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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE, Plaintiff and Respondent, v. ADRIAN EUGENE BANKS, Defendant and Appellant.	B280932 (Los Angeles County Super. Ct. No. TA140593)

APPEAL from a judgment of the Superior Court of Los Angeles County, Michael J. Schultz, Judge. Reversed.

Richard D. Miggins, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Michael C. Keller and Eric J.

Kohm, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted Adrian Eugene Banks (Appellant or Banks) of sexual penetration with a foreign object of an unconscious person (Pen. Code, § 289, subd. (d)[1]). On appeal, Banks argues, inter alia, that his conviction must be reversed because there was "no direct evidence of penetration of anything" and the circumstantial evidence of penetration was insufficient as a matter of law because it was "based on speculation, and guessing alone." We agree and, accordingly, reverse the judgment.

BACKGROUND

I. The incident

At approximately 3:30 p.m. on June 29, 2016, as Brandon Whitehead (Whitehead) was walking to a bus stop at the corner of 92nd and Figueroa Streets in Los Angeles County, he saw Banks laying on top of a woman (victim) with his hand inside the victim's pants. The victim, who was lying on the ground, was "kind of" moving "but not really." Whitehead activated the video-recorder on his cell phone to capture the incident.[2] Whitehead recorded Banks and the victim from a distance of about three feet.

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

[2] The People showed the jury the video from Whitehead's phone (People's Exh. No. 1), as well as certain screen or still shots excerpted from the video (People's Exh.

As he was recording, Whitehead made the following comments: "I bet his fingers stink and all this. Only on Fig,[3] my nig, you'll see some weird shit like this going on. My nigger was really fingerbanging. He was all in the ass. He had the fingers in the ass and in the pussy, right."

Although Whitehead did not have an actual view of either the victim's genital area or Banks's hand, he believed that Banks was penetrating the victim's vagina and anus based on the way Banks was moving his arm back and forth. Whitehead, however, could not actually see Banks's fingers, and he never saw Banks penetrating the victim's vagina or anus. Whitehead conceded that Banks could have been doing something other than penetrating the victim's vagina or anus. Whitehead, in short, admitted that he was "speculating or guessing" about what Banks was doing with his hand.

At or around the same time that Whitehead happened upon the victim and Banks, Denise Beck (Beck) was in her van and stopped at a red light at the intersection of 92nd and Figueroa Streets. From across the street, Beck saw a

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No. 2A–J) and the trial court admitted those exhibits into evidence. Those trial exhibits, however, were not included by the parties in the record on appeal. Accordingly, we requested and reviewed those exhibits.

[3] According to Whitehead, the area of Figueroa Street where the incident occurred is known "for a lot of weird stuff," including "prostitution" and "open displays of affection."

"young lady laying down and a guy had his finger in her private parts." According to Beck, Banks was moving his hand in a back and forth motion inside the victim's pants. Although Banks could not actually see Banks's fingers or what they were doing while inside the victim's pants, she purportedly saw "his hand going in and out of her vaginal area." Beck never saw the victim move. Beck also saw Whitehead recording the incident, as well as a father who was covering his son's eyes. While stopped at the traffic light, Beck was scanning the entire scene, and not focused on any particular detail. Beck drove away as soon as the traffic light turned from red to green, but felt compelled to return to the scene to help the victim.

Before Beck returned to the scene, two motorcycle officers with the Los Angeles Police Department, who had just completed a traffic stop, noticed "something unusual" a short distance (35 to 50 feet) from their location. One of the officers thought "he saw a man on top of woman, possibly taking her property, reaching inside of her pockets." The two officers walked over and saw Banks and the victim "in opposing directions of each other." As the officers approached, Banks rolled off the victim.

The officers found the victim "unconscious and unresponsive." She remained unconscious even after the paramedics arrived and took her away from the scene. The victim did not regain consciousness until after she was at the hospital.

II. The trial

On August 3, 2016, the People filed a one-count information charging Banks with sexual penetration with a foreign object of an unconscious person (§ 289, subd. (d)). From the record before us, it does not appear that People ever attempted to amend the information so as to add any other charges, such as sexual battery (§ 243.4[4]).

