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

THE PEOPLE,

Plaintiff and Respondent,

v.

MINH NGOC NGUYEN,

Defendant and Appellant.

H037951

(Santa Clara County

Super. Ct. No. CC950550)

Defendant Minh Ngoc Nguyen falsely reported to police and to his insurance company that his leased 2004 Mercedes Benz SL500 had been stolen when he went into a store to buy cigarettes. His insurance company eventually paid \$55,573.39 on this reported loss. But the Mercedes Benz was not stolen as reported. Instead, it was in the possession of someone to whom Nguyen had willingly delivered the vehicle as security in a business deal that went bad. Nguyen was arrested and charged with crimes related to his false reports to the police and to his insurance company.

A jury convicted Nguyen of one count of presenting a false or fraudulent insurance claim in violation of Penal Code¹ section 550, subdivision (a)(1), a felony, and one count of making a false report of vehicle theft in violation of Vehicle Code section

¹ Further unspecified statutory references are to the Penal Code.

10501, subdivision (a), a misdemeanor. After the verdict, the trial court found a prior strike allegation true. At sentencing, the court granted Nguyen's *Romero*² motion to strike the prior conviction and sentenced him to the low term of two years on the felony count. The court also imposed a 146-day jail term for the misdemeanor conviction, deemed satisfied with credit for time served. Nguyen was awarded 146 days of pre-sentence credit, consisting of 98 actual days and 48 days of conduct credit under section 4019.

On appeal, Nguyen contends with respect to the conviction for making a false insurance claim that the court erred by giving a jury instruction concerning confessions and admissions. He admits to testifying at trial that he lied about the circumstances of his car having been stolen, but he contends that he never acknowledged having the specific intent to defraud the insurance company—an element of the crime—so, he argues, he never made a confession. Thus, he contends, the portion of the instruction dealing with confessions was not applicable to his case and its inclusion in the jury instructions effectively and improperly reduced the prosecution's burden of proof to convict him. He also contends that the false-vehicle-theft-report charge was prosecuted beyond the applicable statute of limitations set out in sections 802, subdivision (a) and 803, subdivision (b). And, finally, he contends that he is entitled on equal protection grounds to a higher rate of conduct credits under legislative changes to section 4019, effective October 1, 2011.

Respondent concedes that the misdemeanor conviction under Vehicle Code section 10501 for false vehicle-theft report is time barred, and we accept that concession. But Nguyen's other contentions have no merit; therefore, we will set aside the conviction

² *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497.

on count two for making a false report of vehicle theft in violation of Vehicle Code section 10501 but will otherwise affirm the judgment.

STATEMENT OF THE CASE

I. *Factual Background*

Nguyen drove a leased 2004 Mercedes Benz SL500. He had arranged for his friend, Minh Ly, to lease the car and co-sign a finance agreement. But it was Nguyen who drove the car and paid all expenses related to it, including auto insurance coverage that he obtained from Farmers Insurance.

On July 25, 2007, Nguyen entered into a written contract with G2Sources, Inc., a Chinese export trading company whose president was Ge Bao Lin. G2Sources's primary business involved exportation of vehicles. The contract provided that G2Sources would "deposit" \$40,000 with Nguyen "as an initial good faith security deposit" and Nguyen would procure 10 Mercedes Benz model GL450 cars for G2Sources. Then, within two weeks, G2Sources would buy the vehicles, with delivery to the Port of Oakland from where they would presumably be shipped to China for resale. Nguyen was to use the \$40,000 to make deposits toward G2Source's purchase of the cars, but G2Sources would actually buy the cars by paying the full "sticker price." There was a margin between the sticker price and the price Nguyen would negotiate with the seller, which would yield a form of commission to Nguyen on each sale. As a "good faith security commitment," Nguyen was to "deposit his 2004 Mercedes Benz SL500" with G2Sources, which would "return the car to [Nguyen] once" the 10 transactions were completed. Nguyen deposited the \$40,000 in his bank account and left his car as security for his performance with Ge Bao Lin, who drove the car to his home in Saratoga where it remained.

