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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE,

Plaintiff and Respondent,

v.

DUANE WARREN JACKSON,

Defendant and Appellant.

A139695

(Marin County
Super. Ct. No. SC183811A &
SC183814A)

I.

INTRODUCTION

Appellant Duane Warren Jackson appeals from his conviction and sentence in two consolidated superior court cases after he obtained a certificate of probable cause from the lower court. He contends on appeal that the trial court abused its discretion in denying him probation, and in selecting the aggravated term for his conviction for assault with a deadly weapon. He also contends the court miscalculated his presentence custody credits.

Respondent concedes that the custody credits were improperly calculated, and that appellant is entitled to a total of 320 days of presentence custody credit time instead of the 184 days awarded by the trial court. We agree and order the abstract of judgment amended to show custody credits in that amount. In all other respects, we affirm the sentence and judgment.

II.

PROCEDURAL BACKGROUNDS OF BOTH APPEALS

On February 20, 2013, the Marin County District Attorney filed a criminal complaint in Marin County Superior Court Case No. SC183811 (Case 811) charging appellant with attempted murder (Pen. Code, §§ 187, subd. (a), 664).¹ The complaint alleged as enhancements the use of a knife (§ 12022, subd. (b)(1)), and infliction of great bodily injury (§ 12022.7, subd. (a)). The complaint also alleged that the offense constituted a serious or violent felony within the meaning of sections 667.5, subdivision (c), 1192.7, and 1170.12, and that appellant was presumptively ineligible for probation (§ 1203, subds. (e)(1),(2), (4)).

On February 21, 2013, the Marin County District Attorney filed another criminal complaint in the same court in Case No. SC183814A (Case 814), which charged appellant with obstructing or resisting an executive officer (§ 69—count 1), driving under the influence of alcohol or drugs with prior similar convictions (Veh. Code, §§ 23152, subd. (a), 23550, subd. (a)—count 2), driving under the influence with a blood-alcohol level of .08 percent or above with prior similar convictions (Veh. Code, §§ 23152, subd. (b), 23550—count 3), giving false information to a peace officer (§ 148.9, subd. (a)—count 4), resisting, delaying, or obstructing a peace officer (§ 148, subd. (a)(1)—count 5), and several misdemeanor counts of driving when his driving privileges had been revoked (Veh. Code, §§ 14601.2, subd. (a), 14601.5, subd. (a), 14601.1, subd. (a)—counts 6, 7, & 8). Numerous priors were also alleged.

Following a preliminary hearing in Case 811, the district attorney filed an information in that case charging appellant with assault with a deadly weapon—a knife (§ 245, subd. (a)(1)—count 1) and assault by means likely to cause great bodily injury (§ 245, subd. (a)(4)—count 2). The information alleged serious and violent felony allegations for count 1 (§§ 1192.7, subd. (c)(23) & 1170.12, subd. (a), (b), (c)), a great

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

bodily injury enhancement for both counts (§ 12022.7, subd. (a)), and an enhancement for the use of a deadly weapon for count 2 (§ 12022, subd. (b)(1)).

Thereafter, on June 7, 2013, appellant pleaded guilty to one count of assault with a deadly weapon in Case 811 (§ 245, subd. (a)(1)—count 1). At the same time appellant pleaded guilty in Case 814 to one count of driving under the influence with prior similar convictions (Veh. Code, §§ 23152, subd. (b), 23550—count 3). At the time he entered his plea, appellant acknowledged that there was no promised sentence, and that he could be placed on probation or sentenced to state prison for up to four years eight months. As part of his plea, appellant also admitted three prior convictions for driving under the influence. The remaining counts and allegations were dismissed, although the plea included a *Harvey*² waiver.

On July 29, 2013, the court denied probation and sentenced appellant to a total prison term of four years eight months. The court imposed the upper term of four years for the assault. It also imposed the midterm for driving under the influence, to be served consecutively at one-third the midterm for a term of eight months. Appellant received 184 days of presentence credit, based on an award of 160 actual days and 24 days of good conduct credit.

