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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

ERRON BRADFORD ZIMMERMAN,

Defendant and Appellant.

E056130

(Super.Ct.No. FMB1100599)

OPINION

APPEAL from the Superior Court of San Bernardino County. Daniel W.

Detienne, Judge. Affirmed.

Stephen M. Hinkle, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Julie L. Garland, Senior Assistant Attorney General, and Melissa Mandel and Marissa Bejarano, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant Erron Zimmerman hit his girlfriend in the face, causing multiple injuries, including breaking her nose. Defendant was convicted by a jury of inflicting corporal injury on a cohabitant in violation of Penal Code¹ section 273.5, subdivision (a).² In a bifurcated proceeding, after waiving his right to a jury trial, the trial court found that he had one prior serious or violent offense (§§ 667, subds. (b)-(i) & 1170.12) and one prior conviction for which he had served a prior prison term (§ 667.5, subd. (b)). Defendant was sentenced to nine years in state prison.

Defendant makes the following claims on appeal:

1. The trial court abused its discretion by admitting expert testimony on intimate partner battering because the evidence was irrelevant and was more prejudicial than probative within the meaning of Evidence Code section 352.
2. Instruction to the jury with CALCRIM No. 850, regarding the relevance of the expert testimony on domestic violence, violated his state and federal constitutional rights to due process and a fair trial.
3. Evidence Code section 1109 on its face violated his federal and state constitutional rights to due process of law and equal protection.

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

² The jury found that the special allegation that defendant personally inflicted great bodily injury upon the victim, within the meaning of section 12022.7, not true.

4. He was entitled to additional conduct credits pursuant to section 4019 as amended effective October 1, 2011.

I

FACTUAL BACKGROUND

A. *Incident Occurring on June 10, 2011*

On June 10, 2011, Everett Pittman was living with his daughter, Shawna Pittman, in an apartment located in Yucca Valley. On that night, Everett was on the couch in the living room. Defendant and Shawna had been drinking vodka that day. At some point in the evening, he observed Shawna emerge from her bedroom with a “steady stream” of blood coming from her nose. Defendant was also in the bedroom. Defendant told Everett that Shawna had been beating on his chest. Shawna told Everett that defendant “beat the shit out” of her.

Everett called 911 and told the operator that his daughter’s boyfriend had beat her up. He told the operator that Shawna needed medical attention. Shawna then talked to the 911 operator and stated that she had been assaulted. She explained that she was having trouble breathing through her nose and thought it was broken. She was spitting up blood.

Shawna testified at trial that she and defendant had been dating for two months prior to this incident. On the day of the incident, Shawna had been contacted by a friend from high school. Defendant walked in the room while they were talking and got jealous.

He accused Shawna of having sex with the high school friend. He was drinking and continued to harass Shawna about calling her high school friend.

The fight escalated; at some point, defendant got on top of Shawna while they were in the bedroom, and he hit her. He got up, and she threw a fan, which hit the wall. He then hit her in the face with his fists, after which he grabbed a vodka bottle that was in the room and walked out. Shawna chased after him to get her vodka back. When she tried to get the bottle back, defendant pushed her to the ground. After defendant hit her, she was spitting up blood.

San Bernardino Sheriff's Deputy Mike Cusack arrived at Shawna's apartment around 8:40 p.m. that night responding to a call that a female had been assaulted by her boyfriend. When he arrived, Shawna was in front of the residence. She was crying. She had blood on her face and was "slightly" bleeding. She complained of dizziness. Her lips were swollen, and she had black eyes. Everett was inside the apartment, but defendant was not present. Shawna had redness around her neck that was consistent with being choked. She had dried blood on her hands. There was also redness on her hands.

Shawna told Deputy Cusack that defendant had assaulted her in the bedroom. She said that defendant was mad at her for contacting an old friend, with whom defendant accused her of having sex. Defendant got jealous, pulled her hair, and pulled her down on the bed. He then hit her in the face with his fist.

Shawna chased after defendant when he left. Deputy Cusack found a fan at the foot of the bed, and it had blood on it. Based on the blood spatter on the fan, it appeared to Deputy Cusack that the assault had taken place in the bedroom.

