Filed 5/29/02

NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Shasta)

THE PEOPLE, Plaintiff and Respondent, v. TIMOTHY BRIAN STOWELL, Defendant and Appellant.	C032839 (Super.Ct.No. 98F5894)

Defendant Timothy Brian Stowell was convicted by a jury of digitally penetrating and committing a lewd act upon a four-year-old female acquaintance in violation of Penal Code sections 289, subdivision (j), and 288, subdivision (a), respectively.[1]

On appeal, defendant asserts that the trial court erred in (1) refusing to instruct the jury with CALJIC No. 4.30 on his

[1] Unless designated otherwise, all further statutory references are to the Penal Code.

defense that he was sleepwalking and was therefore unconscious at the time of the crimes; (2) instructing the jury pursuant to CALJIC No. 4.21 that it "should" (rather than "must") consider evidence of defendant's intoxication in deciding whether he possessed the requisite criminal intent; (3) instructing the jury with CALJIC No. 2.03 concerning a consciousness of guilt; (4) instructing the jury with CALJIC No. 2.62 regarding the inferences to be drawn from defendant's failure to explain or deny evidence against him; (5) instructing the jury with CALJIC No. 17.41.1 because it improperly infringed on the jurors' privacy and constituted an impermissible anti-nullification instruction; and (6) ordering defendant to undergo HIV testing. He also contends that the cumulative prejudice arising from these errors compels reversal.

As none of these contentions has merit, we shall affirm the judgment.

FACTS AND PROCEDURAL BACKGROUND

Defendant and LeaAnn Thompson, his girlfriend, lived together. The victim, Taylor, is the daughter of Tracie H., a friend of defendant's girlfriend. At the time of these events, defendant was 38 years old, and the victim, Taylor, was four.

On Saturday, July 25, 1998, Tracie and her daughter Taylor went with defendant and Thompson on a day trip from Redding to Bruney Falls. Over the course of the day and before returning home to Redding, they hiked to the falls, picnicked, waded and

swam, visited a cabin belonging to defendant's family, and went sightseeing in defendant's truck. The adults bought and drank beer throughout the day.

After the four returned to the apartment shared by Thompson and defendant, they agreed that Tracie and her daughter would spend the night at the apartment. Tracie and her daughter were to sleep in the bedroom, while Thompson and defendant slept in the living room. After dinner and more beer, Tracie finally retired and got into the bed with Taylor, who was already asleep.

Tracie testified at trial that she was awakened by Taylor's "rustling" in the bed around 2:30 a.m., and told her to settle down. As Taylor seemed to settle down, Tracie heard someone say the words, "tight little pussy." Suddenly fully awake and listening, Tracie heard Taylor say, "Don't, Tim. Quit it." She asked, "Taylor, what is he doing to you?" Taylor responded, "He's got his finger in my pee-pee." Tracie scooped Taylor out of the bed and fled to the living room, where she saw Thompson asleep.

Leaving Taylor on the couch, Tracie returned to the bedroom to retrieve her purse, and saw defendant, wrapped in a blanket, in the bedroom doorway. Defendant told Tracie: "I'm so sorry[,] I'm so sorry" and "I didn't know" or "I didn't know it was her." Tracie responded, "You probably thought it was LeaAnn."

When she arrived home around 3:00 a.m., Tracie examined her daughter. Taylor's genitals seemed a little red, and she said it hurt to go to the bathroom. Tracie contacted the police and took Taylor to a local emergency room for evaluation.

The following Monday, Tracie spoke to Redding Police Investigator Tracy Hall. Investigator Hall arranged for Taylor to be examined by Dr. Vovakes.

Investigator Hall first interviewed defendant on July 29.[2] Defendant stated that he had no recollection of getting into the bed with Taylor or of touching her: "[T]he last thing I remember is drinking my beer and watching television. And the next thing I remember is Trac[ie] yelling and I said, '[O]h shit, where am I.' . . . I do not remember doing anything, I honestly don't think I did do anything." Defendant explained that he only apologized to Tracie because "I was in the bed that she was sleeping in. My bed. And then when she got up and left, went out the door . . . I apologized to her a second time. I honestly just thought that I was just in the wrong place."

On August 12, police again interviewed defendant.[3] This time, he said, "[T]he first thing I remember is Taylor pulling away from me . . . . I'm positive in my heart that it was

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[2] This interview was recorded by audiotape, and played for the jury at trial.

[3] A videotape of defendant's August 12 interview with police was also played for the jury.

Taylor. . . . My hand was on her belly, I think, because when I, when she pulled away from me my hand dropped off her belly." Although at one point, defendant suggested that he believed himself to have been touching his girlfriend, Thompson, not Taylor, he later admitted that touching Taylor's vagina "felt different" from touching Thompson's, and that he "first knew it was Taylor . . . when she had said something. She said something like, uh, ouwie [*sic*], or something like that . . . when I had my finger in her." He also said that he had been aware that his finger was inside her vagina up to the first knuckle.

Defendant was arrested and charged in count 1 with committing a lewd act upon Taylor (§ 288, subd. (a)) and in count 2 with digitally penetrating her (§ 289, subd. (j)).

At trial, Dr. Vovakes, a pediatrician with special training in child abuse, testified that when he examined Taylor on July 28, her examination was "normal," but that a normal examination was consistent with Taylor's claim that she had been touched by a finger.

