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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
SIXTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

RHOLDAN ALCONCEL CABANA,

Defendant and Appellant.

H037076

(Santa Clara County

Super. Ct. No. C1075793)

Defendant pleaded no contest to numerous charges arising from his prosecution for injuring three children and an adult while driving drunk. He challenges the trial court's calculation of presentence conduct credits and its imposition of a booking fee. Both of his claims are without support in the law and we will affirm the judgment.

**PROCEDURAL BACKGROUND**

Defendant pleaded no contest to child endangerment (Pen. Code, § 273a, subd. (a)), driving under the influence of an intoxicant and causing injury to another person (Veh. Code, § 23153, subd. (a)), and driving with a license he knew to be suspended or revoked (*id.*, § 14601.1, subd. (a)). He admitted to a number of enhancements: causing great bodily injury to a child under age five (Pen. Code, § 12022.7, subd. (d)), causing great bodily injury to a person other than an accomplice (*id.*, subd. (a)), injuring multiple people by driving under the influence of an intoxicant (Veh. Code, § 23558), and having a

blood-alcohol concentration greater than 0.15 grams of alcohol per deciliter of blood (*id.*, § 23578; see *id.*, § 23152, subd. (b) [providing the quantitative values in which blood-alcohol concentration is measured]). The trial court sentenced defendant to 13 years and four months in state prison. As relevant here, it imposed a \$129.75 criminal justice administration fee for defendant's jail booking. Also relevant here, it awarded 364 days of custody credit and 54 days of presentence conduct credit under Penal Code section 2933.1.

Of significance to defendant's appeal, the information did not plead that defendant intended to cause great bodily injury under Penal Code section 12022.7, nor did defendant admit that he so intended. The information charged in Count Two, and defendant admitted in his plea, that he "personally inflicted great bodily injury upon Lila Bruno" within the meaning of section 12022.7, subdivision (d), and "personally inflicted great bodily injury upon Christopher Ramirez" within the meaning of section 12022.7, subdivision (a). The language quoted is from the information. It is materially the same as the language the trial court used in taking defendant's plea.

## FACTS

Because defendant pleaded no contest, we take the facts from the probation report. On May 1, 2010, defendant went to a daytime party with his cousin, a friend, and his 13-year-old brother and proceeded to become drunk. He drove away from the festivities with his cousin and brother. Operating the vehicle at high speed, defendant lost control and crashed, injuring a number of victims, most of them children.

Initially, defendant ran over four-year-old Lila Bruno, pinning her underneath the front tire of one of the vehicles involved in the collision. Bruno suffered a left skull fracture and was transported for emergency neurosurgery. She was hospitalized in the intensive care unit at Valley Medical Center before being transferred to a Kaiser hospital in Oakland. There she remained in intensive care for 30 days before being transferred to a regular ward for two days. She returned home, but doctors found that her body had

rejected the metal staples and plates used to repair the damage to her skull. She was readmitted and remained hospitalized for two more months, undergoing more surgery. As of the date of the final probation report, Bruno was awaiting additional surgery, to take place in June of 2011. Her mother reported estimated medical expenses of more than \$1 million, and the family's attorney reported a preliminary figure from Kaiser of \$385,427, which did not include the most recent six months of medical care, including surgery. The attorney agreed with Bruno's mother's million-dollar estimate of eventual medical expenses.

The probation report stated that Lila Bruno "has been required to wear a protective helmet, and is very restricted on her activities. Since there are no plates covering the damage to her skull, her brain in one section is protected only by her scalp. . . . Per her doctor, that area of her head will always be fragile, and her injury will have lifetime effects. [Her mother] has been told that Lila cannot ever play any physical sports . . . for the rest of her life. At school, during recess and lunch time, Lila cannot play in the playground, go on the swings, or use the slides and other play areas like other kids. [She] said, 'All she can do is sit and color while her classmates are out being kids.' " According to her mother, "Lila thinks it's her own fault for being struck by the van [because she was] playing in the front yard."

Also in the initial impact, defendant struck Leslie Manzano, wedging her between his vehicle and another. Manzano, a six-year-old, suffered "moderate lacerations and abrasions, mostly to her right leg," according to the probation report. She has permanent scarring which has left her self-conscious about her appearance. According to her mother, she "does not wear shorts or skirts because other kids tease her about the marks on her leg."

