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CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. SAUL ALBERTO LANDAVERDE, Defendant and Appellant.	B195340 (Los Angeles County Super. Ct. No. BA295538)

APPEAL from a judgment of the Superior Court of Los Angeles County, Marsha N. Revel, Judge. Affirmed.

Daniel G. Koryn, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Susan D. Martynec and Robert S. Henry, Deputy Attorneys General, for Plaintiff and Respondent.

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*Pursuant to California Rules of Court, rules 8.1105(b) and 8.1110, this opinion is certified for publication with the exception of parts I, II and IV of the Discussion.

INTRODUCTION

Appellant Saul Alberto Landaverde appeals from his conviction of continuous sexual abuse of a child under the age of 14, in violation of Penal Code section 288.5, subdivision (a), as charged in count 2 of the information. He contends the trial court should have excluded evidence of a prior, uncharged sex offense against a different victim. Appellant also contends the court erred in instructing the jury with CALJIC No. 2.50.01, and that the imposition of the upper term of imprisonment violated his right to a jury trial and due process pursuant to *Cunningham v. California* (2007) ___U.S. ___ [127 S.Ct. 856] (*Cunningham*). Finally, appellant contends the order requiring his submission to an AIDS/HIV test should be vacated, because the trial court failed to make the required finding of probable cause to believe there was transmission of bodily fluid. We reject appellant's contentions and affirm the judgment.

PROCEDURAL BACKGROUND

Appellant was charged with two counts of lewd acts upon a child under the age of 14, one count of continuous sexual abuse of a child under the age of 14 and one count of sodomy upon a person under the age of 14. The trial court dismissed three of the charges in furtherance of justice, and the jury convicted appellant of count 2, continuous sexual abuse of a child under the age of 14, committed between May 4, 2003, and December 23, 2005. On November 21, 2006, appellant was sentenced to the upper term of 16 years in prison, and the same day, he timely filed a notice of appeal.

FACTS

Appellant's 12-year-old daughter, V.L., testified that in December 2005, she lived with her mother and father, as well as two younger siblings with whom she

shared a bedroom. The evening of December 23, 2005, she was sleeping in the living room on a mattress on the floor, while her brother and sister slept on the couch, waiting for their mother to come home from a meeting. Appellant lay down on the mattress with her, positioned himself on top of her, and pulled her shorts and underwear down, exposing her buttocks, which he rubbed with his hands while trying to insert his penis in her anus. V.L. woke up, but said nothing at first, pretending to sleep. Then she moved away from him, woke up her siblings and moved to their bedroom. V.L. called her mother, using her cell phone. She did not reach her mother, but left a message, telling her it was an emergency, and she was needed at home. Two days later, she told her mother what had happened, and told her that something similar had happened when she was nine or eleven. They went to the police and to a doctor for a medical examination. At the end of the examination, they were told to return, but did not do so.

V.L. described two earlier experiences. She was still asleep one morning, lying on her back with her clothes on. Her siblings were playing outside, and her mother had gone for bread. Appellant came in from outside and tried to have what she described as "sexual relationships" with her, rubbing his body against her. They were both clothed, and his penis was not exposed.

The next day, V.L. was in the shower, when appellant got into the shower with her, pushed her against him, and touched her chest and buttocks. Both were nude. V.L.'s siblings were outside playing, and her mother was at work. V.L. testified that a few times after that, appellant touched her chest and buttocks, but did not get in the shower again.

Prosecution's witness Z.M. was permitted to testify over appellant's objection that her testimony would be more prejudicial than probative. Z.M., who was 23 years old at the time of her testimony, described events that had taken place eight years earlier, when Z.M. was 15, and her father and appellant were friends.

V.L. was about four years old at the time, and Z.M. would babysit or just visit the family occasionally, as the two families were very close.