Defendant also testified at trial. He did not deny digitally penetrating Taylor, but instead testified, "I don't know whether I did or not. It's a good possibility. A very good possibility." However, he stated that he did not know how he came to be in bed with Taylor, and denied that he ever recalled having touched her. He specifically denied that he ever remembered putting his finger in her vagina. He explained

that he admitted doing so during his interview with police only because "the police officers had told me that I had done it." In fact, he testified, the last thing he recalled about the evening of July 25 was watching a movie on television, and the "next thing [he] remember[ed was] waking up to Trac[ie] yelling 'what the hell is going on?'" Defendant also recanted both his prior statement to police that Taylor had said "owie" when he had his finger in her vagina, and his suggestion in the August 12 interview that he had any awareness that it felt "different" from Thompson's vagina.

Defendant's chief defense was voluntary intoxication. Defense counsel argued in closing that had defendant not been drunk, he would not have attempted to sexually molest Taylor "with [her] mother sleeping right next to the girl." Defendant also testified at one point that he had walked in his sleep on several occasions.

Testimony concerning how much beer was consumed over the course of the group's July 25 outing varied widely. Tracie testified that the adults had purchased more than 30 beers that day, and that she had consumed approximately 10 or 12 beers. She also testified that defendant was neither stumbling nor slurring his words when the group returned to defendant's apartment in the evening and that defendant seemed "fine" later, just before she went to bed.

In contrast, defendant testified that he had consumed about 30 beers. And Thompson testified that she drank between 18 and

20, and that the adults purchased nearly twice as much beer that day as Tracie had estimated.

The jury found defendant guilty on both counts, and he received a prison sentence of six years.

DISCUSSION

On appeal, defendant raises various claims of instructional error and one claim of sentencing error.

I. *It Was Not Error to Refuse to Instruct with CALJIC No. 4.30*

The trial court refused defendant's request that the jury be instructed with CALJIC No. 4.30.

That instruction states in pertinent part: "A person who while unconscious commits what would otherwise be a criminal act, is not guilty of a crime. [¶] This rule of law applies to persons who are not conscious of acting but who perform acts while asleep or while suffering from a delirium of . . . the involuntary consumption of intoxicating liquor, or any similar cause. [¶] Unconsciousness does not require that a person be incapable of movement. [¶] Evidence has been received which may tend to show that the defendant was unconscious at the time and place of the commission of the alleged crime for which [he] [she] is here on trial. If, after a consideration of all the evidence, you have a reasonable doubt that the defendant was conscious at the time the alleged crime was committed, he must be found not guilty."

At trial, defense counsel had argued that CALJIC No. 4.30 was proper because "with the testimony that [defendant] . . . ha[d] a propensity to sleepwalk," the jury should decide whether his actions "occurred as a result of sleepwalking or occurred as a result of voluntary intoxication."[4]

Rejecting defendant's sleepwalking defense as "an alternate theory to the voluntary intoxication" defense, the trial court opined: "[T]he alleged act of digital penetration, in my judgment, is not an act for which there is any evidentiary support that can occur without an awareness and without volition because it involves identifying the anatomy of another human being, getting feedback in your nervous system as to what it is you are doing by touch . . . and then . . . locating a particular, discreet region which is not readily accessible and then having done that, exercising some level of manual dexterity in accomplishing the penetration. [¶] Those acts, in my judgment, are not acts which can be accomplished as a matter of law absent some awareness, absent some volition. . . . [¶] I don't see that the evidence supports, other than in an entirely conjectural or speculative way, the proposition that a person who is unconscious can accomplish an act of digital penetration.

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[4] Thus, the Attorney General is incorrect in asserting that "[t]here was no assertion [by defendant] to the court that CALJIC No. 4.30 should be given for any reason other than the fact of [defendant's] voluntary intoxication." Indeed, the trial court expressly recognized that the defendant had timely raised his request for the instruction based on sleepwalking.

There's been no scientific evidence that supports that. And, indeed . . . you have not offered any."

Defendant asserts on appeal that "[t]he trial court committed prejudicial error in denying [defendant's] request that the jury be instructed in the language of CALJIC No. 4.30 . . . in light of the defense testimony that [defendant] suffered from the mental disorder of sleepwalking." He notes that he "specifically testified that he [had] suffered from sleep disorders that included sleep walking [*sic*]" and that "Ms. Thompson confirmed this testimony."

"'"It is settled that in criminal cases, even in the absence of a request, the trial court must instruct on the general principles of law relevant to the issues raised by the evidence. [Citations.] The general principles of law governing the case are those principles closely and openly connected with the facts before the court, and which are necessary for the jury's understanding of the case." [Citation.]'" (*People v. Breverman* (1998) 19 Cal.4th 142, 154.)

However, "'[a] trial court need give a requested instruction concerning a defense *only if there is substantial evidence to support the defense.*' [Citation.]" (*In re Christian S.* (1994) 7 Cal.4th 768, 783, original italics; accord, *People v. Marshall* (1997) 15 Cal.4th 1, 39.) "As [the Supreme Court] ha[s] stressed . . . , 'unsupported theories

should not be presented to the jury.'" (*People v. Marshall, supra,* 15 Cal.4th at p. 40.)[5]

We agree that "[u]nconsciousness, when not voluntarily induced [citation] is a complete defense to a criminal charge [citation]." (*Sedeno, supra,* 10 Cal.3d at p. 717.)