Still out of control, defendant's vehicle then struck 10-year-old Christopher Ramirez and 22-year-old Brandy Sereno. Ramirez was inside a vehicle and Sereno was outside it, removing her 10-month-old child. Both suffered serious injuries. Ramirez,

according to the probation report, “suffered from a completely broken left clavicle, a major laceration to his left ear through the cartilage, which would require surgery to repair, and [a] skull fracture to the base of the skull, resulting in air being trapped at the base of his skull.” Sereno was wedged between defendant’s vehicle and her own. According to the probation report, “she suffered a severely twisted left knee, with swelling and muscle spasms, and a bruised bone on her right shin, with some nerve damage. She was on crutches for about ten days after the incident.”

Brandy Sereno’s husband asked defendant if he was drunk and quoted defendant as replying, “Yea man I’m drunk, I’m drunk!” Defendant “could hardly open his eyes.” Defendant was sufficiently inebriated that San Jose police officers who responded and arrested him could not perform sobriety tests on him at the accident scene.

## DISCUSSION

### I. *Calculation of Presentence Conduct Credits*

Defendant claims that the trial court erroneously calculated his presentence conduct credits on the restricted basis available to violent felons, rather than on the more generous provisions available to nonviolent offenders.

As we will explain, the trial court correctly applied a statute under which defendant is considered a violent felon. Therefore, his claim is without merit.

Together, Penal Code sections 667.5 and 2933.1 impose a limitation on presentence custody credit that a convicted violent felon sentenced to state prison can earn. Credit is limited to 15 percent of the number of days that the prisoner is confined before sentence is pronounced.

To this effect, subdivision (c) of section 2933.1 provides:

“Notwithstanding Section 4019 or any other provision of law, the maximum credit that may be earned against a period of confinement in, or commitment to, a county jail, industrial farm, or road camp, or a city jail, industrial farm, or road camp, following arrest and prior to placement in the custody of the Director of Corrections, shall not

exceed 15 percent of the actual period of confinement for any person specified in subdivision (a) [of section 2933.1].”

In turn, subdivision (a) of Penal Code section 2933.1 refers to certain felons:

“(a) Notwithstanding any other law, any person who is convicted of a felony offense listed in subdivision (c) of Section 667.5 shall accrue no more than 15 percent of worktime credit, as defined in Section 2933.”

Finally, subdivision (c) of Penal Code section 667.5 refers to and defines categories of violent felonies:

“(c) For the purpose of this section, ‘violent felony’ shall mean any of the following:

“[¶] . . . [¶]

“(8) Any felony in which the defendant inflicts great bodily injury on any person other than an accomplice which has been charged and proved as provided for in Section 12022.7, 12022.8, or 12022.9 on or after July 1, 1977 . . . .”

The version of Penal Code section 12022.7 in effect on July 1, 1977, provided that “[a]ny person who, with the intent to inflict such injury, personally inflicts great bodily injury on any person other than an accomplice in the commission or attempted commission of a felony” was to receive a longer prison sentence unless the injury was an element of the substantive offense. (Stats. 1977, ch. 165, § 94, p. 679; see *People v. Escobar* (1992) 3 Cal.4th 740, 747.) At the time of defendant’s crimes and sentencing, however, the Legislature had removed from section 12022.7 the element of intent. Section 12022.7 now reads, as pertinent to the allegations against defendant recited in the information: “(a) Any person who personally inflicts great bodily injury on any person other than an accomplice in the commission of a felony or attempted felony shall be punished by an additional and consecutive term of imprisonment in the state prison for three years. [¶] . . . [¶] (d) Any person who personally inflicts great bodily injury on a child under the age of five years in the commission of a felony or attempted felony shall

be punished by an additional and consecutive term of imprisonment in the state prison for four, five, or six years.”

