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

THE PEOPLE,

Plaintiff and Respondent,

v.

RICHARD EVANS,

Defendant and Appellant.

C076348

(Super. Ct. No. 09F07201)

A jury found defendant Richard Evans guilty of committing seven lewd acts on two children: R. (R.) and K. The trial court granted him probation for a period of seven years and ordered him to serve 365 days in jail. Defendant appeals on three grounds.

First, defendant argues there was insufficient evidence to support his convictions for committing lewd acts on K. “Specifically,” he contends “the evidence is insufficient to prove the requisite intent -- that the ‘climbover game’ was ‘accomplished with the intent of arousing the sexual desires of either the perpetrator or the child.’ ” Second, defendant “contends that imposing [certain] mandatory probation conditions, which are

based upon amended [Penal Code¹] section 1203.067(b), violate[d] the state and federal prohibitions against ex post facto laws because [Penal Code] section 1203.067(b) was amended after [defendant's] 2009 offenses." Third, defendant "believes the trial court erred by failing to award [him] any conduct credits." We remand for the trial court to determine defendant's conduct credits but otherwise affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Defendant was charged with seven counts of committing lewd acts on a child. The victims were his stepgrandchildren, K. and R. Defendant had previously been married to the victims' biological maternal grandmother, Mary Ann. The girls lived with their father and mother until the two split in 2008, after which they lived with their mother. Their mother was an "alcoholic," and K. and R. routinely stayed at defendant's house while their mother was "sick."

Between 2007 and 2009, defendant touched R.'s breasts on three occasions and her thigh and underwear on another. R. told her mother about defendant's behavior but because her mother was drunk at the time, she forgot what R. had said and continued to send the girls to defendant's house.

Also between 2007 and 2009, defendant grabbed K.'s breasts on one occasion and he pressed his body against K.'s during the climbover game which they played almost every time K. stayed at his house. In addition to the climbover game, defendant touched K.'s breasts while playing the tickle game. He squeezed her breasts for two seconds and said, " 'That's a good tickle monster.' " After defendant let go, he stopped tickling K., and they both sat down "like nothing ever happened."

When K. and R. stayed overnight at defendant's house, K. and R. slept on an air mattress. To wake the girls up, defendant would play the climbover game. K. testified

¹ Further undesignated section references are to the Penal Code.

that defendant would climb over them “like [they] were mountains.” He would “put his full weight down and slide down.” “[Defendant] would usually be on top of [her] on [her] back, so [her] behind end would usually be around [defendant’s genital] area.” She did not feel any particularized pressure or rubbing near her buttocks.

K. testified that she did not believe the climbover game was improper at the time, because, at 13 years old, she “was still an innocent little virgin.” Her opinion of the climbover game changed “[a]s [she] got older and understood what sex was.”

R. saw defendant play the climbover game with K. She testified that defendant grabbed K.’s breasts during the game on four occasions and pressed his “genital area” against K. on two occasions.

Mary Ann also witnessed the climbover game on one occasion while visiting to oversee defendant’s care. When she saw the game, she stopped it immediately because she thought it was inappropriate.

Following their mother’s death in July 2009, the girls moved in with their father and his roommate, Sabrina. The day after moving in, R. told Sabrina “everything.” Sabrina informed the girls’ father, who notified Child Protective Services and took K. and R. to an interview on August 11, 2009. Defendant was arrested on September 18, 2009, and charged on May 28, 2010, with seven counts of commission of a lewd act on a child under the age of 14. Four involved R. and three involved K. At trial a jury found him guilty of all seven counts.

The trial court suspended imposition of sentence and placed defendant on seven years of formal probation on the condition he serve 365 days in jail. The court awarded him 213 days of credit for actual time served in custody. Defendant’s actual custody days appear to be based on the following: (1) one day of actual custody for September 18, 2009, when defendant was arrested; and (2) 212 days of actual custody for the period from August 8, 2013 (when defendant was remanded into custody on the verdict date) to March 7, 2014 (when defendant was sentenced). The trial court did not award defendant

any presentence conduct credit. At the judgment and sentencing hearing, defendant attempted to address his award of presentence conduct credit. The following colloquy occurred between defense counsel and the court:

“MR. MILLER: We believe [defendant]’s credits received is 365 days we’d ask that the Court simply request that any --

“THE COURT: I don’t think so.

“MR. MILLER: 213 and day for day.

