Filed 9/12/17 P. v. Johnson CA2/8

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE, Plaintiff and Respondent, v. PATRICK DIRON JOHNSON, Defendant and Appellant.	B271957 (Los Angeles County Super. Ct. No. NA092752)

APPEAL from a judgment of the Superior Court of Los Angeles County, Gary J. Ferrari, Judge. Affirmed in part, reversed in part, and remanded with directions.

Maxine Weksler, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Victoria B. Wilson and Carl N. Henry, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted appellant Patrick Diron Johnson of child abuse (count 1; Pen. Code, § 273a, subd. (a))[1] and assault on a child under eight years of age resulting in coma or paralysis (count 2; § 273ab, subd. (b)). Further, the jury found as to both counts that Johnson personally inflicted great bodily injury (GBI) on a child under five years of age. (§ 12022.7. subd. (d).) The trial court thereafter found that Johnson had suffered a prior strike conviction (§§ 667, subds. (b)-(i); 1170.12, subds. (a)-(d)), a prior serious or violent felony conviction (§ 667, subd. (a)(1)), and two prior felony convictions with a prison term (§ 667.5, subd. (b)).

The trial court sentenced Johnson to a total state prison term of 25 years to life on his count 2 conviction for assault on a child resulting in coma or paralysis as follows: a base term of seven years to life, doubled to 14 years to life for a prior strike, plus a five-year term for a prior serious or violent felony, plus an upper term of six years for the GBI enhancement. The court sentenced Johnson to a total state prison term of 18 years on his child abuse conviction in count 1 (six-year high term, doubled for the strike, plus a six-year GBI enhancement), and stayed execution of sentence pursuant to section 654.

On appeal, Johnson argues the six-year GBI enhancement attached to count 2 pursuant to section 12022.7, subdivision (d), is unauthorized and that the trial court erred in denying his *Romero* motion[2] to dismiss his prior strike conviction for purposes of sentencing. We find no *Romero* error, but agree with Johnson that the six-year term for the GBI enhancement pursuant to

---

1 All undesignated section references are to the Penal Code.

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

section 12022.7, subdivision (d), as to count 2 should not have been imposed. Accordingly, we remand the case for sentencing in accord with this opinion.

FACTS

The Crimes

On July 6, 2012, at about 10:00 a.m., Johnson brought his son, K.J. (born in January 2009),[3] to the emergency room at Pacific Hospital in Long Beach. K.J. was "pale, . . . unconscious, not responding to any stimuli, with a very low blood pressure and respiratory rate. He appeared to be in some sort of shock." Doctors administered oxygen, an I.V., and used a bag valve mask to assist his respiration. At some point after arriving at Pacific, K.J. suffered a focal seizure in an arm, an involuntary jerking movement on one particular part of the body caused by brain injury, epilepsy or imbalance in the electrolytes. By about noon, doctors at Pacific determined that K.J. was in critical condition and required critical pediatric care, and decided that he needed to be ambulance-transported to Miller's Children Hospital (MCH), which could provide such care.

At about noon, Dr. Graham Tse, the attending physician for the transport team from MCH, rode with K.J. in the ambulance from Pacific Hospital to MCH. The "Glascow Coma Scale" is used to score a patient's consciousness and brain cognitive ability levels from 3 to 15, with a range of 3 to 8 generally considered comatose. During the drive to MCH, Dr. Tse opined that K.J.'s Glascow Coma Scale score was about five, a "very low" level.

---

[3] Johnson is not K.J.'s biological father, but is listed on K.J.'s birth certificate as his father.

Dr. Alireza Fathi, treated K.J. after he arrived at MCH. When K.J. was brought into the pediatric intensive care unit, he was in very critical condition. He had a very low blood pressure, his abdomen was very hard and distended, and he was not breathing on his own. When Dr. Fathi spoke to Johnson to get a history to help guide the treatment, Johnson told Dr. Fathi that K.J. began experiencing vomiting, diarrhea and abdominal pain about three days earlier. Johnson added that K.J. had "improved" and been "able to drink something" the previous night (i.e., July 5). Based upon Johnson's information, doctors at MCH considered whether K.J. might be suffering from "abdominal compartment syndrome," a swelling in the abdomen, or sepsis from an infection. At some point, x-rays "showed free air in [K.J.'s] abdomen, which should not be there, and usually indicates a bowl injury or perforation." Blood tests showed a "really low" white blood cell count, a symptom that could have been caused by peritonitis. Ultimately, Dr. Fathi arranged for K.J. to be taken for surgery.