At trial, the People presented testimony from three percipient witnesses (Whitehead, Beck, and one of the police officers), an expert witness—a sexual assault nurse examiner who testified generally regarding the anatomy of the female genitalia—and the victim. The victim testified to not having any recollection of the events at issue. She also testified to not knowing Banks and to not giving him permission to touch her.

At trial, Banks testified on his own behalf. Among other things, Banks testified that he knew the victim, having sold drugs to her in the past and, on one occasion, he gave her drugs in exchange for sexual favors.

On the day of the alleged crime, Banks admitted that he had been drinking and smoking marijuana and "wasn't thinking right." He testified that the victim was also "high and drunk," but not unconscious. Banks testified further

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[4] Section 243.4, subdivision (e)(1) defines misdemeanor sexual battery as follows: "[a]ny 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."

that the victim was on her way to a homeless shelter when they met, but she didn't make it there because she was so intoxicated. Bank stated that he offered to help her find her a place to stay.

With regard to the specifics of the alleged crime, Banks admitted that he rubbed the victim's vagina and pelvis, but denied ever penetrating "her hole"; he expressly testified that he rubbed "only on the outside" of the victim's "pussy lips." Moreover, he testified that he was not trying to give the victim pleasure, only himself; as a result, he did not believe he ever touched the victim's clitoris. Banks testified that the physical encounter between himself and the victim lasted a short time, 20 to 30 seconds.

After the close of evidence, the trial court elected to instruct the jury on the "lesser" crime of simple battery, as well as the charged crime. Neither Banks nor the People objected.

On November 14, 2016, after just 30 minutes of deliberation, the jury returned its verdict finding Banks guilty of the charged crime.

On February 3, 2017, the trial court sentenced Banks to the upper term of eight years in prison. Banks timely appealed.

DISCUSSION

I. The verdict was not supported by substantial evidence

A. STANDARD OF REVIEW

When a criminal conviction is challenged as lacking evidentiary support, "the court must review the whole record in the light most favorable to the judgment below to determine whether it discloses substantial evidence—that is, evidence which is reasonable, credible, and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt." (*People v. Johnson* (1980) 26 Cal.3d 557, 578.) We must "presume[ ] in support of the judgment the existence of every fact the jury could reasonably deduce from the evidence." (*People v. Kraft* (2000) 23 Cal.4th 978, 1053.) "The same standard applies when the conviction rests primarily on circumstantial evidence." (*Ibid.*)

We do not reweigh the evidence or resolve conflicts in the evidence. (*People v. Young* (2005) 34 Cal.4th 1149, 1181.) "Reversal on this ground is unwarranted unless it appears 'that upon no hypothesis whatever is there sufficient substantial evidence to support [the conviction].' " (*People v. Bolin* (1998) 18 Cal.4th 297, 331.)

"However, substantial evidence is not synonymous with *any* evidence. [Citations.] A decision supported by a mere scintilla of evidence need not be affirmed on appeal. [Citation.] Furthermore, '[w]hile substantial evidence may consist of inferences, such inferences must be "a product of

logic and reason" and "must rest on the evidence" [citation]; *inferences that are the result of mere speculation or conjecture cannot support a finding* [citations].' [Citation.] 'The ultimate test is whether it is reasonable for a trier of fact to make the ruling in question in light of the whole record.' " (*In re Savannah M.* (2005) 131 Cal.App.4th 1387, 1393–1394.)

A reviewing court "must accept logical inferences the jury might have drawn from the circumstantial evidence." (*People v. Maury* (2003) 30 Cal.4th 342, 396.) However, a reasonable inference " '*may not be based on suspicion alone, or on imagination, speculation, supposition, surmise, conjecture, or guess work.* [¶] . . . A finding of fact must be an inference drawn from evidence rather than . . . a mere speculation as to probabilities without evidence.' " (*People v. Morris* (1988) 46 Cal.3d 1, 21.) Instead, a reasonable inference " ' " 'must logically flow from other *facts* established in the action.' " ' " (*People v. Velazquez* (2011) 201 Cal.App.4th 219, 231, italics added.)

