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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

MIGUEL ANGEL BARAJAS,

Defendant and Appellant.

F063330

(Super. Ct. No. BF133193A)

**OPINION**

APPEAL from a judgment of the Superior Court of Kern County. Sidney P. Chapin, Judge.

C. Athena Roussos, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Louis M. Vasquez and Rebecca Whitfield, Deputy Attorneys General, for Plaintiff and Respondent.

-ooOoo-

Defendant Miguel Angel Barajas stands convicted, following a jury trial, of battery resulting in the infliction of serious bodily injury (Pen. Code,<sup>1</sup> § 243, subd. (d)). He was acquitted of drawing or exhibiting a firearm in a threatening manner (§ 417, subd. (a)(2)), a misdemeanor. His request for probation was denied, and he was sentenced to two years in prison and ordered to pay restitution, as well as various fees, fines, and assessments. On appeal, defendant claims the trial court misinstructed the jury, and that various sentencing errors occurred. We affirm.

## **FACTS**

### **I**

#### **PROSECUTION EVIDENCE**

On July 24, 2010, Adrian Perez was the assistant manager at a clothing store in Bakersfield.<sup>2</sup> When his shift ended that evening, he walked to his vehicle, which was in the store's parking lot. He did not hear anyone approach or say anything to him. As he put his key in the car door, however, defendant attacked him from behind, "smash[ing]" Perez's face into the car window and putting him in a choke hold. When Perez tried to break out of the choke hold, defendant flipped him over a metal railing next to the vehicle, causing Perez to land on his back. Defendant then retrieved a firearm from his pants and pointed it at Perez's face. Perez started yelling for help. Defendant put the weapon back into the back of his pants and started kicking Perez in the face and ribs. Perez curled up in a fetal position, whereupon defendant started stomping downward on the top of Perez's spine and lower back.

Perez was kicked multiple times in the head, causing him to black out for 10 to 15 seconds. When he came to and tried to get up, defendant kept kicking him. Perez finally tried to run away, losing a shoe in the process, only to have defendant attack him again

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<sup>1</sup> All statutory references are to the Penal Code.

<sup>2</sup> References to dates in the statement of facts are to dates in 2010.

on the other side of the parking lot. The attack finally ended when some of Perez's coworkers saw what was happening. They encircled Perez; when defendant tried to break through them to get to Perez again, one of them pulled Perez back into the store. At no time during the incident did Perez strike back at defendant. Perez was "pretty much helpless" and never had a chance to defend himself.<sup>3</sup>

Perez was bleeding from his face, mouth, forehead, and top of his head. He had a lot of pain to his left rib cage and shortness of breath. At the hospital, it was determined he had suffered a rib fracture on the left side, a bruised lung, and mild hemothorax, meaning bleeding within the chest. He was hospitalized for four days. As of the time of trial, about a year later, he still had pain from his neck down to his lower back.

Defendant turned himself in on July 26, after learning the police were looking for him. He waived his rights and gave a statement to Officer Escobedo. Defendant related that he had gone to the store to speak with his ex-girlfriend, Cindy Lopez, about taking their child to Los Angeles. As he was walking through the parking lot, defendant saw Perez, who gave him a sarcastic smile. This enraged defendant because of what he believed had happened between Perez and Lopez, and so he approached Perez, wanting to fight him. Defendant said after seeing the smile, he let his emotions get to him. Defendant was so enraged, he blacked out and could only remember bits and pieces of the fight.

Defendant was very cooperative with Escobedo, and expressed remorse for what took place. However, he denied owning or having a firearm.<sup>4</sup>

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<sup>3</sup> Alejandrina Ramirez, a store employee who saw the incident, confirmed Perez did not swing at defendant before defendant grabbed the back of Perez's head and hit it against the car window. Ramirez did not recall Perez ever getting up and fighting back. He was just trying to get away from defendant. After the two were separated, Perez did not threaten or try to attack defendant.

<sup>4</sup> Aside from Perez, no one at the scene reported seeing a handgun. Escobedo ran a records check; there was no firearm registered to defendant.

## II

### DEFENSE EVIDENCE

Bulmaro Gonzales was defendant's stepfather. On July 24, the two were together all day, working on a project in defendant's garage. When Gonzales left a little after 7:00 p.m., defendant was happy. Defendant said he was going to see his baby's mother so he could take the child to Los Angeles. He said nothing about confronting anyone at her work.

Lopez was the mother of defendant's child. She and defendant broke up in March or April, but, as of July, were trying to work things out. Perez was Lopez's manager at work. They had a single sexual encounter in April, during the time Lopez and defendant were not together.<sup>5</sup> Lopez told defendant about having sex with Perez, whose picture was on her MySpace page. It upset defendant and made him mad.

During July, defendant and Lopez had a cooperative relationship in terms of his visiting with their child. Prior to July 24, however, he had never stopped by her work. That day, she did not recall whether she had any missed calls from defendant on her cell phone. The first she knew something unusual had happened was when security called her outside. She saw Perez standing in front of the store, and security holding defendant perhaps 35 feet away. Nobody was holding Perez, although there were people between him and defendant. Perez and defendant were telling each other, "Come on," essentially challenging one another to fight. Neither man appeared to Lopez to be injured.

Lopez lived with defendant for three years. He did not own a pistol.

Defendant testified that on July 24, he was at his house all day, working on a project with his stepfather. His plans were to go to an AA meeting between 7:00 and 9:00 that evening, go to work at 10:00, get off at 2:00 a.m., pick up his daughter, and go to Los Angeles. As of that time, defendant and Lopez were trying to work things out.

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<sup>5</sup> Perez denied having any relationship with Lopez other than that of coworkers.

She had told defendant about her sexual encounter with Perez about a week after it happened. Defendant, who was shocked and emotional over her admission, had never met Perez, but had seen his photographs on MySpace. When defendant found out in April, he made no attempt to contact Perez. Rather, he started going to a church group and AA meetings to have people with whom he could talk.

On July 24, defendant went to the store, intending to ask Lopez whether, since he got off work at 2:00 a.m., she could have their daughter's bags ready so he could pick her up and head to Los Angeles. He was a little nervous, since he had been trying to avoid being anywhere around the store, but Lopez was working and defendant knew she would not answer her phone. He did not have a handgun with him and was not intending to fight or attack anyone.