But there was no substantial evidence to support a defense of unconsciousness by reason of sleepwalking in this case, and unconsciousness caused by voluntary intoxication is governed by another code section.[6] The only evidence concerning defendant's sleepwalking was the following:

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[5] Despite some ambiguous language in *People v. Sedeno* (1974) 10 Cal.3d 703, 716 (*Sedeno*), overruled on other grounds in *People v. Breverman, supra,* 19 Cal.4th at page 149, that "the duty to give instructions, *sua sponte,* on particular defenses . . . arises only if it appears that the defendant is relying on such a defense, or if there is substantial evidence supportive of such a defense and the defense is not inconsistent with the defendant's theory of the case" -- thereby implying that there might be a duty to give an instruction for a defense for which there is no substantial evidence if the defendant is relying on it -- the California Supreme Court has subsequently made clear that an instruction requested by a defendant need only be given "if it is supported by substantial evidence, that is, evidence sufficient to deserve jury consideration." (*People v. Marshall, supra,* 15 Cal.4th at p. 39.) Defendant does not argue otherwise. Nor could the very brief references to sleepwalking in the testimony at the trial -- which was never mentioned in opening or closing arguments -- qualify as a defense upon which defendant was "relying." (Cf. *People v. Elize* (1999) 71 Cal.App.4th 605, 611 ["It is not clear what the Supreme Court meant in stating that a defendant is 'relying' on a defense . . ."].)

[6] Unconsciousness caused by voluntary intoxication is governed by section 22, not section 26, which latter section governs other acts for which the defendant is unconscious, like sleepwalking. (§ 22, subd. (b).) Defendant agrees that "[w]here the defense reliance is solely on unconsciousness due to voluntary

(Continued.)

"Q. Do you walk in your sleep?

"A. [By defendant] Yes, I do.

"Q. How often?

"A. Not frequently. But there are several occasions."

And defendant's girlfriend testified that defendant "had a lot of problems sleeping. He would toss and turn. He would walk in his sleep and talk in his sleep." She responded "Yes, sir" to the question whether "this [would] happen often." But we do not know whether "this" referred to tossing and turning, talking in his sleep, sleepwalking, or all three.

It should nonetheless be evident that the testimony that the defendant had walked in his sleep on "several occasions" is not in any way linked with defendant's actions on the night of the molestation. Defendant did not testify that he thought that he was sleepwalking on that night, and he did not describe his prior sleepwalking experiences so that a trier of fact could infer that those episodes were similar to his claimed lack of consciousness on the night of the molestation. Nor did he mention the possibility that he was sleepwalking in his interviews with police. And there was no expert testimony about whether a sleepwalker could engage in the digital penetration

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intoxication, the basis of the defense is section 22 rather than section 26 . . . ." Section 22 has been incorporated into CALJIC Nos. 4.20, 4.21, and 4.22. Here, the jury was properly instructed with CALJIC No. 4.21 in light of the evidence that defendant was voluntarily intoxicated with alcohol at the time of the alleged molestation.

and lewd conduct charged against the defendant. The mere fact that defendant had walked in his sleep on "several occasions" was simply not substantial evidence, in and of itself, upon which a sleepwalking defense on a particular day against a particular charge could be based.

A court need not instruct "whenever *any* evidence, no matter how weak, is presented to support an instruction." (*People v. Barton* (1995) 12 Cal.4th 186, 195, fn. 4.) "Substantial evidence," in the context of determining whether certain evidence warrants a requested instruction, is defined as evidence which is sufficient to deserve consideration by the jury, that is, evidence from which a reasonable jury can conclude that the particular facts underlying the instruction exist. (*People v. Lemus* (1988) 203 Cal.App.3d 470, 477.)

Moreover, we agree with the trial court that the acts charged -- digital penetration and lewd touching of a four-year-old's genitals while she was clothed and sleeping -- necessarily required sophisticated manual manipulation and dexterity. The evidence was simply not sufficient to justify an instruction of unconsciousness based on sleepwalking where there was no evidence to support the highly improbable conclusion that defendant digitally penetrated a clothed four-year-old while sleepwalking. (See *People v. Lemus, supra,* 203 Cal.App.3d at p. 477.)

In view of the foregoing, we conclude that the trial court did not err in refusing to instruct with CALJIC No. 4.30.

Defendant cites a study by the American Psychiatric Association for the proposition that there have been cases of "'unlocking doors and even operating machinery . . . '" while sleepwalking. (*Diagnostic and Statistical Manual of Mental Health* (4th ed. 1994) § 307.46, pp. 587-588.) This does not, however, further his claim that he could perform digital penetration on a four-year-old under her clothes while he was sleepwalking. Further, our function on appeal is limited to a consideration of the evidence contained in the record of the trial proceedings and not on new materials that defendant introduces on appeal. (*People v. Merriam* (1967) 66 Cal.2d 390, 396-397 ["It is elementary that the function of an appellate court, in reviewing a trial court judgment on direct appeal, is limited to a consideration of matters contained in the record of trial proceedings, and that 'Matters not presented by the record cannot be considered on the suggestion of counsel in the briefs'"], disapproved on another point in *People v. Rincon-Pineda* (1975) 14 Cal.3d 864, 882; *People By and Through Dept. of Public Works v. Keligian* (1960) 182 Cal.App.2d 771, 774 ["It is improper to set forth in briefs facts, events, or other matters not included in the record on appeal"].)

