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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.

FRANK CLINE, JR.

Defendant and Appellant.

E056489

(Super.Ct.No. SWF1100953)

OPINION

APPEAL from the Superior Court of Riverside County. Kelly L. Hansen, Judge.

Affirmed as modified with directions.

John L. Dodd, 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 Eric A. Swenson, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant Frank Cline, Jr., while drunk, kissed his 14-year-old cousin; he then ran his hand up her leg, touched her crotch, and tried to move her underwear out of the way.

After a jury trial, defendant was found guilty of a lewd and lascivious act on a child aged 14 or 15. (Pen. Code, § 288, subd. (c)(1).) In addition, although he was found not guilty of felony sexual battery with restraint (Pen. Code, § 243.4, subd. (a)), he was found guilty of the lesser included offense of misdemeanor battery (Pen. Code, §§ 242, 243, subd. (a)). He admitted one “strike” prior. (Pen. Code, §§ 667, subds. (b)-(i), 1170.12.)

Defendant was sentenced to a total of six years in prison, along with the usual fines and fees.

Defendant now contends that the trial court erred by admitting a police officer’s testimony that it is common for there to be discrepancies in the stories given by child sexual abuse victims, because they are traumatized. We will reject this contention and affirm the conviction.

Defendant also contends that the trial court erred by limiting his presentence conduct credit to 20 percent. According to defendant, he is entitled to credit on a “two-for-two” basis under a version of Penal Code section 4019 that was enacted after the crimes were committed.

The People concede that the trial court erred by limiting defendant’s credit to 20 percent. According to the People, however, defendant is entitled to credit only on a

“two-for-four” basis, because the “two-for-two” version of Penal Code section 4019 does not apply to crimes committed before its enactment.

We will hold that the “two-for-two” version of Penal Code section 4019 does not apply. Accordingly, defendant is entitled to some additional credit, but not as much as he is seeking.

I

FACTUAL BACKGROUND

Given defendant’s contentions on appeal, an exhaustive review of the evidence is not necessary. Rather, we provide a brief summary, with particular emphasis on the discrepancies between the victim’s various accounts of the crimes.

Jane Doe¹ and defendant are cousins. On the night of March 1-2, 2011, Jane and her older brother were at defendant’s house. Jane was 14; defendant was 37. Defendant was “very drunk.”

A. *Jane’s Testimony at Trial.*

At trial, Jane testified that she and defendant were alone in a bedroom together because he was helping her get the DVD player and television to play a movie.

When defendant finished fixing the DVD player, he put his arm around the back of Jane’s head so she could not get away and tried to kiss her. She moved her head, and he “barely” managed to kiss her upper lip.

¹ The trial court ordered that the victim be referred to by this fictitious name. (See Pen. Code, § 293.5.)

Defendant left the room. Jane lay down on a bed and watched the movie.

About 10 minutes later, defendant came back in and sat or lay on the bed, to Jane's left. He ran his left hand up her right leg. Twice, she pushed his hand away, but each time he put his hand back even higher; the third time, it ended up under her shorts, just touching the crease between her thigh and the outer lip of her vagina. Defendant tried to move her underwear out of the way.

Jane got up, ran out to the kitchen, where her brother was, and told him she wanted to leave.

B. Jane's Statement to the Police the Next Day.

On March 2, 2011, a patrol deputy interviewed Jane.

Jane said that defendant sat on the bed, then tried to kiss her. Immediately afterward, in "a flowing moment," his hand went up her leg. She did not say that in between, he left the room and came back. She said that she pushed his hand away; she did not say that he kept putting it back.

Jane got up; she and defendant both went out to the kitchen, where her brother was. She watched defendant and her brother play games for a while. Then her brother asked her if she wanted to leave.

C. Jane's Forensic Interview Two Weeks Later.

On March 17, 2011, a member of the Riverside County Child Assessment Team (RCCAT) conducted a forensic interview of Jane. A detective observed the interview via closed-circuit television.

Jane said that, immediately after entering the bedroom, defendant tried to kiss her. Next, he fixed the DVD player; then he lay on the bed and ran his hand up her leg. Once again, she did not say that defendant left the room and came back.

Jane was not sure whether defendant was to her left or to her right. She explained, “. . . I don’t really remember any of the images that much.”

Jane said that, the first time defendant touched her leg, his hand went up to “the crease of [her] vagina.” She pushed his hand away, and he put it back, but lower — on her thigh. “He only got to do it twice.”

She got up, went to her brother, and told him, “I want to go home.”

II

TESTIMONY REGARDING DISCREPANCIES IN CHILD VICTIMS’ ACCOUNTS

Defendant contends the trial court erred by admitting a detective’s testimony that there are commonly discrepancies between the accounts given by child sexual abuse victims and that this is because they are traumatized.

