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OPINION ON REHEARING

CERTIFIED FOR PARTIAL PUBLICATION*

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE, Plaintiff and Respondent, v. TIMOTHY WAYNE SHEROW et al., Defendants and Appellants.	D056988 (Super. Ct. No. RIF138991)

APPEALS from judgments of the Superior Court of Riverside County, Craig G. Riemer, Judge. Affirmed in part as modified, reversed in part.

William D. Farber, under appointment by the Court of Appeal, for Defendant and Appellant Timothy Wayne Sherow.

Mark Yanis, under appointment by the Court of Appeal, for Defendant and Appellant Timothy Wayne Sherow, Jr.

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* Pursuant to California Rules of Court, rule 8.1110, this opinion is certified for publication with the exception of part II.A., B., E. and F.

Edmund G. Brown Jr., and Kamala D. Harris, Attorneys General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, Pamela Ratner Sobeck and Kelley Johnson, Deputy Attorneys General, for Plaintiff and Respondent.

Timothy Wayne Sherow (Sherow, Sr.) and Timothy Wayne Sherow, Jr., (Sherow, Jr.) were charged in the same information.

The charges against Sherow, Sr., were tried to a jury, which found him guilty on nine counts of burglary (Pen. Code, § 459).[1] Sherow, Sr., admitted a prior strike and eight prior prison terms. (§§ 667.5, subd. (b), 667, subds. (c), (e)(1), 1170.12, subd. (c)(1).) The trial court sentenced Sherow, Sr., to 19 years four months in prison.

Sherow, Jr., pled guilty to 27 counts of burglary (§ 459) and 27 counts of receiving stolen property (§ 496, subd. (a)). The trial court sentenced Sherow, Jr., to six years four months in prison.

Sherow, Sr., contends that (1) the trial court erred in admitting surveillance videos showing him stealing DVD's from Walmart and Sam's Club stores; (2) insufficient evidence supports certain of the burglary convictions; and (3) the trial court erred by instructing the jury, with respect to counts 7 through 10, that Sherow, Sr., had the burden to prove a consent defense to burglary by a preponderance of the evidence. We conclude that the third argument has merit. The trial court committed prejudicial instructional

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1 Unless otherwise indicated, all further statutory references are to the Penal Code.

error regarding the consent defense to burglary. Accordingly, we reverse the judgment against Sherow, Sr., on counts 7 through 10.

Sherow, Jr., argues that (1) the imposition of a criminal conviction assessment under Government Code section 70373 was invalid on ex post facto grounds, and (2) his presentence conduct credits under section 4019 should be adjusted to reflect the retroactive application of an amendment to section 4019 that became effective after he was sentenced. We reject Sherow, Jr.'s first argument but conclude that the second argument has merit, and therefore modify the judgment to award an additional 64 days of conduct credits to Sherow, Jr., for a total of 128 days of conduct credits.

I

FACTUAL AND PROCEDURAL BACKGROUND

In approximately 2003, Sherow, Sr., began engaging in transactions at the AAA Jewelry & Loan pawnshop in Riverside (the pawnshop), which was managed by Robert Stephen Mann. Sherow, Sr. — always accompanied by a second person — would bring large quantities of DVD's to the pawnshop to sell. The DVD's were new and in the original shrink-wrap packaging.

In 2007, Detective Charles Payne of the Riverside Police Department became suspicious upon reviewing the pawnshop's records, which showed large transactions involving new DVD's. Detective Payne met with Mann, who showed him a storeroom containing 1,230 new boxed sets of DVD's, most of which Mann purchased from Sherow, Sr., and his associates. Mann had received over $100,000 by reselling the new DVD's brought in by Sherow, Sr., and his associates.

On July 31, 2007, Detective Payne and Police Officer Daniel Cisneros conducted visual surveillance of Sherow, Sr. He was first observed with his sister selling 377 DVD's at the pawnshop for $754. Sherow, Sr., then drove to a Ross store in Riverside, where Officer Cisneros observed him taking clothes off the rack, rolling them up, placing them in his pants and then leaving the store without purchasing the clothes. Officer Cisneros next followed Sherow, Sr., to an AJWright store in Riverside where he witnessed Sherow, Sr., steal clothes in the same manner. While Sherow, Sr., was inside a third store, Officer Cisneros placed a tracking device on Sherow, Sr.'s car.

The next day, August 1, 2007, Detective Payne used the tracking device to determine the movement of Sherow, Sr.'s car. Detective Payne determined that the car traveled to a Walmart store in Westminster at 8:46 a.m., a Walmart store in Corona at 9:39 a.m. and a Sam's Club store in Corona at 10:10 a.m. Later that day, Detective Payne observed Sherow, Sr., meet his son Dominique in the parking lot of the pawnshop and hand over a large box of DVD's. Dominique went into the pawnshop with the DVD's and sold 259 DVD's for $518. Dominique emerged a short time later and pulled money out of his pocket, which he divided with Sherow, Sr.

Detective Payne obtained surveillance videos from the Walmart store in Westminster, the Walmart store in Corona and the Sam's Club store in Corona for the time period that the tracking device indicated Sherow, Sr., was in those stores on August 1, 2007. Detective Payne reviewed the videos and observed Sherow, Sr., at each of the stores taking DVD's off the shelves and putting them down his pants.

On August 18, 2007, Detective Payne conducted surveillance of Sherow, Sr., at the pawnshop. He saw Sherow, Sr., enter the pawnshop with a woman he introduced to Mann as his girlfriend. They sold 423 DVD's to Mann for $846.

Police arrested Sherow, Sr., at the pawnshop on September 19, 2007. On that day, Sherow, Sr., entered the pawnshop with 67 boxed sets of DVD's and a homeless man, whom Sherow, Sr., had asked to complete the sales transaction for him using the man's identification.

Sherow, Sr., was charged with several counts of burglary (§ 459). Counts 1 and 2 arose from stealing clothes in the Ross and AJ Wright stores on July 31, 2007. Counts 4, 5 and 6 arose from stealing the DVD's at the Walmart and Sam's Club stores on August 1, 2007.[2] Counts 7 through 10 alleged that Sherow, Sr., committed burglary by entering the pawnshop with the intent to commit theft or a felony on July 31, 2007, August 1, 2007, August 18, 2007, and September 10, 2007.

The same information charged Sherow, Jr., with 27 counts of burglary (§ 459) and 27 counts of receiving stolen property (§ 496, subd. (a)).

The jury convicted Sherow, Sr., on counts 1, 2 and 4 through 10. Sherow admitted prior prison terms and a prior strike, and the trial court sentenced Sherow, Sr., to prison for 19 years four months.