According to Nguyen, he located the cars and arranged for their purchase but G2Sources refused to follow through with the transactions. According to Ge Bao Lin, G2Sources was prepared to follow through with the contract but Nguyen failed in his

obligation to arrange for its purchase of the vehicles. In any event, none of the contemplated vehicle sales took place. As a result, Nguyen and G2Sources entered into a second written contract on October 16, 2007. This contract acknowledged that because of the prior failed contract, there was “no business between G2 and [Nguyen]” and it provided for Nguyen to return G2Sources’s \$40,000 by cashier’s check by November 5, 2007, with a \$500 per day penalty thereafter for every day that the \$40,000 was not paid. G2Sources agreed to “return [Nguyen’s] car . . . once the payment is clear.”

According to Ge Bao Lin, Nguyen did not return G2Sources’s \$40,000, so Nguyen’s car was not returned to him. According to Nguyen, in early 2008, he asked for his car to be returned but Ge Bao Lin refused to even show him the car to prove that it was still in G2Sources’s possession, causing Nguyen to fear that the car would not be returned to him once he repaid the money. He further came to believe, falsely, that Ge Bao Lin had already shipped his car to China for resale there, and that he would never see the car again. He accordingly kept the \$40,000.

On February 4, 2008, Nguyen told his friend Minh Ly, the car’s co-lessee, that the Mercedes had been stolen, and he asked for and received Minh Ly’s assistance in reporting the theft. Nguyen told Minh Ly and police that he had that day left the car parked and running in a shopping mall parking lot on Stevens Creek Boulevard in Saratoga while he went into a store to buy cigarettes, and when he came out, the car was gone. According to Nguyen, he involved police because he thought they may be able to locate the car as it was equipped with a GPS device. The next day, Nguyen contacted his agent with Farmers Insurance and reported the car stolen, telling the same false story about the theft that he had told police. Nguyen made a recorded statement to Farmers about the loss and filled out an insurance proof-of-loss claim form on February 12, 2008, signing it under penalty of perjury. He also signed all other documents requested by Farmers as part of the claim. By March 2008, he had negotiated the amount of the

ultimate insurance settlement paid by Farmers on the loss. Although Nguyen asked that the full settlement be paid to him so he could, in turn, pay the lienholder, Farmers informed him that this was not possible. Settlement of the claim was finally composed of a \$49,794.18 payment by Farmers to the lienholder and another payment of \$5,879.21 directly to Nguyen, for a total pay out of \$55,573.39.

Farmers Insurance ultimately determined that the claim was fraudulent, and reported it to police. In November 2008, police recovered Nguyen's car at Ge Bao Lin's residence in Saratoga, and Farmers Insurance received salvage value for it—\$15,000. Nguyen was arrested in July 2009. He testified at trial that he actually believed the car had been stolen from him by Ge Bao Lin, but he was afraid police would suspect his own conspiratorial involvement in the theft if he told the true facts surrounding it. He therefore lied about these circumstances, both to police and to Farmers Insurance, and ultimately admitted doing so.

II. *Procedural Background*

Nguyen was first charged by felony complaint on July 28, 2009. After he was bound over for trial, the People filed an information on November 18, 2010. An amended information was filed at trial on November 1, 2011, charging Nguyen with one count of presenting a false or fraudulent insurance claim in violation of section 550, subdivision (a)(1) (count 1), and one count of making a false report of vehicle theft in violation of Vehicle Code section 10501, subdivision (a)(2), a misdemeanor (count 2).³ The amended information further alleged that Nguyen had a prior strike conviction within the meaning of sections 667, subdivisions (b) through (i) and 1170.12, subdivision (c).

On November 7, 2011, a jury convicted Nguyen on both counts. The trial court later found the enhancement allegation true. On February 10, 2012, the court granted

³ This is the first time the Vehicle Code section 10501, subdivision (a)(2) violation was charged.

Nguyen's oral *Romero* motion to strike the prior conviction in the interests of justice and sentenced him to the low term of two years on count one. The court imposed a concurrent 146-day jail term on the misdemeanor count two, this sentence deemed satisfied with credit for time served. He was awarded a total of 146 days of pre-sentence credit, consisting of 98 actual days plus 48 days of conduct credit under section 4019. Among other fines and fees, he was ordered to pay restitution to Farmers Insurance in the amount of \$34,712.39, after credit for the salvage value Farmers had received for the car. Nguyen timely appealed.

