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CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, Plaintiff and Respondent, v. PAUL GARCIA, Defendant and Appellant.	B233562 (Los Angeles County Super. Ct. No. BA371988)

APPEAL from a judgment of the Superior Court of Los Angeles County, Fred N. Wapner, Judge. Affirmed as modified with directions.

Jonathan P. Fly, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Victoria B. Wilson and David E. Madeo, Deputy Attorneys General, for Plaintiff and Respondent.

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* Pursuant to California Rules of Court, rules 8.1100 and 8.1110, this opinion is certified for publication with the exception of parts II, III A-B and III (C)(8).

I. INTRODUCTION

A jury convicted defendant, Paul Garcia, of making criminal threats (Pen. Code,[1] § 422), a serious felony. (§ 1192.7, subd. (c)(38).) Defendant made the criminal threats on May 28, 2010. The trial court found defendant had sustained one prior serious felony conviction. (§ 667, subd. (a)(1).) Defendant was sentenced to 6 years, 4 months in state prison. Defendant was sentenced on January 26, 2011.

Defendant was in presentence custody for 244 days from May 28, 2010, to January 26, 2011. Prisoners in local presentence custody earn credit against their state prison terms for good conduct and agreeing to performing labor as directed by the sheriff. (*People v. Brown* (2012) 54 Cal.4th 314, 317; *People v. Austin* (1981) 30 Cal.3d 155, 163.) Over the past several decades, computing presentence conduct credits has been a fairly straight-forward, albeit sometimes taxing, ministerial duty. But between October 11, 2009, and September 20, 2011, Governors Arnold Schwarzenegger or Edmund G. Brown, Jr., signed five legislative bills which concern the calculation of presentence conduct credits. These five legislative bills have made calculating presentence conduct credits a potentially complex undertaking. And, trial courts throughout California have been deluged with motions, habeas corpus petitions and hand scrawled or typewritten (on actual typewriters) letters from inmates seeking additional presentence conduct credits.

In the published portion of this opinion, we will describe how those five legislative bills apply to this case. Because of the interplay between various bills and the dates of the commission of different offenses, there are a wide ranging number of presentence conduct credit calculation scenarios. We will only resolve the case before us—a May 28, 2010 offense and a January 26, 2011 sentencing. We conclude defendant is entitled to only two days of conduct credit for every four days served in presentence custody. This

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[1] All further statutory references are to the Penal Code unless otherwise noted.

is because in this case and on a prior occasion defendant was convicted of a serious felony.

This case does not involve a murder or other violent felony conviction. Presentence conduct credits in such cases involve different calculations. (§§ 2933.1, subd. (c) [15 per cent limit on presentence conduct credits in violent felony conviction prosecutions]; 2933.2 [no presentence conduct credits for convicted murderers].) Hence, we are not discussing in any way the effect of the five legislative bills on presentence conduct credits in murder or other violent felony prosecutions.

[The portion of this opinion that follows, part II is deleted from publication.]

II. THE EVIDENCE

A. The Prosecution Case

The victim, 73-year-old Charles Brooks, was a hotel manager in Los Angeles. Mr. Brooks was unavailable as a witness at trial. His prior testimony was read into the record. Mr. Brooks had seen people in the area of the hotel who were under the influence of alcohol or drugs many times. And as manager, it was his responsibility to handle any disturbances in the building. He was required to confront people and remove them from the building when they caused disturbances.

On May 28, 2010, at about 4:45 p.m., Mr. Brooks found defendant on the third floor of the hotel. Defendant was lying on his back on the floor and knocking on the door to a room. Mr. Brooks had never seen defendant before. Defendant was not a building tenant so far as Mr. Brooks knew. Mr. Brooks picked defendant up off the floor. Defendant was picked up by his shirt. Mr. Brooks shook defendant. Mr. Brooks said to defendant, "Hey, you got to go." Defendant was incoherent, dazed and unfocused. He appeared to be drunk or on drugs. His eyes were nearly closed.

Within minutes, however, defendant became very agitated. Defendant said he was going to go home and get his AK-47. Defendant threatened to shoot Mr. Brooks's ass. He said it in a vicious tone of voice. He did not use the word "kill." Mr. Brooks started to walk away down the hall. Defendant got up off the floor and followed Mr. Brooks. Defendant said: "I will blow your ass away. I am Mexican." Mr. Brooks "definitely" took that statement as a threat. He walked to the staircase and down to the second floor. Defendant followed Mr. Brooks. At trial, Mr. Brooks described defendant's ensuing stalking conduct, "He was following me." When asked how far behind, defendant testified, "Maybe 15, 20 feet."

