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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

LIONEL DACOSTA,

Defendant and Appellant.

D058997

(Super. Ct. No. RIF154051)

APPEAL from a judgment of the Superior Court of Riverside County, Craig G. Riemer, Judge. Affirmed as modified with directions.

A jury convicted Lionel DaCosta of simple assault as a lesser included offense of assault with a deadly weapon (Pen. Code,¹ § 240, count 3); making a criminal threat (§ 422, count 4); unlawfully driving or taking a vehicle (Veh. Code, § 10851, subd. (a), count 5); assault with a deadly weapon by means of force likely to produce great bodily injury (§ 245, subd. (a)(1), count 7); and stalking (§ 646.9, subd. (a), count 11). In

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

addition to imposing various restitution fines and fees, the trial court sentenced DaCosta to a state prison term of three years and four months, consisting of the low term of two years on count 7, eight months (one-third the midterm of two years) on count 11, and eight months (one-third the midterm of two years) on count 4. It sentenced him to concurrent terms of two years on count 5 and 180 days in county jail for the misdemeanor assault of count 3. The court awarded DaCosta 517 total days of custody credit: 265 actual days and 252 days of conduct credit under section 4019.

DaCosta contends the trial court erred by failing to stay under section 654 his sentence on the count 4 criminal threat because the conduct related to that count was part of a continuous course of conduct with the same objective as the count 11 stalking offense. He also contends he is entitled to additional conduct credits under the version of section 4019 effective January 25, 2010, because he was sentenced after the effective date of that section. He asks us to modify the judgment to award him 12 additional custody credits. There is merit to DaCosta's latter contention, and we therefore modify the judgment to apply the amended version of section 4019 to all of the days served by DaCosta in presentence local custody. We otherwise affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

DaCosta and the victim, Rena, dated for about three months in late 2009. Rena began to notice DaCosta's possessiveness; among other things, if she was speaking with him on the phone he would ask her who was with her, and he began looking through her phone and accusing her of being intimate with her friends who had sent her messages.

On October 10, 2009, Rena and DaCosta were in her garage smoking cigarettes and talking when her phone rang. She ignored the call, but DaCosta grabbed the phone, which fell on the ground and slid away from them. When Rena reached down to pick it up, DaCosta punched her in the face, called her a slut, and accused her of cheating on him, telling her he would "fuck her up" if he found out she was cheating on him. She reported the incident to police.

Rena next spoke with DaCosta about a week or two later, when he called her and very apologetically told her he would never do it again and would "cut off his hands" to be with her. Rena felt sympathy for DaCosta and they reconciled, but that changed quickly when he became physical with her again.

Rena broke up with DaCosta after he actually appeared ready to cut off his hands with a knife. At that time, Rena realized their relationship was not going to get better. After she broke off their relationship, DaCosta told her he could not live without her and that nobody else could have her; he said if their "flesh [could not be] together, [their] souls would be." These comments "petrified" Rena.

The next morning, December 9, 2009, DaCosta somehow entered Rena's house and told her in a demanding tone she could not break up with him. He grabbed her, put a razor to her eye and told her to drive him and her children to a convenience store to purchase cigarettes, which Rena did out of fear he would hurt her children. Before she left the car, DaCosta told her if she tried anything, he would hurt her children. She entered the store and spoke with the manager for a few seconds after the manager, recognizing Rena and noticing something wrong, asked her if she wanted her to call

police. Rena declined help, telling the manager she had her children in the car and DaCosta would not "mess with" her with them there. Rena returned to the car and drove DaCosta to his motel while he pressed the razor to her side. DaCosta demanded that Rena exit the car and walk around a wall surrounding the motel. When she followed him, he began asking her if their relationship was really over. Crying out of fear, Rena told him yes. He then grabbed her in a chokehold and told her he would cut her face off, and that if she screamed, he would cut her throat open. She begged him not to cut her throat and he started cutting her hair off. Eventually, Rena saw an opening and pushed him away, causing her keys to fall on the ground. She grabbed them, ran back to her car and drove to the police department. During her escape, DaCosta slashed her in her face with the razor.

