Filed 7/26/17 P. v. Equivias CA2/2

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. MIGUEL ALBERTO ESQUIVIAS et al., Defendants and Appellants.	B268972 (Los Angeles County Super. Ct. No. PA077370)

APPEAL from judgments of the Superior Court of Los Angeles County. Daniel B. Feldstern, Judge. Affirmed in part, reversed and remanded in part with directions, and modified.

Stephen Temko, under appointment by the Court of Appeal, for Defendant and Appellant Miguel Alberto Esquivias.

Brett Harding Duxbury, under appointment by the Court of Appeal, for Defendant and Appellant Kimberly Alexis Garcia.

Victoria H. Stafford, under appointment by the Court of Appeal, for Defendant and Appellant Alondra Salinas.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Scott A. Taryle, Supervising Deputy Attorney General, and Pamela C. Hamanaka, Deputy Attorney General, for Plaintiff and Respondent.

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One member of a gang's clique gunned down another member of the clique, and was aided by two others. A few days later, they called the victim's friend to take credit for the killing and to threaten him. Then two of them committed two armed robberies. All three were convicted of murder, two were convicted of robbery, and one was convicted of making criminal threats. All of them appeal, challenging the sufficiency of the evidence as to several counts, arguing that the trial court erred in instructing the jury and admitting certain items of evidence, asserting that the prosecutor engaged in misconduct, and contending that the trial court made several sentencing errors. We conclude there was no reversible error except as to two arguments—namely, that (1) one defendant's conviction for criminal threats must be reversed because the jury was not instructed on the lesser included crime of attempted criminal threats, and (2) another defendant's conviction for receipt of stolen property must be reduced to a misdemeanor. We also order that the abstracts of judgment be corrected. Otherwise, we affirm the convictions and sentences.

FACTS AND PROCEDURAL BACKGROUND

I. Facts

A. Killing of Manuel Haro

On June 11, 2013, defendant Miguel Esquivias (Esquivias) walked up to Manual Haro (Haro) and shot him several times in the chest. Haro died from those injuries.

The shooting was the culmination of a feud between members of the "818" clique of the Wicked Insane Diablos street gang. In years prior, Haro, his best friend James Posey (Posey), Esquivias, and defendant Kimberly Garcia (Garcia) had been friends; all four also belonged to the 818 clique. However, in the months leading up to June 2013, Haro and Posey had a bit of a falling out with Esquivias and Garcia because (1) Garcia believed Haro and Posey had something to do with the death of Garcia's brother the year before; (2) Esquivias had loaned Posey $250 that Posey never repaid; and (3) Haro had expressed romantic interest in defendant Alondra Salinas (Salinas), despite Salinas's romantic involvement with Garcia.

By early June 2013, the rift between the two groups of former friends had become public. The "older homies" overseeing the Wicked Insane Diablos directed Esquivias and his friends to "handle" the problem and "gave" them "the okay" to kill Haro and Posey; killing Haro was considered "putting in work" for the gang. Esquivias sent Posey a message over Facebook, promising, "I'ma fuck your little bitch ass up." Garcia threatened both Haro and Posey, called Posey a "little bitch," and sent him text messages saying, "Fuck you . . . I'ma kill you, Dog. And this is Pimpz [Garcia's gang moniker]. I mean this from the bottom of my heart," and "I'm coming for you and I'm gonna find you."

Two days before the shooting, Garcia and Salinas exchanged text messages. Garcia stated that "they're all getting dropped." Salinas responded, "We will make 'em pay for everything they did, I swear. And ima be by your side the whole time." Several hours later, Garcia told Salinas she was "thinking how we gonna do it."

Garcia and Salinas then drove Esquivias to Haro's location in a gold Toyota Camry, Esquivias shot Haro, and Garcia and Salinas drove Esquivias away.

B. Threats to Posey

Nine days after the shooting, on June 20, 2013, Esquivias, Garcia, and Salinas called another 818 clique member. On speaker phone and within earshot of Posey, all three chimed in to say that they had killed Haro and were "going to come and kill" Posey.

C. Robberies

On June 26, 2013, Esquivias and Garcia robbed two people at gunpoint—Devin Rivas and Christopher Lares. When they robbed Lares, Garcia was carrying a knife and Esquivias asked Rivas for his gang affiliation. Among the items taken were Lares's and Rivas's iPhones.

D. Arrest and Postarrest Behavior

Esquivias, Garcia, and Salinas (collectively, defendants) were arrested on June 27, 2013, in a gold Toyota Camry. Garcia was driving, Salinas was the front-seat passenger, and Esquivias was seated in the rear passenger seat. Salinas had Lares's iPhone in her possession, but had reprogrammed it to show that it belonged to her.

Six weeks later, Garcia called Salinas's mother from jail. Salinas's mother said that Salinas's attorney had told her that a witness had seen "two girls and a guy" get into a car that looked like Garcia's gold Camry after Haro's shooting. Salinas's mother chided Garcia, saying, "I told you guys, you guys need . . . to change your guys's routine." Garcia replied, "Yeah" and "Uh huh" to Salinas's mother's statements implying Garcia's

involvement in the shooting; Garcia in no way disputed her involvement.

II. Procedural Background

The People charged (1) all three defendants with murder (Pen. Code, § 187, subd. (a))[1]; (2) Esquivias with being a felon in possession (§ 29800, subd. (a)(1)); (3) all three defendants with making criminal threats to Posey (§ 422); (4) Esquivias and Garcia with the second degree robbery of Rivas (§ 211); (5) Esquivias and Garcia with the second degree robbery of Lares (§ 211); and (6) Salinas with possessing stolen property (§ 496, subd. (a)). The People also alleged that all crimes, except the felon-in-possession count, were for the benefit of, at the direction of, or in association with a criminal street gang (§ 186.22), that the murder involved a principal's discharge of a firearm causing great bodily injury or death (§ 12022.53, subd. (d)), and that the robberies involved a principal who was armed (§ 12022, subd. (a)(1)) as well as Esquivias's personal use of a firearm (§ 12022.5, subd. (a)). The People further alleged that Esquivias's 2012 conviction for first degree burglary (§ 459) constituted a prior "strike" within the meaning of our Three Strikes law (§§ 667, subds. (b)-(j) & 1170.12, subds. (a)-(d)) and a prior "serious" felony (§ 667, subd. (a)(1)).

The case proceeded to a joint trial in May 2015.

