

**NOT TO BE PUBLISHED IN OFFICIAL REPORTS**

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,  
Plaintiff and Respondent,  
v.  
LUIS MARTINEZ,  
Defendant and Appellant.

A128777

(Contra Costa County  
Super. Ct. No. 05-090784-0)

**ORDER MODIFYING OPINION  
AND DENYING PETITION  
FOR REHEARING**

NO CHANGE IN JUDGMENT

THE COURT:

It is ordered that the opinion filed December 3, 2012, be modified as follows:

On page 8, before the first full paragraph, add the following two paragraphs:

Martinez relies upon *Walters v. Maass* (9th Cir. 1995) 45 F.3d 1355, where, in a split decision overturning the judgment of the Oregon Supreme Court (*State v. Walters* (Ore. 1991) 804 P.2d 1164), the court determined that the evidence was sufficient to convict the defendant for an attempted kidnapping but not an attempted rape or sodomy. The evidence showed that the defendant had attempted to lure a 13-year-old girl into his truck with a false story that he was looking for his lost white German shepherd. There was also evidence that seven years before, he had used the same ploy to kidnap, rape, and sodomize a different 13-year-old girl. Evidence of the prior incident was properly admitted to show the defendant's intent. (*Id.* at p. 1359.) In setting aside the convictions for attempted rape and attempted sodomy, the Ninth Circuit concluded that where the

only evidence of the defendant's intent to commit rape and sodomy was the earlier crime, the attempt to entice the victim into his truck was not a substantial step toward the commission of those same sex offenses. (*Id.* at p. 1360.) In reaching its ruling, the Ninth Circuit observed that the weight and tendency of prior conduct evidence to prove intent is a question of degree and context, and that "[a]t some point, the link between the enticement and the charged crimes becomes too attenuated: we cannot say that the enticement strongly corroborates any intent to commit those crimes." (*Id.* at p. 1359.)

We haven't reached such a point in this case. Here, as in *Walters*, the evidence of the prior acts was probative of Martinez's intent. But, unlike in *Walters*, the evidence here showed that the prior acts happened within a year of the charged crimes, and more importantly with the same victim. Moreover, unlike the defendant in *Walters*, Martinez succeeded in luring the victim to a place where he could repeat his prior acts of kissing and touching her genitals, and had taken further direct steps toward accomplishing those acts by caressing and possibly kissing her. Thus, even if *Walters* was correctly decided, that case is distinguishable.

There is no change in the judgment.

The petition for rehearing is denied.

Dated: \_\_\_\_\_ P.J.

**NOT TO BE PUBLISHED IN OFFICIAL REPORTS**

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
FIRST APPELLATE DISTRICT  
DIVISION THREE

THE PEOPLE,  
Plaintiff and Respondent,  
v.  
LUIS MARTINEZ,  
Defendant and Appellant.

A128777  
(Contra Costa County  
Super. Ct. No. 05-090784-0)

Defendant Luis Martinez was charged with two counts of lewd acts on a child under age 14 committed on or about July 15, 2004 (Pen. Code, § 288, subd. (a)).<sup>1</sup> He was alleged to be ineligible for probation because the crimes involved substantial sexual conduct (§ 1203.066, subd. (a)(8)). A jury convicted Martinez of two counts of attempted lewd acts on a child under 14, as lesser included offenses. (§§ 288, subd. (a), 664.) He was sentenced to the midterm of one year and six months in prison on one of the counts, and the sentence on the other was stayed pursuant to section 654.

Martinez argues that the judgment must be reversed because: the evidence did not support attempt findings as to the charged offenses; the jury instructions erroneously permitted him to be convicted of attempting offenses other than those charged; the court abused its discretion in denying his new trial motion; and a taped interview of the victim was erroneously admitted into evidence. We conclude that these contentions lack merit.

---

<sup>1</sup> Subsequent statutory references are to the Penal Code.

The parties agree that the sentence conduct credits were erroneously calculated, but disagree on the proper method for recalculation. We remand for recalculation of the credits, but not under the formula suggested by Martinez.