When V.L.'s mother, Anita, was recovering from a cesarean section, Z.M. came to help with V.L. and her brother. Z.M. slept in the only bedroom with the two children, V.L.'s brother in a bunk bed, and V.L. and Z.M. together in a king size bed, while Anita slept in the living room with the baby. One night at approximately 4:00 a.m., appellant came into the bedroom, stood near her and watched her while touching the outside of her left thigh. Z.M. was not asleep, but did not make eye contact with appellant. Appellant picked up V.L., placed her on the empty bunk bed, and then left, returning three minutes later wearing only shorts. Z.M. testified that appellant, who was nude by that time, lay down next to her and touched "[her] vagina outside of [her] clothes." He then lifted Z.M., placed her on top of him, and tried to pull down her sweatpants while rubbing her body. When appellant took her hand and placed it on his erect penis, she sat up and moved to the corner of the bed, but appellant pushed her back down, telling her to go back to sleep and not to say anything. When Z.M. pretended to go back to sleep, appellant left. In the morning, Z.M. told Anita what had happened, causing Anita's incision to open (Z.M. believed), which made Anita ill. Not wanting to cause her parents any more problems than they were experiencing due to their recent separation, Z.M. never told anyone else.

Detective Jose Martinez interviewed appellant on December 28, 2005. A videotape of the interview, conducted in Spanish, was shown to the jury, and a translated transcript was admitted into evidence. Appellant told Detective Martinez that he and Anita had been having problems in the relationship, beginning with the birth of V.L., and worsening when their second child was born. Appellant admitted he had been on the mattress with V.L. in the living room the night of December 23, but claimed it was she who had lain next to him. Appellant

claimed he rubbed her stomach and back as "a father's thing," because V.L. had complained of a stomachache. He told Detective Martinez that V.L. turned to face him, with her mind in a "different state." Appellant agreed when Martinez suggested: "[Y]ou know that girls mature at an early age. They have the hormones, and curiosity comes around. She already had an experience of being curious." Appellant told Martinez he saw her both as a daughter and as a "young lady," which caused him to experience curiosity and temptation. He admitted that he had "watched her . . . a lot," and said, "I keep myself as far away as possible because I, I got scared. . . ."

Appellant admitted he touched V.L.'s anus with his erect penis during the December 23 incident. Later in the interview, appellant admitted he had penetrated her anus. He also admitted he had inserted his finger in her anus when she was 10 years old, but then modified his answer: "No, not in the anus. In her part, we said."

Appellant admitted he had touched V.L.'s breasts many times before that, but claimed it was by accident, although he admitted he had reached under her bra on one occasion, claiming he did it out of curiosity. Appellant also claimed that V.L. had touched his penis once. He explained that his daughter had kissed him "not like a girl, not like . . . like if she had seen a movie . . . [a] couple . . . . [S]he positioned herself on top, you know, like wanting to be, to be . . . [b]ut she was a girl . . . . Just say, that happened . . . four, five years ago. . . . I think she was six, between six and seven."

Appellant admitted he touched V.L.'s vagina three times, twice on the outside, and once by inserting his finger. Again, he said he touched her out of curiosity; however, he admitted he masturbated and ejaculated while inserting his finger. Appellant estimated that V.L. was eight years old when he inserted his

finger, and 11 years old the other two times. Appellant also admitted having placed his penis in V.L.'s mouth once, when she was 10 years old.

Asked whether he remembered Z.M., appellant told Detective Martinez he did remember her -- he experienced the same curiosity about her when she was 15 years old. His wife was not well at the time, and as Z.M. was a good friend of his wife, she came to stay at the house. Appellant admitted he went into the bedroom very late at night while she was sleeping, intending "to touch her and [have] a relationship." He explained he was not having a good relationship with his wife, and he became desperate for a relationship when there was no sex. He touched her "on top" and on her vagina. Asked whether she allowed him to touch her vagina, appellant replied, "Yes, . . . I think she was even sleeping. It was very late at night."

DISCUSSION

1. *Evidence of Prior Uncharged Sex Offense*

Prior to trial, the prosecution brought a motion to admit Z.M.'s testimony under Evidence Code section 1108,[1] which provides: "In a criminal action in which the defendant is accused of a sexual offense, evidence of the defendant's commission of another sexual offense or offenses is not made inadmissible by [s]ection 1101, if the evidence is not inadmissible pursuant to [s]ection 352."[2]

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[1] All further references are to the Evidence Code unless otherwise noted.