DISCUSSION

I. *The Misdemeanor Conviction is Barred by the Statute of Limitations*

Nguyen raises four independent challenges to his misdemeanor conviction under Vehicle Code section 10501, subdivision (a), false report of vehicle theft. Among these challenges is the contention that the conviction cannot stand because it was obtained in violation of the one-year statute of limitations set out for misdemeanors in sections 802, subdivision (a) and 803, subdivision (b). The crime occurred on February 4, 2008, when Nguyen reported to police the false story of his car being stolen, and it was not charged until November 1, 2011, by amended information.⁴ Respondent concedes that the charge

⁴ Respondent suggests that the pleading amendments surrounding the charge took place in the wake of *People v. Murphy* (2011) 52 Cal.4th 81, filed in July 2011. This case held that the filing of a false vehicle-theft report, conduct which would also violate the more general felony statute set out at section 115—procuring or offering a false or forged instrument for record—is to be prosecuted under the more specific statute embodied at Vehicle Code section 10501. (*Id.* at pp. 82-87.) Here, earlier pleadings, similarly not filed within a year from the alleged crime, alleged a felony violation of section 115 but this charge was dropped at trial in favor of the newly charged misdemeanor Vehicle Code violation. The record does not elucidate the reasons for these pleading amendments.

and conviction are barred by the statute of limitations. We accept the concession and will reverse the Vehicle Code section 10501, subdivision (a) misdemeanor conviction.⁵

II. *There Was No Prejudicial Error Arising From CALJIC No. 2.70*

Nguyen admitted while testifying at trial that he had lied to his insurance company by reporting that his car was stolen from a shopping center parking lot on February 4, 2008, and submitting a claim to his insurer based on this false scenario. He maintained that he lied, at least to police with the same story, because though he honestly believed that his car had been stolen by Ge Bao Lin, he feared that revealing his own involvement in the true circumstances of his parting with the car would implicate him in a conspiracy.

Among the jury instructions given, without objection and by agreement, was CALJIC No. 2.70, which defines a confession and an admission, and advises caution in the consideration of such statements made out of court.⁶ Nguyen contends that his testimony acknowledging that he had lied about the facts surrounding the theft of his car did not constitute a full confession of guilt for the crime because he never acknowledged having the specific intent to defraud, a required element of making a false insurance claim under section 550.⁷ Thus, he contends, the trial court erred by giving this

⁵ This disposition moots Nguyen's other challenges to the misdemeanor conviction and we accordingly will not address them.

⁶ The instruction stated: "A confession is a statement made by a defendant in which he has acknowledged his guilt of the crimes for which he is on trial. In order to constitute a confession, the statement must acknowledge participation in the crimes as well as the required criminal intent state of mind. [¶] An admission is a statement made by a defendant which does not by itself acknowledge his guilt of the crimes for which the defendant is on trial, but which statement tends to prove his guilt when considered with the rest of the evidence. [¶] You are the exclusive judges as to whether the defendant made a confession or an admission, and if so, whether that statement is true in whole or in part. [¶] Evidence of an oral confession or admission of the defendant not contained in an audio or video recording and not made in court should be viewed with caution."

⁷ For reference, his testimony when questioned by the prosecutor on cross-examination went as follows: "Q. You admit that you lied to Farmers agent Kevin
(continued)

instruction to the extent it addressed confessions because it “allowed the jury to convict . . . based solely on his testimony and without an independent inquiry into whether he had the specific intent to defraud,” reducing the burden of proof.⁸

Respondent contends that this claim of error, raised for the first time on appeal, has been forfeited, as defense counsel below agreed to the instruction, so the doctrine of invited error bars this claim.⁹ Nguyen counters that he did not forfeit this claim because the doctrine of invited error only bars a claim of instructional error when defense counsel has offered a deliberate tactical purpose for acceding to the instruction challenged on appeal, citing *People v. Valdez* (2004) 32 Cal.4th 73, 115 [invited error found only where counsel expresses a deliberate tactical purpose relating to the complained-of instruction]. He further cites section 1259, which permits an appellate court to “review any instruction given, refused or modified, even though no objection was made thereto in the lower court, if the substantial rights of the defendant were affected thereby.”