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[2] Count 3, which is not at issue in this appeal, alleged a burglary at a Walmart store in Long Beach on August 1, 2007. The trial court entered a judgment of acquittal on that count pursuant to section 1118.1.

Sherow, Jr., pled guilty and the trial court sentenced him to prison for six years four months.

Both Sherow, Jr., and Sherow, Sr., appeal.

II

DISCUSSION

A. *The Trial Court Did Not Abuse Its Discretion by Admitting Surveillance Videos Into Evidence*

We first consider Sherow, Sr.'s argument that the trial court erred in admitting store surveillance videos showing him stealing DVD's.

We apply an abuse of discretion standard of review. (*People v. Waidla* (2000) 22 Cal.4th 690, 717 (*Waidla*) ["Broadly speaking, an appellate court applies the abuse of discretion standard of review to any ruling by a trial court on the admissibility of evidence."]; *People v. Rowland* (1992) 4 Cal.4th 238, 264 [abuse of discretion review applies to ruling on hearsay objection]; *People v. Gonzalez* (2006) 38 Cal.4th 932, 953 [applying abuse of discretion standard when reviewing trial court's ruling on authentication of videotape].)

The centerpiece of the prosecution's case against Sherow, Sr., on counts 4, 5 and 6 was surveillance videos showing Sherow, Sr., taking DVD's off the shelves at the Walmart stores in Corona and Westminster and the Sam's Club store in Corona and then hiding the DVD's in his pants. The surveillance videos, which were marked, respectively, as exhibits 41, 42 and 44, were played for the jury during the testimony of Detective Payne and were later admitted into evidence by the trial court. The foundation

for the admission of the DVD's, however, was provided during the testimony of Laura Guerry, who works for Walmart as an asset protection field investigator.

Defense counsel objected to the admission of the surveillance videos on two grounds. First, the videos contained time and date stamps, which were automatically placed on the videos as they were recording. Defense counsel objected that these time and date stamps constituted hearsay, as they were out-of-court statements offered to prove the truth of the matter asserted. (§ 1200.) The trial court agreed that the time and date stamps were hearsay, but it overruled the hearsay objection on the ground that the business records exception to the hearsay rule applied. (Evid. Code, § 1271.) Second, defense counsel objected to the admission of the surveillance videos on the ground that they had not been properly authenticated. The trial court also overruled that objection, apparently relying on the same evidence that established the applicability of the business records exception to the hearsay rule.[3]

Although Sherow, Sr.'s argument is not completely clear, he appears to challenge the trial court's evidentiary ruling on the applicability of the business records exception and its ruling on the authentication of the videos. We examine both of those issues in turn.

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[3] As do the parties in their appellate briefing, the trial court appears to have blurred the distinction between the issue of whether the videos were properly authenticated and the issue of whether the prosecution had established the business records exception to the hearsay rule. Our discussion will maintain the distinction between the two issues, as a different legal analysis applies to each.

1. *The Court Was Within Its Discretion to Rule that the Business Records Exception to the Hearsay Rule Was Established*

The business records exception to the hearsay rule is set forth in Evidence Code section 1271, which provides:

> "Evidence of a writing made as a record of an act, condition, or event is not made inadmissible by the hearsay rule when offered to prove the act, condition, or event if:
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> "(a) The writing was made in the regular course of a business;
>
> "(b) The writing was made at or near the time of the act, condition, or event;
>
> "(c) The custodian or other qualified witness testifies to its identity and the mode of its preparation; and
>
> "(d) The sources of information and method and time of preparation were such as to indicate its trustworthiness."

As we will explain, Guerry's testimony was sufficient to establish these requirements as to the surveillance videos and, more specifically, as to the time/date stamp on the videos, which was the focus of the hearsay objection.

Guerry testified that as an asset protection field investigator for Walmart and its subsidiary Sam's Club, she is familiar with the video surveillance system in those stores. She explained that as surveillance videos are recorded, the system marks the videos with a time and date stamp that cannot be altered. Guerry explained that the surveillance videos are made in the regular course of business and that the system is always recording, making a record of events in the stores as they take place. She explained that the copies of the videos contained in exhibits 41, 42 and 44 were made upon request and that she became the custodian of those copies. Further, Guerry testified that she reviewed the

videos contained in exhibits 41, 42 and 44 and verified that the surveillance system was working properly when they were recorded.

Based on this testimony, the trial court was within its discretion to conclude, as required by Evidence Code section 1271, that the surveillance videos were made in the regular course of business, that they were made at the time of the events recorded in them, that Guerry was a custodian or other qualified witness testifying to the identity of the videos and their mode of preparation, and that the sources of information and the method and time of preparation of the videos were such as to indicate their trustworthiness.

Although it is difficult to separate Sherow, Sr.'s argument regarding the business records exception from his argument regarding authentication, Sherow, Sr., appears to argue that Guerry was not a proper witness to establish the business records exception because she "was not present when the videotapes were made and did not know the person or persons who made them," and that to establish the business records exception, "testimony was . . . required from someone who had personal knowledge of the matters and circumstances depicted on the videotapes." This argument fails. "Evidence Code section 1271 does not require that the person who gathered the information contained in a record testify as custodian of that record. [Citations.] 'It is the object of the business records statutes to eliminate the necessity of calling each witness, and to substitute the record of the transaction or event. It is not necessary that the person making the entry have personal knowledge of the transaction.'" (*People v. Matthews* (1991) 229 Cal.App.3d 930, 940.) "The witness need not have been present at every transaction to

establish the business records exception; he or she need only be familiar with the procedures followed . . . ." (*Jazayeri v. Mao* (2009) 174 Cal.App.4th 301, 322.)

In his challenge to the applicability of the business records exception to the hearsay rule, Sherow, Sr., also focuses on Guerry's testimony that she must rely on the employees in the stores who operate the surveillance video system to initially set the system to show the correct date and time. Although Sherow, Sr.'s argument is not clear, he apparently contends that because the accuracy of the time and date stamp depends on the actions of people other than Guerry, her testimony was not sufficient to establish a business records exception for the hearsay contained in the time and date stamp. We reject this argument. "A trial court has broad discretion in determining whether a sufficient foundation has been laid to qualify evidence as a business record." (*People v. Hovarter* (2008) 44 Cal.4th 983, 1011.) It was within the trial court's court discretion to conclude, based on Guerry's description of the stores' video surveillance systems, that the method of creating the videos was sufficiently trustworthy to support an application of the business records exception. Significantly, no evidence in the record suggests that there was any inaccuracy in the initial setting of the time and date stamp. (See *Hovarter*, at p. 1011 [rejecting argument that business records were insufficiently trustworthy, as there was no showing that the entries in the records were unreliable despite certain irregularities and omissions].)