When defendant arrived at the parking lot, he looked to see if he recognized anyone who could go inside and call Lopez out. Not seeing anyone, he waited by his car for a bit, then decided to go inside. As he was walking toward the front door, he fortuitously encountered Perez, who was walking out. They locked eyes, and Perez kind of started smirking and giving defendant "a certain look." They passed each other, then, when they were about four feet apart, defendant asked if Perez knew who he was. Perez started laughing. He kept ignoring defendant, and then he turned away.

Defendant felt there were things that had to be said, and that Perez owed defendant an explanation or apology, so he decided to turn Perez around. When defendant touched Perez's left shoulder, Perez struck at defendant with his elbow or hand and almost hit defendant in the face. He missed because defendant moved back, then defendant pushed him and they started exchanging punches. Defendant estimated striking Perez three times in the face and four or five in the body, while Perez's punches "landed in random places."

Perez fell down from one of the hits and rolled under a place for shopping carts. Perez started saying he was going to go and get his cousin. He was using profanity and calling defendant names. Defendant tried to kick him, but did not connect. Once Perez

went to the ground, there was no more physical contact between the two men, although when Perez started running to the store, defendant chased him. That was when the security guard and others came. Once the security guard started walking toward him, defendant just stopped and stood there. The security guard bear-hugged defendant, while Perez kept “talking crap.” Perez acted like he wanted to fight, so defendant told him, “Okay, let’s go.”

At no time did defendant point anything at Perez or have anything in his hands. At the end of the fight, Perez was holding his side when he was talking, but defendant did not see any blood on him. Defendant did not feel he was defending himself, but believed it was a mutual fight.

Defendant regretted that Perez was hurt. It was never his intention to hurt Perez.<sup>6</sup> Defendant was in Los Angeles when he learned the police were looking for him, and he turned himself in upon his return. He admitted lying to the police about blacking out from anger; he had never been in trouble with the law and did not want to talk about the situation, but at the same time did not want to be someone who asked to speak to a lawyer. He had heard rumors that if the police thought someone did something, they would keep at the person until he or she admitted it. Defendant did not “want to go down that route,” and felt like saying he blacked out was the easiest way out.

## **DISCUSSION**

### **I**

#### **CALCRIM No. 361**

The conference on jury instructions was not reported. Insofar as the record shows, defendant did not object to the giving of CALCRIM No. 361, pursuant to which jurors were told: “If the defendant failed in his testimony to explain or deny evidence against him, and if he could reasonably be expected to have done so based upon what he knew,

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<sup>6</sup> Defendant himself ended up with some bruises and soreness.

you may consider his failure [to explain] or deny in evaluating that testimony. Any such failure is not enough to prove guilt. The People must still prove the defendant's guilt beyond a reasonable doubt. If the defendant failed to explain or deny, it's up to you to decide the meaning and importance of that failure.”<sup>7</sup>

Defendant now contends he did not fail to explain or deny adverse evidence; hence, CALCRIM No. 361 should not have been given. He further contends the error was prejudicial, because by giving the instruction, the trial court lightened the prosecution's burden of proof by singling out defendant's testimony for negative scrutiny without factual or legal basis. We reject the Attorney General's assertion defendant forfeited his claim by failing to object to the instruction; if defendant's claim of prejudicial error is correct, the instruction affected his substantial rights. (§ 1259; *People v. Lawrence* (2009) 177 Cal.App.4th 547, 553-554, fn. 11; cf. *People v. Taylor* (2010) 48 Cal.4th 574, 630, fn. 13; *People v. Bonilla* (2007) 41 Cal.4th 313, 329, fn. 4; but see *People v. Frandsen* (2011) 196 Cal.App.4th 266, 278.) On the merits, however, we conclude any error was harmless.

It is settled jurors properly may consider logical gaps in the defense case, and CALCRIM No. 361 reminds them of this power. (*People v. Redmond* (1981) 29 Cal.3d 904, 911.)<sup>8</sup> However, “before a jury can be instructed that it may draw a particular

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<sup>7</sup> The bracketed portion was omitted from the oral instruction, but included in the written instruction that was among the packet provided to the jury for use in deliberations.

<sup>8</sup> Many of the cases we cite deal with CALJIC No. 2.62, CALCRIM No. 361's counterpart. CALJIC No. 2.62 states: “In this case defendant has testified to certain matters. [¶] If you find that [a] [the] defendant failed to explain or deny any evidence against [him] [her] introduced by the prosecution which [he] [she] can reasonably be expected to deny or explain because of facts within [his] [her] knowledge, you may take that failure into consideration as tending to indicate the truth of this evidence and as indicating that among the inferences that may reasonably be drawn therefrom those unfavorable to the defendant are the more probable. [¶] The failure of a defendant to deny or explain evidence against [him] [her] does not, by itself, warrant an inference of

inference, evidence must appear in the record which, if believed by the jury, will support the suggested inference [citation].’ [Citation.]” (*People v. Saddler* (1979) 24 Cal.3d 671, 681 (*Saddler*)). The applicability of CALCRIM No. 361 “is peculiarly dependent on the particular facts of the case.” (*People v. Roehler* (1985) 167 Cal.App.3d 353, 393.) Whether the instruction may be given turns on an assessment of evidence adduced during “the scope of relevant cross-examination” of the defendant. (*Id.* at p. 392.)

The instruction is proper only if the trial court preliminarily determines, as a matter of law, that the evidence supports a conclusion the defendant failed to bridge a gap in his or her case. It is then up to jurors to decide whether such a gap in fact exists and whether the instruction will be applied. (*People v. Roehler, supra*, 167 Cal.App.3d at p. 392.) As one court stated almost 20 years ago, “it will always be unwise of a trial court to include [the instruction] among its general instructions without prior inquiry of the parties concerning it. In fact, today it should not even be requested by either side unless there is some specific and significant defense omission that the prosecution wishes to stress or the defense wishes to mitigate.” (*People v. Haynes* (1983) 148 Cal.App.3d 1117, 1119-1120.)