Certified pediatric surgeon Dr. Nam Nguyen, performed emergency exploratory surgery on K.J. During surgery, Dr. Nguyen discovered that K.J.'s duodenum, the first part of the intestine connected to the stomach, was almost entirely transected, and an area on the duodenum was necrotic, or dead, from loss of blood flow. The cut in the intestine is called a duodenal rupture. Dr. Nguyen had to remove a portion of the duodenum, and, because K.J. was too sick at that point for the duodenum to be reconstructed, Dr. Nguyen had to create a "silo" in the area, a procedure to allow the intestines to be able to "breathe" until further surgery could be performed. Dr. Nguyen felt that, if he had closed the area, then the swelling in the

intestine might have put pressure on K.J.'s lungs or kidneys, leading to a fatal outcome. This "abdominal compartment syndrome," Dr. Nguyen explained, means that the blood cannot get to the organs in the abdomen because the pressure in the abdomen is too high to allow the free flow of blood. K.J. also had a hematoma, bruising, extending down to his pelvis. When asked what causes the type of injuries he saw, Dr. Nguyen answered: "This typically [is] caused by a direct trauma of some form."

At 2:35 p.m., Long Beach Police Department Officer Ramiro Herrera responded to MCM and took a statement from Johnson. Johnson reported that he took K.J. and his six-year-old brother T.J. to a baby-sitter, Sequoia, on July 4, 2012 at about 11:00 a.m. Johnson said that he knew Sequoia because she was a girlfriend of his "best friend," James Robinson. Johnson later "changed James' name to Jerome." Johnson said that Sequoia babysat K.J. and T.J. "all day" until Johnson picked the children up at about 8:00 p.m. According to Johnson, K.J. and T.J. both "appeared normal and [K.J.] did not appear to be in any pain." However, about 15 minutes later, K.J. began to have a "stomach ache." Johnson said that he rubbed K.J.'s stomach for several minutes, then he vomited. Hours later, K.J. had "very bad diarrhea." The next morning (July 5), K.J. was "the same," but "seemed to get better that evening," and was "back up on his feet, running around and skateboarding." The next morning (July 6), K.J. fell and was "wobbly and a little bit unresponsive." At that time, Johnson took K.J. to Pacific Hospital.

After his interview with Officer Herrera, Johnson gave another report to Long Beach Police Department Officer Jacqueline Parkhill. In talking to Officer Parkhill, Johnson provided similar information he had given to Officer Herrera.

Further, Johnson said that James Robinson's phone had been disconnected. Johnson said that he did not have a phone number for Sequoia. Parkhill thereafter talked with Long Beach Police Department Detective Mark Steenhausen, who acted as a departmental "on-call child abuse" officer.

After talking to Officer Parkhill, Detective Steenhausen responded to MCH where he separately interviewed Johnson and T.J. Both interviews were audiotaped and played for the jury at trial.[4]

During Detective Steenhausen's interview with T.J. at about 5:40 p.m. on July 6, the child reported that Johnson punched K.J. somewhere around the shoulders. At trial, Detective Steenhausen testified that he had asked T.J. to show what he had seen, and that T.J. acted it out as follows: "I [i.e., Detective Steenhausen] was in a seated position and [T.J.] was standing in front of me and I held up my hands and he was hitting my hands with his closed fist and you heard the punches on the recording."

When Detective Steenhausen interviewed Johnson, Johnson showed how he would discipline K.J. and T.J. by hitting them in the chest with the back of his hand. At trial Detective Steenhausen explained that Johnson's hand "would flop open" during this demonstration. Johnson repeated his story that a friend's girlfriend babysat K.J. and T.J. on the Fourth of July.

---

[4] Transcripts were also provided to the jury to follow along with the audio recordings; it appears the transcripts were marked for identification only and not admitted into evidence.