## **I. BACKGROUND**

### **A. Prosecution Case**

The victim, Jane Doe, testified at trial at age 11 about events that occurred on July 15, 2004, when she was five years old. According to the probation report, Martinez was then 29 years old. Doe was playing that afternoon in the backyard of the home where she lived with other family members, including Martinez, who was her mother's cousin. She went into the garage and Martinez was there alone. He touched her genital area with his hand under her clothes. Doe could not remember why she went into the garage, or whether Martinez kissed or otherwise molested her in addition to touching her genital area. Nor could she recall being interviewed about what transpired that day.

Doe's mother, C.L., testified that, on the afternoon in question, she was doing the dishes and listening to Doe play outside when she went looking for Doe after she noticed that the yard had been quiet for three or four minutes. She opened the sliding glass door to the yard and called out Doe's name but did not see her. She walked through the house and opened a door to the garage. The garage lights were off, but a door to the garage from the backyard was open.

C.L. saw Doe and Martinez standing "right next to" and facing each other. Martinez had his hand around Doe's shoulders or upper arm, and his face was very close to hers, only four or five inches away. He moved quickly away from Doe when C.L. walked in. C.L. thought that he and Doe had been kissing. Doe was clothed and even though C.L. did not see any kissing, she suspected it because, as she put it, "[W]hat are they supposed to be doing in the garage alone with nobody there?" C.L. testified that, when she confronted the two of them, Martinez left the garage and Doe ran crying out into the backyard. C.L. made Martinez move out of the house later that day. C.L. had testified before trial that Martinez's back was to her when she walked into the garage, and that she grabbed Doe away from Martinez when she saw them together.

C.L. asked Doe if Martinez had kissed her or touched her genital area. For a couple of days Doe said that Martinez had only kissed her, and denied that he touched her genital area. She seemed reluctant to tell her mother what had occurred. But a couple of days later she reported that he had also touched her genital area.

Four days after the encounter in the garage, C.L. took Doe to the Pittsburg Police Department, where Doe was interviewed by one of the officers. C.L. was present but did not speak during the interview. Doe told the officer that she was playing in the backyard when Martinez beckoned her to come to him. He grabbed her hand and they walked into the garage. He told her he loved her, grabbed her by the arms, kissed her on the lips, and put his tongue in her mouth. As he was kissing her he brushed his hand along her crotch. He had not done anything like that to her before that day.

Three weeks later Doe was interviewed again at the Martinez Children's Interview Center (CIC). Before this interview, C.L. asked Doe if Martinez had kissed her genital area, and Doe said that he had.

A videotape of the interview was played at trial. Doe told the interviewer that Martinez "sex's at me" and "I don't like it." He touched her genital area with his hand, which made her "feel like I — I'm in trouble." Doe said that Martinez was in his room when he said, "Let's go to the garage." In the garage he said, "Let's have sexy." He took her clothes off, touched her arm and genital area, and kissed her mouth and genital area. Doe reported that Martinez had molested her on more than one occasion. She would ask him to stop, but he would say, " 'No, I don't wanna stop.' " He told her, " 'Don't tell anybody.' "

The colloquy on the prior molestation was as follows: "Q. . . . Okay, so did this happen one time or more than one time? [¶] A. Um, more than one time. [¶] Q. One? [¶] A. More than one time. [¶] Q. . . . It's okay. So, there was a time that your mom . . . found you guys in the garage? *Did it happen on another day too? It did.* Okay. [¶] A. My mom's always there. [¶] Q. Um, your mom's always there? Okay, how many times do you think he did this to you? [¶] A. Um, let — em — in last time. And my mom said we'd never see him again. We'd have to put him in jail. [¶] Q. You have to put him in

jail? Okay. Was there any other places that he did this besides the garage? [¶] A. O — only he did that. [¶] Q. Only he did that, you mean in the garage? Okay. . . . [¶] Q. . . . *[I]s there another day that he did that besides the day your mom found you? There is? Okay.* How old were you the first time that he did that? [¶] A. I was five.” Doe was presumably nodding affirmatively at the points where we have italicized the interview transcript, but we have been unable to obtain the DVD from the superior court or counsel to confirm those gestures. In any event, entirely apart from any affirmative gestures Doe may have made, the transcript shows her clearly stating that Martinez had molested her multiple times.

