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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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. DARYL P. BANKS, Defendant and Appellant.	B260917 (Los Angeles County Super. Ct. No. GA086514)

APPEAL from a judgment of the Superior Court of the County of Los Angeles, Suzette Clover, Judge. Affirmed in part, modified, and remanded.

Murray A. Rosenberg, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Steven D. Matthews, Supervising Deputy Attorney General, Rama A. Maline, Deputy Attorney General, for Plaintiff and Respondent.

INTRODUCTION

Defendant and appellant Daryl P. Banks (defendant) was convicted of three counts of robbery (Pen. Code, § 211[1]), one count of first degree burglary (§ 459), one count of criminal threats (§ 422. subd. (a)), and two counts of false imprisonment (§ 236). On appeal, defendant contends that the trial court erred in admitting evidence of an uncharged burglary pursuant to Evidence Code section 1101, subdivision (b). The Attorney General contends, and defendant agrees, that defendant's sentence on count 1 is unauthorized and should be changed. We remand the matter for the trial court to amend the abstract of judgment to reflect that defendant is sentenced on count 1 to an indeterminate term of 41 years to life, plus 25 years for the five section 667, subdivision (a), 5-year enhancements. We otherwise affirm the judgment.

BACKGROUND

A. Factual Background

1. Prosecution Evidence

a) Prior Uncharged Burglary

Marianela Pereyra resided in a ground floor apartment unit in an apartment complex located on Scott Road in Burbank. On April 17, 2012, Pereyra left her apartment to go on a business trip, and before leaving she locked and secured the door to her apartment. On May 6, 2012, Pereyra returned from her business trip, and when she entered her apartment, she discovered that her television, DVD player, and iMac computer were missing. Pereyra's bedroom was disheveled, everything in the closet was

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

on the floor, and the kitchen window screen (which faced Scott Road) had been torn off and was on the floor. Pereyra called the police.

Burbank Police Officer Harry Markey was dispatched to a burglary call at Pereyra's apartment. When he arrived, he observed that the apartment had been ransacked and the kitchen window screen was cut. Pereyra told him that several items, including her television, computer, jewelry, and DVD player were missing.

The following day, Pereyra discovered that her jewelry box, hard drives, and purses were also missing. She also observed that her makeup box was on the floor. A fingerprint recovered from the makeup box matched defendant's fingerprint. Pereyra did not know defendant, and did not give him permission to enter her apartment.

b) The Charged Offenses

Mark Siegel, Makahla Ross, and William Garrett McArthur[2] (Garrett) lived together in the same Burbank apartment complex as Pereyra. In the evening on May 30, 2012, Siegel, Ross, and Garrett went to their respective rooms to sleep.[3] The next morning, Siegel was awakened when defendant nudged his shoulder and pointed a black or dark gray revolver to the side of his head with the barrel touching his neck. Defendant told Siegel not to say anything and then asked, "Where's your money at?" Siegel said that he did not have any money.

Codefendant Robert Grogan[4] took Siegel's iPhone, and continued to warn Siegel not to say anything. Defendant told Siegel, "Don't pick up your head again. We will shoot." Siegel was terrified. Defendant and codefendant Grogan tied Siegel's hands tightly behind his back with a rubber cable. They placed Siegel face down on the ground,

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[2] McArthur went by his middle name Garrett, and Ross called him "G."

[3] Garrett and Ross were in a romantic relationship and shared the same bedroom.

[4] Defendant and codefendant Grogan were tried together; however, codefendant Grogan is not a party to this appeal.

put a blanket over him, and defendant told Siegel not to make any noise or he would shoot him. Shortly thereafter, Siegel heard Garrett scream.

A sound awoke Garrett. Defendant was on Ross's side of the bed and pointed a gun at Garrett. Garrett screamed "what." Either defendant or codefendant Grogan said, "Don't say nothing. Don't say nothing." Ross then heard the sound of hammer on a revolver being pulled back. Codefendant Grogan tied Garrett and told him not to say anything. Codefendant Grogan told Ross, "Put your face in the pillow. Face down. Don't say nothing."