On August 23, 2013, appellant filed a request to recall his sentence. He filed a notice of appeal on August 30, 2013. On September 20, 2013, the trial court heard and denied appellant's motion to recall his sentence. Appellant filed a second notice of appeal that same day.

III.

FACTUAL BACKGROUNDS RELATING TO CASES 811 & 814

A. Case 811—The Assault Case³

Shirley Hall testified as the first witness at the preliminary hearing held in Case 811. She is the mother of both appellant and the victim, Daniel Grayson (Grayson). At

² *People v. Harvey* (1979) 25 Cal.3d 754.

³ The facts are taken from the preliminary hearing transcript in Case 811.

the time of the assault, Hall was living with her sons in a two-bedroom home with a loft and a converted garage. Appellant's room was in the converted garage. Grayson's bedroom was on the second floor of the residence.

On the night the altercation occurred, Hall was awakened by Grayson, who asked her to come downstairs and see what had happened to the door to his room. She went downstairs and saw nothing unusual. She then returned to her room. Hall refused to answer any further questions about that night, and the judge excused her, indicating that someone would be contacted and asked to talk to her about her refusal to testify.⁴

Grayson was then called as a witness. He recalled coming home around 2:00 a.m. from an evening of "clubbing." When he went to his room he noticed some DVDs were missing. He went down to appellant's room to ask about them. The two got into a "verbal match," and Grayson went back to his bedroom, and closed and locked the door. When Grayson first approached appellant's room, the door had been closed. He opened it, went inside, and asked appellant where his "stuff" was. When appellant reacted hostilely, Grayson left the room in order to diffuse any tension. Grayson testified that appellant's demeanor at that time was "disrespectful," and he was "angry and rageful."

It was only a few seconds after returning to his room that appellant came upstairs and kicked open the locked bedroom door to Grayson's room. Grayson grabbed appellant, pushed him against a closet door, and then threw him out of his room. After he released appellant, he went back downstairs. Grayson then went to get his mother to show her what appellant had done to his bedroom door. The doorframe was cracked.

Grayson then closed and locked his door again. Shortly thereafter, appellant came back upstairs and kicked in the door again. By this time, Grayson had started getting ready for bed and the room was dark. Just before appellant came back to Grayson's room, Grayson could hear appellant rummaging through a drawer in the kitchen.

⁴ During Grayson's testimony, a deputy public defender appeared for Hall and requested a copy of the police report concerning the incident. Ultimately, Hall was not recalled as a witness at the preliminary hearing.

Because it was dark, Grayson could not see if appellant was carrying anything. However, he felt appellant cut his face with something. The two struggled into the hallway, and that was when Grayson saw that appellant was carrying a knife. The first cut was to Grayson's lip, and then he felt a stab to his stomach. Grayson lowered his head and felt another stab to the back of his head. The stomach wound was about two inches long. Grayson did his best to restrain appellant as they struggled into the living room, but he was losing a lot of blood. In addition to the stab wounds, Grayson suffered a fracture to a finger on his dominant hand. At some point, Grayson grabbed appellant and threw him down the stairs. Grayson got on top of appellant and held him down with a choke hold for 20-30 seconds.

Grayson described the knife that appellant used as a "steak knife." Grayson could feel the blood running down his back, so he took off his shirt and wrapped it around his head. Someone else in the house called 911, and Grayson was later taken to the hospital for treatment.

When he got to the hospital, Grayson received nine staples, 10 stitches in his lip, and claimed he was shown x-rays indicating he had two broken fingers. He could still feel the effect of the broken fingers in that he has trouble bending his hand. He was at the hospital for a total of about five hours and left under his own power.