#### B. Defense Case

Psychiatrist Lee Coleman testified for the defense that people can develop false memories they sincerely believe to be true. Memories “can be altered over time or created out of nothing by the things that you’re exposed to.” According to Dr. Coleman, children are especially susceptible to such influences, and can develop false memories based on what is “brought to them by adults who [have] a point of view.” “[O]nce you believe that something has happened to the child, then it’s very easy to communicate to the child that I want to help you and I want you to tell me the truth. And if . . . the child doesn’t describe anything bad, then they’re not fulfilling what the adult already believes. And . . . if the adult keeps on going and keeps continuing this process, the pressure can build on the child . . . to satisfy the expectations that are being put upon them.”

Coleman considered the four-day delay in taking Doe for a police interview “most unfortunate,” because by then she had been exposed to the “very direct, suggestive kind of questions” from her mother that were “the most dangerous kind of interaction you could have with regard to the possibility of the child’s memory being influenced.” He opined that C.L. should not have been allowed to attend the police interview because “if you’re concerned, as you should be, about the potential for somebody to have influenced the child, you don’t want to have that person present when you interview them.”

Coleman was also critical of the CIC interviewer for asking Doe questions about telling the truth and not guessing. Those questions “demonstrate[d] that the interviewer

really doesn't understand the issues of what they're doing. Because telling the truth is a general concept. It doesn't explore the idea of how does the child come to believe what the truth is. . . . [I]t's as though . . . the interviewer is believing that if the child can say yes, I will [tell the truth], somehow they don't need to pay attention to possible prior influences. [¶] So I think it's a very poor technique and demonstrates that the interviewer is not really tuned in to what's important."

Coleman acknowledged that he was not board certified in psychiatry, explaining: "[T]here are many things that psychiatry teaches that I don't agree with. The entire diagnostic framework of psychiatry is misleading, misrepresents what we actually do. . . . If I were to decide to take boards in psychiatry, I would have to deliberately give them answers that the mainstream wants to hear, not what I think."

### C. Additional Background

#### (1) Charged Offenses

Before evidence was taken in the case, the court asked whether the prosecution was alleging specific lewd acts in the two counts against Martinez, which were phrased in identical, general terms in the information. The prosecutor responded that Count One referred to touching, and Count Two to kissing, Doe's genital area on the day when C.L. found Doe and Martinez in the garage.

The court advised the jury that "[t]he parties now have agreed or at least understand that Count One relates to a particular act or acts and Count Two relates to a particular acts or act. Those will be described no doubt by [the prosecutor] in her opening statement. [¶] So the People have indicated to the Court and will be indicating to you which particular act or acts are Count One and which particular act or acts are Count Two."

The prosecutor concluded her opening statement by saying, "And at the end of this trial when you hear all of the evidence, I will ask you to find the defendant guilty on Count One for touching the victim's genital area and on Count Two, for kissing the victim's genital area."

(2) The Jury's Note

During deliberations, the jury asked: "Are we only allowed to only take into account the alleged events of July 15, 2004 in determining our verdict? For clarification, some jurors are concerned that [Doe] may be recounting events during the taped interview that may have happened prior to July 15." The court responded: "The two charges in this case relate to events immediately preceding the entry into the garage by the mother of Jane Doe and not events occurring on some other day or in some other place. You are allowed to take into account all of the trial evidence but only for purposes of deciding whether the charged events have been proved. Also please refer to Instruction #207 at page 23 [prosecution need only prove that the crime occurred at a time reasonably close to the date alleged]."

**II. DISCUSSION**

A. Substantial Evidence

Martinez argues that there was no substantial evidence from which the jury could have concluded he attempted the alleged lewd acts. When sufficiency of the evidence is challenged, we "must review the whole record in the light most favorable to the judgment below to determine whether it discloses substantial evidence such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt." (*People v. Johnson* (1980) 26 Cal.3d 557, 562 (*Johnson*)). "In determining whether a reasonable trier of fact could have found defendant guilty beyond a reasonable doubt, the appellate court 'must . . . presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence.' " (*Id.* at p. 576.)

Martinez argues that the evidence "supports only two possible outcomes: guilt on the charged crimes, or acquittal." Therefore, he says the attempt instructions should not have been given. The court must instruct on a lesser-included offense "when the evidence raises a question as to whether all of the elements of the charged offenses were present," but such instructions are inappropriate "when there is no evidence that the offense was less than that charged." (*People v. Breverman* (1998) 19 Cal.4th 142, 154.)