Rena drove to a police station and reported the incident to Riverside Police Officer Vincent Thomas, who was working at the front counter. Rena was visibly upset, shaken and crying. The officer saw she had blood running down her face and was missing clumps of hair. He interviewed Rena and two of her children, had pictures taken of Rena, then contacted dispatch and had them send a unit to check the area for DaCosta.

On December 18, 2009, DaCosta returned to Rena's house and entered through a back sliding door. He accused Rena of calling police on him, and said he was going to kill her and then kill himself. Rena believed DaCosta was serious because she felt he already had tried to kill her. DaCosta then attacked Rena, grabbing her by the neck, lifting her off the ground, and slammed her to the ground while she struggled. She begged DaCosta not to kill her. Rena ran up her stairs but DaCosta followed her, forced

himself in her room and stabbed her with a knife on the back of her neck. Rena felt pain and then fell to the ground. DaCosta started to express remorse and Rena decided to try reverse psychology, asking him to please come back to her. However, DaCosta shoved her away and then started to choke her again, causing Rena to become dizzy and urinate on herself. DaCosta then stood Rena up, and she went into the restroom while he watched her. DaCosta told her the world was evil, they needed to leave it, that she could not leave him, and he was going to make it so their souls were ready to die. Believing DaCosta was going to kill her and then kill himself, Rena begged him to let her have a cigarette before they died. He allowed her to go outside and sit on the hood of her truck, but he blocked her from leaving. When Rena heard a car and a woman's voice, she pretended it might be her daughter and was able to jump into it when she saw it was her neighbor. Rena called 911. While she was sitting in her neighbor's car, she saw DaCosta drive away in her car.

Riverside Police Officer Cristina Arangure responded to Rena's 911 call that day. Rena was crying, shaking and appeared frightened and upset. The officer observed red marks on her. Officer Arangure had another officer take a photograph of Rena. Rena told the officer about an injury to the back of her neck, and the officer observed broken skin on Rena's back. In her report, Officer Arangure noted that Rena had a stab mark and a small laceration. Police located Rena's stolen vehicle later that day on a residential street about three miles from Rena's home.

About a week or so later, Rena noticed at about 1:00 o'clock in the morning that her detached garage was on fire. She could not access the garage because DaCosta had

taken her keys when he took her vehicle. Rena's neighbor saw the garage on fire and helped try to hose it down.

After the fire, Rena was given a device to record some calls with DaCosta. The recordings were played for the jury at trial. The prosecution also transcribed and played for the jury messages DaCosta had left on Rena's phone. Rena testified that DaCosta left other messages saying he was going to kill her and that he was coming to burn down something.

During closing arguments, the prosecutor suggested the count 4 criminal threat charge was satisfied by numerous threats DaCosta made: "Count 4, criminal threats. In order to prove that, we have to show he willfully threatened or unlawfully [sic] to kill or unlawfully caused great bodily injury to Rena. [¶] How many times did you hear this? How many times did you hear he was going to do this? Just on the tapes alone? You had her saying it. You had him saying it. How many times did you hear it[?]" To illustrate an actual criminal threat he cited one of DaCosta's voicemail messages: "You had better have protection, because I'm coming, and I'm coming hard."² To support the stalking

² The prosecutor went over the elements of section 422, including that the threat had to be "clear, immediate, unconditional, and specific that it communicated to Rena a serious intention and that the immediate prospect that the threat would be carried out." He then used one of DaCosta's statements as an example: "When he's saying, 'You had better have protection, because I'm coming, and I'm coming hard,' it's not conditional. It's not, 'Hey, if you don't get me some milk, then I'm going to hurt you.' That's a conditional threat. [¶] He's saying, 'I'm coming, and I'm coming hard. Have protection.'" The information alleged that the conduct constituting the criminal threat in count 4 occurred on December 18, 2009, the day that DaCosta arrived at Rena's home and threatened to kill her before choking her.