Charlie Mae Pulluaim lived next door to Shawna. On the afternoon of June 10, she heard defendant and Shawna arguing. Sometime that day, she saw Shawna with bruises on her face, a black eye, and a swollen face. She had blood on her nose. Shawna told her that she and defendant had been in a fight.

Shawna was treated at the hospital. Her nose was broken in three separate places. She had multiple bruises on her face and neck. Her injuries were consistent with being punched in the face. She was referred to a plastic surgeon, but she did not go. There was no real treatment for her broken nose. Any lasting effect of the injury would be a deformed nose.

Defendant came back to Shawna's apartment the following day. He apologized to her. They continued their relationship until defendant got into a fight with the neighbors and moved out.

After the incident, Everett signed a written statement wherein he stated that defendant did not hit Shawna; Everett claimed she was beat up by someone else while walking to a nearby liquor store. At trial, Everett stated that he volunteered to write the statement and made up the story because he liked defendant when defendant was not drinking. Everett decided to testify at trial that defendant beat up Shawna because he was afraid once defendant was released he would come back and hurt Shawna. In addition,

after this incident and after he had written his statement, Shawna was in a sober living facility, and defendant came to visit her while he was drunk. He forced his way inside, pushing an employee out of the way.

Shawna admitted she wrote a statement that she thought that defendant had assaulted her until she spoke with Everett, who told her that she was beat up by three other people while returning from the liquor store. At trial, Shawna testified that the statement was untrue. Shawna made the statement because she was still in love with defendant.

Shawna testified at two preliminary hearings in this case: on September 15 and December 7, 2010. At both hearings, she testified that someone other than defendant beat her up. At trial, she stated she had testified that way because she and defendant had been trying to work on their relationship. After she testified at the first preliminary hearing, a deputy district attorney called her and threatened to bring felony perjury charges for not telling the truth.

Despite being scared after the first preliminary hearing, Shawn again lied at the second preliminary hearing and said that three girls beat her up and not defendant. She claimed she was telling the truth at trial because it was part of her effort at sobriety, which she seriously addressed after the second preliminary hearing. She also was afraid of being prosecuted.³

³ The jury was advised that Shawna was granted immunity to testify at trial.

Several telephone calls made by defendant from jail were recorded and played for the jury. Defendant called Everett and told him that “if everybody sticks to their stories I should be out next week.” Defendant also told Everett he needed to call the “DA.” Defendant spoke with Shawna and told her that she needed to “[s]tay with the statements” and to call the prosecutor to “tell them you don’t want to press charges.” If she and Everett called, he could be out the next week. Defendant told her to tell the district attorney’s office that she had been beaten up in the field and that he ripped the vodka bottle from her hands. Defendant advised Shawna that after she blamed the beating on the women in the field, she should “[j]ust drop off the face of the planet” and not call them back. On October 20, 2011, defendant asked Shawna why she was mad at him, and she said, “You beat the fuck out of me.” Everett called defendant on November 17, 2011, advising him that he was going to testify against defendant because defendant would not leave Shawna alone, and Everett was afraid that once defendant got out, he would get drunk and kill Shawna.

B. Prior Incident of Domestic Violence

Barbara Huber had previously dated defendant. On July 5, 2004, Huber and defendant got into an argument. In order to get away from defendant, Huber drove away in her car. Defendant followed her and caught up with her. He pulled Huber by her hair through the car window and called her a “whore.” He dragged her across the asphalt onto the curb.

Huber had been contacted by defendant since the incident with Shawna. Defendant asked her to call Shawna and tell her that he loved her. Huber called Shawna and warned her about defendant being violent.

C. *Expert Testimony on Domestic Violence*

Susanna Barnett worked at Unity Home as a community education and prevention manager. She educated people in the community about domestic violence. Unity Home was a domestic violence organization that kept victims and families safe from domestic violence. Barnett provided domestic violence training to those responders who dealt with domestic violence and assisted with domestic violence calls made to the sheriff's department. She also counseled victims of domestic violence.