Defendant and codefendant Grogan ransacked the apartment and took various items belonging to Siegel, Garrett, and Ross and left the apartment. Before defendant and codefendant Grogan left the apartment, one of them was downstairs and said, "Come on man. Just do it. Come on man." The other intruder, who was in Ross's bedroom, said, "No. Let's just go."

Once the intruders had left the apartment, Siegel was able to untie himself, and he then untied Garrett. Siegel, Ross and Garrett went to the leasing office for the apartment complex. Pursuant to their request, Kiley Speakman, a leasing agent at the apartment complex, allowed the victims to call the police. The items defendant and codefendant Grogan took from Siegel, Garrett, and Ross included computers, money, jewelry, a watch, cellular telephones, a nine-millimeter handgun, a passport, a guitar, a camera, and a portable safe.

Burbank Police Department Officer Jesus Espinolda responded to the victims' call. Siegel, Ross and Garrett provided Officer Espinolda and other officers with a description of the suspects. Officer Espinolda saw that the master bedroom was in disarray, the dresser drawers were pulled open, there was an open gun case on top of the bed, and Siegel had redness and indentations on both wrists.

Siegel had a feature on his iPhone called "Find My iPhone," which was a "GPS locator" for the phone in case it was lost. When Siegel's iPhone was stolen, the feature was active. Siegel provided officers with his log-in information for that tracking feature and gave them permission to track the phone's location.

Later that morning, the police used a computer at the police station to track Siegel's iPhone. A Burbank Police Department detective went to the location disclosed by the iPhone tracking and saw defendant and codefendant Grogan exit an apartment on Bonnie Brae Street in Los Angeles and drive away in a silver Hyundai.

A Los Angeles Police Department officer was conducting a surveillance of Guadalajara Jewelry Mart located in Los Angeles because it was being investigated for receiving stolen property. Defendant and codefendant Grogan entered the jewelry store. Defendant engaged in a transaction in which defendant received money, and defendant and codefendant Grogan exited the store and drove away in a silver Hyundai. The police stopped the Hyundai, and found two computers, two iPhones, and a gallon baggie containing numerous pieces of jewelry were in the trunk of the car. The police turned on one of the iPhones and a picture of Ross and Garrett appeared on the screensaver.

Ross, Siegel, and Garrett went to where defendant and codefendant Grogan were being detained and they identified defendant, and Siegel also identified codefendant Grogan. Defendant and codefendant Grogan were arrested. The police took Ross to where the silver Hyundai was detained, and Ross saw her cell phone, a bag of her jewelry, Siegel's laptop, and Garrett's laptop in the trunk. Ross was taken to the Guadalajara Jewelry Mart and identified 11 pieces of jewelry taken from her during the robbery. Later, Ross identified her MacBook Pro and camera at the Burbank Police Department, and Garrett identified his laptop, portable safe, cell phone, watch, and iPod.

On May 31, 2012, Burbank Police Department detectives interviewed defendant. Defendant said that he owned the silver Hyundai that he was driving at the time of his arrest; and after initially denying that he was recently in Burbank, defendant admitted to going to the victims' apartment with his cousin, codefendant Grogan. Defendant said that Siegel (whom defendant called Kyle) and Garrett (whom defendant called "G."), gave defendant the items found in the trunk of his silver Hyundai. Defendant said that he dealt drugs, through an intermediary, to Garrett, and Siegel worked for Garrett. Defendant said that Garrett owed him $825 for 1,000 Ecstasy pills that defendant sold to

Garrett. Siegel told defendant that he could collect his money from Garrett by going to an apartment, but said that Garrett carried guns.

Defendant told the detectives that Siegel did not live at the apartment involved in the incident; just Garrett and a female lived there. In the morning on May 31, 2012, Siegel met defendant and codefendant Grogan, who did not have guns, in the front of the apartment. Siegel took defendant and codefendant Grogan inside the apartment, and they went upstairs.