In the present case, the prosecutor requested that CALCRIM No. 361 be given. We do not know whether, in the off-the-record instructional conference, he identified any particular defense omission warranting the instruction. In any event, as a reviewing court, we must ascertain whether the record evidence supports a conclusion defendant

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guilt, nor does it relieve the prosecution of its burden of proving every essential element of the crime and the guilt of the defendant beyond a reasonable doubt. [¶] If a defendant does not have the knowledge that [he] [she] would need to deny or to explain evidence against [him,] [her,] it would be unreasonable to draw an inference unfavorable to [him] [her] because of [his] [her] failure to deny or explain this evidence.”

Although there are some differences between the two instructions, for purposes of the issue raised by defendant, cases addressing CALJIC No. 2.62 are equally applicable to CALCRIM No. 361. (See *People v. Rodriguez* (2009) 170 Cal.App.4th 1062, 1067.)

failed to explain or deny any evidence within the scope of relevant cross-examination. (*Saddler, supra*, 24 Cal.3d at p. 682.) Neither the contradiction of prosecution evidence nor the failure to recall specific details constitutes a failure to explain or deny. (*Ibid.*; *People v. Roehler, supra*, 167 Cal.App.3d at p. 393.) Similarly, the test is not whether defendant's testimony was believable. (*People v. Kondor* (1988) 200 Cal.App.3d 52, 57.) On the other hand, "[i]f the defendant tenders an explanation which, while superficially accounting for his activities, nevertheless seems bizarre or implausible, the inquiry whether he reasonably should have known about circumstances claimed to be outside his knowledge is a credibility question for resolution by the jury [citations]." (*People v. Belmontes* (1988) 45 Cal.3d 744, 784, disapproved on another ground in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22; see also *People v. Mask* (1986) 188 Cal.App.3d 450, 455.) Likewise, if the jury could have found a defendant's purported memory loss was feigned, and that it was within his or her knowledge to fill in gaps in testimony, the instruction is properly given. (*People v. Kozel* (1982) 133 Cal.App.3d 507, 531.)

In the present case, the Attorney General says the instruction was properly given in light of defendant's inherently implausible explanation of why he lied to Officer Escobedo. Defendant gave an explanation, however; that it was subject to justifiable suspicion does not mean CALCRIM No. 361 was appropriate. (See *People v. Kondor, supra*, 200 Cal.App.3d at pp. 56-57.)

Assuming the instruction should not have been given, reversal is not required, because it is not reasonably probable the jury would have returned a verdict more favorable to defendant in the absence of the instruction. (*People v. Watson* (1956) 46 Cal.2d 818, 836 (*Watson*); see *Saddler, supra*, 24 Cal.3d at pp. 681, 683 [applying *Watson* standard to erroneous giving of CALJIC No. 2.62]; *People v. Lamer* (2003) 110 Cal.App.4th 1463, 1471-1472 [same]; *People v. Roehler, supra*, 167 Cal.App.3d at p. 393 [same]; but see *People v. Tealer* (1975) 48 Cal.App.3d 598, 606-607 [applying harmless-beyond-a-reasonable-doubt standard of *Chapman v. California* (1967) 386 U.S. 18, 24

where “net effect” of improper argument and instruction was to tell jury it could infer guilt from silence, in violation of *Griffin v. California* (1965) 380 U.S. 609].) Defendant admitted punching Perez multiple times in the face and body, and attempting to kick him. The nature and extent of Perez’s injuries were undisputed. Defendant also admitted lying to police about what happened. In addition, jurors were informed some instructions might not apply, depending on their findings about the facts of the case, and to follow the instructions that did apply. While this instruction “does not render an otherwise improper instruction proper, it may be considered in assessing the prejudicial effect of an improper instruction.” (*Saddler, supra*, 24 Cal.3d at p. 684 [discussing CALJIC No. 17.31].) The record here does not support a finding of prejudice. (See *People v. Lamer, supra*, 110 Cal.App.4th at pp. 1472-1473.)

Contrary to defendant’s arguments, CALCRIM No. 361 “does not direct the jury to draw an adverse inference. It applies only if the jury finds that the defendant failed to explain or deny evidence. It contains other portions favorable to the defense .... [Citations.]” (*People v. Ballard* (1991) 1 Cal.App.4th 752, 756-757.) The instruction did not lighten the prosecution’s burden of proof (*Saddler, supra*, 24 Cal.3d at pp. 679-680), and it did not impermissibly single out, or unduly focus on, defendant’s testimony (*id.* at pp. 680-681; *People v. Rodriguez, supra*, 170 Cal.App.4th at p. 1067). Finally, there is no reasonable likelihood it misled jurors. (See *People v. Tate* (2010) 49 Cal.4th 635, 696.)<sup>9</sup>

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<sup>9</sup> Although we reject defendant’s claim of prejudicial error, we commend his appellate attorney on her reply brief. Unlike too many we see that simply regurgitate — often verbatim — the contents of the opening brief, the brief here truly and specifically replied to the Attorney General’s brief.

## II

### SENTENCING ISSUES

#### A. Denial of Probation

As previously stated, defendant was convicted of violating section 243, subdivision (d), which prescribes the punishment to be imposed “[w]hen a battery is committed against any person and serious bodily injury is inflicted on the person ....” Jurors were instructed that “[t]o prove that the defendant is guilty of this charge, the People must prove that, one, the defendant willfully and unlawfully touched Adrian Perez in a harmful or offensive manner. Two, Adrian Perez suffered serious bodily injury as a result of the force used. And three, the defendant did not act in self defense. Someone commits an act willfully when he or she does it willingly or on purpose. It’s not required that he or she intend to break the law, hurt someone else, or gain any advantage.... A serious bodily injury means a serious impairment of physical condition. Such an injury may include, but is not limited to, loss of consciousness, concussion, bone fracture, protracted loss or impairment of function of any bodily member or organ, a wound requiring extensive suturing or serious disfigurement.”

The probation officer’s report (RPO) stated defendant was statutorily ineligible for probation, except in unusual circumstances, pursuant to section 1203, subdivision (e)(3), because he willfully inflicted great bodily injury. At sentencing, everyone proceeded under the assumption defendant was presumptively ineligible for probation.<sup>10</sup> The court stated:

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<sup>10</sup> In his written sentencing memorandum, in which he requested a grant of probation or, alternatively, imposition of the mitigated term, defendant acknowledged he was ineligible for a grant of probation without any unusual case finding by the court. In his argument at sentencing, the prosecutor asserted this was a case “involving grave bodily injury.”

