

NOT TO BE PUBLISHED

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 This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.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
THIRD APPELLATE DISTRICT
(Sacramento)

THE PEOPLE,

Plaintiff and Respondent,

v.

CLAUDELL NOLEN,

Defendant and Appellant.

C065765

(Super. Ct. No.
09F07558)

A jury convicted defendant Claudell Nolen of one count of child endangerment (Pen. Code, § 273a, subd. (a)). Defendant admitted a prior strike conviction and four prior prison terms. The trial court sentenced him to the middle term of eight years for the child endangerment conviction and four years for the enhancements, for a total prison term of 12 years. The court awarded defendant 299 days of actual credit and 148 days of

conduct credit for a total of 447 days of credit for time served.

Defendant argues the trial court erred in admitting the birth certificate of his victim for the purpose of establishing the victim's age. He claims the birth certificate was hearsay, and was not relevant. He further argues the trial court erred in calculating his credit for time served.

We shall conclude that the birth certificate was neither inadmissible hearsay, nor irrelevant. However, the trial court miscalculated defendant's presentence credits. We shall therefore modify the judgment to credit defendant with three more days.

FACTUAL AND PROCEDURAL BACKGROUND

Sheriff's Deputy James Wilcox attempted to initiate a nighttime traffic stop on a pickup being driven by defendant. The pickup did not stop when Wilcox activated his lights, and instead sped up and made a U-turn. Officer Wilcox pursued the vehicle with his lights and siren on. He estimated defendant's vehicle was traveling 45 to 50 miles per hour. As Wilcox followed the pickup, he observed defendant climb out of the driver's side window while the pickup was still moving. Defendant fell to the ground and was struck by the pickup. Wilcox estimated the pickup was moving at approximately 40 to 45 miles per hour when defendant climbed out of the window.

The pickup continued down the street about 100 to 150 yards. A few minutes after the stop, Wilcox became aware that there was a passenger in the pickup. Wilcox testified that

there was a child in the pickup who was very quiet, and seemed scared and in shock. Wilcox estimated the child was four feet tall and weighed 120 pounds.

Wilcox's car was equipped with an in-car camera that was activated and recorded the incident. The video was played for the jury.

Deputy Sheriff Cathy Crowley also responded to the scene. The victim told Crowley that his name was Latrale W. Crowley estimated the victim was approximately four feet, eight inches tall, and around 11 years old. She stated the victim was shaking and crying. She testified that the victim was taken to the receiving home because his father could not be located.

Crowley's vehicle also had an in-car camera that was activated, and recorded a picture of the victim. The video was played for the jury.

DISCUSSION

I

Birth Certificate Properly Admitted

The prosecution was allowed to admit over defense objection a certified copy of a birth certificate for one Latrale Dupree W. The birth certificate is for a male baby born in Sacramento on November 20, 1996. Assuming the birth certificate is the victim's, he would have been 12 years old at the time of the incident on October 11, 2009.

Defendant objected to the admission of the certificate on the ground it violated the Confrontation Clause, since the victim did not testify at trial. Defendant argued the birth

certificate could not be linked to the victim without the victim's testimony. The trial court allowed the birth certificate, stating that it was circumstantial evidence, the weight of which could be determined by the jury.

Thereafter, defense counsel made the following argument to the jury:

"[T]he D.A. has told you that the passenger is this person Latrale. And that there is a birth certificate here for Latrale and that that has been proven, that the passenger in this case is this Latrale.

The problem is, there is no Latrale here. The problem is I can't question Latrale. I can't even -- we don't have the person who belongs to this birth certificate whose name is Latrale [W].

We haven't brought this person in here. And you, nor I, have been able to look at this person who this birth certificate supposedly belongs to and see if that person even looks like the passenger on the video. . . .

Maybe the passenger is not Latrale [W.]
Maybe the passenger is Latrale's cousin
who's on probation for something.

Maybe Latrale just gave his friend's name.
Maybe it is Latrale. I don't know, and
neither do you because we have no idea if
the person in this birth certificate is
actually the person who was the passenger in
that car."

Defendant now argues the birth certificate was inadmissible because it was hearsay and irrelevant. The birth certificate was neither inadmissible hearsay, nor was it irrelevant.