Grayson testified that while he was clubbing that night, he may have had one or two drinks. He later admitted that he had also used cocaine and marijuana that evening.⁵ Grayson had seen his brother drunk on prior occasions, and testified that his brother (appellant) appeared to be intoxicated that night.

Grayson and appellant had had a prior altercation some years earlier. At that time he punched appellant in the face.

⁵ This admission came after Grayson met with court-appointed counsel and an immunity agreement was signed and filed with the court.

At the conclusion of Grayson's testimony the trial court noted that there was a scar on Grayson's nose from the injury he received from appellant. There was no scar on his lip or on the back of his head where he was cut.

Police officer Kayla Pendley responded to the 911 call. While at the home she interviewed Grayson, who was not willing to give her much information about what had happened. The officer examined Grayson's bedroom door and found no kick marks, although the plate on the door was misshapen. While she interviewed Grayson, he had a shirt tied around his head with blood on it and was being tended to by emergency personnel.

Grayson's medical records were admitted during the hearing. An x-ray report confirmed that his middle finger was fractured and "mildly displaced." The scalp wound was described as being 3.5 centimeters long and was actively bleeding when Grayson was first seen. The wound was closed with staples in the hospital emergency room. A superficial one-centimeter laceration of Grayson's upper lip was observed, along with a one-centimeter laceration of his nose. The stab wound to his stomach was approximately two-centimeters long through the fatty tissue of the upper left quadrant of his abdomen, and was not actively bleeding when he was seen at the hospital. The lip laceration was sutured, and the nose cut repaired with Dermabond. A splint was applied to stabilize Grayson's fractured finger.

B. Case 814—The DUI and Related Charges Case

The following factual narrative concerning the incident giving rise to Case 814 is taken verbatim from the presentence probation report:

"At about 7.40 p.m. officers responded to the parking lot of the Burger King located on Alameda Del Prado on the report of subject possibly driving while under the influence of alcohol. The reporting party had observed the driver of a white four door sedan pull in to the parking lot at an excessive speed, run into a parking stall curb, and then parked diagonally across two parking spaces. Officers contacted [appellant] in the driver's seat of a white Dodge Stratus, and he appeared to be sleeping when they initially approached. When asked to identify himself he stated, 'Warren Jackson', and gave a date

of birth of 7/26/1970, but indicated he had no formal identification to prove this. When asked if he was lying about his true name [appellant] said, 'No'. When the dispatcher ran a record check the name Duane Warren Jackson returned with the 7/26/1970 date of birth and officers were notified he was wanted on a [Penal Code section] 836 warrant for attempted murder.

“[Appellant] had a strong odor of alcohol and objective signs of intoxication and was asked to step out of the car. He was not wearing shoes and his pants were pulled down below his waist. Upon searching [appellant] for weapons the officer found his California identification card confirming his true name and date of birth. [Appellant] was then asked to perform field sobriety tests; he either failed the tests or refused to attempt the tests. The officer then had [appellant] submit preliminary alcohol screen (PAS) breath tests, the two tests taken a few minutes apart returned results of .308 [percent] and .307 [percent] blood alcohol content. At this point [appellant] was told he was under arrest for driving under the influence and was directed to face the trunk of his vehicle for placing in handcuffs. As [appellant] began to position himself he then took off running through the parking lot of the Burger King, two officers were able to grab his arms after he had run [15 to 20] feet, but he continued to resist their attempts to control him. [Appellant] was placed on the ground with a leg sweep by one of the officers and eventually placed in handcuffs, although he continued to struggle with them and resisted by lying on top of his left arm. He was then placed in the patrol car, and when asked if he had any injury, he yelled, 'I'm fucked up' and then continued a profanity laced invective. Neither officer suffered an injury as a result of the struggle with [appellant].