In sum, the trial court was within its discretion to rule that the surveillance videos, including their time and date stamp, fell within the business records exception to the hearsay rule.

2. *The Surveillance Videos Were Properly Authenticated*

Sherow, Sr.'s contention that the surveillance videos were not properly authenticated also lacks merit.

A videotape is equivalent to a "writing" for purposes of the Evidence Code. (Evid. Code, § 250; *People v. Rich* (1988) 45 Cal.3d 1036, 1086, fn. 12.) Pursuant to Evidence Code section 1401, subdivision (a), "[a]uthentication of a writing is required before it may be received in evidence." Therefore, the surveillance videos were not admissible unless they were properly authenticated.

Authority establishes that "a video recording is authenticated by testimony or other evidence that it actually depicts what it purports to show." (*McGarry v. Sax* (2008) 158 Cal.App.4th 983, 990.) "The general rule is that photographs are admissible when it is shown that they are correct reproductions of what they purport to show. This is usually shown by the testimony of the one who took the picture. However, this is not necessary and it is well settled that the showing may be made by the testimony of anyone who knows that the picture correctly depicts what it purports to represent." (*People v. Doggett* (1948) 83 Cal.App.2d 405, 409; see also *People v. Bowley* (1963) 59 Cal.2d 855, 860-861 [citing *Doggett* with approval].) "[I]t is not required that the photographer himself be produced where other evidence is available to accomplish the same end. The effect and probative value of such other evidence is the important consideration, and not that the way or manner of making the requisite showing should be exactly the same in all cases." (*Doggett*, at p. 410.)

Here, the trial court was well within its discretion to conclude, based on Guerry's testimony, that the surveillance videos correctly depicted events at the Walmart and Sam's Club stores. As Guerry explained, she was familiar with the stores' surveillance systems, and she was able to tell from reviewing the videos that the system was working properly. Further based on her review of the videos and her familiarity with the stores, she was able to establish that exhibit 41 depicted the electronics department of the Corona Walmart store, exhibit 42 depicted the DVD aisle at the Westminster Walmart store, and exhibit 44 depicted the DVD aisle at the Corona Sam's Club store.

Citing *Ashford v. Culver City Unified School Dist.* (2005) 130 Cal.App.4th 344, Sherow, Sr., argues that the surveillance videos were not properly authenticated. However, *Ashford* presented a very different situation. In *Ashford*, the issue was whether videos depicting the petitioner engaging in activities inconsistent with his claim of illness were properly authenticated to be admitted at an administrative hearing. (*Id*. at pp. 347-350.) The sole witness at the hearing was a human resources manager who did not make the videotapes, did not know the person who made them, was not present when they were made, could not say whether the dates on the videos were accurate and had no knowledge as to whether the videotapes had been edited, spliced or pieced together. (*Id*. at p. 347.) *Ashford* concluded that the human resource manager's testimony did not properly authenticate the videotapes. (*Id*. at pp. 349-350.) Here, in contrast, the videos were made by the stores' established surveillance system, with which Guerry was familiar, and Guerry was able to view the videos and verify that the system was working properly. Under those circumstances, unlike in *Ashford*, the videos were properly authenticated.

B. *Substantial Evidence Supports the Convictions on Counts 4 and 5*

Sherow, Sr., next argues that insufficient evidence supports the conviction in count 4 for burglary of the Westminster Walmart store and count 5 for burglary of the Corona Walmart store. As we will explain, the argument is plainly without merit.

We first provide the factual background necessary to understand Sherow, Sr.'s argument. Detective Payne took the witness stand at several points during the trial. Early in his testimony, the prosecution asked Detective Payne about the surveillance videos recorded on two discs, which were identified as exhibits 56 and 57. Exhibits 56 and 57 were not played for the jury and apparently were not moved into evidence, but Detective Payne testified that based on his writing on the discs, he recognized them as containing surveillance videos from the Westminster and Corona Walmart stores. Detective Payne testified that he had viewed the videos contained on the discs, in which he saw Sherow, Sr., shoplifting DVD's.

Later during trial, the surveillance videos for the Westminster and Corona Walmart stores that were in the custody of Guerry were introduced into evidence as exhibits 41 and 42 through Guerry's testimony. Further, Detective Payne was called to the stand later in the trial, and exhibits 41 and 42 were played for the jury during his testimony. Detective Payne testified after viewing exhibits 41 and 42 in court that he had identified Sherow, Sr., in the videos and that Sherow, Sr., was wearing the same clothing that he was wearing later that day when Detective Payne observed him at the pawnshop.

In arguing that insufficient evidence supports the convictions on counts 4 and 5, Sherow, Sr., relies solely on the fact that exhibits 56 and 57 were not admitted into

evidence. He contends that exhibits 56 and 57 "constituted the only evidence supporting [Sherow, Sr.'s] burglary convictions on courts 4 and 5. . . . There was no other evidence showing that [Sherow, Sr.,] perpetrated these specific crimes." According to Sherow, Sr., "Other than the nonadmitted . . . Exhibit[] Nos. 56 and 57, there was no evidence linking appellant to any criminal act inside those stores."

This argument is plainly wrong. As we have explained, the surveillance videos showing Sherow, Sr., stealing DVD's in the Westminster and Corona Walmart stores were introduced into evidence as exhibits 41 and 42. Those videos provided the necessary evidence that Sherow, Sr., committed burglary of those stores as charged in counts 4 and 5. Exhibits 56 and 57 were not needed to support the convictions.

C. *The Trial Court Erred in Instructing the Jury Regarding the Consent Defense to Burglary*

We next consider Sherow, Sr.'s argument that the trial court improperly instructed the jury regarding consent as a defense to burglary.

The offense of burglary is committed when a person enters a building with the intent to commit a felony. (§ 459.) However, a defense to a charge of burglary is available "when the owner *actively* invites the accused to enter, *knowing* the illegal, felonious intention in the mind of the invitee. . . . [T]he owner-possessor must know the felonious intention of the invitee. There must be evidence 'of informed consent to enter *coupled* with the "visitor's" knowledge the occupant is aware of the felonious purpose and does not challenge it.'" (*People v. Felix* (1994) 23 Cal.App.4th 1385, 1397-1398 (*Felix*), citations omitted.)