Barnett explained that there was a cycle of violence in a domestic violence relationship. The first stage was the honeymoon stage, which was the loving stage. Even after a violent episode, the abuser might be apologetic and loving to the victim. Next was the tension-building phase, where there were threats and verbal abuse. The third stage was an act of violence. The cycle continually repeated itself in a violent relationship.

It was common for a victim to return to a relationship with the abuser due to fear. It was common for victims to blame themselves for the violence. It was also common for a victim to recant an accusation of abuse. Barnett expressed that just one incident of abuse was enough to show a cycle of violence.

D. *Defense*

Defendant denied that he committed any act of violence against Huber.

On June 10, defendant had been working and came home to find Shawna drinking. Shawna asked defendant to walk to the liquor store with her to get more alcohol. Defendant refused. Shawna went by herself; when she came back, she had the injuries to her face. Shawna told him that she had been “jumped.” Defendant took away her vodka bottle and left. Defendant moved back in with Shawna after the incident. He claimed he then moved out when a neighbor came into the house when he was passed out from drinking too much and punched him in the jaw.

Huber was called by the defendant and impeached with a jail call to defendant wherein she told him that she loved him. Three additional prior offenses committed by defendant against Huber, including his smashing her finger, choking her, and locking her in his house and beating her, were also introduced.

II

ADMISSION OF EXPERT TESTIMONY ON INTIMATE PARTNER BATTERING

Defendant contends that the trial court erred by admitting Barnett’s expert testimony on intimate partner battering, as it was irrelevant and it was more prejudicial than probative under Evidence Code section 352.

A. *Additional Factual Background*

Prior to trial, the People sought to introduce the expert testimony of Barnett and offered that she would testify to the cycle of violence and the effects of physical, emotional, and mental abuse on the beliefs, perceptions, and behavior of victims of

domestic violence under Evidence Code section 1107. Defendant’s counsel objected that such decision to admit the evidence would be premature, as Shawna had yet to testify, and Barnett did not qualify as an expert witness.

The trial court noted that it was aware that Shawna had testified differently at the preliminary hearings than what was contained in the police reports. As such, the evidence was admissible under Evidence Code section 1107, subdivision (a). The People would be allowed to lay a foundation for Barnett’s expertise, which was done at an Evidence Code section 402 hearing.

B. *Analysis*

Evidence Code section 1107, subdivision (a) provides as follows: “In a criminal action, expert testimony is admissible by either the prosecution or the defense regarding intimate partner battering and its effects, including the nature and effect of physical, emotional or mental abuse on the beliefs, perceptions, or behavior of victims of domestic violence, except when offered against a criminal defendant to prove the occurrence of the act or acts of abuse which form the basis of the criminal charge.”⁴ Our Supreme Court has also found such testimony admissible under section 801, subdivision (a) which permits expert testimony related to a “subject ‘sufficiently beyond common experience

⁴ “Although often referred to as ‘battered women’s syndrome,’ ‘intimate partner battering and its effects’ is the more accurate and now preferred term. [Citations.]” (*In re Walker* (2007) 147 Cal.App.4th 533, 536, fn. 1.)

that the opinion of an expert would assist the trier of fact.” (*People v. Brown* (2004) 33 Cal.4th 892, 905.)

“When the trial testimony of an alleged victim of domestic violence is inconsistent with what the victim had earlier told the police, the jurors may well assume that the victim is an untruthful or unreliable witness. [Citations.] And when the victim’s trial testimony supports the defendant or minimizes the violence of his actions, the jurors may assume that if there really had been abusive behavior, the victim would not be testifying in the defendant’s favor.” (*People v. Brown, supra*, 33 Cal.4th at p. 906.) “Even if the defendant never expressly contests the witness’s credibility along these lines, there is nothing preventing the jury from ultimately finding in its deliberations that the witness was not credible, based on misconceptions that could have been dispelled by [intimate partner battering] evidence.” (*People v. Riggs* (2008) 44 Cal.4th 248, 293.)