A jury returned mixed verdicts. The jury found Esquivias guilty of first degree murder, being a felon in possession, and both robberies; it acquitted him of making a criminal threat. The jury found Garcia guilty of first degree murder, making a

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1 All further statutory references are to the Penal Code unless otherwise indicated.

criminal threat, and both robberies. The jury found Salinas guilty of second degree murder and receipt of stolen property; it acquitted her of making criminal threats. The jury found all of the gang, firearm, and armed principal enhancements to be true.

The trial court sentenced each defendant.

As to Esquivias, the court imposed a total sentence of 37 years 8 months plus 75 years to life. The court calculated the 37 years and 8 months by imposing (1) 29 years on the robbery against Lares, comprised of a four-year base term (two years, doubled due to Esquivias's prior strike) plus 10 years for the personal use of a firearm plus 10 years because the crime was gang-related plus five years due to his prior serious felony; and (2) a consecutive term of eight years and eight months on the robbery against Rivas, comprised of a two-year base term (one-third of a midterm three-year sentence, doubled due to Esquivias's prior strike) plus three years and four months (one-third of 10 years) for the personal use of a firearm plus three years and four months (one-third of 10 years) because the crime was gang related. The court calculated the consecutive 75-year-to-life sentence by imposing a base sentence of 50 years for the first degree murder (25 years, doubled due to Esquivias's prior strike) plus a firearm enhancement of 25 years to life. The court denied Esquivias's motion to strike his prior strike conviction under section 1385. The court stayed Esquivias's felon-in-possession sentence under section 654.

As to Garcia, the court imposed a total sentence of 12 years plus 50 years to life. The court imposed 12 years for the robbery against Lares, comprised of a base term of two years plus 10 years for a principal's use of a firearm. The court calculated the consecutive 50-year-to-life sentence by imposing a base sentence

of 25 years for the first degree murder plus a 25-year-to-life firearm enhancement. The court ran a 12-year sentence for the robbery against Rivas and a six-year four-month sentence for the criminal threat concurrently to one another and to the initial robbery sentence.

As to Salinas, the court imposed a total sentence of 40 years to life. The court imposed a 40-year sentence for the second degree murder, comprised of a 15-year-to-life base term plus a 25-year-to-life firearm enhancement. The court ran a 16-month sentence for receiving stolen property concurrently.

Each defendant filed a timely notice of appeal.

DISCUSSION

I. Evidentiary Issues

Defendants object to a number of the trial court's evidentiary rulings. We review such rulings for an abuse of discretion (*People v. Clark* (2016) 63 Cal.4th 522, 597), but independently review whether those rulings violate constitutional guarantees (*People v. Albarran* (2007) 149 Cal.App.4th 214, 224-225, fn. 7).

A. Admission of Garcia's Adoptive Admission

As noted above, during a jailhouse call between Garcia and Salinas's mother, Garcia did not object—and, in fact, said, "yeah" and "uh huh"—as Salinas's mother reprimanded Garcia for not "chang[ing] [their] routine" in how they traveled in Garcia's car because a witness to Haro's murder saw "two girls and a guy" get into her car, which was the very same seating arrangement defendants had at the time of their arrest. The trial court admitted the statement, against Garcia only, as an adopted admission and a declaration against penal interest. Salinas (joined by Esquivias) argues that introduction of this statement

at the joint trial (1) violated the confrontation clause, (2) violated due process, and (3) was an abuse of discretion under Evidence Code section 352.

1. Confrontation clause

Under the so-called *Aranda/Bruton* doctrine, a defendant's Sixth Amendment right to confront witnesses is violated when a codefendant's out-of-court statement implicating the defendant is introduced into evidence unless the codefendant testifies (and is subject to cross-examination) or unless the portions of the statement implicating the defendant are redacted in a non-obvious way. (*People v. Capistrano* (2014) 59 Cal.4th 830, 869; see generally *People v. Aranda* (1965) 63 Cal.2d 518; *Bruton v. United States* (1968) 391 U.S. 123.) Salinas argues that the admission of Garcia's statement on the jailhouse call violates this doctrine because it is an out-of-court statement implicating Salinas, Salinas did not have the opportunity to cross-examine Garcia, and the statement was not redacted.

We reject this argument. In *Crawford v. Washington* (2004) 541 U.S. 36, 68 (*Crawford*), the United States Supreme Court narrowed the scope of the right to confrontation; it now bars only those out-of-court statements that are "testimonial." An out-of-court statement is "testimonial" if it is "'made with some degree of formality or solemnity'" (*People v. Leon* (2015) 61 Cal.4th 569, 602-603, quoting *People v. Lopez* (2012) 55 Cal.4th 569, 581), or if the "primary purpose" of the statement "is to establish or prove past events potentially relevant to later criminal prosecution" (*Davis v. Washington* (2006) 547 U.S. 813, 822 (*Davis*)). By narrowing the right of confrontation generally, *Crawford* also limited the right of confrontation protected by *Aranda/Bruton*: Unless the codefendant's statement is

testimonial within the meaning of *Crawford*, its admission at a joint trial does not violate *Aranda/Bruton*. (*People v. Arceo* (2011) 195 Cal.App.4th 556, 571, citing *U.S. v. Figueroa-Cartagena* (1st Cir. 2010) 612 F.3d 69, 85; *U.S. v. Johnson* (6th Cir. 2009) 581 F.3d 320, 326.) Garcia's adopted admission was not testimonial because it was a casual conversation between two private individuals—namely, herself and Salinas's mother. (See *People v. Hajek and Vo* (2014) 58 Cal.4th 1144, 1214 ["[p]rivate communications between inmates are not testimonial"]; *People v. Cage* (2007) 40 Cal.4th 965, 989-990, fn. 20 [statements to private doctors not testimonial]; *People v. Blacksher* (2011) 52 Cal.4th 769, 817-818 [statements made to family members not testimonial].)

Salinas raises two arguments in response. First, she asserts that *Kansas v. Carr* (2016) 136 S.Ct. 633 rejects the notion that *Crawford* narrowed the scope of the *Aranda/Bruton* doctrine. We disagree. *Carr* held that the *Bruton* doctrine does not apply to joint capital sentencing proceedings. (*Carr*, at pp. 645-646.) Nothing in *Carr* states or implies anything about *Crawford's* effect on *Bruton*. Second, Salinas argues that the private conversation took place over a jailhouse phone, and that this fact distinguishes it from an ordinary private conversation because these calls are recorded (as the call participants are informed) and because law enforcement sometimes uses them in prosecutions (as was done here). We need not decide, as a general matter, whether an otherwise private conversation somehow becomes testimonial if it takes place in an area monitored by jail officials because in this case Garcia expressed her belief that, notwithstanding the warnings that jailhouse calls are recorded, Garcia herself believed that calls were "very

rar[ely]" "tapped." As a result, *her* statements were not being made with the primary purpose of "establish[ing] or prov[ing] past events potentially relevant to later criminal prosecution" (*Davis*, *supra*, 547 U.S. at p. 822), and were accordingly not testimonial.

