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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, Plaintiff and Respondent, v. ELMER ALBERTO VASQUEZ et al., Defendants and Appellants.	B235687 (Los Angeles County Super. Ct. No. MA052708)

APPEALS from judgments of the Superior Court of Los Angeles County, Carol Koppel, Judge. (Retired Judge of the former Mun. Ct. for the San Bernardino Jud. Dist. assigned by the Chief Justice pursuant to art. VI, § 6 of the Cal. Const.) Affirmed as modified with directions.

Alex Green, under appointment by the Court of Appeal, for Defendant and Appellant Elmer Alberto Vasquez.

Jeffrey J. Douglas, under appointment by the Court of Appeal, for Defendant and Appellant Artemio Galiana.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Margaret E. Maxwell and Thomas C. Hsieh, Deputy Attorneys General, for Plaintiff and Respondent.

I. INTRODUCTION

A jury convicted defendants, Elmer Alberto Vasquez and Artemio Galiana, of first degree burglary where another person was present. (Pen. Code,[1] §§ 459, 667.5, subdivision (c)(21).) Mr. Vasquez was sentenced to four years in state prison. Mr. Galiana was sentenced to two years in state prison. We modify the sentence in certain aspects but affirm defendants' convictions.

II. THE EVIDENCE

A. The Prosecution Case

Defendants entered their next door neighbors' house uninvited and stole a computer. One of the neighbors, Annelise Gleason, was home at the time. Ms. Gleason had known defendants for several years and considered them friends. Mr. Galiana had an on and off dating relationship with Ms. Gleason's younger sister, Mariah.[2] He had been in Ms. Gleason's home on prior occasions.

On May 5, 2011, at about 6 p.m., Ms. Gleason was at home watching television with her three-year-old son. Ms. Gleason heard loud banging first at the front door and then at her son's window. Both the door and the window were in the front of the house. When Ms. Gleason looked out her son's window, she saw defendants. Ms. Gleason watched defendants run around toward the backyard and the garage. A door in the garage accessed the living room. Defendants knocked on the living room door for about five minutes. Mr. Vasquez called Ms. Gleason's cellular telephone, but she did not answer. Eventually, defendants stopped banging on the door. Ms. Gleason opened the door to see whether they were gone. When she closed the door, she forgot to lock it. Mr. Galiana

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

2 To avoid confusion, we refer to Ms. Gleason's sister as Mariah.

immediately opened the door and walked in. He proceeded to engage in friendly small talk with Ms. Gleason. Two or three minutes after Mr. Galiana entered the house, Mr. Vasquez came through the door. He walked past Ms. Gleason without speaking to her. She assumed Mr. Vasquez was walking to the bathroom. Ms. Gleason continued talking to Mr. Galiana for 10 or 15 minutes.

A computer was about three or four feet behind Ms. Gleason on a desk. During her conversation with Mr. Galiana, she turned to look in the direction of the computer. Mr. Galiana positioned her so she could not see it. He grabbed her shoulders and moved her. At some point, Ms. Gleason saw Mr. Vasquez run out of the house holding something. She had not seen him in the living room. Ms. Gleason chased Mr. Vasquez. Ms. Gleason's son followed her. Ms. Gleason chased Mr. Vasquez into the backyard where a chain-link fence divided her property from his. Ms. Gleason saw Mr. Vasquez hand the computer over the fence to someone else. She saw a big black object—the computer tower. Ms. Gleason could not identify the person on the other side of the fence. Mr. Vasquez then hopped over the fence. Ms. Gleason said to Mr. Vasquez, "Give it back." He claimed he did not have it. Mr. Vasquez said he did not know what Ms. Gleason was talking about. He said, "It wasn't me." The computer was in the living room before defendants entered the house. After they left, the computer was gone.

Ms. Gleason called a neighbor, Alayna Austin. Ms. Gleason asked her what she should do. Ms. Gleason wanted Ms. Austin's advice. Ten or fifteen minutes after Ms. Gleason told Ms. Austin what had happened, the sheriff's deputies arrived. Deputy Marco Grajales observed a desk that held a computer screen and keyboard. It was dusty. It looked like something had been dragged off the desk to the left of the computer screen.

