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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 SIX

THE PEOPLE, Plaintiff and Appellant, v. GILBERT BARBA, Defendant and Respondent.	2d Crim. No. B264992 (Super. Ct. No. MA061164-01) (Los Angeles County)

On October 22, 2013, Gilbert Barba went on a one-man, one-day crime spree and was arrested after he carjacked a truck, burglarized two homes, and robbed a donut store. The jury convicted appellant of two counts of first degree residential burglary (counts 1 & 8; Pen. Code, § 459)[1], unlawfully taking of a vehicle (count 2; Veh. Code, §10851, subd. (a)), carjacking (count 3; § 215, subd. (a)); robbery (count 4; § 211), attempted robbery (count 5: §§ 664/211), and attempted criminal threats (count 6;

[1] All statutory references are to the Penal Code.

§§ 664/422, subd. (a)). Appellant admitted a prior prison term (§ 667.5) and a prior violent felony conviction (§ 667, subd. (a)), and was sentenced as a second strike offender to 34 years state prison. (§§ 667, subds. (b) -(i); 1170.12, subds. (a) - (d).)

Appellant contends, among other things, that the six-pack photo identification of appellant was unduly suggestive and that his prior serious felony conviction does not qualify as a strike because he was 15 years old when he committed the offense. (See § 667, subd. (d)(3)(A).) We modify the judgment to reflect that appellant was sentenced to eight months state prison on count 6 for attempted criminal threats and the sentence was stayed pursuant to section 654. (§ 1260.) We direct the superior court clerk to amend the abstract of judgment to reflect the sentence modification and to reflect that appellant was awarded 582 days actual custody credit. (§ 2900.5.) The judgment, as modified, is affirmed. The sentence remains the same: 34 years state prison.

Facts

On October 22, 2013, Sally Perez returned home at noon and found her patio door kicked in and garage door open. Perez reported that a black duffle bag filled with earthquake supplies, a Blu-ray player, a laptop computer, a digital camera, her son's ski jacket and BMX bike, and 10 to 40 pieces of jewelry, including a silver P.O.W. bracelet were missing.

The son's BMX bike was found a mile away in Valencia where Chris Williams' white F-350 truck was stolen. Williams left his keys in the truck that morning to go to a landscaping job.

At 12:30 p.m., appellant parked Williams' truck outside a Chase Bank in Sylmar. Appellant approached

Alejandro Cruz as he got out of his blue Ford Ranger truck and said, "'I have a gun, give me your keys.'" Cruz tossed the keys in the truck bed and was ordered to go to the nearby Vons. Cruz walked towards Vons but changed direction and went to the Chase Bank. Looking back, he saw appellant transfer a duffle bag from the white truck to Cruz's blue truck and drive off. Cruz called 911 and described appellant as a Hispanic male with brown eyes, about five feet five inches, 140 pounds, and wearing a gray beanie and white t-shirt.

At 1:20 p.m., appellant parked Cruz's blue truck outside a Spudnuts donut store in Palmdale. Appellant entered the store, took a bottle of water, and started to walk out. The owner, Sothy Sin, told appellant to pay for the water. Appellant said "'I put the money on the counter'" and left. Appellant returned a minute later, gestured towards his jacket, and said he had a gun. He ordered the customers out and told Sin to "'Get your money for me.'" Sin ran to the backroom, called the police, and watched appellant on the store security camera. Appellant was unable to open the cash register and grabbed it, ripping out the electrical cord. Sin watched appellant carry the cash register to the blue truck and took a picture of the truck as appellant drove off. Los Angeles County Sheriff's Deputy Darren Robison responded to the 911 call, reviewed the surveillance video, and found a black construction glove where the blue truck had been parked.

At 1:45 p.m., appellant parked next to Orien Vance Jr. at the Stater Brothers Market in Palmdale. Appellant hid his hand under a small pillow, pointed it at Vance, and said, "'Give me your wallet or I'll shoot you.'" Vance responded, "'I'm not going to give you my wallet. I have nothing in it'" and walked

away. Vance told Stephanie Torres, a store employee, that appellant was going to shoot him. Torres had the store call 911 and identified appellant in a photo lineup.