A second floor tenant, Eugene Wilson, had left his door open. Mr. Brooks described their conversation: "I told him to call 911. He said, you call 'em. He gave me the phone, and I called 911." Defendant went to another second floor apartment and tried to force his way in. Then he went down to the lobby and took off all his clothing. He re-clothed himself and started to leave the building, but police officers were waiting for him at the door.

Mr. Brooks was asked about how he felt: "Q 'Did [defendant's first statement] make you feel anything when he said that to you? [¶] 'A A little comprehension, yeah. [¶] 'Q What do you mean by that? [¶] 'A A little bit of being afraid, yes. [¶] . . . [¶] 'Q . . . [¶] And then when he followed you and he said the statement that he said regarding I'm Mexican, and I don't remember the other words. What were the other words that he said? [¶] 'A He said, I will blow you away. He said, I'm Mexican. [¶] 'Q And when he said that, did that make you feel the same way? [¶] 'A About the same, yes. [¶] 'Q Okay. [¶] And did you feel like it was possible that he could carry out those threats? [¶] . . . [¶] 'A Yes."

The jury listened to a recording of Mr. Brooks's conversation with the emergency operator. Mr. Brooks can be heard breathing heavily. Mr. Brooks told the operator, "I got a Mexican guy here . . . that tried to assault me." Mr. Brooks said, "He's planning to shoot me, you want to get a cop out here or not?" A man can be heard shouting in the background.

Mr. Wilson had known Mr. Brooks for five years. Mr. Wilson testified Mr. Brooks had to confront problems in the building all the time. Mr. Wilson had seen Mr. Brooks do so on prior occasions. On those occasions, Mr. Brooks had been frightened. Mr. Wilson had heard Mr. Brooks angry and frustrated during confrontational conversations. On the date of the present incident, Mr. Wilson watched Mr. Brooks telephone the emergency operator. Mr. Brooks appeared to Mr. Wilson to be nervous and shaken. Mr. Wilson testified, "He seemed more scared than I'd ever seen him." Mr. Brooks's voice when he was talking during the emergency telephone call was similar to earlier incidents, but different. Mr. Wilson testified: "It was a little more nervous, and it was really shaken up loose. Usually he's real strong and ready to fight back, but this time he was scared."

Detective Tina Ross interviewed Mr. Brooks by telephone. Mr. Brooks said defendant said, "I'm a big gang member" and referred to a specific street gang. Mr. Brooks told Detective Ross that defendant stripped naked in the lobby. Defendant then again threatened to kill Mr. Brooks.

Officer Amme Michelle Green and a partner detained defendant who was about to exit the building. Defendant, who was drunk, did not resist when handcuffed. He was transported to the jail dispensary to be treated for alcohol consumption. Mr. Brooks told Officer Green defendant said: "Shut up, old man. I'm going to kill you" and "I'm going to get my AK 47 and kill you." Also, defendant ran towards Mr. Brooks and said, "I'm going to kill you, old man."

B. Defense Case

Dr. Sanjay Sahgal, a forensic psychiatrist, interviewed defendant. Dr. Sahgal also reviewed defendant's psychiatric records. Dr. Sahgal testified defendant had a history of traumatic brain injury, a prior diagnosis of bipolar disorder, and alcohol dependence. Defendant's behavior at the time of the altercation with Mr. Brooks was consistent with

someone experiencing acute alcohol intoxication or bipolar disorder or a combination of both.

[The portion of the opinion that follows is to be published.]

III. DISCUSSION

[The portions of the opinion that follow, parts III A-B, are deleted from publication.]

A. Attempted Criminal Threats

Defendant contends there was evidence he failed to arouse sustained fear; therefore, the trial court should have instructed the jury on *attempted* criminal threat. Our review is de novo. (*People v. Licas* (2007) 41 Cal.4th 362, 366; *People v. Cole* (2004) 33 Cal.4th 1158, 1218.) We find no prejudicial error.

Section 422, subdivision (a), sets forth the elements of the criminal threat offense: "Any person who willfully threatens to commit a crime which will result in death or great bodily injury to another person, with the specific intent that the statement . . . is to be taken as a threat, even if there is no intent of actually carrying it out, which, on its face and under the circumstances in which it is made, is so unequivocal, unconditional, immediate, and specific as to convey to the person threatened, a gravity of purpose and an immediate prospect of execution of the threat, *and thereby causes that person reasonably to be in sustained fear* for his or her own safety or for his or her immediate family's safety, shall be punished . . . ." (Italics added.) Section 422 does not define "sustained fear." However, Division Three of the Court of Appeal for this appellate district has held that sustained fear means, "[A] period of time that extends beyond what is momentary, fleeting, or transitory." (*People v. Allen* (1995) 33 Cal.App.4th 1149, 1156; accord, *People v. Fierro* (2010) 180 Cal.App.4th 1342, 1349; *In re Ricky T.* (2001) 87 Cal.App.4th 1132, 1140.)

