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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
THIRD APPELLATE DISTRICT
(San Joaquin)

THE PEOPLE,

Plaintiff and Respondent,

v.

MICHAEL VINCENT HUTCHINSON,

Defendant and Appellant.

C068354

(Super. Ct. Nos. SF115278A,
SF097038A, SF097248A)

In case No. SF115278A, a jury convicted defendant Michael Vincent Hutchinson of evading a police officer (Veh. Code, § 2800.2), possession of a firearm by a felon (Pen. Code, § 12021, subd. (a)),¹ possession of ammunition by a felon (former § 12316, subd. (b)(1)), and misdemeanor being under the influence of methamphetamine (Health & Saf. Code, § 11550, subd. (a)). The trial court found that defendant had a prior serious felony conviction (§ 667, subds. (b)-(i)) and had served two prior prison terms (§ 667.5.

¹ Undesignated statutory references are to the Penal Code.

subd. (b)). Accordingly, the trial court sentenced defendant to eight years and eight months in state prison.

In conjunction with the same trial, the court heard the allegations that defendant violated his probation in case Nos. SF097248A and SF097038A. The court found that in both cases defendant failed to obey all laws as required by the conditions of his probation. Defendant's probation was summarily revoked, and the court imposed two consecutive eight-month sentences for the violations of probation.

On appeal, defendant does not challenge the result in his revocation of probation cases. Instead, his arguments focus exclusively on case No. SF115278A, which he contends must be reversed because (1) the government failed to preserve the motorcycle on which defendant had been riding even though the prosecution was aware of its potential exculpatory value, (2) the trial court erred in allowing defendant to be impeached by his seven prior felony convictions, (3) the court improperly ordered that he be physically restrained during the jury trial, and (4) his motion for new trial should have been granted based on newly-discovered evidence regarding the incompetence of the toxicologist who testified against him. On our own motion, we requested that the parties submit supplemental briefs on the issue of whether defendant received the correct number of presentence custody credits. In response, defendant argued that he correctly received credits for half of his actual days in custody, and that any reduction of credits would violate equal protection after the Legislature amended section 4019 in October 2011.

We reject defendant's contentions. We conclude that the government did not have a duty to preserve a motorcycle that was not in its possession and the location of which was known to the defense. Defendant was properly impeached with his prior convictions. The trial court did not abuse its discretion in ordering defendant to be physically restrained in a manner that the jury was not able to observe. And, the court did not err in denying the motion for new trial given that testimony from the arresting

officer provided the evidence that defendant had been under the influence of methamphetamine. Finally, we order the presentence custody credits corrected to add one day. Based on the recent California Supreme Court decision in *People v. Lara* (2012) 54 Cal.4th 896, we conclude that equal protection does not require retroactive application of the October 2011 amendment of section 4019. As modified to correct the presentence custody credits, we affirm the judgment.

FACTUAL AND PROCEDURAL HISTORY

Prosecution Evidence

At approximately 11:00 p.m. on July 7, 2010, California Highway Patrol Officers Kris Glenn and John Edwards were on duty in uniform and driving a marked patrol vehicle in Stockton, California. Officer Glenn noticed a motorcycle being driven without a rear taillight and activated the emergency lights on the patrol car. The motorcyclist, later identified as defendant, soon brought the motorcycle to a complete stop in the middle of Lafayette Street. Officer Glenn used the patrol vehicle's public address system to instruct defendant to pull over on the side of the street. Defendant looked back "for a second" and accelerated down Lafayette Street. Officer Glenn activated his siren and followed defendant.

During the ensuing pursuit, defendant exceeded the posted speed limits, ran a stop sign and three red lights, and nearly lost control of the motorcycle when he took turns too quickly. Officer Glenn finally caught up to defendant on Netherton Avenue, where he saw defendant get off of the motorcycle. The officer saw defendant attempt to hide the motorcycle by laying it down behind a parked car. Defendant took off his helmet and put it into the back of a pickup truck. He then began "trotting" away from the pursuing officers.

Officer Glenn maneuvered the patrol car in front of defendant in an attempt to intercept defendant. However, defendant quickly walked behind a nearby garage.

Defendant soon reemerged and began walking toward the officers. Officer Glenn observed defendant put his hands up and throw away a silver-colored metal object. The officers arrested defendant. In the area where defendant had thrown the object, Officer Glen found a silver and black colored snub-nose .38 revolver. The gun was fully loaded and bore the serial number W242987.

Officer Edwards examined the motorcycle. The officer had experience with motorcycles. Officer Edwards observed that defendant's motorcycle had a few dents and dings on it, "but nothing that looked fresh." The officer found no mechanical defects — such as a stuck throttle. He noticed that the motorcycle rolled freely when the clutch was engaged and that the gears shifted freely. Officer Edwards did not discover anything to indicate that the motorcycle had been malfunctioning.