After interviewing Johnson, Detective Steenhausen drove him to a Long Beach residence on East Pleasant Street where Johnson said that Sequoia lived. On arriving at the location, Detective Steenhausen spoke with two women named Sequoia and Latasha. Detective Steenhausen audiotaped his conversation with Johnson during the drive. The tape was played for the jury at trial.[5] Officer Parkhill followed in her police car.[6]

After talking to Sequoia and Latasha, Detective Steenhausen drove Johnson to his apartment.[7] Officer Parkhill again followed. Shortly after they arrived at Johnson's apartment, Detective Steenhausen arrested Johnson and recovered his cell phone. Detective Steenhausen inspected Johnson's phone, and recovered a series of text messages from Johnson to Sequoia, including one sent the prior night (July 5), and one sent while Detective Steenhausen had been driving Johnson to Sequoia's residence.

---

[5] As with the other recordings, a transcript was provided to the jury, but again apparently only marked for identification.

[6] At trial, Sequoia Chavez and Latasha Johnson testified that they were Johnson's sisters. Both denied having babysat K.J. and T.J. on the Fourth of July. Chavez denied ever having a boyfriend named Jerome Robinson. She also testified about receiving a text from Johnson sometime around July 6, 2012, "letting [her] know that police were arriving to [her] house and to say [she] watched the kids."

[7] Again the conversation in the police vehicle was recorded, as was the moment of Johnson's arrest, and the recording was played at trial.

The Criminal Case

In December 2012, the People filed an information charging Johnson as noted at the outset of this opinion. The charges and allegations were tried to a jury in March 2016, at which time the prosecution presented evidence establishing the facts summarized above. In addition, Dr. Sandra Murray, a board certified pediatric physician at MCH, testified on the subject of "child abuse pediatrics." Dr. Murray testified that she consulted with K.J.'s doctors, and examined K.J. when he was a patient at the hospital. She testified that only a "very forceful punch" to a three-year-old's stomach would have caused K.J.'s trauma. As Dr. Murray stated: "This is not a playful, you know, slap or even, you know, normal parents might spank a child or something like that. This is very forceful direct force to the abdomen." Also: "There [is] absolutely no plausible history to explain how this child had any type of accident to explain his extensive injuries." Further: "This is an abusive, inflicted injury. . . . [I]t's not some minor accident that a three year old might trip and fall and somebody might not see or know about."

Further evidence concerning K.J.'s injuries was presented through the testimony of his mother, K.H., who had been away serving in the Air Force in July 2012. K.H. testified that when she first saw K.J. at the hospital, he "had a whole bunch of tubes and . . . he wasn't moving or anything because they put him in an induced coma and he had to have emergency surgery and they couldn't put his intestines back in, so they were just out on the side in a bag." K.J. had three surgeries and was hospitalized for two months. He had to "learn how to walk and eat and kind of talk all over again because he was just laying in bed for so long,

not use to getting up, his muscles, so he had to build those back up."

Johnson did not present any defense evidence. His counsel argued to the jury that the prosecution's evidence did not prove the charged offenses beyond a reasonable doubt. In this vein, counsel urged the jury to question whether the prosecution had proven that an act by Johnson had "caused" K.J. to become comatose, and noted testimony by Dr. Murray that she could not "narrow down" exactly when K.J. suffered his injuries. As summarized by Johnson's counsel: "We don't know what caused [K.J.'s injuries]. We just know at some point Patrick hit the child. But not that those specific times are the cause of the great bodily injury." As to count 2, the trial court instructed on the charged offense of assault on a child under eight years of age resulting in coma or paralysis (§ 273ab, subd. (b)), and the lesser offenses of assault by means of force likely to produce great bodily injury (§ 245, subd. (a)(4)) and simple assault (§ 240).

On March 16, 2016, the jury returned verdicts finding Johnson guilty of counts 1 and 2 as noted at the outset of his opinion. On May 2, 2016, the trial court sentenced Johnson as noted.

DISCUSSION

I. Section 12022.7

Johnson contends the six-year GBI enhancement imposed on count 2 under section 12022.7, subdivision (d), must be reversed. He argues that the enhancement is not authorized on a conviction for the crime of assault on a child resulting in coma in violation of section 273ab, subdivision (b), because infliction of GBI is an element of the crime, and, thus, is barred by section 12022.7, subdivision (g). We agree with Johnson.