2. Due process

Among other things, due process protects against the admission of evidence that "offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." (*People v. Falsetta* (1999) 21 Cal.4th 903, 913.) It is well settled, however, that the ""[a]pplication of the ordinary rules of evidence generally does not impermissibly infringe on a . . . defendant's constitutional rights."" (*People v. Eubanks* (2011) 53 Cal.4th 110, 143.) Because Salinas does not dispute that Garcia's statements on the jailhouse call were properly admitted as adoptive admissions and declarations against penal interest (Evid. Code, §§ 1221 & 1230), the trial court's admission of Garcia's statement did not violate due process.

Salinas nevertheless protests that the court's ruling effectively put before the jury "false triple hearsay" because the admission Garcia adopted came from (1) Salinas's mother, who was repeating what (2) Salinas's attorney had told her that (3) a witness to Haro's murder had said. This argument overlooks the fact that these three statements were "'admitted not to prove the truth of the statements but to show [Garcia's] response to them.'" (*People v. Silva* (1988) 45 Cal.3d 604, 624; *People v. Jennings* (2010) 50 Cal.4th 616, 661-662 (*Jennings*) [same].) Because they were not admitted for their truth, they are not hearsay at all—let alone impermissible hearsay. (Evid. Code, § 1200, subd (a)

[defining "hearsay evidence" as "a statement that was made other than by a witness while testifying at the hearing and *that is offered to prove the truth of the matter stated*"], italics added.)

3. Evidence Code section 352

Evidence Code section 352 grants a trial court discretion to exclude otherwise relevant evidence if its probative value is "substantially outweighed" by a "substantial danger of undue prejudice, of confusing the issues, or of misleading the jury" or may "necessitate undue consumption of time." Garcia's adopted admission is, in effect, an acknowledgment that she drove Esquivias to and from the scene of Haro's murder; this is very probative evidence of her guilt. The trial court did not abuse its discretion in concluding that the countervailing factors set forth in Evidence Code section 352 did not substantially outweigh that probative value.

B. Admission of Gang Expert Testimony

The People called a gang expert who testified, among other things, that (1) the Wicked Insane Diablos was a street gang with more than 60 members and whose primary activity was the commission of "robbery, assault with a deadly weapon and criminal threats"; (2) two Wicked Insane Diablo members had, in 2010 and 2012, committed felonies; (3) the 818 clique was the San Fernando Valley-based arm of the Rowland Heights-based Wicked Insane Diablos; (4) Esquivias and Garcia were members of the Wicked Insane Diablos; (5) Salinas was "not yet" a "full-fledged" member, but was "definitely . . . an associate," of the Wicked Insane Diablos; (6) Haro's murder benefitted the Wicked Insane Diablos by ending a division within the gang that made the gang look weaker to rivals; and (7) the two robberies benefited the Wicked Insane Diablos by instilling fear in the

community and obtaining property to use to fund the gang's operations.

Salinas (joined by Esquivias) argues that the trial court (1) violated the confrontation clause in allowing the expert to testify about her gang affiliation based on the out-of-court statements of others; (2) violated due process by allowing the prosecutor to admit false testimony regarding her gang affiliation; and (3) erred in admitting this highly prejudicial evidence of "other acts," in violation of Evidence Code sections 352 and 1101, subdivision (b).

1. Confrontation clause

In *People v. Sanchez* (2016) 63 Cal.4th 665, 680 (*Sanchez*), our Supreme Court held the admission of out-of-court statements in a criminal case sometimes requires a "two-step analysis": (1) Are the statements properly admitted under the hearsay rule (and its many exceptions)?; and (2) If the statements are hearsay, are they "testimonial" under *Crawford* and, if so, has or will the defendant have the opportunity to cross-examine the declarant?

Sanchez went on to delineate which aspects of an expert's testimony would be subject to the two-step analysis set forth above, and which aspects would not. Under *Sanchez*, an expert—without having to satisfy the two-step analysis—(1) "may . . . *rely* on hearsay in forming an opinion, and may tell the jury *in general terms* that he did so" (*Sanchez*, *supra*, 63 Cal.4th at pp. 685-686; Evid. Code, § 801, subd. (b) [an expert's opinion may be "[b]ased on matter . . . *whether or not admissible*, that is of a type that reasonably may be relied upon by an expert in forming an opinion"], italics added); and (2) may tell the jury the specific basis for his or her opinion if it comes from (a) the expert's "general knowledge" "acquired through . . . training and

experience, even though that information may have been derived from conversations with others, lectures, study of learned treatises, etc." (*Sanchez*, at pp. 675-676), or (b) the expert's "personal knowledge" (*id.* at p. 675). However, an expert may not—without satisfying the two-step analysis—"relate as true case-specific" "out-of-court statements" and "facts" of "which he has no personal knowledge" if those statements or facts "relat[e] to the particular events and participants alleged to have been involved in the case being tried." (*Id.* at pp. 676, 684, 686.)

The gang expert's testimony regarding Salinas largely did not transgress *Sanchez*. The expert testified to his opinion that Salinas was an associate of the Wicked Insane Diablos and that his opinion came from "the information that [he had] been provided." Because *Sanchez* permits an expert to "rely on hearsay in forming an opinion, and [to] tell the jury *in general terms* that he did so" without satisfying its two-part analysis, this testimony was properly admitted. (*Sanchez*, *supra*, 63 Cal.4th at pp. 685-686.) The expert elsewhere noted that "the information" he relied upon consisted of "taped interviews," "documents, photographs, and other things." This would also seem to fall into the category of telling the jury "in general terms" of the hearsay the expert relied upon because at no time did he "relate as true case-specific" statements from those interviews, documents and "other things." On cross-examination, Salinas's attorney elicited that the expert might have been shown a field identification card with Salinas's name on it, but the expert testified on redirect examination that the existence of a field identification card did not matter to his opinion regarding Salinas's gang membership. Because *Sanchez* held that recounting the content of a field identification card might

constitute a case-specific statement that could be testimonial (*Sanchez*, p. 697), the expert's reference to the field identification card could be construed as error.