Relying on this principle, defense counsel argued to the jury that Sherow, Sr., was not guilty of counts 7 through 10, which charged him with burglarizing the pawnshop by entering it with the intent to sell stolen property. According to defense counsel's closing argument, the evidence established that Mann knew that Sherow, Sr., was selling stolen DVD's and consented to him coming into the pawnshop for that purpose.

The form jury instruction for burglary in CALCRIM No. 1700 does not include a consent defense for burglary, although the notes to the instruction point out that "consent by the owner or occupant of property may constitute a defense to burglary." (Judicial Council of Cal., Crim. Jury Instns. (2011) CALCRIM No. 1700, Related Issues, Consent, p. 1226.) Therefore, the trial court drafted its own instruction on the issue after considering proposed instructions from counsel.[4] The instruction given by the trial court stated that Sherow, Sr., had the burden of establishing, by a preponderance of the evidence, the elements of the consent defense. The trial court instructed:

> "The defendant is not guilty of burglary if the occupant of the building consented to the defendant's entry into the building.
>
> "In order to establish this defense, the defendant must prove that:

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4 Defense counsel proposed the following instruction: "The prosecution must prove all the elements of burglary including that the defendant did not have a right to enter the building. The defendant contends he had a right to enter the premises because the lawful occupant of the building consented to the defendant's entry with knowledge of the defendant's felonious purpose. However the defendant does not need to prove that the occupant consented. If you have a reasonable doubt about whether the prosecution has proven that the defendant entered without consent, you must find him not guilty."

> "1. Prior to the defendant's entry into the building, the occupant expressly gave to the defendant the occupant's permission for the defendant to enter the building;
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> "2. At the time that the occupant give his or her permission, the occupant knew that the defendant intended to enter the building for the purpose either of committing a theft or selling stolen property; and
>
> "3. Prior to the defendant's entry into the building, the defendant knew that the occupant was aware of the defendant's illegal intention.
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> "The defendant has the burden of proving this defense by a preponderance of the evidence. This is a different standard of proof than proof beyond a reasonable doubt. To meet the burden of proof by a preponderance of the evidence, the defendant must prove that it is more likely than not that each of the three listed items is true."

At trial, defense counsel objected to the jury instruction given by the trial court "based on due process, trial by jury, confrontation, compulsory process [and] right to counsel clauses" of the state and federal Constitutions. According to defense counsel, the trial court's instruction would have the effect of "eliminating, shifting, or lessening the prosecutor's burden of proof under the presumption of innocence."

On appeal, Sherow, Sr., contends that the trial court erred when it "instructed that [Sherow, Sr.,] had to prove consent by a preponderance of the evidence." According to Sherow, Sr., the "affirmative defense of consent involves an element of burglary" and therefore he "need only raise a reasonable doubt about that fact." As we will explain, we agree, and therefore we conclude that the trial court erred in instructing the jury that Sherow, Sr., was required to prove the consent defense to burglary by a preponderance of the evidence.

1. *The Burden of Proof on the Consent Defense to Burglary Is Allocated to the Defendant*

We begin by considering the preliminary issue of who has the burden of proof to establish the consent defense to burglary as described in *Felix*, *supra*, 23 Cal.App.4th at pages 1397-1398.

Unless constitutional principles require otherwise, "'[d]efining the elements of an offense and the procedures, including the burdens of producing evidence and of persuasion, are matters committed to the state.'" (*People v. Neidinger* (2006) 40 Cal.4th 67, 73 (*Neidinger*).) It is constitutionally permissible for the state to place the burden of proving a fact on the defendant unless the fact constitutes a traditional element of an offense. (*Id*. at p. 74.)

Case law establishes that the lack of consent to enter the building at issue is *not* an element of burglary. (*Felix*, *supra*, 23 Cal.App.4th at p. 1397 ["Lack of consent — *by itself* — is *not* an element of the offense."]; *People v. Barry* (1892) 94 Cal. 481, 483 [defendant was properly convicted of burglary of a store during business hours regardless of the fact that the proprietor allowed the defendant to enter the store along with the general public].) Therefore, state law governs the issue of whether the defendant or the prosecution has the burden of proof on the affirmative defense of consent to burglary as described in *Felix, supra,* at pages 1397-1398.

With respect to allocating the burden of proof for an affirmative defense, state law provides that "[u]nder the so-called rule of convenience and necessity, '"the burden of proving an exonerating fact may be imposed on a defendant if its existence is 'peculiarly'

within his personal knowledge and proof of its nonexistence by the prosecution would be relatively difficult or inconvenient."'" (*People v. Salas* (2006) 37 Cal.4th 967, 981; see also *Neidinger*, *supra*, 40 Cal.4th at p. 74 [applying rule of convenience and necessity].) In the case of the consent defense to burglary, it is a matter of proof peculiarly within the knowledge of the defendant whether the occupant of the building at issue (1) actively invited the defendant to enter with knowledge of the defendant's felonious intent, and (2) the defendant knew that the occupant was aware of his felonious intent. (See *Felix*, *supra*, 23 Cal.App.4th at pp. 1397-1398.) Further, it would be relatively difficult or inconvenient for the prosecution to prove the nonexistence of these facts. Therefore, the defendant has the burden of proof regarding the consent defense to burglary.

2. *The Defendant's Burden of Proof on the Consent Defense to Burglary Is to Raise a Reasonable Doubt as to the Facts Underlying the Defense*

The next issue is "what is required to be done by the party who bears the burden of proof as to the facts underlying the defense" — in this case Sherow, Sr. (*People v. Mower* (2002) 28 Cal.4th 457, 476 (*Mower*).) The trial court concluded that Sherow, Sr., was required to prove the facts underlying the consent defense to burglary by a preponderance of the evidence. Sherow, Sr., on the other hand, contends that a defendant raising a consent defense to a burglary charge need only raise a reasonable doubt as to the existence of the facts establishing the defense.

"With respect to many defenses, as 'ha[s] been and [is] extremely common in the penal law' (Model Pen. Code & Commentaries, com. 3 to § 1.12, p. 192), a defendant has been required merely to raise a reasonable doubt as to the underlying facts." (*Mower*,

supra, 28 Cal.4th at p. 479.) Based on Evidence Code section 501, this rule has been applied where a statute allocates the burden of proof to a defendant on any fact relating to his or her guilt. (*Mower*, at p. 479.)[5] However, the same rule also applies where the allocation of the burden of proof to a defendant is *not* based on a statutory provision. (See, e.g., *Mower*, *supra*, 28 Cal.4th at p. 477 [statute did not allocate any burden of proof].)