[2] Section 1101 provides in subdivisions (a) and (b): "Except as provided in this section and in [section 1108], evidence of . . . specific instances of [defendant's] conduct . . . is inadmissible when offered to prove his or her conduct on a specified occasion. [¶] . . . Nothing in this section prohibits the admission of evidence that a person committed a crime . . . or other act when relevant to prove . . . motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident, . . . other than his or her disposition to commit such an act."

Appellant objected to the testimony, on the ground that it would be more prejudicial than probative, and thus inadmissible under section 352. He contends the trial court erred in overruling his objection and admitting the evidence.

"Section 352 states: 'The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury.' 'Under . . . section 352, the trial court enjoys broad discretion in assessing whether the probative value of particular evidence is outweighed by concerns of undue prejudice, confusion or consumption of time.' [Citation.] A trial court's exercise of its discretion under section 352 '"must not be disturbed on appeal *except* on a showing that the court exercised its discretion in an arbitrary, capricious or patently absurd manner that resulted in a manifest miscarriage of justice."' [Citation.]" (*People v. Callahan* (1999) 74 Cal.App.4th 356, 366-367 (*Callahan*).) "'"'[Section] 1108 permits courts to admit such evidence on a common sense basis. . . .'"'" (*Id*. at p. 367.)

Appellant contends the incident involving Z.M. lacked probative value, because it was dissimilar. He argues it was dissimilar because Z.M. was not a relative and did not reside with appellant, and because appellant did not sodomize her or commit continuous sexual abuse, as his molestation of Z.M. involved a single act of misconduct.

The similarity between the charged offense and the prior offense need not be identical or even substantially similar. (*Callahan, supra*, 74 Cal.App.4th at p. 368.) "'"'Many sex offenders are not "specialists," and commit a variety of offenses which differ in specific character.'" [Citation.]' [Citation.]" (*Ibid*.) Moreover, the two incidents were quite similar. Appellant demonstrated a preference for a sleeping victim, and he attacked both victims while his wife was

unlikely to discover him, because she was out or incapacitated, but while other minors were present. Both victims were underage and small: V.L. was six or seven years old when the molestation began; Z.M. was 15 years old, but just 5'1." Although Z.M., was not a relative, she was a close family friend, and because appellant and Z.M.'s father were friends, appellant's position was more parental than merely friendly or neighborly, particularly during her temporary residence in the home.

Appellant also contends Z.M.'s testimony was cumulative as to the issue of V.L.'s credibility, because appellant confessed to numerous acts of sexual abuse against V.L. Thus, he argues, there was no need to corroborate V.L.'s testimony. However, appellant's defense consisted largely of attempting to cast doubt on V.L.'s credibility. Defense counsel pointed out several of V.L.'s conflicting statements, and argued that her testimony lacked corroboration as her mother did not testify. Given appellant's claim at trial that corroborating evidence was lacking, we cannot agree that the trial court should have found Z.M.'s testimony unduly cumulative. Moreover, evidence does not become inadmissible under section 352, simply because it is cumulative. (*People v. Smithey* (1999) 20 Cal.4th 936, 974.)

Appellant contends Z.M.'s testimony was highly inflammatory and prejudicial, and this increased the likelihood of confusing the jury, causing it to convict in order to punish him for the uncharged offense. Such a likelihood is not great where "[t]he testimony describing defendant's uncharged acts . . . was no stronger and no more inflammatory than the testimony concerning the charged offenses." (*People v. Ewoldt* (1994) 7 Cal.4th 380, 405.) Thus, evidence of an uncharged offense is not considered highly inflammatory when evidence of the charged offense is equally graphic. (*People v. Yovanov* (1999) 69 Cal.App.4th 392, 406.) Z.M.'s testimony was no more inflammatory than V.L.'s testimony or

appellant's own admissions. There was just one incident, Z.M. remained clothed, and Z.M. was older, in contrast with the continuous sexual abuse of appellant's own daughter, beginning when she was six or seven years old. We conclude Z.M.'s testimony was not unduly inflammatory.