However, any error—with respect to the reference of a possible field identification card or the sources of information the expert cited—was harmless beyond a reasonable doubt. (*Sanchez*, *supra*, 63 Cal.4th at p. 698 [applying harmless beyond a reasonable doubt test].) That is because the expert expressly noted that the field identification card did not matter to his analysis and because there was overwhelming other evidence of Salinas's association with the Wicked Insane Diablos—namely, (1) Salinas's Facebook post that she was "putting it down for Pacas W.I.D."; (2) Salinas's Facebook profile claiming to be "from" the Wicked Insane Diablos; (3) photographs of Salinas "throwing gang signs"; (4) Salinas's participation in the threatening June 20 telephone call; (5) her text messages to Garcia planning Haro's killing; and (6) the testimony of Posey and others that Salinas was actively participating in conduct with other Wicked Insane Diablos members.

2. Presentation of false evidence

A prosecutor's knowing presentation of false evidence, or his or her knowing failure to correct the presentation of such evidence by others, violates due process. (*Napue v. Illinois* (1959) 360 U.S. 264, 269; *People v. Marshall* (1996) 13 Cal.4th 799, 829-830.) Salinas argues that the prosecutor knowingly allowed the expert to testify falsely to the existence of a field identification card naming her. However, the expert testified that he was uncertain whether he ever saw that card; his testimony was not false.

3. "Other acts" evidence

Although evidence of uncharged conduct is inadmissible to prove that a defendant had a propensity to commit a charged crime (Evid. Code, § 1101, subd. (a)), the People may introduce prior uncharged conduct to prove matters other than a defendant's criminal disposition, such as her intent or knowledge (Evid. Code, § 1101, subd. (b); *People v. Williams* (2009) 170 Cal.App.4th 587, 607). Salinas contends that evidence of her association with the Wicked Insane Diablos constitutes "highly prejudicial other crimes evidence" because it shows that she had "previously engaged in criminal behavior with the gang." This contention lacks merit because Salinas *was charged* with the gang enhancement, so evidence of her association with the gang is not "other crimes" evidence. What is more, the evidence of Salinas's gang association involved her association with gang members or gang signs; as noted below, such association is not itself a crime.

II. Instructional Issues

Defendants also attack two jury instructions. We independently review instructional issues. (*People v. Nelson* (2016) 1 Cal.5th 513, 538.)

A. Receipt of Stolen Property Instruction

A trial court is required to instruct the jury on all of the elements of a charged crime, and the failure to do so is an error of constitutional dimension. (*People v. Merritt* (2017) 2 Cal.5th 819, 821-822.) In November 2014, the crime of felony receipt of stolen property was amended by voter initiative to require proof that the property taken be worth more than $950. (§ 496, subd. (a).) That amended version was in effect at the time of Salinas's trial. (See *People v. Mutter* (2016) 1 Cal.App.5th 429, 437.) The trial

court's instruction on this crime did not include the $950 value requirement. Salinas argues that this was error, and the People concede she is right. We agree. Although such error can be harmless beyond a reasonable doubt where the "'omitted element was uncontested and supported by overwhelming evidence'" (*Merritt*, at p. 832, quoting *Neder v. United States* (1999) 527 U.S. 1, 17) there was no evidence introduced at trial regarding the value of the iPhone that underlies the receipt of stolen property count. Because no other elements of the crime are challenged, the remedy is to reduce the felony to a misdemeanor. (E.g., *People v. Love* (2008) 166 Cal.App.4th 1292, 1300-1301 [reducing theft from felony to misdemeanor when trial court omitted element on value of item taken].)[2]

B. Attempted Criminal Threats Instruction

A trial court is required to instruct a jury on any lesser included offense to any charged crime if "'there is "substantial evidence" from which a rational jury could conclude that the defendant committed the lesser offense, and that [s]he is not guilty of the greater offense. [Citations.]'" (*People v. Whalen* (2013) 56 Cal.4th 1, 68, quoting *People v. DePriest* (2007) 42 Cal.4th 1, 50.) The crime of attempted criminal threats is a lesser included offense to the crime of criminal threats. (*People v. Toledo* (2001) 26 Cal.4th 221, 233-234 (*Toledo*).) Garcia argues that the trial court erred in not instructing the jury on the lesser included crime of attempted criminal threats because there was substantial evidence supporting such an instruction.

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[2] In light of this conclusion, we need not reach Salinas's further argument that the trial court erred in not instructing the jury on the lesser included crime of misdemeanor receipt of stolen property.

We agree. To prove the *completed* crime of making criminal threats, the People must prove, among other things, that "the threat actually caused the person threatened 'to be in sustained fear'"—that is, for "a period of time that extends beyond what is momentary, fleeting, or transitory"—"'for his or her own safety.'" (*Toledo*, *supra*, 26 Cal.4th at p. 228, quoting *People v. Bolin* (1998) 18 Cal.4th 297, 337-340 & fn. 13; *People v. Allen* (1995) 33 Cal.App.4th 1149, 1156.) A defendant is guilty of only *attempted* criminal threats if she satisfies every other element of the crime but her threat does not cause the victim to be in sustained fear. (*Toledo*, at pp. 233-234; *In re Sylvester C.* (2006) 137 Cal.App.4th 601, 607-608.)

In this case, the People affirmatively elected to narrow the criminal threats count to a single incident—namely, the threatening phone call on June 20, 2013. Posey told police immediately after the call that he was not "bother[ed]" by that call, and testified at trial that he was not threatened during the call. To be sure, Posey's *conduct*—namely, that he lied to defendants about his whereabouts, that he tried to evade defendants both before and after the call, that he was afraid to come to court, and that he tried to avoid testifying—supports a reasonable inference that he was actually in fear and belies his statements to the contrary. Posey's statements disclaiming fear could nevertheless reasonably support a finding that the call did not place him in sustained fear. The trial court was consequently obligated to instruct on the crime of attempted criminal threats.

However, because none of the other elements of the crime is contested and, as described below, there is otherwise sufficient evidence to support a conviction of that crime, the People have the option of (1) retrying Garcia on the crime of criminal threats

(with the jury to be instructed on the lesser included offense of attempted criminal threats), or (2) deciding not to retry Garcia and consenting to modification of the judgment to reflect a conviction for attempted criminal threats. (See *People v. Edwards* (1985) 39 Cal.3d 107, 118.)