In *People v. Toledo* (2001) 26 Cal.4th 221, 231, our Supreme Court explained the circumstances in which a person may be found to have committed the offense of *attempted* criminal threat: "[A] defendant properly may be found guilty of attempted criminal threat whenever, acting with the specific intent to commit the offense of criminal threat, the defendant performs an act that goes beyond mere preparation and indicates that he or she is putting a plan into action. Furthermore, in view of the elements of the offense of criminal threat, a defendant acts with the specific intent to commit the offense of criminal threat only if he or she specifically intends to threaten to commit a crime resulting in death or great bodily injury with the further intent that the threat be taken as a threat, under circumstances sufficient to convey to the person threatened a gravity of purpose and an immediate prospect of execution so as to reasonably cause the person to be in sustained fear for his or her own safety or for his or her family's safety. [¶] A variety of potential circumstances fall within the reach of the offense of attempted criminal threat. For example, . . . if a defendant, again acting with the requisite intent, makes a sufficient threat that is received and understood by the threatened person, but, for whatever reason, the threat does not *actually* cause the threatened person to be in sustained fear for his or her safety even though, under the circumstances, that person reasonably could have been placed in such fear, the defendant properly may be found to have committed the offense of attempted criminal threat. In [this situation], only a fortuity, not intended by the defendant, has prevented the defendant from perpetrating the completed offense of criminal threat itself." As the Court of Appeal for the Sixth Appellate District explained in *People v. Jackson* (2009) 178 Cal.App.4th 590, 597-598, in this circumstance, attempted criminal threat includes all the elements of criminal threat except the victim's subjective response.

Defendant did not request instruction on attempted criminal threat. However, our courts have concluded, without explicit analysis, that attempted criminal threat is a lesser included offense of criminal threat. (See *People v. Toledo, supra,* 26 Cal.4th at p. 226; *In re Sylvester C.* (2006) 137 Cal.App.4th 601, 607; *People v. Jackson, supra*, 178 Cal.App.4th at p. 593.) Moreover, as our Supreme Court has held: "[A trial court has a

sua sponte duty to instruct on a lesser included offense] when the evidence raises a question as to whether all of the elements of the charged offense were present [citation], but not when there is no evidence that the offense was less than that charged. [Citations.]" (*People v. Breverman* (1998) 19 Cal.4th 142, 154-155; accord, *People v. Mendoza* (2000) 24 Cal.4th 130, 174.)

We find no evidence the offense was less than that charged. A victim may, of course, supply evidence he or she experienced sustained fear. Also, a percipient witness may testify he or she observed the victim to actually experience sustained fear. (See *In re Sylvester C., supra,* 137 Cal.App.4th at p. 606.) Here, we have evidence of sustained fear from both such sources. It is true that Mr. Brooks did not testify at trial. The jury was not able to observe his demeanor. And he was unavailable for cross-examination before the jury. However, in his prior recorded testimony where he was cross-examined, Mr. Brooks said the viciously uttered threats made him feel "comprehensive" and afraid. We assume Mr. Brooks meant he felt *apprehensive.* Mr. Brooks walked away from defendant, down a flight of stairs and called for emergency assistance. Mr. Wilson had observed Mr. Brooks frequently and repeatedly respond to disturbances in the hotel over a five-year period. Mr. Wilson described Mr. Brooks as, on the present occasion, "a little more nervous" than usual and "really shaken up." Mr. Wilson testified as to Mr. Brooks's anxiety, "He seemed more scared than I'd ever seen him." Mr. Wilson explained, "Usually he's real strong and ready to fight back, but this time he was scared." The jury had before it the recording of Mr. Brooks's conversation with the emergency operator. In that recording, Mr. Brooks is breathing heavily and sounds agitated. Mr. Brooks told the emergency operator, "He's planning to shoot me, you want to get a cop out here or not?" There is no evidence Mr. Brooks, after the threatening run-in with a bi-polar intoxicated individual, only experienced transitory or fleeting fear. If there had been circumstantial evidence he was able to intellectually or emotionally shake off the threat to kill him, the result would be different in terms of the duty to instruct.

Moreover, even if the trial court had erred, the instructional error was harmless. It is not reasonably probable the result would have been more favorable to defendant had

the jury been instructed on attempted criminal threats. (*People v. Breverman, supra,* 19 Cal.4th at pp. 176-177; *People v. Watson* (1956) 46 Cal.2d 818, 836.) As noted, there was no substantial evidence Mr. Brooks was *not* afraid. There was no substantial evidence he experienced only momentary fear.

