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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

AARON BRUNDAGE,

Defendant and Appellant.

A132204

(San Francisco County
Super. Ct. No. 210392)

Aaron Brundage seeks reversal of the trial court’s revocation of his probation for attacking Lashonna Neal. He argues the court prejudicially erred when it overruled a hearsay objection to a police officer’s testimony of statements made by Lashonna¹ because the court, along with determining whether Lashonna’s statements qualified under the “spontaneous statement” exception to the hearsay rule, was required to make a good cause determination about their admissibility pursuant to his due process right to confrontation guaranteed for the federal Constitution. Defendant also argues that the trial court erred in failing to award him day-for-day conduct credits because no prior conviction was pleaded and proved at trial, and that the Legislature’s prospective-only application of the relevant statute denied him day-for day conduct credits retroactively in violation of his equal protection rights under our state and federal Constitutions.

¹ We refer herein to Lashonna Neal as “Lashonna” and her mother, Frances Neal, a witness in the case, as “Frances” to avoid confusion, and mean no disrespect by doing so.

We do not reach defendant's due process claim because, to the extent the court had any duty to make a good cause finding, a dubious proposition in light of the limited nature of defendant's objection below, it was undoubtedly harmless. We also reject defendant's arguments regarding his conduct credits. Accordingly, we affirm the judgment.

BACKGROUND

In October 2009, defendant pled guilty in the San Francisco County Superior Court to a single count of selling heroin (Health & Saf. Code, § 11352, subd. (a)). Imposition of his sentence was suspended and defendant was placed on probation, contingent on his obeying all laws. Five months later, in December 2010, the probation department moved to revoke defendant's probation, alleging he attacked his girlfriend and had three active traffic warrants.

The Revocation Hearing

The trial court held a probation revocation hearing, at which the People called San Francisco Police Officer Antonio Cacatian and the victim's mother, Frances Neal, to testify.

Officer Cacatian's Testimony

Officer Cacatian testified that he and his partner responded to a 911 call about a possible domestic incident on December 2, 2010. Upon arriving at the scene, they encountered Lashonna, who appeared upset. She was crying, her lip was cut, her eyes were glassy and watery, and her voice cracked as she spoke. When the prosecutor asked Cacatian what Lashonna said had happened, the defense raised a hearsay objection. The court overruled the objection, finding Lashonna's statements to Cacatian were excited utterances. Defense counsel was permitted to maintain a "standing objection" and subsequently clarified this was a "continuing objection to this entire line of hearsay statements."

Cacatian testified that Lashonna said she let defendant, who was her boyfriend, into her apartment and that he was upset with her giving him methadone medication. He struck her several times about her face with closed fists, hitting her in the front of her

face, including her mouth, and on top and in the back of her head. Lashonna said she told him to leave, but he continued to strike her, although he eventually left. Lashonna said his attack caused the injury to her lip.

Cacatian further testified that Lashonna said she went down to the front lobby and called her mother after the attack. Her mother noticed distress in Lashonna's voice and asked her what had happened; when Lashonna told her, Frances called 911. Lashonna told Cacatian the attack had occurred "a few minutes" before the police arrived at the scene.

Photographs of Lashonna's injuries were taken. They were admitted into evidence during Cacatian's testimony.

Frances's Testimony

Lashonna's mother, Frances, testified in rebuttal to defense testimony that is not relevant to this appeal. Asked if she remembered any interactions between Lashonna and defendant shortly before or after December 2, 2010, Frances testified that she once saw defendant "smack" Lashonna in her face with an open hand in the lobby of a hotel where they stayed and, on Thanksgiving 2007, saw defendant aggressively lunge at Lashonna, when he was stopped by Frances's son.

On cross-examination, defense counsel asked Frances about her telephone call to 911 on December 2, 2010, the day of the incident with Lashonna. Frances testified that Lashonna called her by telephone that day and was "quite upset." She did not want to stay on the phone long "because she said he would be coming back," and the call only lasted between five or six minutes. When Frances asked Lashonna why she was upset, Lashonna said "Aaron jumped on her." Defendant did not ask to have any portion of Frances's testimony stricken.