B. SEXUAL PENETRATION

Section 289, subsection (d) provides: "Any person who commits an act of sexual penetration, and the victim is at the time unconscious of the nature of the act and this is known to the person committing the act or causing the act to be committed, shall be punished by imprisonment in the state prison for three, six, or eight years. As used in this subdivision, 'unconscious of the nature of the act' means incapable of resisting because the victim meets one of the

following conditions: [¶] (1) Was unconscious or asleep. [¶] (2) Was not aware, knowing, perceiving, or cognizant that the act occurred. [¶] (3) Was not aware, knowing, perceiving, or cognizant of the essential characteristics of the act due to the perpetrator's fraud in fact. [¶] (4) Was not aware, knowing, perceiving, or cognizant of the essential characteristics of the act due to the perpetrator's fraudulent representation that the sexual penetration served a professional purpose when it served no professional purpose."

" 'Sexual penetration,' " as used in section 289, "is the act of causing the penetration, however slight, of the genital or anal opening of any person or causing another person to so penetrate the defendant's or another person's genital or anal opening for the purpose of sexual arousal, gratification, or abuse by any foreign object, substance, instrument, or device, or by any unknown object." (§ 289, subd. (k)(1).)

Penetration of a woman's genital opening is not the same as vaginal penetration. "Penetration of the external genital organs is sufficient to constitute sexual penetration . . . even if the [offender] does not thereafter succeed in penetrating into the vagina." (*People v. Karsai* (1982) 131 Cal.App.3d 224, 232; *People v. Quintana* (2001) 89 Cal.App.4th 1362, 1366–1371.) "The external female genitalia are referred to as the 'vulva' and ' "include[e] the labia majora, labia minora, clitoris and vestibule of the vagina." ' [Citations.] The labia majora ' "form the external lateral boundaries of the vulva." ' [Citation.] The hymen is

'located directly at the front of the opening to the vagina' [citation]; the vagina is ' "the passage leading from the external genital orifice to the uterus" ' [citation]. Accordingly, contact with the hymen as well as the clitoris and the other genitalia inside the exterior of the labia majora constitutes 'sexual penetration' within the meaning of section 289." (*Quintana*, at p. 1371.) So, for example, evidence that a defendant penetrated the victim's labia majora was held to be sufficient to establish sexual penetration within the meaning of section 289. (*Ibid.*)

Similarly, penetration of person's anal opening does not require penetration of the anal canal. Sexual penetration of the anal opening "requires penetration of the tissues that surround and encompass the lower border of the anal canal—that is, it requires penetration past the buttocks and into the perianal area but does not require penetration beyond the perianal folds or anal margin." (*People v. Paz* (2017) 10 Cal.App.5th 1023, 1038.) However, "mere penetration of the buttocks is not sufficient to establish penetration of the anal opening. 'An intrusion into the space between a person's buttocks, while perhaps a necessary step on the path to intrusion of the anal opening, is not, in itself, an intrusion into the anal opening.' " (*Ibid.*)

"While penetration is an essential ingredient of the offense [citation], '[a]ny sexual penetration, however slight, is sufficient to complete the crime.' " (*People v. Minkowski* (1962) 204 Cal.App.2d 832, 842; *People v. Roundtree* (2000) 77 Cal.App.4th 846, 852; § 263.)

C. PROVING SEXUAL PENETRATION

Although penetration may be proved by circumstantial evidence (*People v. Holt* (1997) 15 Cal.4th 619, 669), "[i]n all sex-crime cases requiring penetration, prosecutors must elicit precise and specific testimony to prove the required penetration beyond a reasonable doubt." (*People v. Paz*, *supra*, 10 Cal.App.4th at p. 1038.)

1. Victim testimony

Sexual penetration, like any other fact, may be proved by one witness's testimony alone, including that of the victim. (Evid. Code, § 411.) For example, in *People v. Karsai*, *supra*, 131 Cal.App.3d 224, the Court of Appeal rejected defendant's claim of insufficient evidence of rape based on the testimony of the victim.[5] (*Id.* at p. 231.) "[T]he victim testified [the defendant] did not penetrate her vagina with his penis." (*Id.* at p. 232.) She testified that the "defendant's penis was erect and that he pushed it between her 'lips.' Defendant did not succeed in full penetration. Defendant denied any penetration. He testified that he was

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[5] Because there is a very close relationship between the crimes of rape and object penetration—indeed, "object penetration . . . *is* a form of rape"— and because the rape statute (§ 263) and the object penetration statute (§ 289) both "use the very same words—'sexual penetration'— to characterize the type of penetration that is prohibited," courts have held that "there is no reason to distinguish the degrees of penetration required to commit different forms of this same crime." (*People v. Quintana*, *supra*, 89 Cal.App.4th at pp. 1368, 1370.)