III. Prosecutorial Misconduct

Esquivias asserts that the prosecutor committed misconduct during closing argument because he said, "[Esquivias] told us that after the shooting he ran to the now waiting car on Ventura Canyon that . . . Garcia and . . . Salinas pulled up, and we've heard from the witnesses and from . . . Esquivias himself that he went into the rear seat on the passenger side." Esquivias contends that the prosecutor's statement could be read to suggest that *Esquivias said* Garcia and Salinas were in the waiting car, and that no such statement by Esquivias was in evidence. We review this claim for an abuse of discretion. (*People v. Peoples* (2016) 62 Cal.4th 718, 792-793 (*Peoples*).)

Esquivias has forfeited this claim. To preserve a claim of prosecutorial misconduct for review on appeal, a defendant must make a timely objection at trial and request an admonition to the jury, except where "'an objection would have been futile or an admonition ineffective.'" (*People v. Jackson* (2016) 1 Cal.5th 269, 367.) Esquivias never objected to the prosecutor's comment or requested an admonition. Esquivias asserts on appeal that such an objection would have been futile, but points to nothing in the record to support this assertion.

Esquivias's claim of prosecutorial misconduct lacks merit in any event, thereby obviating any claim that his counsel's failure to object was constitutionally deficient or prejudicial. A

prosecutor's conduct during a criminal trial violates the federal Constitution if it is """"""so egregious that it infects the trial with such unfairness as to make the conviction a denial of due process""""""" and violates the California Constitution if it "involves ""the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury."""" (*Peoples*, *supra*, 62 Cal.4th at pp. 792-793.) Telling a jury about matters that are not in evidence constitutes misconduct. (*People v. Pinholster* (1992) 1 Cal.4th 865, 948, disapproved on another ground in *People v. Williams* (2010) 49 Cal.4th 405, 459.) However, attorneys are given "'wide latitude'" to comment on the evidence in closing arguments (*People v. Winbush* (2017) 2 Cal.5th 402, 484), and ambiguous comments will be construed as misconduct only if there is a "'reasonable likelihood the jury understood or applied the complained-of comments in an improper or erroneous manner.'" (*People v. Seumanu* (2015) 61 Cal.4th 1293, 1337.) The comment Esquivias assails is ambiguous insofar as it is unclear whether the prosecutor is saying that (1) *Esquivias said* that Garcia and Salinas were waiting for him, or (2) that other evidence at trial so proved. There was no evidence of the former, but ample evidence of the latter—namely, that Garcia's car matched the description of the car witnesses saw at the scene and that Salinas said she would be by Garcia's side the whole time. Under these circumstances, it is not reasonably likely that the jury construed the prosecutor as making an argument not based on the evidence rather than one based on the evidence.

What is more, any misconduct was not prejudicial (*People v. Alvarado* (2006) 141 Cal.App.4th 1577, 1585) because the jury was instructed that counsel's arguments were not evidence, and

we presume the jurors heeded that admonition (*People v. Ervine* (2009) 47 Cal.4th 745, 776).

IV. Sufficiency of the Evidence

Defendants raise four different challenges to the sufficiency of the evidence. In evaluating these claims, we ask whether the record contains enough evidence that is reasonable, credible, and of solid value for a reasonable trier of fact to find the defendants guilty beyond a reasonable doubt. (*People v. Brooks* (2017) 2 Cal.5th 674, 729.) We must look at the entire record, construe it in the light most favorable to the verdict, and "'"accept [all] logical inferences that the jury might have drawn from the evidence."'" (*People v. Salazar* (2016) 63 Cal.4th 214, 242 (*Salazar*).)

A. Gang Enhancement

Esquivias, joined by Garcia and Salinas, argues that there was insufficient evidence to support the jury's finding that the gang enhancement applied to the charged crimes.

To prove the gang enhancement for a particular crime, the People must prove that the crime was "committed [1] for the benefit of, at the direction of, or in association with any criminal street gang"; and "[2] with the specific intent to promote, further, or assist in any criminal conduct by gang members." (§ 186.22, subds. (b)(1) & (b)(4)(B); *People v. Rios* (2013) 222 Cal.App.4th 542, 561 [enumerating elements of gang enhancement].) Proof of the specific intent element is "'almost inevitably circumstantial'" (*Rios*, at p. 568, quoting *People v. Bloom* (1989) 48 Cal.3d 1194, 1208), and "requires only the specific intent to promote, further, or assist criminal conduct by *gang members*"—not the gang itself (*People v. Albillar* (2010) 51 Cal.4th 47, 67 (*Albillar*)). Both elements may be established through expert testimony as long as

that testimony is "'coupled with other evidence from which the jury could reasonably infer the crime was gang related.'" (*People v. Ochoa* (2009) 179 Cal.App.4th 650, 659.) A person need not be a gang member for the enhancement to apply. (*Albillar*, at pp. 67-68.)

Substantial evidence supports the jury's findings that Haro's murder, the threats to Posey, and the two robberies were committed for the benefit of, at the direction of, or in association with the Wicked Insane Diablos street gang, and with each defendant's specific intent to promote, further, or assist in those crimes. With respect to the murder, "older homies" in the Wicked Insane Diablos "gave" Esquivias "the okay" to kill Haro and Posey, and another member of Esquivias's faction of the 818 clique considered the shooting to be "putting in work" for the gang. This is proof that Haro's murder was at the direction of the gang. The People's gang expert further explained that squelching dissent within a gang makes the gang appear stronger in the eyes of its rivals. This is proof that the murder and subsequent threats to Posey also benefitted the gang. There is also sufficient evidence that Esquivias, Garcia, and Salinas specifically intended to assist one another in accomplishing Haro's murder; Esquivias pulled the trigger, Garcia drove him there, and Salinas provided encouragement and moral support by her text messages and her presence in Garcia's car before and after the murder. With respect to the robberies, Esquivias and Garcia took items from the robbery victims, and the expert explained how the robberies benefitted the gang by sending a message of intimidation and by acquiring property that could be used or sold by gang members. Indeed, in the Lares robbery, Esquivias and Garcia specifically asked the victim for his gang affiliation.

Defendants raise three categories of attacks at this conclusion. First, they argue the gang enhancement is inappropriate as to all of the charged crimes because the People's proof that the Wicked Insane Diablos is a "criminal street gang" within the meaning of the gang enhancement did not apply to *defendants* because (1) the 818 clique defendants belonged to was *not* part of the Wicked Insane Diablos, and (2) defendants were no longer part of the 818 clique at the time they murdered Haro, threatened Posey, and robbed Lares and Rivas. Our Supreme Court's decision in *People v. Prunty* (2015) 62 Cal.4th 59 (*Prunty*), defendants reason, mandates reversal of the gang enhancement.