Generally speaking, section 12022.7 mandates the imposition of added punishment when a defendant personally inflicts GBI in the commission of felony offenses. For example, section 12022.7, subdivision (a), provides that any defendant who personally inflicts GBI in the commission of a felony or attempted felony shall be punished by an additional term of imprisonment in the state prison for three years. Section 12022.7, subdivision (b), provides for a five-year term when a defendant's GBI causes a victim to become comatose or to suffer paralysis. Section 12022.7, subdivision (c), provided for a five-year term when a victim is 70 years or older.

In Johnson's case, the information alleged an enhancement under section 12022.7, subdivision (d). Section 12022.7, subdivision (d), provides: "Any person who personally inflicts [GBI] on a child under the age of five years in the commission of a felony or attempted felony shall be punished by an additional and consecutive term of imprisonment in the state prison for four, five, or six years." At Johnson's sentencing hearing, the trial court imposed the upper term GBI enhancement of six years under section 12022.7, subdivision (d).

Section 12022.7, subdivision (g), reads: "Subdivisions (a), (b), (c), and (d) *shall not apply if infliction of great bodily injury is an element of the offense*." (Italics added.) Applying the plain language of section 12022.7, subdivision (g), the Court of Appeal in *People v. Pitts* (1990) 223 Cal.App.3d 1547 ruled that a three-year GBI enhancement pursuant to section 12022.7, subdivision (a), could not be added to the defendant's conviction for the crime of mayhem (§§ 203 & 205) because infliction of GBI is

encompassed within the statutory definition of mayhem.[8] We find the same conclusion inescapable in Johnson's current case involving the crime of assault on a child resulting in coma under section 273ab.

Section 273ab, subdivision (b), provides: "Any person, having the care or custody of a child who is under eight years of age, who assaults the child by means of force that to a reasonable person would be likely to produce great bodily injury, *resulting in the child becoming comatose due to brain injury or suffering paralysis of a permanent nature*, shall be punished by imprisonment in the state prison for life with the possibility of parole." (Italics added.)

At Johnson's trial, consistent with the statutory language of section 273ab, subdivision (b), noted above, the trial court instructed the jury on the crime of assault on a child resulting in coma as follows:

"In order to prove this crime, each of the following elements must be proved:

1. A person had the care or custody of a child under eight years of age;

2. That person committed an assault upon the child;

3. The assault was committed by means of force that to a reasonable person would be likely to produce great bodily injury; and

---

[8] Section 203 provides: "Every person who unlawfully and maliciously deprives a human being of a member of his body, or disables, disfigures, or renders it useless, or cuts or disables the tongue, or puts out an eye, or slits the nose, ear, or lip, is guilty of mayhem." This statutory definition does not explicitly use the language "great bodily injury."

4. The assault resulted in the child becoming comatose due to brain injury or suffering paralysis of a permanent nature." (Italics added.)

The phrase "great bodily injury" as used in section 12022.7 means "a significant or substantial physical injury." (§ 12022.7, subd. (f).) We can discern of no way that a child who "becom[es] comatose due to a brain injury or suffer[s] paralysis of a permanent nature" — an element of the crime defined in section 273ab, subdivision (b) — has not also suffered "a significant or substantial physical injury" — the definition of GBI for purposes of section 12022.7, subdivision (d). Thus, under section 12022.7, subdivision (g), a GBI enhancement under section 12022.7, subdivision (d), cannot be imposed since GBI is an element of the crime statutorily defined by section 273ab.

The People's respondent's brief focuses on the statutory language in section 273ab, subdivision (b), describing the *force* required for the crime, specifically, the defendant must commit an assault "by means of force that to a reasonable person would be likely to produce great bodily injury." It is true that a GBI enhancement under section 12022.7 may be added to an assault conviction under section 245, subdivision (a)(4), based on the theory and evidence that the defendant used force "likely to produce great bodily injury." (See, e.g., *People v. Parrish* (1985) 170 Cal.App.3d 336, 340.) This result reflects the principle that, in the crime of aggravated assault based on the type of force used, it is immaterial whether the force used actually resulted in an injury. (*Ibid.*) However, the People's argument ignores that for the more specific crime of assault on a child "resulting in the child becoming comatose," it is an element of the crime that the assault did, in fact, actually "result[] in the child becoming

comatose." Because causing a child to become comatose necessarily includes the infliction of GBI, an added term under section 12022.7, subdivision (d), is not permitted under the crime defined by section 12022.7, subdivision (g).