Given that the record does not disclose an expressed tactical purpose for defense counsel’s agreement to CALJIC No. 2.70 in the court below, we will exercise our discretion to review the claim of error. Moreover, “[t]he inclusion of irrelevant language in an instruction implicates the trial court’s duty to give only correct and pertinent

Truong; correct? A. Yes. Q. You admit that you lied to the Farmers Insurance agents when you filed your claim and told them the same story [about the car being stolen from a shopping center parking lot] you [had] told Officer Sanchez; correct? A. Yes. Q. You admit that you lied on the . . . proof of loss form that you signed and submitted to the insurance company; isn’t that correct? A. Yes.”

⁸ Nguyen does not appear to focus on any other evidence that might constitute a confession or an admission. Our review of the record does not reveal any out-of-court statements by Nguyen that were offered at trial as evidence of a confession or admission.

⁹ “The doctrine of invited error is designed to prevent an accused from gaining a reversal on appeal because of an error made by the trial court at his behest. If defense counsel intentionally caused the trial court to err, the appellant cannot be heard to complain on appeal.” (*People v. Bunyard* (1988) 45 Cal.3d 1189, 1234.)

instructions responsive to the evidence. [Citation.] Therefore, defendant may properly raise this claim despite his failure to challenge the instruction below.” (*People v. Farley* (1996) 45 Cal.App.4th 1697, 1712.)

We determine the correctness of a particular instruction by viewing the jury instructions as a whole. (*People v. Wilson* (1992) 3 Cal.4th 926, 943.) “ ‘It is well established in California that the correctness of jury instructions is to be determined from the entire charge of the court, not from a consideration of parts of an instruction or from a particular instruction.’ ” (*People v. Bolin* (1998) 18 Cal.4th 297, 328.)

In addition to CALJIC No. 2.70 defining a confession and an admission, the jury was instructed on: 1) CALJIC No. 2.00 concerning direct and circumstantial evidence and inferences; 2) CALJIC No. 2.01 concerning the sufficiency of circumstantial evidence; 3) CALJIC No. 2.72 concerning the presumption of innocence and the definition of reasonable doubt; 4) CALJIC No. 3.31 concerning the concurrence of act and specific intent; 5) the allegations of the information that Nguyen presented a false or fraudulent insurance claim in violation of section 550, subdivision (a)(1), which included that he “did knowingly present and cause to be presented, a false and fraudulent claim for the payment of a loss,” under an insurance policy; 6) proof of the elements of the crime required for a conviction, which included that Nguyen must have knowingly presented or caused to be presented a false or fraudulent claim for the payment of a loss or injury, including under a policy of insurance, and that he must have acted with the specific intent to defraud; 7) CALJIC No. 15.26 defining intent to defraud;¹⁰ and CALJIC No. 17.31 on not all instructions being applicable, depending on what the jury found to be the facts.

¹⁰ The instruction stated, “An intent to defraud is an intent to deceive another person for the purpose of gaining some material advantage over that person or to induce that person to part with property or to alter that person’s position to his injury or risk, and to accomplish that purpose by some false statement, false representation of fact, wrongful concealment or suppression of truth, or by any other artifice or act designed to deceive.”

As a threshold matter, the language of CALJIC No. 2.70 did not direct the jury that Nguyen's statements while testifying amounted to a confession. Nor did it imply this conclusion. Instead, the instruction simply defined what is meant by a confession and an admission, and it clearly informed the jury that it was exclusively for them to decide if Nguyen had made either. If so, it further instructed the jury to decide whether his statements were true. The jury was equipped to properly perform this task, having been instructed regarding the elements of a section 550 violation and having been explicitly instructed that proof of specific intent to defraud, as defined, was necessary for a conviction. Further, because CALJIC No. 17.31 was also given, the jury was directed to disregard any instruction that did not apply to the facts the jury determined to be true. We presume the jury followed the instructions it was given. (*People v. Horton* (1995) 11 Cal.4th 1068, 1121.) But even if the instruction—given without excising the portions dealing with a confession—was erroneous, Nguyen was not prejudiced by any such error. The jury could have relied on circumstantial evidence, outside of Nguyen's testimony, of his specific intent to defraud. (*People v. Turley* (1953) 119 Cal.App.2d 632, 635 [intent to defraud in the presentation of proof of loss to insurer may be proven by surrounding circumstances].) Thus, he cannot show that it is reasonably probable the jury would have reached a more favorable verdict without that instruction, as given.¹¹ (*People v. Watson* (1956) 46 Cal.2d 818, 836.)