Martinez apparently concedes that some of his actions could be found to have exhibited a lewd intent. Those actions included: (1) luring Doe into the garage, as Doe reported to the Pittsburg police; (2) holding Doe by the shoulders or upper arms, as C.L. observed; and (3) putting his face right up next to Doe's as if he intended to kiss or had just kissed Doe, as C.L. inferred. But here, Martinez says he was charged with touching and kissing Doe's genital area. To be convicted of an unlawful attempt, the defendant must take a direct step "indicat[ing] a definite and unambiguous intent to commit [the] target offense." (CALCRIM No. 460 [standard attempt instruction].) "Obviously," Martinez submits, "the testimony that [he] may have lured the minor into the garage, touched her arms, and had his face close to hers, cannot by any stretch of the imagination be said to indicate *unambiguously* an intent to touch and kiss her genital area." "Such a claim," in Martinez's view, "would clearly require the most extreme speculation."

The problem with this argument is that it disregards Doe's statements in the CIC interview that Martinez had molested her on other occasions before that afternoon in the garage. The jury's note focused on those statements, and the jury could credit them even if it rejected other parts of Doe's testimony. Doe reported the prior molestations shortly after stating in the interview that Martinez had touched and kissed her genital area in the garage. Viewed in the light most favorable to the judgment (*Johnson, supra*, 26 Cal.3d at p. 562), Doe's affirmative answers to the questions asking whether he had previously done "this," "that," or "it" must refer to genital area contacts such as those charged in the case. Since Martinez had touched and kissed Doe's genital areas in the past, it was reasonable, not merely speculative, for the jury to infer that he intended to do so again when C.L. found him with Doe in the garage.

Drawing that reasonable inference from the evidence (*Johnson, supra*, 26 Cal.3d at p. 576), the jury could find that the lewd intent his actions exhibited was specifically aimed at accomplishing the charged conduct, and that the charged conduct would have been completed had he been alone with Doe for more than three or four minutes before her mother intervened. Luring her into the garage, taking hold of her, and kissing or preparing to kiss her face could reasonably be viewed as "direct movement[s] towards the

commission of the crime[s] after preparations [were] made. [They were] immediate step[s to] put[] the plan in motion so that the plan would have been completed if some circumstance outside the plan had not interrupted the attempt.” (CALCRIM No. 460.) Under the circumstances, whether Martinez’s intent to commit the charged crimes was “definite and unambiguous” (*ibid.*) was a matter for the jury.

The jury was properly instructed that it could convict Martinez of attempting to commit the charged crimes, and its verdicts on those lesser included offenses were supported by substantial evidence.

#### B. Content of the Attempt Instruction

The jury was instructed on the findings required to convict Martinez of attempts pursuant to CALCRIM No. 460, which calls for the court to “insert [the] targeted offense” at various points. At those points, the court here inserted general language about committing a lewd act on a child, rather than specific language about the charged acts of touching and kissing Doe’s genital area. Martinez contends that the jury was thereby erroneously authorized to convict him “so long as they found a lewd intent to commit any act, charged or uncharged.” The court instructed as follows:

“[A]ttempting to commit a lewd or lascivious act on a child under the age of 14 is what is called a lesser-included offense of the offenses charged in Counts 1 and 2 of the Information.

“To prove that the defendant is guilty of attempted lewd and lascivious act on a child under the age of 14, the People must prove beyond a reasonable doubt the following two things:

“First, the defendant took a direct but ineffective step toward the crime of *committing a lewd and lascivious act on a child under the age of 14*; and

“Second, the defendant intended to commit the crime of *committing a lewd and lascivious act on a child under the age of 14*.

“So, what’s meant by a direct step? A direct step requires more than merely planning or preparing to commit the crime of *committing a lewd and lascivious act on a child under the age of 14* or it requires more than obtaining or arranging for something

needed to commit the crime of *committing a lewd and lascivious act*. A direct step is one that goes beyond planning or preparation that shows that a person is putting his or her plan into action. A direct step indicates a definite and unambiguous intent to commit the crime of *committing a lewd and lascivious act on a child under the age of 14*. It is a direct movement towards the commission of the crime after preparations are made. It is an immediate step that puts the plan in motion so that the plan would have been completed if some circumstance outside the plan had not interrupted the attempt.