In *Brown*, the California Supreme Court held that an expert’s explanation of why domestic violence victims frequently recant and give conflicting statements was admissible despite a single incident of domestic violence. (*People v. Brown, supra*, 33 Cal.4th at pp. 902, 908.)

Even though intimate partner battering evidence may be admissible, it is subject to exclusion pursuant to Evidence Code section 352. “Under Evidence Code section 352, a trial court may exclude otherwise relevant evidence when its probative value is substantially outweighed by concerns of undue prejudice, confusion, or consumption of time. ‘Evidence is substantially more prejudicial than probative [citation] if, broadly

stated, it poses an intolerable “risk to the fairness of the proceedings or the reliability of the outcome [citation].” [Citation.] On appeal, we review the trial court’s rulings concerning the admissibility of the evidence for abuse of discretion. [Citations.]” (*People v. Riggs, supra*, 44 Cal.4th at p. 290.)

The trial court’s decision to admit expert testimony on intimate partner battering is reviewed for abuse of discretion. (*People v. Lindberg* (2008) 45 Cal.4th 1, 45.)

The evidence that was presented showed that Shawna told police that defendant had beaten her up. Despite being severely beaten, she allowed defendant to move back into her apartment. Everett and Shawna testified that defendant came back to the apartment, and Everett claimed that defendant apologized to Shawna. Shawna admitted that they continued their relationship. The jury certainly could question Shawna’s credibility, as it is inconceivable to a lay person why a woman who has been severely beaten would continue a relationship with the person who assaulted her. This showed a cycle of violence, as he beat her up and then came back and apologized. Barnett’s testimony was relevant to explain Shawna’s actions.

In addition, Shawna changed her story at the first and second preliminary hearings regarding who beat her up. The jury was advised that she changed her story because she and defendant were trying to work things out. Although her trial testimony mirrored what she told the police, the jury could question her reason for lying at the preliminary hearings. The expert testimony explained that such conduct was consistent with the conduct of others who have experienced similar abuse, and was therefore relevant.

Moreover, this expert testimony was not more prejudicial than probative. Defendant argues that it was not relevant to any issue in this case, and therefore, there was a “very great likelihood” it would be misused. However, as noted above, the evidence was relevant to explain why Shawna changed her story, and also to show why she allowed defendant to continue to live with her when he had severely beaten her. Further, it was not too prejudicial as it was general testimony that did not involve Shawna and defendant and their specific relationship.

Defendant contends that Shawna’s testimony was not inconsistent, as she testified at trial consistently with what she told Deputy Cusack. He claims the jury did not hear the inconsistent testimony given at the two preliminary hearings. This does not accurately reflect the record in this case. The jury was informed that Shawna signed a statement wherein she claimed that she was beat up by three women while returning from the neighborhood liquor store. They were additionally advised that she testified at two preliminary hearings, and both times she claimed she was beat up by three women. While *Brown* involved a change of testimony at trial, the reasoning in *Brown* applies here. Shawna’s credibility was at issue because she let defendant back into her apartment, and she recanted her story on two prior occasions.

We also reject defendant’s claim that admission of this evidence violated his federal and state constitutional due process rights. Defendant claims that the expert testimony raised only impermissible inferences about his character. As noted, *ante*, this evidence was relevant to explain Shawna’s recant at the preliminary hearings and why

she would continue her relationship with defendant after he beat her up. There was no due process violation.

Even if the evidence of intimate partner battering was erroneously admitted, such error was harmless. “It is . . . well settled that the erroneous admission or exclusion of evidence does not require reversal except where the error or errors caused a miscarriage of justice. [Citation.] “[A] “miscarriage of justice” should be declared only when the court, “after an examination of the entire cause, including the evidence,” is of the “opinion” that it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error.”” (*Ibid.*, citing *People v. Watson* (1956) 46 Cal.2d 818, 836.)⁵

Evidence that defendant beat Shawna was strong even without Barnett’s testimony and even without Shawna’s testimony. Everett observed Shawna emerge from the bedroom with a bloody face. Defendant was present and claimed that Shawna had hit him first. Defendant had a history of committing domestic violence against his girlfriends as evidenced by his pulling Huber from her car and dragging her by her hair. Further, before defendant could influence Shawna, she immediately told Everett after the incident that defendant “beat the shit out” of her and told her neighbor that defendant had beaten her. There was strong evidence to support that defendant had caused the injuries

⁵ Defendant claims that review is pursuant to the federal standard of beyond a reasonable doubt of *Chapman v. California* (1967) 386 U.S. 18, 24. We have rejected that there was a violation of his federal constitutional rights.

to Shawna. It is not reasonably probable that a result more favorable to defendant would have been reached in absence of the expert testimony.