charge, the prosecutor pointed in closing arguments to DaCosta's messages, his calls to Rena, his driving by her house and the times he visited and attacked her.³

DISCUSSION

I. The Trial Court Did Not Err in Sentencing DaCosta on the Count 4 Criminal Threat and the Count 11 Stalking Offense

DaCosta contends the trial court should have stayed his eight month sentence on the count 4 criminal threat (§ 422⁴) under section 654 because the threat was part of the

³ The prosecutor argued: "Stalking. The defendant willfully and maliciously harassed another person. [¶] How many messages do we have to hear? How many times was he calling? What was he saying to her when they talked[?] How he was driving by her house, how he was watching the police driving by, how he would show up at the house, come inside and then do what he did? That he made a credible threat with the intent to place the other person in reasonable fear for their safety. [¶] So, one, you have to show that he harassed her, and, two, that a credible threat that was made. We know there were tons of threats made, tons. [¶] So the question is, did he harass her? [¶] And a credible threat is one that causes the target of the threat to reasonably fear for their own safety or for the safety of his or her — that's not applicable, the family part. It's whether or not she feared [for] her own safety. We know she feared [for] her own safety. She called the cops. [¶] The threat could be made orally or in writing, electronically, or by conduct, basically, such as lighting the house on fire, or garage — excuse me. [¶] And this is the real question. Harassing means engaging in a knowing and willful course of conduct, directed at a specific person that seriously either annoys them or alarms them, or torments, or terrorizes the person, and that serves no legitimate purpose. [¶] . . . [¶] Course of conduct means either two or more acts occurring over a period of time, however short, demonstrating a continuous purpose. Two or more."

⁴ Section 422 specifies punishment for "[a]ny person who willfully threatens to commit a crime which will result in death or great bodily injury to another person, with the specific intent that the statement, made verbally, in writing, or by means of an electronic communication device, is to be taken as a threat, even if there is no intent of actually carrying it out, which, on its face and under the circumstances in which it is made, is so unequivocal, unconditional, immediate, and specific as to convey to the person threatened, a gravity of purpose and an immediate prospect of execution of the

stalking behavior of count 11 (§ 646.9⁵). Relying on *Neal v. State of California* (1960) 55 Cal.2d 11, and maintaining the prosecutor treated the crimes as overlapping, he argues the court should have concluded the stalking and criminal threat were encompassed within an indivisible course of conduct incident to one objective: to harass, annoy, intimidate and threaten Rena.

"Section 654, subdivision (a) provides in part: 'An act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision.' '[S]ection 654 applies not only where there was but one act in the ordinary sense, but also where there was a course of conduct which violated more than one statute but nevertheless constituted an indivisible transaction. . . . If all the offenses were *incident to one objective*, the defendant may be punished for any *one* of such offenses but not for more than one.' [Citation.] Whether offenses are 'indivisible' for these purposes is determined by the 'defendant's intent and objective, not the temporal proximity of his offenses.' [Citation.] 'If [a] defendant harbored "multiple criminal objectives," which were independent of and not merely incidental to each other, he may be punished for each statutory violation

threat, and thereby causes that person reasonably to be in sustained fear for his or her own safety"

⁵ Section 646.9, subdivision (a) provides in part: "Any person who willfully, maliciously, and repeatedly follows or willfully and maliciously harasses another person and who makes a credible threat with the intent to place that person in reasonable fear for his or her safety, . . . is guilty of the crime of stalking"

committed in pursuit of each objective, "even though the violations shared common acts or were parts of an otherwise indivisible course of conduct." ' (*Ibid.*) The application of section 654, thus, 'turns on the *defendant's* objective in violating' multiple statutory provisions. [Citation.] Where the commission of one offense is merely ' "a means toward the objective of the commission of the other," ' section 654 prohibits separate punishments for the two offenses." (*People v. Wynn* (2010) 184 Cal.App.4th 1210, 1214-1215; *People v. Beamon* (1973) 8 Cal.3d 625, 639.)