not erect because he had just ejaculated during the oral copulation, and that he merely rubbed his flaccid penis against the victim's genitalia." (*Ibid.*) Relying on the "universal rule" among out-of-state authorities in the absence of "California law directly on point," the *Karsai* court concluded "[t]he penetration which is required is sexual penetration and not vaginal penetration. (*Id.* at pp. 232–233.) Accordingly, the court rejected the defendant's substantial evidence claim. (*Id.* at p. 233.)

2. Forensic evidence and defendant's testimony

Sexual penetration may also be proven by a combination of forensic evidence and related testimony by the defendant. In *People v. Holt* (1997) 15 Cal.4th 619, the defendant was charged with sodomizing, raping and murdering the victim. There were no witnesses to the actual crime and the victim died at the hospital without ever regaining consciousness. (*Id.* at p. 641.) At trial, the emergency room doctor who examined the victim when she was brought to the hospital testified that the victim's "vaginal area was red and that this could be consistent with either bruising and penetration by an adult penis or an infection." (*Id.* at p. 668.) The defendant argued that the evidence was insufficient to support his rape conviction, because "the redness could have been caused by any low-grade infection or atrophic vaginitis for which one of the medications the victim was taking is sometimes prescribed. This, coupled with the finding of apparent blood in the anus, suggested that if a sexual assault took place only sodomy

occurred." (*Ibid.*) Our Supreme Court affirmed the conviction on the rape charge because the "jury verdict in this case was not, as defendant argues, based only on speculation. It was based on evidence that the redness present in the victim's vagina was consistent with penetration by an adult male penis. The inference that defendant accomplished penetration, apparently drawn by the jury on the basis of this evidence and defendant's admission that he [sodomized] the victim, is reasonable." (*Id.* at p. 669.)

3. Victim testimony and forensic evidence

A conviction may also be obtained through a combination of victim testimony and forensic evidence. In *People v. Quintana*, *supra*, 89 Cal.App.4th 1362, the defendant was convicted of foreign object penetration of a child under 14 (§ 289, subd. (j)) after a court trial at which the five-year-old victim's preliminary hearing testimony was admitted in lieu of her live testimony pursuant to a sentence bargain. (*Id.* at p. 1364.) At the preliminary hearing, the victim testified that the defendant touched her with his hand between her legs, outside of her panties, and that it hurt. He did not move his fingers. She immediately told her mother and a friend. (*Ibid.*) The friend testified at trial that the victim told her and the victim's mother that the defendant "put his hand in her pants, 'poking her.' " Asked where she was poked, the child pointed to her vagina and stated, "[I]t burns," when her mother wiped her vagina with a tissue. (*Id.* at p. 1365.) The physician's assistant who

performed the sexual assault examination testified that the injuries to the victim included swelling of the labia majora; irritation of the perihymenal tissue; an abnormally shaped border of the hymen; and a laceration and broken capillaries at the posterior fourchette. (*Id.* at p. 1365.) She explained that a five-year-old's labia majora " 'are usually quite plum[p] and cover the genital area' " and that the hymenal tissues, which are hidden under " 'several layers of material,' " are " 'not easy to get to.' " (*Id.* at p. 1367.) The physician's assistant opined that the injuries "were consistent with 'blunt force trauma or digital penetration to the hymeneal tissue' " and "could have been inflicted by digital penetration through panties." (*Id.* at p. 1365.) The Court of Appeal held that in light of such evidence the defendant's conviction was supported by substantial evidence.

Similarly, in *People v. Gonzalez* (1983) 141 Cal.App.3d 786, 790, the court found that the victim's testimony that the defendant " 'tried to enter a little bit, but it hurt a lot' " supported a finding of slight penetration, which when combined with circumstantial evidence of rectal pain and bleeding, was sufficient to sustain the sodomy conviction.

In *People v. Paz*, *supra*, 10 Cal.App.5th at p. 1040, the court affirmed a conviction on the basis of victim testimony and forensic evidence: "we conclude the blunt-force injuries to the top and bottom of [the victim]'s perianal folds, when combined with her testimony that defendant 'started having anal sex' with her and her agreement that he moved 'his

body in and out' of hers, were sufficient to prove the slight penetration required under section 286 [forcible sodomy]."