Siegel gave a telephone cord to defendant and codefendant Grogan and told them to tie Garrett's hands. Defendant took two cellular telephones, two laptops, jewelry and a safe. Siegel put jewelry and a telephone into a bag that defendant and codefendant Grogan took. Defendant denied taking a camera, watch, guitar and gun, and said that he only took what he was owed. Defendant said codefendant Grogan sold $25 worth of jewelry that they took at a jewelry store, and defendant went to the shoe store next door. Defendant later denied that he and codefendant Grogan sold any of the jewelry.

Police officers accessed the Bonnie Brae Street apartment (the apartment that police officers saw defendant and codefendant Grogan exit earlier that day) by using a key from a set of keys found on defendant when he was detained. The officers searched the apartment and found mail addressed to "Homer" Banks, a bill in defendant's name, two handguns, a camera, portable safe, a computer, jewelry and a passport. The camera, safe, computer, jewelry and passport were later identified as items belonging to Ross that were taken during the home invasion. The police also determined defendant was the major contributor of the DNA profiled on a .45 semiautomatic handgun that was found in the apartment.

The police searched the silver Hyundai and found Garrett's credit cards and identification. The police also found a receipt showing that Garrett's debit card was used in an attempt to withdraw $200 from his account, but the transaction was denied because an incorrect personal identification number had been used.

Defendant was housed at Twins Towers jail, and on June 25, 2014, Gilbert Davis, an inmate at that facility, handed Los Angeles County Sheriff's Department Deputy Carl

Deleon a "jailhouse kite"—a handwritten letter from one inmate to another used as a method of communicating between inmates. Subsequently, Davis provided Deputy Deleon with a second kite. The kites appeared to threaten the lives of the victims of the home invasion if they testified, and gave identifying information for Garrett and Ross. Defendant refused Deleon's request to provide a writing sample. Thereafter, all of the paperwork in defendant's cell was confiscated. The police advised Siegel, Garrett and Ross of the threats.

2. Defendant's Evidence

Defendant testified that he was a narcotics dealer, and had been convicted of 10 felonies from 1990 through 2008. Defendant resided with his nephew in Compton. His brother, Homer Banks, Jr., lived at the Bonnie Brae Street apartment; defendant did not live there. Defendant looks exactly like his brother.

On May 31, 2012, defendant drove his daughter's Hyundai to Burbank to pick up $825 from Siegel and Garrett that they owed to defendant's boss for Ecstasy they had purchased. Defendant had not met Siegel or Garret before this date. On the way to Burbank, defendant picked up his cousin, codefendant Grogan, in Los Angeles. When defendant arrived at the Burbank apartment complex, Siegel was in the front of the complex waiting for him. Defendant had never been to that apartment complex before, and denied ever being in Pereyra's apartment. Siegel led defendant and codefendant Grogan into an apartment, escorted them to the living room on the second level, and offered them something to drink.

Defendant asked Siegel, "What's up? Where's the money at so we can go, bro?" Siegel said, "I have to go in Garrett's room." Siegel went into Garrett's room, exited the room to return to defendant, and said, "Garrett got a gun" and he was "tripping." It was obvious to defendant that Siegel was "high" from ingesting methamphetamine. Defendant and codefendant Grogan did not have guns.

Defendant and Siegel walked into Garrett's bedroom. Garrett looked up, and defendant said, "What's up?" and "where's my money at?" Garrett responded "shit," and

put his head under the covers. The woman in bed with Garrett offered defendant $100, but defendant denied the offer saying that he did not want only $100.

Siegel gave defendant Siegel's telephone, the woman's telephone, two computers, a wallet, a camera, a safe containing passports, some watches, and the woman's jewelry. These items were given to defendant as collateral because Siegel said he would go to Los Angeles to pay defendant. Defendant did not tie up Siegel or Garrett with cords, and did not tell Siegel, "don't lift your head up or I'm going to kill you." Defendant also denied writing any threatening letters.