Citing the California Supreme Court's decision in *People v. Wilson* (1967) 66 Cal.2d 749, 760-763, defendant also argues that his testimony that he could not remember what had occurred before he awoke warranted such an instruction. In *People v. Wilson, supra,* the failure to give unconsciousness instructions were deemed to be error where the defendant testified that he

could not remember shooting another man and his wife and "was distraught and mentally exacerbated" by the events that precipitated his actions. But that case did not involve sleepwalking, and defendant's testimony in that case was consistent with the story first told police (66 Cal.2d at p. 762), unlike here where sleepwalking was never mentioned. The chief difference between this case and *People v. Wilson,* however, is that there simply is no evidence in this case that defendant was engaged in sleepwalking on the night in question, while there was evidence of unconsciousness on the date in question in *People v. Wilson.*

Finally, any error here was harmless beyond a reasonable doubt (see *People v. Flood* (1998) 18 Cal.4th 470, 499)[7] because the jury could not possibly have credited any claim that defendant was unconscious by virtue of sleepwalking and still have found that he had the requisite intent to commit the crimes. To find defendant guilty of lewd conduct under count 1, the jury had to find that defendant touched the victim "with specific intent to arouse, appeal to, or gratify the lust, passions, or sexual desires" of defendant or Taylor. (CALJIC No. 10.41.) To find defendant guilty of count 2 of penetrating Taylor with a foreign object, the jurors had to find that "the act was done with the purpose and specific intent to cause

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[7] The cases cited by defendant for the proposition that the failure to instruct on unconsciousness requires automatic reversal all predate the California Supreme Court's decision in *People v. Flood.*

sexual arousal or gratification." (CALJIC No. 10.50) The jury was further instructed that it could not find defendant guilty of the charged crimes unless it found that he had acted with the intent that is an element of each charged offense, and instructed that "if the evidence as to any specific intent permits two reasonable interpretations, one of which points to the existence of the specific intent and the other to its absence, [the jury] must adopt that interpretation which points to its absence."

In light of the foregoing instructions, had the jury credited defendant's suggestion that he was unconscious, whether by sleepwalking or otherwise, when he digitally penetrated Taylor, these instructions would have required it to acquit him of those charges, because he would not have had the requisite specific intent to cause sexual arousal. By returning guilty verdicts on the counts for lewd and lascivious conduct and digital penetration, the jury necessarily found defendant was not unconscious.

Accordingly, there was no substantial evidence to support the giving of CALJIC No. 4.30. And even if the court erred in not giving the instruction, the court's refusal to so instruct the jury was harmless error.[8]

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[8] The absence of a specific unconsciousness instruction did not, as defendant argues, leave the "jury with an unwarranted all or nothing choice." Had the jurors been persuaded that defendant was too intoxicated to form the requisite criminal intent, they ***(Continued.)***

II. *The Court Did Not Err in Instructing Pursuant to CALJIC No. 4.21*

At defendant's request, the trial court instructed the jury on the effect of voluntary intoxication pursuant to CALJIC No. 4.21, as follows in relevant part:

"In the crime charged in Count I, a necessary element is the existence in the mind of the defendant of the specific intent to arouse, appeal to, or gratify the lust, passions, or sexual desires of the defendant or the child. [¶] In the crime charged in Count 2, a necessary element is the existence in the mind of the defendant of the specific intent to cause sexual arousal or gratification. [¶] If the evidence shows that the defendant was intoxicated at the time of the alleged crime, you can -- you should consider that fact in deciding whether the defendant had the required specific intent. If from all the evidence you have a reasonable doubt whether the defendant formed that specific intent, you must find that he did not have the specific intent."

On appeal, defendant challenges the wording of the form instruction that he requested, contending that "[b]y using the term 'should' instead of 'must,' CALJIC No. 4.21 effectively informed the jury that while the trial court recommended it consider the defense evidence, it was not obligated to do so."

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were instructed that they could find him guilty of the lesser included offense of battery.

In short, defendant claims "the instruction was defective in that it informed the jury that consideration of voluntary intoxication is permissive rather than mandatory" and "the jury should have been instructed that it 'must' consider evidence of voluntary intoxication." He concludes that this instruction "denied [defendant] his constitutional right to have the jury to consider the defense evidence and theory in this case."

We consider the argument frivolous. "Should" is used "to express duty, obligation, necessity, propriety, or expediency." (Webster's Third New Internat. Dict. (1986) p. 2104.) In the context here, it was used to express obligation.

Moreover, where an instruction is purportedly ambiguous and therefore subject to an erroneous interpretation, the test is whether there is a reasonable likelihood that the jury misunderstood and misapplied the challenged instruction. (*People v. Avena* (1996) 13 Cal.4th 394, 417; see *Boyde v. California* (1990) 494 U.S. 370, 380 [108 L.Ed.2d 316, 329].) The instruction here provided in the challenged portion: "If the evidence shows that the defendant was intoxicated at the time of the alleged crime, . . . you should consider that fact in deciding whether defendant had the required specific intent." We do not find that the instruction could have been understood to mean that consideration of voluntary intoxication was permissive if the evidence showed that defendant was intoxicated.

Finally and separately, by requesting this particular instruction, defendant waived his right to challenge it. (See *People v. Wader* (1993) 5 Cal.4th 610, 657-658; *People v. Hardy* (1992) 2 Cal.4th 86, 152; *People v. Hernandez* (1988) 47 Cal.3d 315, 353.) "We may review the validity of an instruction initially requested by the defense where counsel's actions in seeking or not objecting to the instruction constitutes simply neglect or mistake. [Citations.] The trial court does have a duty to correctly instruct the jury on principles of law relevant to issues raised by the evidence in a criminal case. We have recognized, however, that defendant may not be entitled to challenge a requested instruction where the record clearly reflects that counsel had a deliberate tactical purpose in requesting it." (*Ibid*.)