But more importantly, the jury could properly have found that Nguyen's testimony did amount to a full confession of guilt with respect to count one alleging a violation of section 550, subdivision (a). As noted, a conviction under this section requires proof that a person knowingly presented a false claim for the payment for the payment of a loss or

¹¹ This would have meant, in effect, giving CALJIC No. 2.71 instead. This instruction is a similar cautionary instruction but it deals with admissions alone.

injury, including under a contract of insurance, and that the person acted with specific intent to defraud.¹² But a person necessarily acts with specific intent to defraud when he presents information he knows to be false with the intent that the insurance company rely upon it to settle his claim. (*Dieguez, supra*, 89 Cal.App.4th at p. 279; *People v. Booth* (1996) 48 Cal.App.4th 1247, 1254, fn. 3.) “The courts have held that ‘the intent to defraud the insurer is necessarily implied when the misrepresentation is material and the insured willfully makes it with knowledge of its falsity. [Citation.] ‘One who willfully submits a claim, knowing it to be false, necessarily does so with intent to defraud.’ [Citation.]” (*Dieguez, supra*, 89 Cal.App.4th at p. 279.) Accordingly, the jury could properly have found that Nguyen’s testimony in which he admitted lying to Farmers Insurance in his proof of loss amounted to a confession. This is so even without any express reference in Nguyen’s testimony of his intent to defraud and notwithstanding his proffered reasons for having presented the false claim, which the jury was free to disbelieve.¹³ This being the case, the language of CALJIC No. 2.70 concerning

¹² The statute itself does not mention the requirement of specific intent to defraud. But a “specific intent to defraud may be an implied element in a criminal statute making unlawful certain false or fraudulent claims, where the statute in question omits any other element of intent.” (*People v. Dieguez* (2001) 89 Cal.App.4th 266, 279 (*Dieguez*), specifically referring to § 550.)

¹³ There is case law that might suggest that CALJIC No. 2.70, the purpose of which is to “ ‘assist the jury in determining if the statement was in fact made’ ” (*People v. Carpenter* (1997) 15 Cal.4th 312, 393, superseded on another ground as stated in *Verdin v. Superior Court* (2008) 43 Cal.4th 1096, 1106, superseded by statute on another ground as stated in *Sharp v. Superior Court* (2012) 54 Cal.4th 172, 174), is a cautionary instruction to be used only with respect to pretrial, out-of-court confessions or admissions as opposed to testimony in court. (See, e.g., *People v. Slaughter* (2002) 27 Cal.4th 1187, 1200; *People v. Beagle* (1972) 6 Cal.3d 441, 456, reversed on another ground in *People v. Castro* (1985) 38 Cal.3d 301.) But the instruction on its face cannot be so narrowly read, though it is error to give it when the defendant’s out-of-court statements were tape-recorded. (*People v. Mayfield* (1997) 14 Cal.4th 668, 776.) We need not resolve the
(continued)

confessions was applicable, undermining Nguyen's claim of error. Indeed, when there is evidence of statements by a defendant that could be construed as an admission or confession, the trial court has a sua sponte duty to give this instruction. (*People v. Marks* (1988) 45 Cal.3d 1335, 1346.)

For the above reasons, we conclude that Nguyen has failed to show error, let alone prejudicial error, in the giving of CALJIC No. 2.70.