B. Presentence Custody Credit

The trial court awarded defendant credit for 243 actual days in presentence custody. However, defendant was arrested on May 28, 2010, and sentenced on January 26, 2011. Therefore, he was entitled to credit for 244 days in actual presentence custody. (*People v. Morgain* (2009) 177 Cal.App.4th 454, 469; *People v. Heard* (1993) 18 Cal.App.4th 1025, 1027.)

[The balance of the opinion is to be published]

C. Presentence Conduct Credit

1. Overview

The availability of conduct credits has been the subject of reform throughout California history. Initially, local boards of supervisors were charged with the duty to enact rules concerning labor in county jails. (Ann. Pen. Code §§ 1612-1614 1st ed. 1872 , Haymond & Burch, Comrs.-annotators) p. 292; Stats. 1893, ch. CCXIV, § 1, p. 298.) In 1893, former section 1614 was amended to permit an inmate who had obeyed a jail's rules and regulations to receive five days of credit against her or his sentence. The availability of the potential five days of credit was dependent on the approval of a local board of supervisors. (Stats. 1893, ch. CCXIV, § 1, p. 298.) In 1941, former sections 4018 and 4019 were enacted which allowed for up to a total of 10 days per month of conduct and work credits. (Stats. 1941, ch. 106, pp. 1122-1123.) In 1955, former sections 4018 and 4019 were amended, but the maximum amount of work and conduct

credits remained fixed at 10 days per month. (Stats. 1955, ch. 912, §§ 2-3, pp. 1538-1539.) In 1976, the Legislature repealed the 1955 versions of former sections 4018 and 4019. Former section 4019 was then reenacted and provided prisoners were to receive, for each "one-fifth of a month" of actual custody, two days of conduct and work credits. (Stats. 1976, ch. 286, § 4, p. 595.) In 1978, former section 2900.5, subdivision (a) was amended to include section 4019 conduct credits in the calculation of presentence conduct credits for convicted defendants sentenced to prison. (Stats. 1978, ch. 304, § 1, pp. 632-633.)

In 1982, former section 4019 was amended to provide presentence conduct credits so that for every four days served in custody the defendant was deemed to have served six days. From 1982 through 2009, former section 4019 authorized two days' conduct credit for every four days spent in presentence custody. (Former § 4019, subds. (b) & (c), as amended by Stats. 1982, ch. 1234, § 7, pp. 4553-4554; *People v. Brown, supra,* 54 Cal.4th at p. 318, fn. 4; *Payton v. Superior Court* (2011) 202 Cal.App.4th 1187, 1190.) The Legislature declared in 1982, "It is the intent of the Legislature 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." (Former § 4019, subd. (f), as amended by Stats. 1982, ch. 1234, § 7, p. 4554.)

At issue in this case are five amendments to section 4019 and two amendments to section 2933. Before proceeding to a specific analysis of each amendment to sections 2933 and 4019, it is best to identify the five separate bills which affect presentence conduct credit calculations. For purposes of clarity, we shall refer to the amendments by their bill numbers. First, on October 11, 2009, former Governor Schwarzenegger approved Senate Bill No. 18, which amended section 4019. (Stats. 2009, 3rd Ex. Sess. 2009-2010, ch. 28, § 50.) Senate Bill No. 18 contains the controlling amendments to section 4019 in effect when defendant threatened the victim on May 28, 2010. Second, on September 28, 2010, Governor Schwarzenegger signed Senate Bill No. 76, which amended sections 2933 and 4019. (Stats. 2010, ch. 426, §§ 1-2.) Senate Bill No. 76 was in effect when defendant was sentenced on January 26, 2011. Third, on April 4, 2011,

Governor Brown signed Assembly Bill No. 109, which amended, as relevant here, section 4019. (Stats. 2011, ch. 15, § 482.) Fourth, on June 30, 2011, Governor Brown signed Assembly Bill No. 117, which amended section 4019. (Stats. 2011, ch. 39, § 53.) Fifth, on September 20, 2011, Governor Brown signed Assembly Bill No. 17, which amended section 4019. (Stats. 2011, 1st Ex. Sess. 2011-2012, ch. 12, § 35.)

As we will explain, Senate Bill No. 76, which amended sections 2933 and 4019, contains the controlling presentence conduct credits provisions. Now what is the impact in this case of Assembly Bill Nos. 17, 109 and 117, all adopted after defendant was sentenced on January 26, 2011? The answer to that question; absolutely nothing.