A few minutes after the 911 call, sheriff's deputies responded to a burglary call at Michelle Estrada's house a few blocks away. Deputy Sheriff Julie Vezina saw appellant go back and forth from the house to a blue truck in the driveway. Appellant put a grandfather clock in the truck and tried to carry out a big screen TV but dropped it. As appellant tried to drive away, two detectives blocked his path and arrested him. Inside the truck, detectives found the Spudnuts cash register, a black construction glove matching the glove found in the Spudnuts parking lot, and property taken in the Perez burglary. Officers determined that appellant broke into Estrada's house by throwing a flowerpot through the rear sliding door.

Six-Pack Photo Identification

Cruz was interviewed the next day and gave the officers a physical description of the carjacker. Cruz was then asked to look at a six-pack photo lineup and pointed to the Hispanic man in photo number 2 (appellant) who was shirtless. Cruz was 100 percent positive that the individual was the carjacker and identified appellant at the preliminary hearing and trial.

Motion to Strike Cruz's Photo Identification and Testimony

Appellant argues that the six-pack photo identification was unduly suggestive and violated his right to due process and a fair trial. Before trial, the trial court denied a defense motion to exclude the photo identification and Cruz's in-court identification. Appellant argued that the six-pack lineup was unduly suggestive because appellant was shirtless and the

other men in the photo lineup wore shirts. The prosecution conceded that a shirtless photo of appellant was "not the best practice" but argued that all the men in the photo lineup looked substantially similar. The prosecution noted that the shirtless photo may have worked in appellant's favor because the carjacker wore a shirt and a witness might subconsciously eliminate photo number 2.

The trial court reviewed the six-pack and found that all the photos depicted male Hispanics who had similar appearances. All six men had very short hair and the men in photos 2 and 3 had some facial hair. The trial court found that appellant was not wearing a shirt but "the lighting of the photograph appears to cast a shadow on the shoulders and chin area. [¶] And [at] first glance, it would appear [appellant] may be wearing kind of a light tan-colored shirt, but upon further glance, it appears he is without a shirt." The trial court concluded that the absence of a shirt on the man in photo 2 did not cause the photo to stand out or render the photo lineup impermissibly suggestive.[2]

At trial, Cruz was cross-examined about his identification and the photo six-pack. Cruz stated that he read a "'photographic showup admonition'" after he identified appellant

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[2] Stephanie Torres, the store clerk who witnessed the Stater Brothers attempted robbery, identified appellant in a different photo lineup. (Court Exh. No. 1.) The photo six-pack depicted three shirtless men and three men wearing tank tops. Torres testified that the shirtless photo of appellant and its placement in the six-pack did not influence her identification. Appellant does not contend that the photo six-pack shown Torres was unduly suggestive or tainted her identification.

in the photo lineup. The trial court denied a defense motion to strike Cruz's testimony, finding no legal or factual basis to exclude Cruz's testimony.

We independently review the ruling on the photo identification. (*People v. Kennedy* (2005) 36 Cal.4th 595, 609, overruled in part on another ground in *People v. Williams* (2010) 49 Cal.4th 405, 459.) In order to prove a due process violation, the burden is on appellant to show that the photo lineup was unduly suggestive and that the identification was unreliable under the totality of the circumstances. (*People v. Ochoa* (1998) 19 Cal.4th 353, 412; *People v. Avila* (2009) 46 Cal.4th 680, 700.) "A due process violation occurs only if the identification procedure is 'so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification.' [Citation.]" (*People v. Cook* (2007) 40 Cal.4th 1334, 1355.) "[T]here is no requirement that a defendant in a lineup, either in person or by photo, be surrounded by others nearly identical in appearance. [Citation.] Nor is the validity of a photographic lineup considered unconstitutional simply where one suspect's photograph is much more distinguishable from the others in the lineup. [Citations.]" (*People v. Brandon* (1995) 32 Cal.App.4th 1033, 1052.)