III. *Defendant is Not Entitled to Additional Conduct Credits*

Nguyen contends that principles of equal protection entitle him to additional conduct credits. His contention is that the statutory changes to section 4019, expressly operative October 1, 2011, apply retroactively, in effect, so as to entitle him to one-for-one conduct credits under the current version of section 4019 rather than the two-for-four credits he was awarded. We recently rejected this very contention in *People v. Kennedy* (2012) 209 Cal.App.4th 385 (*Kennedy*).

A criminal defendant is entitled to accrue both actual pre-sentence custody credits under section 2900.5 and conduct credits under section 4019 for the period of incarceration prior to sentencing. Additional conduct credits may be earned under section 4019 by performing additional labor (§ 4019, subd. (b)) and by a prisoner's good behavior. (§ 4019, subd. (c).) In both instances, the section 4019 credits are collectively referred to as conduct credits. (*People v. Dieck* (2009) 46 Cal.4th 934, 939, fn. 3.) The court is charged with awarding such credits at sentencing. (§ 2900.5, subd. (a).)

As we observed in *Kennedy*, "Before January 25, 2010, conduct credits under Penal Code section 4019 could be accrued at the rate of two days for every four days of actual time served in pre-sentence custody. [Citation.] Effective January 25, 2010, the Legislature amended Penal Code section 4019 in an extraordinary session to address the

question of the instruction's applicability to testimony in court as Nguyen does not raise it in this case.

state's ongoing fiscal crisis.” (*Kennedy, supra*, 209 Cal.App.4th at p. 395.) Among other things, then-amended section 4019 provided that defendants could accrue custody credits at the rate of two days for every two days actually served, twice the rate as before except for those defendants required to register as a sex offender, those committed for a serious felony (as defined in § 1192.7), or those who had a prior conviction for a violent or serious felony (*Kennedy, supra*, at p. 395.)

Effective September 28, 2010, section 4019 was amended again to restore the presentence conduct credit calculation that had been in effect prior to the January 2010 amendments, eliminating one-for-one credits (hereafter the September 2010 amendment). By its express terms, the newly created subdivision (g), declared these amendments applicable only to inmates confined for a crime committed on or after that date, expressing legislative intent that they have prospective application only. (*Kennedy, supra*, at p. 395.)

The Legislature later again amended section 4019. “These statutory changes, among other things, reinstated one-for-one conduct credits and made this change applicable to crimes committed on or after October 1, 2011, the operative date of the amendments, expressing legislative intent for prospective application only. [Citation]” (*Kennedy, supra*, at pp. 395-396.)

Notwithstanding the express legislative intent that the changes to section 4019, operative October 1, 2011 (hereafter the 2011 amendment), are to have prospective application only, Nguyen contends, on equal protection grounds,¹⁴ that he is entitled to the reinstated one-for-one conduct credits implemented by those changes. He argues that *In re Kapperman* (1974) 11 Cal.3d 542, 544-545 (*Kapperman*) compels this result.

¹⁴ To succeed on an equal protection claim, one must first show that the state has adopted a classification that affects two or more similarly situated groups in an unequal manner. (*People v. Wilkinson* (2004) 33 Cal.4th 821, 836-837.)

But we dispensed with this claim in *Kennedy* following the Supreme Court’s recent decision in *People v. Brown* (2012) 54 Cal.4th 314, 330 (*Brown*).

“In *Kapperman*, the Supreme Court reviewed a provision (then-new Penal Code section 2900.5) that made actual custody credits prospective, applying only to persons delivered to the Department of Corrections after the effective date of the legislation. (*Kapperman, supra*, 11 Cal.3d at pp. 544-545.) The court concluded that this limitation violated equal protection because there was no legitimate purpose to be served by excluding those already sentenced, and extended the benefits retroactively to those improperly excluded by the Legislature. (*Id.* at p. 545.) In our view, *Kapperman* is distinguishable from the instant case because it addressed *actual* custody credits, not *conduct* credits. Conduct credits must be earned by a defendant, whereas custody credits are constitutionally required and awarded automatically on the basis of time served.” (*Kennedy, supra*, at p. 396.)

