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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

YONY HILARIO,

Defendant and Appellant.

B269994

(Los Angeles County  
Super. Ct. No. NA095892)

APPEAL from a judgment of the Superior Court of Los Angeles County.  
Tomson T. Ong, Judge. Affirmed as modified with directions.

Russell S. Babcock, 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, Assistant Attorney General, Idan Ivri  
and Lindsay Boyd, Deputy Attorneys General, for Plaintiff and Respondent.

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Defendant Yony Hilario (Hilario) appeals his convictions for attempted willful, deliberate and premeditated murder, use of a deadly weapon, and causing great bodily injury. He contends the prosecutor committed misconduct, violating his due process rights under the United States and California Constitutions, and under California's decisional law.

We find that no prosecutorial misconduct occurred, and that even if any such conduct had occurred, it was harmless. We affirm, modifying the judgment to correct Hilario's presentence local custody credits.

### **STATEMENT OF THE CASE**

Hilario was charged with one count of attempted murder of Ana F. (Ana),<sup>1</sup> pursuant to Penal Code sections 187 and 664.<sup>2</sup> The information also alleged that the attempted murder was willful, deliberate and premeditated (§ 664, subd. (a)), that Hilario used a deadly weapon (§ 12022, subd. (b)(1)), and that the victim suffered great bodily injury (§ 12022.7, subd. (a)).

After an eight-day trial, the jury convicted Hilario of all charges. The trial court sentenced Hilario to a total term of 11 years to life in state prison, comprised of seven years to life for the attempted murder, a consecutive term of one year for the deadly weapon enhancement, and a consecutive term of three years for the great bodily injury enhancement. Hilario was awarded 1,948 days of presentence custody credit, which included 974 days of actual credit and 974 days of local conduct credit. Hilario filed a timely notice of appeal.<sup>3</sup>

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<sup>1</sup> We refer to the victim in this manner as that was the way in which she was generally referred to in the parties' briefing on appeal. We mean no disrespect.

<sup>2</sup> All further statutory references are to the Penal Code.

<sup>3</sup> The appeal is authorized by section 1237.

## **STATEMENT OF FACTS**

In March 2013, Ana lived in a one-bedroom apartment in the city of Long Beach. Ana had originally rented the living room of the apartment from Frankie Molina and his cousin Johnnie Molina, who continued to live there. Ana dated Johnnie for over a year, eventually sharing the apartment with him after his brother moved out. When Johnnie moved out in mid-December 2012, Ana rented parts of the apartment to a series of tenants.

In December 2012, she rented the living room couch to Hilario. As a renter, Hilario had a key to the apartment.

Ana and Hilario began a romantic relationship in January 2013, twice having sexual relations. Their relationship ended and Hilario moved out in mid-February 2013, but he continued to come by unannounced and enter without Ana's permission and threaten her "a lot."

On March 5, 2013, Ana went to dinner and locked her apartment. She returned at about 2:00 a.m. to find Hilario standing in her doorway holding both her cell phone (she had left it behind that night) and a beer. He looked like he had been crying. Hilario told her he needed \$500 or \$600 to pay for a woman's abortion. She refused to give it to him, telling him she needed it for her rent. They continued talking for about two more hours.

Hilario continued drinking "an extreme amount" of alcohol and smoking. Ana went to the bathroom; when she returned, she noticed Hilario had placed plastic bags on his hands. Next, he wiped down every surface of the apartment he had touched and took out the trash, including "several" beer cans from which he had been drinking, and his cigarette butts. The argument continued. He locked the window and door and went into the kitchen. After Hilario said, "What if I kill you," he started sharpening knives he grabbed from a kitchen drawer. Ana thought he was going to cook some

food and told him he was crazy. She then lay down because she “just couldn’t fight the sleep.”

Hilario approached Ana, who was laying face down on the bed, and tried to cut her throat. As they struggled, he stabbed her multiple times in the torso, puncturing her right lung. During the struggle, Ana kicked the wall she shared with the adjoining apartment. Attempting to flee, Ana tried to open the front door; then Hilario cut her finger. When she tried to grab the knife, he cut her hand.

Ana fell down and pretended to be dead. Hilario fled. Ana then went to a neighbor’s door and yelled for help.

Erik Torres lived next door to Ana. His apartment shared a bathroom wall with hers. After he awakened around 5:00 a.m., he heard a man and a woman arguing about money through the shared bathroom wall. He heard the male voice say, “I can’t be that. I can’t have a kid.” He also heard fighting and a female voice say in Spanish, “I don’t want to die,” after which he called 911.

