



Office of the District Attorney Stanislaus County

Birgit Fladager
District Attorney

Assistant District Attorney
David P. Harris

Chief Deputies
Annette Rees
Marlisa Ferreira
Stephen R. Robinson
Jeffrey M. Laugero
Jeff Mangar

Bureau of Investigation
Chief Terry L. Seese

July 7, 2020

Det. Marissa Silva
Stanislaus County Sheriff's Office
250 E. Hackett Rd.
Modesto, CA 95358

Re: Complaint against Lt. Marcelino Nuno

Dear Det. Silva:

This office has completed our review of the accusation against Lt. Marcelino Nuno relating to his interactions with female cadets at the Law Enforcement Academy. Lt. Nuno's behavior may or may not conform to sexual harassment standards¹ but there was no evidence demonstrating that a sexual battery occurred. It is our determination that no crime occurred based on the evidence presented to us.

FACTS

On April 22, 2020, Lt. Nuno served as an instructor at the Peace Officer Standards and Training Law Enforcement Academy (hereafter POST) in the area of defensive tactics. Defensive tactics involves searching "suspects" (sometimes played by other students) and taking physical control of suspects during simulated arrests/detentions ("hands on" techniques). The building/location where the training occurred is covered by multiple video cameras. The factual issues can be divided into two separate types of activities – 1) physical defensive contact, and 2) "suspect" role playing.

Category One

Recruit One was interviewed. She had been identified by the Academy Class Leader as having been subjected to inappropriate touching by Nuno. Recruit One relayed the incident happened during ground training. Recruit One was doing the "squid" maneuver which she admitted she was doing incorrectly. In this maneuver, she was on her back with another recruit over her. Recruit One was supposed to bring one leg up and push off the other recruit to get away moving backwards. She said that Nuno stepped in and grabbed her "crotch and butt" and moved her into the correct

¹ The District Attorney has no jurisdiction to investigate another agency's internal complaints of sexual harassment that do not also constitute crimes.

position. When Recruit One was asked to demonstrate the “grab” she showed that it was in front of her torso “where her thighs bent, near the hip flexors” and on her “buttocks” causing her cargo pocket to come undone.

Recruit One was upset by the touching but stated she may have been “primed for the behavior.” She stated that throughout the day she had seen Nuno be inappropriate with female recruits and had been told to stay away from him. As an example, she mentioned that Nuno had asked to sit next to a recruit he knew. The recruit, a female, apparently stated no² and then Nuno made the class do push-ups. Recruit One “felt” someone should not be punished for saying no. Recruit One also mentioned she came from an HR background.

After the “squid” incident, Recruit One told her squad leader that she may need to report something. She asked the squad leader to watch Nuno because she wasn’t sure if she was “seeing things correctly.” Later in the day, Recruit One saw Nuno come up behind a female recruit who was sitting down and place his hands near her neck. Recruit One motioned for the squad leader to watch Nuno even though she stated, “what Nuno did was not necessarily inappropriate,” but she didn’t understand “why it was happening.” Recruit One “noticed” that Nuno was paying more attention to the female recruits, but “believed he was just a handsy person.”

During her interview, Recruit Two relayed a conversation with Recruit One. Recruit Two said that Recruit One had told her that she (Recruit One) felt Nuno had touched her (Recruit One) inappropriately during a physical contact drill. Recruit Two had not seen this and was asked if she (Recruit Two) had a similar experience. Recruit Two relayed that during “ground work” Nuno had been “too aggressive” but she felt he was supposed to be and she (Recruit Two) had asked him for help with techniques.

Recruit Three. was interviewed regarding Nuno’s behavior. The only incident she felt uncomfortable with was when Nuno had hugged a female recruit³. Recruit Three was asked about any experiences with Nuno during the ground exercises. She explained that during one practice Nuno had pulled her legs out from underneath her, but they were practicing a move and “she did not feel uncomfortable” about his actions.

Recruit Four was partnered for one exercise with Nuno and Recruit Two. Recruit Four relayed that Nuno taught her the standard technique, but--on the second time through--he showed her and Recruit Two an additional escape technique by jabbing the thumb into the hip flexor/pelvic bone. Recruit Four said she didn’t think anything about this other than the fact that Nuno only showed it to her and Recruit Two.