“The court has ... reviewed the pre-sentence investigation report, the defense papers, the recently submitted [letter] of Mr. Barajas. And taking those into consideration, the comments of both counsel and the victim, the defendant is statutorily ineligible, given the count on which he is convicted, absent there being unusual circumstances. The court does not find that there are unusual circumstances that would justify an admission to probation in this case.

“The defendant in the course of testifying at trial, and to some extent, also, included in the letter, there is a complete blame shifting to the victim in the case. We don’t know what the jury decided with regard to this claim by Ms. Lopez that there had been an assignation with the victim in this case in April of 2010. All we know is that she certainly made a point of telling Mr. Barajas about it and showing him something on a Facebook page of herself where she had somehow incorporated a picture of Mr. Perez that was some three months prior to the incident which arose in the parking lot outside the store where Mr. Perez is coming out of the store. And according to the testimony of Mr. Barajas, essentially, has his hands full. He has, according to Mr. Barajas, a cup of coffee in one hand and some papers in the other; some issue, perhaps, as to whether or not he was also talking on the cell phone at the time. And then claimed at various times that he blacked out, as Mr. Barajas having said that he wasn’t sure it was him, that is, a person having had a relationship with the mother of Mr. Barajas’[s] child, but he smiled in a caustic way, he smirked at me, he dissed me. And according to Mr. Baraja[s’s] testimony, he had to turn around to approach the passing victim, Mr. Perez.

“So, I find the testimony of the defendant not only supportive of the proposition that from behind Mr. Perez was approached by the defendant, but then this black out -- that is, Mr. Barajas’s black out -- is, I think, contrived, because we have this detailed recollection of each and every physical movement of everybody in order to set up what Mr. Barajas claims is a mutual combat, that he had to initially defend himself. And as he states in his testimony, I was lead [*sic*] into it by the victim.

“But the jurors concluded, unanimous jury, that there was an assault with infliction of serious bodily injury. We know there was serious bodily injury in terms of rib fractures, contused lung and blows to the face and head.

“So, the court does not see that there is any reasonable expectation that there would be some service rendered by placing the defendant on probation.

“What needs to go out is the message that we don’t go out and get in everybody’s face because we think somebody may have smirked at us or smiled in a caustic way. That can’t happen. And we need deterrence in that regard. It’s a serious offense and it should be punished.

“I will, based upon the age at the time of the offense and based upon some of the circumstances, however, proceed to impose the sentence, low term, two years state prison, based on the recommendation [in the RPO] and the lack of prior criminal violations; there only being one misdemeanor violation, driving without a license.”

Defendant now contends the trial court misinterpreted the pertinent statutes, which defendant says do *not* render him presumptively ineligible for probation; because the trial court misunderstood the extent of its discretion to grant probation, the argument runs, the matter must be remanded for resentencing. The Attorney General suggests the claim is forfeited because defendant did not raise it below; in any event, we can imply the requisite finding from the trial court’s statements and the evidence presented at trial. We conclude the trial court (and parties) erred in concluding defendant was presumptively ineligible for probation, but resentencing is not required.<sup>11</sup>

“The grant or denial of probation is within the trial court’s discretion and the defendant bears a heavy burden when attempting to show an abuse of that discretion. [Citation.] ‘However, an erroneous understanding by the trial court of its discretionary power is not a true exercise of discretion.’ [Citation.]” (*People v. Aubrey* (1998) 65 Cal.App.4th 279, 282.) “Defendants are entitled to sentencing decisions made in the exercise of the ‘informed discretion’ of the sentencing court. [Citations.] A court which is unaware of the scope of its discretionary powers can no more exercise that ‘informed discretion’ than one whose sentence is or may have been based on misinformation

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<sup>11</sup> We reject the Attorney General’s claim the issue was forfeited. Defendant does not contend the trial court merely failed to make express findings or articulate reasons for denying probation. (Compare *People v. Scott* (1994) 9 Cal.4th 331, 356 with *People v. Corban* (2006) 138 Cal.App.4th 1111, 1117.)

regarding a material aspect of a defendant's record. [Citation.]" (*People v. Belmontes* (1983) 34 Cal.3d 335, 348, fn. 8.)

Section 1203, subdivision (e) provides, in pertinent part: "Except in unusual cases where the interests of justice would best be served if the person is granted probation, probation shall not be granted to any of the following persons: [¶] ... [¶] (3) Any person who *willfully* inflicted great bodily injury or torture in the perpetration of the crime of which he or she has been convicted." (Italics added.) A defendant falling within the statute's purview is presumptively ineligible for probation. (*People v. Stuart* (2007) 156 Cal.App.4th 165, 177.)

Under subdivision 1 of section 7, "[t]he word 'willfully,' when applied to the intent with which an act is done or omitted, implies simply a purpose or willingness to commit the act, or make the omission referred to. It does not require any intent to violate law, or to injure another, or to acquire any advantage." Thus, "[c]ourts have concluded the word 'willfully' implies no evil intent but means the person knows what he or she is doing, intends to do it and is a free agent. Usually the word 'willfully' defines a general intent crime unless the statutory language requires an intent to do some further act or achieve some future consequence. [Citation.]" (*People v. Lewis* (2004) 120 Cal.App.4th 837, 852 (*Lewis*).)<sup>12</sup> As the California Supreme Court has recognized, however, the meaning of the term varies, depending on the statutory context. (*People v. Garcia* (2001) 25 Cal.4th 744, 753.)