On May 5, 2011, at about 6 p.m., Ms. Austin saw defendants and a third man banging on Ms. Gleason's doors and window. After five or ten minutes, she saw them run around to the back of the house. Later, Ms. Austin saw one of the men go over the fence. She did not know who it was. Another person came around the front of the house. It looked like he was carrying something. One person handed the item over the fence to the other. Ms. Gleason came out of her house with her son. She was yelling. In

response to Ms. Gleason's telephone call, Ms. Austin contacted the sheriff's department. According to Deputy Grajales, however, Ms. Austin never said she saw defendants carrying any object away from Ms. Gleason's house.

During a field show-up, Ms. Gleason identified Mr. Galiana as one of the perpetrators. Deputy Grajales arrested Mr. Galiana for burglary. Mr. Galiana was handcuffed and put in the backseat of Deputy Grajales's patrol car. Mr. Galiana was advised of his *Miranda* rights. Deputy Grajales then asked Mr. Galiana what had happened. At first Mr. Galiana denied he was involved. Deputy Grajales searched defendants' home but did not find the computer. While being transported to the sheriff's station, however, Mr. Galiana again spoke to Deputy Grajales. Deputy Grajales testified: "During the transport [Mr. Galiana] made a statement . . . that if he were to tell us where the item that was taken was, if we would not arrest him for the crime that had been committed. [¶] . . . [¶] . . . . I asked him, 'What had been stolen,' which he responded to that - - he told me he believed [it] was a computer screen or computer equipment. [¶] . . . [¶] . . . I asked him where the item was, where he basically become uncooperative and stopped answering any questions."

On direct examination, Ms. Gleason said Mr. Galiana had been in her house on earlier occasions. He had been in the living room where the computer was located. When cross-examined, Ms. Gleason admitted she had previously testified Mr. Vasquez had also been in her house on a prior occasion. At trial, however, Ms. Gleason said her prior testimony was an honest mistake in that regard. Mr. Vasquez had not previously been in her house. She testified: "I must have not been aware of it at the time. But I am aware of it now. And I made a mistake." Also on cross-examination, Ms. Gleason admitted she had previously testified Mr. Galiana had not restrained her. At trial she said: " . . . I thought restraining meant something different. Like, actually hold me down or putting rope on me or something. That's what I thought restraining was. But I didn't know there [were] different forms of restraint." Ms. Gleason also admitted that at the preliminary hearing, she referred to the item stolen from her house as a computer modem.

B. The Defense Case

Mr. Vasquez did not present any affirmative defense. Mr. Galiana testified in his own defense. He admitted being inside Ms. Gleason's house, but denied taking anything from her home. Mr. Galiana also denied that Mr. Vasquez took anything. Mr. Galiana testified he had gone to Ms. Gleason's home to visit her. He said, " . . . I went over there . . . to see if they wanted to hang out for [the] Lake L.A. Cinco de Mayo parade[.]" He knocked on the door but no one answered. Mr. Galiana could hear loud television noise inside the house, so he banged on the window next to the door. He thought someone was home but could not hear him knocking. Mr. Galiana went to the side of the house and knocked on Mariah's bedroom window. He could hear people walking around inside the house. Mr. Galiana thought they were playing with him and not coming to the door. He went to the back door. Ms. Gleason opened it and Mr. Galiana walked in. Mr. Vasquez came in at some point and greeted Ms. Gleason. Mr. Vasquez briefly stood nearby, then asked to use the restroom. As Mr. Vasquez was exiting the restroom 10 or 15 minutes later, the three of them heard a loud noise. It sounded like an engine. Mr. Galiana thought it was Ms. Gleason's grandparents' recreational vehicle. Ms. Gleason's grandparents were not fond of Mr. Vasquez. Mr. Vasquez ran out of the house. Mr. Vasquez was carrying a sweater. Mr. Galiana did not see anything else in Mr. Vasquez's hands. According to Mr. Galiana, Ms. Gleason ran after Mr. Vasquez screaming something like, "'Give me my stuff.'" Mr. Galiana walked out behind her. Sometime later, a sheriff's deputy came to Mr. Galiana's house. Mr. Galiana was arrested. As noted, Ms. Gleason ran after Mr. Vasquez. Mr. Galiana explained why he left after Ms. Gleason ran from the home. As noted, she chased Mr. Vasquez. Mr. Galiana testified: "Because her baby was right next to me so - - . . . I had talked to her - - Mariah wasn't home, obviously, because I was inside of the house. So I just left because there was no reason for me being there."