“THE COURT: Gets 15 percent.

“MR. MILLER: Only -- well, I believe if he goes to state prison he gets 15.

“THE COURT: Even here 15 percent.

“MR. MILLER: Thank you. Then we’ll address the credit issue there. Thank you.”

The trial court adopted the terms and conditions recommended by probation. Relevant to this appeal, the adopted probation conditions required defendant to: (1) complete a certified sex offender management program under section 1203.067, subdivision (b) (hereinafter section 1203.067(b)) for a period of no less than one year; (2) participate in polygraph examinations; and (3) waive any psychotherapist-patient privilege.

DISCUSSION

I

Sufficient Evidence Supports Defendant’s Convictions

Defendant first argues the evidence was insufficient to support his convictions for committing lewd acts on K. during the climbover game. We disagree.

A

Standard Of Review

“In determining whether the evidence was sufficient . . . to sustain a conviction . . . [,] ‘[w]e do not determine the facts ourselves. Rather, we ‘examine the

whole record in the light most favorable to the judgment to determine whether it discloses substantial evidence--evidence that is reasonable, credible and of solid value--such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt.’ [Citations.] We presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence. [Citation.] [¶] The same standard of review applies to cases in which the prosecution relies primarily on circumstantial evidence and to special circumstance allegations. [Citation.] ‘[I]f the circumstances reasonably justify the jury’s findings, the judgment may not be reversed simply because the circumstances might also reasonably be reconciled with a contrary finding.’ ” ” (*People v. Hajek and Vo* (2014) 58 Cal.4th 1144, 1182-1183.)

Regarding witness testimony specifically, the “ ‘[r]esolution of conflicts and inconsistencies in the testimony is the exclusive province of the trier of fact. [Citation.] Moreover, unless the testimony is physically impossible or inherently improbable, testimony of a single witness is sufficient to support a conviction.’ ” (*People v. Brown* (2014) 59 Cal.4th 86, 106.) “The trier of fact may believe and accept a portion of the testimony of a witness and disbelieve the remainder. On appeal that portion which supports the judgment must be accepted, not that portion which would defeat, or tend to defeat, the judgment.” (*People v. Thomas* (1951) 103 Cal.App.2d 669, 672.) “Our function is to determine whether the evidence, *if believed*, is of sufficient character to justify conviction.” (*People v. Whitehurst* (1952) 112 Cal.App.2d 140, 144, italics added.)

B

Witness And Victim Testimony Provides Sufficient Evidence Of Defendant’s Intent

Defendant argues a “close review of the circumstances supports [his] contention that the requisite intent was lacking. The circumstances include: (1) the touching was not overtly sexual . . . ; (2) [K.] testified that at the time of the ‘climbover game’ she did not believe that contact ‘meant anything’; (3) [K.] said she did not feel any pressure or

rubbing near her buttocks or in any other area which might suggest a sexual intent; and (4) [defendant] did not speak or make any sexual comments during the ‘climbover game.’ ” Defendant further argues the testimony of Mary Ann and R. should not be relied on because their description of the climbover game differed significantly from K.’s description, and Mary Ann “may have been hypersensitive and too quick to view [the] contact as inappropriate.” We find no merit in these arguments.

Defendant contends the climbover game did not constitute a lewd act on K. In making his argument, defendant compares the climbover game to a hug, explaining that “a tight hug, with arms wrapped around a minor, could involve touching that is both more sustained and greater in intensity than the fleeting ‘climbover game’ described here.” A hypothetical like this can be a useful means of explanation, but it can also backfire. While unhelpful to defendant’s argument, the “tight hug” hypothetical is helpful to explain what constitutes a lewd act. If done with proper intent, a “tight hug” can show love, give comfort, celebrate a team’s victory, or simply say hello. However, a “tight hug” coupled with an ulterior motive can be a restraint, a suggestion of *sexual desire*, or an excuse to press against a woman’s breasts for sexual arousal or gratification. The nature of the act -- tightly wrapping arms around another person -- only garners meaning in light of the intent with which it was done.