Officer Glenn observed that defendant "was agitated, very excited. Seemed to be on edge." The officer also noticed that defendant appeared to be sweating profusely. Officer Glenn considered this unusual because defendant had not been running or engaging in "apparent exertion of any kind." The officer asked defendant questions to make sure that defendant was not suffering a medical condition that required immediate attention. However, defendant invoked his rights to remain silent.

The officers transported defendant to a local hospital where his blood was drawn at 1:17 a.m. Department of Justice forensic toxicologist Ronald Kitagawa tested the blood sample and found that it contained both amphetamine and methamphetamine. Kitagawa explained amphetamine and methamphetamine are stimulants that can cause symptoms of elevated heart rate, profuse sweating, and even result in greater risk-taking behavior. In Kitagawa's opinion, defendant's behavior during and after the motorcycle chase was consistent with the effects of methamphetamine.

At trial, the parties stipulated that defendant had a prior felony conviction that prohibited him from owning or possessing a firearm or ammunition. The prosecution

called Luis Ramirez, who testified that he borrowed his father's .38-caliber revolver in September 2009. During that month, someone broke into Ramirez's truck and stole the gun from his glove compartment. Ramirez reported the gun stolen and gave the police the serial number for the firearm. In court, Ramirez identified the firearm found near defendant to be that owned by Ramirez's father. Ramirez never gave defendant permission to have the gun.

Defense Evidence

Dennis Wilkison, a friend of defendant, is a mechanic. Wilkison worked on defendant's motorcycle in July 2010. In doing so, he found that the throttle cable was too short. Wilkison told defendant "he shouldn't be driving it until we got him the right throttle cable." Wilkison acknowledged that the motorcycle had a kill switch, clutch, and other mechanical features that would allow the rider to stop it.

Defendant testified on his own behalf, stating that he had purchased the motorcycle only about a month prior to the chase that led to his arrest. He had ridden it only once prior to July 7, 2010. On the evening of July 7, defendant "had a burning desire to ride" the motorcycle. Defendant got on the bike and drove onto the freeway where he quickly realized something was wrong with the motorcycle. He found it unusual that the motorcycle was "idling at half throttle." Defendant exited the freeway at the Filbert Street off-ramp and stopped for a red light. When the light turned green, defendant drove to his friend's house near Washington and Filbert Streets. By that time, the motorcycle was "revving up. It's really loud." Defendant leaned over to try to make adjustments to the bike.

Since his friends were not home, defendant left. As he turned down various streets, he tried to downshift and use the brakes because the throttle was nearly completely open. The motorcycle was going so fast that defendant nearly crashed into a fence. Defendant was "just trying to hang on to this bike." As he turned north on the

bike, he continued to be unable to bring it to a stop. Thus, he “blew through” an intersection despite the red traffic light. Defendant was not aware that he was being followed by the police. He did not hear any sirens or see any flashing emergency lights.

At the corner of Netherton and Marsh Streets, defendant crashed into a parked car. People from a nearby house came out to see what happened. Defendant took off his helmet and was putting it in the back of a truck when the police arrived. Defendant was still very excited at the time he was arrested because he had thought he was going to die on the back of the motorcycle. Defendant attempted to explain that the throttle had been stuck, but the police refused to listen.

Defendant acknowledged that he had methamphetamine in his system, having ingested the drug with his wife three days earlier. However, he denied throwing a gun.

At the direction of the California Highway Patrol, the motorcycle was transported to the storage yard of Advanced Tow. Unclaimed, the motorcycle was sold at a lien sale to Peter Matuz. Matuz, in turn, sold it to Steven Castilleja. Castilleja testified that the motorcycle ran “a little bit rough” because the throttle cable was kinked. He “moved it by hand” and fixed the cable problem.

On cross-examination, defendant admitted that he had been previously convicted of seven felonies.

Rebuttal Evidence

The prosecution presented rebuttal evidence in the form of Officer Edwards’s testimony. The officer explained that, even if the motorcycle’s throttle had been stuck, it could have been stopped by pressing the kill switch, pulling the clutch, turning the engine off, stalling the bike, and turning the gas off. Officer Edwards also testified that defendant’s driving was not consistent with someone on a motorcycle with a stuck throttle. Specifically, the officer noted that defendant came to a stop on Filbert Street before accelerating and driving away. Defendant also slowed down at various points

during the pursuit by the police. Finally, defendant made numerous turns even though it would have been easier to continue going straight while trying to remedy the mechanical problem.

Officer Edwards also explained that he examined the throttle immediately after the chase and did not find it to be stuck.

DISCUSSION

I

Failure to Preserve the Evidence

Defendant contends his conviction must be reversed because the People failed to preserve the motorcycle even though it had obvious exculpatory value. We reject the argument.

