

NOT TO BE PUBLISHED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 This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.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.

JAIME L. CLARK,

Defendant and Appellant.

C068918

(Super. Ct. No. 11F00282)

A jury found defendant Jaime L. Clark guilty of possessing marijuana (Health & Saf. Code,¹ § 11357, subd. (c) (section 11357(c))); selling or furnishing marijuana (Health & Saf. Code, § 11360, subd. (a) (section 11360(a))); and selling or furnishing marijuana to a minor 14 years or older (Health & Saf. Code, § 11361, subd. (b) (section 11361(b))). On appeal, defendant contends: (1) he was improperly convicted of selling or furnishing marijuana under section 11360(a) because that offense is a lesser included offense of selling or furnishing marijuana to a minor 14 years or older under section 11361(b); and (2) he is entitled to 190 day-for-day conduct credits for 190 days served in presentence custody under former Penal Code section 2933 as it was previously amended on September 28, 2010. We agree with defendant on both points and therefore

¹ Further section references are to the Health and Safety Code.

reverse his conviction for selling or furnishing marijuana under section 11360(a) and award him 94 additional conduct credits for time served in presentence custody.

FACTUAL AND PROCEDURAL BACKGROUND

On January 6, 2011, Officer Douglas Nelson and three other peace officers were patrolling the area around 7th and K Streets in Sacramento. Officer Nelson saw defendant trying to converse with pedestrians as they passed him. First, defendant offered marijuana to an adult who walked away without purchasing any. After a period of surveillance, Officer Douglas saw defendant contact 15-year-old Axel M. Defendant asked Axel if he needed any marijuana or “weed.” Axel responded that he did not have any money, but had a “Metro PC card.” Axel proposed a trade. Defendant took Axel’s “Metro PCS card” in exchange for marijuana wrapped in a plastic bag. Axel also gave defendant \$1.25 to buy him a tobacco cigar. He removed the tobacco from it in order to fill it with marijuana. When Axel saw the police in pursuit, he boarded a light rail train. Officers boarded the train and detained him. He was found with 1.22 grams of marijuana in a torn piece of plastic bag. Defendant was also detained and searched. A white plastic bag containing marijuana was found in his inner coat pocket. The marijuana was later found to weigh 30.1 grams. He was also carrying a data card and scan-disc flash drive.

Defendant was charged with selling marijuana, possession of marijuana for sale, and selling marijuana to a minor. The information further alleged that defendant had served a prior prison term following a felony conviction. A jury returned a verdict of guilty on selling or furnishing marijuana under section 11360(a), selling or furnishing marijuana to a minor under section 11361(b), and simple possession of marijuana under section 11357(c). In bifurcated proceedings, the court found true the allegation that defendant served a prior prison term following a felony conviction.

Defendant was sentenced to the midterm of four years for selling or furnishing marijuana to a minor under section 11361(b); three years for selling or furnishing marijuana under 11360(a), which was stayed; 30 days stayed for simple possession of

marijuana under section 11357(c); and one year for the prison prior enhancement. In a different case, defendant was sentenced to an additional eight months in prison to run consecutively for a total sentence of five years eight months. The trial court awarded defendant credit for time served of 190 days, plus 96 days of conduct credit for a total of 286 days of presentence credit. This timely appeal followed.

DISCUSSION

I

Selling Or Furnishing Marijuana Is A Lesser Included Offense Of Selling Or Furnishing Marijuana To A Minor

Defendant contends his conviction for selling or furnishing marijuana under section 11360(a) must be reversed because it is a lesser included offense of selling or furnishing marijuana to a minor 14 years or older under section 11361(b). The People argue that selling or furnishing marijuana under section 11360(a) is not a lesser included offense primarily because it contains an additional element of “unlawfulness.” We agree with defendant.

“In this state, multiple convictions may not be based on necessarily included offenses arising out of a single act or course of conduct. [Citations.] An offense is necessarily included within another if ‘the statutory elements of the greater offense . . . include all the elements of the lesser offense’ [Citations.] ‘In other words, “if a crime cannot be committed without also necessarily committing a lesser offense, the latter is a lesser included offense within the former.” ’ ” (*People v. Lewis* (2008) 43 Cal.4th 415, 518.)

Section 11361(b) provides as follows: “Every person 18 years of age or over who furnishes, administers, or gives, or offers to furnish, administer, or give, any marijuana to a minor 14 years of age or older shall be punished by imprisonment in the state prison for a period of three, four, or five years.” Section 11360(a) provides as follows: “Except as

otherwise provided by this section or as authorized by law, every person who transports, imports into this state, sells, furnishes, administers, or gives away, or offers to transport, import into this state, sell, furnish, administer, or give away, or attempts to import into this state or transport any marijuana shall be punished by imprisonment pursuant to subdivision (h) of Section 1170 of the Penal Code for a period of two, three or four years.”

