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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. ESTEBAN ROCHA, Defendant and Appellant.	F074521 (Super. Ct. No. DF012496A) **OPINION**

THE COURT[*]

APPEAL from a judgment of the Superior Court of Kern County. Robert S. Tafoya, Judge.

Steven A. Torres, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Eric L. Christoffersen and Ward A. Campbell, Deputy Attorneys General, for Plaintiff and Respondent.

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[*] Before Detjen, Acting P.J., Franson, J. and Meehan, J.

Defendant Esteban Rocha pleaded no contest to one count of lewd and lascivious conduct with a child under the age of 14 (Pen. Code,[1] § 288, subd. (a)) and the trial court sentenced him to the upper term of eight years. The court also ordered defendant to submit to an HIV test pursuant to section 1202.1, subdivision (a). On appeal, defendant contends, and the People concede, there was insufficient evidence to impose HIV testing. We agree that the order requiring defendant to submit to HIV testing is not supported by the evidence and remand for further proceedings at the election of the prosecution.

FACTS[2]

> "On June 30, 2016, … an officer was dispatched to the Delano Police Department lobby regarding a child molestation investigation. Upon arrival, contact was made with the reporting party, [the victim's mother] and the then thirteen-year-old victim. [The victim's mother] … explained … the victim revealed to her, her ex-husband, … the defendant, had done some inappropriate things to her. [The victim's mother] stated the victim told her the defendant would look inside her pants in the vaginal area when they were alone. It later progressed to touching the victim's breasts, vagina and buttocks.
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> "Officers then spoke with the victim. The victim was unable to remember how old she was when the defendant began to look inside of her pants and at her vagina. She stated the defendant would ask her to unzip her pants and move aside her underwear to look at her vagina. She was not forced to remove her pants or underwear; however, the defendant could see her bare skin. The victim would also be forced to remove her shirt and [move her] bra aside to allow the defendant to view her exposed breasts. When she was in the sixth grade, the defendant began to touch her with his hand. He began to hug her at first but then would proceed to touch her over clothes on the breasts and vaginal area. He would also unzip her pants, move her underwear and touch her bare skin on the vagina with his hand, as well as touch her bare breasts with his hand. The defendant rubbed the victim's vagina with his finger."

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1 Further statutory references are to the Penal Code.

2 The facts are taken from the probation officer's report.

DISCUSSION

Section 1202.1, subdivision (a), requires the court to order designated persons "to 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." Among those required to submit to an AIDS test are those persons convicted of lewd conduct with a child in violation of section 288, provided that "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[.]" (§ 1202.1, subd. (e)(6)(A)(iii).)

On appeal, defendant contends that there is not probable cause to believe that any bodily fluids capable of transmitting HIV were transferred from defendant to the victim. Defendant therefore requests that we either strike the order or remand under *People v. Butler* (2003) 31 Cal.4th 1119 (*Butler*).[3] The People concede that the trial court did not find probable cause as directed by the statute and that there is not sufficient evidence in the record to make such a finding. The People argue that remand under *Butler* is the appropriate remedy.

The Supreme Court in *Butler* made clear our role on appeal: "[I]f the trial court orders testing without articulating its reasons on the record, the appellate court will presume an implied finding of probable cause. [Citation.] Nevertheless, because the terms of the statute condition imposition on the existence of probable cause, the appellate court can sustain the order only if it finds evidentiary support, which it can do simply from examining the record. Moreover, even if the prosecution *could have* established

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[3] Defendant also argued in his opening brief that the HIV testing order should be stricken because the court never ordered such test and it appeared only in the minute order and abstract of judgment but not in the reporter's transcript of the sentencing hearing. However, as the People observe in the respondent's brief and defendant—who did not file a reply brief—does not dispute, the court did issue a written order requiring defendant to submit to an HIV test.

probable cause, in the absence of sufficient evidence *in the record*, the order is fatally compromised." (*Butler*, *supra*, 31 Cal.4th at p. 1127.) We agree with the parties that there is not probable cause in the record to believe that blood, semen, or any other bodily fluid capable of transmitting HIV was transferred from defendant to the victim. We therefore turn to the question of the appropriate remedy.

The Supreme Court examined this issue at length in *Butler*: "Given the significant public policy considerations at issue, we conclude it would be inappropriate simply to strike the testing order without remanding for further proceedings to determine whether the prosecution has additional evidence that may establish the requisite probable cause. As the Court of Appeal observed, 'in the absence of an objection at trial, the prosecutor had no notice that such evidence would be needed to overcome a defense objection.' [Citations.] Given the serious health consequences of HIV infection, it would be unfair to both the victim and the public to permit evasion of the legislative directive if evidence exists to support a testing order. Accordingly, we concur in the Court of Appeal's determination that it is appropriate to remand the matter for further proceedings at the election of the prosecution." (*Butler*, *supra*, 31 Cal.4th at p. 1129.) Here, defendant did not object to the court's order below, and the prosecution had no notice that additional evidence supporting the section 1202.1 order was needed. We therefore find that remand is the appropriate remedy.

DISPOSITION

The judgment is reversed and remanded for the sole purpose of conducting further proceedings at the election of the prosecution to determine if there is sufficient evidence to support an order requiring HIV testing pursuant to Penal Code section 1202.1. If the People fail to request a further hearing within 30 days, the HIV testing order shall be stricken and any existing blood or saliva specimen taken pursuant to the order shall be destroyed. In all other respects, the judgment is affirmed. The trial court is directed to prepare an amended abstract of judgment at the expiration of the 30-day period or

following any further Penal Code section 1202.1 hearing, as required, and to forward a certified copy to the appropriate authorities.