“To decide whether the defendant intended to commit the crime of *committing a lewd and lascivious act on a child under the age of 14*, please refer to the separate instruction on the elements for that offense, which is referred to in instruction No. 1110 above, which is actually just the preceding instruction.” (Italics added.)

Martinez forfeited his argument that the italicized language was too general by failing to raise it before the trial court. “ ‘A party may not complain on appeal that an instruction correct in law and responsive to the evidence was too general or incomplete unless the party has requested appropriate clarifying or amplifying language.’ ” (*People v. Hart* (1999) 20 Cal.4th 546, 622.) No such request was made here.

Moreover, there is no reasonable probability that the jury would have interpreted the challenged language as Martinez suggests. CALCRIM No. 460 as given referred the jury to CALCRIM No. 1110, which set forth the elements of the charged crimes. When the court furnished CALCRIM No. 1110, it reminded the jury of what it had been told at the outset of the case about the particular acts being charged (part I.C.(1), *ante*), adding the following italicized language to the standard instruction:

“The defendant is charged in Counts 1 and 2 with committing a lewd and lascivious act on a child under the age of 14 in violation of Penal Code section 288, subsection (a).

“To prove that the defendant is guilty of this crime, the People must prove beyond a reasonable doubt the following three things:

“[¶] . . . [¶]

“The defendant willfully touched with any part of his body any part of Jane Doe’s body either on the bare skin or through the clothing, item number one.

“Item number two, the defendant committed the act of touching Jane Doe, the child, with the intent of arousing, appealing to, or gratifying the lust, passions, or sexual desires of himself or the child; and

“The third element: The child was under the age of 14 at the time of the act.

“Each separate touching can constitute a separate crime. Before you may find the defendant guilty of a particular charge, you must all agree that the defendant committed a particular act or acts constituting the crime.

*“And you’ve heard earlier in the case, [the prosecutor] describing in her opening statement, which particular act or acts relate to Count 1 and which particular act or acts relate to Count 2. So you must accept that description for purposes of deciding whether or not the defendant is guilty or not guilty of Count 1 and/or Count 2.*

“Once you have found that a particular act or acts constitutes one of the charged offenses, you may not use the same act or acts to find the defendant guilty of the other charged crime.” (Italics added.)

If this instruction were not sufficient to remind the jury about the specific acts charged, the prosecutor repeatedly noted in her closing argument that Count One involved touching Doe’s genital area and that Count Two involved kissing that area. She said: “The defendant is charged with two counts of Penal Code section 288, that’s lewd and lascivious act on a child under the age of 14.

“The first element is that the defendant willfully, meaning on his own volition, touched any part of the victim’s body either on her bare skin or through the clothing with any part of his body. That means that the defendant *touching [Doe] on her private part with his hand* satisfies the first element.

“Two, the defendant committed the act of touching the child with the intent of arousing, appealing to, . . . or gratifying the lust, passions, or sexual desires of himself or the child. So he touched her with a sexual intent.

“And *touching a person, a child, on their private area, on their genital area*, is a sexual act. That’s what it’s done for. There’s no other reasonable explanation that the defendant was *touching [Doe’s] genital area*.

“ . . . [¶]

“Count 2, same elements, but number one, is the defendant *kissing [Doe’s] private area, her genital area, which she described as her pee-pee*, and that he did that with the intent of arousing, appealing, gratifying the lust, passions or sexual desires. Again, that’s the purpose of *kissing the genital area*. There’s no other legitimate reason to be *kissing anyone, much less a six-year-old’s, genital area*. . . .

“One more thing. You’ll be asked to find that the defendant’s conduct in both Count 1 and Count 2 amounts to substantial sexual conduct. And we heard the judge describe substantial sexual conduct includes both oral copulation and masturbation of the child by the defendant.

“I’m going to kind of go down to masturbation because Count 1 is the *touching of the private area*. So that’s the first one you’ll decide is that substantial sexual conduct. And masturbation includes any *touching no matter how slight of the genitals*. . . . Any *touching of the defendant’s hand on [Doe’s] genital area* is substantial sexual conduct.

“And for . . . Count 2, . . . oral copulation which is *the kissing of [Doe’s] genital area, any contact, no matter how slight between the mouth of one person and the sexual organ of the other* accompanied by the sexual intent is enough for substantial sexual conduct. That means the defendant’s *putting his lips on [Doe’s] genital area* is enough to show oral copulation. . . . Him simply *putting his mouth on her genital area* is enough to meet the definition of oral copulation to amount to substantial sexual conduct.” (Italics added.)