A. *Additional Factual and Procedural Background.*

Detective Kim Judge had been assigned to investigating sex crimes for six years. She had investigated over 100 sex crimes involving children. She testified that, whenever the victim of a sex crime was a child, it was customary to conduct a forensic interview of the victim. She had observed Jane’s forensic interview.

During the detective’s direct examination, there was this exchange:

“Q. BY [PROSECUTOR]: When you’re testifying in these cases involving child sex victims, is it common for there to be some discrepancies in their story from the time they are initially interviewed until the trial?

“[DEFENSE COUNSEL]: Objection. Relevance. Speculation. Improper opinion.

“THE COURT: Overruled.

“THE WITNESS: Absolutely.

“Q. BY [PROSECUTOR]: And why is that?

“[DEFENSE COUNSEL]: Objection.

“THE COURT: Overruled.

“THE WITNESS: They are usually traumatized . . . during the first interview, and then even a lot of times . . . it could even be six months, a year when things come up that they remember that they didn’t initially because they were traumatized.

“Q. BY [PROSECUTOR]: Okay. And I’m not asking you if it ever means people are telling the truth or lying. I’m just asking: Does that happen in these types of cases involving child sex victims?

“THE WITNESS: Yes.”

On cross-examination, Detective Judge admitted that “some people give inconsistent statements because they are lying[.]”

In closing argument, when discussing the different accounts Jane had given, the prosecutor stated: “And Detective Judge said, look, based on her experience in dealing

with these types of cases for the last six years, she expects there to be some slight discrepancies. She expects it. Because when you're talking about the initial disclosure on the day of an incident, there is still emotions, there's trauma, and there's a patrol deputy who isn't trained in the way that she is And it's not surprising to her at all. And in most of her cases you get that slight change."

B. *Analysis.*

Defendant argues that the detective essentially rendered an inadmissible opinion that the victim was telling the truth.

"[G]enerally a lay witness may not express an opinion about the veracity of another person's statement [Citations.]" (*People v. Houston* (2012) 54 Cal.4th 1186, 1221.) "[T]he reasons are several. With limited exceptions, the fact finder, not the witnesses, must draw the ultimate inferences from the evidence. Qualified experts may express opinions on issues beyond common understanding [citations], but lay views on veracity do not meet the standards for admission of expert testimony. A lay witness is occasionally permitted to express an ultimate opinion based on his perception, but only where 'helpful to a clear understanding of his testimony' [citation], i.e., where the concrete observations on which the opinion is based cannot otherwise be conveyed. [Citations.] Finally, a lay opinion about the veracity of particular statements does not constitute properly founded character or reputation evidence [citation], nor does it bear on any of the other matters listed by statute as most commonly affecting credibility [citation]. Thus, such an opinion has no 'tendency in reason' to disprove the veracity of

the statements. [Citations.]” (*People v. Melton* (1988) 44 Cal.3d 713, 744; accord, *People v. Sergill* (1982) 138 Cal.App.3d 34, 39–40.)

Here, however, the detective did *not* testify that the victim was telling the truth. Indeed, she conceded that discrepancies in an alleged victim’s story *could* mean that he or she was lying. She merely testified it was *common* for there to be discrepancies in an alleged victim’s story and that this was *usually* because the alleged victim was initially traumatized. This testimony was not speculative. The detective did not purport to read Jane’s mind. Rather, her testimony was rationally based on her personal perception of over 100 investigations of alleged sex crimes against children, which typically included forensic interviews of the alleged victims. Moreover, it was helpful to a clear understanding of her testimony, because it would not have been practical for her to discuss in detail every one of these prior investigations.

This testimony did not invade the province of the jury, because the detective did not claim to know whether Jane was, in fact, telling the truth. (See *People v. McDonald* (1984) 37 Cal.3d 351, 370-371 [expert testimony regarding the weaknesses of eyewitness identification does not “‘invade the province’ or ‘usurp the function’ of the jury”], overruled on other grounds in *People v. Mendoza* (2000) 23 Cal.4th 896, 914.) In any event, the Supreme Court has stated: “It is a truism that it is for the jury to determine credibility. Questions that legitimately assist the jurors in discharging that obligation are proper. The ‘legal cliché used by many courts, [that evidence] would “invade the province” or “usurp the function” of the jury’ is . . . “so misleading, as well as so

unsound, that it should be entirely repudiated. It is a mere bit of empty rhetoric,” and “remains simply one of those impracticable and misconceived utterances which lack any justification in principle.” [Citation.]” (*People v. Chatman* (2006) 38 Cal.4th 344, 380.)