" 'The determination of whether there was more than one objective is a factual determination, which will not be reversed on appeal unless unsupported by the evidence presented at trial.' [Citations.] '[T]he law gives the trial court broad latitude in making this determination.' " (*People v. Wynn, supra*, 184 Cal.App.4th at p. 1215.)

Here, the trial court made express findings as to the independent nature and objectives of DaCosta's count 4 and count 11 crimes at the sentencing hearing, when addressing the California Rules of Court, rule 4.425 criteria for consecutive and concurrent sentences: "And as to Counts 4 and 11, it appears that the crimes and their objectives were predominantly independent of each other; that they involved separate acts of violence or threats of violence, and that they were committed at different times and at different places rather than being committed so closely in time and place to indicate a single period of aberrant behavior. Therefore, the Court is going to run those terms for those counts consecutively."

We conclude DaCosta has not met his burden to show the court's finding lacks substantial evidence, and thus we hold the eight month term on count 4 need not be

stayed under section 654. In particular, we disagree that the evidence shows DaCosta engaged in a continuous or indivisible course of conduct. His actions were separated by periods of days, giving him time to reflect. It is settled that "'a course of conduct divisible in time, although directed to one objective, may give rise to multiple violations and punishment. [Citations.]" [Citations.] This is particularly so where the offenses are temporally separated in such a way as to afford the defendant opportunity to reflect and to renew his or her intent before committing the next one, thereby aggravating the violation of public security or policy already undertaken.'" (*People v. Andra* (2007) 156 Cal.App.4th 638, 640, citing *People v. Gaiio* (2000) 81 Cal.App.4th 919, 935; see also *People v. Kwok* (1998) 63 Cal.App.4th 1236, 1253-1254.)

DaCosta cites *People v. Neal, supra*, 55 Cal.2d 11 to urge otherwise. In *Neal*, the "'course of criminal conduct' resulted in the attempted murder of two victims when gasoline was thrown into their bedroom and ignited by the defendant. Since he entertained only an objective to kill, and the arson was merely incidental to that objective, his course of conduct was not deemed to be divisible and he could not be punished for arson as well as the attempted murders." (*People v. Beamon, supra*, 8 Cal.3d at pp. 637-638 [summarizing *Neal*].) The *Neal* test has been "refined and limited" (*People v. Kwok, supra*, 63 Cal.App.4th at p. 1253) out of concern that the test defeats its own purpose because it does not necessarily ensure a defendant's punishment will be commensurate with his culpability. (*Ibid.*) "For example, in *People v. Beamon, supra*, 8 Cal.3d at page 639, the Supreme Court stated that protection against multiple punishment under section 654 applies to 'a course of conduct deemed to be *indivisible in time*.' (Italics added.) The

court added in a footnote: 'It seems clear that a course of conduct *divisible in time*, although directed to one objective, may give rise to multiple violations and punishment. [Citations.]' (*People v. Beamon, supra*, fn. 11, italics added.) Thus, a finding that multiple offenses were aimed at one intent and objective does not necessarily mean that they constituted 'one indivisible course of conduct' for purposes of section 654. If the offenses were committed on different occasions, they may be punished separately." (*Kwok*, 63 Cal.App.4th at p. 1253.)

This is the case here. A reasonable trier of fact can conclude that DaCosta's stalking of Rena, though comprised of repeated events including various threats, is not a continuous or indivisible course of conduct. Rather, the court reasonably concluded that DaCosta's threat to kill Rena on December 18, 2009, was an event separated in time from others, and could be separately punished even if made with the same objective as DaCosta's other threats and acts. But the court also reasonably concluded that DaCosta's threat on December 18, 2009, was made with a separate intent — to physically harm Rena for reporting his prior assaultive conduct to police — and that his stalking behaviors — his phone calls, other visits and actions done on different days, including setting Rena's garage on fire — were done with the objective to frighten and harass Rena in revenge for her ending their relationship. Accordingly, the court did not err by imposing separate punishment for the criminal threat and stalking offenses.