A.

Denial of Motion to Dismiss

Three weeks before trial, the defense moved to have the case dismissed on grounds that the People breached their duty to preserve exculpatory evidence. Defense counsel argued that the motorcycle could have proven “that the ‘accelerator had gotten stuck’” so that defendant was not fleeing from the police but riding an out-of-control motorcycle. Counsel further argued that if the motorcycle had a taillight, it would refute the police officers’ statements that they initiated a traffic stop because defendant did not have a taillight.

The People countered that the defense had full access to the motorcycle from July 9, 2010, until it was sold on October 22, 2010, from the tow yard where it had been kept. The prosecution noted that the motorcycle was not destroyed or lost, and that the defense was trying to contact the new owner. At the hearing on the motion, the People argued that the tow yard was not subject to the control of the prosecution or the police.

The trial court denied the motion to dismiss, explaining: “First of all, if this had been a stolen vehicle, then, of course, [defendant] wouldn’t have had any right to hold it at that time. It would have to go back to the original owner. If it were not a stolen vehicle and he had permission from the owner to ride the motorcycle at that time, then he could have contacted the motorcycle owner and had the motorcycle owner preserve it for him.

“In addition to that, it appears the defense did, in fact, know where the motorcycle was from the very beginning of this, according to the record here, representations anyway, the D.A. [*sic*] the motorcycle was still at the tow yard as of October 22nd, 2010. So the defense had from July 7, 2010, to October 22nd, 2010, to go look at the motorcycle or have somebody else take measurements of it, or whatever you wanted to do at that time. So you certainly had plenty of time to do it.

“Moreover, the police cannot be expected to hold things like cars and motorcycles and trucks or whatever else under these circumstances forever. They just simply — it’s impractical. They don’t have the room or the ability to do that.

“And so the Court is going to find that certainly the defense had every opportunity to get whatever information they needed from this motorcycle. They failed to do that. The police have no obligation to hold this sort of thing for the benefit of the defense. And, on top of that, it appears the defense hasn’t lost anything because you have got the whole chain of witnesses who were involved with the motorcycle. You know who they were and you can call them as witnesses.”

B.

Duty to Preserve Evidence

As a matter of federal due process, law enforcement agencies have a duty to preserve evidence “that might be expected to play a significant role in the suspect’s defense.” (*California v. Trombetta* (1984) 467 U.S. 479, 488 [81 L.Ed.2d 413])

(*Trombetta*.) For evidence to be subject to this duty, it “must both possess an exculpatory value that was apparent before the evidence was destroyed, and be of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means.” (*Id.* at p. 489; *People v. Beeler* (1995) 9 Cal.4th 953, 976.)

Even so, the “police ‘cannot be expected to “gather up everything which might eventually prove useful to the defense.”’” (*In re Michael L.* (1985) 39 Cal.3d 81, 86 (*Michael L.*), quoting *People v. Hogan* (1982) 31 Cal.3d 815, 851.) Thus, the duty to preserve exculpatory evidence generally pertains only to evidence that is already in the possession or control of the police. (*People v. Frye* (1998) 18 Cal.4th 894, 943 (*Frye*), overruled on other grounds in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22.) *Frye* noted that, even though “there might be cases in which the failure to collect or obtain evidence would justify sanctions against the prosecution at trial,” the Supreme Court has “continued to recognize that, as a general matter, due process does not require the police to collect particular items of evidence.” (*Frye*, at p. 943; *In re Michael L., supra*, 39 Cal.3d at pp. 86-87.) The Ninth Circuit has also refused to extend *Trombetta, supra*, 467 U.S. 479 to impose on the police an affirmative duty to gather evidence for its exculpatory value. (*Miller v. Vasquez* (9th Cir. 1989) 868 F.2d 1116, 1119 [“We are not persuaded . . . that *Trombetta* imposes upon police a duty to obtain evidence”].)

We review the trial court’s factual determinations regarding the potential exculpatory value of the evidence and the availability of comparable evidence or access to the evidence by the defense under the substantial evidence standard of review by “viewing the evidence in the light most favorable to the superior court’s finding.” (*People v. Roybal* (1998) 19 Cal.4th 481, 510 (*Roybal*.) The question of whether the police had a constitutional duty to gather the potentially exculpatory evidence, we review independently. (See *People v. Uribe* (2008) 162 Cal.App.4th 1457, 1473 & fn. 19.)

C.

Failure to Preserve the Motorcycle

The trial court did not err in denying defendant's motion to dismiss for failure to preserve the motorcycle for its exculpatory value.