Appellant complains that he is the only shirtless man in the photo lineup and that his photo is in the top center of the photo array. In *People v. Carter* (2005) 36 Cal.4th 1114, defendant claimed that the photo identification was unduly suggestive because he was the only one in the photo lineup wearing an orange shirt that resembled a jail jumpsuit. Our Supreme Court found the differences trivial and not unduly suggestive. (*Id.*, at p. 1163.) "Nothing about defendant's shirt

identifies it as a 'jail jumpsuit' or any other type of jail-issued clothing, and even if it had, a conclusion that the lineup was unduly suggestive would not necessarily follow. [Citation.]" (*Ibid.;* see also *People v. Johnson* (1992) 3 Cal.4th 1183, 1217 [defendant only person depicted in jail clothing not unduly suggestive]; *People v. McDaniels* (1972) 25 Cal.App.3d 708, 710-711 [defendant only one wearing a blue shirt in lineup not unduly suggestive].)

We have examined the photo lineup (Court Exhibit No. 3) and reject the argument that it is unduly suggestive or rendered Cruz's in-court identification unreliable. (*People v. Ochoa*, *supra*, 19 Cal.4th at p. 412.) All the photos depict Hispanic males generally of the same age, complexion, and build. "Minor differences in facial hair among the participants [do] not make the lineup suggestive. [Citation.] Nor [do] differences in background color and image size among the various photographs render the lineup impermissibly suggestive. [Citation.]" (*People v. Johnson*, *supra*, 3 Cal.4th at p.1217.) As discussed by the trial court, the lighting, shadows and cropping of the photos make it appear that appellant is wearing a light tan-colored shirt. Other than shirts or the lack thereof, the men have similar physical features and short hair.

Cruz was cross-examined about the photo lineup and said that he did not notice that the man in photo number 2 was shirtless. He focused on the face, not the clothing. Before Cruz was shown the photo six-pack, he gave two physical descriptions of the carjacker that were relatively consistent and accurate. Immediately after the carjacking, Cruz described the carjacker as a Hispanic male with brown eyes, about five feet five inches tall, 140 pounds, and wearing a gray beanie and white t-shirt. Cruz

gave a second description the next day. He described the carjacker as a Hispanic male, light skin, five foot seven inches, 135 pounds, light goatee mustache, possibly wearing a beige sweater and gray beanie. Cruz was then shown the six-pack photo lineup and identified appellant.

Assuming, arguendo, that the photo six-pack was unnecessarily suggestive, appellant must show that Cruz's identification was not reliable under the totality of the circumstances. (*People v. Ochoa*, *supra*, 19 Cal.4th at p. 412.) The relevant factors include "the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of his prior description of the criminal, the level of certainty demonstrated at the confrontation, and the time between the crime and the confrontation." (*Manson v. Brathwaite* (1977) 432 U.S. 98, 114.)

Cruz saw appellant in broad daylight, viewed him close up, and gave the police two physical descriptions that were substantially the same. When Cruz was shown the photo six-pack, he studied each photo, recognized the carjacker's face in photo number 2, and was "100 percent" certain appellant was the carjacker. Cruz made the identification on his own and said that he had "a pretty photographic memory" and did not forget the carjacker's face. Appellant has failed to show that the identification was constitutionally unreliable. (*People v. DeSantis* (1992) 2 Cal.4th 1198, 1222.) Appellant bears the burden of showing unfairness as a demonstrable reality, not just speculation. (*Ibid.*)

Assuming that the trial court erred in not striking the photo identification and Cruz's in-court identification, the alleged error was harmless beyond a reasonable doubt.

(*Chapman v. California* (1967) 386 U.S. 18, 24; *People v. Martin* (1970) 2 Cal.3d 822, 831.) Cruz's description of the carjacker was admissible even if the photo identification was excluded. Other evidence linked appellant to the carjacking and it was substantial. Appellant's fingerprints were found on the truck door and the evidence showed that he committed similar theft-related crimes with the truck a few minutes after the carjacking. Appellant used the blue truck at the Stater Brothers attempted robbery and to rob the Spudnuts donut shop where he was photographed driving away with the cash register. When appellant burglarized Estrada's house, the cash register and property from the Perez burglary were in the truck. Earlier that day, appellant took another truck (Williams' truck) and left it running in the same parking lot where Cruz's truck was carjacked. Before appellant drove off in the blue truck, Cruz saw appellant transfer Perez's duffle bag from Williams' truck to the blue truck. It was strong evidence and it tied appellant to the burglary of Perez's home, the theft of Williams' truck, and the carjacking.