Although there are other limitations on credits against prison terms (see Pen. Code, §§ 2933.2, 2933.5), for certain people who are not convicted violent felons—and defendant maintains that except for the trial court’s determination he would be one of those people—credit was conferred more generously under the law in effect on the date of defendant’s sentencing, which was April 29, 2011:

“(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, city jail, industrial farm, or road camp from the date of arrest until state prison credits pursuant to this article are applicable to the prisoner.” (Stats. 2010, ch. 426, § 1, p. 2087.)<sup>1</sup>

Defendant relies on a rule of statutory interpretation for statutes that refer to specific other statutes. It is a rule of originalism. In some circumstances, a statute referred to by section number in another statute is deemed to apply in its original form even though the Legislature has later modified it. In other words, when “ ‘a statute

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<sup>1</sup> There were certain limitations on this former allowance, but it is not contended that either applies to defendant. The limitations were:

“A prisoner may not receive the credit specified in paragraph (1) if it appears by the record that the prisoner has refused to satisfactorily perform labor as assigned by, or has not satisfactorily complied with the reasonable rules and regulations established by, the sheriff, chief of police, or superintendent of an industrial farm or road camp.” (Pen. Code, § 2933, former subd. (e)(2); Stats. 2010, ch. 426, § 1, p. 2087.)

“Section 4019, and not this subdivision, shall apply if the prisoner is required to register as a sex offender, pursuant to Chapter 5.5 (commencing with Section 290), was committed for a serious felony, as defined in Section 1192.7, or has a prior conviction for a serious felony, as defined in Section 1192.7, or a violent felony, as defined in Section 667.5.” (Pen. Code, § 2933, former subd. (e)(3); Stats. 2010, ch. 426, § 1, p. 2087.)

adopts by specific reference the provisions of another statute, regulation, or ordinance, such provisions are incorporated in the form in which they exist at the time of the reference and not as subsequently modified.’” (*Palermo v. Stockton Theatres, Inc.* (1948) 32 Cal.2d 53, 58-59 (*Palermo*)). This rule of statutory construction is limited by a proviso, also found in *Palermo*, that when “ ‘the reference is general instead of specific, such as a reference to a system or body of laws or to the general law relating to the subject in hand, the referring statute takes the law or laws referred to not only in their contemporary form, but also as they may be changed from time to time . . . .’ ” (*Id.* at p. 59.)

This rule of originalism is, however, only the initial word in this area. Ultimately, it yields to the overarching legislative intent. “[W]hen the statutory words themselves ‘do not make clear whether [the statute] contemplates only a time-specific incorporation, “the determining factor will be . . . legislative intent . . . .’ ”” (*People v. Anderson* (2002) 28 Cal.4th 767, 779.)

Because subdivision (c)(8) of Penal Code section 667.5 does contain a time-specific incorporation, we are not forced to rely on secondary indicators of legislative intent (although we will discuss them in the next paragraph). Violent felonies include those “provided for in Section 12022.7, 12022.8, or 12022.9 on or after July 1, 1977 . . . .” The clause *on or after* means any version of Penal Code section 12022.7 to the present day.

That legislative language alone shows defendant’s claim to be without merit. Moreover, the legislative history is against him. Although defendant insists otherwise, his point has effectively been rejected in *People v. Van Buren* (2001) 93 Cal.App.4th 875 (*Van Buren*), disapproved on another ground in *People v. Mosby* (2004) 33 Cal.4th 353, 365, footnote 3, which, after extended consideration of the relevant legislative history (*id.* at pp. 880-881), found a legislative intent that “section 2933.1 was intended to apply generally to felonies listed in section 667.5, subdivision (c), as that subdivision is

amended from time to time” (*id.* at p. 880) and that “[t]he legislative history of section 2933.1 confirms that the Legislature was considering crimes of violence as a category of offense which may evolve over time.” (*Ibid.*) Accordingly, *Van Buren* “decide[d] that [Penal Code] section 2933.1 incorporates subsequent amendments to section 667.5, not only the version in effect when section 2933.1 was enacted.” (*Id.* at p. 877.)

“[C]onclud[ing] that section 2933.1 incorporated the contemporaneous version of section 667.5, subdivision (c), along with subsequent amendments” (*id.* at pp. 878-879), the court held that “[s]ince Van Buren’s . . . offense occurred after the effective date of [later legislation amending section 667.5], his custody credits are subject to the section 2933.1 limitation.” (*Id.* at p. 880.) The fact that the later legislation did not amend Penal Code section 2933.1 was immaterial. (See *id.* at pp. 878-879.)