Finally, we do not agree that the prejudicial effect of Z.M.'s testimony outweighed its probative value. "'With the enactment of section 1108, the Legislature "declared that the willingness to commit a sexual offense is not common to most individuals; thus, evidence of any prior sexual offenses is particularly probative and necessary for determining the credibility of the witness." [Citation.]'" (*Callahan, supra,* 74 Cal.App.4th at p. 367.) Such evidence is presumptively admissible and highly probative. (*People v. Soto* (1998) 64 Cal.App.4th 966, 989, 991.) The prejudice presented by evidence of this type is inherent in all propensity evidence. (*Id*. at p. 992.) Propensity evidence is prejudicial, "'"not because it has no appreciable probative value, but because it has too much." . . . [Citations.]'" (*People v. Falsetta* (1999) 21 Cal.4th 903, 915, italics omitted.) However, "[t]he prejudice which exclusion of evidence under . . . section 352 is designed to avoid is not the prejudice or damage to a defense that naturally flows from relevant, highly probative evidence. '[A]ll evidence which tends to prove guilt is prejudicial or damaging to the defendant's case. The stronger the evidence, the more it is "prejudicial.". . . In applying section 352, "prejudicial" is not synonymous with "damaging."' [Citation.]" (*People v. Karis* (1988) 46 Cal.3d 612, 638.)

We conclude the trial court did not act in an arbitrary, capricious or patently absurd manner, but reasonably exercised its discretion under section 352. (See *Callahan, supra,* 74 Cal.App.4th at pp. 366-367.) As we reject appellant's contention that the trial court abused its discretion, we do not reach appellant's

contention that the admission of Z.M.'s testimony resulted in a miscarriage of justice.

2. *Propriety of CALJIC No. 2.50.01*

Appellant contends the language of CALJIC No. 2.50.01 is "constitutionally infirm and denied [his] federal and state constitutional rights to due process and a fair trial."[3] Appellant does not explain the reasons for his contention, and cites only *People v. Reliford* (2003) 29 Cal.4th 1007 (*Reliford*), in which the California Supreme Court found no constitutional error in the 1999 version of CALJIC No. 2.50.01 of the instruction. (See *Reliford*, at p. 1016.) Further, although the court recognized the instruction could be improved, it indicated the 2002 revision had done so by providing "additional guidance on the permissible use of the other-acts evidence and remind[ing] the jury of the standard of proof for a conviction of the charged offenses." (*Ibid*.) As the improved, 2002 revision was given in this case, it is unlikely the Supreme Court would find fault with the instruction as given here.

Appellant acknowledges the Supreme Court's approval of the instruction in *Reliford*, but states he assigns the error for the sole purpose of preserving his claim

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[3] As given here, CALJIC No. 2.50.01 reads: "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 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 . . . 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 charged crime[]. If you determine an inference properly can be drawn from this evidence, this inference is simply one item for you to consider, along with all other evidence, in determining whether the defendant has been proved guilty beyond a reasonable doubt of the charged crime. [¶] Unless you are otherwise instructed, you must not consider this evidence for any other purpose."

for further review. Under the rule enunciated in *Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455, we must follow the decisions of the Supreme Court. (*People v. Birks* (1998) 19 Cal.4th 108, 116, fn. 6.)

3. *Cunningham Error*

The trial court sentenced appellant to the high term of imprisonment. After quoting extensively from appellant's own admissions, the trial court cited several aggravating factors justifying the high term, viz., appellant carried on the abuse for years; the victim was particularly vulnerable; the manner in which the crime was carried out indicated premeditation and planning; appellant took advantage of a position of trust or confidence; appellant excused his conduct and blamed others; and the molestation was ongoing, dangerous and caused damage to the family and the victim that might never be rectified.

Appellant contends his sentence violates his federal constitutional right to due process and a jury trial, because in choosing to impose the upper term, the court relied on factors not found by a jury. (*Blakely v. Washington* (2004) 542 U.S. 296, 303 (*Blakely*); *Apprendi v. New Jersey* (2000) 530 U.S. 466, 490 (*Apprendi*).) "[T]he Federal Constitution's jury-trial guarantee proscribes a sentencing scheme that allows a judge to impose a sentence above the statutory maximum based on a fact, other than a prior conviction, not found by a jury or admitted by the defendant. [Citations.]" (*Cunningham*, *supra*, 127 S.Ct. at p. 860.)