We reject the People's argument that "GBI is not an element of the felony of assault of child causing coma." An assailant simply cannot commit an assault "resulting in the child becoming comatose" without, at the same time, inflicting GBI. The People's reliance on *People v. Preller* (1997) 54 Cal.App.4th 93 (*Preller*) is misplaced. *Preller* addressed claims of instructional error concerning the substantive crime defined by section 273ab; *Preller* is not a sentencing case addressing whether a GBI enhancement pursuant to section 12022.7 may be added to a conviction under section 273ab. Indeed, we note that the opinion in *Preller* indicates that the information in that case charged a crime under section 273ab but did not include an alleged ancillary GBI enhancement under section 12022.7. (*Preller,* at p. 95.)

On a final matter, although not directly raised by the parties' briefs, we note that Johnson's sentencing memorandum in the trial court failed to raise the issue that a GBI enhancement under section 12022.7, subdivision (d), was not authorized on his count 2 conviction for assault on a child resulting in a coma or paralysis in violation of section 273ab, subdivision (d). Further, we note that Johnson's trial counsel did not raise this issue at the sentencing hearing. On the contrary, Johnson's counsel stated that the trial court had "discretion[]" under the GBI enhancement statute to choose from varying punishments, and argued for the "mitigated" low term of four years. Thus, it appears that the trial court was not alerted to the issue which is now being raised on

appeal. Nonetheless, because a GBI enhancement under section 12022.7, subdivision (d), "shall not apply if infliction of great bodily injury is an element of the offense" (§ 12022.7, subd. (g)), we find Johnson's sentencing claim implicates the principle that an unauthorized sentence may be raised for the first time on appeal. (See, e.g., *People v. Anderson* (2010) 50 Cal.4th 19, 26 [an unauthorized sentence may be addressed in the first instance on appeal].) Accordingly, we find Johnson did not forfeit the issue, and that it is properly before us for decision.

II. *Romero*

Johnson contends the trial court erred in denying his *Romero* motion to dismiss his prior strike, a 1999 conviction for robbery (§ 211), for purposes of sentencing. We disagree.

In *Romero*, the Supreme Court held that, in a case brought under the Three Strikes law, the trial court has the authority to dismiss a prior strike pursuant to section 1385 in the furtherance of justice. (*Romero, supra*, 13 Cal.4th at p. 504.) When presented with a defendant's *Romero* motion to dismiss a prior strike conviction, the trial court applies this well-settled standard: may the defendant, in light of the circumstances of his or her present crime and his or her criminal history, and the particulars of his or her background, character, and prospects for rehabilitation, "be deemed outside the spirit" of the Three Strikes law in whole or part, such that he or she should be treated for purposes of sentencing as though he or she did not suffer the prior strike conviction. (See *People v. Williams* (1998) 17 Cal.4th 148, 161.) A trial court's order denying a *Romero* motion is reviewed under an abuse of discretion standard. (*People v. Carmony* (2004) 33 Cal.4th 367, 374.) Under this standard, the burden is on the

defendant to show that the trial court's sentencing decision was irrational or arbitrary. (*Id.* at pp. 376, 378.)

Here, at the sentencing hearing, the prosecutor addressed Johnson's *Romero* motion as follows: "I believe one of the issues [in the defense] asking for 16 years to life, that would require the court to strike the 1170 prior strike allegation. That's how he mathematically gets to the 16 years. [¶] However, there is nothing in this defendant's history that indicates the court should strike that allegation.

"In [the People's] sentencing memo and with the 969(b) packet, [the People] laid out the defendant's criminal history. He has not been completely free of custody time since he . . . picked up the 211 in 1999. He was finally discharged from parole in 2011 because he maxed out. He previously had maxed out on the 211 and then he maxed out on the 496, so he was discharged because he maxed out, not because he ever successfully completed parole. Six months after maxing out, he picked up this charge . . . .