III

INSTRUCTION WITH CALCRIM NO. 850

Defendant appears to claim that the trial court erred by instructing the jury with CALCRIM No. 850. He claims that the instruction allowed the jury to assume that the offense charged in this case was true, and this lightened the People's burden of proof in violation of his federal and state constitutional rights to due process and a fair trial.

The jury was instructed with CALCRIM No. 850 as follows: "You have heard testimony from Susanna Barnett regarding the effect of intimate partner battery. Susanna Barnett's testimony about intimate partner battery is not evidence that the defendant committed any of the crimes charged against him. You may consider this evidence only in deciding whether or not Shawna Pittman's conduct was not inconsistent with the conduct of someone who has been abused and in evaluating the believability of her testimony." Defendant made no objection.

Defendant has forfeited his claim by his failure to object to the instruction in the lower court. "A party may not complain on appeal that an instruction correct in law and responsive to the evidence was too general or incomplete unless the party has requested appropriate clarifying or amplifying language." (*People v. Hart* (1999) 20 Cal.4th 546, 622.) As will be discussed, *post*, this standard instruction correctly stated the law. As

such, defendant's failure to seek modification or object to the instruction waives any claim of error on appeal.

Evidence of intimate partner battering is admissible to explain "a behavior pattern that might otherwise appear unreasonable to the average person." (*People v. Day* (1992) 2 Cal.App.4th 405, 419.) "Because juries may accord undue weight to an expert's opinion, special care must be taken to insure the jury understands its duty to independently assess the expert opinion along with and in light of all other relevant evidence." (*People v. Housley* (1992) 6 Cal.App.4th 947, 957.) In *People v. Bledsoe* (1984) 36 Cal.3d 236, 247-248, a case involving expert testimony of rape trauma syndrome, our Supreme Court determined that expert testimony could not be used to prove a rape actually occurred because "[p]ermitting a person in the role of an expert to suggest that because the complainant exhibits some of the symptoms of rape trauma syndrome, the victim was therefore raped, unfairly prejudices the appellant by creating an aura of special reliability and trustworthiness." (*Id.* at p. 251.)

Here, CALCRIM No. 850 cautioned the jury to use Barnett's testimony for the limited purpose of evaluating Shawna's testimony. It did not suggest that Shawna was telling the truth or that the intimate battering had, in fact, occurred. (See *People v. Housley, supra*, 6 Cal.App.4th at p. 959.) It specifically admonished the jurors they could not consider the evidence as proof that the act actually occurred. As such, the instruction properly advised the jury of the importance of intimate partner battering and also its limitations.

Further, we reject that the instruction violated defendant's right to a fair trial or due process by lessening the burden of proof by "permitting the jury to base a finding of guilt on testimony that *assumed* abuse happened." As noted, *ante*, the instruction did not require the jury to assume that the battering had occurred. In addition, during closing argument, the prosecutor reiterated that the evidence was only relevant to decide whether Shawna's conduct was consistent with someone who had been abused and in evaluating the believability of her testimony. Further, CALCRIM No. 850 does not address the burden of proof, and the jury was instructed that it must find defendant guilty beyond a reasonable doubt based on all the evidence presented. We presume that jurors are intelligent persons capable of understanding and following the court's instructions. (*People v. Castaneda* (2011) 51 Cal.4th 1292, 1321.)

Finally, as noted, *ante*, strong evidence supported defendant's conviction even without the expert testimony. Defendant's claim that the jury was improperly instructed with CALCRIM No. 850 lacks merit.