The Court's Finding

The court found that the photographs of Lashonna showed there was dried blood on her lip, a fresher injury towards the corner of her mouth, and swelling on the right side of her cheek and about her face. The court concluded the injuries were fresh and Lashonna was crying when the photographs were taken.

The court stated that it was impressed by Frances's testimony, including because she was "honest enough to talk about her daughter in realistic terms." It referred to Frances's testimony that Lashonna said defendant had jumped on her, and stated this testimony "was not asked to be stricken as hearsay." Counsel made no objection to the court's statement.

The court concluded, "So what I have is him being aggressive to her, his smacking her about the face. I have injuries in the form of photographs, I have excited utterances. I have a woman [Lashonna], who is upset, who is crying, who has more than one injury on her face." It also found both Frances and Cacatian to be credible. The court concluded that defendant had willfully violated his probation. In May 2011, defendant was sentenced to four years in state prison, minus credit for time served and conduct.

Defendant filed a timely notice of appeal and the parties submitted appellate briefs. After Penal Code section 4019² was amended operative October 1, 2011 (2011 Stats. 2011, ch. 15, § 482), the parties submitted supplemental briefing on whether or not it should be applied, as amended, retroactively to defendant so as to award him additional conduct credits.

DISCUSSION

I. Defendant's Due Process Right to Confrontation

Defendant does not contest that the trial court correctly admitted the evidence of Lashonna's statements to Cacatian under the "spontaneous statement" exception to the hearsay rule. (Evid. Code, § 1240.) He argues the trial court nonetheless prejudicially erred because his due process right to confrontation guaranteed by the United States Constitution required the court to also find good cause for doing so, relying on case law such as *People v. Arreola* (1994) 7 Cal.4th 1144 (*Arreola*). We conclude this claim lacks merit, if only because, assuming the court erred by not making a good cause finding despite the lack of a due process objection, the error was, as the People argue, harmless

² All further statutory references are to the Penal Code unless otherwise indicated.

beyond a reasonable doubt.³ We have no need to, and do not, address the merits of defendant's constitutional claim.

Defendant must prove that, if error occurred as he claims, he was prejudiced by it. (*Arreola, supra*, 7 Cal.4th at p. 1161.) We conduct this inquiry under the “ ‘harmless-beyond-a-reasonable-doubt’ standard.” (*Ibid.*) Frances's testimony indicated that, a few minutes before Lashonna called her, Lashonna was attacked by defendant. This, combined with the photographs of Lashonna's bruised and battered face, both of which the court prominently relied on for its finding, amply supported the court's finding. Therefore, any court error in admitting the evidence of Lashonna's out-of-court statements to Cacatian was harmless beyond a reasonable doubt.

In his opening brief, defendant details and challenges only the evidence of Lashonna's statements to *Cacatian*. In response to the People's argument that any trial court error was harmless because of the evidence of Lashonna's statements to *Frances*, defendant argues in his reply brief that his trial counsel's continuing hearsay objection during Cacatian's testimony applied equally to Frances's testimony, claiming the line of questioning was the same and any objection would have been futile.

Defendant does not explain why he did not make this argument in his opening brief, when the People had an opportunity to respond to it. “Points raised in the reply brief for the first time will not be considered, unless good reason is shown for failure to present them before.” (*Campos v. Anderson* (1997) 57 Cal.App.4th 784, 794, fn. 3.) Given the prominence of Frances's testimony in the court's findings and its obvious import to defendant's appellate claim, which requires he show *prejudicial* error, defendant should have raised this argument in his opening brief. We disregard it as tardily presented without explanation, other than to point out two things.

First, the record indicates defendant's continuing hearsay objection was *not* intended or understood by anyone to extend to Frances's testimony. Defendant neglects

³ Arguably, defendant forfeited his due process claim by not first objecting on this ground below. (See, e.g., *People v. Smithey* (1999) 20 Cal.4th 936, 995.) Because the People do not argue forfeiture, we do not discuss the issue further.

to point out that Frances testified about Lashonna's statements in response to *defense* cross-examination. Also, the court stated in announcing its findings that Frances's account was not subject to defendant's continuing hearsay objection without complaint from defense counsel.