Other neighbors heard parts of the fight. Neighbor Rosalva Gomez was awakened by screams of a female voice in Spanish saying, “Help me. I have been stabbed.” Giselle M., the daughter of one of Ana’s neighbors, heard Ana say in Spanish, “Jonathan did this.” Octavia Gomora was walking to work about 5:00 a.m. that morning. She heard a high-pitched scream and went to the apartment building, finding Ana laying in a pool of blood.

A Long Beach Police Officer responded to the 911 call and found Ana on her back outside of her apartment bleeding badly. When Ana was taken to the hospital, it was determined she had suffered multiple stab wounds, including one to her right chest, three to her abdomen, and one to her left wrist; she had a punctured lung, lacerations on her left wrist and hand; her

blood pressure was “extremely low” (65 over 38); she was in shock; and her bowels were injured in two places, requiring surgical repair. Ana was hospitalized for a month. She required surgery on her hand and numerous staples to close her wounds. At the time of trial, she could not bend her hand as a result of the knife wound.

While at the hospital, Ana identified Hilario as her attacker. Ana told the detective the attacker’s name was “Johnny” or “Jonathan,” as that was the name she called him.

Hilario testified in his own defense, stating that he could not recall his whereabouts on the night that Ana was attacked, but that he did not attack her and was not at her apartment when the attack occurred.

The jury convicted Hilario on all counts and enhancements.

### **CONTENTIONS**

Hilario contends the prosecutor committed misconduct by saving for her closing rebuttal arguments that raised “almost completely new themes” and facts. Hilario also contends the prosecutor committed misconduct because her rebuttal closing argument was so much longer than her initial closing argument. Based on these circumstances, Hilario contends his due process rights under the federal and state Constitutions, and under state statutes, were violated, requiring reversal of his convictions. Respondent contends there was no error, but even if there had been any error, it was harmless. Respondent separately contends the judgment must be modified to correct the award of custody credits as it exceeds statutory limits.

### **DISCUSSION**

#### **I. The Closing Argument**

To properly analyze these contentions, we first set out the circumstances of the closing arguments.

A. Additional Facts

*The Prosecutor's Initial Closing Argument*

After a brief introduction, the prosecutor explained the elements of the crime of attempted murder, and then explained how, by slashing Ana's throat, repeatedly stabbing her, and swinging the knife at her as she continued to fight, Hilario had satisfied the element of attempt. The prosecutor then reviewed the evidence showing that Hilario possessed the intent to kill, focusing on evidence that he used a knife, inflicted extensive wounds on his initial attack, did not stop when she fought, and chased her, resuming his attack and inflicting additional injuries.

The prosecutor then explained the legal standard for premeditation and argued that Hilario's conduct while in the apartment, bagging his hands, sharpening knives, wiping surfaces and taking out the trash (including beer cans from which he had been drinking, and his cigarette butts), all showed that Hilario deliberated and acted with premeditation. The prosecutor next explained the element of "great bodily injury," and how the evidence of Ana's extensive injuries showed that Hilario had inflicted injuries on her that established this element. The prosecutor then explained the enhancement relating to Hilario's personal use of a deadly weapon, and how the evidence showed Hilario had used a knife. She also reviewed the fact that Ana had never waived in her claim that the person who did this was Yony Hilario, whom Ana had always called Jonathan.

The prosecutor's initial closing argument spanned a total of approximately 13 transcript pages.

*Defense Counsel's Closing Argument*

Defense counsel's closing focused on two theories. The first theory was that Ana was at least embellishing if not outright lying, and was a bad

person. As one example, the defense argued that Ana was motivated to lie and incriminate Hilario because of the prospect of obtaining a U visa.<sup>4</sup>

The second defense theory was that, even though Ana had been brutally attacked, reasonable doubt existed about whether Hilario was the attacker. To support this argument, the defense argued that the evidence showed many people had access to Ana's apartment, including the Molina cousins, who had lived with her for a year.

Defense counsel's closing argument spanned a total of approximately 22-1/2 transcript pages.

*The Prosecutor's Rebuttal Closing Argument*

The prosecutor began the final section of her argument by marshalling evidence to rebut defense counsel's unsupported statement that Ana had tested positive for methamphetamine.<sup>5</sup> The prosecutor then explained and rebutted defense counsel's many arguments for why Ana was not credible (the first defense theory), by explaining the evidence from the prosecution's perspective.