Defendant suggests that the "doctrine of invited error does not apply here" because any deliberate tactical reason for the instruction "must be articulated on the record." But more recent California Supreme Court authority has retreated from the requirement that a defendant must "expressly" articulate his tactical reason for requesting the challenged instruction; the court has found "invited error" where the defense's tactical strategy can be inferred from the record. (E.g., *People v. Duncan* (1991) 53 Cal.3d 955, 969-970; *People v. Cooper* (1991) 53 Cal.3d 771, 827; *People v. Whitt* (1990) 51 Cal.3d 620, 641.)

The record here supports the conclusion that defendant's request of CALJIC No. 4.21 was deliberate and conscious.

Defense counsel, of course, needed the instruction in order to argue that defendant's voluntary intoxication negated any finding that he possessed the requisite criminal intent, and indeed, he argued vigorously that defendant should be acquitted of the molestation charges based on evidence of his intoxication. The best way to get this instruction was to request the CALJIC form instruction, which uses the word, "should." Thus, we find that requesting a CALJIC instruction for purposes of defendant's principal defense was a deliberate and tactical decision for which defendant may not now claim error.

III. *The Failure to "Modify" CALJIC No. 2.03 Was Not Error*

Over defendant's objection, the trial court instructed the jury with CALJIC No. 2.03 as follows: "If you find that before this trial the defendant made a willfully false or deliberately misleading statement concerning the crimes for which he is now being tried, you may consider that statement as a circumstance tending to prove a consciousness of guilt. However, that conduct is not sufficient by itself to prove guilt, and its weight and significance, if any, are matters for you to decide."

Defendant makes a number of claims regarding this instruction. First, he contends that this instruction "is premised on and only reasonable where the false statement is made to mislead authorities and avoid suspicion," but that the instruction "fails to set out this prerequisite finding for the

jury . . . to insure that the inference of consciousness of guilt is valid."

We disagree. The instruction requires that the jury find that "defendant made a willfully false or deliberately misleading statement concerning the crimes for which he is now being tried" before considering the statement as a circumstance tending to show a consciousness of guilt. The instruction therefore removed from the jury's consideration any innocent misrepresentation or mistake. (See *People v. Amador* (1970) 8 Cal.App.3d 788, 792.) Thus, the jury had to find the premise -- a willfully false statement -- before considering the conclusion -- a circumstance tending to prove a consciousness of guilt.

Indeed, the instruction has been consistently upheld when it is supported by the evidence. (*People v. Arias* (1996) 13 Cal.4th 92, 141.) "'The giving of CALJIC No. 2.03 is justified when there exists evidence that the defendant prefabricated a story to explain his conduct. . . .' [Citation.]" (*People v. Williams* (1995) 33 Cal.App.4th 467, 478, quoting *People v. Edwards* (1992) 8 Cal.App.4th 1092, 1103-1104.) In this case, defendant's statements to police contained a sufficient number of inconsistencies to suggest willfully false statements, which justified the giving of this instruction. For instance, he claimed not to recall anything during his first interview with the police, but then at his second interview, he said that he remembered Taylor pulling away from him and that he had his hand

on her belly. He also remembered how she felt to him, how far he had digitally penetrated, and what she said.

Defendant next contends that the instruction is incomplete and that "CALJIC No. 2.03 should contain specific language that the jury disregard statements not related to the charged offense."

But CALJIC No. 2.03 expressly refers to a "willfully false or deliberately misleading statement [made by defendant] *concerning the crime for which defendant is now being tried*." (Italics added.) There is no need for the instruction to state that to which the instruction does not refer -- namely, that the instruction does not apply if the willfully false or deliberately misleading statement is unrelated to the charged offense. Such reasoning would require virtually every instruction that contains a qualification to state that it does not apply when the qualification does not apply -- thereby doubling the length of already lengthy instructions for purposes of stating what should be obvious.

Finally, relying on *United States v. Littlefield* (1st Cir. 1988) 840 F.2d 143, 149, the defendant contends that the consciousness of guilt instruction should be given only when the statement involves a matter collateral to the facts establishing guilt or is so incredible that its very implausibility suggests that it was created to conceal guilt.

The *Littlefield* court reached this conclusion after noting that an instruction such as CALJIC No. 2.03 "should not be given when . . . the jury could find the exculpatory statement at issue to be false only if it already believed evidence directly establishing the defendant's guilt." (840 F.2d at p. 149.) The court reasoned in part: "It is the direct evidence of appellant's guilt . . . that allows the jury to draw an inference of consciousness of guilt from the appellant's [exculpatory] statement. In effect, the jurors were told that once they found guilt, they could find consciousness of guilt, which in turn is probative of guilt. This is both circular and confusing." (*Ibid.*)

In this case, the jury did not need to decide that defendant was guilty to determine that his statements to the police were false because his statements during the two police interviews as to what he remembered were in conflict.

And even assuming that the instruction is circular and confusing for the reasons explained in *Littlefield*, it is nonetheless harmless. If the jury found false defendant's denials of consciously and willfully digitally penetrating Taylor, an instruction on consciousness of guilt was, at worst, unnecessary. "To instruct the jury that it could use the statement of consciousness of guilt on the part of [defendant] probably adds little to the analysis, since the same evidence which would lead the jury to conclude that the statement was a prefabrication would lead the jury to conclude that [defendant]

was guilty of the crime charged. In that light the instruction was redundant, but not prejudicial." (*People v. McFarland* (1980) 108 Cal.App.3d 211, 217; see also *United States v. Littlefield*, *supra*, 840 F.2d at p. 150.) Defendant has not shown how he was prejudiced in this action by the instruction.