Second, given that defendant invited this testimony via defense cross-examination, he cannot maintain an appellate claim that it should have been excluded. (See, e.g., *Zarafonitis v. Yellow Cab Company* (1932) 127 Cal.App. 607, 609 ["[w]here evidence of facts likely to be prejudicial to a party are invited . . . he is under well-settled principles in no position to complain"]; *Romeo v. Jumbo Market* (1967) 247 Cal.App.2d 817, 823 [trial counsel waived any prior objection by joining opposing counsel in the offer of a written statement containing the same objectionable material].)

We conclude that, even without Cacatian's testimony, ample evidence established that defendant attacked Lashonna. If the court erred in admitting Cacatian's testimony about what Lashonna told him, it was harmless beyond a reasonable doubt.

II. Conduct Credits

The trial court awarded defendant with credits for both time served and conduct. The court found, based on the probation report's summary of defendant's prior record, that defendant had prior strike convictions, over the defense objection that no prior conviction was pleaded and proved and, therefore, was not entitled to one-for-one conduct credits. The court credited defendant with 290 days for actual time served and an additional 144 days of conduct credits.

Defendant argues that the trial court erred in failing to award him day-for-day conduct credits because his prior convictions were not pleaded and proved at trial. He also argues that the Legislature's prospective-only application of section 4019, as amended operative October 2011, denied him day-for-day conduct credits retroactively in violation of his equal protection rights under our state and federal Constitutions.

A. Prior Conviction Not Pleaded and Proved

Defendant's "pleading and proof" argument relates to certain amendments in the conduct credits law. Effective January 25, 2010, the Legislature amended section 4019 to

accelerate the pace for accruing custody credits so that certain defendants received two days of conduct credit for every two days of actual custody credit. (Stats. 2009, 3d Ex. Sess., ch. 28, § 50.) Effective September 28, 2010, the Legislature amended sections 2933 and 4019. (Stats. 2010, ch. 426, §§ 1, 2.) As a result, the provision for the accruing of day-for-day conduct credits for defendants sentenced to state prison (as was defendant) was contained in former section 2933, subdivision (e). (Stats. 2010, ch. 426, § 1.)

Defendant argues that the trial court erred when it denied him day-for-day conduct credits under section 2933, as amended, on the basis of prior violent felony convictions that were not pleaded or proved by the prosecution. He contends the prosecution was required to do so because a denial of day-for-day credits constitutes an increase in punishment.

As defendant acknowledges, there is currently a dispute among the appellate courts as to whether there is an implied pleading and proof requirement regarding the existence of a prior serious felony conviction that disqualifies a defendant from receiving additional presentence conduct credits under section 4019, as amended in 2010. (See, e.g., *People v. Voravongsa* (2011) 197 Cal.App.4th 657, review granted Aug. 31, 2011, No. S195672; *People v. James* (2011) 196 Cal.App.4th 1102, review granted Aug. 31, 2011, No. S195512; *People v. Lara* (2011) 193 Cal.App.4th 1393, review granted May 18, 2011, No. S192784; *People v. Koontz* (2011) 193 Cal.App.4th 151, review granted Mar. 18, 2011, No. S192116; *People v. Jones* (2010) 188 Cal.App.4th 165, review granted Dec. 15, 2010, No. S187135.) Because this issue, essentially the same as that argued by defendant regarding section 2933, is before the Supreme Court we see no need for a lengthy analysis.

Neither section 4019 nor section 2933, as amended in 2010, contained an express pleading and proof requirement regarding a prior serious felony conviction that could disqualify a defendant from receiving additional conduct credits under sections 4019 and 2933, as amended in 2010. Defendant argues there was an implied “pleading and proof” requirement for such convictions credits in these statutes, relying on *People v. Lo Cicero* (1969) 71 Cal.2d 1186. As the People point out, however, the Supreme Court rejected

the idea of an implied “pleading and proof” requirement in *In re Varnell* (2003) 30 Cal.4th 1132 because, among other things, “ ‘when a pleading and proof requirement is intended, the Legislature knows how to specify the requirement.’ ” (*Id.* at p. 1141.) Appellant does not provide a persuasive reason why we should read an implied pleading and proof requirement into either section 4019 or section 2933 in light of the *Varnell* court’s conclusion.