The prosecutor also argued in rebuttal to the second defense theory that someone else could have attacked Ana. To support this argument, the prosecutor emphasized that Ana's testimony implicating Hilario was direct, not circumstantial, evidence.

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<sup>4</sup> A Long Beach Police Detective had testified that he was called after the crime by a law firm representing Ana. The caller told the detective his firm was representing Ana in her visa application, which was being made on the basis that she was a victim of a certain type of crime which qualified her for what was referred to as a U visa. The detective told the caller he would not assist with the application until after the case against Hilario was completed.

<sup>5</sup> While Ana was in the hospital, a blood test showed that she had an "unconfirmed" positive test for amphetamines.

The rebuttal closing spanned a total of approximately 23 pages of the trial transcript.

### *Defense Counsel's Objections*

Near the end of the prosecutor's rebuttal, when the prosecutor was discussing the evidence that Ana's neighbor Torres had corroborated Ana's statements about an argument over money and an abortion, defense counsel stated: "Your Honor, can we approach on a *People v. Robinson* issue at this point." The court responded by telling defense counsel that the issue was preserved. "I'll hear it afterwards, okay. You preserve the issue."

When the jury had retired to deliberate, the court took up the defense counsel's objection. Defense counsel argued that the prosecutor only explained the law in her initial closing, and "did not really to touch upon the facts at all." The prosecutor countered that she had talked about facts relating to the stabbing, premeditation, and Hilario's conduct in her "A" argument, and that in her rebuttal "B" argument" she "addressed specific issues that defense brought up that allowed me to go into the facts in more detail because [defense counsel had] brought out specific statements that were being made and said." Defense counsel did not ask the court for any specific relief.

In its ruling, the court stated: "When you say it is in the timing and sequence [referring to the length and content of the prosecutor's two arguments] I don't believe [it] is of any consequence. . . . I don't think there's any violation to warrant a mistrial in this particular case . . . ."

## **II. Legal Analysis**

Hilario contends the content and length of the prosecutor's rebuttal argument constituted a denial of his right to due process and misconduct, each requiring reversal of his conviction. We do not agree.



A. Applicable law

Section 1093, subdivision (e), sets out the order for closing arguments: “When the evidence is concluded, . . . the district attorney . . . and counsel for the defendant[] may argue the case to the court and jury; the district attorney . . . opening the argument and having the right to close.”

In closing argument, “[p]rosecutors may make vigorous arguments and fairly comment on the evidence; they have broad discretion to argue inferences and deductions from the evidence to the jury. [Citation.]” (*People v. Reyes* (2016) 246 Cal.App.4th 62, 74 (*Reyes*)). On rebuttal, a prosecutor has a right to meet the issues within the scope of the record and defense counsel’s argument. (*People v. Hill* (1967) 66 Cal.2d 536, 564 (*Hill*); *People v. Talbot* (1966) 64 Cal.2d 691; 712, overruled in part on other grounds, as recognized by *People v. Sears* (1970) 2 Cal.3d 180, 188.) This is because “[r]ebuttal argument must permit the prosecutor to fairly respond to arguments by defense counsel [citation] . . . .” (*People v. Bryden* (1998) 63 Cal.App.4th 159, 184.) There is no misconduct “where the remarks are responsive to defense counsel’s argument and do not go beyond the record. [Citation.]” (*Hill*, at p. 562.) This right is liberally construed, viz., “a prosecutor is justified in making comments in rebuttal, perhaps otherwise improper, which are fairly responsive to argument of defense counsel and are based on the record.” (*Id.* at p. 560.) “In such circumstances, the prosecutor ‘cannot be charged with misconduct if his comments only spill over somewhat into a forbidden area; the departure from propriety must be a substantial one.’ [Citation.]” (*Reyes*, at p. 74.)

In *People v. Robinson* (1995) 31 Cal.App.4th 494 (*Robinson*), the case noted by defense counsel near the end of the prosecutor’s final argument in this case, the court reversed a conviction based on multiple errors by the

prosecution, including withholding exculpatory eyewitness evidence, as well as what the court described as a “perfunctory” initial closing argument by the prosecutor (three and one-half reporter transcript pages), followed by a final closing argument that was 10 times longer (35 pages) than the opening portion. In support of its ruling, the court cited discussions of the prosecutor’s closing arguments in two death penalty cases, *People v. Hill*, *supra*, 66 Cal.2d 536, and *People v. Bandhauer* (1967) 66 Cal.2d 524. In *Hill*, in addressing a defendant’s contention that the prosecutor had taken unfair advantage by arguing specific facts not raised in his initial closing argument, our Supreme Court both noted the potential for unfairness and determined that the prosecutor had not exceeded those limits, stating: “Carried to its logical conclusion [the scope of argument contention] would permit the prosecutor to present his entire argument in rebuttal on the penalty phase and accord to the People unfair advantage. Nevertheless, for the most part, the remarks complained of here constitute reasonable and proper response to defense counsel’s arguments.” (66 Cal.4th at p. 565.)<sup>6</sup>