IV

EVIDENCE CODE SECTION 1109

Defendant contends that admission of propensity evidence of prior acts of domestic violence committed by him pursuant to Evidence Code section 1109 violated his federal and state constitutional rights to due process of law and equal protection, necessitating reversal of his conviction. As set forth, *ante*, the trial court allowed in evidence that defendant had engaged in domestic violence during his relationship with

Huber. Defendant does not contest that the evidence itself was inadmissible but that the admission of propensity evidence under Evidence Code section 1109 violated due process and equal protection. Defendant acknowledges that his contention has been repeatedly rejected but raises the issue purely to preserve it for federal court review.

A. *Additional Factual Background*

The People sought to introduce pursuant to Evidence Code section 1109 evidence that defendant had been involved in domestic violence with Huber. The trial court stated that it had to determine if the evidence was admissible under Evidence Code section 352. The trial court first determined that the prior incident was not “out of proportion” with the current charge. There would not be any undue consumption of time issue, since only one witness was being called. The trial court concluded, “And given the jury instructions that exist for [Evidence Code section] 1109 specifically, I don’t believe there’s a danger of confusing the issue and misleading the jury.”

The jury was instructed as to Evidence Code section 1109 that “[t]he People presented evidence that the defendant committed domestic violence that was not charged in this case, specifically the testimony of Barbara Huber.” The terms “domestic violence,” “cohabitant,” and “abuse” were defined for the jury. The jury was further advised, “You may use this evidence only if the People have proved beyond a preponderance of the evidence that the defendant, in fact, committed the uncharged domestic violence. [¶] Proof by a preponderance of the evidence is a different burden of proof from proof beyond a reasonable doubt. A fact is proved by a preponderance of the

evidence if you conclude that it is more likely than not that the fact is true. [¶] If the People have not met this burden, you must disregard this evidence entirely. If you decide that the defendant committed the uncharged domestic violence, you may, but are not required to, [co]nclude from that evidence that the defendant was disposed or inclined to commit domestic violence. And based on that decision also conclude that the defendant was likely to commit and did commit an act involving domestic violence charged here. [¶] If you conclude that the defendant committed the uncharged domestic violence, that conclusion is only one factor to consider along with all the other evidence. It is not sufficient by itself to prove that the defendant is guilty of Count 1. The People must still prove the charge and allegation beyond a reasonable doubt. [¶] Do not consider this evidence for any other purpose except for the limited purpose of determining the defendant's credibility.” There was no objection by counsel.

B. *Analysis*

Defendant waived any objection to the instruction on the grounds the instruction violated his federal constitutional rights because he did not raise a constitutional objection to Evidence Code section 1109 in the lower court. (Evid. Code, § 353, subd. (a); see *People v. Bolden* (2002) 29 Cal.4th 515, 546-547.) Nonetheless, we briefly review his claim.

Defendant acknowledges that the California Supreme Court has rejected a due process challenge to a closely analogous statute, Evidence Code section 1108. (*People v. Falsetta* (1999) 21 Cal.4th 903, 912-922.) Defendant disagrees with the reasoning in

Falsetta. However, we must follow the case. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.)

We and our sister courts have rejected challenges to Evidence Code section 1109 based on both due process (*People v. Rucker* (2005) 126 Cal.App.4th 1107, 1120; *People v. Escobar* (2000) 82 Cal.App.4th 1085, 1095-1096; *People v. Hoover* (2000) 77 Cal.App.4th 1020, 1028-1029 [Fourth Dist., Div. Two]) and equal protection (*People v. Price* (2004) 120 Cal.App.4th 224, 240; *People v. Jennings* (2000) 81 Cal.App.4th 1301, 1310.) We find these opinions well reasoned, and we are persuaded to follow them.

We conclude that Evidence Code section 1109 is not unconstitutional on its face.