3. Rebuttal Evidence

Burbank Police Department Detective Fernando Muñoz, an expert on drug sales, testified that he responded to the victims' apartment within 30 minutes of the initial call, and Siegel was not under the influence of any illegal drug. He also testified that a drug dealer would not "front" someone 1,000 pills of Ecstasy, which would have a street value of over $10,000.

Codefendant Grogan was interviewed by the police. He said that when he accompanied defendant to the victims' apartment in Burbank, defendant appeared to know where he was going.

B. Procedural Background

The District Attorney of Los Angeles County filed an information charging defendant with three counts of first degree residential robbery in violation of section 211 (counts 1-3), first degree burglary in violation of section 459 (count 4), making criminal threats in violation of section 422, subdivision (a) (count 5), and two counts of false imprisonment in violation of section 236 (counts 6 and 7). District Attorney alleged as to all counts that defendant personally used a firearm within the meaning of section 12022.5, subdivision (a)(1). The District Attorney alleged as to counts 1 through 3 that defendant personally used a firearm within the meaning of section 12022.53, subdivision (b); and was armed with a firearm within the meaning of section 12022, subdivision (a)

(1). It was further alleged that defendant had served 10 prior prison terms within the meaning of section 667.5, subdivision (b), and had suffered seven prior serious or violent felony convictions within the meaning of section 667, subdivision (a)(1), section 667, subdivisions (b) through (i), and section 1170.12, subdivisions (a) and (d).

Following a trial, the jury found defendant guilty on all counts, and found that the firearm allegations were true. Defendant admitted the prior conviction allegations. The trial court sentenced defendant to state prison for a term of 41 years to life, consisting of the upper term of six years on count 1, the upper term of 10 years on the enhancement allegation in violation of section 12022.5, and 25 years for the five enhancement allegations in violation of section 667, subdivision (a)(1). The trial court concurrently sentenced defendant to those same prison terms on counts 2 and 3. The trial court also imposed and then stayed those same prison terms on counts 4 through 7 pursuant to section 654.

The trial court awarded defendant custody credit and ordered him to pay various fees, fines, and penalties. Defendant filed a timely notice of appeal.

DISCUSSION

A. Evidence of Prior Uncharged Crimes Admitted Pursuant to Evidence Code Section 1101

Defendant contends that the trial court erred in admitting evidence of the nearby uncharged burglary of Pereyra's residence pursuant to Evidence Code section 1101, subdivision (b). We disagree.

1. Standard of Review

A "trial court is 'vested with broad discretion in ruling on the admissibility of evidence.' [Citation.] '[T]he court's ruling will be upset only if there is a clear showing of an abuse of discretion.' [Citation.]" (*Tudor Ranches, Inc. v. State Comp. Ins. Fund* (1998) 65 Cal.App.4th 1422, 1431.) The admission of "uncharged offenses" evidence

under Evidence Code section 1101, subsection (b) is reviewed for abuse of discretion. (*People v. Roldan* (2005) 35 Cal.4th 646, 705, disapproved on other grounds in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22; *People v. Memro* (1995) 11 Cal.4th 786, 864.)

2. Applicable Law

Trial courts have "wide discretion" in determining the admissibility of evidence. (*People v. Kelly* (1992) 1 Cal.4th 495, 523.) "Evidence Code section 1101, subdivision (b), permits the admission of other-crimes evidence against a defendant 'when relevant to prove some fact (such as motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident . . .) other than his or her disposition to commit such an act.' [Citation.] 'Section 1101 prohibits the admission of other-crimes evidence for the purpose of showing the defendant's bad character or criminal propensity.' [Citation.] As with other circumstantial evidence, . . . admissibility [of other-crimes evidence] depends on the materiality of the fact sought to be proved, the tendency of the prior crime to prove the material fact, and the existence or absence of some other rule requiring exclusion. [Citation.]" (*People v. Whisenhunt* (2008) 44 Cal.4th 174, 203.)