In *Lewis*, the defendant was convicted of assaulting a child with force likely to produce great bodily injury, resulting in death. (§ 273ab.) On appeal, he claimed the trial court erred by finding him presumptively ineligible for probation under section 1203, subdivision (e)(3), as that statute's restriction on the granting of probation applied only to

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<sup>12</sup> Battery is a general intent crime. (*People v. Lara* (1996) 44 Cal.App.4th 102, 107.)

those who intended to inflict great bodily injury and not to those whose criminal acts merely resulted in great bodily injury. (*Lewis, supra*, 120 Cal.App.4th at pp. 842, 850-851.) The Court of Appeal agreed, reasoning:

“The word ‘willfully’ as generally used in the law is a synonym for ‘intentionally,’ i.e., the defendant intended to do the act proscribed by the penal statute. Section 1203, subdivision (e)(3), so read requires the defendant *intentionally* inflicted great bodily injury or torture in the commission of the crime. The section describes no initial act, e.g., willfully strikes, or willfully burns, resulting in some required particular result, e.g., great bodily injury, the burning of some particular type of property. When the structure of a section requires a willful act followed by some particular result, then it is reasonable to read the willful, i.e., intentional, element as referring only to the initial act and not to the ultimate result. In such sections the word ‘willfully’ does not require the defendant intend the ultimate result, only that he or she intended the initial act. [Citation.]

“The word ‘willfully’ in section 1203, subdivision (e)(3), does not follow this act/result form. It refers merely to a result, i.e., the infliction of great bodily injury. Given this structure of the section, we conclude the only reasonable reading of it is the word ‘willful’ requires the defendant’s intent to cause great bodily injury or torture, not merely that the crime resulted in great bodily injury or torture. [Citation.]

“This interpretation of section 1203, subdivision (e)(3), is supported by a comparison of its language with that of the enhancement for the infliction of great bodily injury contained in section 12022.7, subdivision (a). Section 12022.7 requires a person ‘personally inflict great bodily injury’ on another in the commission or attempted commission of a felony. Unlike section 1203, subdivision (e)(3), it does not require that the infliction be willful. The section has been interpreted to require only a general criminal intent, i.e., the defendant need not intend great bodily injury result, the only intent required is that for the underlying felony. [Citations.]

“The inclusion of the word ‘willfully’ in section 1203, subdivision (e)(3), suggests that the Legislature meant the section to be applicable not merely when great bodily injury is the result of a crime but,

rather, when the defendant intended to cause great bodily injury.<sup>13]</sup>”  
(*Lewis, supra*, 120 Cal.App.4th at pp. 852-853, 1st fn. omitted.)

Defendant’s jury was not asked to, and did not, find defendant *intentionally* inflicted serious bodily injury on Perez.<sup>14</sup> For purposes of determining probation eligibility, however, the trial court had the power to make the necessary factual determination. (*Lewis, supra*, 120 Cal.App.4th at p. 854; see *In re Varnell* (2003) 30 Cal.4th 1132, 1141-1142; *People v. Dove* (2004) 124 Cal.App.4th 1, 4, 10-11; cf. *United States v. Watts* (1997) 519 U.S. 148, 156-157.) There is authority the requisite finding can be implied rather than express. (*People v. Fisher* (1965) 234 Cal.App.2d 189, 192-193.)

We need not determine whether the trial court made such an implied finding here, because its comments make it clear it would not have granted probation even if defendant were not presumptively ineligible therefor.<sup>15</sup> (Compare *People v. Rivas* (2004) 119 Cal.App.4th 565, 574-575.) Nothing suggests, and defendant does not argue, denial of probation would be an abuse of the trial court’s “broad discretion” under the circumstances. (See *People v. Carbajal* (1995) 10 Cal.4th 1114, 1120; *People v. Marquez* (1983) 143 Cal.App.3d 797, 803.) Accordingly, a remand for resentencing would be an idle act.

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<sup>13</sup> “Until 1949 section 1203 denied probation to defendants who, in the perpetration of the crime for which they were convicted ‘inflicted a great bodily injury or torture.’ [Citation.] In that year the Legislature modified the section to require the infliction of great bodily injury be willful. [Citation.] In 1957 the Legislature amended section 1203 to allow probation to such defendants in unusual cases. [Citation.]”

<sup>14</sup> For purposes of our analysis, we assume serious bodily injury is the equivalent of great bodily injury.

<sup>15</sup> We note the RPO related that even if eligible, defendant would be considered an unsuitable candidate for a grant of felony probation.

**B. Realignment**

Defendant contends that, although he was sentenced on September 7, 2011, he is entitled to be resentenced under the “2011 Realignment Legislation addressing public safety” (Stats. 2011, ch. 15, § 1), despite the fact the sentencing changes made by this and subsequent related legislation expressly apply “prospectively to any person sentenced on or after October 1, 2011.” (§ 1170, subd. (h)(6).) In *People v. Cruz* (2012) 207 Cal.App.4th 664, this court held the changes “apply only to persons sentenced on or after October 1, 2011, and such prospective-only application does not violate equal protection.” (*Id.* at p. 668, fn. omitted.) We decline to revisit the issue.

**C. Time Credits**

The RPO recommended defendant be awarded time credits in the amount of 31 actual days, plus 14 days of conduct credits, for a total of 45 days. The RPO stated that, pursuant to section 2933, subdivision (e)(3), defendant was not entitled to “half time” conduct credits because the instant offense was a serious felony. The trial court awarded credits as recommended. Despite defense counsel’s express concurrence in the calculation of credits, defendant now contends he is entitled to additional conduct credits under the version of section 2933 in effect at the time of sentencing. Alternatively, he says he should receive enhanced credits under the current version of section 4019. His claims lack merit.

As previously stated, defendant was sentenced on September 7, 2011. At the time of sentencing, section 2933 provided, in pertinent part:

“(e)(1) Notwithstanding Section 4019 and subject to the limitations of this subdivision, a prisoner sentenced to the state prison under Section 1170 for whom the sentence is executed shall have one day deducted from his or her period of confinement for every day he or she served in a county jail ... from the date of arrest until state prison credits pursuant to this article are applicable to the prisoner. [¶] ... [¶]

“(3) Section 4019, and not this subdivision, shall apply if the prisoner ... was committed for a serious felony, as defined in Section 1192.7 ....” (Stats. 2010, ch. 426, § 1, eff. Sept. 28, 2010.)<sup>16</sup>

At issue is whether defendant’s conviction for committing battery with infliction of *serious* bodily injury (§ 243, subd. (d)) constitutes a serious felony within the meaning of section 1192.7. Subdivision (c)(8) of that statute defines “serious felony” to include “any felony in which the defendant personally inflicts *great* bodily injury on any person, other than an accomplice ....” (Italics added.) Defendant’s jury was instructed on serious bodily injury, but was not instructed on, and did not find defendant did or did not inflict, great bodily injury.