Likewise, a lewd act does not necessarily turn on the physical nature of the offending act. (See *People v. Martinez* (1995) 11 Cal.4th 434, 444.) A lewd act is committed when the defendant “willfully and lewdly commits any lewd or lascivious act” upon the body of a child under the age of 14 years, “with the intent of arousing, appealing to, or gratifying the lust, passions, or sexual desires of that person or the child.” (§ 288, subd. (a).) A lewd act includes “any touching” of an underage child done with the requisite intent. (*Martinez*, at pp. 444-445.) “ ‘[E]ven if the touching is outwardly innocuous and inoffensive, if it is accompanied by the *intent* to arouse or gratify the sexual desires of either the perpetrator or the victim,’ ” it violates the statute. (*People v.*

Shockley (2013) 58 Cal.4th 400, 404, quoting *People v. Lopez* (1998) 19 Cal.4th 282, 289.) “[T]his definition recognizes the fact that sexual behavior, especially deviant sexual behavior towards children, encompasses a wide range of conduct that would not be immediately recognizable as ‘sexual’ except when considered from the defendant’s perspective, and in light of his or her intent.” (*People v. Levesque* (1995) 35 Cal.App.4th 530, 541.) Contact with bare skin or sexual organs of the defendant or victim is not required. (*Martinez*, at p. 444.)

Intent may be inferred from circumstantial evidence, as intent can seldom be proven by direct evidence. (*In re Mariah T.* (2008) 159 Cal.App.4th 428, 440.) To determine intent, “[T]he trier of fact looks to all the circumstances, including the act” and “[o]ther relevant factors [such as] defendant’s extrajudicial statements [citation], other acts of lewd conduct admitted or charged in the case [citations], [and] the relationship of the parties. . . .” (*People v. Martinez, supra*, 11 Cal.4th at p. 445.)

With regard to K.’s contemporaneous belief, defendant contends that “[i]f [K.], the victim, did not think [he] had the requisite intent at the time, then it logically follows that it would be unreasonable to infer [defendant]’s intent from these circumstances.” According to defendant, K.’s description of the climbover game was “nothing more than rolling over or sliding down [K.]’s back as a means to wake her up” and “it was only when Mary Ann observed the game and told [defendant] to stop that [K.] decided the ‘climbover’ game was not innocent.”

This is a misrepresentation of the record. K. did testify that she did not believe the climbover game was improper at the time. But, as the People point out, defendant fails to include K.’s explanation for her belief. According to K., at 13 years old, she “was still an innocent little virgin” and her opinion of the climbover game changed “[a]s [she] got older and understood what sex was.”

Defendant also asserts K. testified she did not feel any pressure or rubbing near her buttocks. But defendant fails to include that K. also testified that “[defendant] would

usually be on top of [her] on [her] back, so [her] behind end would usually be around [defendant's genital] area.” There was not any particular amount of pressure that was different in that area because “[defendant] never really held himself up. He would just put his full weight down and slide down.” A jury could reasonably determine based on K.’s complete testimony (along with other evidence) that the climbover game was done with the intent to gratify defendant’s sexual desires and was not “nothing more than rolling over or sliding down [K.’s] back as a means to wake her up,” as defendant insists.

The fact that defendant “did not speak or make any sexual comments during the ‘climbover game’ ” is not indicative of a lack of intent. While a sexual comment during the climbover game might have constituted direct evidence of his intent, the converse does not hold true. In this instance, the lack of communication during the climbover game gives little insight into the mind of defendant other than that he did not express his intent verbally. Here, defendant pressed himself against K.’s body with his genitals near her buttocks and slid down her; R. testified that defendant touched K.’s breasts during the game; and Mary Ann considered the game inappropriate when she witnessed defendant’s actions. Considering all the circumstances, defendant’s actions spoke louder than his silence.

The jury also considered testimony from R. and Mary Ann regarding the climbover game. Defendant argues that their testimony should be rejected because their descriptions of the climbover game differed from K.’s. We disagree.

R. testified “[defendant] woke [them] up that way. He would climb over on top of [them] like he was just rolling over [them] and he’d just stop along the way.” When he stopped, “[defendant] was touching [them], grabbing [them].” When defendant played the game with K., R. testified that “[defendant] just pressed up against [K.]” She also testified that she saw defendant grab K.’s breasts on four occasions and press his “genital area” against K. on two occasions during the climbover game in the beginning of 2009.

Mary Ann described the climbover game as “just a game where they hop over each other.” She further testified that “it just sparked something in [her] because [she] was molested too and [she is] always looking . . . for that kind of stuff. And so [she] just stopped it. [She] said it’s not appropriate.”