At the time of appellant's conviction, California's determinate sentencing law (DSL) provided for a lower, middle and upper term, and required the imposition of the middle term, unless there were circumstances in aggravation or

mitigation of the crime. (Pen. Code, § 1170, subd. (b).)[4] In *Cunningham*, the United States Supreme Court held that because the upper term may be imposed only when the sentencing judge finds an aggravating circumstance, the statutory maximum under the DSL was the middle term. (*Cunningham, supra,* 127 S.Ct. at p. 868.) Thus, as the DSL permitted a trial court to impose the upper term based on facts found by the court rather than by a jury beyond a reasonable doubt, or admitted by the defendant, it violated a defendant's Sixth and Fourteenth Amendment right to a jury trial. (*Id*. at pp. 860, 871.)

Aggravating factors admitted by the defendant need not be tried to a jury. (*Blakely, supra*, 542 U.S. at p. 303; *Apprendi, supra,* 530 U.S. at p. 488; *People v. Sandoval* (2007) 41 Cal.4th 825, 836.) The Constitution does not require a jury trial as to *all* aggravating factors cited by the sentencing court; it is sufficient that one factor has been admitted. (See *People v. Sandoval, supra*, at pp. 837-838.) Appellant admitted he carried on the abuse for years. He told Detective Martinez of sexually abusing V.L. when she was six, again when she was 10, and again when she was 11. We conclude that reliance upon that fact was not *Cunningham* error.

"[A]s long as a single aggravating circumstance that renders a defendant eligible for the upper term sentence has been established in accordance with the requirements of *Apprendi* and its progeny, any additional factfinding engaged in by the trial court in selecting the appropriate sentence among the three available options does not violate the defendant's right to jury trial." (*People v. Black*

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[4] The Legislature has since amended the statute in response to *Cunningham* to give the sentencing court discretion to choose any one of the three terms. (See, e.g., Stats. 2007, ch. 3, § 2, eff. March 30, 2007.) All further references in this opinion to the DSL or to section 1170 are to the former Penal Code section 1170, in effect at the time of appellant's conviction, unless otherwise indicated.

(2007) 41 Cal.4th 799, 812, italics omitted.) Thus, as the trial court relied upon at least one proper factor, its reliance upon other factors was not error.[5]

As the trial court did not err, we need not address appellant's contentions regarding harmlessness. However, we note that we would find any Sixth Amendment error harmless. Appellant admitted all facts necessary to the trial court's determination of V.L.'s particular vulnerability and appellant's taking advantage of a position of trust or confidence, by admitting the abuse began when V.L. was between six and seven years old, that he was her father and that he was involved in her life as her father. Such circumstances prove both factors. (See *People v. Dancer* (1996) 45 Cal.App.4th 1677, 1693-1695, overruled on other grounds in *People v. Hammon* (1997) 15 Cal.4th 1117, 1123.) We conclude from such facts, "beyond a reasonable doubt, that the jury, applying the beyond-a-reasonable-doubt standard, unquestionably would have found true at least a single aggravating circumstance had it been submitted to the jury . . . ." (*People v. Sandoval*, *supra*, 41 Cal.4th at p. 839; see also *Washington v. Recuenco* (2006) 548 U.S. ___, ___ [126 S.Ct. 2546, 2553].)

4. *AIDS/HIV Test*

Appellant contends the order he submit to an AIDS/HIV test should be vacated, because the trial court failed to make the required finding of probable cause to believe there had been a transmission of bodily fluid. If, upon a defendant's conviction of continuous sexual abuse of a child, "the court finds that there is probable cause to believe that blood, semen, or any other bodily fluid

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[5] The court suggested that the first cited factor -- multiple acts of abuse over several years -- outweighed the single mitigating factor of appellant's lack of a prior record of convictions. In this regard, the court stated: "So when you say he has no prior record, no one ever reported it, but there was conduct from his own mouth that he was doing this for years."

capable of transmitting HIV has been transferred from the defendant to the victim," the defendant must "submit to a blood or oral mucosal transudate saliva test for evidence of antibodies to the probable causative agent of acquired immune deficiency syndrome (AIDS) within 180 days of the date of conviction." (Pen. Code, § 1202.1, subds. (a) & (e)(6)(A).) The court must note its finding on the court docket and minute order if one is prepared." (Pen. Code, § 1202.1, subds. (a), (e)(6)(A) & (B).)