Here, to be sure, we are concerned with a third statute, namely Penal Code section 12022.7. But that is a distinction that makes no difference to the general conclusions in *Van Buren, supra*, 93 Cal.App.4th 875. The main point is that “[t]he legislative history of section 2933.1 confirms that the Legislature was considering crimes of violence as a category of offense which may evolve over time.” (*Id.* at p. 880.) That conclusion applies to changes in Penal Code section 12022.7. Defendant quibbles with certain aspects of *Van Buren* in his reply brief, but even if he is correct about them, they do not detract from the foregoing general principle.

We have also considered recent California Supreme Court cases that discuss the rule (and its limitation) set forth in *Palermo, supra*, 32 Cal.2d 53. (*People v. Hernandez* (2003) 30 Cal.4th 835, 864-868; *People v. Anderson, supra*, 28 Cal.4th at p. 779; *In re Jovan B.* (1993) 6 Cal.4th 801, 815-819.) Nothing in those cases contravenes *Van Buren*’s conclusion, and one passage in particular militates against the theme of defendant’s arguments: “As we have seen, section 1170.1, subdivision (a) sets forth the [Determinate Sentencing Act’s] basic scheme for consecutive adult felony sentences. ¶¶ Thus, in the language of *Palermo, supra*, 32 Cal.2d 53, 58-59, Welfare and Institutions

Code section 726's reference to Penal Code sections 1170, subdivision (a)(2) and 1170.1, subdivision (a) is not a 'specific reference [to] the provisions of another statute,' but rather is a 'general' reference 'to a system or body of laws.' Penal Code sections 1170, subdivision (a)(2) and 1170.1, subdivision (a), the sections to which Welfare and Institutions Code section 726 refers, serve that systematic purpose in the DSA; they state the central, fundamental principles by which all DSA sentences are to be computed." (*In re Jovan B.*, *supra*, 6 Cal.4th at pp. 818-819.)

*In re Jovan B.* reached this conclusion even though, as accurately described in *Van Buren*, "*In re Jovan B.* concerns the incorporation of two statutes, Penal Code sections 1170, subdivision (a)(2), and 1170.1, subdivision (a), into Welfare and Institutions Code section 726. Although it was by a specific rather than a general reference, the Supreme Court found that the incorporation was of a 'system or body of laws' concerning determinate sentencing and included later amendments to those sentencing statutes." (*Van Buren*, *supra*, 93 Cal.App.4th at p. 879; see *In re Jovan B.*, *supra*, 6 Cal.4th at p. 810 [quoting the Welfare and Institutions Code section and its specific and enumerated references to Penal Code sections].) Similarly, Penal Code section 2933.1 "is an expression of the Legislature's desire to delay the parole of violent felons, a common purpose it shares with section 667.5, subdivision (c) . . . ." (*Van Buren*, *supra*, 93 Cal.App.4th at p. 880.)

We glean from the three foregoing Supreme Court cases that, except for *People v. Anderson*, *supra*, 28 Cal.4th at page 779, our Supreme Court has been reluctant to extend *Palermo*'s technical rule beyond strict limits and, even in *Anderson*, has relied wholly or in part on more general principles of legislative intent. (See *In re Jovan B.*, *supra*, 6 Cal.4th at p. 816, fn. 10 ["Several modern decisions have applied the *Palermo* rule, but none have done so without regard to other indicia of legislative intent."].)

Defendant points out the apparent anomaly that someone convicted of a vehicular intoxication offense resulting in death is not treated as a violent felon and that it is

questionable that the Legislature should intend that he be, given that he did not kill anyone. We quote from defendant's opening brief:

“The only homicide offenses that have ever been included as violent felonies under section 667.5(c) are murder and voluntary manslaughter; neither gross vehicular manslaughter while intoxicated[ ] nor vehicular manslaughter while intoxicated have ever been so defined. [Citations.] . . . [¶] Appellant was convicted of violating Vehicle Code section 23153, a lesser offense included within gross vehicular manslaughter while intoxicated. (*People v. Miranda* (1994) 21 Cal.App.4th 1464, 1467-1468.) It would be incongruous if a defendant who drives while intoxicated in violation of section 23153 and unintentionally inflicts great bodily injury on a victim commits a violent felony, while one who drives while intoxicated in violation of the same law and unintentionally kills someone does not. [Citation.] Construing section 667.5(c)(8) to incorporate the 1977 version of section 12022.7, and require an intent to injure, is the only way to harmonize these statutes without absurd results.”