We acknowledge that differences, perhaps even substantial differences, exist in the descriptions of the climbover game among K., R., and Mary Ann, but the “[r]esolution of conflicts and inconsistencies in the testimony” is not our task. (*People v. Brown, supra*, 59 Cal.4th at p. 106.) Weighing the credibility of K.’s, R.’s and Mary Ann’s testimony “is the exclusive province of the trier of fact.” (*Ibid.*) There is nothing to suggest that individually, the testimony of K., R., or Mary Ann was “physically impossible or inherently improbable”; therefore, if the jury chose to believe only one of the three individuals’ testimony, or part thereof, that single witness would be sufficient to support defendant’s convictions. (*Ibid.*)

Whether Mary Ann, as defendant suggests, “may have been hypersensitive and too quick to view [the] contact as inappropriate” due to her experience with molestation is also not for us to decide. Our function is not to determine whether Mary Ann’s testimony is credible but rather to determine whether, “*if believed*, [it] is of sufficient character to justify conviction.” (*People v. Whitehurst, supra*, 112 Cal.App.2d at p. 144, italics added.)

Lastly, the jury could have properly taken into consideration the “other acts of lewd conduct admitted or charged in the case. . . .” (*People v. Martinez, supra*, 11 Cal.4th at p. 445.) Defendant was charged not just with the two lewd acts but with a total of seven lewd acts on a child. On separate occasions, defendant grabbed K.’s breasts while playing the “tickle game,” touched R.’s breasts three times, and once reached under R.’s skirt to touch her upper thigh and underwear. The People correctly assert that a jury “[could] infer from the evidence of [defendant]’s repeated molestations of his granddaughters that he would touch K. for purposes of his own sexual gratification.”

For all the foregoing reasons, there was “substantial evidence--evidence that is reasonable, credible and of solid value--such that a reasonable trier of fact could find defendant guilty beyond a reasonable doubt” of lewd acts for the incidents involving the climbover game. (*People v. Hajek and Vo, supra*, 58 Cal.4th at pp. 1182-1183.)

II

The Probation Conditions Imposed On Defendant Do Not Violate The Prohibition Against Ex Post Facto Laws

Defendant argues the following conditions of his probation are in violation of the prohibition against ex post facto laws and should be stricken: (1) completion of the certified sex offender management program; (2) participation in polygraph examinations;² and (3) waiver of the psychotherapist-patient privilege. We disagree.

“Legislatures may not retroactively alter the definition of crimes or increase the punishment for criminal acts.” (*Collins v. Youngblood* (1990) 497 U.S. 37, 43 [111 L.Ed.2d 30, 39].) Both the federal and state Constitutions prohibit ex post facto laws. (U.S. Const., art. I, § 10, cl. 1; Cal. Const., art. I, § 9; *Youngblood*, at pp. 41-42 [111 L.Ed.2d at pp. 38-39]; *Tapia v. Superior Court* (1991) 53 Cal.3d 282, 288.)

“The standard for determining whether a law violates the ex post facto clause has two components, ‘a law must be retroactive--that is, “it must apply to events occurring before its enactment” -- and it “must disadvantage the offender affected by it” . . . by altering the definition of criminal conduct or increasing the punishment for the crime. . . .’ ” (*People v. Delgado* (2006) 140 Cal.App.4th 1157, 1164.)

² The California Supreme Court has granted review to determine whether this requirement is unconstitutional under the Fifth Amendment’s right against self-incrimination. (*People v. Friday* (2014) 225 Cal.App.4th 8, review granted July 16, 2014, S218288; *People v. Klatt* (2014) 225 Cal.App.4th 906, review granted July 16, 2014, S218755.) The question of a Fifth Amendment violation was not presented to this court and will not be addressed.

To determine whether a law is punitive for ex post facto purposes, “[w]e first examine whether the statute’s effect is to punish defendant for past offenses” and “next we examine the purpose of the statute.” (*People v. McVickers* (1992) 4 Cal.4th 81, 87, 88.)

Section 1203.067(b) as originally enacted required a defendant who had been granted probation “to be placed in an appropriate treatment program designed to deal with child molestation or sexual offenders, if an appropriate program is available in the county.” (Former § 1203.067(b), added by Stats. 1994, ch. 918, § 1.)