“[Appellant] was then transported to Novato Community Hospital for medical clearance prior to his booking, as well as blood sample for blood alcohol level. One officer was with him in examination room while he was waiting to be seen and suddenly [appellant] yelled, 'I'm going to fucking kill you!' When the officer asked what he meant by that, [appellant] responded, 'I'm going to get my gun and fucking shoot you!' A few minutes later a sheriff's deputy who had arrived as back-up in the arrest joined the

Novato police officer in the examination room, and [appellant] yelled at him that he was going to the deputy's house to kill him and his family.

“Upon getting medical clearance and the blood sample the officer returned [appellant] to his patrol vehicle and started his transport to the Marin County Jail. Within seconds after leaving the hospital parking lot [appellant] began yelling profanities, and kicking the patrol vehicle door, window and the barrier between the front and rear seats. [Appellant] was ordered to stop his behavior, but he continued the angry outburst. The officer pulled over less than a mile from the hospital and with the assistance of the back-up officers placed [appellant's] legs in restraints. [Appellant's] transport to the Marin County Jail was then completed by [s]heriff [d]eputies who had placed him in the restraints.”

C. Appellant's Sentencing

Appellant's sentencing hearing took place on July 29, 2013. Prior to that hearing, he had filed a statement in mitigation. The statement in mitigation argued that a grant of probation was the appropriate disposition “given the unique circumstances of these cases and [appellant's] background, including his current commitment to sobriety and acceptance of several live-in treatment programs.” Appellant's position was supported by a discussion concerning the rule-based factors bearing on his suitability for probation (Cal. Rules of Court, rule 4.414).⁶ Appellant also discussed those factors bearing on what sentence should be imposed (rules 4.421, 4.423) if probation were to be denied. In this latter regard, appellant concluded that if a state prison sentence were imposed, the court should impose the mitigated term of two years eight months.

A felony presentence report was filed by the county probation department before sentencing. The recommendations included that probation be denied and that the aggravated term of three years in state prison in Case 814 be selected as the principal term with a one-year consecutive term added for the conviction in Case 811 (one-third the mid-term of three years), for a total aggregate state prison term of four years.

⁶ All further rule references are to the California Rules of Court.

Among the matters discussed, the report chronicled appellant's prior criminal record since he turned 18 in 1988.⁷ His record included a felony conviction for being in possession of a dangerous weapon and a concomitant misdemeanor conviction for carrying a loaded firearm in public (1988); a felony conviction for possession of cocaine for sale (1990); and a felony conviction for possession of a controlled substance for sale (1999). These prior convictions resulted in two imposed, but suspended, state prison sentences, the latter of which appellant ultimately served after he failed on probation and was terminated from a residential substance abuse treatment center (2000).

In addition to these prior felony convictions, appellant was convicted of approximately 36 misdemeanors over a period of approximately 25 years, including three prior DUI convictions, and several prior batteries committed against public employees. He also was found to have violated probation on at least seven prior occasions, and to have violated parole four times which resulted in his twice returning to prison.

The report noted that appellant was last placed on probation in 2007 for a domestic violence offense against a girlfriend. While he participated in a batterers' intervention class, he did not complete it, and when questioned about his missed appointments, he exhibited anger and belligerent behavior towards the probation officer questioning him. In late 2009, he was arrested for another battery offense, but the prosecutor decided to proceed only on a probation violation and not to charge that offense separately.

The section entitled "Performance on Probation/Parole" concluded with the following: "Subsequent violation petitions followed this one in the final months of the defendant's probation. Finally in July 2010 his probation was terminated by the Court. [¶] In the past three years the defendant has had several grants of Conditional Sentence. Court minutes for the one of the Marin County cases . . . show[] he has had several violation petitions filed in the past two years."

⁷ The reports added that appellant was originally referred to the probation department beginning when appellant was 15 years old, and that there had been a total of four juvenile referrals, none of which resulted in appellant being declared a ward of the court.

As for his substance abuse, the report noted that he was a chronic alcohol abuser with three prior DUI offenses and several arrests for being drunk and disorderly. As noted above, appellant attempted residential treatment in 2000, and he attended 12-step meetings “occasionally” in recent years. In addition to alcohol, appellant had used cocaine and Ecstasy, but claims not to have used any drugs for the past two years.