Based on these elements, a person cannot commit the greater offense of selling or furnishing marijuana to a minor without also violating the lesser offense of selling or furnishing marijuana. To prove that a defendant committed the crime of selling or furnishing marijuana to a minor under section 11361(b), the People have to show that an adult furnished, administered, or gave marijuana to a minor, or offered to do so. Furnishing, administering, or giving marijuana, or offering to furnish, administer, or give marijuana are all acts that are included within section 11360(a) as well. Thus, selling or furnishing marijuana under section 11360(a) is a lesser included offense of selling or furnishing marijuana to a minor 14 years or older under section 11361(b).

The People argue that “[b]ecause [section 11360(a)] includes the phrase ‘[e]xcept . . . as authorized by law,’ ” the statute necessarily contains “an element of *unlawfulness*.” Thus, in the People’s view, “[i]n order to prove a defendant guilty of violating section 11360 subdivision (a), the prosecution must prove that his conduct was unlawful” -- that is, not otherwise authorized by law. Because no such phrase appears in section 11361(b), the People contend “section 11360, subdivision (a), is not a lesser-included offense of section 11361, subdivision (b).”

We are not persuaded. Defendant was convicted of selling or furnishing marijuana (lesser offense) and selling or furnishing marijuana to a minor (greater offense). With respect to the greater offense, there is no lawful way to supply a minor with marijuana. Therefore, if the defendant committed the greater offense of furnishing marijuana to a minor, his conduct would be unlawful, which would make him guilty of

the lesser offense under section 11360(a) also. Thus, even assuming it exists, the element of “unlawfulness” does not prevent section 11360(a) from being a lesser included offense of section 11361(b).

When a jury finds a defendant guilty of both the greater and the lesser offense, and the evidence supports the verdict as to the greater offense, the conviction of the lesser offense must be reversed. (*People v. Moran* (1970) 1 Cal.3d 755, 763.) Accordingly, we reverse defendant’s conviction of selling or furnishing marijuana under section 11360(a).

II

Conduct Credits

Defendant contends the court erred in refusing to award him day-for-day conduct credit for each day served in presentence confinement under former Penal Code section 2933 as it was amended on September 28, 2010. Defendant argues that he served 190 days in presentence custody and is therefore entitled to 190 days of conduct credit pursuant to the statute in effect at the time of his sentencing. The People do not dispute that defendant was entitled to 190 days of conduct credit; instead, they contend that pursuant to footnote 11 in *People v. Brown* (2012) 54 Cal.4th 314, 322, defendant’s claim is not properly before this court. Once again, we agree with defendant and disagree with the People.

In *Brown*, the defendant argued that the Department of Corrections and Rehabilitation violated former Penal Code section 2933 by failing to award him additional conduct credits. (*People v. Brown, supra*, 54 Cal.4th at p. 322, fn. 11.) The Supreme Court concluded that the defendant should have brought his claim in a petition for a writ of habeas corpus. (*Ibid.*) Here, defendant is seeking appellate review of an error in the judgment, not accusing the Department of Corrections and Rehabilitation of incorrectly failing to award additional conduct credits. Even if defendant did not first raise the issue of conduct credits by filing a motion in superior court, it is well settled that, “defense counsel [is not required] to file a motion to correct a presentence award of

credits in order to raise that question on appeal when other issues are litigated on appeal.”
(*People v. Acosta* (1996) 48 Cal.App.4th 411, 427.)

On September 28, 2010, as an urgency measure effective on that date, the Legislature enacted Senate Bill No. 76 (2009-2010 Reg. Sess.), which amended (now former) Penal Code section 2933 (Stats. 2010, ch. 426, § 1) regarding presentence conduct credits for defendants sentenced to state prison. The amendment gave qualifying prisoners one day of presentence conduct credit for each day of actual presentence confinement served (Penal Code, § 2933, former subd. (e)(1), (2), (3)). Neither defendant’s current convictions nor his criminal record disqualify him from that formula.

An amended version of Penal Code section 2933 came into effect on October 1, 2011, but defendant was sentenced on July 14, 2011. He is entitled to the benefit of the statute in effect at the time of sentencing: the amended version of Penal Code section 2933 effective on September 28, 2010. The trial court was required to calculate his presentence conduct credit pursuant to the law in force at the time of sentencing.

DISPOSITION

Defendant’s conviction for violating section 11360(a) is reversed. The judgment is modified to reflect an award of 190 days of conduct credit. The trial court is directed to modify the abstract of judgment accordingly and forward a certified copy of the modified abstract of judgment to the Department of Corrections and Rehabilitation.

_____ ROBIE _____, Acting P. J.

We concur:

_____ MAURO _____, J.

_____ DUARTE _____, J.