Defendant's argument is "[b]ased on the prosecution's failure to preserve the motorcycle." However, this case does not involve a failure to *preserve* evidence within police possession or control. Instead, the situation arises from a failure to *gather* the evidence that was in the possession and control of a private tow yard. (See *Roybal, supra*, 19 Cal.4th at p. 510; *Michael L., supra*, 39 Cal.3d at pp. 84-87.) Moreover, the record shows that the defense knew the motorcycle's location and had the same access to it as the People did for a period of three months. Even though the potentially exculpatory value of the motorcycle was apparent, the People did not have the duty to gather and preserve it for the defense at a time when the defense was in an equal position to do the same. (*Frye, supra*, 18 Cal.4th at p. 943; *Michael L., supra*, 39 Cal.3d at pp. 86-87.)

Moreover, the defense had access to the evidence even after the motorcycle's sale by Advance Tow. The defense knew who bought the motorcycle, and even called the new owner as a witness during trial to testify about the kinked throttle cable. Additionally, the defense called Wilkison who testified that he told defendant not to ride the motorcycle due to a stuck throttle. Thus, the defense succeeded in introducing comparable evidence that was available by other means. (*Trombetta, supra*, 467 U.S. at p. 489.)

The trial court did not err in denying defendant's motion based on an asserted failure to preserve the motorcycle for its potentially exculpatory value.

II

Impeachment of Defendant with Prior Felony Convictions

Defendant next argues that his federal and state due process rights to a fair trial were denied when the trial court allowed the People to impeach him with his prior felony convictions. We disagree.

A.

Defendant's Impeachment

Before trial commenced, the People filed an in limine motion to impeach defendant with four of his prior felony convictions in the event he would testify on his own behalf. Specifically, the People sought to rely on defendant's convictions of witness or victim intimidation (§ 136.1), receipt of a stolen vehicle (§ 496d), and two counts of vehicle theft (Veh. Code, § 10851). Defense counsel opposed the motion, arguing that the admission of the convictions would be more prejudicial than probative. The trial court found that defendant's record showed "a fairly consistent pattern of picking up new felony convictions." The convictions dated from 1999, 2003, and 2005.

The court granted the People's motion, finding that "in view of their age, and the type of felonies and the consistent pattern, that the probative value of the use of these felonies for impeachment outweighs [their] prejudicial effect." The court later granted defendant's motion to sanitize the seven felonies, stating that the prior convictions could be referred to only as generic felonies with the dates on which they were committed. During the ruling, the court found that defendant actually had seven prior felony convictions — all of which could be used for impeachment purposes.

Defendant testified on his own behalf. On cross-examination, he admitted that he was convicted of three felonies in 1999, one in 2003, and three more in 2005. None of the felonies was identified or the underlying conduct described to the jury.

B.

Use of Prior Felony Convictions for Impeachment

The California Constitution provides that “[a]ny prior felony conviction of any person in any criminal proceeding, whether adult or juvenile, shall subsequently be used without limitation for purposes of impeachment or enhancement of sentence in any criminal proceeding. When a prior felony conviction is an element of any felony offense, it shall be proven to the trier of fact in open court.” (Cal. Const. art. I, § 28, subd. (f)(4).) “Our Supreme Court has interpreted this to mean that ‘any felony conviction which necessarily involves moral turpitude, even if the immoral trait is one other than dishonesty,’ may be used to impeach a witness in a criminal proceeding ‘subject to the trial court’s discretion under [Evidence Code] section 352. . . .’ (*People v. Castro* [(1985)] 38 Cal.3d [301,] 306.)” (*People v. Dewey* (1996) 42 Cal.App.4th 216, 220.)

Even when prior felony convictions are available to impeach a witness, “trial courts retain their discretion under Evidence Code section 352 to bar impeachment with such convictions when their probative value is substantially outweighed by their prejudicial effect.” (*People v. Clair* (1992) 2 Cal.4th 629, 654, citing *People v. Castro* (1985) 38 Cal.3d 301, 306–313, 323.) In exercising its discretion, a trial court “should consider, among other factors, whether it reflects on the witness’s honesty or veracity, whether it is near or remote in time, whether it is for the same or similar conduct as the charged offense, and what effect its admission would have on the defendant’s decision to testify.” (*People v. Clark* (2011) 52 Cal.4th 856, 931.)

On appeal, we review the trial court’s decision to allow a witness to be impeached by prior convictions for abuse of discretion. (*People v. Clark, supra*, 52 Cal.4th at p. 892.) Under this standard, we reverse only when the trial court has acted in a manner that is arbitrary, capricious, or exceeds the bounds of reason. (*People v. Feaster* (2002)

102 Cal.App.4th 1084, 1092.) “In most instances the appellate courts will uphold the exercise of discretion even if another court might have ruled otherwise.” (*Ibid.*)

C.