On September 9, 2010, the Legislature amended section 1203.067 as part of the Chelsea King Child Predator Prevention Act of 2010 (Stats. 2010, ch. 219, § 1), to provide, in relevant part as follows: “(b) On or after July 1, 2012, the terms of probation for persons placed on formal supervised probation for an offense that requires registration pursuant to Sections 290 to 290.023, inclusive, shall include all of the following: [¶] . . . [¶] (2) Persons placed on formal supervised probation on or after July 1, 2012, shall successfully complete a sex offender management program, following the standards developed pursuant to Section 9003, as a condition of release from probation. The length of the period in the program shall be not less than one year, up to the entire period of probation, as determined by the certified sex offender management professional in consultation with the probation officer and as approved by the court. [¶] (3) Waiver of any privilege against self-incrimination and participation in polygraph examinations, which shall be part of the sex offender management program. [¶] (4) Waiver of any psychotherapist-patient privilege to enable communication between the sex offender management professional and supervising probation officer, pursuant to Section 290.09.” (§ 1203.067(b), as amended by Stats. 2010, ch. 219, § 17, eff. Sept. 9, 2010.) The amended provisions became operative July 1, 2012. (See *ibid.*)

On September 26, 2014, section 1203.067(b)(2) was further amended to include the following qualification: “Participation in this program applies to each person without

regard to when his or her crime or crimes were committed.” (§ 1203.067(b)(2), as amended by Stats. 2014, ch. 611, § 1, eff. Sept. 26, 2014.)

In this case, defendant committed his crimes between September 1, 2007, and February 28, 2009, at which time the original version of the statute applied. At the time of sentencing on March 7, 2014, the 2010 version of section 1203.067(b) was in force. Finally, the 2014 amendments to the statute occurred after defendant’s opening brief was filed on September 11, 2014, but before the People’s response was filed on October 10, 2014.

We begin by addressing the retroactive application of the statute. In his opening brief, defendant contends the statute was improperly applied retroactively. Defendant argues, under *People v. Douglas M.* (2013) 220 Cal.App.4th 1068 (*Douglas M.*), that “ ‘the amended statute must be viewed as “unambiguously prospective,” applying to probationers who committed their crimes on or after the statute’s effective date of September 9, 2010. [Citation.] Because [defendant]’s offenses occurred before September 9, 2010, the provisions of revised section 1203.067 were improperly applied to him and must be stricken.’ ”

In *Douglas M.*, the defendant pled guilty to two counts of lewd and lascivious acts upon a child on September 8, 2006, and was placed on formal probation for seven years. (*Douglas M.*, *supra*, 220 Cal.App.4th at p. 1071.) On October 19, 2012, the trial court modified the terms and conditions of the defendant’s probation pursuant to amended section 1203.067. (*Ibid.*)

The court in *Douglas M.* found that the trial court improperly modified the terms and conditions of the defendant’s probation because “the provisions of revised section 1203.067 may not be applied retroactively to change the terms and conditions of probation for probationers who committed their offenses before the effective date of the amendment.” (*Douglas M.*, *supra*, 220 Cal.App.4th at p. 1070.) The court explained, “the bill was enacted in September 2010 as urgency legislation, intended to take effect

immediately.” (*Id.* at p. 1076.) However, it did not become operative until July 2012, presumably due to the required prerequisite “development and updating of standards for certification of sex offender management professionals and programs” under section 9003. (*Id.* at p. 1076.) “There is nothing in [the] legislative history that provides ‘ “ ‘a clear and compelling implication’ ” ’ that the Legislature intended the revised statute to apply retroactively. . . .” [¶] Given this context, the most reasonable interpretation of the language of amended section 1203.067, subdivision (b), regarding ‘[p]ersons placed on formal probation prior to July 1, 2012,’ is that, [it applies only to] those probationers whose offenses occurred between the effective date of September 9, 2010, and the operative date of July 1, 2012.” (*Id.* at p. 1076.)

Douglas M. rested its analysis on section 3 of the Penal Code, which provides that “ ‘[n]o part of [the Penal Code] is retroactive, unless expressly so declared.’ Our Supreme Court has ‘described section 3 . . . as codifying “the time-honored principle . . . that in the absence of an express retroactivity provision, a statute will not be applied retroactively unless it is very clear from extrinsic sources that the Legislature . . . must have intended a retroactive application.” [Citations.] In applying this principle, we have been cautious not to infer retroactive intent from vague phrases and broad, general language in statutes. [Citations.] Consequently, “ ‘a statute that is ambiguous with respect to retroactive application is construed . . . to be unambiguously prospective.’ ” ’ ” (*Douglas M., supra*, 220 Cal.App.4th at p. 1075.)