Mr. Galiana denied talking to Deputy Grajales. Mr. Galiana also denied saying anything about a computer. Under questioning by his defense attorney, Veronica

Murayama, Mr. Galiana testified: "Q. By Ms. Murayama: . . . Now, at some point did you tell the deputy that you knew where the computer was at or you knew or you could tell them where the computer was at? [¶] A. No. [¶] Q. Did you tell him anything about a computer? [¶] A. No. [¶] Q. Now, did he tell you anything about a computer? [¶] A. He told me - - I knew where this computer was at and for me to tell him. [¶] Q. So he told you, 'You know where this computer's at, tell me'? [¶] A. Yes, something - - [¶] A. And what did you say? [¶] A. I said, 'I can't tell you about something if I don't know where something is at.' [¶] And he told me that he was going to take me to jail if I didn't [tell] him. That was it. [¶] Q. What did you tell him or did you tell him anything when he said, 'I'm going to take you to jail if you don't tell me where this computer's at'? [¶] A. I asked him, 'So you're taking me to jail because I won't tell you where something is at, that I don't' know?' [¶] He said, 'Yes, it's a probable cause.' [¶] And I said, 'So you're telling me, if I was to know where this stolen item that you're telling me to tell you where it's at, you will let me go free?' [¶] And he just responded, 'Yes.'" Mr. Galiana believed Deputy Grajales had lied about their conversation.

On cross-examination, Mr. Galiana was asked why he had not told the authorities he was innocent: "Q. Now, you testified to something . . . different than what we've heard all day today; right? [¶] A. Yes. [¶] Q. Did you tell any of this to the police that day? [¶] A. No. [¶] Q. Why not? [¶] A. Because I was nervous about them arresting me for something I didn't do, and they accusing me. [¶] Q. Sure. But it seems like if you would have told them what you said here today that would have been good for you; right? [¶] . . . [¶] [Mr. Galiana]: Can you repeat your question? [¶] Q. [The prosecutor]: Sure. I'll ask you in a different way. [¶] What you're telling us today is that you didn't do anything wrong; right? [¶] A. Yes. [¶] Q. And why wouldn't you tell the police you weren't doing anything wrong? [¶] A. I did. I told them what was the reason for them arresting me. And they told me what was the reason. And I told them, 'I didn't have nothing to do with it.' [¶] Q. Okay. So you did tell them that? [¶] A. I told them something like that. I told them it wasn't right for them to arrest me." "Q. [The prosecutor]: So . . . I just want to be certain because you stated that Deputy Grajales

said some things that may be different than what he testified to; is that right? [¶] A. Yes. [¶] Q. And you never told him any of what you told us here today? [¶] A. No, I just - - no." Mr. Galiana said he had never seen a computer in Ms. Gleason's living room. Mr. Vasquez and he had not discussed and had no plan to take Ms. Gleason's computer.

III. DISCUSSION

A. Mr. Galiana's Statements To Deputy Grajales

Over defense objection, the trial court admitted Mr. Galiana's post-arrest statements to Deputy Grajales. Mr. Galiana contends the evidence was not admissible as a statement against penal interest. (Evid. Code, § 1230; *People v. Spriggs* (1964) 60 Cal.2d 868, 874-875.) Mr. Galiana reasons the statement did not necessarily implicate him in any criminal activity. This contention has no merit. Mr. Galiana's statement was admissible as an admission. (Evid. Code § 1220; *People v. Hovarter* (2008) 44 Cal.4th 983, 1007-1008; *People v. Carpenter* (1999) 21 Cal.4th 1016, 1048-1049.)