[¶] . . . [¶]

"The victim in this case, [K.J.], was a three-year-old child who was hit with such force that the doctors described it [as] equivalent to him being ejected from a moving vehicle or thrown from a third story building. The minor was placed in a coma.

"More importantly, when doctors . . . approached the defendant in this case, as [K.J.]'s life was hanging in the balance and [they] were trying to inquire what happened to this child so that they could do what they needed to do to save his life, the defendant lied. He gave them misinformation. He had them running around.

"It took until [K.J.] basically passed out for the defendant to take him to seek medical help and we had evidence presented in this case that part of this didn't only consist of the defendant hitting [K.J.] once, it consisted that was a form of punishment, that is how he handled these children. [¶] More importantly, part of the evidence presented [was] that the defendant was stuffing soiled underwear into the minor child's mouth.

"He lied to the police. He tried to get other individuals to lie on his behalf. [¶] The People feel that all these things factor into . . . aggravation. He had a vulnerable victim. His prior conduct on parole [was] unsatisfactory, [and] he had served prior prison terms. He was in a position of trust and confidence. He tried to mislead . . . the investigation and the medical professionals who were trying to help this child and there has not been any factors in mitigation presented."

The trial court denied Johnson's *Romero* motion within the context of its pronouncement of sentence as follows: "I'm not going to strike the strike prior, that would be absolutely and totally inappropriate in this case. [¶] As [the prosecutor] has stated, you have a vulnerable child, a three-year-old child that it wasn't an accident when that child was hit, that was not an accident, it was an intentional act, a child hit so hard that it ruptured the intestines.

"You were in a position of trust and your prior criminal record, all of these were factors in aggravation. And as [the prosecutor] said, there were no factors in mitigation and you are absolutely entitled and have earned the maximum sentence."

Given the record summarized above, we cannot find that the trial court's sentencing decision was irrational or arbitrary. (*People v. Carmony*, *supra*, 33 Cal.4th at pp. 374, 376, 378.)

The record shows that the trial court considered the nature of Johnson's current crime, his background (factors in mitigation), and implicitly determined that he was not outside the spirit of the three strikes law. This perspective is reasonable in light of the record taken as a whole.

III. Custody Credits

The trial court sentenced Johnson to state prison for two indeterminate terms of life with parole eligibility in 14 years, plus a determinate term of 11 years. In light of our discussion of section 12022.7, subdivision (d), above, the determinate element of Johnson's sentence will now be five years. When the trial court asked Johnson's counsel at the sentencing hearing, "What are the time credits?" Counsel replied, "1,032 actual days." And when the court asked about "the conduct," Johnson's counsel replied, "Since it's an indeterminate sentence, I do not believe he's entitled to conduct credits." The prosecution added, "I'm not sure on that. I believe that is true, your Honor." The court orally pronounced that "[t]ime credits are 1,032."[9]

---

[9] As noted above, the record indicates that officers arrested Johnson at his apartment on July 6, 2012. The record does not show whether Johnson was released at any time after his arrest. At his preliminary hearing on November 29, 2012, the magistrate "committed [Johnson] to the custody of the Sheriff of LA County," with bail set at $1 million. At Johnson's arraignment on December 13, 2012, the trial court remanded him into custody with bail set at $1 million. All subsequent minute orders in the record indicate that Johnson remained remanded into custody. The sentencing hearing took place on May 2, 2016. As we compute time, there are 1397 days between July 6, 2012 and May 2, 2016. For Johnson to have been in custody for 1,032 days, he would have had to been arrested on July 6, 2013, not 2012.

Notwithstanding the record summarized above, the trial court's minute order from the sentencing hearing reads: "Defendant given credit for 1397 actual days. Defendant is not eligible for good time/work time credits." The court's abstract of judgment indicates that the trial court awarded Johnson custody credits for 1,397 days of actual custody, and no "local conduct" credits.

On appeal, Johnson contends that he "should have been awarded 15% local conduct credit of 210 days." He relies largely on *People v. Brewer* (2011) 192 Cal.App.4th 457 (*Brewer*) for the proposition that the sentencing statutes include no generally applicable limitation on presentence conduct credits to persons sentenced to indeterminate life sentences. Johnson argues: Since he was confined in county jail following his arrest and prior to imposition of sentence, he is entitled to good time/work time credits pursuant to section 4019. We agree.