4. Victim and third-party witness testimony

In *People v. Miranda* (2011) 199 Cal.App.4th 1403, the defendant was convicted of attempted rape and sexual penetration of his 15-year old granddaughter. (*Id.* at p. 1407.) The victim slept in the same room as her 13-year-old brother Vincent; because the victim suffered from cerebral palsy, Vincent would sometimes sleep with his sister to guard against seizures. (*Id.* at pp. 1407–1408.) Early one morning, after the children's father left for work, the defendant entered the bedroom and directed Vincent to another bed, while he climbed into bed with the victim. (*Id.* at p. 1408.) "Vincent soon heard the sound of a female moaning. Defendant was under the blankets, which were moving, with [the victim] beneath him. When the blankets moved off defendant, Vincent saw defendant with his head close to 'her privates,' between her knees, licking her. Defendant's head moved up and down, and a bit later, Vincent saw defendant's fingers entering a split in the boxer shorts worn by [the victim] in the area of her 'privates.' Defendant asked [the victim] several times if she liked that. Vincent definitely saw defendant's fingers touching his sister, but he could not actually see if defendant's tongue touched her 'privates.' " (*Ibid.*) The victim was not subjected to physical exam. (*Id.* at p. 1410.)

Both Vincent and his sister testified at trial. (*People v. Miranda, supra*, 199 Cal.App.4th at pp. 1408–1409.)

However, due to her cerebral palsy, the victim's testimony was limited in both duration and substance: "Direct examination of [the victim] before the jury consumed six pages of reporter's transcript. . . . With the exception of three answers, [the victim's] verbal responses on direct examination were one word consisting of a single syllable. At least seven of her answers were inaudible or unintelligible." (*Id.* at p. 1408, fn. omitted.)

On appeal, the defendant argued that the evidence was insufficient to support his sexual penetration conviction "because there is no evidence he did anything other than rub [the victim's] pubic area." (*People v. Miranda, supra*, 199 Cal.App.4th at p. 1418.) The Court of Appeal rejected defendant's arguments: "Vincent testified he was certain defendant's fingers were touching [the victim's] private parts as his hand was 'moving up and down, and she was moaning.' [The victim] held up 10 fingers to describe how defendant had touched her. The jury could infer from these facts that defendant penetrated [the victim] with his fingers." (*Ibid.*)

C. THE EVIDENCE DOES NOT ESTABLISH SEXUAL PENETRATION

Here, the evidence is insufficient to establish the fact of penetration. There was no testimony from the victim from which the jury could reasonably infer that Banks sexually penetrated her. While the victim did testify and stated that she recognized herself in the video, she was unable to recall

anything about the incident—she could only recall getting on a bus and later waking up in the hospital.

There was no forensic evidence from which the jury could reasonably infer that Banks sexually penetrated the victim. In fact, there was no forensic evidence regarding the victim at all—no medical records regarding the victim; no testimony by a healthcare provider who treated the victim; no testimony by an expert who had reviewed the victim's medical records.

Finally, there was no percipient witness testimony from which the jury could reasonably infer that Banks committed the act with which he was charged. The three percipient witnesses who testified—Whitehead, Beck, and the police officer—all saw Banks's hands in the victim's pants. None of them saw or even could see exactly what Banks was doing with his hands because the victim had her pants on. They could only speculate as to what he was doing. In the absence of any other confirming evidence, such as the victim's testimony that Banks sexually penetrated her or medical evidence indicating that Banks sexually penetrated her, the jury's verdict was based on speculation alone. As our Supreme Court has stated, "An inference is *not* reasonable if it is based only on speculation." (*People v. Holt*, *supra*, 15 Cal.4th at p. 669, italics added.) As a result, the conviction must be vacated.

II. The judgment cannot be modified to a conviction for battery

Given our conclusion that the evidence at trial was insufficient as a matter of law to support Banks's conviction on the sexual penetration charge, he cannot be retried for that offense. (See *Burks v. United States* (1978) 437 U.S. 1, 18; *People v. Hatch* (2000) 22 Cal.4th 260, 271–272; *People v. Seel* (2004) 34 Cal.4th 535, 544.)