B. CALCRIM No. 361

Defendants argue it was error to instruct the jury with CALCRIM No. 361. The jury was instructed pursuant to CALCRIM No. 361 as follows: "If a defendant failed in his testimony to explain or deny evidence against him, and if he could reasonably be expected to have done so based on what he knew, you may consider his failure to explain or deny in evaluating that evidence. Any such failure is not enough by itself to prove guilt. The People must still prove the defendant guilty beyond a reasonable doubt. If the defendant failed to explain or deny, it's up to you to decide the meaning and importance, if any, of that failure." (See Evid. Code, § 413; CALJIC No. 2.62.) Our review is de

novo. (*People v. Posey* (2004) 32 Cal.4th 193, 218; *People v. Lamer* (2003) 110 Cal.App.4th 1463, 1469; *People v. Shaw* (2002) 97 Cal.App.4th 833, 838.)

A trial court must instruct with CALCRIM No. 361 when a trier of fact could conclude the defendant failed to explain or deny facts presented by the prosecution. (*People v. Saddler* (1979) 24 Cal.3d 671, 681; *People v. Lamer, supra,* 110 Cal.App.4th at p. 1469; *People v. James* (1987) 196 Cal.App.3d 272, 296.) It is error to give the instruction absent such circumstances. (*People v. Saddler, supra,* 24 Cal.3d at p. 683; *People v. James, supra,* 196 Cal.App.3d at p. 296.) As our Supreme Court explained in *People v. Saddler, supra,* 24 Cal.3d at page 683, "[If] there [are] no facts or evidence in the People's case which defendant failed to explain that were in his particular knowledge to explain, [then] there was no support in the record for an instruction on drawing of adverse inferences from a failure to explain or deny." Further, as the Court of Appeal held in *People v. Kondor* (1988) 200 Cal.App.3d 52, 57: "[T]he test for giving the instruction is not whether the defendant's testimony is believable. [The instruction] is unwarranted when a defendant explains or denies matters within his or her knowledge, no matter how improbable that explanation may appear. [And], a contradiction [between defendant's testimony and that of prosecution witnesses] does not equate to a failure to explain or deny. (*People v. Saddler, supra,* 24 Cal.3d at p. 682.)" (See also, *People v. De Larco* (1983) 142 Cal.App.3d 294, 309 [where defendant denied being present at the time of the crimes, he could not have disclosed further facts shedding light on his innocence].)

Mr. Galiana argues: "[T]he prosecutor improperly requested the instruction, since he failed to cite 'some specific and significant defense omission that the prosecution wishes to stress' as required by [*People v. Lamer, supra,* 110 Cal.App.4th at pp. 1469-1470]. The judge agreed to the prosecution request without ever inquiring what evidence the prosecutor claimed was not explained." In *Lamer,* the Court of Appeal for the Fourth Appellate District, Division One, suggested it would be unwise for a trial court to give the challenged instruction absent a specific showing that, "'[T]here is some specific and significant defense omission that the prosecution wishes to stress or the defense wishes to

mitigate.'" (*People v. Lamar, supra,* 110 Cal.App.4th at pp. 1469-1470, quoting *People v. Haynes* (1983) 148 Cal.App.3d 1117, 1119-1120, italics omitted.) However, neither *Lamar* nor *Haynes* requires such a showing as a prerequisite to giving the instruction.