II. *Calculation of Section 4019 Conduct Credit*

Section 4019 provides for two types of presentence conduct credits available to prisoners confined in or committed to county or city jails, and other facilities. (*People v.*

Dieck (2009) 46 Cal.4th 934, 939; see also *People v. Duff* (2010) 50 Cal.4th 787, 793.) Section 4019, subdivision (b) assigns credit for worktime, and subdivision (c) of the statute provides credits for good behavior. (*Dieck*, at p. 939.) Both worktime and good behavior presentence credits are referred to as conduct credit. (*Duff*, at p. 793; *Dieck*, p. 939.) "Section 4019 provides that a defendant may earn conduct credits during custody in a county jail or a comparable local facility 'prior to the imposition of sentence,' including custody imposed 'as a condition of probation after suspension of imposition of a sentence or suspension of execution of sentence.' (§4019, subd. (a)(2) & (4).)" (*People v. Daniels* (2003) 106 Cal.App.4th 736, 740.)

The version of section 4019 in effect until January 24, 2010, provided that a defendant may earn conduct credit at a rate of two days for every four-day period of actual custody. (Stats. 1982, ch. 1234, § 7, pp. 4553-4554.) Effective January 25, 2010, section 4019 was amended to allow qualifying defendants with increased conduct credits of two days for every two days spent in local custody, so 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." (§4019, subd. (f); Stats. 2010, 3d Ex. Sess. 2009-2010, ch. 28, § 50, p. 5271.)⁶

⁶ Section 4019 was amended again, effective September 28, 2010, to reinstate the conduct credit provisions that applied before the January 25, 2010 amendment took effect; but the September 28, 2010 amended version applies only to local custody served by defendants for crimes committed on or after September 28, 2010. (§ 4019, subd. (g); Stats. 2010, ch. 426, § 2.) This amendment to section 4019 is inapplicable to this case because DaCosta committed his crimes before September 28, 2010. Additional bills concerning section 4019 have since been enacted in April 2011 and June 2011. (Stats.

In this case, DaCosta's crimes were committed before the effective date of the January 25, 2010 version of section 4019, but his sentencing occurred after January 25, 2010. Thus, the calculation of DaCosta's conduct credit involves time in custody before and after January 25, 2010. The question on this appeal then is whether the January 25, 2010 version of section 4019 should be used to calculate *all* of DaCosta's conduct credit, or whether, as the trial court here did, the January 25, 2010 version *and* the prior version should be used to calculate his conduct credit.⁷

The People contend that DaCosta's September 2010 sentencing date does not entitle him to retroactive credits; that given the nature of the credits as a means to encourage good behavior, it would "def[y] logic," potentially give rise to equal protection violations, and reward inmates for delaying their court proceedings beyond the statute's effective date to award such credits after the behavior has occurred. They argue the Legislature could not have intended this outcome, which is assertedly inconsistent with the canon of statutory construction requiring reviewing courts to avoid interpretations

2011, ch. 15, § 482; Stats. 2011, ch. 39, § 53.) These are not pertinent, as they apply to confinement for crimes committed on or after October 1, 2011.

⁷ The separate question, not applicable here, of whether the January 25, 2010 version of section 4019 applies to defendants who earned conduct credits before January 25, 2010, but whose judgments were not yet final on that date, is currently pending before the California Supreme Court. (See, e.g., *People v. Bacon* (2010) 186 Cal.App.4th 333, review granted Oct. 13, 2010, No. S184782 [holding amended section 4019 applies retroactively to judgments not yet final]; *People v. Landon* (2010) 183 Cal.App.4th 1096, review granted June 23, 2010, No. S182808 [same]; *People v. Brown* (2010) 182 Cal.App.4th 1354, review granted June 9, 2010, No. S181963 [same]; contra, *People v. Eusebio* (2010) 185 Cal.App.4th 990, review granted Sept. 22, 2010, No. S184957; *People v. Rodriguez* (2010) 183 Cal.App.4th 1, review granted June 9, 2010, No. S181808.)

leading to inequitable or unjust results. According to the People, the court's two-tiered calculation "is consistent with the legislative intent because it grants inmates the credits earned pursuant to the incentives in place at the relevant times."