Section 243, subdivision (f)(4) defines “[s]erious bodily injury” as “a serious impairment of physical condition, including, but not limited to, the following: loss of consciousness; concussion; bone fracture; protracted loss or impairment of function of any bodily member or organ; a wound requiring extensive suturing; and serious

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<sup>16</sup> The version of section 2933 in effect at the time defendant’s crime was committed also referenced section 4019. Subdivision (e) of section 2933 then provided: “A prisoner sentenced to the state prison under Section 1170 shall receive one day of credit for every day served in a county jail ... after the date he or she was sentenced to the state prison as specified in subdivision (f) of Section 4019.” (Stats. 2009-2010, 3d Ex. Sess., ch. 28, § 38, eff. Jan. 25, 2010.)

The rate at which credit can be earned under section 4019 has varied due to the numerous amendments made to that statute over the last few years. At the time defendant’s crime was committed, subdivision (f) of the statute stated the Legislature’s intent that if all days were earned, a term of four days would be deemed to have been served for every two days spent in actual custody, except that a term of six days would be deemed to have been served for every four days spent in actual custody for persons who, inter alia, were committed for a serious felony. (Stats. 2009-2010, 3d Ex. Sess., ch. 28, § 50, eff. Jan. 25, 2010.) Section 4019 had been amended by the time defendant was sentenced, but, pursuant to subdivision (g) of the statute, those changes applied to prisoners confined to jail for a crime committed on or after September 28, 2010, the effective date of the amendment. (Stats. 2010, ch. 426, § 2, eff. Sept. 28, 2010.)

For a staggeringly complete recap of the various amendments, see *People v. Garcia* (2012) 209 Cal.App.4th 530, 533-541.

disfigurement.” “[G]reat bodily injury” is most often defined in accordance with section 12022.7, subdivision (f), to wit: “a significant or substantial physical injury.” As the California Supreme Court has long recognized, the two “are essentially equivalent elements.” [Citations.]” (*People v. Burroughs* (1984) 35 Cal.3d 824, 831, overruled on another ground in *People v. Blakeley* (2000) 23 Cal.4th 82, 89; accord, *People v. Knoller* (2007) 41 Cal.4th 139, 143, fn. 2; *People v. Wade* (2012) 204 Cal.App.4th 1142, 1149-1150; *People v. Arnett* (2006) 139 Cal.App.4th 1609, 1613; *People v. Hawkins* (1993) 15 Cal.App.4th 1373, 1375; *People v. Moore* (1992) 10 Cal.App.4th 1868, 1871; *People v. Kent* (1979) 96 Cal.App.3d 130, 136-137; *Boultinghouse v. Hall* (C.D.Cal. 2008) 583 F.Supp.2d 1145, 1163.)<sup>17</sup> This being the case, the jury’s finding that defendant inflicted serious bodily injury, which was amply supported by the evidence, was sufficient to bring defendant’s offense within the purview of subdivision (c)(8) of section 1192.7. (See *People v. Arnett, supra*, 139 Cal.App.4th at p. 1613; *Boultinghouse v. Hall, supra*, 583 F.Supp.2d at p. 1163.) The jury did not need to be instructed on, or to find, infliction of great bodily injury.

Defendant relies on *People v. Taylor* (2004) 118 Cal.App.4th 11 (*Taylor*) and *People v. Bueno* (2006) 143 Cal.App.4th 1503 (*Bueno*) as support for his argument. Both are readily distinguishable.

In *Taylor*, the defendant was convicted of three offenses, one of which was battery with serious bodily injury. However, the jury found not true allegations he personally inflicted great bodily injury in commission of the charged offenses. On appeal, he claimed the trial court erred in imposing a five-year enhancement, pursuant to

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<sup>17</sup> If anything, “great bodily injury” is broader, and encompasses more types and degrees of injury, than “serious bodily injury.” (See *People v. Escobar* (1992) 3 Cal.4th 740, 749-750.) As the Attorney General reasons, great bodily injury essentially includes serious bodily injury.

section 667, subdivision (a)(1), for his prior serious robbery convictions. (*Taylor, supra*, 118 Cal.App.4th at pp. 16, 17-18.)

The Court of Appeal first examined the statutory requirements. It stated:

“Section 667, subdivision (a)(1) provides a five-year sentence enhancement for serious felony priors. The statute applies only if the current conviction itself is also a serious felony. Serious felonies are defined in section 1192.7, subdivision (c). ‘Section 1192.7, subdivision (c), lists some felonies that are per se serious felonies, such as murder, mayhem, rape, arson, robbery, kidnapping, and carjacking.’ [Citation.] If the current conviction falls within this group of crimes, ‘then the question whether that conviction qualifies as a serious felony is entirely legal.’ [Citation.] It is undisputed that none of Taylor’s current convictions fall within this group of serious felonies. Specifically, battery with serious bodily injury (§ 243, subd. (d)) is not one of the enumerated crimes that qualify as per se serious felonies. [Citation.]

“Section 1192.7, subdivision (c), defines other crimes as serious felonies by reference ‘to conduct rather than to a specific crime.’ [Citations.] For example, the statute defines serious felonies to include ‘any felony in which the defendant personally inflicts great bodily injury on any person other than an accomplice, or any felony in which the defendant personally uses a firearm’ (§ 1192.7, subd. (c)(8)), or ‘any felony in which the defendant personally used a dangerous or deadly weapon’ (§ 1192.7, subd. (c)(23)).

“Under these conduct-based definitions, a felony that does not qualify as a serious felony as a matter of law may be found to constitute a serious felony if the prosecution properly pleads and proves the facts necessary to establish the defined conduct. [Citation.] The prosecution may satisfy this burden by pleading and proving a separate sentence enhancement that has the same factual elements as the defined serious felony conduct [citation], such as an enhancement for personally inflicting great bodily injury (§ 12022.7), personally using a firearm (§§ 12022.5, 12022.53), or personally using a deadly or dangerous weapon (§ 12022, subd. (b)(1)). If such a sentence enhancement is not alleged, the accusatory pleading must somehow give the defendant actual notice of the factual basis for the allegation that the charged offense is a serious felony. [Citation.]” (*Taylor, supra*, 118 Cal.App.4th at pp. 22-23.)