On this record, there was no prospect that the jury could have convicted Martinez of attempting any lewd acts other than the charged offenses. He was not prejudiced by the language of the attempt instruction.

### C. New Trial Motion

Martinez filed a motion for new trial, on the basis that one or both of the verdicts were not supported by substantial evidence. He contends that the court abused its discretion when it denied the motion because it relied on “unlawful legal considerations and erroneous factual findings.” However, the issue for us is the propriety of the court’s ruling, not its reasoning (see, e.g., *People v. Evans* (2011) 200 Cal.App.4th 735, 742 (*Evans*)), and the motion here was properly denied.

Martinez argued in his new trial motion that the attempt convictions were insupportable because “[t]he jury was unanimous in finding that Mr. Martinez had not touched Jane Doe with unlawful sexual intent on the day in question. [¶] Therefore, the only other evidence presented to support Mr. Martinez’s conviction was the vague reference in Jane Doe’s CIC interview to this having happened on other occasions and Jane Doe’s mother’s testimony. As to the former, the reference in the CIC interview to prior acts of molestation was not only vague but inconsistent with all of Jane Doe’s other statements. In light of the fact that the jury found Jane Doe’s other testimony not credible, her statement about other incidents should also be discounted. As to Jane Doe’s mother, it is clear that she only saw Mr. Martinez and her daughter near each other in the garage. Jane Doe’s mother did not see any actual touching, nor was she aware of any prior touching between Jane Doe and Mr. Martinez. [¶] Either alone or together, Jane Doe’s statements and her mother’s testimony were insufficient to prove beyond a reasonable doubt that Mr. Martinez harbored the necessary intent to commit even one count of 288(a)/664 when he was in the garage with Jane Doe.”

This argument lacked merit for the reasons we discussed in part II.A. of this opinion, which are similar to those given by the prosecutor when the motion was heard. At the hearing on the new trial motion, the prosecutor argued:

“[As for] whether or not the jury believed that the defendant had ever touched Jane Doe’s genitals or kissed Jane Doe’s genitals, I think it’s clear from the note sent out from the jury where the foreperson said some of the jurors believed those action occurred, but

do not believe that they occurred on the date in question. It shows they believed Jane Doe's testimony.

“What they did not perhaps believe or believe beyond a reasonable doubt is when they occurred. [It] was rational and consistent with the evidence for the jury to believe that on this date the defendant was attempting to molest Jane Doe, but was interrupted by the mother because of the length of time the mom said she was only out of her sight was for four minutes.

“And so just to address defense counsel's points that the jury verdict wasn't consistent or couldn't be reasoned by the evidence that they heard, it actually is wholly consistent and rational based upon the evidence that they heard.”

It is immaterial that the court disagreed with the prosecutor's argument, or cited other considerations when discussing the motion. (*Evans, supra*, 200 Cal.App.4th at p. 742.)

Martinez's alternative argument in the motion for new trial was that the evidence supported only one attempt conviction because only one direct step was taken — luring Doe into the garage — toward committing the charged crimes. However, there was evidence of other direct acts — taking hold of Doe, and kissing or preparing to kiss her face — even assuming any additional acts were required. Martinez does not renew this alternative argument on appeal so we need not resolve it.

#### D. Sixth Amendment Issue

Martinez argues that admission of Doe's CIC interview violated his constitutional right to cross-examination because, when Doe testified at trial, she did not remember the interview and could not answer any questions about it. Martinez concedes that our Supreme Court rejected this argument in *People v. Cowan* (2010) 50 Cal.4th 401. We are bound to follow that precedent and therefore reject this argument. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.)

#### E. Conduct Credits

Martinez was awarded 409 days of presentence credit, consisting of 356 days of credit for time served and 53 days of conduct credit. At the May 2010 sentencing

hearing, his counsel stated he had been in custody since May 2009. Martinez contends, and respondent concedes, that his conduct credits were erroneously calculated due to the application of section 2933.1, which provides that those convicted of “violent” felonies as defined in section 667.5, subdivision (c) “accrue no more than 15 percent of worktime credit, as defined in Section 2933.” (§ 2933.1, subd. (a).) Since an attempted violation of section 288, subdivision (a) is not a violent felony listed in section 667.5, subdivision (c), it is undisputed that Martinez’s conduct credits must be recalculated under section 4019. The dispute is over which version of section 4019 will govern the recalculation: the two versions in effect during Martinez’s presentence custody, or the one currently in effect.