Numerosity

Defendant does not argue that any of the seven prior felonies used to impeach him were inadmissible for that purpose. Instead, he asserts that “the sheer number of prior convictions — seven felonies — counseled against admission of all of them” for purposes of impeachment. He argues that “[t]he mere admission of just one of the priors certainly would have inflamed the passions of the jury against [him].” We reject the argument.

It is well settled that “[t]here is no automatic limitation on the number of priors admissible for impeachment. Moreover, a series of crimes relevant to credibility is more probative than is a single such offense. Thus, whether or not more than one prior felony should be admitted is simply one of the factors which must be weighed against the danger of prejudice.” (*People v. Dillingham* (1986) 186 Cal.App.3d 688, 695; see *People v. Mendoza* (2000) 78 Cal.App.4th 918, 927 [ten prior convictions admitted for impeachment purposes]; *People v. Green* (1995) 34 Cal.App.4th 165 [six prior convictions admitted for impeachment purposes]; *People v. Muldrow* (1988) 202 Cal.App.3d 636, 647 [five identical prior convictions admitted for impeachment purposes where there is a supported exercise of discretion].)

Potential prejudice may be alleviated by “sanitizing” the prior felony convictions by simply informing the jury of the fact of the convictions without providing information regarding the underlying criminal conduct. Thus, the jury is precluded from comparing the facts of the prior offense to the charged offenses. (*People v. Sandoval* (1992) 4 Cal.4th 155, 178; *People v. Elwell* (1988) 206 Cal.App.3d 171, 175.) Sanitizing prior convictions renders prejudice less likely, “notwithstanding the possibility of jury speculation.” (*People v. Massey* (1987) 192 Cal.App.3d 819, 825.)

In deciding whether to limit the number of prior convictions for purposes of impeachment, trial courts are also bound to consider that “[n]o witness including a defendant who elects to testify in his [or her] own behalf is entitled to a false aura of veracity.” [Citation.]” (*People v. Gray* (2007) 158 Cal.App.4th 635, 641.) “A series of crimes evidencing moral turpitude is more probative of a defendant’s willingness to give perjured testimony than a single such offense.” (*People v. Lewis* (1987) 191 Cal.App.3d 1288, 1297.)

In this case, the trial court did not err by allowing the People to impeach defendant with the fact that he was convicted of seven felonies in three prior cases. As the trial court noted, defendant had “a fairly consistent pattern of picking up new felony convictions” prior to the time when he committed the offenses charged in this case. Impeachment of defendant with the felonies from only one or two of the prior cases would have allowed for an undeserved aura of veracity. (*People v. Muldrow, supra*, 202 Cal.App.3d at pp. 646–647.) Since numerosity alone does not suffice to establish an abuse of discretion by the trial court or prejudice to the defendant, we find no error in allowing defendant to be impeached by his seven prior felony convictions.

III

Physical Restraint During Trial

Defendant contends the trial court abused its discretion in ordering that defendant be physically restrained to his chair during trial, even though the restraint was not visible to the jury. We are not persuaded.

A.

Defendant’s Restraint During Trial

Prior to trial, the court expressed concern about courtroom security after it learned that defendant “had a couple of write-ups from the jail.” Several inmate-manufactured weapons were found in an area to which defendant had access. Defendant was suspected

by the jail staff to be involved. Accordingly, the court looked into the matter to see whether the circumstances required physical restraint of defendant during trial.

The trial court received a report from the jail that contained confidential information regarding the reasons why defendant had been placed on “double restrictions” at the jail. The court found the restrictions imposed on defendant to warrant concern about “everybody’s safety here” during trial “because it’s so unusual at the jail to ever put anybody on double restriction” The court concluded “that there is sufficient basis here for taking extra precautions with [defendant]. And so I am going to require that he be in a secure chair during this trial. And that not be made available to the jury. I recognize all the other problems that go with that. But nevertheless, I think that the overriding concerns of the safety for all people in the courtroom necessitate that. [¶] And unfortunately I cannot give you [referring to defense counsel] this report.” Thus, the court expressly noted that it was not justifying the restraint based on the contents of the jailhouse report — which it ordered sealed — but on the fact of the jail’s imposition of restrictions on defendant.

During trial, the court noted on the record that defendant was shackled at his waist in a manner that was not visible to the jury. During trial, the defense moved for mistrial based on the sound made when the Velcro concealing the chain failed and made a sound when it fell to the floor. Defense counsel further noted that it might have been possible for alternate jurors to see an unidentified part of the restraint. The court inquired and learned the problem had been fixed. The court denied the motion for mistrial, stating that it had not heard the noise and that the jury would be instructed to ignore the fact that defendant was in custody.

Later during trial, the court again noted that the restraint was invisible even while the defendant was testifying: “And I will say for the record the defendant is attached to the eye bolt on the floor. And it’s something that the jurors cannot see. So there is not an

issue about the jury seeing anything because he's surrounded by the witness box. So it's totally invisible to the jury. But I know that doesn't solve all the problems. But nevertheless, for the reasons that I have already given, I feel it's necessary that the defendant have a little extra security here."