Our Supreme Court in *Mower* listed numerous examples of cases in which the defendant's burden of proof as to an affirmative defense was to raise a reasonable doubt as to the facts underlying the defense. (*Mower*, *supra*, 28 Cal.4th at p. 479, fn. 7.)[6] In

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5 Evidence Code section 501 provides: "Insofar as any statute, except Section 522, assigns the burden of proof in a criminal action, such statute is subject to Penal Code Section 1096." As our Supreme Court explained in *Mower*, "The comment to Evidence Code section 501 by the California Law Revision Commission, which proposed that provision, states in pertinent part: '[Evidence Code] Section 501 is intended to make it clear that the statutory allocations of the burden of proof . . . are subject to [section] 1096, which requires that a criminal defendant be proved guilty beyond a reasonable doubt, *i.e.*, that the statutory allocations do not (except on the issue of insanity) require the defendant to persuade the trier of fact of his innocence. Under Evidence Code Section 522, as under existing law, the defendant must prove his insanity by a preponderance of the evidence. [Citation.] *However, where a statute allocates the burden of proof to the defendant on any other issue relating to the defendant's guilt, the defendant's burden, as under existing law, is merely to raise a reasonable doubt as to his guilt.*'" (*Mower*, *supra*, 28 Cal.4th at pp. 478-479, quoting Recommendation Proposing an Evidence Code (Jan. 1965) 7 Cal. Law Revision Com. Rep. (1965) p. 91.)

6 *Mower* provided the following citations to cases in which the defendant had the burden merely to raise a reasonable doubt as to the facts underlying an affirmative defense: "Included are the defense of alibi (*People v. Costello* (1943) 21 Cal.2d 760, 765-766 [predating Evid. Code, § 501]); the defense of unconsciousness (*People v. Babbitt* (1988) 45 Cal.3d 660, 689-696); the defense of duress (*People v. Graham* (1976) 57 Cal.App.3d 238, 240); any defense justifying, excusing or mitigating the commission of homicide (*People v. Bushton* (1889) 80 Cal. 160, 164 [predating Evid. Code, § 501]);

general, "it is well settled that it is error to instruct the jury that defendant has the burden of proving mitigating circumstances by a preponderance of the evidence." (*People v. Hardy* (1948) 33 Cal.2d 52, 65.) This is because "[i]t is a cardinal rule in criminal cases that the burden rests on the prosecution to prove the offense beyond a reasonable doubt . . . , and it is error to deprive an accused of the benefit of the doctrine of reasonable doubt by giving an instruction that he has the burden of proving a defense by a preponderance of the evidence." (*Id*. at pp. 63-64, citation omitted.) Further, as our Supreme Court long ago explained in holding that a defendant has the burden to raise a reasonable doubt in a murder case on any defense of mitigation, justification or excuse, "[a]ny other rule as to the weight of the evidence makes one measure applicable to one

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defense of another, against a charge of murder (*People v. Roe* (1922) 189 Cal. 548, 560-561 [predating Evid. Code, § 501]); self-defense, against a charge of assault (*People v. Adrian* (1982) 135 Cal.App.3d 335, 337-341); the defense of reasonable and good faith belief in the victim's consent, against a charge of kidnapping (*People v. Mayberry* (1975) 15 Cal.3d 143, 157); the defense of reasonable and good faith belief in the victim's consent, against a charge of rape (*ibid*.); the defense of intent to marry, against a charge of taking a woman for the purpose of prostitution (*People v. Marshall* (1881) 59 Cal. 386, 388-389 [predating Evid. Code, § 501]); the defense of lawful arrest, against a charge of false imprisonment (*People v. Agnew* [(1940)] 16 Cal.2d [655,] 664-667 [predating Evid. Code, § 501]); and the defense of exemption under state securities laws, against a charge of violating such laws (*People v. Simon* (1995) 9 Cal.4th 493, 501; *People v. Figueroa* (1986) 41 Cal.3d 714, 722)." (*Mower*, *supra*, 28 Cal.4th at p. 479, fn. 7.)

In *Mower*, *supra*, 28 Cal.4th at page 481, our Supreme Court applied the reasonable doubt standard to the defendant's defense under Health and Safety Code section 11362.5, subdivision (d) to a charge of possession and cultivation of marijuana based on the theory that the defendant was a primary caregiver of a patient using medical marijuana. Later, in *Neidinger*, *supra*, 40 Cal.4th at page 79, the reasonable doubt standard was applied to the defendant's defense under section 278.7, subdivision (a) to a charge of child detention in violation of section 278.5, subdivision (a), based on the theory that the defendant acted with a good faith and reasonable belief that the child would be harmed if left in the custody of the person from whom the child was taken.

part of the case and a different one to another part, and leads to confusion." (*People v. Bushton*, *supra*, 80 Cal. at pp. 164-165.)

However, there is one important exception to the rule giving the defendant the burden to raise a reasonable doubt as to the facts underlying an affirmative defense. For "a handful of defenses . . . the defendant [has] been required to prove the underlying facts by a preponderance of the evidence. Those are defenses that are *collateral* to the defendant's guilt or innocence." (*Mower*, *supra*, 28 Cal.4th at p. 480, fn. omitted, italics added.) "'[O]n a guilt issue *other than* whether defendant committed the criminal acts charged, the burden of proof assigned to defendant may be fixed at proof by a preponderance of the evidence.'" (*People v. Figueroa*, *supra*, 41 Cal.3d at p. 722, italics added, quoting 2 Jefferson, Cal. Evidence Benchbook (2d ed. 1982) § 45.1, p. 1640.) Put another way, a preponderance of the evidence standard is applicable to "defenses asserted by an accused which raise factual issues collateral to the question of the accused's guilt or innocence and do not bear directly on any link in the chain of proof of any element of the crime." (*People v. Tewksbury* (1976) 15 Cal.3d 953, 964 (*Tewksbury*).) Examples of such defenses are the defense of entrapment (*Mower*, at p. 480, citing *People v. Moran* (1970) 1 Cal.3d 755, 760); the defense of momentary handling of a controlled substance for the sole purpose of disposal, against a charge of possession of such a substance (*Mower*, at p. 480, fn. 8, citing *People v. Spry* (1997) 58 Cal.App.4th 1345, 1367-1369 (*Spry*)); and the defense of necessity against a charge of escape from lawful custody (*Mower*, at p. 480, fn. 8, citing *People v. Waters* (1985) 163 Cal.App.3d 935, 937-938

(*Waters*) and *People v. Condley* (1977) 69 Cal.App.3d 999, 1008-1013 (*Condley*)).[7] These are defenses that "for reasons of public policy insulate the accused notwithstanding the question of his guilt." (*Tewksbury*, *supra*, 15 Cal.3d at p. 964.)