The necessary degree of similarity between the charged and uncharged crimes depends on the element sought to be proved. (*People v. Ewoldt* (1994) 7 Cal.4th 380, 402, superseded by statute on other grounds as stated in *People v. Robertson* (2012) 208 Cal.App.4th 965, 991; accord, *People v. Harris* (2013) 57 Cal.4th 804, 841; *People v. Thomas* (2011) 52 Cal.4th 336, 355.) Our Supreme Court stated, "'The least degree of similarity (between the uncharged act and the charged offense) is required in order to prove intent. [Citation.] "[T]he recurrence of a similar result . . . tends (increasingly with each instance) to negative accident or inadvertence or self-defense or good faith or other innocent mental state, and tends to establish . . . the presence of the normal, i.e., criminal, intent accompanying such an act . . . ." [Citation.] In order to be admissible to prove intent, the uncharged misconduct must be sufficiently similar to support the inference that the defendant "'probably harbor[ed] the same intent in each instance.' [Citations.]" [Citation.]' [Citation.]" (*People v. Harris*, *supra*, 57 Cal.4th at p. 841.)

A greater degree of similarity is required to prove a common design or plan than is required to prove intent. (*People v. Thomas*, *supra*, 52 Cal.4th at p. 355; *People v. Ewoldt, supra*, 7 Cal.4th at p. 402.) The greatest degree of similarity is required for the uncharged crimes evidence to be relevant to prove identity. (*People v. Harris*, *supra*, 57 Cal.4th at p. 841; *People v. Ewoldt, supra*, 7 Cal.4th at p. 403.)

If a trial court has determined that evidence of a criminal defendant's uncharged conduct is not excluded by Evidence Code section 1101, subdivision (a), it must then consider whether the evidence should nevertheless be excluded pursuant to Evidence Code section 352. (*People v. Balcom* (1994) 7 Cal.4th 414, 426-427.) Evidence Code section 352 provides that, "The court in its discretion may exclude evidence if its probative value is *substantially outweighed* by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury." (Italics added.)

3. Relevant Proceedings

Defendant filed a motion to exclude evidence of an uncharged prior similar act of burglary. The prosecution filed a motion seeking to introduce evidence of the uncharged burglary of Pereyra's residence where defendant's fingerprint was found pursuant to Evidence Code section 1101, subdivision (b).

At the hearing on the motion, defendant argued that the prior burglary with forcible entry where his fingerprint was found was not similar to the instant case. Defendant argued that Evidence Code section 1101 "basically requires that the case almost be on all fours with the case before the court or that the—I believe the degree of similarity must be higher." Defendant contended that unlike the case at bar, the prior burglary case involved an apparent forcible entry. Defendant conceded that the prior burglary took place in roughly the same neighborhood. The prosecutor said the defendant's fingerprint obtained from the prior uncharged burglary incident was lifted from a makeup box that was being used as a jewelry box.

The prosecutor argued that a greater degree of similarity is required if the evidence was used for identity, but said that she was not using the other crime evidence for identity. The prosecutor said she was using the evidence to show common scheme or plan which required a lesser degree of similarity. She also argued that the evidence of the common scheme or plan would be used to dispute defendant and codefendant Grogan's statements that they were there at the apartment to collect a debt and that a robbery did not occur.

The trial court stated that intent was an element of the crimes as well. The prosecutor said defendant was not convicted of the prior burglary incident.

The trial court characterized the issue as whether there was sufficient similarity to show intent and found that the least degree of similarity was required for intent. The trial court ruled that it would admit evidence of the prior burglary and found that it was sufficiently similar to the instant case for purposes of intent. The trial court ultimately admitted at trial evidence of the prior burglary of Pereyra's apartment.