Section 4019 applies in a case "[w]hen a prisoner is confined in a county jail . . . following arrest and prior to the imposition of sentence for a felony conviction." (§ 4019, subd. (a)(4).) In such a case: "[F]or 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 . . . ." (§ 4019, subd. (b).) " 'Section 4019 is the general statute governing credit for presentence custody. Absent contrary authority, "a defendant receives what are commonly known as conduct credits toward his term of imprisonment for good behavior and willingness to work during time served prior to commencement of sentence. . . ." ' "

(*Brewer, supra*, 192 Cal.App.4th at p. 461, citing *People v. Philpot* (2004) 122 Cal.App.4th 893, 907.)[10]

Section 2933.1 limits section 4019 by providing that the maximum credit that a prisoner may earn is limited to 15 percent of the actual period of confinement for any person who ultimately is convicted of a felony offense listed in section 667.5, subdivision (c). "Any felony punishable by . . . imprisonment in state prison for life" is listed in section 667.5, subdivision (c)(7). Thus, because Johnson was convicted under section 273ab, subdivision (b), an offense punishable by imprisonment in state prison for life, his presentence credits under section 4019 are limited to 15 percent of his actual period of confinement under 2933.1.

Johnson tells us that "[t]he only statute rendering certain persons ineligible to earn any [presentence] credits" is section 2933.5. Section 2933.5, subdivision (a)(1), provides: "Notwithstanding any other law, every person who is convicted of any felony offense listed in paragraph (2), and who previously has been convicted two or more times, on charges separately brought and tried, and who previously has served two or more separate prior prison terms, as defined in subdivision (g) of Section 667.5, of any offense or offenses listed in paragraph (2), shall be ineligible to earn credit on his or her term of imprisonment pursuant to this article."

---

[10] The version of section 4019 in effect at the time Johnson committed his crimes was largely enacted as part of Assembly Bill 109, known as the "2011 Realignment Legislation." (See Stats. 2011, ch. 15, § 1 and § 482.)

In *Brewer*, the Court of Appeal interpreted the sentencing statutes and concluded that persons serving indeterminate life sentences are entitled to presentence conduct credit. (*Brewer, supra,* 192 Cal.App.4th at p. 462.) We would add, unless they are ineligible under section 2933.5 based on having two listed prior serious or violent felony convictions, which Johnson does not have. As stated in *Brewer*: "[N]either section 2933.1 nor section 4019 contains any express provision making defendants ineligible for presentence conduct credit if they receive an indeterminate life sentence. If anything, section 2933.1 implicitly provides to the contrary, because it puts a limitation on the presentence conduct credit available to persons convicted of any of the offenses characterized as violent felonies by section 667.5, subdivision (c), several of which carry mandatory indeterminate life sentences. If defendants who receive indeterminate life sentences were thereby ineligible for any presentence conduct credit, there would be no need for a statutory provision limiting the amount of such credit available to those defendants." (*Ibid.*)

To avoid this reasoning and statutory construction, the People cite *People v. Sampsell* (1950) 34 Cal.2d 757 (*Sampsell*), *In re Monigold* (1983) 139 Cal.App.3d 485 (*Monigold*), and *People v. Rowland* (1982) 134 Cal.App.3d 1 (*Rowland*). Here, the People argue: "*Brewer* was wrongly decided because the applicable sentencing statute may make a difference." We are not certain what point the People are trying to make, but we do agree that the governing sentencing statutes do make a difference in evaluating whether a prisoner is entitled to sentencing credits. It is for this reason that we find reliance on *Sampsell*, *Monigold* and *Rowland* unpersuasive.

Sampsell was an automatic appeal to the Supreme Court after the defendant was convicted of first degree murder and sentenced to the death penalty. The only issue touching on the issue of sentencing in *Sampsell* had to do with whether the prosecutor engaged in misconduct in commenting to the jury in argument about the possibility that the defendant might someday be released from prison if the jury decided to impose a life term. The defendant argued that such comments wrongly interfered with the jury's discretion to impose the death penalty as opposed to life in prison. (*Sampsell, supra*, 34 Cal.2d at pp. 762-765.) Plainly, *Sampsell* did not involve interpretation of section 4019, or any statute with similar statutory language governing credits.