Recruit Five was interviewed and said her only interaction with Nuno was when he was walking by. She was apparently in his way, so he moved her aside. She didn’t think this was inappropriate.

² This recruit, Recruit Six, knew Nuno and worked with him before she became a recruit. When she was interviewed she stated that she was not telling Nuno “no” he couldn’t sit by her, but that “no, it was okay” to sit by her. When the class had to do push-ups, she became the subject of attention by other students who didn’t appreciate having to do push-ups. Recruit Six may have told others to stay away from Nuno. According to the instructors, the push ups were part of a scheduled activity and not due to the interaction.

³ The recruit who was hugged is the same recruit mentioned in footnote #2. It is this prior relationship that seemed to cause difficulty for the recruit and caused the class to feel uncomfortable.

Recruit Seven explained that she was partnered with Recruit Six during some defensive tactic exercises. Recruit Six was handcuffed and on the ground during the exercise. Nuno approached and put his hand on Recruit Six's back telling Recruit Seven to keep her down. Recruit Seven took this as joking and they all laughed. She did ask Recruit Six if she and Nuno were friends. Recruit Seven thought the interaction between Recruit Six and Nuno was "weird." Recruit Seven continued to talk about this with Recruit Six and in front of Recruit One.

Later, after the push-up incident, Recruit Seven was partnered with Recruit One during a defensive tactic exercise. Nuno kept telling Recruit One that she was doing it incorrectly and she needed to get her "butt higher" off the ground. Recruit Seven said that, when Recruit One failed to do it correctly again, Nuno "grabbed her butt with his hand and grabbed her arm/shoulder and pulled her into the position he thought she needed to be in."

Recruit Seven was partnered with Recruit Eight for another drill when Nuno approached. Nuno demonstrated techniques on Recruit Eight which made Recruit Seven uncomfortable. Recruit Seven then went to the squad leader and made a complaint. Recruit Seven stated that she knew every female recruit was touched because she was paying attention. According to her, the "touching wasn't necessarily in an inappropriate way," but she felt that verbal instructions could have been used. Recruit Seven specifically stated that she "did not notice this type of behavior with the males."

Recruit Six was interviewed; she was the recruit who had previously worked with Nuno. She stated he was a friendly person and was "handsy," but she never took it as "weird." On the day in question, Nuno had come up and hugged her and then started rubbing her shoulders. Other male recruits started asking her if this made her feel weird. She then began to get uncomfortable because now people were noticing.

During one of the exercises, Nuno came over and pushed Recruit Six in the lower back as she was laying on her stomach on the floor. Recruit Six stated she did not understand why he did it. Her partner, Recruit Seven, then asked Recruit Six if she was friends with Nuno. Recruit Seven asked her if she found it weird that he kept touching her if they weren't friends. Recruit Six stated she did "not feel it was malicious" but starting to second guess herself because there "were several girls finding it weird."

After the chair/push-up incident, Recruit Six had other students in the class comment to her about having to do push-ups because of her. Recruit Six then made an effort to move away from Nuno. Recruit Six continued to be asked by other recruits if she and Nuno "were a thing." Recruit Six told the other female recruits she did not want to be brought into this. When asked during her interview why Nuno paid attention to her, Recruit Six stated that she "did not believe that Nuno was touching her for some weird sexual gratification and was not a "creepy weirdo." Recruit Six stated that Nuno never said anything inappropriate during any of the interactions.

A female Lieutenant was present on the day in question and advised she was told by one of the instructors (not Nuno) that the class was showing some "reluctancy to search incident to arrest and search" of females. She decided to change into civilian clothes to play a suspect. She went with Nuno to the gym and concealed the "prop" weapons on her person. She could not completely recall if Nuno helped hide or place some of the items on her person but believed he may have.

Most of the male recruits interviewed didn't have much first-hand information; at least one thought some of the behavior by Nuno was odd but stated that he did not "see anything that would be blatantly be seen as sexual misconduct."