B.

Physical Restraints Not Visible to Defendant's Jury

As the California Supreme Court has explained, "[A] defendant cannot be subjected to physical restraints of any kind in the courtroom while in the jury's presence, unless there is a showing of a manifest need for such restraints.' (*People v. Duran* (1976) 16 Cal.3d 282, 290–291, fn. omitted.) 'The imposition of physical restraints in the absence of a record showing violence or a threat of violence or other nonconforming conduct will be deemed to constitute an abuse of discretion' under state law. (*Id.* at p. 291.) Under the federal Constitution, where a court ordered a defendant, without adequate justification, to wear restraints that were seen by the jury, the state must prove beyond a reasonable doubt that the unjustified shackling did not contribute to the verdict. (*Deck v. Missouri* (2005) 544 U.S. 622, 635 [161 L.Ed.2d 953].) 'The trial court may not delegate to law enforcement personnel the decision whether to shackle a defendant.' (*People v. Seaton* (2001) 26 Cal.4th 598, 651.)" (*People v. Ervine* (2009) 47 Cal.4th 745, 773.)

In short, a trial court must consider the "pernicious effect of the 'possible prejudice in the minds of the jurors, the affront to human dignity, the disrespect for the entire judicial system . . . , as well as the effect such restraints have upon a defendant's decision to take the stand" (16 Cal.3d at p. 290; see also *Illinois v. Allen* (1970) 397 U.S. 337, 344 [25 L.Ed.2d 353, 359].) In assessing the impact on the right to a fair trial, the first and last of these considerations predominate." (*People v. Cox* (1991) 53 Cal.3d 618, 652, disapproved of on other grounds by *People v. Doolin, supra*, 45 Cal.4th 390,

421, fn. 22.) Even when shackling does not dissuade a defendant from testifying on his own behalf, it can impermissibly undermine credibility when the restraints are visible to the jury. (*People v. Duran* (1976) 16 Cal.3d 282, 296.)

However, when a defendant's shackles are not visible to the jury and the defendant is not dissuaded from testifying by the restraints, no reversal is warranted. The California Supreme Court has "consistently held that courtroom shackling, *even if error*, was harmless if there is no evidence that the jury saw the restraints, or that the shackles impaired or prejudiced the defendant's right to testify or participate in his defense. (E.g., *People v. Coddington* (2000) 23 Cal.4th 529, 650–651 (*Coddington*); *People v. Majors* (1998) 18 Cal.4th 385, 406; *People v. Tuilaepa* [(1992)] 4 Cal.4th 569, 584; *Cox, supra*, 53 Cal.3d 618, 652–653; but see *People v. Hill* (1998) 17 Cal.4th 800, 846 [cumulative error].)" (*People v. Anderson* (2001) 25 Cal.4th 543, 595-596, italics added.)

Here, the trial court ordered defendant shackled after noting the restrictions placed on defendant in jail. The court properly considered the circumstances of defendant's incarceration and determined that the safety of everyone in the courtroom required defendant's restraint.

Even if the trial court had erred in ordering defendant's restraint, any such error would not justify reversal. As the trial court found, the restraints were not visible to the jury either when he was seated at the counsel table or when he testified on his own behalf. Although defense counsel objected to the restraints based on a sound made when part of the restraint fell to the floor, the trial court indicated that it had not heard any such sound. We defer to the trial court's courtroom observations. (See *People v. Lomax* (2010) 49 Cal.4th 530, 567; *People v. Lewis* (2006) 39 Cal.4th 970, 1047.) Given that the restraints were not observable by defendant's jury and that they did not deter defendant from testifying on his own behalf, we conclude that even if there had been error it would be harmless. (*People v. Anderson, supra*, 25 Cal.4th at pp. 595-596.)

IV

Denial of Motion for New Trial Based on Newly-discovered Evidence

Defendant contends the trial court erroneously denied his motion for new trial after he learned that the toxicologist who tested the sample of his blood for the presence of methamphetamine was being investigated for mislabeling of samples at the laboratory. We find no error.

A.

Motion for New Trial

At trial, Officer Glenn testified that he had received training on how to evaluate whether persons are under the influence of illicit drugs. Based on his training, Officer Glenn concluded that defendant showed signs of impairment due to being under the influence of a drug. Specifically, Officer Glenn observed defendant being more agitated, fidgety, and sweaty than defendant's physical exertion prior to arrest would have explained. Thus, Officer Glenn transported defendant to a nearby hospital to have his blood drawn.