In *Monigold*, an inmate in state prison filed a petition for writ of mandate claiming that the Department of Corrections was required by law to award him certain conduct credit for purposes of determining his release date. (*Monigold, supra*, 139, Cal.App.3d at p. 487.) A large part of the dispute in *Monigold* was whether the Department could treat prisoners who were serving determinate sentences (they were getting conduct credit) differently from prisoners who were serving indeterminate life sentences (they were not). In the end, the Court of Appeal ruled as follows: "[W]e construe the phrase in section 2931 authorizing conduct credit for inmates 'sentenced to the state prison pursuant to section 1170' to mean 'sentenced to the state prison for a determinate term.' In our view, the reference to section 1170 is merely a shorthand way of referring to a determinate term and was used by the Legislature to distinguish such a sentence from an indeterminate one imposed under section 1168, subdivision (b). Monigold received two sentences: an indeterminate term for

second degree murder of 15 years to life and a determinate term of 2 years for the use of a firearm during that murder [pursuant to section 12022.5]. Like all other prisoners serving a determinate term, he is entitled to earn conduct credit to reduce his determinate sentence. Accordingly, we affirm the order of the trial court directing that the department award Monigold conduct credits on his determinate term under section 12022.5 to the extent he earns such credits." (*Manigold, supra*, 139 Cal.App.3d at p. 494, fn. omitted.) *Monigold* did not address section 4019 or issues involving any similar statutory language.

In *Rowland*, the defendant was charged with murder and submitted his case to the trial court on the transcript from his preliminary hearing. The court found him guilty of first degree murder and "sentenced him to state prison for the term provided by law," which we understand to have been life without the possibility of parole. (*Rowland, supra*, 134 Cal.App.3d at p. 5.) On appeal, the court reduced the conviction to second degree murder, finding the evidence was insufficient to show planning, premeditation and deliberation. (*Id*. at pp. 5-10.) As to the issue of sentencing and credits, the Court of Appeal noted that the defendant had been sentenced under section 190. The court then ruled: "Defendant received 311 days of presentence credit for time actually served. [¶] The proper formula for determining the amount of conduct credit is one day of such credit for every two days served. (*People v. Regaldo* (1980) 108 Cal.App.3d 531, 541.) Defendant is thus entitled to 155 days of conduct credit. The judgment will be modified to provide for total presentence credit of 466 days." (*Rowland, supra*, 134 Cal.App.3d at p. 14.) To the extent *Rowland* may still have any relevance under the newer sentencing statutes, it does not support the proposition that a

person sentence to an indeterminate life term is not entitled to presentence credits. In short, we do not read *Rowland* to support disallowing presentence credits under section 4019.

For all of the reasons discussed above, we agree that Johnson is entitled to presentence good conduct credits in addition to actual time in custody. As mentioned above, though, because of the nature of his offense, he is limited to 15 percent credits, rounded downward to the nearest whole number. (See also *People v. Ramos* (1996) 50 Cal.App.4th 810, 815-816.) Since Johnson was apparently in custody continuously from the date of his arrest on July 6, 2012 to the date of his sentencing on May 2, 2016, his actual time in presentence custody is 1397 days. Fifteen percent of 1397 equals 209.55.

Johnson is therefore entitled to 1397 actual days plus 209 good conduct days in terms of his presentence credits.

IV. The Abstract of Judgment

On our own accord, we note errors in the form of the abstract of judgment apart from the indicated six-year GBI enhancement under section 12022.7, subdivision (d), which we discussed above. The abstract states that Johnson is sentenced to "02 years to Life on counts 14." When the trial court resentences Johnson without a six-year GBI enhancement under section 12022.7, subdivision (d), as to count 2, the court should correct any other clerical errors on the abstract of judgment at that time.

DISPOSITION

Johnson's convictions are affirmed. The case is remanded for resentencing and correction of the abstract of judgment consistent with this opinion. The trial court is directed to prepare a corrected abstract of judgment to forward to the Department of Corrections and Rehabilitation.

SORTINO, J.*

We concur:

FLIER, Acting P.J.

GRIMES, J.

---

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