2. Senate Bill No. 18

On December 19, 2008, former Governor Schwarzenegger declared a fiscal emergency. (Exec. Order No. S-16-08, http://gov.ca.gov/news.php?id=11310 [as of Sept. 19, 2012].) In response, the Legislature adopted a comprehensive set of amendments designed to reduce expenditures. (See Stats. 2009, 3rd Ex. Sess. 2009-2010, ch. 28, § 62; Sen. Rules Com., Off. of Sen. Floor Analyses, Rep. on Sen. Bill No. 18 (3rd Ex. Sess. 2009-2010) Jan. 12, 2009); *People v. Brown, supra,* 54 Cal.4th at pp. 317-318; *Payton v. Superior Court, supra,* 202 Cal.App.4th at p. 1191.) Signed into law on October 11, 2009, by Governor Schwarzenegger, Senate Bill No. 18 provided a more generous award of presentence conduct credits than in the 1982 version of section 4019. (Stats. 2009, 3rd Ex. Sess. 2009-2010, ch. 28, § 50.) Senate Bill No. 18 was adopted during an extraordinary legislative session. Thus, Senate Bill No. 18 did not go into effect until January 25, 2010. (Cal. Const., Art. 4, § 8 (c)(1) ["[A] statute enacted at a special session shall go into effect on the 91st day after adjournment of the special session at which the bill was passed."]; see *People v. Brown*, *supra*, 54 Cal.4th at p. 318.) The 2009-2010 third extraordinary session adjourned on October 26, 2009. (Cal. Senate Journal, 2009-2010 Third Extraordinary Session, Nov. 30, 2009, p. 273.) The 91st day after October 26, 2009, was January 25, 2010. Thus, prior to January 25, 2010, the two days of

conduct credit for every four days in custody computation was the controlling rule of law. (See *People v. Brown*, *supra*, 54 Cal.4th at p. 318 & fn. 4; Stats. 1982, ch. 1234, § 7, pp. 4553-4554.)

With exceptions, Senate Bill No. 18 provided presentence conduct credits of two days for every two days served in a county jail for persons committed to prison. (Former § 4019, subds. (b)(1) and (c)(1).) But defendant was ineligible for an award of two days of conduct credit for every two days served in county jail. This is because he was convicted in this case of a serious felony. And he had previously been convicted of a serious felony. Former section 4019, subdivisions (b)(2) and (c)(2) in the Senate Bill No. 18 version of the statute barred such an award for inmates under these circumstances. The Senate Bill No. 18 version of former section 4019, subdivisions (b) and (c) stated in those parts relevant to defendant: "(b)(1) Except as provided in Section 2933.1 and paragraph (2), subject to the provisions of subdivision (d), for each four-day period in which a prisoner is confined in . . . a facility as specified in this section, one day shall be deducted from his or her period of confinement unless it appears by the record that the prisoner has refused to satisfactorily perform labor as assigned by the sheriff. . . . [¶] (2) If the prisoner . . . was committed for a serious felony . . . or has a prior conviction for a serious felony . . . , for each six-day period in which the prisoner is confined in or committed to a facility as specified in this section, one day shall be deducted from his or her period of confinement unless it appears by the record that the prisoner has refused to satisfactorily perform labor as assigned by the sheriff. . . . [¶] (c)(1) Except as provided in Section 2933.1 and paragraph (2), for each four-day period in which a prisoner is confined in . . . a facility as specified in this section, one day shall be deducted from his or her period of confinement unless it appears by the record that the prisoner has not satisfactorily complied with the reasonable rules and regulations established by the sheriff . . . [¶] (2) If the prisoner . . . was committed for a serious felony . . . , or has a prior conviction for a serious felony . . . . , for each six-day period in which the prisoner is confined in . . . a facility as specified in this section, one day shall be deducted from his or her period of confinement unless is appears by the record that the prisoner has not

satisfactorily complied with the reasonable rules and regulations established by the sheriff. . . ." As noted, defendant was convicted of a serious felony. Either defendant's present or prior serious felony conviction precluded a presentence conduct credit award of two days for every two days in actual physical confinement. Thus, former section 4019, subdivisions (b)(2) and (c)(2) as amended in Senate Bill No. 18 only provided defendant with two days of conduct credits for every four days served in actual custody.[2]

The foregoing is confirmed by former section 4019, subdivision (f) as amended in Senate Bill No. 18, "It is the intent of the Legislature that if all days are earned under this

