cal.App.4th 133 and *People v. O'Neal*, *supra*, 78 Cal.App.4th 1065. These cases, as well as other published decisions, considered the version of CALJIC No. 2.50.01 used before the 1999 revision. This version of the instruction did not inform the jury that if it found the defendant committed the prior sexual misconduct by a preponderance of the evidence, that in and of itself was insufficient to prove the defendant guilty beyond a reasonable doubt of the charged crime.

We held in *Van Winkle* and *O'Neal* that CALJIC No. 2.50.01 before the 1999 revision, when considered with the other instructions, did not impermissibly lessen the prosecution's burden of proof. (*People v. Van Winkle*, *supra*, 75 Cal.App.4th at pp. 147-149; *People v. O'Neal*, *supra*, 78 Cal.App.4th at pp. 1078-1079.) There is a split of authority among the remaining districts whether the pre-1999 version of CALJIC No. 2.05.01 and its sister instruction used in domestic violence cases, CALJIC No. 2.50.02, deprive a defendant of the right to due process by allowing a conviction on less than proof beyond a reasonable doubt. (See, e.g., *People v. Younger* (2000) 84 Cal.App.4th 1360 [CALJIC No. 2.50.02—error]; *People v. Jeffries*, *supra*, 83 Cal.App.4th 15 [CALJIC No. 2.50.01—no error].)

We need not revisit this issue since the trial court read the 1999 revision of CALJIC No. 2.50.01 to the jury. This revision remedies the defect in the instruction some courts found objectionable.

Cases from other districts which have considered the 1999 revision of CALJIC No. 2.50.01 have found CALJIC Nos. 2.50.01 and 2.50.02 do not deprive a defendant of his right to due process and do not result in a conviction by a standard less than beyond a reasonable doubt. (*People v. Hill* (2001) 86 Cal.App.4th 273; *People v. Brown*, *supra*, 77 Cal.App.4th 1324.) We agree and find the jury was properly instructed with the 1999 revision of CALJIC No. 2.50.01.

III. The trial court's instructions pursuant to CALJIC No. 17.41.1 were proper.

Appellant claims that the trial court's instructing the jury pursuant to CALJIC No. 17.41.1 interfered with his right to a trial by jury. Appellant contends the instruction, improperly chills jury deliberations and interferes with the jury's right to nullify the law. Respondent contends that appellant waived any challenge to CALJIC No. 17.41.1 because he failed to object to the instruction at trial. We find that appellant's challenge to the instruction was not waived, and conclude the instruction was proper.

A. Appellant's claim was not waived.

The debate over the validity of CALJIC No. 17.41.1 centers on whether the instruction impermissibly interferes with jury deliberations and the asserted right to jury nullification. The jury deliberative process is a right guaranteed under the Sixth Amendment of the United States Constitution and article I, section 16 of the California Constitution. (*People v. Collins* (1976) 17 Cal.3d 687, 693.) Thus, an instruction that undermines or impinges on that process would affect a defendant's substantial rights. No objection was required to preserve the issue on appeal. (§ 1259; see also *People v. Baca* (1996) 48 Cal.App.4th 1703, 1706.) We therefore reject respondent's claim of waiver and proceed to consider the merits of appellant's claim.

B. The instruction was proper.

CALJIC No. 17.41.1 provides:

> "The integrity of a trial requires that jurors, at all times during their deliberations, conduct themselves as required by these instructions. Accordingly, should it occur that any juror refuses to deliberate or expresses an intention to disregard the law or to decide the case based on [penalty or punishment, or] any [other] improper basis, it is the obligation of the other jurors to immediately advise the Court of the situation."

CALJIC No. 17.41.1, and the controversy that follows it, is currently before the California Supreme Court. (E.g., *People v. Engelman* (2000) 77 Cal.App.4th 1297, review granted Apr. 26, 2000, S086462; *People v. Taylor* (2000) 80 Cal.App.4th 804, review granted Aug. 23, 2000, S088909; *People v. Morgan* (2000) 85 Cal.App.4th 34, review granted Mar. 14, 2001, S094101.) Though this court has not yet addressed the issue in a published decision, we find no reason to undergo a lengthy analysis, given the imminence of a ruling by the Supreme Court. We simply state that we find the instruction proper. In particular, we conclude that CALJIC No. 17.41.1 does not intrude into a juror's deliberative thought processes, nor does it eliminate jury secrecy. The instruction does not address proper subjective or objective deliberation, whether collective or individual; it addresses instead impermissible objectively expressed refusals to deliberate or breaches of duty by a juror. It is neither intrusive nor coercive, and simply reminds the jurors of their duty to decide the case before them on the basis of the evidence and the law as instructed by the court. (See *People v. Baca* (1996) 48 Cal.App.4th 1703, 1706.)

We also reject appellant's contention that the instruction interfered with the jury's right to nullify. A jury has no such right: "Juries have had the naked *power* to 'nullify' for over 300 years ...." (*People v. Baca*, *supra*, 48 Cal.App.4th at p. 1707, emphasis added.) But while the power to nullify exists, there is no concomitant right to nullify. (See *People v. Williams* (2001) 25 Cal.4th 441.)

Moreover, the instruction did not tell the jury they did not have the power to nullify. Jurors have a duty to follow the court's instructions (*People v. Daniels* (1991) 52 Cal.3d 815, 865), and the court made reference to this duty. However, the court said nothing about the jury's power to nullify. The jury's duty to follow the court's instructions justifies an instruction obliging jurors to report both refusals to deliberate and expressions of an intention to disregard the law or to decide the case on an improper basis.