The July 29 sentencing hearing commenced with the trial court noting it had read and considered both the statement in mitigation and the probation felony presentence report. Appellant’s counsel asked for a grant of probation including a term that appellant enter one of the three residential treatment programs that had accepted him. During his remarks, counsel emphasized that virtually all of appellant’s legal troubles had been tied to his drinking, including the current offenses, and that it was not too late for appellant to conquer his disease through treatment, which was “never ordered” as a condition of his previous probations. Appellant then read a statement to the court. The prosecutor asked the judge to follow the recommendations of the probation department, and emphasized appellant’s extensive criminal record, his poor performance after his releases from custody, and the seriousness of the current offenses.

After counsel submitted the case, the trial court stated that probation would not be granted. The court first noted that appellant had “an extensive history, . . . nine prior assault offenses, at least six prior alcohol related offenses. These [current] offenses were serious. They involve alcohol, and while intoxicated, [appellant] also threatened to kill police officers, and on another event he’s intoxicated, and he stabs a person more than once.” In denying probation, the court then relied on the following rule-based factors relating to the crime: (1) the nature and seriousness of the crimes when compared to other crimes (rule 4.414(a)(1)); (2) Grayson was vulnerable as he was in his dark bedroom in the middle of the night when the assault took place (rule 4.414(a)(3)); (3) Grayson suffered more than moderate injuries (rule 4.414(a)(4)); and (4) appellant was an active participant (rule 4.414(a)(6)). The court also relied on several factors relating to appellant in denying probation, which included: (1) appellant’s poor criminal record (rule 4.414(b)(1)); (2) his poor past performance on probation (rule 4.414(b)(2)); and (3) the

likelihood that appellant would not be able to comply with the terms of probation (rule 4.414(b)(4)).

The trial court then selected the assault conviction in Case 811 as the principal term choosing the aggravated term of four years because⁸: (1) of the serious nature and circumstances of the crime; (2) appellant used a weapon to commit the assault; (3) appellant inflicted more than moderate injuries on Grayson; (4) appellant was intoxicated at the time of the assault; (5) appellant’s criminal record spans “his entire life”; (6) appellant had performed poorly while under multiple grants of probation and regularly reoffended. The court did not find any mitigating circumstances.⁹ In addition to the four year term in Case 811, the court imposed an additional consecutive term of eight months, for a total aggregate state prison term of four years eight months. The court also awarded 184 days custody credit.

IV.

DISCUSSION

A. Denial of Probation

“A trial court has broad discretion to determine whether a defendant is suitable for probation. [Citation.] The determination on whether a case is an ‘unusual’ case is also within the sound discretion of the trial court. [Citation.] An appellant bears a heavy burden when attempting to show an abuse of such discretion. [Citation.] To establish abuse, the defendant must show that, under all the circumstances, the denial of probation was arbitrary, capricious or exceeded the bounds of reason. [Citation.]” (*People v. Bradley* (2012) 208 Cal.App.4th 64, 89.) In deciding whether to grant probation, the trial court should consider the various factors enumerated in rule 4.414, although it can consider other factors as well. (*People v. Weaver* (2007) 149 Cal.App.4th 1301, 1312–1313 (*Weaver*).)

⁸ Here the court specifically relied on the enumerated factors contained on page 10 of the probation report.

⁹ The probation department likewise found no mitigating sentencing factors to be present.