Accordingly, People did not need to plead or prove a prior violent felony conviction and the trial court properly denied defendant day-for-day conduct credits.

B. Equal Protection

Sections 4019 and 2933 were amended again, operative October 1, 2011. (Stats. 2011, ch. 15, § 482, Stats. 2011, ch. 39, § 53 [regarding section 4019]; Stats. 2011-2012, 1st Ex. Sess., ch. 12, §§ 16, 35.) As the parties acknowledge, as a result of the October 2011 amendments, section 4019 enabled defendants with prior serious or violent felony convictions to obtain conduct credits previously unavailable to them. However, section 4019, as amended, applies only to defendants whose crimes were “committed on or after October 1, 2011,” thereby excluding defendant. (§ 4019, subd. (h).) Defendant argues he nonetheless is entitled to day-for-day conduct credits under the amended section 4019 because its prospective-only application violates his rights under the equal protection clauses of the state and federal Constitutions. We disagree.

As the parties agree, we apply the “rational basis” test to defendant’s equal protection argument. We determine, if the two subject classes are similarly situated, whether “the challenged classification bears a rational relationship to a legitimate state purpose.” (*People v. Hofsheier* (2006) 37 Cal.4th 1185, 1200 (*Hofsheier*); see also *In re Kapperman* (1974) 11 Cal.3d 542, 545-546 (*Kapperman*).)

Defendant contends that the purpose of the October 2011 amendments was, as reflected in the legislative history, to address a fiscal emergency declared by the Governor. (Stats. 2011, ch. 15, (17); Stats. 2011-2012, 1st Ex. Sess., ch. 12, (19).) Given this purpose, he argues, he is entitled to retroactive application of section 4019 based on equal protection principles and the reasoning of *Kapperman, supra*, 11 Cal.3d

542. The People respond, also based on the reasoning of California Supreme Court opinions, that defendant, who served his time before the effective date of the October 2011 amendment, is not similarly situated with those who serve time after that effective date and that, even if he were, there is a rational basis for the state's interest in applying section 4019 prospectively.

We agree with the People that there is a rational basis for the challenged classification here.⁴ The rational relationship test, as articulated by our Supreme Court in *Hofsheier*, states that “ ‘ ‘ ‘ a statutory classification that neither proceeds along suspect lines nor infringes fundamental constitutional rights must be upheld against equal protection challenge *if there is any reasonably conceivable state of facts that could provide a rational basis for the classification.* [Citations.] Where there are “plausible” reasons for [the classification], “our inquiry is at an end.” (*Hofsheier, supra*, 37 Cal.4th at pp. 1200-1201.) The court explained that “ ‘ [t]hose attacking the rationality of the legislative classification have the burden “to negative every conceivable basis which might support it,” ’ ” stressing that the basis for that rationale must be “*reasonably conceivable.*” (*Id.* at p. 1201.)

Defendant asserts that no rational purpose would be served by giving credit to some, but not all, prisoners because the express purpose of the October 2011 amendment was to address a fiscal emergency. According to defendant, this economic benefit is realized regardless of when a prisoner was sentenced, and, as such, there can be no rational basis to classify prisoners based on when they were sentenced. Defendant's argument is flawed, however, for a reason not addressed by the parties, but which is evident from a review of *Hofsheier*, a case cited by both parties: that is, a purpose may be sufficient to uphold a classification regardless of whether it is the actual or expressly stated legislative purpose. (*Hofsheier, supra*, 37 Cal.4th at p. 1201.) “[I]t is irrelevant

⁴ We assume for the sake of argument, without deciding the matter, that the defendant is similarly situated with those who serve time after the effective date of the October 2011 amendment of section 4019. Therefore, we do not further address the parties' arguments on this issue.

whether the perceived reason for the challenged distinction actually motivated the Legislature.” (*Ibid.*) A proffered reason is sufficient if it “ ‘conceivably or “may reasonably have been the purpose and policy” of the relevant governmental decisionmaker,’ ” and its relationship of the classification to its goal “ ‘is not so attenuated as to render the distinction arbitrary or irrational.’ ” (*Ibid.*) The inquiry is “whether ‘ “the statutory classifications are rationally related to the ‘realistically conceivable legislative purpose[s]’ [citation]” . . . and . . . by declining to “invent[] fictitious purposes that could not have been within the contemplation of the Legislature.’ ” ’ ” (*Ibid.*)