In any event, any error would have been harmless. (*People v. Saddler, supra,* 24 Cal.3d at p. 683; *People v. Watson* (1956) 46 Cal.2d 818, 836; *People v. Lamer, supra,* 110 Cal.App.4th at pp. 1471-1472.) First, the jury was to consider Mr. Galiana's failure to explain or deny *only if* it found he did in fact fail to explain evidence presented by the prosecution. (CALCRIM No. 361; *People v. Sadder, supra,* 24 Cal.3d at p. 680; *People v. Lamer, supra,* 110 Cal.App.4th at p. 1472; *People v. Ballard* (1991) 1 Cal.App.4th 752, 756.) We presume the jury complied with the instruction. (*People v. Fuiava* (2012) 53 Cal.4th 622, 716; *People v. Cain* (1995) 10 Cal.4th 1, 34.) Second, the jury was instructed to disregard any instruction it found inapplicable.[3] This instruction mitigated any prejudicial effect of instruction with CALCRIM No. 361. (*People v. Saddler, supra,* 24 Cal.3d at p. 684; *People v. Lamer, supra,* 110 Cal.App.4th at p. 1472; *People v. Kondor, supra,* 200 Cal.App.3d at p. 58.) Third, there was compelling evidence of Mr. Galiana's guilt. There was no question about his identity. He admitted being present in Ms. Gleason's home when the computer was stolen. Ms. Austin watched defendants and a third man leave Ms. Gleason's home carrying an object, which they passed over a fence into defendants' yard. And Mr. Galiana offered to tell Deputy Grajales where the computer was located. But Mr. Galiana offered to do so only if he would not be charged. It is not reasonably probable the jury's verdict would have been more favorable to defendants had the CALCRIM No. 361 instruction not been given.

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3 The jury was instructed pursuant to CALCRIM No. 200: "Some of these instructions may not apply, depending on your findings about the facts of the case. Do not assume just because I give a particular instruction that I am suggesting anything about the facts. After you have decided what the facts are, follow the instructions that do apply to the facts as you find them."

C. Prosecutorial Misconduct

Mr. Vasquez contends the prosecutor, Thomas Hilton, committed prosecutorial misconduct in two respects. Our Supreme Court has held: "'"A prosecutor's misconduct violates the Fourteenth Amendment to the United States Constitution when it 'infects the trial with such unfairness as to make the conviction a denial of due process.' [Citations.] In other words, the misconduct must be 'of sufficient significance to result in the denial of the defendant's right to a fair trial.' [Citation.] A prosecutor's misconduct that does not render a trial fundamentally unfair nevertheless violates California law if it involves 'the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury.' [Citations.]"' (*People v. Clark* (2011) 52 Cal.4th 856, 960.) 'A defendant's conviction will not be reversed for prosecutorial misconduct, however, unless it is reasonably probable that a result more favorable to the defendant would have been reached without the misconduct. [Citation.] Also, a claim of prosecutorial misconduct is not preserved for appeal if defendant fails to object and seek an admonition if an objection and jury admonition would have cured the injury. [Citation.]' (*People v. Crew* (2003) 31 Cal.4th 822, 839.)" (*People v. Tully* (2012) 54 Cal.4th 952, 1009-1010; accord, *People v. Houston* (2012) 54 Cal.4th 1186, ____ [144 Cal.Rptr.3d 716, 748-749, 756].) Our Supreme Court has further held, "'To preserve a misconduct claim for review on appeal, a defendant must make a timely objection and ask the trial court to admonish the jury to disregard the prosecutor's improper remarks or conduct, unless an admonition would not have cured the harm.'" (*People v. Thomas* (2012) 54 Cal.4th 908, 937; *People v. Williams* (2010) 49 Cal.4th 405, 464.) Here, although defense counsel objected on occasion, he never requested that the jury be admonished.

First, during his closing argument, the prosecutor, Mr. Hilton, asserted defense counsels' theory of the case had to be "backed up by the evidence . . . ." Mr. Vasquez's attorney, Kristoffer McFarren, objected on "burden shifting" grounds. The trial court "noted" the objection. Mr. Hilton continued: "[W]hat [defense counsel] say is not evidence. They can give you their spin on the evidence, what they think it says, but it

must have an evidentiary basis. And then once that is there, once there's a basis for what their theory is, it must be reasonable. It must be beyond a reasonable doubt." It was not misconduct to tell the jury a defense attorney's arguments are not evidence. Nor was it misconduct to argue the defendants' theory of the case had to be backed by evidence. These were correct statements of law. (See *People v. Samayoa* (1997) 15 Cal.4th 795, 844; *People v. Fulton* (2012) 205 Cal.App.4th 1546, 1553; CALCRIM No. 222.)