The court then turned to the argument that the jury’s verdicts — convicting the defendant of battery with serious bodily injury while finding not true the enhancements for personally inflicting great bodily injury — were inconsistent, inasmuch as serious bodily injury is legally equivalent to great bodily injury. (*Taylor, supra*, 118 Cal.App.4th at p. 23.) The court concluded: “In *the particular circumstances of this case*, the conviction for battery with serious bodily injury is not legally or factually equivalent to a finding of great bodily injury.” (*Id.* at p. 24, italics added.) It explained: “Although the terms ‘great bodily injury’ and ‘serious bodily injury’ have been described as being ‘essentially equivalent’ [citation] or having ‘substantially the same meaning’ [citations], they have separate and distinct statutory definitions.... Unlike serious bodily injury, the statutory definition of great bodily injury does not include a list of qualifying injuries and makes no specific reference to bone fractures.” (*Ibid.*)

The court noted that the trial court gave standard CALJIC instructions on both serious bodily injury and great bodily injury, and that the instructions provided different definitions of the terms based on the different statutory definitions. Neither instruction stated the two terms were legally equivalent. Based on the instructions, defense counsel specifically argued the victim’s bone fracture did not constitute great bodily injury, because it was only a moderate injury. During deliberations, jurors asked a question indicating they had focused on the precise issue argued by defense counsel, and their verdicts, interpreted in light of the instructions and arguments of counsel, indicated a finding the defendant had inflicted serious bodily injury, but not great bodily injury. (*Taylor, supra*, 118 Cal.App.4th at pp. 24-25.) Under these circumstances, the court concluded, “the jury’s finding of serious bodily injury cannot be deemed equivalent to a finding of great bodily injury. The jury conscientiously applied the instructions given and decided that the victim’s bone fracture did not constitute great bodily injury because it was only a ‘moderate’ injury within the meaning of CALJIC No. 17.20. This is a factual determination that is reserved for the jury. [Citation.] In its verdicts, the jury

distinguished between great bodily injury and serious bodily injury, because only the latter was defined to include a bone fracture, as the prosecutor herself noted in closing argument. Thus, the jury’s finding that the bone fracture fell within the definition of serious bodily injury was not equivalent to a finding of great bodily injury.” (*Id.* at p. 25, fn. omitted.)

The court distinguished the case of *People v. Moore, supra*, 10 Cal.App.4th 1868, in which the issue was whether the defendant’s prior conviction for battery with serious bodily injury qualified as a serious felony. The *Taylor* court observed: “[T]he record of Moore’s battery prior did not include any finding that he had *not* inflicted great bodily injury in committing the prior offense. The trial court’s conclusion that the prior offense was a serious felony thus did not conflict with the express findings of the trier of fact. In the absence of any contrary indication in the record, the trial court in *Moore* was justified in applying the *usual assumption* that ‘great bodily injury’ and ‘serious bodily injury’ are ‘essentially equivalent.’ [Citation.]” (*Taylor, supra*, 118 Cal.App.4th at p. 26, italics added.)

*Taylor* is clearly distinguishable from the present case. Here, jurors were not instructed on, and made no finding concerning, great bodily injury. The “particular circumstances” that caused the *Taylor* court to reject application of the “usual assumption” that great bodily injury and serious bodily injury are essentially the same (*Taylor, supra*, 118 Cal.App.4th at pp. 24, 26) do not exist; hence, “the narrow ruling of *Taylor* does not apply” (*People v. Arnett, supra*, 139 Cal.App.4th at p. 1615).

In *Bueno, supra*, 143 Cal.App.4th 1503, the issue was whether the People proved the defendant’s prior conviction for battery with serious bodily injury constituted a serious felony for purposes of sentencing under the “Three Strikes” law. (*Bueno, supra*, at pp. 1505-1506.) In holding there was insufficient proof, the appellate court stated:

“In considering whether Bueno’s prior offense was a serious felony, we are bound by the rule that a record of a prior conviction establishes only

the ‘least adjudicated elements’ of the offense. [Citation.] At the time of the plea (and now), section 243, subdivision (d) provided that the offense occurs ‘[w]hen a battery is committed against any person and serious bodily injury is inflicted on the person.’ The People do not dispute that the bare fact that Bueno was convicted for battery with serious bodily injury under that section is insufficient to show he was convicted of a serious felony under section 1192.7, subdivision (c)(8). That is, one can commit a battery within the meaning of section 243, subdivision (d) without committing a serious felony within the meaning of section 1192.7, subdivision (c)(8). As pertinent here, to establish that the battery was a serious felony the People were required to show that Bueno *personally* inflicted the injury, rather than that he aided and abetted another [citation], and that the victim was not an accomplice. Accordingly, Bueno’s prior conviction only qualifies as a serious felony if the People proved or Bueno admitted those additional facts regarding the crime. [Citations.]” (*Bueno, supra*, at p. 1508, fn. omitted.)

The appellate court assumed, for purposes of its decision, that Bueno’s admission to causing serious bodily injury was sufficient to establish he inflicted great bodily injury. (*Bueno, supra*, 143 Cal.App.4th at p. 1508, fn. 5.) Nevertheless, it found the People did not present evidence proving Bueno personally inflicted the injury and the victim was not an accomplice, and it rejected the People’s claim Bueno admitted the offense was a serious felony because the information alleged it was such within the meaning of section 1192.7, subdivision (c)(8). (*Bueno, supra*, at p. 1509.)

In the present case, no evidence was presented to suggest Perez was defendant’s accomplice, or that defendant did not personally inflict Perez’s injuries. Accordingly, *Bueno* does not assist defendant.

Defendant observes the information in his case did not allege the battery constituted a serious felony, and his jury made no finding in that regard. The information did allege, however, that *defendant* willfully and unlawfully used force or violence upon the person of Perez, resulting in the infliction of serious bodily injury. The jury found him guilty as charged in this count. In light of the accusatory pleading, evidence, and instructions, it is clear the jury found the *facts* necessary to a finding defendant’s conviction for battery with serious bodily injury constituted a serious felony under

section 1192.7, subdivision (c)(8). (See *People v. Equarte* (1986) 42 Cal.3d 456, 460-461, 465, 467; *People v. Bautista* (2005) 125 Cal.App.4th 646, 654-656; *People v. Flynn* (1995) 31 Cal.App.4th 1387, 1393.)