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[2] Former section 4019, subdivisions (b) and (c) as amended by Senate Bill No. 18, stated in their entirety: "(b)(1) Except as provided in Section 2933.1 and paragraph (2), subject to the provisions of subdivision (d), for each four-day period in which a prisoner is confined in or committed to a facility as specified in this section, one day shall be deducted from his or her period of confinement unless it appears by the record that the prisoner has refused to satisfactorily perform labor as assigned by the sheriff, chief of police, or superintendent of an industrial farm or road camp. [¶] (2) If the prisoner is required to register as a sex offender pursuant to Chapter 5.5 (commencing with Section 290), was committed for a serious felony, as defined in Section 1192.7, or has a prior conviction for a serious felony, as defined in Section 1192.7, or a violent felony, as defined in Section 667.5, subject to the provisions of subdivision (d), for each six-day period in which the prisoner is confined in or committed to a facility as specified in this section, one day shall be deducted from his or her period of confinement unless it appears by the record that the prisoner has refused to satisfactorily perform labor as assigned by the sheriff, chief of police, or superintendent of an industrial farm or road camp. [¶] (c)(1) Except as provided in Section 2933.1 and paragraph (2), for each four-day period in which a prisoner is confined in or committed to a facility as specified in this section, one day shall be deducted from his or her period of confinement unless it appears by the record that the prisoner has not satisfactorily complied with the reasonable rules and regulations established by the sheriff, chief of police, or superintendent of an industrial farm or road camp. [¶] (2) If the prisoner is required to register as a sex offender pursuant to Chapter 5.5 (commencing with Section 290), was committed for a serious felony, as defined in Section 1192.7, or has a prior conviction for a serious felony, as defined in Section 1192.7, or a violent felony, as defined in Section 667.5, for each six-day period in which the prisoner is confined in or committed to a facility as specified in this section, one day shall be deducted from his or her period of confinement unless is appears by the record that the prisoner has not satisfactorily complied with the reasonable rules and regulations established by the sheriff, chief of police, or superintendent of an industrial farm or road camp."

section, a term of four days will be deemed to have been served for every two days spent in actual custody, except that a term of six days will be deemed to have been served for every four days spent in actual custody for persons described in paragraph (2) of subdivision (b) or (c)." Under Senate Bill No. 18, defendant, with his present and prior serious felony convictions, was entitled to only two days of presentence conduct credit for every four days actually served in custody. (*People v. Lara* (2012) 54 Cal.4th 896, 899; *People v. Brown, supra,* 54 Cal.4th at p. 318, fn. 5; *People v. Holford* (2012) 203 Cal.App.4th 155, 159, fn. 2; *People v. Brewer* (2011) 192 Cal.App.4th 457, 461, fn. 5.)

3. Senate Bill No. 76

The increased conduct credit rate (for persons other than defendant) in Senate Bill No. 18 lasted until September 28, 2010. Effective September 28, 2010, in Senate Bill No. 76, the Legislature restored conduct credit accrual *for all local prisoners* to the prior existing rates. That is, local conduct credits were awarded two days for every four days in the county jail. (Former § 4019, subds. (b) & (c) as amended by Stats. 2010, ch. 426, § 2; Sen. Rules Com., Off. of Sen. Floor Analyses, Rep. on Sen. Bill No. 76 (2009-2010 Reg. Sess.) as amended Aug. 20, 2010.) The Legislature declared, "It is the intent of the Legislature 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." (Former § 4019, subd. (f), as amended by Senate Bill No. 76.) Senate Bill No. 76 eliminated the differing treatment of local prisoners in former section 4019, subdivisions (b)(2) and (c)(2): required to register as sex offenders; committed for serious felonies; or who had prior serious or violent felony convictions. The amendment to section 4019 by Senate Bill No. 76 applied to prisoners in local custody for crimes committed on or after September 28, 2010. (Former § 4019, subd. (g), as amended by Senate Bill No. 76.)

At the same time, Senate Bill No. 76 amended former section 2933 to award day-for-day conduct credit to certain prisoners in local presentence custody who were sentenced to prison. (Former § 2933, subd. (e)(1), as amended by Stats. 2010, ch. 426

(Sen. Bill No. 76), § 1, eff. Sept. 28, 2010.) As we will explain, defendant was ineligible for the day-for-day credits. Section 2933 had previously been concerned only with post-sentence prison work credits. (See *In re Reeves* (2005) 35 Cal.4th 765, 774.) Nevertheless, effective on September 28, 2010, with certain exceptions, section 2933 superseded section 4019 with respect to defendants receiving *executed* determinate sentences. (By *executed* sentences, the Legislature meant the accused was actually committed to state prison rather than placed on probation with: proceedings suspended; imposition of sentence suspended; or execution of sentence suspended.)