V

PENAL CODE SECTION 4019 CREDITS

Defendant contends that the trial court erred in calculating conduct credits under section 4019. He claims that due to an amendment to section 4019 effective October 1, 2011, he was entitled to one-to-one conduct credits for the time he spent in custody from October 1, 2011, until the time of sentencing on April 19, 2012. He insists the statutory language is ambiguous and is thus susceptible to the interpretation that he is entitled to have its provisions applied to him despite his crime being committed prior to October 1, 2011. Additionally, if we find he is not entitled to additional conduct credits under the amended statute, such interpretation violates his equal protection rights.

Defendant committed the offense on June 10, 2011. He was arrested on September 1, 2011. He was sentenced on April 19, 2012. At the end of sentencing,

defense counsel inquired about credits. The trial court responded, “My judicial assistant thinks it should be 349 days.” Both parties stipulated this was the correct amount.

According to the probation report, it was recommended that he receive credit for 233 actual days and 116 conduct days for the time up to sentencing on April 19, 2012. It stated that conduct credits were computed pursuant to section 4019.

The Legislature has repeatedly amended section 4019, the conduct credit statute. In June 2011, when defendant committed his offense, those who were sentenced and had a previous conviction of a serious or violent felony were entitled to two days of conduct credits for every four days actually served. (See former § 4019, subds. (b), (c), (f); Stats. 2010, ch. 426, § 2; former § 2933, subd. (e)(1); see also *People v. Rajanayagam* (2012) 211 Cal.App.4th 42, 48-49 (*Rajanayagam*)). While defendant was in custody, the Legislature amended section 4019 as part of the Realignment Act and amended section 2933. The amendments, which became operative on October 1, 2011, eliminated the prior felony strike disqualification and increased the amount of conduct credits earned by prisoners in local custody to one day of conduct credit for each day spent in actual custody. (§ 4019, subds. (b), (c), (f); Stats. 2011, ch. 39, § 53; see also Stats. 2011-2012, 1st Ex.Sess., ch. 12, § 35.)

Section 4019, subdivision (h) provides as follows: “The changes to this section enacted by the act that added this subdivision shall apply prospectively and shall apply to prisoners who are confined to a county jail, city jail, industrial farm, or road camp for a crime committed on or after October 1, 2011. Any days earned by a prisoner prior to

October 1, 2011, shall be calculated at the rate required by the prior law.” Based on the language of the statute, the “enhanced rate appl[ies] *only* to those defendants who committed their crimes on or after October 1, 2011. [Citation.]” (*People v. Ellis* (2012) 207 Cal.App.4th 1546, 1553.) Because defendant committed his offense June 10, 2011, he was ineligible to receive additional conduct credits under current section 4019.⁶

Defendant argues that the language of the second sentence of section 4019, subdivision (h) and subdivision (g) is ambiguous. He claims he is entitled to an interpretation that he is entitled to credits calculated pursuant to current section 4019. Section 4019, subdivision (g) provides, “The changes in this section as enacted by the act that added this subdivision shall apply to prisoners who are confined to a county jail, city jail, industrial farm, or road camp for a crime committed on or after the effective date of that act.”

The “act that added” section 4019, subdivision (g) was Senate Bill No. 76, effective September 28, 2010. (Stats. 2010, ch. 426, § 2.) Section 4019, subdivision (g) thus provides that the credit formula of Senate Bill No. 76 applies to persons, like defendant, who are confined for a crime committed on or after September 28, 2010. (See *People v. Hul, supra*, 213 Cal.App.4th at pp. 186-187.) Because defendant committed his

⁶ We note that defendant would not be eligible for one-to-one conduct credits under former sections 4019 and 2933, subdivision (e)(1) because of his prior conviction of a violent felony. (See *People v. Hul* (2013) 213 Cal.App.4th 182, 186-187.)

crime on June 10, 2011, his conduct credit must be calculated pursuant to former section 4019, and nothing in subdivision (g) contradicts this conclusion.