Relevant staff of the Academy were interviewed and did not notice any issues. Some were asked to view video from the day⁴. The video was shown to prior staff (a sergeant) to elicit opinions on Nuno's behavior. The sergeant stated that he would not have demonstrated techniques on female recruits but that what was shown appeared to be "valid" techniques. The sergeant further stated that "ground fighting can be very physical and have a sexual perspective."

Hours of video footage were provided as part of this submission. Pages 35 to 39 of the submitted report provide a summary of events by time, camera location and a synopsis of activities shown. All of the video footage has been reviewed. The video demonstrates that Nuno demonstrated physical maneuvers with both male and female recruits. There are several instances where Nuno grabbed male recruits in the same general location as described by Recruit One⁵. Although not timed, it does not appear that Nuno spent a greater amount of time with female recruits versus male recruits.

Category Two

Recruit Nine was asked to play a "suspect" for drills on the day in question. She went and changed into her civilian clothes and returned to the gym. She was directed by Nuno to the weight room; the weight room does not have a video camera. The role was explained to Recruit Nine that she was to secrete various prop items (fake gun, etc.) on her person for use in the search drills with other students.

Recruit Nine started putting a small pipe in her boot and Nuno placed a small knife in the front of her pants between the zipper and underwear line. Nuno asked Recruit Nine what kind of underwear she was wearing. She answered but felt awkward. Nuno then manipulated the area where the knife had been placed "multiple times" while she looked forward. Nuno then assisted placing items inside her bra strap and inside of her bra. Recruit Nine stated that Nuno "used the appropriate searching technique" when he examined the items under her clothing. Recruit Nine said during this time he did touch part of her breast on the side over her clothes. Nuno then placed a gun in her pocket (back right rear pants) and patted it – her buttocks.

Recruit Nine then went and acted as a suspect for recruits to search her. She returned to the weight room with Nuno and repeated the process of hiding the props. This time, Nuno placed the items in different locations but again placed an item inside her pants. Recruit Nine felt uncomfortable having Nuno's hand down her pants.

During the interview Recruit Nine stated that Nuno never said "anything" to her "in a sexual manner." She did not "feel like a victim" but was uncomfortable because it was "wrong" and she knew it was "inappropriate." She said that normally if an instructor wanted items concealed they would just tell the student and let the student hide them. Recruit Nine advised her Training Sergeant that she did not want to press charges.

⁴ Except for one incident, where no cameras covered the area in question, the gym was blanketed with cameras. In fact, there are multiple angles for some locations.

⁵ At video timestamp 13:38:20, camera one; 14:04:42, camera one; 14:05:02, camera one; and 14:06:06, camera one.

The video footage was reviewed even though Recruit Nine was not seen on camera. The video did capture Nuno with the female Lieutenant. The video showed that Nuno placed items in the female Lieutenant's pocket and waistband and patted her down to examine the concealed nature of the props. This is consistent with what was described by Recruit Nine.

LAW

This case was referred as a possible violation of Penal Code §243.4, referred to as sexual battery. To start any analysis, you start with the language of the statute; §243.4 has four parts we will review:

- (a) Any person who **touches an intimate part of another person** while that **person is unlawfully restrained** by the accused or an accomplice, and if the touching is **against the will** of the person touched and is **for the purpose of sexual arousal, sexual gratification or sexual abuse**, is guilty of sexual battery. A violation of this subdivision is punishable by imprisonment in a county jail for not more than one year and by a fine not exceeding two thousand dollars (\$2,000), or by imprisonment in the state prison for two, three or four years and by a fine not exceeding ten thousand dollars (\$10,000).
- (b) Any person who **touches an intimate part of another person who is institutionalized** for medical treatment and who is seriously disabled or medically incapacitated, if the touching is against the will of the person touched, and if the touching is for the purpose of sexual arousal, sexual gratification or sexual abuse, is guilty of sexual battery. A violation of this subdivision is punishable by imprisonment in a county jail for not more than one year, and by a fine not exceeding two thousand dollars (\$2,000), or by imprisonment in the state prison for two, three or four years and by a fine not exceeding ten thousand dollars (\$10,000).
- (c) Any person who **touches an intimate part of another person** for the **purpose of sexual arousal, sexual gratification or sexual abuse**, and the victim is at the time **unconscious of the nature of the act** because the **perpetrator fraudulently represented that the touching served a professional purpose**, is guilty of sexual battery. A violation of this subdivision is punishable by imprisonment in a county jail for not more than one year and by a fine not exceeding two thousand dollars (\$2,000), or by imprisonment in the state prison for two, three or four years and by a fine not exceeding ten thousand dollars (\$10,000).
- (d) Any person who, **for the purpose of sexual arousal, sexual gratification or sexual abuse**, causes another, against that person's will **while that person is unlawfully restrained** either by the accused or an accomplice, or **is institutionalized for medical treatment** and is seriously disabled or medically incapacitated, to masturbate or touch an intimate part of either of those persons or a third person, is guilty of sexual battery. A violation of this subdivision is punishable by imprisonment in a county jail for not more than one year and by a fine not exceeding two thousand dollars (\$2,000), or by imprisonment in the state prison for two, three or four years and by a fine not exceeding ten thousand dollars (\$10,000).
- (e)(1) Any person who **touches an intimate part of another person**, if the touching is **against the will** of the person touched, and is for the **specific purpose of sexual arousal, sexual gratification, or sexual abuse**, is guilty of misdemeanor sexual battery, punishable by a fine not exceeding two thousand dollars (\$2,000) or by imprisonment in a county jail not exceeding six months, or by both that fine and imprisonment. However, if the defendant was an employer and the victim was an employee of the defendant, the misdemeanor sexual battery shall be punishable by a fine not exceeding three thousand dollars (\$3,000), by imprisonment in a county jail not exceeding six months, or by both that fine and imprisonment. Notwithstanding any other provision of law, any amount of a fine above two thousand dollars (\$2,000) which is collected from a

defendant for a violation of this subdivision shall be transmitted to the State Treasury and, upon appropriation by the Legislature, distributed to the Department of Fair Employment and Housing for the purpose of enforcement of the California Fair Employment and Housing Act (Part 2.8 (commencing with Section 12900) of Division 3 of Title 2 of the Government Code), including, but not limited to, laws that proscribe sexual harassment in places of employment. However, in no event shall an amount over two thousand dollars (\$2,000) be transmitted to the State Treasury until all fines, including any restitution fines that may have been imposed upon the defendant, have been paid in full. [Penal Code § 243.4 in part. Emphasis added]

It is clear that subsections (a)⁶, (b) and (d) do not apply to this set of facts. Only subsections (c) and (e) warrant further discussion. The standard jury instruction for subsection (c) states:

Every person who, with the specific intent to cause sexual arousal, sexual gratification or sexual abuse, touches an intimate part of another person, and the victim is at the time unconscious of the nature of the act because the perpetrator fraudulently represented that the touching served a professional purpose, is guilty of the crime of sexual battery in violation of Penal Code section 243.4, subdivision (c).

The “specific intent to cause sexual abuse” means a purpose to injure, hurt, cause pain or cause discomfort. It does not mean that the perpetrator must be motivated by sexual gratification or arousal or have a lewd intent.

“Intimate part” means the sexual organ, anus, groin, or buttocks of any person, and the breast of a female.

“Touches” means physical contact with the skin of another person whether accomplished directly or through the clothing of the person committing the offense.

A fraudulent representation that a touching is for a professional purpose need not be solely expressed in words. In determining whether a fraudulent representation was made you should consider the totality of the defendant’s conduct and not just his verbal statements. A false representation may be inferred from conduct, or a combination of words and conduct.