Prunty held that "when the prosecution seeks to prove the street gang enhancement by showing a defendant committed a felony to benefit a given gang, but establishes the commission of the required predicate offenses with evidence of crimes committed by members of the gang's alleged subsets, it must prove a connection between the gang and the subsets." (*Prunty*, *supra*, 62 Cal.4th at pp. 67-68.) To be sure, the People in this case proved that the Wicked Insane Diablos were a "criminal street gang" by showing that two Wicked Insane Diablos members had committed qualifying "predicate offenses"; the People did not show that those two gang members were also members of the 818 clique. But this is of no moment. Esquivias and Garcia had Wicked Insane Diablos tattoos, all three defendants made statements or threw gang signs affiliated with the Wicked Insane Diablos, and—critically—the "older homies" in the Wicked Insane Diablos specifically sanctioned Haro's shooting. This is evidence that the 818 clique was part of the broader Wicked Insane Diablos gang. *Prunty* expressly noted that the gang enhancement is appropriately applied where

"various subset members exhibit behavior showing their self-identification with a larger group." (*Prunty*, at p. 71.) Further, the fact that defendants were still taking orders from the "older homies" is sufficient evidence that *they*—not Haro and Posey—were the faction of the 818 clique still affiliated with the Wicked Insane Diablos.

Second, defendants contend that the enhancement is inappropriate for all of the charged crimes because being a gang member is not enough to qualify for the enhancement. That is true (*Albillar*, *supra*, 51 Cal.4th at p. 60), but irrelevant in light of the evidence that Haro's murder, the threat to Posey, and the two robberies were at the direction of, or benefitted, the gang.

Lastly, defendants assert that their dispute with Haro was a personal squabble rather than a matter of internal gang politics. Indeed, the People's gang expert agreed that the rift between Haro and Posey on the one hand, and defendants on the other, started out as "personal." But there was ample evidence that it "escalated" into an internecine conflict within the 818 clique that the gang's "older homies" decreed must stop. Even if defendants are right that a jury could have inferred that the conflict remained personal, the jury was faced with two competing inferences and was "entitled to credit the evidence that the attack on [Haro] was gang related, not [personal]." (*Albillar*, *supra*, 51 Cal.4th at p. 62.)

B. Salinas's Conviction for Second Degree Murder

Salinas argues that there was insufficient evidence to convict her of aiding and abetting Esquivias and Garcia in committing Haro's murder.

"Murder" is defined as the "unlawful killing of a human being . . . with malice aforethought." (§ 187, subd. (a).) A

defendant is guilty of second degree murder if she causes an unjustified killing with an intent to kill, but does so without the willfulness, deliberateness, and premeditation that would elevate the killing to first degree murder. (§ 189; *People v. Chiu* (2014) 59 Cal.4th 155, 166; *People v. Cravens* (2012) 53 Cal.4th 500, 507.)

A person is liable for a crime, including murder, if she commits the crime herself or if she aids and abets another in its commission. (§ 31.) A person is liable as an aider and abettor if (1) she knows of the actual perpetrator's unlawful purpose, (2) she, by her act or advice, aids, promotes, encourages, or instigates the actual perpetrator's commission of the crime, and (3) she acts with the intent or purpose to commit, encourage, or facilitate the actual perpetrator's commission of the crime. (*People v. McCoy* (2001) 25 Cal.4th 1111, 1118; *People v. Prettyman* (1996) 14 Cal.4th 248, 259; *People v. Beeman* (1984) 35 Cal.3d 547, 561.) When a person aids and abets a crime, she must share the same intent as the actual perpetrator. (*McCoy*, at p. 1118 & fn. 1; *People v. Nguyen* (2015) 61 Cal.4th 1015, 1054 (*Nguyen*).) "'[A]n aider and abettor will "share" the perpetrator's specific intent when he or she knows the full extent of the perpetrator's criminal purpose and gives aid or encouragement with the intent or purpose of facilitating the perpetrator's commission of the crime.'" (*People v. Maciel* (2013) 57 Cal.4th 482, 518 (*Maciel*).)

Substantial evidence supports the jury's verdict that Salinas aided and abetted Haro's murder. She knew of Garcia's and Esquivias's plan to kill Haro because Salinas and Garcia discussed it over text messages. She also encouraged the murder by assuring Garcia that she would "be by [Garcia's] side the

whole time." And Salinas made good on that assurance by being in the car when Esquivias hopped out to shoot Haro and then got back in; the jury could reasonably infer Salinas's presence in the car from the facts that Salinas was sitting in the front passenger seat and Esquivias in the rear passenger seat at the time of their arrest and that Esquivias got into the rear passenger seat after shooting Haro because Salinas was, by their custom, in the front passenger seat.

Salinas raises three arguments in response. First, she asserts that she did not help *plan* the murder, that she did not pull the trigger, that the People did not prove that she was at the scene, and that she was not on the June 20 phone call. These arguments lack merit. The fact that Salinas did not plan the murder or pull the trigger is irrelevant to her liability as an aider and abettor; all that is needed is proof of her knowledge, intent, and encouragement (*Maciel*, *supra*, 57 Cal.4th at p. 518), and the People presented such proof. Although Salinas is correct that no one saw her inside Garcia's car, the jury could reasonably infer as much for the reasons noted above. In any event, a person need not be present at the scene to be an aider and abettor. (*Jennings*, *supra*, 50 Cal.4th at pp. 641-642, fn. 11.) Salinas points to text messages in which she expressed her fear that "something may go wrong" and that she "would lose Garcia," but the jury could reasonably interpret those statements as reflecting Salinas's awareness of how dangerous the planned murder would be rather than hesitation to participate in it. And although the evidence is conflicting as to whether Salinas herself took credit for the shooting during the June 20 call, we must defer to the jury's resolution of such conflicts. (See *Salazar*, *supra*, 63 Cal.4th at p. 242.)

Second, Salinas asserts that the jury's verdict rests solely on "guilt by [her] association" with Esquivias and Garcia, who are both gang members. The evidence set forth above belies this assertion. (Accord, *Nguyen*, *supra*, 61 Cal.4th at p. 1055 [defendant's presence in car along with evidence of ongoing gang conflict and gang practices described by expert testimony sufficient to show aiding and abetting liability for attempted murder].) Salinas cites *U.S. v. Garcia* (9th Cir. 1998) 151 F.3d 1243, 1245-1246 for the proposition that being a supportive "back up" is insufficient, but *Garcia* addressed criminal liability by way of conspiracy, not aiding and abetting.