Even if the Supreme Court invalidates CALJIC No. 17.41.1, we find the instruction caused no prejudice in the instant case. There was no report of a juror refusing to deliberate or disregarding the law. There was no jury deadlock, and no holdout juror. In short, there is no reason to believe that the court's use of CALJIC No. 17.41.1 played any role in the jury's deliberations. Appellant has therefore failed to demonstrate how he was prejudiced by the court's reading of the instruction.

IV. Appellants sentence for sexual battery must be reduced.

Appellant was convicted of misdemeanor sexual battery (§ 243.4, subd. (d)(1)), and sentenced to a one-year prison term. However, section 243.4, subdivision (d) provides in pertinent part:

> "Any person who touches an intimate part of another person, if the touching is against the will of the person touched, and is for the specific purpose of sexual arousal, sexual gratification, or sexual abuse, is guilty of misdemeanor sexual battery, punishable by a fine not exceeding two thousand dollars ($2,000), or by *imprisonment in a county jail not exceeding six months*, or by both that fine and imprisonment." (Italics added.)

As is clear from the code section, the maximum authorized sentence for misdemeanor sexual battery is six months. By imposing a sentence greater than the maximum allowable the trial court pronounced an unauthorized sentence. (*People v.*

Scott (1994) 9 Cal.4th 331, 354.) The imposition of an unauthorized sentence is correctable in the first instance on appeal. (*Ibid*.)

The trial court imposition of a one-year sentence for the sexual battery conviction was unauthorized. Therefore, we will reduce appellant's sentence to a lawful six-month term.

V. The trial court's order requiring appellant to submit to AIDS testing must be reversed.

Appellant contends that the trial court's order that he be tested pursuant to section 1202.1 for AIDS antibodies is unlawful and must be stricken. Respondent contends the issue is waived because it requires a factual determination and was not raised at trial.

Mandatory testing for AIDS is strictly limited by statute. (*People v. Guardardo* (1995) 40 Cal.App.4th 757, 763.) Here, the applicable statute is section 1202.1 and its relevant provisions provide as follows:

> "(a) Notwithstanding Sections 120975 and 120990 of the Health and Safety Code, the court shall order every person who is convicted of, or adjudged by the court to be a person described by Section 601 or 602 of the Welfare and Institutions Code as provided in Section 725 of the Welfare and Institutions Code by reason of a violation of, a sexual offense listed in subdivision (e), whether or not a sentence or fine is imposed or probation is granted, to submit to a blood test for evidence of antibodies to the probable causative agent of acquired immune deficiency syndrome (AIDS)…. [¶] ...
>
> "(e) For purposes of this section, 'sexual offense' includes any of the following: [¶] ...
>
> "(6) Lewd or lascivious acts with a child in violation of Section 288, if the court finds that there is 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. For purposes of this paragraph, the court shall note its finding on the court docket and minute order if one is prepared."

The record does not contain any finding of probable cause to believe a bodily fluid had been transferred from appellant to the victim and the court's docket and minute order do not contain the necessary finding.

Citing *People v. Scott*, *supra*, 9 Cal.4th at page 353, respondent argues the matter is waived because appellant failed to make a timely objection which would permit the court to make the required finding. Respondent contends if a timely objection had been raised the prosecution would have had an opportunity to present evidence to establish whether or not bodily fluids had been transferred.

While we might find respondent's argument persuasive in a case where the challenge is to the sufficiency of the evidence on which the required finding was made or where there was a factual dispute concerning the appropriateness of the finding (see *People v. Caird* (1998) 63 Cal.App.4th 578 [evidence showing defendant on top of victim with penis between victim's thighs was sufficient to establish probable cause under statute]), this is not such a case. Here there is no finding to support the order that appellant is to submit to AIDS testing. Furthermore, there is nothing in the record to suggest even a possibility that bodily fluids were transferred. (See *In re Khonsavanh S.* (1998) 67 Cal.App.4th 532, 537 [nothing in the record remotely suggests any statutory basis for AIDS testing].) Thus the challenge raised by appellant does not present a factual question but instead a pure question of law concerning the validity of the order. This claim has not been waived.

The statute is clear and unambiguous and must be strictly construed. (See *People v. Green* (1996) 50 Cal.App.4th 1076, 1090; *People v. Jillie* (1992) 8 Cal.App.4th 960, 963.) The failure of the court to make the required finding and the lack of any evidence on the record to support such a finding renders the order unauthorized.

As we have already noted, there is nothing in the record to suggest that there is evidence available to the prosecutor to establish probable cause that bodily fluids were transferred from appellant to the victim. However, we are mindful that in the absence of

an objection at trial, the prosecutor had no notice that such evidence would be needed to overcome a defense objection. Therefore, we will strike the AIDS testing order but remand the matter to permit a further hearing on the issue if the prosecutor so requests.

DISPOSITION

Appellant's sentence on count two, sexual battery (§ 243.4, subd. (d)), is modified to reflect a six-month term and the superior court is directed to amend the abstract of judgment accordingly. The order requiring appellant to submit to testing for AIDS is vacated. Should the prosecutor request a hearing concerning AIDS testing within 30 days of the filing of the remittitur, the court shall conduct a further hearing, at which appellant shall be present, concerning whether the offense was a "sexual offense" within the meaning of section 1202.1, subdivision (e)(6). If no request is made within the stated time frame, the superior court is directed to amend the abstract of judgment accordingly and to forward a certified copy of the amended abstract to the Department of Corrections. In all other respects the judgment is affirmed.

_____
Levy, J.

WE CONCUR:

_____
Buckley, Acting P.J.

_____
Cornell, J.