In order to prove this crime, the following elements must be proved:

1. A person touched an intimate part of another person;
2. The person who touched the intimate part did so with the specific intent to cause sexual arousal, sexual gratification, or sexual abuse;
3. The alleged victim of the touching was at the time unconscious of the nature of the act because the perpetrator represented that the touching served a professional purpose;
4. The representation was false, in that the touching served no professional purpose; and
5. At the time the representation was made, the perpetrator knew that the touching did not serve a professional purpose, and made the representation with the intent to deceive and mislead the alleged victim. CALJIC 10.37.2

⁶ It might be argued that Nuno used his position to “restrain Recruit Nine. Some caselaw has allowed positions of authority to create restraint, but none under these facts. In fact, the standard jury instruction for subsection (a) states: “‘Unlawful restraint’ occurs when without consent a person’s liberty is controlled by the words, acts or authority of another. The means of the restraint need not be physical, but must consist of something more than simply the exertion of the physical effort required to commit the prohibited sexual act. A restraint is not unlawful if it is accomplished by lawful authority and for a lawful purpose, as long as the restraint continues to be for a lawful purpose. “Against the will” means without the consent of the alleged victim.” [CALJIC 10.37] There is no showing that the recruit was restrained either physically or through a show of authority.

Caselaw has expanded on what 10.37.2 means. “Unconscious” as used in this section, a necessary element, ...

“...does not require proof the victim was totally and physically unconscious during the acts in question. It simply requires proof the defendant tricked the victim into submitting to the touching on the pretext it served a professional purpose. This can be accomplished even when the victim has agreed to the act in question. So long as the victim was unaware of the “essential characteristics of the act,” i.e., the sexual nature of the act itself, the unconsciousness requirement will be satisfied.” [Citations Omitted.]

People v. Pham, (2009) 180 Cal. App. 4th 919, 928

In addition, a defendant charged with a sexual battery may assert a *Mayberry* defense; *Mayberry* is predicated on the notion that ... a reasonable mistake of fact regarding consent is incompatible with the existence of wrongful intent. (See People v. Duarte-Lara, (2020) 49 Cal. App. 5th 332.) A jury would be advised that the defense of a mistaken but honest and reasonable belief of the victim's consent is available to defendants charged with sexual battery. This all relates to the issue of the victim being unaware; if there is a lawful reason for the touching to which the victim consented then the suspect would not have the requisite intent to “conceal” negating that element even under the most expansive view of the law.

The next subdivision to discuss is (e)(1), as set out above. The jury instruction for this crime states:

Every person who with the specific intent to cause sexual arousal, sexual gratification, or sexual abuse, touches an intimate part of another person against the will of the person touched, is guilty of the crime of misdemeanor sexual battery in violation of Penal Code section 243.4, subdivision (e)(1).

“Intimate part” means the sexual organ, anus, groin, or buttocks of any person and the breast of a female.

“Touches” as used in crimes of misdemeanor sexual battery means physical contact with another person, whether accomplished directly, through the clothing of the person committing the offense, or through the clothing of the alleged victim.

“Against the will” means without the consent of the alleged victim.

In order to prove this crime, the following elements must be proved:

1. A person touched an intimate part of another person;
2. The touching was against the will of the person touched; and
3. The touching was done with the specific intent to cause sexual arousal, sexual gratification, or sexual abuse. CALJIC 16.145

Both subdivision (c) and (e)(1) have two elements in common – against the will and an act done with a specific intent towards a sexual purpose. As one court has explained:

The crime of misdemeanor sexual battery includes as its elements the touching of “an intimate part of another person ... against the will of the person touched ... for the specific purpose of sexual arousal, sexual gratification, or sexual abuse.” “ ‘[A]gainst the will’ of the victim is synonymous with ‘without the victim's consent.’ ” “A defendant therefore commits a sexual battery if he engages in an intimate non-consensual touching.” It is a specific intent crime. [Citations omitted.] People v. Andrews, (2015) 234 Cal. App. 4th 590, 602.

The last element of a required specific intent for “sexual arousal, sexual gratification, or sexual abuse⁷” is not defined in the instructions or caselaw. The meaning of such a term must be understood to carry with it a lay-person’s understanding of the term. Was the act intended to cause “sexual arousal or gratification” as would be understood by an objective person? The last stated element of intent required to prove sexual battery is also used in various other sex crime offenses. As the Supreme Court has stated, in discussing the intent element in another sex offense:

“.... the lewd character of an activity cannot logically be determined separate and apart from the perpetrator's intent. ***As the vast majority of courts have long recognized, the only way to determine whether a particular touching is permitted or prohibited is by reference to the actor's intent as inferred from all the circumstances.” People v. Martinez, (1995) 11 Cal. 4th 434, 450.