Conversely, the reasonable doubt standard applies to a defense which, "if established[,] would tend to overcome or negate proof of any element of the crime charged as otherwise established by the People." (*Tewksbury*, *supra*, 15 Cal.3d at p. 963.) The reasonable doubt standard applies to a defense that is "not entirely collateral to the elements of the offense" (*Neidinger*, *supra*, 40 Cal.4th at p. 79) and which "relates to the defendant's guilt or innocence" (*Mower*, *supra*, 28 Cal.4th at pp. 481-482).

We turn to an application of these standards to determine a defendant's burden of proof in establishing an affirmative defense to burglary as set forth in *Felix*, *supra*, 23 Cal.App.4th at pages 1397-1398.

According to statute, a person is guilty of burglary if he or she enters a building or other structure listed in the statute with intent to commit grand or petit larceny or any felony. (§ 459.) Based on common law precedent, our Supreme Court has clarified the statutory element of "entry" by explaining that the crime of burglary involves "entry that invades a possessory right in a building, and must be committed by someone who has no right to be in the building." (*People v. Frye* (1998) 18 Cal.4th 894, 954; see also *People*

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7 Although *Mower* cited *Spry*, *supra*, 58 Cal.App.4th 1345, *Waters*, *supra*, 163 Cal.App.3d 935, and *Condley*, *supra*, 69 Cal.App.3d 999, as cases applying a preponderance of the evidence burden of proof, *Mower* made clear that it was not reaching the question of whether those cases were correctly decided. (*Mower*, *supra*, 28 Cal.4th at p. 480, fn. 8.)

v. Gauze (1975) 15 Cal.3d 709, 714 (*Gauze*) ["section 459, while substantially changing common law burglary, has retained two important aspects of that crime. A burglary remains an entry which invades a possessory right in a building. And it still must be committed by a person who has no right to be in the building."].)[8] On the premise that the type of entry involved in burglary is the invasion of a possessory right by someone who has no right to be in the building for illegal purposes, case law has developed the consent defense to burglary. (*Felix*, *supra*, 23 Cal.App.4th at p. 1398 [relying on requirement of an invasion of a possessory right in formulating the consent defense to burglary]; *People v. Superior Court (Granillo)* (1988) 205 Cal.App.3d 1478, 1485 [relying on the principle that "burglary law is designed to protect a possessory right in property against intrusion and the risk of harm" in determining that burglary is not committed by a defendant selling stolen property in an undercover officer's apartment at the officer's invitation].)

Premised on the foregoing, we conclude that the consent defense to burglary, based on the occupant's consent to the defendant's entry into the building for the purpose of committing a felony, relates to the defendant's guilt or innocence and is not entirely collateral to the elements of burglary. (*Neidinger*, *supra*, 40 Cal.4th at p. 79; *Mower*, *supra*, 28 Cal.4th at pp. 481-482.) As we have explained, the defense arises out of the

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8 Although *Gauze* explained that burglary must be committed by someone who has no right to be in the building, it clarified that it was referring to a right to be in the building *for illegal purposes*. (*Gauze*, *supra*, 15 Cal.3d at p. 713 [citing the principle that "a person has an implied invitation to enter a store during business hours for legal purposes only"].)

principle that the element of *entry* referred to in the burglary statute must invade a possessory right in a building and must be committed by a person who has no right to be in the building for the purpose of committing illegal acts. Indeed, as our Supreme Court has observed, "[l]ack of consent [is] material to burglary because it [is] material to the element of entry . . . ." (*Waidla, supra*, 22 Cal.4th at p. 723.)

The consent defense therefore goes to the heart of a defendant's guilt or innocence of the crime of burglary. Accordingly, a defendant has the burden of proof to establish a reasonable doubt as to the facts underlying the defense. More specifically, in this case, Sherow, Sr., had the burden to raise a reasonable doubt as to whether (1) Mann actively invited Sherow, Sr., to enter the pawnshop, (2) knowing of Sherow, Sr.'s felonious intention to sell stolen property, and (3) Sherow, Sr., was aware that Mann knew of his intention to sell stolen property and did not challenge it. (See *Felix, supra,* 23 Cal.App.4th at pp. 1397-1398.)

The trial court did not so instruct the jury and therefore erred in instructing the jury that Sherow, Sr., had the burden to prove the consent defense to burglary by a preponderance of the evidence.

D. *The Instructional Error Was Prejudicial*

Having concluded that the trial court erred in instructing regarding the defendants' burden of proof on the consent defense to burglary, we must determine whether the error was prejudicial.

Our Supreme Court repeatedly has declined to decide whether an instructional error regarding the defendant's burden of proof on an affirmative defense is one of federal

constitutional dimension that necessitates application of the *Chapman* test for reversible error (*Chapman v. California* (1967) 386 U.S. 18), or is susceptible to analysis under the more lenient test for state law error set forth in *People v. Watson* (1956) 46 Cal.2d 818 (*Watson*). (See *Neidinger, supra,* 40 Cal.4th at p. 79; *Mower, supra,* 28 Cal.4th at p. 484; *People v. Simon, supra,* 9 Cal.4th at p. 506.) In each case where the issue was presented, our Supreme Court determined that the error was prejudicial even under the more lenient standard. (*Neidinger,* at p. 79; *Mower,* at p. 484; *Simon,* at p. 506.) As we will explain, we reach the same conclusion here.

The evidence relevant to the consent defense to burglary was presented through Mann's testimony and through the details brought out during trial about the sales transactions in the pawnshop involving the DVD's.

The evidence concerning the transactions was that Sherow, Sr., and his associates sold to Mann thousands of new DVD's in their original store packaging over the course of several years, on a regular basis and in large batches. On the paperwork that Sherow, Sr., and his associates filled out when selling the DVD's, they often indicated that the DVD's were gifts. One witness testified to hearing Mann suggest to Sherow, Sr., the type of movies that he would like Sherow, Sr., to bring to the pawnshop. Mann had a motive to buy stolen DVD's, as he resold the DVD's that he purchased from Sherow, Sr., and his associates for over $100,000, at a price of at least double what he paid for them. The jury was informed that Mann was testifying under immunity from criminal prosecution.