The analysis in *Douglas M.* is not applicable after the 2014 amendment to the statute, which requires “[p]articipation in [the certified sex offender management program] without regard to when [the defendant’s] crime or crimes were committed.” (§ 1203.067(b)(2), as amended by Stats. 2014, ch. 611, § 1, eff. Sept. 26, 2014.) This express retroactivity provision provides “ ‘ “ ‘a clear and compelling implication’ ” ’ that the Legislature intended the revised statute to apply retroactively.” (*Douglas M., supra*,

220 Cal.App.4th at p. 1076; see Sen. Com. on Pub. Safety, Bill Analysis of Assem. Bill No. 2411 (2013-2014 Reg. Sess.) June 24, 2014.)

Therefore, we conclude that section 1203.067, as amended, is unambiguously retroactive, and the only remaining question is whether its probation provisions increase the “punishment” attached to defendant’s crime. We determine they do not.

Relying on *People v. Delgado*, *supra*, 140 Cal.App.4th at page 1157, defendant argues that “mandatory probation conditions are properly characterized as punishment.” In *Delgado*, the court found the retroactive application of a statute imposing certain mandatory conditions of probation -- including a minimum period of 36 months, 40 hours of community service, and a \$400 domestic violence payment -- violated the prohibition against ex post facto laws. (See *Delgado*, at pp. 1161, 1167, 1171.) Defendant’s reliance on *Delgado* is misplaced because additional probation time and extra fines are clearly punishment. (See *People v. McVickers*, *supra*, 4 Cal.4th at p. 84; *People v. Edwards* (1976) 18 Cal. 3d 796, 801 [probation is an alternative form of punishment].)

Here, the changes to section 1203.067(b) do not increase defendant’s probationary period or increase his punitive fines. While the length of the sex offender program is a minimum of one year, the maximum length is limited by the probationary term. (§ 1203.067(b)(2) [“The length of the period in the program shall not be less than one year, up to the entire period of probation”].) Further, the statute does not extend the probationary period for defendants with less than one year left of probation to accommodate the sex offender program. (§ 1203.067(b)(1) [“Persons placed on formal probation prior to July 1, 2012, shall participate in an approved sex offender management program, . . . for a period of no less than one year or the remaining term of probation if it is less than one year”].)

Looking to the purpose of section 1203.067(b), the amendments to the statute were not designed to alter or increase the punishment of defendants -- the changes were designed to ensure that registered sex offenders received regulated, proven-effective treatment thereby “enhanc[ing] public safety and reduc[ing] the risk of recidivism posed by these offenders.” (§ 290.03.) Under the amendments, defendant is no longer allowed to participate in any “appropriate treatment program designed to deal with child molestation or sexual offenders” as required by former section 1203.067(b) but now must “complete a sex offender management program, following the standards developed pursuant to Section 9003.”

Section 9003 requires the California Sex Offender Management Board to “develop and update standards for certification of sex offender management professionals” and “sex offender management programs, which shall include treatment, as specified, and dynamic and future violence risk assessment pursuant to section 290.09.” (§ 9003, subs. (a), (b).) Section 290.09 requires that “[t]he sex offender management program shall meet the certification requirements developed by [the board].” (§ 290.09, subd. (a)(2).)

The retroactive application of the probation conditions under section 1203.067(b) promotes the board’s recommendation to the Legislature that “[r]isk level-appropriate and evidence-based sex offender specific treatment” should be required for all sex offenders under supervision in California. (See Sex Offender Management Bd., Recommendations Rep. (Jan. 2010) p. 29.)³ Programs required under the previous statute did not have to meet evidence-based standards identified by current research to most effectively reduce risk of reoffense. (*Id.* at pp. 29, 31 [indicating that the probation departments in each of California’s 58 counties had different protocol and practices for providing treatment for sex offenders].) Additionally, treatment providers were not

³ Publications by the board are available online at <<http://www.casomb.org/>>.

required to be licensed or have training specific to sex offender treatment as now required under section 9003, subdivisions (a) through (b) and offenders already on probation were not scored on the dynamic and violence risk instruments now mandated for use in these programs under section 209.09, subdivision. (b)(1). (Sex Offender Management Bd., Recommendations Rep., *supra*, at pp. 29-36; see former § 1203.067(b), added by Stats. 1994, ch. 918, § 1.) Therefore, the probation requirements were enacted to provide uniform, effective treatment to sex offenders.