CONCLUSION

Based on the law, no crime was committed here because there is no evidence of any sexual intent on Nuno’s part. The video demonstrated that he taught male and female recruits approximately the same. Apparently, the class had some reluctance to engage in cross gender drills which might be uncomfortable but is a fact of life in police work. This reluctance caused a female Lieutenant to have to step in and play a “suspect” role. In this case, it appears that the uncomfortableness became a belief in illegal behavior; the law does not work that way. At least one recruit admitted that she might have been “primed” to see things that weren’t there. This does not diminish what anyone thought, felt or experienced, but crimes are rarely based on the subjective “belief” or “state of mind” of a victim.

Any crime with a subjective definition would immediately be subjected to strict scrutiny under the Due Process clause because laws are required to be fixed and certain; a defendant must know what the law is. it cannot change based on the feelings of the victim. Such a law would be unconstitutional in the criminal arena. An example that can be demonstrated from the facts in this case is when a recruit was bothered by Nuno placing the props on her, but an experience deputy was not. The criminal law requires a standard that lets everyone know what is right and what is wrong. Most criminal laws also require that the suspect have a criminal mindset so that accidents or misunderstandings are not penalized. That is not the case in the civil realm⁸.

In reviewing the Category One behavior, it is apparent that Nuno was considered “handsy” because he hugged the recruit he knew, touched another recruit on the neck and “touched every female” recruit. However, except for the hugging of someone he knew, what was described is the same behavior shown on video with male recruits. Additionally, none of the conduct can be tethered to

⁷ “Sexual abuse” is defined in the law but is not included in this discussion because it does not apply either legally or factually to this review.

⁸ Sexual harassment is a civil tort in California. The Government Code defines it as follows – “For purposes of this subdivision, “harassment” because of sex includes sexual harassment, gender harassment, and harassment based on pregnancy, childbirth, or related medical conditions. Sexually harassing **conduct need not be motivated by sexual desire.**” Gov’t Code § 12940 The law further states – “The Legislature hereby declares that harassment creates a hostile, offensive, oppressive, or intimidating work environment and deprives victims of their statutory right to work in a place free of discrimination when the harassing conduct sufficiently offends, humiliates, distresses, or intrudes upon its victim, so as to disrupt the victim's emotional tranquility in the workplace, affect the victim's ability to perform the job as usual, or otherwise interfere with and undermine the victim's personal sense of well-being.” Gov’t Code § 12923.

sexual behavior. Most of the female recruits admitted that the touching occurred during the defensive tactic drills where physical contact was expected.

The complaints seemed to have come from the manifested reluctance to have male instructors wrestling with female students. This reluctance caused a female lieutenant to have to jump into role playing. One student explained that Nuno could have used verbal commands instead of grabbing the student, but that does not make it a crime especially since he grabbed male students the same way. Cross gender police work happens all the time. Nuno's behavior being non-sexual is borne out by his interaction with the female Lieutenant. He placed props on her and she didn't even remember that he did.

Nuno's behavior may have been inappropriate in the civil context, but that is not an issue the District Attorney can decide. To prove a crime, we must establish each element of the crime. There is no showing of the required intent in this case and there can, therefore, be no crime. Our obligation, however, does not end there. We must determine if an obligation exists to disclose this information to the defense in any case where Nuno is a material witness, often referred to as our Brady obligation.

Traditionally, a misdemeanor battery is not admissible for impeachment. However, sexual battery is a crime of moral turpitude and has been found to be admissible for impeachment. (See People v. Chavez, (2000) 84 Cal. App. 4th 25, 30.) Under the lax standard for disclosure in California, even if we disagree that a crime occurred, we must still discover this incident since a law enforcement agency believed that there was sufficient evidence to warrant a criminal investigation. However, disclosure is not the same as admissibility and we will seek to exclude this incident in any case in which Lt. Nuno is called as a material witness.

Very truly yours,

BIRGIT FLADAGER
District Attorney

David P. Harris
Assistant District Attorney