As we noted in *Kennedy* and as our Supreme Court recently confirmed in *Brown*, “ ‘[c]redit for time served is given without regard to behavior, and thus does not entail the paradoxical consequences of applying a statute intended to create incentives for good behavior. *Kapperman* does not hold or suggest that prisoners serving time before and after the effective date of a statute authorizing *conduct* credits are similarly situated.’ (*Brown, supra*, 54 Cal.4th at p. 330.)” (*Kennedy, supra*, at p. 396.)

Although the Supreme Court in *Brown* focused on the January 2010 amendment to section 4019 (*Brown, supra*, 54 Cal.4th at p. 318), *Brown*’s reasoning applies with equal force to the prospective-only application of the current version of section 4019. “In rejecting the defendant’s argument that the January 2010 amendments to section 4019 should apply retroactively, the California Supreme Court explained ‘the important correctional purposes of a statute authorizing incentives for good behavior [citation] are not served by rewarding prisoners who served time before the incentives took effect and

thus could not have modified their behavior in response. That prisoners who served time before and after former section 4019 took effect are not similarly situated necessarily follows.’ (*Brown, supra*, at pp. 328-329.)” (*Kennedy, supra*, at pp. 396-397.)

As in *Kennedy* and *Brown*, we also reject Nguyen’s reliance on *People ex rel. Carroll v. Frye* (1966) 35 Ill.2d 604. That case “dealt with actual custody, and not presentence conduct credits with which we are concerned here. Moreover, the date that was considered potentially arbitrary or fortuitous in the equal protection analysis . . . was the date of conviction, a date out of a defendant’s control, and not the date the crime was committed. [Citation.]” (*Kennedy, supra*, at p. 397.)

Even if we were to agree that during the period of time that Nguyen was in presentence custody after October 1, 2011, “he was similarly situated to other defendants who committed their crimes after October 1, and . . . where, as here, the statutory distinction at issue neither ‘touch[es] upon fundamental interests’ nor is based on gender, there is no equal protection violation ‘if the challenged classification bears a rational relationship to a legitimate state purpose. [Citations.]’ [Citations.] Under the rational relationship test, ‘ ‘ ‘ ‘ ‘a statutory classification that neither proceeds along suspect lines nor infringes fundamental constitutional rights must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification. [Citations.] Where there are “plausible reasons” for [the classification], “our inquiry is at an end.’ ” ’ ” ’ [Citation.]” (*Kennedy, supra*, at p. 397.)

As in *Kennedy*, we perceive such a plausible reason in this case as to the period of time Nguyen was in custody after October 1, 2011. “ ‘[S]tatutes lessening the *punishment* for a particular offense’ may be made prospective only without offending equal protection principles. [Citation.] In *Kapperman*, the court wrote that the Legislature may rationally adopt such an approach, ‘to assure that penal laws will

maintain their desired deterrent effect by carrying out the original prescribed punishment as written.’ [Citation.]” (*Kennedy, supra*, at p. 398, fn. omitted.)

“In *People v. Floyd* (2003) 31 Cal.4th 179 (*Floyd*), the defendant sought to invalidate a provision of Proposition 36 barring retroactive application of its provisions for diversion of nonviolent drug offenders. (*Id.* at pp. 183-184.) The court reiterated that the Legislature may preserve the penalties for existing offenses while ameliorating punishment for future offenders in order to “ ‘assure that penal laws will maintain their desired deterrent effect by carrying out the original prescribed punishment as written.’ ” (*Id.* at p. 190.) The statute before the court came within this rationale because it ‘lessen[ed] punishment for particular offenses.’ (*Ibid.*) As the *Floyd* court noted, “ ‘[t]he 14th Amendment does not forbid statutes and statutory changes to have a beginning, and thus to discriminate between the rights of an earlier and later time.’ ” [Citation.]’ (*Id.* at p. 191.)” (*Kennedy, supra*, at p. 398.)

As the California Supreme Court also recently noted in *People v. Lara* (2012) 54 Cal.4th 896, 906, “ ‘[t]he very purpose of conduct credits is to foster constructive behavior in prison by reducing punishment.’ ” And as the court accepted in *Brown*, “to increase credits reduces punishment.” (*Brown, supra*, at p. 325, fn. 15.)” “[T]he rule acknowledged in *Kapperman* and *Floyd* is that a statute ameliorating punishment for particular offenses may be made prospective only without offending equal protection, because the Legislature will be supposed to have acted in order to optimize the deterrent effect of criminal penalties by deflecting any assumption by offenders that future acts of lenity will necessarily benefit them.” (*Kennedy, supra*, at p. 398.)