Moreover, the probation requirements under section 1203.067(b) are a part of the now mandatory collaborative approach to sex offender management in California, known as the Containment Model. Under this model, communication and collaboration among the supervising officer, sex offender treatment provider, and polygraph examiner is mandatory to determine the offender's progress and criminogenic needs. (Sex Offender Management Bd., Sex Offender Treatment Program Certification Requirements (Jan. 2014) pp. 6-7.) Thus, the completion of the certified sex offender management program, participation in polygraph examinations, and waiver of the psychotherapist-patient privilege as required under section 1203.067(b) work in concert to help defendants manage their conditions, monitor their compliance, and promote communication with their psychotherapists. (See Sex Offender Management Bd., Sex Offender Treatment Program Certification Requirements, *supra*, at pp. 6-7.)

For the foregoing reasons, we conclude that the probation conditions under section 1203.067(b) do not serve to punish the defendant for past offenses but instead serve a legitimate nonpunitive governmental purpose -- to reduce recidivism and enhance public safety. Therefore, the *ex post facto* clause is not implicated.

III

Defendant Is Entitled To Presentence Conduct Credits

Defendant contends, and the People agree, the trial court failed to award defendant conduct credits. The parties also agree defendant should receive conduct credit as

calculated under the applicable section 4019 not 15 percent of actual time served under section 2933.1 as suggested by the trial court, and any excess credit should be applied proportionately to punitive fines or fees owed by defendant. We agree.

“[U]nder section 2900.5, subdivision (a) if a defendant is ‘over-penalized’ by serving presentence days in custody in excess of his imposed imprisonment term, those excess days are to be applied to the defendant’s court-ordered payment of monies that serve as punishment” (*People v. Robinson* (2012) 209 Cal.App.4th 401, 407.) Any excess credit must be applied proportionally to reduce the base fine, penalty assessments, and restitution fine. (*People v. McGarry* (2002) 96 Cal.App.4th 644, 648.) Credits awarded under section 2900.5 may not be used to reduce nonpunitive fines. (*Robinson*, at pp. 405-407 [concluding that an assessment under § 1465.8, subd. (a) & Gov. Code, § 70373, subd. (a)(1) are not within the scope of § 2900.5, subd. (a) because they fund court operations and facilities and are “not considered punitive”].)

The limitations under section 2933.1, subdivision (c)⁴ apply only to state prisoners and not to defendants who have been granted probation. (*In re Carr* (1998) 65 Cal.App.4th 1525, 1535-1536.) The applicable version of section 4019 must be applied instead. (*Carr*, at pp. 1535-1536.)

In this case, the trial court placed defendant on seven years of formal probation but suspended imposition of sentence conditioned on defendant serving 365 days in county jail. The trial court awarded defendant 213 days of credit for actual time served in custody, one day for his arrest date on September 18, 2009, and 212 days for the period between his conviction date of August 8, 2013, and the date of sentencing on March 7, 2014. Applying the traditional section 4019 formula, defendant is entitled to six days for

⁴ Section 2933.1, subdivision (c) limits the amount of presentence conduct credits to 15 percent of the actual time served if the defendant is convicted of certain enumerated felonies.

every four days spent in actual custody. (*In re Marquez* (2003) 30 Cal.4th 14, 25-26.) To calculate defendant's conduct credit, defendant's actual days in custody (213) are divided by four (53) and the result is multiplied by two (106). (*Ibid.*) Thus, defendant is entitled to 106 days of conduct credits in addition to 213 of actual custody time for a total of 319 days of credit.

Defendant was sentenced on March 7, 2014, but the record does not supply the date defendant was released from jail. Defendant's release date must be determined and any days spent in custody in excess of his 365-day sentence must be credited proportionally to defendant's fines and fees, exclusive of the nonpunitive \$280 court security surcharge fee under section 1465.8, subdivision (a)(1) and the \$210 mandatory court facility fee pursuant to Government Code 70373. (*People v. Robinson, supra*, 209 Cal.App.4th at pp. 405-407.)

DISPOSITION

We remand to the trial court to: (1) determine the date defendant was released from jail; and (2) apply any excess credits proportionally to punitive fines and fees. In all other respects, the judgment is affirmed.

ROBIE, Acting P. J.

We concur:

BUTZ, J.

DUARTE, J.