Rule 4.414, sets forth certain criteria relevant to the trial court’s decision to grant or deny probation, and provides in part:

“Criteria affecting the decision to grant or deny probation include facts relating to the crime and facts relating to the defendant. [¶] (a) Facts relating to the crime . . . include: [¶] (1) The nature, seriousness, and circumstances of the crime as compared to other instances of the same crime; [¶] (2) Whether the defendant was armed with or used a weapon; [¶] (3) The vulnerability of the victim; [¶] (4) Whether the defendant inflicted physical or emotional injury; [¶] (5) The degree of monetary loss to the victim; [¶] (6) Whether the defendant was an active or a passive participant; [¶] (7) Whether the crime was committed because of an unusual circumstance, such as great provocation, which is unlikely to recur; [¶] (8) Whether the manner in which the crime was carried out demonstrated criminal sophistication or professionalism on the part of the defendant; . . .

“(b) Facts relating to the defendant . . . include: [¶] (1) Prior record of criminal conduct, whether as an adult or a juvenile, including the recency and frequency of prior crimes; and whether the prior record indicates a pattern of regular or increasingly serious criminal conduct; [¶] (2) Prior performance on probation or parole and present probation or parole status; [¶] (3) Willingness to comply with the terms of probation; [¶] (4) Ability to comply with reasonable terms of probation as indicated by the defendant’s age, education, health, mental faculties, history of alcohol or other substance abuse, family background and ties, employment and military service history, and other relevant factors; [¶] (5) The likely effect of imprisonment on the defendant and his or her dependents; [¶] (6) [¶] (7) Whether the defendant is remorseful; and [¶] (8) The likelihood that if not imprisoned the defendant will be a danger to others.”

These criteria are not exclusive, and “[i]n deciding whether to grant or deny probation, a trial court may also consider additional criteria not listed in the rules provided those criteria are reasonably related to that decision. (Rule 4.408(a).)” (*Weaver, supra*, 149 Cal.App.4th at p. 1313.)

As to the denial of probation, the trial court indicated that it had read and considered the probation report, which recommended a denial of probation. The

recommendation was based upon the department's assessment that there existed a preponderance of "unfavorable" factors bearing on probation, including those enumerated in rule 4.414(a)(1), (2), (4), (6), and (7).

In determining whether a trial court abused its discretion in denying probation, a reviewing court considers whether substantial evidence supports the trial court's finding that a particular factor for or against probation existed. (*Weaver, supra*, 149 Cal.App.4th at p. 1313.) In denying probation, the court based its decision upon the factors relating to the crime enumerated in rule 4.414 including (a)(1), (2), (3), and (6). Each of these four factors selected for the court's decision was supported by substantial evidence. Similarly, the court relied on several factors relating to appellant in denying probation, including those factors enumerated in rule 4.414(b) including (1) appellant's poor criminal record (rule 4.414(b)(1)); (2) his poor past performance on probation (rule 4.414(b)(2)); and (3) the likelihood that appellant would not be able to comply with the terms of probation (rule 4.414(b)(4)). These factors were supported by substantial evidence. Consequently, the trial court's decision to deny probation was not an abuse of discretion.

B. Selection of the Aggravated Term

Appellant also contends that the trial court abused its discretion in sentencing him to an aggravated prison term for his assault conviction. Like the grant or denial of probation, rule 4.421 sets forth criteria for trial courts to consider in determining whether the aggravated or mitigated term should be imposed rather than the mid-term. As to factors in aggravation relating to the conviction for which sentence is being imposed, the rule provides:

"(a) Factors relating to the crime . . . , whether or not charged or chargeable as enhancements include that: [¶] (1) The crime involved great violence, great bodily harm, threat of great bodily harm, or other acts disclosing a high degree of cruelty, viciousness, or callousness; [¶] (2) The defendant was armed with or used a weapon at the time of the commission of the crime; [¶] (3) The victim was particularly vulnerable; [¶] (4) The defendant induced others to participate in the commission of the crime or occupied a position of leadership or dominance of other participants in its commission; [¶] (5) The

defendant induced a minor to commit or assist in the commission of the crime; [¶] (6) The defendant threatened witnesses, unlawfully prevented or dissuaded witnesses from testifying, suborned perjury, or in any other way illegally interfered with the judicial process; [¶] (7) The defendant was convicted of other crimes for which consecutive sentences could have been imposed but for which concurrent sentences are being imposed; [¶] (8) The manner in which the crime was carried out indicates planning, sophistication, or professionalism; [¶] (9) The crime involved an attempted or actual taking or damage of great monetary value; [¶] (10) The crime involved a large quantity of contraband; and [¶] (11) The defendant took advantage of a position of trust or confidence to commit the offense. . . .”