There is no notation in the minutes, and the docket has not been made part of the record on appeal. However, appellant did not object in the trial court, as required to preserve for appeal the absence of an express finding of probable cause or docket notation. (*People v. Stowell* (2003) 31 Cal.4th 1107, 1110-1111 (*Stowell*).)[6] Appellant contends he should not be deemed to have forfeited the issue, because the trial court erroneously believed ordering the test was discretionary, and the prosecutor told the court the test was not required. Appellant does not explain why such errors would relieve him of his failure to object, and he cites no authority for his contention. To the extent appellant suggests he was misled by the court and the prosecutor, we disagree, as the information clearly put appellant on notice of the requirement. The information stated: "'NOTICE: Conviction of this offense will require the court to order you to submit to a blood test for evidence of antibodies to the probable causative agent of Acquired Immune

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[6] The statute requires only a ministerial notation on the minutes and docket, which is made after the sentencing hearing. (See *Stowell*, *supra*, 31 Cal.4th at pp. 1115 & 1117.) Thus, in order to preserve the issue for appeal, "the defendant will generally have to check the docket entry and minute order after they have been prepared. If the required notation is missing, the defendant must then submit an objection, presumably, although not necessarily, in writing. We suggest this procedure only as guidance in preserving the notation issue." (*Id*. at p. 1117, fn. 5.)

Deficiency Syndrome (AIDS). Penal Code section 1201.1.'" At sentencing, the court clearly stated its intent to impose the testing requirement.

Appellant also contends there was no evidence to support a finding of probable cause to believe there was transmission of bodily fluid. A failure to object to the absence of a notation of the order in the minutes does not effect a forfeiture of a challenge to the sufficiency of the evidence to support a finding of probable cause. (*People v. Butler* (2003) 31 Cal.4th 1119, 1125-1126.) Nevertheless, appellant makes this point for the first time in his reply brief. "'To withhold a point until the closing brief would deprive the respondent of his opportunity to answer it or require the effort and delay of an additional brief by permission. Hence, the rule is that points raised in the reply brief for the first time will not be considered, unless good reason is shown for failure to present them before. [Citations.]' [Citation.]" (*People v. Adams* (1990) 216 Cal.App.3d 1431, 1441, fn. 2, italics omitted.)

Further, the point is made with no analysis of the evidence; indeed, without reference to the evidence. Appellant simply states there is no evidence to support a probable cause finding. We need not address claims of error unaccompanied by argument. (*People v. Hardy* (1992) 2 Cal.4th 86, 150.) Nevertheless, the contention is easily rejected. V.L. testified appellant partially inserted his penis in her anus during the December 23 incident, and that on an earlier occasion, he pushed her against his body when they were both nude in the shower. Appellant admitted he ejaculated while he was inserting a finger in V.L.'s vagina. He admitted the December 23 incident, telling Detective Martinez he placed his "penis on her rear . . . but not all the way down." Appellant also admitted that he had placed his penis in her mouth one time. Such facts are more than sufficient to find probable cause to believe there was transmission of bodily fluid. (See *People v. Caird* (1998) 63 Cal.App.4th 578, 590 ["'substantial chance'" of semen transfer

when the defendant "got on top of the victim and had his [erect] penis between her thighs"].)

We conclude that appellant has not shown a lack of substantial evidence to support a finding of probable cause, and that appellant has forfeited any claim the AIDS/HIV order was unlawful. Thus, no remand is required. (See *People v. Butler*, *supra*, 31 Cal.4th at pp. 1125-1126.)

DISPOSITION

The judgment is affirmed.

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MANELLA, J.

We concur:

EPSTEIN, P. J.

WILLHITE, J.