Section 2933, subdivision (e)(1) as amended by Senate Bill No. 76 stated in part: "Notwithstanding Section 4019 and subject to the limitations of this subdivision, a prisoner sentenced to the state prison under Section 1170 for whom the sentence is executed shall have one day deducted from his or her period of confinement for every day he or she served in [local custody] from the date of arrest until state prison credits pursuant to this article are applicable to the prisoner." However, section 2933, subdivision (e)(3) provided exceptions to the day-for-day conduct credits regime: "Section 4019, and not this subdivision, shall apply if the prisoner is required to register as a sex offender . . . , was committed for a serious felony, . . . or has a prior conviction for a serious felony . . . or a violent felony . . . ." This provision remained in effect until October 1, 2011. Senate Bill No. 76 was urgency legislation that took effect immediately. The Legislature declared: "This act is an urgency statute necessary for the immediate preservation of public peace, health, or safety within the meaning of Article IV of the Constitution and shall go into immediate effect. The facts constituting the necessity are: [¶] In order to provide for local custody credits in a manner consistent with historic practices and policies of local law enforcement officials as soon as possible . . . ." (Stats. 2010, ch. 426, § 5.)

Thus, under Senate Bill No. 76, defendant was ineligible for the one day conduct credit award for each day in custody under former section 2933, subdivision (e)(1). Why—because in this case he was convicted of a serious felony. And he had previously been convicted of a serious felony. Therefore, conduct credits must be calculated under

former section 4019; not under former section 2933, subdivision (e)(1) as amended by Senate Bill No. 76. As we will explain next, section 2933, subdivision (e), with its impact on presentence conduct credits, was short-lived. Effective October 1, 2011, as part of the realignment legislation, the section 2933, subdivision (e) presentence conduct credits provision was repealed. Section 4019 returned as the standard for awarding presentence conduct credits. (Stats. 2011, 1st Ex. Sess. 2011-2012, ch. 12, § 16.)

4. Assembly Bill No. 109

Governor Brown signed Assembly Bill No. 109 on April 4, 2011. Assembly Bill No. 109 was part of the criminal justice realignment reforms. The Legislative Counsel's Digest states Assembly Bill No. 109 was to take effect immediately. (Legis. Counsel's Dig., Assem. Bill No. 109 (2011-2012 Reg. Sess.) p. 7.) However, as we will explain, the effective date as of April 4, 2011 was initially July 1, 2011, and it was extended later to October 1, 2011.

Assembly Bill No. 109 authorized conduct credit for *all local prisoners* at the rate of two days for every two days spent in local presentence custody. (§ 4019, subds. (b) & (c), as amended by Stats. 2011, ch. 15, § 482, eff. April 4, 2011, op. October 1, 2011.) The Legislature declared, "It is the intent of the Legislature 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 local custody." (§ 4019, subd. (f), as amended by Stats. 2011, ch. 15, § 482.) This conduct credit accrual rate was consistent with that for state prison inmates. (Sen. Rules Com., Off. of Sen. Floor Analyses, Rep. on Assem. Bill No. 109, as introduced Jan. 10, 2011 and as amended March 14, 2011; Assem. Com. on Budget, Rep. on Assem. Bill No. 109, as amended March 17, 2011.) Assembly Bill No. 109 omitted any exclusion for prisoners: required to register as sex offenders; committed for a serious felonies; or who had sustained prior serious or violent felony convictions. (§ 4019, as amended by Assem. Bill No. 109; *People v. Lara, supra,* 54 Cal.4th at p. 906, fn. 9.) In former section 4019, subdivision (h), Assembly Bill No. 109 described its prospective

nature and effective date of the new presentence conduct credit calculations standards: "The changes to this section enacted by the act that added this subdivision shall apply prospectively and shall apply to prisoners who are confined to a county jail, city jail, industrial farm, or road camp for a crime committed on or after July 1, 2011. Any days earned by a prisoner prior to July 1, 2011, shall be calculated at the rate required by the prior law." (Stats. 2011, ch. 15, § 482.) A note of caution though, the July 1 section 4019 effective date was superseded by an October 1, 2011 effective date in Assembly Bill No. 117. We digest Assembly Bill No. 117 in the next paragraph.

5. Assembly Bill No. 117

On June 30, 2011, Governor Brown signed Assembly Bill No. 117. Governor Brown signed Assembly Bill No. 117 before the July 1, 2011 operative date of Assembly Bill No. 109. Assembly Bill No. 117 maintained the two days of credit for every two days served standard of presentence credit calculation established in the initial realignment legislation in Assembly Bill No. 109. There were amendments to section 4019 that are irrelevant to our discussion. But Assembly Bill No. 117 adopted a new effective date for application of the two days of credit for every two days served standard of presentence conduct credits calculation: "The changes to this section enacted by the act that added this subdivision shall apply prospectively and shall apply to prisoners who are confined to a county jail, city jail, industrial farm, or road camp for a crime committed on or after October 1, 2011. Any days earned by a prisoner prior to October 1, 2011, shall be calculated at the rate required by the prior law." (Former § 4019, subd. (h), as amended by Assem. Bill No. 117.) Assembly Bill No. 117 thus created a new effective date for calculating presentence conduct credits.