The jury was instructed with CALCRIM No. 375 as follows: "The People presented evidence that defendant committed the offense of residential burglary that was not charged in this case. You may consider this evidence only if the People have proved by a preponderance of the evidence that the defendant, in fact, committed the offense. . . . If the People have not met his burden, you must disregard this evidence entirely. [¶] If you decide that the defendant committed the offense, you may but are not required to consider that evidence for the limited purpose of deciding whether or not the defendant was the person who committed the offenses alleged in this case or the defendant acted with specific intent in this case or the defendant had a plan to commit the offenses alleged in this case. [¶] In evaluating this evidence, consider the similarity or lack of similarity between the uncharged offense and the charged offenses. Do not consider this evidence for any other purpose. If you conclude that the defendant committed the uncharged offense, that conclusion is only a factor to consider along with all the other evidence. It is not sufficient by itself to prove that the defendant is guilty of

first degree residential burglary. The People must still prove every charge beyond a reasonable doubt."

4. Analysis

The trial court did not abuse its discretion in admitting evidence of the uncharged burglary of Pereyra's apartment because it was relevant to show that defendant had the intent to commit burglary and robbery when he entered the victims' apartment. As noted above, the least degree of similarity between the uncharged act and the charged offense is required in order to prove intent; "the uncharged misconduct must be sufficiently similar to support the inference that the defendant '"probably harbor[ed] the same intent in each instance."'" (*People v. Harris*, *supra*, 57 Cal.4th at p. 841.)

The District Attorney of Los Angeles County filed an information charging defendant with, inter alia, one count of first degree burglary in violation of section 459, and three counts of first degree residential robbery in violation of section 211. During the police interview, defendant claimed that he took property from the victims' apartment because Garrett owed him $825 for 1,000 Ecstasy pills. Defendant essentially contends that the victims consented to his taking their items.

The evidence of the prior uncharged crime was relevant to show that defendant intended to rob the victims (i.e., without their consent). The Pereyra burglary occurred in the same apartment complex where Siegel, Ross, and Garrett lived. Defendant's fingerprint was recovered from the make-up box located in Pereyra's apartment. Defendant robbed and burglarized the apartment of Siegel, Ross, and Garrett, less than one month after Pereyra discovered that her apartment had been burglarized. This is evidence that defendant intended to rob the victims, and that they did not consent to defendant taking their items.

Defendant contends that the evidence should have been excluded pursuant to Evidence Code section 352. Under Evidence Code section 352, the trial court has discretion to exclude evidence, and it may do so if the probative value must be *substantially outweighed* by substantial danger of undue prejudice. As noted above, the

evidence of the prior uncharged crime was directly relevant. As to any "substantial danger of undue prejudice" to defendant, the trial court instructed the jury that the prior uncharged burglary was not sufficient by itself to prove that defendant committed burglary in the instant case. "We presume that the jury understood and followed the instructions. (*People v. Stitely* [(2005)] 35 Cal.4th [514,] 559.)" (*People v. Jablonski* (2006) 37 Cal.4th 774, 834; *People v. Cline* (1998) 60 Cal.App.4th 1327, 1336.) The trial court did not abuse its discretion in concluding that the relevance of the evidence of the prior uncharged crime is not substantially outweighed by any undue prejudice to defendant.

Defendant contends that the evidence should have been excluded pursuant to Evidence Code section 352 because absent evidence of the Pereyra burglary, there was not strong probative evidence of criminal intent as to the robbery and burglary of the apartment of Siegel, Ross, and Garrett. Despite defendant's contention, there is substantial evidence of his criminal intent to rob the victims without evidence of the Pereyra burglary. Specifically, there was evidence that defendant entered the victims' apartment, went into the victims' respective bedrooms, pointed a gun at them, tied Siegel and Garrett, threatened to kill the victims, demanded money from them, ransacked the apartment, and took several items belonging to the victims.

Even if the trial court erred in admitting evidence of the uncharged burglary of Pereyra's apartment, the error was harmless under *People v. Watson* (1956) 46 Cal.2d 818 [reasonable probability of more favorable result]. The evidence, discussed above, was very strong against defendant. It is not reasonably probable a result more favorable to defendant would have been reached had the evidence of the uncharged burglary of Pereyra's apartment been excluded.