On the other hand, in *Reyes*, *supra*, 246 Cal.App.4th 62, the appellate court rejected a challenge to new factual allegations the prosecutor made for the first time in his final closing argument about consent by the victim to the alleged contact by the defendant. Even though this issue was one on which the prosecution had the burden of proof, and thus a proper subject for the first section of the prosecutor’s closing, the court found no error,

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<sup>6</sup> The court in *Hill* noted that in *People v. Bandhauer*, *supra*, 66 Cal.2d at page 530, it had announced a new rule for closing arguments for the penalty phase in capital cases. To “insur[e] equality in the arguments on each side” the court announced that thereafter “in both the main and rebuttal arguments, the prosecution should open and the defense respond.” (*Hill*, *supra*, 66 Cal.2d at pp. 564-564, fn. 7.)

characterizing the new argument as a response to a claim the defense had made in its closing argument. (*Id.* at p. 72.)

Hilario accurately describes the standard for our review in the following terms: “Absent a fundamentally unfair trial under the federal Constitution, prosecutorial misconduct or error does not require reversal of the judgment unless it was prejudicial under state law, e.g., it is reasonably probable that the defendant would have obtained a more favorable verdict absent the misconduct or error. (*People v. Bell* (1989) 49 Cal.3d 502, 534, 542; *People v. Castillo* (2008) 168 Cal.App.4th 364, 386; *People v. Crew* (2003) 31 Cal.4th 822, 839.) If the prosecutorial misconduct or error renders the defendant’s trial fundamentally unfair under the federal Constitution, reversal of the judgment is required unless the misconduct or error is harmless beyond a reasonable doubt. (*Castillo, supra*, at pp. 386-387, fn. 9.)”

We turn now to address and resolve Hilario’s specific contentions.

B. The Prosecutor Did Not Commit Misconduct by Discussing Additional Facts in Her Rebuttal Closing

Hilario first contends there were new themes and facts discussed in the prosecutor’s rebuttal, and that this constituted misconduct. In support of this contention, Hilario points to what he contends were two specific instances of facts or themes discussed “for the first time” in the prosecutor’s closing argument.<sup>7</sup> In her closing argument, defense counsel addressed Torres’s testimony concerning what he had overheard (regarding Hilario not wanting

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<sup>7</sup> While Hilario’s brief alludes to “several issues” of misconduct, it only describes and cites two such alleged instances. We address those and do not speculate as to others as “[i]t is not the function of this court to comb the record looking for the evidence or absence of evidence to support [a party’s] argument. [Citations.]” (*People ex rel. Reisig v. Acuna* (2010) 182 Cal.App.4th 866, 879; see also Cal. Rules of Court, rule 8.204(a)(1)(C) [stating that appellate briefs must be supported by record citations].)

to be a father and demanding money from Ana to pay for an abortion), characterizing Torres as confused and his testimony as contradictory. Defense counsel suggested that Torres's failure to open the door to his apartment implied he might have been afraid of Ana. Counsel also argued that Torres's testimony about numerous parties Ana had had at the apartment supported a defense theory that any one of a number of people could have been her assailant. These arguments were designed to attack Ana's credibility and create reasonable doubt that Hilario was the person who attacked her.

Given these arguments, it was not misconduct for the prosecutor to respond in her final argument with facts which addressed the claims made by Hilario's counsel, such as Torres's testimony that he had not seen other people going into or out of Ana's apartment on the day of the attack.<sup>8</sup> The prosecutor also used Torres's statements, which the defense counsel had just used in her own closing, to corroborate a central part of Ana's story: Hilario got somebody pregnant, he and Ana had first a conversation, and then an argument, about money, and then violence ensued. This argument, made during the final argument of the prosecutor and about which Hilario complains on appeal, was a direct response to defense counsel's closing argument; and it tended to rebut one of defense counsel's primary claims, that Ana could not be trusted to tell the truth.<sup>9</sup>

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<sup>8</sup> During defense counsel's closing, the prosecutor objected when defense counsel said it "doesn't sound like [Ana's] door was ever closed and that's another reason to doubt her story." The trial judge overruled the prosecutor's objection and told the prosecutor she could comment on this in her rebuttal.