IV. *CALJIC No. 2.62 Was Not Given in Error*

The jury was also instructed the jury, over defendant's objection, with CALJIC No. 2.62 as follows:

"In this case, the defendant has testified to certain matters. If you find that the defendant failed to explain or deny evidence against him introduced by the prosecution which he can reasonably be expected to deny or explain because of facts within his knowledge, you may take that failure into consideration as tending to indicate the truth of this evidence and as indicating that among the inferences that may reasonably be drawn therefrom, those unfavorable to the defendant are the more probable. The failure of a defendant to deny or explain evidence against him does not by itself warrant an inference of guilt, nor does it relieve the prosecution of its burden of proving every essential element of the crime and the guilt of the defendant beyond a reasonable doubt. If a defendant does not have the knowledge that he would need to deny or explain evidence against him, it would be unreasonable to draw an inference unfavorable to him because of his failure to deny or explain this evidence."

Defendant argues that "[t]he instruction was not supported by this record." Citing *People v. Saddler* (1979) 24 Cal.3d 671, 681, he argues that "there must exist some type of prosecution evidence which a defendant fails to explain or deny on the record, before a trial court can give the instruction."

It is true that "'[i]t is an elementary principle of law that before a jury can be instructed that it may draw a particular inference, evidence must appear in the record which, if believed by the jury, will support the suggested inference [citation].'" (*People v. Saddler, supra,* 24 Cal.3d at p. 681.)

But there was substantial evidence to support the instruction. Looking at the big picture, defendant had no explanation of how he ended up in bed with Taylor and got his hand under her clothes, first finding and then penetrating her vagina. The instruction was therefore proper in instructing that if defendant failed to explain or deny evidence against him, the jury could take that failure into consideration as indicating the truth of this evidence. Looking at the case from a more detailed level, defendant also failed to deny or explain other evidence against him that he could reasonably have been expected to explain. Although he had recalled for police several details of the molestation -- including that his finger was inside Taylor's vagina up to his first knuckle, that his penetration gave him a different sensation than that he had experienced with Thompson, and that he had heard Taylor say "owie" when his finger was inside her -- defendant denied at

trial any recall of these details and attempted to explain his previous admissions as the result of the police having told him that he "had done it." But a suggestion that he "had done it" would not put the defendant in the position of recalling a sound that Taylor had made or how his penetration of the victim felt. The instruction was supported by sufficient evidence here of defendant's failure at trial to explain (or deny) evidence against him.

"The instruction, *if* justified by the evidence, does not violate a defendant's privilege against self-incrimination, deny him the presumption of innocence, nor violate due process. [Citation.] When a defendant testifies but fails to deny or explain inculpatory evidence or gives a 'bizarre or implausible' explanation, the instruction is proper. [Citations.] '[T]he applicability of CALJIC No. 2.62 is peculiarly dependent on the particular facts of the case.' [Citation.]" (*People v. Sanchez* (1994) 24 Cal.App.4th 1012, 1029-1030, original italics; see *People v. Belmontes* (1988) 45 Cal.3d 744, 784; *People v. Mask* (1986) 188 Cal.App.3d 450, 455; *People v. Roehler* (1985) 167 Cal.App.3d 353, 393.) In *People v. Sanchez, supra,* 24 Cal.App.4th at pages 1029-1030, for instance, the Court of Appeal found that the failure to recall inculpatory events, such as tying the victim's wrists and elbows or strangling the victim, warranted the giving of CALJIC No. 2.62. So, too, was it proper to give the instruction here where defendant could not recall how he ended up in a bed molesting a four-year-old and

where he could not recall at trial matters that he had admitted earlier to police.

Defendant also argues that "the instruction was improper because it constituted a pinpoint instruction for the prosecution." But this argument was rejected by the very case defendant cites, *People v. Saddler, supra,* 24 Cal.3d at pages 680-681: "Defendant also argues that the challenged instruction should never be given because it impermissibly singles out a defendant's testimony and unduly focuses upon it. The same argument was rejected in *People v. Mayberry* [(1975)] 15 Cal.3d 143, 161. We noted there that the instruction was consistent with Evidence Code section 413 which permits the drawing of inferences from any party's failure to explain or deny evidence against him. Since the only testifying 'party' in a criminal case is the defendant, the code section can have reference only to him."

Finally, even assuming that this instruction should not have been given here, any error was not prejudicial. If the jury believed defendant's claim of unconsciousness, CALJIC No. 2.62 instructed it that "[i]f a defendant does not have the knowledge that he would need to deny or to explain evidence against him, it would be unreasonable to draw an inference unfavorable to him . . . ." And if the jury disbelieved that he was unconscious, it would have found him guilty, regardless of this instruction.

Moreover, the instruction cautioned the jury that "[t]he failure of a defendant to deny or explain evidence against him does not by itself warrant an inference of guilt, nor does it relieve the prosecution of its burden of proving every essential element of the crime and the guilt of the defendant beyond a reasonable doubt." Thus, the instruction fully protected defendant by making clear that the prosecution had to nonetheless prove each element of its case. "CALJIC No. 2.62 does not direct the jury to draw an adverse inference. It applies only if the jury finds that the defendant failed to explain or deny evidence. It contains other portions favorable to the defense (suggesting when it would be unreasonable to draw the inference; and cautioning that the failure to deny or explain evidence does not create a presumption of guilt, or by itself warrant an inference of guilt, nor relieve the prosecution of the burden of proving every essential element of the crime beyond a reasonable doubt)." (*People v. Ballard* (1991) 1 Cal.App.4th 752, 756-757.) Furthermore, jurors were even instructed to disregard any instruction which applied to a state of facts it determined did not exist.