As to factors relating to the defendant that are relevant to the term selected, the rule provides:

“(b) Factors relating to the defendant . . . include that: [¶] (1) The defendant has engaged in violent conduct that indicates a serious danger to society; (2) The defendant’s prior convictions as an adult or sustained petitions in juvenile delinquency proceedings are numerous or of increasing seriousness; [¶] (3) The defendant has served a prior prison term; [¶] (4) The defendant was on probation or parole when the crime was committed; and [¶] (5) The defendant’s prior performance on probation or parole was unsatisfactory.”

Importantly, a trial court may impose the upper term based on finding any *one* of these factors present. (*People v. Black* (2007) 41 Cal.4th 799, 816; accord: *People v. Myles* (2012) 53 Cal.4th 1181, 1221.) In this case, the trial court chose the aggravated term based on rule 4.421(a)(1), (2), and (3), and 4.421(b)(1), (2), (3), and (5). These factors were all supported by substantial evidence and warranted the selection of the aggravated term.

Nonetheless, appellant asserts that the trial court’s failure to identify any mitigating factors indicates that it failed to consider those factors. We disagree. The sentencing hearing was extensive with counsel and the court engaged in a detailed discussion of which sentencing factors the trial court should consider and the weight to be attached to them. We conclude on this record that the court considered, but rejected, the

factors in mitigation argued by appellant. The court was not bound to further explain its reasons for the sentence. (See *People v. Lai* (2006) 138 Cal.App.4th 1227, 1258.)

We note too that appellant made a post-sentencing motion to recall the sentence, and a hearing held on that motion at which time defense counsel emphasized the factors that purportedly justified the selection of the mitigated term. After hearing from counsel the trial court reaffirmed its choice of the aggravated term emphasizing appellant's "terrible" criminal record, and the injuries sustained by Grayson in the assault, concluding with the court's concern that appellant is a "dangerous individual."

For all of these reasons, we find no abuse of discretion in selecting the aggravated term, and we affirm the court's sentencing decision.

C. Custody Credits

As noted, at sentencing the trial court awarded appellant a total of 184 days of custody credit. The credits were based upon the assumption that appellant was entitled only to 15 percent custody credits because the underlying offense was a crime of violence, and not to 50 percent custody credits generally available. Under this assumption, the court found that appellant had served 160 actual days in custody to which the court added 24 days for good conduct credit (15 percent times 180 days).

On appeal appellant points out that because the underlying assault was committed after October 1, 2011, section 4019 applies, entitling appellant to credit based on the formula that "four days will be deemed to have been served for every two days spent in actual custody." (§ 4019, subd. (f).) While there are certain crimes excluded from this section's calculation, assault with a deadly weapon under section 245, subdivision (a) is not one of them. (See §§ 2933.1, 667.5, subd. (c).) The Attorney General agrees.

Because the crime of assault with a deadly weapon was not excluded from the calculation of custody credits under section 4019, appellant was entitled to 50 percent good conduct credits mandated by that section, and not the 15 percent credits awarded. Thus, appellant was entitled to 320 days good conduct custody credits instead of the 184 days awarded by the trial court.

IV.
DISPOSITION

The trial court is hereby ordered to prepare an amended abstract of judgment awarding appellant 320 days of presentence custody credit. The judgment and sentence is otherwise affirmed.

RUVOLO, P. J.

We concur:

REARDON, J.

RIVERA, J.