<sup>9</sup> That it was a principal focus of the defense closing is indicated by the fact that this argument extended over nearly 15 of the 22-1/2 pages of defense counsel's closing argument.

While the prosecutor had not discussed Torres or these particular facts as part of her initial closing argument, the circumstance that Hilario's counsel had done so validates the prosecutor's addressing these matters in her final argument. The circumstance that a prosecutor's rebuttal contains "new" material does not necessarily indicate misconduct, even where (unlike here where the "new" material is offered in response to arguments made by the defense in its closing) it is "venomous." (*People v. Fernandez* (2013) 216 Cal.App.4th 540, 563-564 (*Fernandez*); see also *People v. Bryden*, *supra*, 63 Cal.App.4th at p. 184.)

Hilario's reliance on *United States v. Maloney* (2012) 699 F.3d 1130 (*Maloney I*) is misplaced, and Hilario omits the salient issue in that case. There, the defendant's relevant complaint on appeal was that the prosecutor had relied in rebuttal on facts not in the record at all. (*Id.* at pp. 1144, 1149.) That is not the situation in the present case. Upon rehearing of *Maloney I*, the Ninth Circuit again noted that the prosecutor had drawn inferences in closing argument based upon a critical fact that defendant's truck contained luggage, which fact had never been put into evidence at all. (*United States v. Maloney* (2014) 755 F.3d 1044, 1045-1046 (*Maloney II*).) The rehearing and the United States Attorney's motion to reverse the conviction (which is referred to in *Maloney II*) were consonant with *Hill*, *supra*, 66 Cal.2d at page 562.

We conclude that the prosecutor's remarks in her final closing argument were no more than a fair rebuttal of defense counsel's closing.

C. The Relative Length of the Prosecutor's Final Closing Compared to Her Initial Closing Does Not Indicate Misconduct

The second factor upon which Hilario relies for her claim of misconduct is the circumstance that the concluding argument of the prosecutor was

unfairly lengthy when compared to the first portion of the prosecutor’s closing argument. We do not agree.

It is true that, where it is part of a broad pattern of misconduct before and during trial, a profoundly cursory initial closing argument followed by a rebuttal that is 10 times longer may constitute prejudicial prosecutorial misconduct. (*Robinson, supra*, 31 Cal.App.4th at p. 505.) But *Robinson* does not articulate a per se rule. As discussed, *ante*, the general rule is that a prosecutor’s rebuttal is proper “where the remarks are responsive to defense counsel’s argument and do not go beyond the record. [Citation.]” (*Hill, supra*, 66 Cal.2d at p. 562.) *Robinson* itself cites *Hill* to support its discussion of the issue. (See *Robinson*, at p. 505.)

*Fernandez, supra*, 216 Cal.App.4th at pages 563-564, supports respondent. In *Fernandez* (20-page initial closing argument), as here, the prosecutor’s initial closing argument was “not perfunctory.” (*Ibid.*) In this case, the prosecutor gave a 13-page initial closing argument, arguing many evidentiary references in order to show that she had met her burden of proving the People’s case-in-chief. And, here (although longer than the final argument in *Fernandez*), the prosecutor’s rebuttal was about the same length as defense counsel’s closing argument and focused on the same themes of victim credibility and attacker identity that the defense had. Applying the *Fernandez* test, the prosecution’s final rebuttal “was a fair response to the theory posed in appellant’s closing argument.” (*Id.* at p. 564.) Finally, in contrast to the circumstances in *Robinson, supra*, 31 Cal.App.4th at page 505, the rebuttal was not “10 times longer” than the prosecutor’s initial closing statement.

As Hilario acknowledges, what is “more important” is whether the prosecutor engaged in a true rebuttal of the defense counsel’s closing. Having

reviewed both closing arguments, we have determined that the prosecutor did so. Under these circumstances, the prosecutor's rebuttal closing argument did not constitute misconduct.

D. Any Error Committed by the Prosecutor Was Harmless

Hilario contends the prosecutor's conduct in closing rendered the trial fundamentally unfair under the United States Constitution. Alternatively, he argues that the prosecutor's final argument was deceptive or reprehensible, and constituted prosecutorial misconduct, which was prejudicial under state law.