Kitagawa testified that he worked as a forensic toxicologist for the California Department of Justice. He testified about the symptoms of methamphetamine use, including agitation, profuse sweating, and increased heart rate. Kitagawa tested defendant's blood sample and found it contained both amphetamine and methamphetamine. He explained that the body metabolizes methamphetamine into amphetamine. However, Kitagawa acknowledged that the mere presence of methamphetamine and amphetamine in the blood cannot establish whether that person was actually under the influence of the drug:

“Q. . . . So if you were going to give an opinion as to whether someone is impaired to the degree that — their ability to safely operate a motor vehicle, instead of operating it

as a reasonably prudent, sober person would, you can't rely on any percentages in that report, is that true?

“A. Yeah, just looking only at the toxicology report and whatever the findings are, even if you had quantitations done, that alone, you can't give an opinion. *We always have to fall back on, what did the officer see at that time*, did he look like he was showing symptoms of being under the effects of the drugs that you would find in the toxicology report.” (Italics added.)

On further questioning, Kitagawa again acknowledged that he was unable to give an opinion as to whether defendant was under the influence of a drug at the time of his arrest based on the toxicology test alone.

During deliberations, the jury requested that Kitagawa's testimony be read back.

Defendant filed a motion for new trial based on several grounds, including his discovery that Kitagawa was being investigated for mislabeling of a few samples that he had tested in the previous nine months. Attached to the motion for new trial was a letter from the Department of Justice laboratory director to the San Joaquin County District Attorney that detailed the investigation. The letter noted the discovery of instances of mishandled samples tested by Kitagawa in four cases in counties other than San Joaquin. The sample tested in defendant's case was not affected by Kitagawa's “mistakes [which], although unfortunate, appear to be isolated and relatively infrequent compared to the large number of samples he analyzes each year.” The letter concluded that “[t]he Department of Justice has not found any evidence of malicious intent or any pattern of failure to meet professional standards by . . . Kitagawa.”

The trial court denied the motion for new trial. In pertinent part, the court explained: “I don't have any problem with this issue in regard to DOJ criminalist Kit[a]gawa here. First of all, as I pointed out, it only relates to the [Health and Safety Code section] 11550 [conviction]. The fact that the jury might have asked to have his

testimony reread only applies to the 11550 again, because he didn't say that the defendant was under the influence. [Kitagawa] merely said all he could say is that the defendant had used methamphetamine. And the defendant admitted he used methamphetamine. The only issue was how close in time it was. [Defendant] said it was three days before. Kit[a]gawa doesn't know and never said, as a matter of fact. So it really is not an issue of any significance here."

B.

Newly-discovered Evidence

A criminal defendant may move for a new trial based on newly-discovered evidence that could not, even with due diligence, have been produced at trial. (§ 1181, subd. 8.) To secure a new trial, a defendant must show that the newly-discovered evidence is material and non-cumulative so that a different result would be probable if the case were retried. (*People v. Drake* (1992) 6 Cal.App.4th 92, 98.) Motions for new trial are generally viewed with disfavor. (*Ibid.*) Nonetheless, a new trial must be granted when newly-discovered evidence indicates the defendant did not receive a fair trial. (*Ibid.*)

As the California Supreme Court has explained, "[T]he trial court has broad discretion in ruling on a new trial motion . . . , and its 'ruling will be disturbed only for clear abuse of that discretion.' (*People v. Ault* (2004) 33 Cal.4th 1250, 1260.) In addition, '[w]e accept the trial court's credibility determinations and findings on questions of historical fact if supported by substantial evidence.' (*People v. Nesler* (1997) 16 Cal.4th 561, 582 (lead opn. of George, C.J.))" (*People v. Verdugo* (2010) 50 Cal.4th 263, 308.)

Here, Kitagawa's testimony did not supply the evidence required to convict defendant of being under the influence of an illicit drug. Kitagawa explained that the presence of methamphetamine and amphetamine in defendant's blood sample did not

establish whether he was actually under the influence at the time of his arrest. Even the complete negation of Kitagawa’s testimony regarding his testing of the blood sample would not have rendered a different result probable on retrial. Defendant admitted he used methamphetamine three days before the arrest. The evidence of defendant being under the influence came in the form of Officer Glenn’s testimony about his observations of defendant’s symptoms of fidgeting, profuse sweating, and agitation at the time of defendant’s arrest. The newly-discovered evidence of Kitagawa’s mishandling of samples in the lab did not undermine the strength or validity of Officer Glenn’s observations based on his training in identifying behavior of people who are under the influence of illicit drugs. Consequently, the trial court did not err in denying defendant’s motion for new trial based on the investigation of Kitagawa’s compliance with laboratory labeling protocols. (*People v. Drake, supra*, 6 Cal.App.4th at pp. 97–98.)

V

Presentence Custody Credits

A.