Mann was questioned about his knowledge that the DVD's were stolen. Defense counsel elicited the following testimony from Mann regarding the DVD's brought in by Sherow, Sr., and his associates:

> "[Defense counsel]: Are you telling us now that you had no idea that these were stolen?
>
> "[Mann]: It occurred to me.
>
> "[Defense counsel]: It did?
>
> "[Mann]: Yes
>
> "[Defense counsel]: You thought it might be stolen?
>
> "[Mann]: I didn't think one way or the other. It occurred to me, how do you acquire that many sets?"

Later in his testimony, Mann stated that he did not ask Sherow, Sr., or his associates about the source of the DVD's, but "[o]f course it occurred to me. No one gets that many gifts."

Also, although not dispositive of the strength of the evidence regarding the consent defense to burglary, it is worth noting that the trial judge — who was present during the live trial testimony and able to observe the witnesses' demeanor — viewed that evidence as being very strong. Specifically, while discussing jury instructions outside the presence of the jury, the prosecutor asserted that "there is no evidence that any of the defendants [(i.e., Sherow, Sr., and his associates)] knew that Mr. Mann knew what they were doing was felonious." The trial court responded, "Oh, sure they did. . . . Was there any direct testimony of that? Of course not. Do I have any doubt of that fact? None whatsoever. Could I think that the jury has any doubt of that fact? I don't think any

whatsoever." Later during that discussion the trial court explained, ". . . I think there's enough for the jury to infer circumstantially that [Mann] knew they were stolen . . . ."

We also know that the jury was focused during deliberations on the issue of whether Mann knew that the DVD's were stolen. The jury sent a note asking: "Does Mann know the DVD's are stolen if asked by the police to continue buying them from [Sherow, Sr.,] from July to Sept[ember] 19, [20]07."

Under the standard set forth in *Watson*, the inquiry is whether there is a reasonable probability that the result would have been more favorable to Sherow, Sr., in the absence of the error. (*Watson*, *supra*, 46 Cal.2d at p. 836.) In light of the facts recited above, we conclude that it is reasonably probable that had the jury been instructed that Sherow, Sr., was required merely to raise a reasonable doubt about Mann's consent to him entering the pawnshop to sell stolen property, rather than proving those facts by a preponderance of the evidence, there is a reasonable probability that the jury would have determined that there were reasonable doubts as to the underlying facts of the defense. The details of the sales transactions were highly suspicious, a witness heard Mann instruct Sherow, Sr., on the types of DVD's to bring in, and Mann himself admitted that it had occurred to him that the DVD's might be stolen.

Therefore, if given the correct instruction, we conclude that there is a reasonable probability that a jury would have found that Sherow, Sr., created a reasonable doubt as to whether (1) Mann actively invited Sherow, Sr., to enter the pawnshop, (2) knowing of

Sherow, Sr.'s felonious intention to sell stolen property, and (3) Sherow, Sr., was aware that Mann knew of his intention to sell stolen property and did not challenge it.[9]

We therefore reverse the judgment against Sherow, Sr., on counts 7 through 10.

E. *Sherow, Jr.'s Challenge to the Calculation of His Custody Credits*

We now turn to the first of two arguments made by Sherow, Jr. On ex post facto grounds, Sherow, Jr., challenges the trial court's imposition of a criminal conviction assessment pursuant to Government Code section 70373.

As we have explained, Sherow, Jr., pled guilty to 54 felony counts. At sentencing, the trial court imposed a criminal conviction assessment under Government Code section 70373, subdivision (a)(1) in the amount of $30 for each of the 54 counts, for a total of $1,620.

Government Code section 70373, subdivision (a)(1), which became effective on January 1, 2009,[10] provides:

> "To ensure and maintain adequate funding for court facilities, an assessment shall be imposed on every conviction for a criminal offense,

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9 Sherow, Sr., also challenges the sufficiency of the evidence to the elements of burglary, arguing that the only finding a reasonable juror could reach is that Mann consented to Sherow, Sr., entering the pawnshop to commit a felony. However, as we have explained, the lack of consent is not an element of burglary that must be established by the prosecution. (*Felix*, *supra*, 23 Cal.App.4th at p. 1397.) Instead, consent is an affirmative defense on which the defendant has the burden of proof. (Part II.C.1, *ante.*) Accordingly, we reject Sherow, Sr.'s attempt to challenge the sufficiency of the evidence in support of the burglary conviction.

10 Government Code section 70373 "was added to the Government Code by Statutes 2008, chapter 311, section 6.5; thus, its effective date is January 1, 2009." (*People v. Knightbent* (2010) 186 Cal.App.4th 1105, 1111 (*Knightbent*).)

> including a traffic offense, except parking offenses as defined in subdivision (i) of Section 1463 of the Penal Code, involving a violation of a section of the Vehicle Code or any local ordinance adopted pursuant to the Vehicle Code. The assessment shall be imposed in the amount of thirty dollars ($30) for each misdemeanor or felony and in the amount of thirty-five dollars ($35) for each infraction."

Sherow, Jr., was convicted and sentenced after the effective date of Government Code section 70373. However, he contends that because all of his crimes were committed in 2005, prior to the effective date of Government Code section 70373, subdivision (a)(1), the imposition of the criminal conviction assessment under that section violates the state and federal prohibitions against ex post facto laws.

"'[T]he ex post facto clauses of the state and federal Constitutions are "aimed at laws that 'retroactively alter the definition of crimes or increase the punishment for criminal acts.'"'" (*People v. Alford* (2007) 42 Cal.4th 749, 755 (*Alford*).) As relevant here, in determining whether a law increases the punishment for criminal acts for ex post facto purposes, the inquiry is "'whether the Legislature intended the provision to constitute punishment and, if not, whether the provision is so punitive in nature or effect that it must be found to constitute punishment despite the Legislature's contrary intent.'" (*Ibid*.)

In the relatively short time since Government Code section 70373 became effective, numerous cases have rejected the contention that application of the statute to convictions for crimes committed before the statute's effective date violates the rule against ex post facto laws. (*People v. Brooks* (2009) 175 Cal.App.4th Supp. 1, 7 (*Brooks*); *People v. Castillo* (2010) 182 Cal.App.4th 1410, 1413-1415 (*Castillo*); *People*

v. Fleury (2010) 182 Cal.App.4th 1486, 1492-1494 (*Fleury*); *People v. Davis* (2010) 185 Cal.App.4th 998, 1000-1001 (*Davis*); *People v. Phillips* (2010) 186 Cal.App.4th 475, 477-479; *Knightbent, supra*, 186 Cal.App.4th at pp. 1111-1112; *People v. Lopez* (2010) 188 Cal.App.4th 474, 479; *People v. Mendez* (2010) 188 Cal.App.4th 47, 61; *People v. Cortez* (2010) 189 Cal.App.4th 1436, 1444.) Sherow, Jr., cites no cases reaching a contrary conclusion, and we are aware of none.