As to the remainder of Mr. Hilton's challenged comments—the defense theory must be proven beyond a reasonable doubt—it was error to suggest defendants had the burden to prove their innocence. (*People v. Medina* (1995) 11 Cal.4th 694, 755; *People v. Woods* (2006) 146 Cal.App.4th 106, 112.) But defendant forfeited this claim by failing to object and request an admonition. (*People v. Houston, supra*, 54 Cal.4th at pp. ___, ___ [144 Cal.Rptr.3d at pp. 749, 756]; *People v. McKinzie* (2012) 54 Cal.4th 1302, ___ [144 Cal.Rptr.3d 427, 479]; *People v. Williams, supra,* 49 Cal.4th at p. 464.) An admonition would have cured any injury.

Even if not forfeited (see *People v. Terry* (1962) 57 Cal.2d 538, 568 [objection to class of evidence or argument need not be repeated]), however, we would not find any prejudice. (*Chapman v. California* (1967) 386 U.S. 18, 24; *People v. Houston, supra,* 54 Cal.4th at p. __ [144 Cal.Rptr.3d at p. 749]; *People v. Watson, supra*, 46 Cal.2d at p. 836.) The vague, brief passing comment that defendants' evidence must "be beyond a reasonable doubt" was dispelled by other arguments and the trial court's instructions. The jury was instructed: to decide the facts based only on the evidence presented; nothing the attorneys say is evidence; to follow the instructions and not the attorneys' comments on the law; and the prosecutor bore the burden to prove a defendant guilty beyond a reasonable doubt. (See *People v. Thomas, supra,* 54 Cal.4th at p. 940 ["The trial court properly instructed the jury that the arguments of counsel did not constitute evidence, and that the prosecution bore the burden of convincing each juror of defendant's guilt of each charge beyond a reasonable doubt, instructions we presume the jury followed."]; *People v. Medina, supra,* 11 Cal.4th at p. 760 [jury was told it should apply the law stated in the instructions and disregard anything said by attorneys that

conflicted with instructions].) We presume the jury followed the trial court's instructions. (*People v. Carey* (2007) 41 Cal.4th 109, 130; *People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 43-44.) Any error was harmless.

Second, Mr. McFarren argued Mr. Vasquez had a constitutional right not to take the stand. Mr. McFarren commented: "Now, his co-defendant, Mr. Galiana, he's asserted his right to testify and that's fine. When you go back to deliberate, you will be instructed you aren't to hold it against Mr. Vasquez that he has not taken the stand. You're to evaluate the evidence and not even to discuss this issue. In fact, why should he testify? Ask yourselves that. Why should he testify? [¶] Mr. Galiana who is there told you what happened. You already heard what happened. You've heard other versions of what may have happened or what the prosecutor thinks happened, but Mr. Galiana has told you what happened."

In rebuttal, Mr. Hilton argued: "Mr. McFarren, I think, made a great point: why would Mr. Vasquez get up and testify? He had his buddy go up there and cover for him." Mr. McFarren objected. The trial court responded: "[The] objection is well-taken. You may continue." Mr. Hilton continued: "[J]ust saying what he said, it's a good point. [Mr. Galiana] went up there and told you their story, told you what happened. Mr. McFarren said he told you what happened. He was covering. Of course he was. He's not going to get up—would we even be here if he was going to get up and tell you, yeah, we did intend to commit a burglary but once we got in, we decide not to, because that's a burglary." Later, outside the jury's presence, Mr. McFarren renewed his objection: "Your Honor, at this time, now that we are outside the presence, I would just like to make an objection regarding counsel's comments as to my client's not taking the stand. I believe a comment regarding the defendant not taking the stand does amount to prosecutorial misconduct. The comment was something to the effect of he didn't need to testify, he had his buddy tell you his story, and I just want to put that on the record." The trial court overruled the objection noting Mr. Hilton's argument was in response to what Mr. McFarren had said.