Defendant expects too much of the Legislature, which is tasked with maintaining an extremely complex body of criminal law. Because of the law's labyrinthine complexity, with layers added by many decades of legislative enactments and amendments, in addition to decisions of the United States Supreme Court, the California Supreme Court, the Courts of Appeal, and the appellate division of the Superior Court, the Penal Code does not operate with the neatness of a Rubik's Cube, endlessly manipulable while maintaining the same external shape after each operation. Instead, it reaches sentencing results by a large number of methods and looks to a sufficient equivalence in outcomes as to not shock the conscience of the legislators, the courts, or the public. The effect of treating defendant as a violent felon is to deny him some months of conduct credit. His total sentence is 13 years and four months for injuring three young children and an adult, some of them seriously, leaving one child to face a lifetime of medical care and disability, and whose medical care costs alone are estimated to

approximate \$1 million. By contrast, individuals who commit gross vehicular manslaughter while intoxicated may be punished by 15 years' to life imprisonment if they have one prior driving-under-the-influence conviction. (Pen. Code, § 191.5, subd. (c)(1).) Even with a clean record, they can receive 10 years' imprisonment. (*Id.*, subd. (a).) To be sure, with no gross negligence, the sentence is at most four years' imprisonment (*id.*, subd. (c)(2)), but such disparities are generally left to the legislators' sound judgment—our Supreme Court has “rejected the notion that strict scrutiny applies whenever a statutory classification would subject a person to a greater period of incarceration” (*People v. McKee* (2010) 47 Cal.4th 1172, 1223)—and certainly cannot be called absurd or anomalous in this case. “ “[I]t is one thing to hold, as did [*People v. Olivas* (1976) 17 Cal.3d 236] that persons convicted of the *same crime* cannot be treated differently. It is quite another to hold that persons convicted of *different crimes* must be treated equally.” ’ ’ ” (*People v. Barrera* (1993) 14 Cal.App.4th 1555, 1565; compare *Olivas, supra*, at pp. 239, 256-257.)

For the foregoing reasons, we find no support in the law for defendant's claim to enhanced presentence conduct credits.

## II. *Booking Fee*

Defendant claims that the trial court erroneously ordered him to pay any booking fee that might eventually be assessed under Government Code section 29550 et seq. without determining that he has the ability to pay it. He asks that we strike the fee. However, the law that applies when a City of San Jose police officer arrests a suspect, as happened with defendant contains no such requirement.

A booking fee is a criminal justice administration fee. (See Gov. Code, § 29550, subds. (a)(1), (c).) The trial court imposed the fee as part of the judgment. Government Code section 29550.1 provides: “Any city . . . whose officer or agent arrests a person is entitled to recover any criminal justice administration fee imposed by a county from the arrested person if the person is convicted of any criminal offense related to the arrest. A

judgment of conviction shall contain an order for payment of the amount of the criminal justice administration fee by the convicted person, and execution shall be issued on the order in the same manner as a judgment in a civil action, but the order shall not be enforceable by contempt. The court shall, as a condition of probation, order the convicted person to reimburse the city . . . for the criminal justice administration fee.” In addition, Government Code section 29550 provides: “(d) When the court has been notified in a manner specified by the court that a criminal justice administration fee is due the agency: [¶] (1) A judgment of conviction may impose an order for payment of the amount of the criminal justice administration fee by the convicted person, and execution may be issued on the order in the same manner as a judgment in a civil action, but shall not be enforceable by contempt.” Neither statute requires a court to determine the defendant’s ability to pay these administrative costs. Therefore, defendant’s claim is unavailing.

#### DISPOSITION

The judgment is affirmed.

Duffy, J.\*

WE CONCUR:

Bamattre-Manoukian, Acting P. J.

Mihara, J.

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\* Retired Associate Justice of the Court of Appeal, Sixth Appellate District, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.