When Nguyen committed his crime, his ability to earn conduct credit was limited to two days for every four days of actual time served in presentence custody. Although section 4019 “does not ameliorate punishment for a particular offense, it does, in effect, ameliorate punishment for all offenses committed after a particular date. By parity of

reasoning to the rule acknowledged by both the *Kapperman* and *Floyd* courts, the Legislature could rationally have believed that by making the 2011 amendment to section 4019 have application determined by the date of the offense, [it was] preserving the deterrent effect of the criminal law as to those crimes committed before that date. To reward appellant with the enhanced credits of the October 2011 amendment to section 4019, even for time he spent in custody after October 1, 2011, weakens the deterrent effect of the law as it stood when appellant committed his crimes. We see nothing irrational or implausible in a legislative conclusion that individuals should be punished in accordance with the sanctions and given the rewards (conduct credits) in effect at the time an offense was committed.” (*Kennedy, supra*, at pp. 398-399.)

Echoing *Kennedy*, we finally observe that “over the past few years we have seen a series of incremental changes in conduct credit earning rates. Some of these changes have affected only those with serious felony priors and other disqualifications, some only providing a benefit to those free from such burdens. Overall, the Legislature has tried to strike a delicate balance between reducing the prison population during the state's fiscal emergency and protecting public safety. Although such an effort may have resulted in comparable groups obtaining different credit earning results, under the rational relationship test, the Legislature is permitted to engage in piecemeal approaches to statutory schemes addressing social ills and funding services to see what works and what does not. [Citation.]” (*Kennedy, supra*, at p. 399, fns. omitted.)

We accordingly conclude that equal protection principles do not entitle Nguyen to additional conduct credits based on amendments to section 4019, operative October 1, 2011.¹⁵ This leaves his alternate argument that he is entitled to the more favorable rate of

¹⁵ The court concluded in *Brown, supra*, 54 Cal.4th at pp. 317-322, that for some defendants whose crimes were committed before the January 2010 legislative changes to section 4019, but who were sentenced after that date, the court needs to apply credit at

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conduct credits for time served on and after October 1, 2011, notwithstanding the date he committed his crime, an argument based solely on dicta in *People v. Olague* (2012) 205 Cal.App.4th 1126, 1131-1132 (*Olague*). As we observed in *Kennedy*, the Supreme Court has granted review in *Olague* (review granted August 8, 2012, S203298). This renders it unpublished and eliminates it as a basis of citable authority. (Cal. Rules of Court, rules 8.1105(e)(1) & 8.1115(a).) Without *Olague*, Nguyen's argument is unsupported, and we accordingly reject it.

DISPOSITION

The conviction on the misdemeanor count two is set aside. The judgment is otherwise affirmed.

two different rates in order to apply the statute prospectively. (See also *Payton v. Superior Court* (2011) 202 Cal.App.4th 1187, 1190-1191.) In light of this conclusion, we asked for and received supplemental briefing on the question whether Nguyen, who committed his crime in 2008 but who was not sentenced until 2012, is entitled to additional conduct credit, and if so, whether the record on appeal is sufficient to calculate such credits without the need to remand for this purpose. As Nguyen's supplemental briefing conceded, the January 2010 amendments excepted from the more generous rate of credit those offenders who have committed a serious felony within the meaning of section 1192.7. As the court recently determined in *People v. Lara* (2012) 54 Cal.4th 896, 899-900, this rule excepting serious offenders from the more generous rate of credit applies notwithstanding the trial court's dismissal of a prior serious or violent felony in the interests of justice under section 1385, subdivision (a). Because Nguyen was found to have suffered a prior serious felony that the court dismissed in the interests of justice, he is ineligible for an award of additional conduct credits under *Brown*.

Márquez, J.

WE CONCUR:

Premo, Acting P.J.

Mihara, J.