The jury considered all the evidence, including the possible suggestiveness of the photo lineup, and was instructed on the various factors to be considered in proving identity by eyewitness testimony (CALJIC No. 2.92). It is not reasonably probable that appellant would have obtained a more favorable result had the trial court stricken the photo identification or Cruz's in-court identification.

Prosecutorial Misconduct

Appellant contends that the prosecutor engaged in prejudicial misconduct in arguing that appellant was arrested outside Estrada's house and has "been in custody ever since, and

there he is. So, that's definitely him [from] Michelle Estrada's house." Defense counsel did not object but did move for mistrial after the prosecutor finished. Denying the motion, the trial court found that the in-custody comment pertained to appellant's identification as the Estrada burglar. The court admonished the jury not to consider appellant's arrest or custody status as evidence of guilt. The jury was instructed that the statements of counsel were not evidence and that it must not be biased against a defendant because the defendant was in custody pending the trial.

Appellant argues that the jury admonition "missed the point" because the in-custody remark created a "direct physical link" to the carjacking. Appellant did not object on that ground and is precluded from raising the argument for the first time on appeal. ""'[A] defendant may not complain on appeal of prosecutorial misconduct unless in a timely fashion - *and on the same ground* - the defendant [requested] an assignment of misconduct and [also] requested that the jury be admonished to disregard the impropriety.'" [Citation.]" (*People v. Ayala* (2000) 23 Cal.4th 225, 284, italics added.)

Defense counsel moved for mistrial on the ground that "telling the jurors that [appellant] has been in custody for a year and a half, ever since the time of his arrest, . . . casts a shadow of guilt on [appellant] that will prejudice his ability to get a fair verdict." The trial court considered the comment in that light and admonished the jury that a defendant's custody status is not evidence of guilt. Similar instructions were given pretrial and during jury selection. Denying the motion for mistrial, the trial court instructed "what the attorneys say during argument is not evidence. It's their interpretation of what they believe the

evidence shows. [¶] [¶] . . . And you must not be biased against a defendant *because he's been arrested for this offense*, charged with a crime or brought to trial or the fact that a defendant is in custody while their [sic] case is pending. None of these circumstances is evidence of guilt." (Italics added.)

Appellant did not object or request that the admonishment be amplified, thus forfeiting the argument that the jury should have been admonished on a new and different ground. (*People v. Linton* (2013) 56 Cal.4th 1146, 1205 [defendant must make a timely and specific objection and ask the court to admonish the jury]; *People v. Lewis* (2001) 26 Cal.4th 334, 380 [failure to request amplification of instruction that correctly states law waives claimed instruction error on appeal].)

On the merits, the alleged error was harmless and did not render the trial fundamentally unfair. (See, e.g., *People v. Bradford* (1997) 15 Cal.4th 1229, 1336.) Appellant was caught carrying a grandfather clock out of Estrada's house. The prosecutor argued that "the police saw him doing it," and "[h]e gets arrested" and "[h]e's been in custody ever since." Appellant's arrest outside Estrada's house established the identity of the burglar and was subject to fair comment. (See *People v. Morales* (2001) 25 Cal.4th 34, 44 ["At closing argument a party is entitled both to discuss the evidence and to comment on reasonable inferences that may be drawn therefrom"].) The jury was properly instructed that appellant's custody status could not be considered as evidence of guilt. It is presumed that the jury understood and followed the instructions. (*People v. Harris* (2005) 37 Cal.4th 310, 350.) "[A]n isolated comment that a defendant is in custody simply does not create the potential for the impairment of the presumption of innocence . . . ." (*People v.*

Bradford, *supra*, 15 Cal.4th at p. 1336.) But for the challenged comment, there is no reasonable probability that appellant would have achieved a more favorable result. (*People v. Frye* (1998) 18 Cal.4th 894, 970, overruled in part on another ground in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22 [remarks to jury not prejudicial unless defendant establishes reasonable likelihood the jury understood or applied the complained-of-comments in an improper or erroneous manner].)