Defendant is Entitled to an Extra Day of Credit

Our examination of the record revealed that the abstract of judgment awards presentence conduct credits amounting to 50 percent of defendant’s actual days in custody. We asked the parties to address whether defendant received the correct number of presentence conduct credits. Having received and considered the parties’ supplemental letter briefs, we conclude that the abstract of judgment errs — albeit by only one day.

Under section 2933.1, subdivision (a), a defendant who is convicted of any “violent felony” listed in section 667.5, subdivision (c), may accrue presentence custody credits of no more than 15 percent of actual days in custody. In this case, the trial court found that defendant had *previously* been convicted of section 136.1 (threats to victim or

witnesses), which is a serious felony under section 667.5, subdivision (c)(20). However, the California Supreme Court has held that “sections 2933.1 and 667.5(c)(7) limit a defendant’s presentence conduct credit to a maximum of 15 percent only when the defendant’s *current* conviction is itself punishable by life imprisonment, not when it is so punishable solely due to his status as a recidivist. Because defendant’s current convictions are not ‘violent’ within the meaning of section 667.5, subdivision (c), the trial court properly awarded him presentence conduct credits under section 4019 rather than section 2933.1.” (*People v. Thomas* (1999) 21 Cal.4th 1122, 1130, italics added.) Because defendant’s current convictions are not violent felonies, he is not limited to the 15 percent formula specified by section 2933.1

Here, defendant was sentenced on May 6, 2011. The version of former section 4019 in effect at the time of sentencing provided that a defendant could receive only one day of conduct credit for every two days of actual custody. (Former § 4019, subd. (f).)² Since then, section 4019 has been amended to provide day-for-day credits. (§ 4019, subd. (f).)³ Applying the law in force at the time of defendant’s sentencing, he is entitled to one day of credit for every two days in actual custody prior to his sentencing.

The abstract of judgment shows that defendant received (1) a total of 151 credits for 303 days in custody for case No. SF115278A, (2) a total of 371 credits for 743 days in custody for case No. SF097248A, and (3) a total of 372 credits for 747 days in custody

² At the time, subdivision (f) of former section 4019 provided: “It is the intent of the Legislature that if all days are earned under this section, a term of six days will be deemed to have been served for every four days spent in actual custody.” (Stats. 2010, ch. 426, § 2, eff. Sept. 28, 2010 to Sept. 30, 2011.)

³ Subdivision (f) of section 4019 currently provides: “It is the intent of the Legislature that if all days are earned under this section, a term of four days will be deemed to have been served for every two days spent in actual custody.”

for case No. SF097038A. These credits are correct — except for case No. SF097038A, in which he should have received 373 credits.

This court “has the inherent power to correct clerical errors in its records so as to make these records reflect the true facts.” (*People v. Mitchell* (2001) 26 Cal.4th 181, 185, quoting *In re Candelario* (1970) 3 Cal.3d 702, 705.) Accordingly, we order that the abstract of judgment be corrected to award defendant one additional presentence custody credit in case No. SF097038A.

B.

Equal Protection Challenge

In his supplemental letter brief on the issue of presentence custody credits, defendant argues that equal protection requires him to receive the more favorable credit formula specified in the amendment to section 4019 that took effect after his sentencing. He contends he is entitled to the additional credits as a matter of equal protection. This argument was rejected by the California Supreme Court in *People v. Lara* (2012) 54 Cal.4th 896, 906, fn. 9 (*Lara*.)

In *Lara*, the Supreme Court explained its rejection of the defendant’s equal protection argument as follows: “As we there [*People v. Brown* (2012) 54 Cal.4th 314, 328-330] explained, “[t]he obvious purpose” of a law increasing conduct credits “is to affect the behavior of inmates by providing them with incentives to engage in productive work and maintain good conduct while they are in prison.” [Citation.] “[T]his incentive purpose has no meaning if an inmate is unaware of it. The very concept demands prospective application.” (*Brown*, at p. 329, quoting *In re Strick* (1983) 148 Cal.App.3d 906, 913.) Accordingly, prisoners who serve their pretrial detention before such a law’s effective date, and those who serve their detention thereafter, are not similarly situated with respect to the law’s purpose. (*Brown*, at pp. 328-329.)” (*Lara, supra*, 54 Cal.4th at p. 906, fn. 9.)

Accordingly, we deny defendant's equal protection challenge and order the presentence custody credits corrected to comport with former section 4019 as it was in effect at the time of his sentencing.

DISPOSITION

The judgment is modified to award a total of 373 presentence custody credits for 747 days in custody in case No. SF097038A. As modified, the judgment is affirmed in case Nos. SF115278A, SF097248A, and SF097038A. The trial court is directed to prepare an amended abstract of judgment in accordance with this opinion, and to forward a certified copy to the Department of Corrections and Rehabilitation.

HOCH, J.

We concur:

ROBIE, Acting P. J.

MAURO, J.