The challenged evidence was analogous to testimony regarding child sexual abuse accommodation syndrome (CSAAS). “. . . ‘CSAAS cases involve expert testimony regarding the responses of a child molestation victim. Expert testimony on the common reactions of a child molestation victim is not admissible to prove the sex crime charged actually occurred. However, CSAAS testimony “is admissible to rehabilitate [the molestation victim’s] credibility when the defendant suggests that the child’s conduct after the incident — e.g., a delay in reporting — is inconsistent with his or her testimony claiming molestation. [Citations.]” [Citations.]” (*People v. Perez* (2010) 182 Cal.App.4th 231, 245.) Here, similarly, the defense strategy was to argue that the discrepancies between the victim’s accounts meant that she was lying. The evidence was relevant to partially rehabilitate the victim by indicating that there could be alternative reasons for any discrepancies.

As the Supreme Court has observed, “[t]here is a difference between asking a witness whether, in his opinion, another is lying and asking that witness whether he knows of a reason why another would be motivated to lie.” (*People v. Chatman, supra*, 38 Cal.4th at p. 381.) Here, the detective was not asked whether the victim was lying, but rather, whether she knew of a reason why there would be discrepancies in the victim’s story.

We therefore conclude that state law did not require the trial court to exclude this evidence. We further conclude that the admission of the evidence did not violate due process.

III

PRESENTENCE CONDUCT CREDIT

Defendant was arrested on September 20, 2011. He was sentenced on June 12, 2012. Thus, he had 268 days of actual presentence custody. The trial court awarded him 54 days of presentence conduct credit pursuant to Penal Code section 4019, commenting, “That’s [a] 20 percent limitation because of the strike offense.”

Defendant contends that the trial court erred by limiting his presentence conduct credit to 20 percent. The People concede the error. We agree. When a defendant has a strike prior, postsentence conduct credit is limited to 20 percent (Pen. Code, §§ 667, subd. (c)(5), 1170.12, subd. (a)(5)), but not presentence conduct credit (Pen. Code, § 4019; *People v. Thomas* (1999) 21 Cal.4th 1122, 1125-1127).

The parties disagree, however, regarding the correct *amount* of credit. After the crimes were committed, but before defendant was sentenced, Penal Code section 4019 was amended so as to provide for a more generous measure of custody credit.

Defendant’s crimes were committed on March 1-2, 2011. At that time, Penal Code section 4019 provided “two-for-four” credit — two days of conduct credit for every four days of actual presentence custody. (Pen. Code, former § 4019, subds. (b), (c), (f), Stats. 2010, ch. 426, § 2.)

On April 4, 2011, however, the Legislature amended Penal Code section 4019 so as to provide “two-for-two” credit — two days of conduct credit for every two days of actual presentence custody. (Pen. Code, former § 4019, subs. (b), (c), (f), Stats. 2011, ch. 15, § 482.) The Legislature specified that this amendment “shall apply prospectively and shall apply to prisoners who are confined . . . 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.” (Pen. Code, § 4019, subd. (h), Stats. 2011, ch. 39, § 53.)²

Defendant argues that, as a matter of statutory construction, the amendment must be construed as applying to him. He argues that the second sentence of Penal Code section 4019, subdivision (h), which states, “[a]ny days earned by a prisoner prior to October 1, 2011, shall be calculated at the rate required by the prior law,” necessarily implies that any days earned *on or after* October 1, 2011 shall be calculated at the rate required by *the amended statute*.

This argument has been rejected in every published case that has ever considered it. (*People v. Rajanayagam* (2012) 211 Cal.App.4th 42, 52-53; *People v. Ellis* (2012) 207 Cal.App.4th 1546, 1552-1553; *People v. Kennedy* (2012) 209 Cal.App.4th 385, 399-

² This language originally referred to July 1, 2011, rather than October 1, 2011. (Pen. Code, former § 4019, subd. (h), Stats. 2011, ch. 15, § 482.) On June 30, 2011, however, the Legislature amended it to refer to October 1, 2011. (Pen. Code, § 4019, subd. (h), Stats. 2011, ch. 39, § 53.)

400.) We adopt the reasoning of those cases, but especially the following language from *Rajanayagam*:

“““It is an elementary rule of construction that effect must be given, if possible, to every word, clause and sentence of a statute.’ A statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant, and so that one section will not destroy another unless the provision is the result of obvious mistake or error.”” [Citations.] Therefore, we cannot read the second sentence to imply any days earned by a defendant after October 1, 2011, shall be calculated at the enhanced conduct credit rate for an offense committed before October 1, 2011, because that would render the first sentence superfluous.