Further, other courts have rejected that the two sentences in section 4019, subdivision (h) are ambiguous. (See, e.g., *Rajanayagam, supra*, 211 Cal.App.4th 42; *People v. Ellis, supra*, 207 Cal.App.4th 1546.) The *Rajanayagam* court explained: “. . . [S]ubdivision (h)’s first sentence reflects the Legislature intended the enhanced conduct credit provision to apply only to those defendants who committed their crimes on or after October 1, 2011. Subdivision (h)’s second sentence does not extend the enhanced conduct credit provision to any other group, namely those defendants who committed offenses before October 1, 2011, but are in local custody on or after October 1, 2011. Instead, subdivision (h)’s second sentence attempts to clarify that those defendants who committed an offense before October 1, 2011, are to earn credit under the prior law. . . . To imply the enhanced conduct credit provision applies to defendants who committed their crimes before the effective date but served time in local custody after the effective date reads too much into the statute and ignores the Legislature’s clear intent in subdivision (h)’s first sentence. [¶] . . . [W]e find the enhanced conduct credit provision applies *only* to those defendants who committed their crimes on or after October 1, 2011.” (*Rajanayagam, supra*, 211 Cal.App.4th at p. 52, fn. omitted.)

The *Ellis* court similarly concluded, “In our view, the Legislature’s clear intent was to have the enhanced rate apply *only* to those defendants who committed their crimes on or after October 1, 2011. [Citation.] The second sentence does not extend the

enhanced rate to any other group, but merely specifies the rate at which all others are to earn conduct credits. So read, the sentence is not meaningless, especially in light of the fact the October 1, 2011, amendment to section 4019, although part of the so-called realignment legislation, applies based on the date a defendant's crime is committed, whereas section 1170, subdivision (h), which sets out the basic sentencing scheme under realignment, applies based on the date a defendant is sentenced.” (*People v. Ellis, supra*, 207 Cal.App.4th at p. 1553.)

We agree with the above reasoning. We thus reject defendant's contention that he is statutorily entitled to conduct credits at the increased rate provided in current section 4019.

Defendant further contends that if he is not entitled to additional conduct credits under current section 4019, his equal protection rights have been violated since he is receiving less conduct credits than another similarly situated inmate who committed his crime after October 1, 2011, despite being in jail at the same time. “The concept of equal protection recognizes that persons who are similarly situated with respect to a law's legitimate purposes must be treated equally. [Citation.] Accordingly, “[t]he first prerequisite to a meritorious claim under the equal protection clause is a showing that the state has adopted a classification that affects two or more *similarly situated* groups in an unequal manner.” [Citation.] “This initial inquiry is not whether persons are similarly situated for all purposes, but “whether they are similarly situated for purposes of the law challenged.” [Citation.]” (*People v. Brown* (2012) 54 Cal.4th 314, 328.) If a court

finds that a classification treats two or more similar situated persons in an unequal manner, the classification must satisfy the requisite level of scrutiny. (*People v. Wilkinson* (2004) 33 Cal.4th 821, 836.)

In *Rajanayagam, supra*, 211 Cal.App.4th 42, the court rejected a similar equal protection claim. The *Rajanayagam* court found that defendants who served time in jail on or after October 1, 2011, regardless of the date they committed their offenses, were indeed similarly situated for purposes of equal protection. However, it concluded there was no equal protection violation, as there was a rational basis for the legislative classification. (*Id.* at pp. 53-56.) As the court explained, the legislative purpose behind the amendment at issue is “‘to reduce recidivism and improve public safety, while at the same time reducing corrections and related criminal justice spending.’ [Citations.]” (*Id.* at p. 55.) The court concluded that “‘the classification in question does bear a rational relationship to cost savings.” (*Ibid.*) Moreover, “‘the Legislature took a measured approach and balanced the goal of cost savings against public safety.” (*Ibid.*) Therefore, the defendant’s equal protection rights were not violated. (*Id.* at p. 56.)

Assuming, without deciding, that the *Rajanayagam* court correctly determined that the defendant was similarly situated with persons who do benefit from the legislation, we agree with the court in *Rajanayagam* that there is a rational basis for the classification. As such, here, defendant’s equal protection rights are not implicated.

Based on the foregoing, the trial court awarded the appropriate conduct credits under former section 4019.

VI
DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

RICHLI
Acting P. J.

We concur:

KING
J.

CODRINGTON
J.