No misconduct occurred. Mr. Hilton's comments echoed Mr. McFarren's argument. Mr. Hilton did not comment directly on Mr. Vasquez's decision not to testify. (*People v. Taylor* (2010) 48 Cal.4th 574, 632-633; *People v. Valdez* (2004) 32 Cal.4th 73, 127; *People v. Medina, supra,* 11 Cal.4th at pp. 755-756.) In any event, Mr. Hilton's brief, awkwardly-phrased comments were harmless under any prejudiced-based standard of review. (*People v. Verdugo* (2010) 50 Cal.4th 263, 301-302; *People v. Miller* (1996) 46 Cal.App.4th 412, 429-430, disapproved on another point in *People v. Cortez* (1998) 18 Cal.4th 1223, 1239-1240.) In a similar vein, there is no merit to Mr. Vazquez's ineffective assistance argument. Mr. Vasquez argues Mr. McFarren's failure to request an admonition was constitutionally ineffective. But Mr. Vasquez has failed to demonstrate there was a reasonable probability of a different result had Mr. McFarren requested an admonition. (*Strickland v. Washington* (1984) 466 U.S. 668, 693-694; *People v. Vines* (2011) 51 Cal.4th 830, 876; *People v. Turner* (2004) 34 Cal.4th 406, 420.)

D. Penalty Assessments

The trial court imposed a $10 crime prevention programs fine (§ 1202.5, subd. (a)) on each of the defendants. The trial court orally imposed penalty assessments as to Mr. Galiana, but not as to Mr. Vasquez. The abstracts of judgment state: "Pay $28 penalty assessment, $35 (76000 GC), $1.00 DNA State Only Penalty (76104.7(a) GC), $1.00 for every $10 deoxyribonucleic acid penalty (76104.6 (a)(1) GC)." The $10 crime prevention programs fine was subject to $28 in penalty assessments and a surcharge as follows: a $10 section 1464, subdivision (a)(1) state penalty; a $7 Government Code section 76000, subdivision (a)(1) county penalty; a $2 section 1465.7, subdivision (a) state surcharge; a $2 Government Code section 76000.5, subdivision (a)(1) emergency medical services penalty; a $3 Government Code section 70372, subdivision (a)(1) state court construction penalty; a $1 Government Code section 76104.6, subdivision (a)(1) deoxyribonucleic acid penalty; and a $3 Government Code section 76104.7, subdivision

(a) state-only deoxyribonucleic acid penalty. (*People v. Voit* (2011) 200 Cal.App.4th 1353, 1373-1374; *People v. Castellanos* (2009) 175 Cal.App.4th 1524, 1528-1530.) Government Code section 76104.7, subdivision (a), was amended effective June 10, 2010, to increase the state-only deoxyribonucleic acid penalty from $1 to $3 for every $10 or part thereof of any fine, penalty or forfeiture imposed or collected. (Stats. 2010, 8th Ex. Sess. 2009-2010, ch. 3, § 1.) Because defendants committed the present offense on May 5, 2011, they are subject to the increased penalty. (See *People v. Fleury* (2010) 182 Cal.App.4th 1486, 1490; *People v. Batman* (2008) 159 Cal.App.4th 587, 589-591.)