“Instead, another well established rule of statutory construction supports our interpretation of subdivision (h). “A statute is passed as a whole and not in parts or sections and is animated by one general purpose and intent. Consequently, each part or section should be construed in connection with every other part or section so as to produce a harmonious whole. Thus, it is not proper to confine interpretation to the one section to be construed.”” [Citations.]

“ . . . [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. However inartful the language of subdivision (h), we read the second sentence as reaffirming that defendants who committed their crimes before October 1, 2011, still have the opportunity to earn conduct credits, just under prior law. [Citation.] 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." (*People v. Rajanayagam, supra*, 211 Cal.App.4th at pp. 52-53, fn. omitted.)

Defendant also argues that he is entitled to the benefits of the amendment as a matter of equal protection, because "all persons serving time after October 1, 2011 are similarly situated with respect to earning conduct credits, without regard to the date of the offense." (Capitalization and boldface omitted.)

This argument has been rejected by the California Supreme Court, as well as in every other published case that has considered it. (*People v. Lara* (2012) 54 Cal.4th 896, 906, fn. 9; *People v. Rajanayagam, supra*, 211 Cal.App.4th at pp. 54-56; *People v. Verba* (2012) 210 Cal.App.4th 991, 995-997; *People v. Kennedy, supra*, 209 Cal.App.4th at pp. 395-399; *People v. Ellis, supra*, 207 Cal.App.4th at pp. 1549-1552.)

In *Lara*, the defendant argued that the Legislature denied equal protection by making the amended version of Penal Code section 4019 prospective only. (*People v.*

Lara, supra, 54 Cal.4th at p. 906, fn. 9.) The Supreme Court responded: “. . . “[T]he obvious purpose” of a law increasing conduct credits “is to affect the behavior of inmates by providing them with incentives to engage in productive work and maintain good conduct while they are in prison.” [Citation.] “[T]his incentive purpose has no meaning if an inmate is unaware of it. The very concept demands prospective application.” [Citation.] Accordingly, prisoners who serve their pretrial detention before such a law’s effective date, and those who serve their detention thereafter, are not similarly situated with respect to the law’s purpose. [Citation.]” (*Ibid.*)

We also adopt the reasoning stated in *Verba*:

“[A] statute’s . . . operative date . . . is set by the Legislature in its discretion. [Citation.] The exercise of that discretion is subject to rational basis review. [Citations.]” (*People v. Verba, supra*, 210 Cal.App.4th at p. 996.)

“We can envision several legitimate reasons for making the increased level of presentence conduct credit applicable only to those who commit their crimes on or after October 1, 2011.

“. . . [T]he Legislature’s decision to increase the amount of presentence conduct a defendant could earn ‘was intended to save the state money.’ [Citation.] The Legislature may have decided that the nature and scope of the fiscal emergency required granting an increase in the level of conduct credits but only at a time after the effective date of the amendments. A slightly delayed operative date, the Legislature may have believed,

struck a proper, rational balance between the state's fiscal concerns and its public safety interests.

“A related justification for the prospective application of increased conduct credits lies in the Legislature's right to control the risk of new legislation by limiting its application. ‘Requiring the Legislature to apply retroactively any change in the law benefitting criminal defendants imposes unnecessary additional burdens on the already difficult task of fashioning a criminal justice system that protects the public and rehabilitates criminals.’ [Citation.]

“In addition, the Legislature could have rationally believed that by tying the increased level of conduct credits to crimes committed on or after a future date, it was preserving the deterrent effect of the criminal law as to those crimes committed before that date. [Citations.] To reward an inmate with enhanced conduct credits, even for time spent in presentence custody after the effective date of the statute, arguably weakens the deterrent effect of the law as it stood when the inmate committed the crime. We see nothing irrational or implausible in a legislative conclusion that individuals should be punished in accordance with the sanctions and given the rewards in effect at the time they committed their offense. Such a punishment scheme also avoids ‘sentencing delays and other manipulations.’ [Citation.]” (*People v. Verba, supra*, 210 Cal.App.4th at pp. 996-997.)

We therefore conclude that defendant is entitled to presentence conduct credit only under the version of Penal Code section 4019 that was in effect when the crimes were

committed. It provided “two-for-four” credit, and defendant had 268 days of actual custody; thus, he was entitled to 134 days of credit. The trial court awarded him only 54 days. We will modify the judgment to award him an additional 80 days.

IV

DISPOSITION

The judgment is modified to award defendant 134 days (rather than 54 days) of presentence conduct credit. As so modified, the judgment is affirmed. The superior court clerk is directed to prepare an amended sentencing minute order and an amended abstract of judgment reflecting this modification and to forward a certified copy of the new abstract to the Department of Corrections and Rehabilitation. (Pen. Code, §§ 1213, 1216.)

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RICHLI
Acting P. J.

We concur:

KING
J.

CODRINGTON
J.