However, as our Supreme Court has observed, " '[a]n appellate court is not restricted to the remedies of affirming or reversing a judgment.' " (*People v. Edwards* (1985) 39 Cal.3d 107, 118; § 1260.) An appellate court may reduce a conviction to a lesser included offense if the evidence supports the lesser included offense but not the charged offense. (*People v. Howard* (2002) 100 Cal.App.4th 94, 99.) Such a procedure is in accord with judicial economy and efficiency as it " 'obviat[es] the necessity for retrial.' " (*People v. Edwards, supra*, 39 Cal.3d at p. 118; see *People v. Stuedemann* (2007) 156 Cal.App.4th 1, 9, fn. 6; *People v. Rivera* (2003) 114 Cal.App.4th 872, 879.)

Here, not only was the jury instructed on the crime of battery, but Banks's counsel admitted during closing argument that his client "committed the crime of battery. That's what he's done. That's what the evidence shows."

However, we cannot reduce Banks' conviction for two principal reasons. First, battery is not a lesser included offense of sexual penetration. "An uncharged offense is included in a greater charged offense if *either* (1) the greater

offense, as defined by statute, cannot be committed without also committing the lesser (the elements test) *or* (2) the language of the accusatory pleading encompasses all the elements of the lesser offense (the accusatory pleading test)." (*People v. Parson* (2008) 44 Cal.4th 332, 349.) The accusatory pleading test "looks to whether ' " 'the charging allegations of the accusatory pleading include language describing the offense in such a way that if committed as specified [some] lesser offense is necessarily committed.' " ' " (*People v. Montoya* (2004) 33 Cal.4th 1031, 1035.) "Consistent with the primary function of the accusatory pleading test—to determine whether a defendant is entitled to instruction on a lesser uncharged offense—we consider *only* the pleading for the greater offense." (*Id.* at p. 1036.)

Here, the uncharged offense of battery fails both tests. Battery is not a lesser included offense of sexual penetration with a foreign object of an unconscious person because the elements are different. Most notably, battery includes as one of its elements—and sexual penetration with a foreign object of an unconscious person does not—"any willful and unlawful use of force or violence upon the person of another." (Compare § 242 and CALCRIM No. 960 with § 289, subd. (d) and CALCRIM 1048.) In other words, an unconscious person could be sexually penetrated with a foreign object without having been subjected to force or violence. (See *People v. Hernandez* (2011) 200 Cal.App.4th 1000, 1006 [battery not lesser included offense of rape of unconscious person].) In addition, the People did not allege the elements

of battery in the information when alleging the sexual penetration charge.[6]

Second, even if battery could somehow be construed as a lesser included offense, there was no evidence that Banks used force or violence against the victim. The force required for a battery need not be violent or severe, and it need not cause bodily harm or pain; rather it includes " ' "any wrongful act committed by means of physical force against the person of another" ' " (*People v. Myers* (1998) 61 Cal.App.4th 328, 335.) Even a slight touching may constitute a battery, "if it is done in a rude or angry way." (CALCRIM No. 960.)

Here, however, the *only* evidence about what occurred immediately before Banks was seen atop the victim came from Banks and he testified that the victim did not resist in any way when he started touching her. Indeed, Banks intimated that the touching was not forced but consensual due to their purported prior relationship which allegedly involved trading sex for drugs: "I had already had sexual

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[6] The People concede that battery is not a lesser included offense of the charged crime.

Courts, however, have held that, although sexual battery (§ 243.4) is not a lesser included offense of sexual penetration (§ 289) under the elements test, it can, depending on the specificity of the allegations, pass the accusatory pleading test. (See *People v. Ortega* (2015) 240 Cal.App.4th 956, 967–968.)

encounters with her. She did just want some fun. She wanted some place to stay."[7]

Due to the fact that battery is not a lesser included offense of sexual penetration, and given that the information did not allege facts sufficient to support a battery charge under the accusatory pleading test, and because there was insufficient evidence to support a battery conviction, we cannot modify the judgment to a conviction for battery.

DISPOSITION

The judgment is reversed.

NOT TO BE PUBLISHED.

JOHNSON, J.

We concur:

ROTHSCHILD, P. J.

LUI, J.

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[7] The People also concede that there was no substantial evidence to support a battery conviction.