6. Assembly Bill No. 17

On September 20, 2011, Governor Brown signed Assembly Bill No. 17 (1st Ex. Sess. 2011-2012), which was enrolled by the Secretary of State on September 21, 2011. (Stats. 2011, 1st Ex. Sess. 2011-2012, ch. 12, § 35.) Assembly Bill No. 17 is the current version of section 4019. As to section 4019, Assembly Bill No. 17 clarified that its terms applied to felons sentenced to county jail pursuant to section 1170, subdivision (h). (§ 4019, subd. (a)(6).) Assembly Bill No. 17 did not change the method of presentence conduct credit calculation. As in connection with the April 4 and June 30, 2011 versions, a term of four days is deemed to have been served for every two days spent in actual custody. (§ 4019, subd. (f).) Section 4019, subdivision (h) describes its prospective effect: "The changes to this section enacted by the act that added this subdivision shall apply prospectively and shall apply to prisoners who are confined to a county jail, city jail, industrial farm, or road camp for a crime committed on or after October 1, 2011. Any days earned by a prisoner prior to October 1, 2011, shall be calculated at the rate required by the prior law." The operative date provisions for presentence conduct credit calculation are the same in Assembly Bills Nos. 117 and 17—October 1, 2011.

7. Application to defendant

Defendant threatened the victim on May 28, 2010. On May 28, 2010, Senate Bill No. 18 provided, in some cases, that for each two days in custody, the accused received two days of conduct credits. But defendant was ineligible for those more generous credits. He was convicted of a serious felony in this case. And he had previously been convicted of a serious felony. (Stats. 2009, 3rd Ex. Sess. 2009-2010, ch. 28, § 50; former § 4019, subds. (b)(2), (c)(2) & (f).) Thus, on the day the victim was threatened, defendant was entitled to only two days of conduct credit for every four days of actual custodial confinement.

Defendant was sentenced on January 26, 2011. By January 26, 2011, Senate Bill No. 76 had repealed the rule which provided that for every two days in custody the accused received two days of conduct credits for some defendants. (Stats. 2010, ch. 426, §§ 1-2; §§ 2933, subd. (e); 4019, subds. (b), (c) & (f).) Hence, under the versions of section 4019 in effect on or before January 26, 2011, defendant may not receive two days of conduct credits for each two days in custody.

Nothing in the criminal justice realignment legislation signed by Governor Brown changes matters for defendant. As noted, the April 4, 2011 legislation, Assembly Bill No. 109, expressly states it applies prospectively only and only to post-June 30, 2011 offenses. (Stats. 2011, ch. 15, § 482; former § 4019, subd.(h).) As to the June 30, 2011 amendments, Assembly Bill No. 117 states its presentence conduct credit provisions are to be prospectively applied and then only to post-September 30, 2011 crimes. (Stats. 2011, ch. 39, § 53; former § 4019, subd. (h).) Finally, as to Assembly Bill No. 17, by its explicit terms, it is to be applied prospectively only. And any credits "earned" prior to October 1, 2011, are to be calculated at the rate required by prior law. Nothing in the post-January 26, 2011 (the date he was sentenced) development of section 4019 grants defendant the right to two days of conduct credits for each two days in custody. (*People v. Brown*, *supra*, 54 Cal.4th at pp. 319-328; *People v. Ellis* (2012) 207 Cal.App.4th 1546, 1548, 1549-1553.)

[Part III (C)(8) is deleted from publication. See *post* in the ensuing paragraph where publication is to resume.]

8. Unpublished discussion

Defendant argues the disparate applications of presentence custody credits violates equal protection. Defendant cites to the prospective-only applications of section 4019 as codified in Assembly Bill Nos. 17, 109 and 117. This contention has no merit. (*People*

v. Brown, *supra*, 54 Cal.4th at pp. 328-330; *People v. Ellis*, *supra*, 207 Cal.App.4th at pp.1549-1553.)

[The balance of the opinion is to be published]

IV. DISPOSITION

The judgment is modified to grant defendant credit for 244 days in presentence custody and 122 days of conduct credit for a total credit of 366 days. The judgment is affirmed in all other respects. Upon remittitur issuance, the superior court clerk is to prepare an amended abstract of judgment and deliver a copy to the Department of Corrections and Rehabilitation.

CERTIFIED FOR PARTIAL PUBLICATION

TURNER, P. J.

We concur:

KRIEGLER, J.

FERNS, J.*

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* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.