B. Sentence on Count 1

The Attorney General contends, and defendant agrees, that defendant's sentence on count 1 is unauthorized and should be changed to an indeterminate term of 41 years to

life, plus 25 years for the five section 667, subdivision (a), 5-year enhancements. We agree.

Section 667, subdivision (e)(2)(A) provides, "[I]f a defendant has two or more prior serious and/or violent felony convictions as defined in subdivision (d) that have been pled and proved, the term for the current felony conviction shall be an indeterminate term of life imprisonment with a minimum term of the indeterminate sentence calculated as the greatest of: [¶] (i) [Option 1:] Three times the term otherwise provided as punishment for each current felony conviction subsequent to the two or more prior serious and/or violent felony convictions. [¶] (ii) [Option 2:] Imprisonment in the state prison for 25 years. [¶] (iii) [Option 3:] The term determined by the court pursuant to Section 1170 for the underlying conviction, including any enhancement applicable under Chapter 4.5 (commencing with Section 1170) of Title 7 of Part 2, or any period prescribed by Section 190 or 3046." (See also § 1170.12, subdivision (c)(2)(A)(i)-(iii).)

Consistent with Option 3 of the "Three Strikes" law, the trial court sentenced defendant to state prison for a term of 41 years to life, consisting of the upper term of six years on count 1, the upper term of 10 years on the enhancement allegation in violation of section 12022.5, and 25 years for the five enhancement allegations in violation of section 667, subdivision (a)(1). The trial court, however, did not add to defendant's sentence the five section 667, subdivision (a), 5-year enhancements to the indeterminate term calculated pursuant to sections 667, subdivision (e)(2)(A) and 1170.12, subdivision (c)(2)(A).

"In third strike cases, the Three Strikes law uses enhancements in two distinct ways: to calculate the minimum term of the indeterminate life sentence and to add an additional, determinate term to be served before the indeterminate life sentence." (*People v. Williams* (2004) 34 Cal.4th 397, 403.) "In addition to its use in calculating the minimum term of the indeterminate life sentence under option three, a prior serious felony conviction requires a 5-year enhancement term. (§ 667(a) ['any person convicted of a serious felony who previously has been convicted of a serious felony . . . shall receive . . . a five-year enhancement for each such prior conviction on charges brought

and tried separately'].) Under the Three Strikes law, this determinate term must be consecutive to the minimum term of the indeterminate life sentence, and it is imposed whether or not the minimum term was established under option three. (*People v. Dotson* [(1997)] 16 Cal.4th [547,] 559 ['Once the minimum indeterminate term is calculated, "other enhancements or punishment provisions," such as section 667(a) enhancements, are added as a separate determinate term to the indeterminate term under options (i), (ii), and (iii)']; accord, *People v. Acosta* (2002) 29 Cal.4th 105, 130-131 [124 Cal.Rptr.2d 435, 52 P.3d 624]; *People v. Thomas* (1997) 56 Cal.App.4th 396, 403-405 [65 Cal.Rptr.2d 425].) Thus, the Three Strikes law provides that the indeterminate life sentence . . . "shall be 'in addition to any other enhancement or punishment provisions which may apply' (§§ 667, subd. (e), 1170.12, subd. (c))." (*People v. Williams*, *supra*, 34 Cal.4th at pp. 403-404) The abstract of judgment must be amended, therefore, to reflect that defendant's sentence on count 1 was of an indeterminate term of 41 years to life calculated under option three of the Three Strikes law, plus 25 years for the five section 667, subdivision (a) enhancements.

DISPOSITION

The matter is remanded for the trial court to amend the abstract of judgment to reflect that defendant is sentenced on count 1 to an indeterminate term of 41 years to life, plus 25 years for the five section 667, subdivision (a), 5-year enhancements. In all other respects, the judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

MOSK, J.

We concur:

TURNER, P. J.

KRIEGLER, J.