Mr. Vasquez argues the trial court's failure to orally impose the penalty assessments on the $10 crime prevention programs fine (§ 1202.5, subd. (a)) was not error. Mr. Vasquez asserts that on a silent record, we must presume the trial court found he did not have the ability to pay the penalty assessments. (See, e.g., *People v. Sharret* (2011) 191 Cal.App.4th 859, 864 [drug program fee]; *People v. Walz* (2008) 160 Cal.App.4th 1364, 1371 [sex offender fine].) That argument is without merit. It would be a nonjurisdictional error to have failed to impose the crime prevention programs fine in the first instance. Under that circumstance, we would presume the trial court found an inability to pay. (*People v. Stewart* (2004) 117 Cal.App.4th 907, 911-912.) The failure to impose penalty assessments on the crime prevention programs fine, however, is a jurisdictional error that can be corrected for the first time on direct appeal. (*People v. Stewart, supra*, 117 Cal.App.4th at pp. 910-912; see *People v. Voit, supra*, 200 Cal.App.4th at p. 1373; 3 Witkin, Cal. Crim. Law (3d ed. 2000) Punishment, § 92, p. 146.) Mr. Vasquez makes no argument that we should remand to permit an ability to pay determination to be made. Therefore, the judgment as to Mr. Vasquez must be modified to impose the applicable penalty assessments on the crime prevention programs fine. (*People v. Stewart, supra*, 117 Cal.App.4th at p. 910-912.) The abstracts of judgment must be amended to reflect the applicable penalty assessments as set forth above.

E. Conduct Credit

Defendants have been convicted of a residential burglary where a person other than an accomplice was present. Hence, they have been convicted of a violent felony subject to the recalculated award of presentence conduct credits as specified in section 2933.1, subdivision (c). (§ 667.5, subd. (c)(21).) Mr. Vasquez was in presentence custody for 118 days, from May 6 to August 31, 2011. The trial court awarded Mr. Vasquez credit for 118 days in presentence custody plus 18 days of conduct credit under section 2933.1, subdivision (c) for a total of 136 days. However, conduct credit under section 2933.1, subdivision (c) is calculated to the greatest whole number, without exceeding 15 percent. (*People v. Duran* (1998) 67 Cal.App.4th 267, 270; *People v. Ramos* (1996) 50 Cal.App.4th 810, 815-817; see *In re Reeves* (2005) 35 Cal.4th 765, 775.) Therefore, Mr. Vasquez was entitled to 17 days of conduct credit, not 18, for a total credit of 135 days.

Mr. Galiana was in presentence custody for 119 days, from May 5 to August 31, 2011. The trial court awarded Mr. Galiana credit for 119 days in presentence custody plus 18 days of conduct credit for a total of 137 days. However, for the reasons stated above, Mr. Galiana was entitled to only 17 days of conduct credit, for a total presentence custody credit of 136 days. The judgments must be modified and the abstracts of judgment amended to so reflect.

F. Abstracts of Judgment

We may correct an abstract of judgment that does not accurately reflect the proceedings in and oral judgment of the sentencing court. (*People v. Jones* (2012) 54 Cal.4th 1, 89; *People v. Mitchell* (2001) 26 Cal.4th 181, 185.) Mr. Vasquez's abstract of judgment must be corrected to reflect that he was convicted by a jury, not by a plea, and that he was sentenced on August 31, 2011, not August 30, 2011.

IV. DISPOSITION

The judgments are modified to reflect 17 days of conduct credit for each of the two defendants. In all other respects, the judgments are affirmed. The abstracts of judgment must be amended to reflect that the $10 crime prevention programs fine imposed on each defendant (Pen. Code, § 1202.5, subd. (a)) is subject to $28 in penalty assessments and a surcharge as follows: a $10 Penal Code section 1464, subdivision (a)(1) state penalty; a $7 Government Code section 76000, subdivision (a)(1) county penalty; a $2 Penal Code section 1465.7, subdivision (a) state surcharge; a $2 Government Code section 76000.5, subdivision (a)(1) emergency medical services penalty; a $3 Government Code section 70372, subdivision (a)(1) state court construction penalty; a $1 Government Code section 76104.6, subdivision (a)(1) deoxyribonucleic acid penalty; and a $3 Government Code section 76104.7, subdivision (a) state-only deoxyribonucleic acid penalty. Further, Mr. Vasquez's abstract of judgment must be corrected to reflect that he was convicted by a jury, not by a plea, and that he was sentenced on August 31, 2011. Upon remittitur issuance, the clerk of the superior court must prepare amended abstracts of judgment and deliver copies to the Department of Corrections and Rehabilitation.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

TURNER, P. J.

We concur:

KRIEGLER, J. FERNS, J.*

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