Evidence Code section 1281 states that a record of birth is not inadmissible hearsay if the "maker was required by law to file the writing in a designated public office and the writing was made and filed as required by law." Thus, a birth certificate is an exception to the hearsay rule. (*Prime Gas, Inc. v. City of Sacramento* (2010) 184 Cal.App.4th 697, 710.)

Defendant argues in his reply brief that although the birth certificate itself was not inadmissible hearsay, it relied on other hearsay evidence, i.e., Officer Crowley's testimony that the victim said his name was Latrale W. He further argues that although Officer Crowley's testimony about the victim's name was not hearsay when it was given, it somehow morphed into hearsay when it was relied upon to demonstrate that the birth certificate belonged to the victim. Defendant argues this was multiple layer hearsay, and the second layer of hearsay was not subject to an exception.

Defendant misunderstands the concept of multiple layer hearsay. The rule is set forth in Evidence Code section 1201, which states: "A statement within the scope of an exception to the hearsay rule is not inadmissible on the ground that the evidence of such statement is hearsay evidence if such hearsay evidence consists of one or more statements each of which meets the requirements of an exception to the hearsay rule." In other words, multiple hearsay involves a statement within a statement, and both statements must qualify as hearsay exceptions.

Here, there were two separate statements, not a statement within a statement. Defendant did not object to the first

statement, i.e., when the victim told Officer Crowley his name. The second statement, the birth certificate, did not contain another hearsay statement within it, thus there was no multiple hearsay problem. The fact that the birth certificate relied on the victim's statement for its *relevance*, does not make it a multiple level hearsay statement.

The birth certificate was also material and relevant. Defendant was charged with child endangerment, thus the prosecution was required to prove the victim was a child. Because the victim's age was a matter at issue in the case, and the birth certificate related to the victim's age, it was material. (See *Andalon v. Superior Court* (1984) 162 Cal.App.3d 600, 605, fn. 3 [evidence is material if it relates to a matter in issue in the case].)

The birth certificate was also relevant. Evidence is relevant both when it tends to prove or disprove the precise fact in issue, and when it tends to establish a fact from which the existence of the fact in issue can be inferred. (*People v. Lint* (1960) 182 Cal.App.2d 402, 415.) "Evidence is relevant when no matter how weak it is it tends to prove a disputed issue." (*In re Romeo C.* (1995) 33 Cal.App.4th 1838, 1843.)

The fact in issue here was the victim's age. The birth certificate tended to prove that fact because the victim's age could be inferred from the information on the certificate. While it is true that the prosecution did not conclusively prove that the certificate in evidence was for the victim, the victim's age could be inferred from several facts. First, the

name on the certificate and the name of the victim were the same and were somewhat unusual. Second, the victim was in Sacramento and the birth certificate was for a Sacramento birth. Finally, the witnesses approximated the victim's age at 11 years, and the birth certificate indicated the person was 12. These facts led to the permissible inference that the victim and the person listed in the birth certificate were one in the same.

Defense counsel could and did attack the weight of the evidence by pointing out to the jury that the birth certificate did not necessarily belong to the victim. Defendant's argument goes to the weight of the evidence--an issue that was properly presented to the jury.

II

Defendant Entitled to Additional Credit

Defendant argues the trial court incorrectly calculated that he had been in actual custody 299 days. Defendant was arrested on October 11, 2009, and sentenced on August 6, 2010. We agree with defendant that he was in local custody 300 days, rather than 299 days. This means defendant is entitled to one extra day of actual credit and two additional days of good time/work time credit, for a total of 450 days. (Pen. Code, § 4019; *People v. Williams* (2000) 79 Cal.App.4th 1157, 1176, fn. 14 ["Under section 4019, presentence conduct credit is calculated 'by dividing the number of days spent in custody by four . . . then [multiplying] by two and the total added to the original number of days spent in custody. [Citation.]'"])

[Citation.]” Three hundred divided by four is 75, times two is 150, plus 300 equals 450.

DISPOSITION

The judgment is modified to reflect that defendant has 450 days of presentence credits, consisting of 300 days in actual custody and 150 days in conduct credits. The trial court is directed to prepare a corrected abstract of judgment and to forward a certified copy to the Department of Corrections and Rehabilitation. In all other respects, the judgment is affirmed.

BLEASE, Acting P. J.

We concur:

HULL, J.

MURRAY, J.