Before January 25, 2010, section 4019 provided that if a defendant earned all available presentence conduct credits, six days would be deemed to have been served for every four days spent in actual custody — a ratio of one day of conduct credit for every two days served (one to two credits). (Former § 4019, subd. (f); Stats. 1982, ch. 1234, § 7, pp. 4553–4554.) Effective January 25, 2010, the Legislature amended section 4019 to increase the number of presentence conduct credits available to eligible defendants. (Stats. 2009, 3d Ex.Sess. 2009–2010, ch. 28, § 50.) Under the January 2010 version of the law, a defendant gained conduct credits at twice the previous rate, earning four days of presentence credit for every two days in custody — a day of conduct credit for every day served (one to one credits). (Former § 4019, subd. (f); Stats. 2009, 3d Ex. Sess. 2009–2010, ch. 28, § 50.)

*People v. Brown* (2012) 54 Cal.4th 314, 318, recently held that the January 2010 amendment to section 4019 did not retroactively benefit prisoners who served time in local custody before the amendment’s effective date. The statute applied only prospectively, “meaning that qualified prisoners in local custody first became eligible to earn credit for good behavior at the increased rate beginning on the statute’s operative date.” (*Ibid.*) Thus, under the versions of section 4019 in effect when Martinez was in custody, he was entitled to one to one credits only during his time served from January 25, 2010. During his time in custody from May 16, 2009 through January 24, 2010, he earned one to two credits.

Martinez seeks one to one credits for all of his pre-sentence custody under the current version of section 4019, which as most recently amended effective October 1, 2011, provides for one to one credits. (§ 4019, subs. (b) & (c).) The Legislature stated that the amendment “shall apply prospectively and shall apply to prisoners who are confined [in local custody] for a crime committed on or after October 1, 2011. Any days earned by a prisoner prior to October 1, 2011, shall be calculated at the rate required by the prior law.” (§ 4019, subd. (h).)

Martinez argues that to prospectively apply the October 2011 amendment as the Legislature directed would deprive him of his constitutional right to equal protection. He contends that this conclusion is compelled by *People v. Sage* (1980) 26 Cal.3d 498 (*Sage*), and *In re Kapperman* (1974) 11 Cal.3d 542 (*Kapperman*), and that *In re Strick* (1983) 148 Cal.App.3d 906 (*Strick*), on which respondent relies, is distinguishable.

*Brown* rejected these same equal protection arguments against prospective application of the January 2010 amendment to section 4019. “ “[T]he first prerequisite to a meritorious claim under the equal protection clause is a showing that the state has adopted a classification that affects two or more *similarly situated* groups in an unequal manner.” ’ ’ ( *Brown, supra*, 54 Cal.4th at p. 328.) This prerequisite was not satisfied as to the January 2010 amendment because “the important correctional purposes of a statute authorizing incentives for good behavior [citation] are not served by rewarding prisoners who served time before the incentives took effect and thus could not have modified their behavior in response. That prisoners who served time before and after former section 4019 took effect are not similarly situated necessarily follows.” (*Id.* at pp. 328–329.) The court said that it found *Strick* persuasive on the point (*id.* at p. 329), and explained why *Sage* and *Kapperman* did not compel a contrary conclusion (*id.* at pp. 329–330).

Martinez’s equal protection argument is untenable under the reasoning of *Brown*. See *People v. Lara* (2012) 54 Cal.4th 896, 906, fn. 9 [prisoners who served their pretrial detention before the current statute’s effective date, and those who serve their detention thereafter, are not similarly situated under the reasoning of *Brown*].)

### III. DISPOSITION

The judgment is reversed insofar as it awards presentence credits, and is otherwise affirmed. The case is remanded for recalculation of presentence credits as prescribed in part II.E. of this opinion. The court is directed to prepare and forward an amended abstract of judgment showing the recalculated credits to the Department of Corrections and Rehabilitation.

---

Siggins, J.

We concur:

---

McGuinness, P.J.

---

Pollak, J