Looking at the instructions given as a whole (*People v. Laws* (1993) 12 Cal.App.4th 786, 796), even if the instruction had been given in error, it could not possibly have prejudiced defendant.

V. *Instructing the Jury with CALJIC No. 17.41.1 Was Not Prejudicial*

Defendant next contends that the trial court erred prejudicially in instructing the jury, over his objection, with CALJIC No. 17.41.1 (1998 New).

That instruction states: "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."

The legality of this instruction is currently before the California Supreme Court in, among other cases, *People v. Engelman* (2000) 77 Cal.App.4th 1297, review granted April 26, 2000, S086462, and *People v. Taylor* (2000) 80 Cal.App.4th 804, review granted August 23, 2000, S088909.

Accordingly, we shall assume, for sake of argument, that the instruction will be found erroneous and consider whether it was prejudicial.

Defendant argues that "[t]he giving of CALJIC No. 17.41.1 constituted a structural defect of the trial that compels reversal of the conviction."

However, in *People v. Molina* (2000) 82 Cal.App.4th 1329, 1332, we concluded that any error in giving CALJIC No. 17.41.1 is not reversible per se, but is subject to harmless error analysis. We concluded: "[E]ven assuming for the sake of argument that the giving of CALJIC No. 17.41.1 constitutes constitutional error, it is not 'structural error' and does not require reversal per se. All the instruction does is to require jurors to inform the court of juror misconduct. It does not '"affect[] the framework within which the trial proceeds,"' nor does it 'necessarily render a criminal trial fundamentally unfair or an unreliable vehicle for determining guilt or innocence.' [Citation.] We do not agree that the instruction is likely to be coercive. Absent misconduct by the jury, expressly identified in the instruction, the instruction is not likely to enter into jury deliberations at all. In the vast majority of cases, there is no jury misconduct. We do not see how an instruction that is not likely to come into play in most cases can constitute error requiring the reversal of every case in which it is given. We think that such a result would be, frankly, absurd." (82 Cal.App.4th at p. 1335.)

Even assuming that the more stringent harmless error standard of *Chapman v. California* (1967) 386 U.S. 18, 24 [17 L.Ed.2d 705, 710-711] applies (see *People v. Molina, supra,* 82 Cal.App.4th at p. 1335), the instruction was not prejudicial here.

Defendant contends that the first prong of the instruction -- its requirement that jurors "conduct themselves as required by these instructions" -- "improperly infringes on the power of any juror or all of them to disregard the law in a given case and deliver a verdict in accord with their consci[ence]." He claims that "[t]he instruction constitute[s] an improper anti-nullification instruction" and "[a]s such, it violate[s] the jurors' rights to freedom of speech and association guaranteed by the First Amendment . . . and sections one and two of Article I of the California Constitution."

But no prejudice could have resulted from that part of the instruction that asks the jury to conduct themselves in accordance with the instructions or to advise the court if a juror expresses an intention to disregard the law. For one thing, the California Supreme Court, upon addressing the issue of juror nullification, has recently reaffirmed "the basic rule that jurors are required to determine the facts and render a verdict in accordance with the court's instructions on the law." (*People v. Williams* (2001) 25 Cal.4th 441, 463.) Accordingly, even if the jury has the *power* to nullify, there can be no prejudice from advising jurors to report that which they have *no right* to engage in -- the refusal to render a verdict in accordance with the court's instructions of law. Secondly, in this case, there was no evidence that any juror had expressed an intention to disregard the law. Nor was there anything controversial about the nature of the law here -- a prohibition against molestation of a four-year-old girl -- so as to

reasonably give rise to a desire to disregard the law. Accordingly, nothing in the record indicates that the verdicts were affected by that part of the instruction that asks the jury to conduct themselves as required by the instructions.

Defendant also claims that "[t]he instruction improperly compromised the private and necessarily uninhibited nature of jury deliberations." He argues that "[t]he instruction . . . chills th[e] essential free discussion in advance, by putting jurors on notice that their every word may be reported to the trial court by their fellow jurors in the event of even an imagined impropriety. This is a prospect that will likely tempt jurors, particularly 'sensitive' ones, to forego their independence of mind and conceal even legitimate concerns they may have about the strength [o]f the state's case . . . ."

In some respects, this is a clever argument, since it excuses the absence of any evidence of prejudice by theorizing that the instruction chilled the manifestation of the very evidence that could prove the prejudice. But a further review of the claim shows that there could be no prejudice. First, defendant speculates that the instruction will "chill" free discussion "by putting jurors on notice that their every word may be reported . . . by their fellow jurors in the event of even an imagined impropriety." But this is mere speculation, based on the contradictory assumption that a warning against deciding the case on an *improper* basis causes jurors not to decide the case on a *proper* basis. In short, defendant

speculates that the jurors would misapply the instruction in contravention of the settled principle that we presume that jurors follow the instructions. (E.g., *People v. McNear* (1961) 190 Cal.App.2d 541, 547.)

Second, in this case, nothing in the record suggests that the instruction thwarted or chilled the deliberations. The jury completed its deliberations after five hours, finding defendant guilty on both counts. During those deliberations, it asked for a transcript of the tapes of defendant's interviews, suggesting no reluctance to request further information. Further, prior to the promulgation of this instruction, jurors were directed to bring any question concerning deliberations to the court's attention, but they brought none. (CALJIC No. 17.43 [directing the jury that "[d]uring deliberations, any question or request the jury may have should be addressed to the Court [on a form that will be provided]"].) And defendant acknowledges that a review of the case law amply demonstrates that jurors have historically been quite willing "to report on any juror's inability or unwillingness to deliberate in a proper manner, even their own." Thus, the absence of any such reports from jurors, and the reasonable time taken by the jury for deliberations over a straightforward case, affords no basis to believe that jury deliberations were chilled in some way.