The People contend there is a rational basis for the challenged classification because the “[I]n legislative intent in increasing the conduct credits awarded to inmates was, at least in part, an effort to further encourage compliance with the rules and regulations of the facility and the inmates’ participation in work.” Section 4019 has such a purpose. (See *People v. Brown* (2004) 33 Cal.4th 382, 405 [“ ‘section 4019[] focuses primarily on encouraging minimal cooperation and good behavior by persons temporarily detained in local custody’ ”].) It is reasonably conceivable that the Legislature continued to act at least in part on this purpose in amending section 4019 in October 2011, as the amendment, which increased the availability of good conduct credits, was consistent with this purpose.⁵

Furthermore, this purpose was a rational basis for the challenged classification. In making this argument, the People rely significantly on *In re Stinnette* (1979) 94 Cal.App.3d 800, 805 (*Stinnette*). *Stinnette* involved a similar equal protection challenge to the prospective-only application of the Determinate Sentencing Act (§ 1170 et seq.),

⁵ The People assert that the Legislature’s *actual* purpose in amending section 4019 in October 2011 included, at least in part, incentivizing good conduct, since this is an underlying purpose of the statute and can be incorporated as part of the legislative purpose for its amendment. (See *People v. Yartz* (2005) 37 Cal.4th 529, 538 [the Legislature is deemed to have amended a statute aware of statutes and judicial decisions already in existence].) As we have indicated, we need not determine the Legislature’s actual purpose in conducting an equal protection analysis and, therefore, we consider the People’s proffered reason without doing so.

which allowed persons to earn credit for good conduct while incarcerated in state prison. (*Stinnette*, at p. 806.) The system in *Stinnette* is analogous to the good conduct system in the present case for those awaiting sentencing under section 4019. The *Stinnette* court found that the Legislature had the legitimate purpose “of motivating good conduct among prisoners so as to maintain discipline and minimize threats to prison security.” (*Ibid.*) As such, a prisoner whose judgment has become final was not entitled to the benefit of the new law because “[r]eason dictates that it is impossible to influence behavior after it has occurred.” (*Ibid.*) The People argue this same reasoning applies here. We agree, given that the 2011 amendment involved the incentivizing of good conduct.

Defendant argues that *Kapperman*, *supra*, 11 Cal.3d 542, establishes that no rational basis supports the challenged classification. *Kapperman* involved an equal protection challenge to the grant of credit for actual time spent in custody prior to sentencing. (*Id.* at pp. 544-545.) This credit was awarded only prospectively to those delivered into the custody of the Director of Corrections after the effective date of the legislation. (*Ibid.*) The *Kapperman* court concluded that there was no rational basis for this limitation, and retroactively extended the credit. (*Id.* at p. 545.)

Kapperman is inapposite because it involved actual custody credit, not conduct credit. The *Kapperman* court itself explicitly distinguished between actual custody credit—what was at issue in that case—and “ ‘good-time’ credit awarded as a bonus for good conduct and efficient performance of duty while in prison.” (*Kapperman*, *supra*, 11 Cal.3d at p. 548.) This distinction makes sense. Conduct credits must be earned, whereas presentence custody credits are awarded automatically, based on the time served prior to sentencing. The purpose of conduct credits is to incentivize good conduct; custody credits offer no corresponding motivation.

In short, the classification withstands an equal protection “if there is any reasonably conceivable state of facts that could provide a rational basis for the classification.” (*Hofsheier*, *supra*, 37 Cal.4th at pp. 1200-1201, italics omitted.) The prospective-only application of the October 2011 amendment is rationally related to the purpose of motivating good conduct among prisoners because it is impossible to

retroactively influence a prisoner’s conduct. This purpose is “ “ “realistically conceivable’ ” ’ ” and plausibly could “have been within the contemplation of the Legislature.” (*Id.* at p. 1201.) Accordingly, defendant’s equal protection claim lacks merit.

DISPOSITION

The judgment is affirmed.

Lambden, J.

We concur:

Kline, P.J.

Haerle, J.