Davis, supra, 185 Cal.App.4th 998, briefly and accurately summarizes the reasoning of the recent case law. "[Government Code section 70373] was enacted in 2008 as 'part of a broader legislative scheme in which filing fees in civil, family, and probate cases were also raised.' ([*Fleury, supra*,] 182 Cal.App.4th 1486, 1489.) Since its history and substance demonstrate that it is not a penal statute, in terms or effect, its application to crimes committed before the effective date does not offend the prohibition against ex post facto laws. (*Id.* at pp. 1488, 1490, 1493; [*Castillo, supra*,] 182 Cal.App.4th 1410, 1414; [*Brooks, supra*,] 175 Cal.App.4th Supp. 1, 4.) The *Fleury* and *Castillo* cases recognize that the phrasing of the statute is similar to the language of the court security fee law (Pen. Code, § 1465.8), which our Supreme Court held did not violate the ex post facto rule. ([*Alford, supra*,] 42 Cal.4th 749, 754.) Neither does its application offend the rule that new laws are presumed to operate prospectively. ([*Castillo, supra*,] 182 Cal.App.4th [at p.]1413.) As the *Castillo* case points out, the question was 'on what event does this statute *operate*.' The answer, provided by the language of the statute itself, is a conviction. (*Ibid.*)" (*Davis, supra*, 185 Cal.App.4th at p. 1000.) We agree with this analysis and see no reason to depart from it. Sherow, Jr.'s

guilty plea was entered in October 2009, after the effective date of Government Code section 70373, subdivision (a)(1), and there is no ex post facto bar to applying Government Code section 70373, subdivision (a)(1) to his convictions.

Accordingly, we find no merit to Sherow, Jr.'s argument that the criminal conviction assessment under Government Code section 70373, subdivision (a)(1) should not have been applied to his convictions for offenses that he committed in 2005.

F. *Sherow, Jr., Is Entitled to Additional Presentence Conduct Credits*

Finally, we address Sherow, Jr.'s challenge to the calculation of his presentence conduct credits under section 4019.[11]

A defendant sentenced to prison is entitled to credit against the prison term for all days spent in local custody before sentencing that are attributable to the same conduct. (§§ 2900, subd. (c), 2900.5, subds. (a), (b); *People v. Buckhalter* (2001) 26 Cal.4th 20, 30.) Such a defendant may also earn so-called "conduct credits" for satisfactory performance of assigned labor and compliance with rules and regulations during local custody. (§ 4019, subds. (b), (c); *People v. Cooper* (2002) 27 Cal.4th 38, 40.)

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11 In a previous version of this opinion, we rejected Sherow, Jr.'s challenge to the calculation of his presentence conduct credits on the ground that there was no evidence in the record that he had presented the issue to the trial court in the first instance. In a petition for rehearing, Sherow, Jr., attached a minute order dated October 15, 2010, showing that he had filed a motion to correct the calculation of his conduct credits, but the trial court had denied it. We granted the petition for rehearing and directed that the record be augmented to include the materials pertaining to Sherow, Jr.'s motion to correct the calculation of his conduct credits. The record now reflects that the motion was presented to the trial court and was denied. We therefore proceed to consider Sherow, Jr.'s challenge to the calculation of his presentence conduct credits.

The version of section 4019 in effect when Sherow, Jr., was sentenced in December 2009 allowed conduct credits to accrue at the rate of two days for every four days spent in local custody, so that "if all days are earned under this section, a term of six days will be deemed to have been served for every four days spent in actual custody." (Stats. 1982, ch. 1234, § 7, p. 4554.) Effective January 25, 2010, section 4019 was amended to provide qualifying defendants with increased conduct credits of two days for every two days spent in local custody, so that "if all days are earned under this section, a term of four days will be deemed to have been served for every two days spent in actual custody." (Stats. 2009, 3d Ex. Sess. 2009-2010, ch. 28, § 50, p. 5271.)[12]

Applying the version of section 4019 in effect at the time of Sherow, Jr.'s sentencing, the trial court awarded 64 days of presentence conduct credits. Sherow, Jr., contends that January 25, 2010 amendment to section 4019 should be retroactively applied to all cases — including his own — in which the convictions were not final on appeal as of the effective date of the amendment, and that he should therefore receive 128 days of presentence conduct credit instead of 64 days.

The issue of whether the January 25, 2010 amendment to section 4019 applies to defendants who earned conduct credits before January 25, 2010, but whose judgments were not yet final on that date, is currently pending before our Supreme Court. (See, e.g.,

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12 Section 4019 was amended again, effective September 28, 2010, to reinstate the conduct credit provisions that applied before the January 25, 2010 amendment took effect; but the September 28, 2010 amended version applies only to local custody served by defendants for crimes committed on or after September 28, 2010. (§ 4019, subd. (g); Stats. 2010, ch. 426, § 2.) The most recent amendment to section 4019 is inapplicable to this case because Sherow, Jr., committed his crimes before September 28, 2010.

People v. Bacon (2010) 186 Cal.App.4th 333, review granted Oct. 13, 2010, S184782 [holding amended § 4019 applies retroactively to judgments not yet final]; *People v. Landon* (2010) 183 Cal.App.4th 1096, review granted June 23, 2010, S182808 [same]; *People v. Brown* (2010) 182 Cal.App.4th 1354, review granted June 9, 2010, S181963 [same]; contra, *People v. Eusebio* (2010) 185 Cal.App.4th 990, review granted Sept. 22, 2010, S184957; *People v. Rodriguez* (2010) 183 Cal.App.4th 1, review granted June 9, 2010, S181808.)

While we await our Supreme Court's decision, we adopt the majority view of the intermediate appellate courts that the January 25, 2010 amendment applies retroactively. Accordingly, Sherow, Jr., is entitled to an additional 64 days of conduct credits (for a total of 128 days of conduct credits), and the judgment is modified to award these credits.

DISPOSITION

Sherow, Sr.'s conviction on counts 7, 8, 9 and 10 is reversed. The judgment as to Sherow, Jr., is modified to award 128 days of conduct credit instead of 64 days, and the trial court is directed to prepare an amended abstract of judgment for Sherow, Jr., and forward a certified copy of the amended abstract of judgment to the Department of Corrections and Rehabilitation. In all other respects the judgments as to Sherow, Sr., and Sherow, Jr., are affirmed.

IRION, J.

WE CONCUR:

HUFFMAN, Acting P. J.

NARES, J.