Lastly, Salinas points to the prosecutor's concession that there was no "direct evidence" of her involvement in Haro's murder. This concession means nothing because there was ample circumstantial evidence of her involvement, and a jury may give circumstantial evidence as much weight as direct evidence. (*People v. Anderson* (2007) 152 Cal.App.4th 919, 930; CALCRIM No. 223.)

C. Salinas's Conviction for Receipt of Stolen Property

Salinas argues that there is insufficient evidence that she knew the iPhone was stolen.[3] To convict a person of receiving stolen property, the People must prove, among other things, that the defendant "actual[ly] [knew] that the property received . . . was stolen." (*People v. Tessman* (2014)

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[3] Salinas also argues that there was insufficient evidence that the iPhone was worth $950. We need not reach this issue because, as discussed above, we have reduced this conviction to a misdemeanor due to the People's failure to establish this monetary threshold.

223 Cal.App.4th 1293, 1302.) Such evidence was present. Salinas and Garcia exchanged text messages in which Salinas indicated she was near the area of the robberies at the time they were occurring. Salinas also had Lares's iPhone in her possession the day after the robbery and had personalized it. From these facts, as well as from Garcia's willingness to share with Salinas her criminal plans regarding Haro's murder, a jury could reasonably infer that Salinas was aware of Garcia's plan to commit robberies and that Salinas knowingly accepted the fruit of those robberies.

D. Garcia's Conviction for Criminal Threats

Garcia argues that there was insufficient evidence that Posey was in "sustained fear" from the June 20 call. As explained above, this is an element of the complete crime of making criminal threats. (*Toledo*, *supra*, 26 Cal.4th at pp. 227-228.) Also as noted above, Posey's conduct—although at odds with what he sometimes said—created a reasonable inference that he was, in fact, actually in fear due to the threats made on the call. Consequently, there was sufficient evidence of this element, even though the conviction must be ultimately vacated because the trial court erred in not instructing the jury on the lesser included offense of attempted criminal threats.

V. Sentencing Issues

A. Denial of Esquivias's Motion to Strike His Strike Allegation

Esquivias argues that the trial court erred in denying his motion to strike (that is, to dismiss) the allegation that his 2012 first degree burglary conviction constitutes a strike within the meaning of our Three Strikes law. We review a trial court's denial of such a motion for an abuse of discretion. (*People v. Carmony* (2004) 33 Cal.4th 367, 373 (*Carmony*).)

A trial court has the discretion to grant a motion to dismiss a strike allegation. (§ 1385, subd. (a); *People v. Williams* (1998) 17 Cal.4th 148, 162.) In deciding whether to exercise that discretion, the court is to "'consider whether, in light of the nature and circumstances of [the defendant's] present felonies and prior serious and/or violent felony convictions, and the particulars of his background, character, and prospects, the defendant may be deemed outside the [Three Strikes] scheme's spirit, in whole or in part, and hence should be treated as though he had not previously been convicted of one or more serious and/or violent felonies.' [Citation.]" (*Carmony*, *supra*, 33 Cal.4th at p. 377.)

The trial court did not abuse its discretion in concluding that Esquivias did fall within the spirit of the Three Strikes law. The court noted that defendant was an "active[] part" of the first degree burglary he committed the year before Haro's murder and that he shot Haro and "was active" in the armed robberies of both Rivas and Lares. The court reasoned that Esquivias's "active" involvement in these crimes—none of which is a "lower level felon[y]"— was "pretty glaring," and that, despite his young age (19 at the time of the charged crimes), Esquivias did not fall "outside the spirit of the Three Strikes law."

Esquivias raises four arguments to assail the trial court's ruling. First, he argues that the court was wrong to find that he actively participated in the first degree burglary because he was merely the lookout. But the court examined the court file from that prior case and determined that although Esquivias did not enter the residence initially with his cohorts, he eventually did enter the house; thus, Esquivias was more than a lookout. Second, Esquivias asserts that the court did not consider his age

or the absence of any juvenile adjudication. However, the court—as noted above—*did* consider Esquivias's age and was cognizant of the fact that defendant's criminal conduct started with the first degree burglary. Third, Esquivias asserts that the court was required to consider his status as a juvenile. But he was not a juvenile at the time of this crime. (Accord, *Miller v. Alabama* (2012) 567 U.S. 460, 465 (*Miller*).) Lastly, Esquivias asserts that he still would have a 50-year sentence on the murder case even if his prior strike was dismissed. However, this fact does not call into question the soundness of the trial court's reasoning or its ultimate conclusion.

B. Failure to Consider Factors Relevant to Juveniles While Sentencing Garcia

Garcia notes that she was under the age of 18 at the time of the charged crimes, and the trial court was obligated by the Eighth Amendment to consider several factors when imposing her sentence. We review this constitutionality claim de novo. (*People v. Em* (2009) 171 Cal.App.4th 964, 971.)

The Eighth Amendment requires a juvenile court, before imposing a sentence of life without the possibility of parole or a term of years that amounts to a de facto life sentence on a person who was a juvenile at the time of her crimes, to consider the defendant's (1) lack of maturity, impulsiveness, and underdeveloped sense of responsibility, (2) vulnerability to negative influences and limited control of her own environment, and (3) lack of well-formed character. (*Miller*, *supra*, 567 U.S. at p. 471; *Graham v. Florida* (2010) 560 U.S. 48, 68-69, 74-75; *People v. Caballero* (2012) 55 Cal.4th 262, 266-269.) However, our Legislature enacted section 3051 as a means of assuring that juvenile defendants are accorded this Eighth Amendment right. (Stats. 2013, ch. 312, § 1.) Section 3051 grants anyone "under 23

years of age at the time of his or her" crime the right to a "youth offender parole hearing" to be held 15, 20, or 25 years after the imposition of sentence to enable the defendant to seek parole based on his or her "diminished culpability [as a] juvenile[]as compared to adults, the hallmark features of youth, and any subsequent growth and increased maturity." (§§ 3051, subds. (a)(1), (b) & 4801, subd. (c).)

Our Supreme Court has held that the availability of section 3051 renders a defendant's Eighth Amendment-based constitutional challenge moot. (*People v. Franklin* (2016) 63 Cal.4th 261, 279-280.) Garcia's challenge is therefore moot. (Garcia does not request a remand for purposes of assessing whether a hearing to receive evidence relevant to a future youth offense parole hearing is required.)