While we disagree with both arguments, assuming *arguendo* that the prosecutor's rebuttal was in any way improper, our review of the record indicates that any such error was harmless, and that no prejudice has been demonstrated. For the federal constitutional standard to apply, the prosecutorial misconduct must so infect the trial with unfairness that it makes the resulting conviction a denial of due process. (*People v. Bordelon* (2008) 162 Cal.App.4th 1311, 1323-1324, discussing *Chapman v. California* (1967) 386 U.S. 18; accord, *Hill, supra*, 66 Cal.2d at pp. 561-562.) That circumstance is clearly not present in this case.

When the allegedly improper comment "falls short of rendering the trial fundamentally unfair," such as when the "jurors are improperly exposed to certain factual matters, the error is usually tested under the standard set out in *People v. Watson* (1956) 46 Cal.2d 818, 836 . . . ." (*People v. Bordelon*, 162 Cal.App.4th *supra*, at pp. 1323-1324.) That standard calls for reversal only when, after reviewing the totality of the evidence, we can determine it is reasonably probable that a result more favorable to a defendant would have occurred absent the misconduct. (*People v. Bell, supra*, (1989) 49 Cal.3d at p. 504; *Watson*, at p. 836.)

Hilario cannot meet this test. The evidence of guilt in this case is compelling, consisting of the facts of premeditation and planning (gloving of his hands, wiping down surfaces he had touched, sharpening the knives and disposing of the beer cans from which he had been drinking and the butts of the cigarettes he had been smoking); the extent and violence of the attack (attacking Ana while she lay face down trying to sleep), attempting to cut her throat, her screams and their struggle, together with the wounds inflicted to Ana's torso (multiple stab wounds and a punctured lung) and hand (which required surgery and was still not fully functional at the time of trial); together with the evidence of substantial blood loss (at the hospital, Ana's blood pressure was 65 over 38), and the circumstance that she remained hospitalized after surgery for a month); combined with Ana's positive identification of Hilario as her assailant (they had cohabited and engaged in sexual relations and she identified him as her assailant shortly after he fled on the morning of the attack, as well as when asked to identify him by the police while she was still in the hospital, and again at trial). Her testimony was corroborated by Torres, who overheard the argument Ana described, and by Giselle M., who heard Ana say that Hilario (whom she called Jonathan) was her attacker.

### **III. Presentence Custody Credits**

The People contend "appellant was entitled to local conduct credit of only 15 percent and should have been awarded 974 days [of] actual credit, plus 146 days of conduct credit," instead of 974 days of local conduct credit. Hilario does not address this argument in his reply brief.

A sentence that awards custody credits exceeding statutory limits is unauthorized, and may be corrected whenever the error is discovered.

(*People v. Valenti* (2016) 243 Cal.App.4th 1140, 1184.) As provided in section



2933.1, if a defendant is convicted of any “violent felony” enumerated in section 667.5, subdivision (c), and is sentenced to state prison, both presentence and postsentence conduct credits are limited to 15 percent. (*Valenti*, at p. 1184; *People v. Ramos* (1996) 50 Cal.App.4th 810, 816-817 [accord].)

Attempted murder, of which Hilario was convicted, is such an enumerated violent felony. (§ 667.5, subd. (c)(12).) Any felony in which the defendant inflicts great bodily injury is also such an enumerated violent felony. (§ 667.5, subd. (c)(8).) The record also reflects that Hilario was sentenced to state prison.

Hilario was arrested on June 2, 2013, and remained in custody until he was sentenced on February 1, 2016, a total of 974 days. On the latter date, the sentencing court awarded Hilario 974 days of local conduct credit. Fifteen percent of 974 is 146.1. However, the 15 percent credit is limited to the largest whole number, and no credit is given for partial days. (*People v. Ramos, supra*, 50 Cal.App.4th at pp. 816-817.) Because Hilario was convicted of an enumerated violent felony and sentenced to state prison, he is only entitled by statute to 146 days of local conduct credit for time served before sentencing, in addition to the 974 days of actual credit for time in custody. We will modify the judgment accordingly.

### **DISPOSITION**

The judgment is modified by reducing Hilario's award of local conduct credit from 974 days to 146 days. As so modified, the judgment is affirmed. The trial court is directed to forward to the Department of Corrections an amended abstract of judgment reflecting the above modification.

**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.**

GOODMAN, J.\*

We concur:

ASHMANN-GERST, Acting P.J.

CHAVEZ, J.

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