As we explain, we hold that because the January 25, 2010 version of section 4019 was the only version in effect at the time of DaCosta's sentencing, the court should have awarded conduct credits for the entirety of his presentence custody pursuant to that version of the statute. This is not an impermissibly retroactive application of the statute. (See *People v. Sandoval* (2007) 41 Cal.4th 825, 845 ["a change in procedural law is not retroactive when applied to proceedings that take place after its enactment"]; see also *People v. Grant* (1999) 20 Cal.4th 150, 157 ["A law is not retroactive 'merely because some of the facts or conditions upon which its application depends came into existence prior to its enactment' ".])

"Everyone sentenced to prison for criminal conduct is entitled to credit against his term for all actual days of confinement solely attributable to the same conduct. [Citations.] Persons detained in a specified city or county facility, or under equivalent circumstances elsewhere . . . 'prior to the imposition of sentence' may also be eligible for good behavior credits. . . . '[T]he court imposing a sentence' has responsibility to calculate the exact number of days the defendant has been in custody 'prior to sentencing,' add applicable good behavior credits earned pursuant to section 4019, and reflect the total in the abstract of judgment." (*People v. Buckhalter* (2001) 26 Cal.4th 20, 30, fn. omitted.) This responsibility is to be performed "[a]t the time of sentencing." (Cal. Rules of Court, rule 4.310.) "[B]efore a sentencing court may withhold conduct credits, the

defendant is entitled to prior notice and an opportunity to (1) rebut the findings of his jail violations, and (2) present any mitigating factors." (*People v. Duesler* (1988) 203 Cal.App.3d 273, 277.) Thus, at the time of DaCosta's sentencing in September 2010, the trial court was required to calculate the exact number of days he had been in custody prior to sentencing, add applicable conduct credits earned under section 4019, and reflect the total in the abstract of judgment. (§ 2900.5, subds. (a), (d); *Buckhalter*, at p. 30.)

Section 4019 conduct credits are neither earned per segment, for example, per four- or two-day period, nor available " 'all or nothing.' " (*People v. Johnson* (1981) 120 Cal.App.3d 808, 813-814.) "If the record fails to show that defendant is not entitled to such credits . . . he shall be granted them." (*Id.* at p. 815.) Section 4019 credits are either withheld or granted at sentencing. It follows then, that the calculation of credits is based on the law in effect at the time of sentencing.

The January 25, 2010 version of section 4019 contains no provision for a two-tiered division of presentence custody credits. Because it was the only version of section 4019 operative at the time of sentencing, the trial court's discretion in awarding conduct credits was limited to reducing credits for failure to comply with rules or perform assigned labor while in presentence local custody (see § 4019, subds. (b), (c)) and did not extend to reducing credits solely because DaCosta had been in custody while the former version of section 4019 had provided a lesser amount of credits. "A sentence that fails to award legally mandated custody credit is unauthorized and may be corrected whenever discovered." (*People v. Taylor* (2004) 119 Cal.App.4th 628, 647.)

DaCosta had served a total of 22 days in local custody prior to January 25, 2010 (the probation officer's report indicates DaCosta was arrested on January 3, 2010), but the trial court awarded him only 10 credits for that period of time. DaCosta was sentenced on September 24, 2010. There was no showing he was not entitled to conduct credits, and thus DaCosta was entitled to 12 more conduct credits than he received for that period, amounting to 264 total days of conduct credit. Adding the 265 days of actual credits, DaCosta should have been awarded a total of 529 days of credit.

DISPOSITION

The judgment is modified to set presentence credit for time served as 529 days, consisting of 265 actual days and 264 days of Penal Code section 4019 conduct credit. As so modified, the judgment is affirmed. The trial court is directed to amend the abstract of judgment reflecting the custody credit modifications, and forward certified copies of the amended abstract to the Department of Corrections and Rehabilitation.

O'ROURKE, J.

WE CONCUR:

McCONNELL, P. J.

NARES, J.