C. Ineffectiveness of Salinas's Counsel At Sentencing

Salinas argues that her trial counsel was constitutionally ineffective (1) for not correcting several factual errors in the probation report, and (2) for not seeking an updated report. We review claims of ineffective assistance of counsel de novo. (*People v. Mayfield* (1993) 5 Cal.4th 142, 199.)

To establish that counsel was constitutionally ineffective, a criminal defendant bears the burden of showing (1) her "counsel's performance was deficient" because it """"fell below an objective standard of reasonableness . . . under prevailing professional norms,""""" and (2) "but for counsel's deficient performance," it is "reasonab[ly] probab[le]" that "the outcome of the proceeding would have been different." (*People v. Mickel* (2016) 2 Cal.5th 181, 198, quoting *People v. Lopez* (2008) 42 Cal.4th 960, 966.) Counsel's decision to forego a meritless objection is not deficient performance. (*People v. Lucero* (2000) 23 Cal.4th 692, 732.)

Salinas's counsel was not constitutionally ineffective.

With respect to Salinas's first claim, she argues that the probation report before the trial court at the time of sentencing inaccurately reported that she was an "active gang member" (rather than just an associate of the gang), that she was in Garcia's car at the time of the shooting (of which she claims there was no evidence), and that she claimed responsibility for Haro's murder on the June 20 call (of which she claims there was no evidence). To be sure, counsel has a duty to ensure "that the sentence imposed is based on complete and accurate information." (*People v. Cotton* (1991) 230 Cal.App.3d 1072, 1085-1086 (*Cotton*).) Even if we assume that counsel should have objected to the report's content, there is no reasonable probability that the report would have lead to a different sentence. To begin, a probation report is merely advisory. (*People v. Johnson* (1999) 70 Cal.App.4th 1429, 1432.) More importantly, the trial court was aware of the accurate facts: The court specifically noted the gang expert's opinion that Salinas was merely an "associate" of the gang, and the court heard the evidence at trial, which included circumstantial evidence of Salinas's presence in Garcia's car as well as direct (albeit conflicting) evidence of Salinas's boasting about her involvement in Haro's murder.

With respect to Salinas's second claim, she asserts that her counsel should have requested an updated probation report. Supplemental reports may be requested (Cal. Rules of Court, rule 4.411(c)), and can be helpful to ensure that "complete and accurate information" is before the trial court (*Cotton*, *supra*, 230 Cal.App.3d at pp. 1085-1086). But, for the reasons detailed above, no prejudice arose from the absence of a more recent report.

D. Miscalculation of Salinas's Presentencing Credits

Salinas asserts that the trial court miscalculated her presentence credits, and the People agree. Salinas was arrested on June 27, 2013, and sentenced on January 29, 2016. This entitles defendant to 947 days of actual credit, but the trial court awarded her only 868 days. Because this issue may be raised for the first time on appeal along with other properly preserved claims (*People v. Mendez* (1999) 19 Cal.4th 1084, 1100-1101), we order that the abstract of judgment be amended to reflect a total of 947 days of custody credit.

E. Clerical Errors in the Abstracts of Judgment

1. Esquivias's abstract of judgment

The indeterminate abstract of judgment for Esquivias (1) fails to indicate the degree of murder of which he was convicted and simply states "Murder" instead of "First Degree Murder"; and (2) incorrectly indicates that he was sentenced to "25 YRS" for the section 12022.53, subdivisions (d) and (e) firearm enhancement, when the actual sentence was "25 years to life."

Accordingly, Esquivias's abstract of judgment should be modified to reflect (1) on page 1, item 1, a conviction for "First Degree Murder"; and (2) on page 1, item 2, a sentence of "25 years to life" for the section 12022.53, subdivisions (d) and (e) firearm enhancement.

2. Garcia's abstract of judgment

The indeterminate abstract of judgment for Garcia incorrectly indicates that (1) she was convicted of "2nd Degree Murder" when she was in fact convicted of first degree murder; (2) that she was sentenced pursuant to the Three Strikes law– "Penal Code section 667, subdivisions (b)-(i) or Penal Code section

1170.12," when she was not; (3) she was sentenced to "25 YRS" for the section 12022.53, subdivisions (d) and (e) firearm enhancement, when the actual sentence was "25 years to life"; and (4) the sentence imposed as to count 1 was "50 years to life" plus enhancement time, when the actual sentence was "25 years to life" plus enhancement time.

Accordingly, Garcia's abstract of judgment should be modified to reflect (1) on page 1, item 1, a conviction for "First Degree Murder"; (2) on page 1, item 2, a sentence of "25 years to life" for the section 12022.53, subdivisions (d) and (e) firearm enhancement; and (3) on page 1, item 6, a sentence of "25 years to life." Additionally, on page 1, item 8, there should be no indication that Garcia was sentenced pursuant to the Three Strikes law.

3. Salinas's Abstract of Judgment

The indeterminate abstract of judgment for Salinas incorrectly indicates that (1) she was sentenced to "25 YRS" for the section 12022.53, subdivisions (d) and (e) firearm enhancement, when the actual sentence was "25 years to life"; and (2) the sentence imposed as to count 1 was "40 years to life" plus enhancement time, when the actual sentence was "15 years to life" plus enhancement time.

Accordingly, Salinas's abstract of judgment should be modified to reflect (1) on page 1, item 2, a sentence of "25 years to life" for the section 12022.53, subdivisions (d) and (e) firearm enhancement; and (2) on page 1, item 6, a sentence of "15 years to life." Additionally, as set forth above, Salinas's abstract of judgment on page 3, item 15, should be amended to reflect a total of 947 days of custody credit.

DISPOSITION

Salinas's felony conviction for receiving stolen property is reduced from a felony to a misdemeanor. Garcia's conviction for a criminal threat is reversed. The matter is remanded to the trial court, and the People shall have 60 days from issuance of the remittitur from this Court to decide whether to retry Garcia for criminal threats. If the People do not file a charge of criminal threats within that period, the judgment shall be modified to reflect Garcia's conviction for attempted criminal threats. The clerk of the trial court is directed to correct the abstracts of judgment to reflect the modifications discussed above and to forward the amended abstracts to the Department of Corrections and Rehabilitation. As modified, the judgments are affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, J.
HOFFSTADT

We concur:

_____, Acting P. J.
ASHMANN-GERST

_____, J.
CHAVEZ