VI. *The Order to Undergo HIV Testing*

In a supplemental brief, defendant contends that "[t]he court erred in ordering [him] to undergo HIV testing under . . .

section 1202.1, because the offense of which he was convicted is not listed under that code section absent a special finding." (Emphasis omitted.)

Section 1202.1 provides in relevant part: "Notwithstanding Sections 120975 and 120990 of the Health and Safety Code, the court shall order every person who is convicted of . . . a sexual offense listed in subdivision (e) . . . 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." (§ 1202.1, subds. (a), (e).)

Defendant was convicted of a violation of section 288; the only failing in the trial court's order is the omission of a finding of probable cause to believe that a bodily fluid capable of transmitting HIV was transferred to the victim.

But defendant failed to object to the court's failure to make such a finding. Instead, he argues that the order was unauthorized and thus that his objection was not waived by the failure to object.

We disagree. In *People v. Scott* (1994) 9 Cal.4th 331, 353, the California Supreme Court concluded: "[T]he waiver doctrine should apply to claims involving the trial court's failure to properly make or articulate its discretionary sentencing choices. Included in this category are cases in which the stated reasons allegedly do not apply to the particular case, and cases in which the court purportedly erred because it . . . failed to state any reasons or give a sufficient number of valid reasons. [¶] Our reasoning is practical and straightforward. Although the court is required to impose sentence in a lawful manner, counsel is charged with understanding, advocating, and clarifying permissible sentencing choices at the hearing. Routine defects in the court's statement of reasons are easily prevented and corrected if called to the court's attention. As in other waiver cases, we hope to reduce the number of errors committed in the first instance and preserve the judicial resources otherwise used to correct them."

In this case, as noted, defense counsel could have objected, but did not object, to the trial court's failure to state its finding of probable cause to believe that a bodily fluid capable of transmitting HIV has been transferred to the victim by defendant. By reason of defendant's failure to object, this court cannot know the basis by which the trial court concluded such probable cause existed, or whether it would have declined to make such an order had it been required to do so. In short, the defect in the court's order -- the failure to state reasons -- could have easily been prevented and corrected

if called to the court's attention. Failure to object constituted waiver.

It is true that the unauthorized sentence concept "constitutes a narrow exception to the general requirement that only those claims properly raised and preserved by the parties are reviewable on appeal." (*People v. Scott, supra,* 9 Cal.4th at p. 354.) "[A] sentence is generally 'unauthorized' where it could not lawfully be imposed under any circumstance in the particular case. Appellate courts are willing to intervene in the first instance because such error is 'clear and correctable' independent of any factual issues presented by the record at sentencing." (*Ibid.*)

Thus, in *People v. Smith* (2001) 24 Cal.4th 849, 853, the California Supreme Court concluded that the imposition of a parole revocation fine (§ 1202.45) in a different amount than the amount of the restitution fine (§ 1202.4) was an unauthorized sentence because "[u]nder section 1202.45, a trial court has *no* choice and *must* impose a parole revocation fine equal to the restitution fine whenever the 'sentence includes a period of parole.'" (Original italics.) The court explained: "Because the erroneous imposition of a parole revocation fine presents a pure question of law with only *one* answer, any such error is obvious and correctable without reference to any factual issues in the record or remanding for further findings." (*Ibid.*, original italics.)

In contrast, in *People v. Tillman* (2000) 22 Cal.4th 300, the California Supreme Court found waiver by reason of the People's failure to object to the trial court's failure to state a reason for its failure to impose a restitution fine under section 1202.4 and a parole revocation fine under section 1202.45. Since a restitution fine must be imposed unless the trial court finds compelling and extraordinary reasons for not doing so and states them on the record, the Supreme Court "implicitly recognized that the erroneous omission of a restitution fine was not correctable without considering factual issues presented by the record or remanding for additional findings." (*People v. Smith, supra,* 24 Cal.4th at p. 853.)

In this case, whether the trial court could have ordered a blood test depended upon factual issues in the record or requires a remand for further findings. Since defendant claimed to be unconscious during his molestation of Taylor -- and Taylor was too young to know exactly what defendant was doing -- it is open to interpretation what defendant actually did to Taylor. On appeal, defendant does not argue that there was no evidence from which a finding of probable cause could be made, thus waiving any such contention on appeal. (E.g., *MST Farms v. C.G. 1464* (1988) 204 Cal.App.3d 304, 306.) We cannot substitute for the trial court in reconstructing what happened, which must be based not only on the medical testimony but on the credibility of the testimony as to what happened. This is precisely the type of circumstance that required a timely objection, which would have resulted in a finding that we could review on appeal.

Any error in making the order here cannot be corrected without considering factual issues and reasonable inferences drawn from the record. Thus, the error was not an unauthorized sentence for which no objection is necessary to preserve. The claimed error is waived.

VII. *Defendant's Claim of Cumulative Error*

Defendant contends that the cumulative effect of his claims of error prejudicially affected his case. However, except for his claim over the HIV testing (for which we found waiver) and the giving of CALJIC No. 17.41.1 (for which we assumed error), we affirmatively found no error. Accordingly, the cumulative effect of any claimed error is limited to the effect of CALJIC No. 17.41.1, which we found was harmless. Accordingly, this claim necessarily fails.

DISPOSITION

The judgment is affirmed.

Kolkey, J.

We concur:

Blease, Acting P.J.

Morrison, J.