The serious felony finding was not used to enhance defendant's sentence or subject him to the harsher sentencing scheme of the Three Strikes law. Rather, it was merely used to determine the rate at which he could earn time credits. "The historical facts that limit a defendant's ability to earn conduct credits do not form part of the charges and allegations in a criminal action. Certainly a court must afford a defendant due process — notice and a fair hearing — in determining the amount of conduct credit to which he or she is entitled. [Citation.] But the courts of this state have rejected the argument that the People must allege credit disabilities in the accusatory pleading or prove the disabling facts to the trier of fact." (*People v. Lara* (2012) 54 Cal.4th 896, 901; *id.* at p. 905.) Defendant does not contend, and the record does not suggest, he was misled by the absence of a serious felony allegation to believe the charged offense did not constitute a serious felony, or that he was denied the opportunity to challenge the serious felony designation.<sup>18</sup> (See *People v. Equarte, supra*, 42 Cal.3d at p. 467, fn. 13; *People v. Flynn, supra*, 31 Cal.App.4th at pp. 1393-1394 & fn. 3.)

In *Taylor*, the Court of Appeal held that, under *Apprendi v. New Jersey* (2000) 530 U.S. 466 (*Apprendi*), the trial court violated the defendant's right to a jury trial by treating the jury's finding of serious bodily injury as the equivalent of a finding of great bodily injury within the meaning of section 1192.7, subdivision (c)(8). The court stated: "We conclude that Taylor had a federal constitutional right to a jury determination of the factual predicate for a finding that any of the charged offenses was a serious felony.

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<sup>18</sup> During a discussion, shortly after the verdict was returned, of whether defendant should remain on bail pending sentencing, the trial court clarified with the prosecutor that the instant offense was a "strike" conviction. Defendant did not dispute the prosecutor's assessment that it was indeed such a conviction, either then or at sentencing.

Because the jury specifically found that Taylor had not inflicted great bodily injury in the commission of the charged offenses, and there was no other factual or legal basis for a finding that any of the charged offenses was a serious felony, the trial court's determination that count three constituted a serious felony violated Taylor's constitutional right to jury trial." (*Taylor, supra*, 118 Cal.App.4th at p. 28.)

In the present case, defendant was afforded his federal constitutional right to a jury determination of the factual predicate for a finding his conviction for battery with serious bodily injury constituted a serious felony. In any event, *Apprendi* holds that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." (*Apprendi, supra*, 530 U.S. at p. 490.) *Apprendi* turns on whether the fact at issue exposes the defendant to increased *punishment*. (*People v. Sloan* (2007) 42 Cal.4th 110, 122-123.) A limitation on credits is not a sentencing enhancement and does not increase the penalty prescribed for defendant's offense. (*People v. Garcia* (2004) 121 Cal.App.4th 271, 277.) "Rather, the provisions for presentence conduct credits function as a sentence 'reduction' mechanism outside the ambit of *Apprendi*. [Citations.]" (*Ibid.*) "Lessening the 'discount' for good conduct credit does not increase the penalty beyond the prescribed maximum punishment and therefore does not trigger the right to a jury trial identified in *Apprendi*. [Citations.]" (*Id.* at pp. 277-278.)

"[J]ust as the trial court properly determines as a matter of state law whether a prior conviction qualifies as a strike [citation], so too determining whether a defendant's current conviction ... is a [serious] felony is properly part of the trial court's traditional sentencing function." (*People v. Garcia, supra*, 121 Cal.App.4th at p. 278. fn. omitted; see *People v. Lara, supra*, 54 Cal.4th at p. 901.) It follows the trial court did not err by implicitly finding defendant's conviction for battery with serious bodily injury was a serious felony for purposes of the rate at which he could earn credits.

Defendant argues the Legislature has classified battery with serious bodily injury as a low-level felony under the realignment statutes. (See § 17.5, subd. (a)(5).) Thus, a violation of section 243, subdivision (d) is now punishable pursuant to section 1170, subdivision (h). (Stats. 2011, ch. 15, § 292, eff. Apr. 4, 2011, operative Oct. 1, 2011.) Generally speaking, a felony punishable under that provision is punishable by a term of imprisonment in county jail. (§ 1170, subd. (h)(1).) An exception exists, however, where the current conviction is of a serious felony within the meaning of section 1192.7, subdivision (c). (§ 1170, subd. (h)(3).) We agree with the Attorney General that, reading the applicable statutes in conjunction with each other, defendants convicted of committing battery with serious bodily injury as aiders and abettors, or against accomplices, will be sentenced to county jail, while those convicted of personally battering and inflicting serious bodily injury on someone who was not an accomplice will be sentenced to state prison. Under these circumstances, it cannot be said the Legislature has seen fit to classify *all* violations of section 243, subdivision (d) as low-level felonies.

Defendant alternatively contends that if he is not eligible to earn credits under the version of section 2933 in effect at the time he was sentenced, equal protection principles require that he receive the benefit of amendments providing for increased conduct credits under section 4019.<sup>19</sup> We recently rejected his claim. (*People v. Ellis* (2012) 207 Cal.App.4th 1546, 1551-1552, petn. for review pending, petn. filed Sept. 12, 2012; see also *People v. Brown* (2012) 54 Cal.4th 314, 323-330.) We see no reason to revisit our reasoning or conclusion in that regard.

Defendant's credits were properly calculated.

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<sup>19</sup> Section 4019 presently states it is the Legislature's intent that a term of four days is deemed served for every two days spent in actual custody. This provision is expressly applicable only to those confined for crimes committed on or after October 1, 2011. (§ 4019, subs. (f), (h) [Stats. 2011, ch. 15, § 482, eff. Apr. 4, 2011, operative Oct. 1, 2011].)

**DISPOSITION**

The judgment is affirmed.

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DETJEN, J.

WE CONCUR:

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WISEMAN, Acting P.J.

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LEVY, J.