Prior Strike Conviction

Appellant argues that his 2005 conviction for assault with a deadly weapon (ADW; § 245(a)) is not a strike because he was 15 years old when he committed the offense. (§ 667, subd. (d)(3).) Relying on *People v. Cole* (2007) 152 Cal.App.4th 230, the trial court found that the ADW conviction qualified as a strike because appellant was tried and convicted as an adult in 2005. "[I]t's the Court's position and the Court's ruling that it is a strike for all purposes. That his age does not enter into the discussion, given the status of the proceedings."

The "Three Strikes" law provides that *a prior juvenile adjudication* does not qualify as a strike unless four conditions are met: (1) the juvenile was 16 years of age or older when the offense was committed; (2) the offense is listed in Welfare and Institutions Code section 707, subdivision (b), or would be a qualifying strike if committed by an adult; (3) the juvenile was found to be a fit and proper subject to be dealt with under the juvenile law; and (4) the juvenile was adjudged a ward of the court, within the meaning of Welfare and Institutions Code section 602, as a result of the offense. (*People v. Davis* (1997) 15 Cal.4th 1096, 1100; § 667, subd. (d)(3).)

Section 667, subdivision (d)(3) provides in pertinent part: "*A prior juvenile adjudication* shall constitute a prior serious and/or violent felony conviction for purposes of sentence enhancement if: [¶] (A) The juvenile was 16 years of age or older at the time he or she committed the prior offense." Our primary task in interpreting the statute is to determine the Legislature's and voter's intent so as to effectuate the law's purpose. (*Robert L. v. Superior Court* (2003) 30 Cal.4th 894, 900.) If the statutory language is clear and unambiguous, the plain meaning of the statute governs. (*People v. Lawrence* (2000) 24 Cal.4th 219, 230-231.) "By enacting the three strikes law, the Legislature has not transformed juvenile adjudications into criminal convictions; it simply has said that, under specified circumstances, a prior juvenile adjudication may be used as evidence of past criminal conduct for the purpose of increasing an adult defendant's sentence." (*People v. Fowler* (1999) 72 Cal.App.4th 581, 586.)

In *People v. Cole*, *supra*, 152 Cal.App.4th 230, defendant was 16 years old when he committed a serious felony offense (lewd conduct without force; § 288, subd. (a)) and was tried and convicted as an adult. The Court of Appeal held that "if the minor is found unfit for handling in the juvenile court and is found in adult court to have committed a serious or violent felony, that felony is a strike. This . . . comports with the declared legislative purpose of the three strikes law - to punish recidivism - and with the legislative purpose behind Welfare and Institutions Code section 707 -- to reconcile concerns of public safety with concerns for the minor's welfare. [Citation.]" (*Id.*, at p. 237.)

Appellant argues that *Cole* is distinguishable because appellant was under the age of 16 when he committed the ADW.

Had appellant been tried for the ADW in juvenile court, the juvenile adjudication would not qualify as a strike. Section 667, subdivision (d)(3), however, does not exclude prior convictions in adult court where the juvenile offender was under the age of 16 when he or she committed the serious or violent felony.[3] Under the plain language of the three strikes statute, a prior serious or violent felony conviction in adult court is a strike regardless of defendant's age at the time of the offense.

Appellant argues that the second strike sentence is an equal protection violation because it results in the disparate treatment of juvenile offenders. To prevail on the equal protection claim appellant must show that the three strikes law affects two or more similarly situated groups in an unequal manner. (*People v. Cole*, *supra*, 152 Cal.App.4th at p. 238.) Fifteen-year-olds convicted in adult criminal court of ADW are not similarly situated to fifteen-year-olds who suffer an ADW juvenile court adjudication. (*Ibid.*; *Manduley v. Superior Court* (2002) 27 Cal.4th 537, 567-571 [rejecting equal protection challenge to Welfare and Institutions Code section 707, subdivision (d) authorizing prosecution to file criminal charges against minor directly in adult court].) This is so because a juvenile offender who is certified unfit for juvenile court and is prosecuted in adult court has not benefited from the intervention of the juvenile justice system, has a serious criminal history, and

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[3] Welfare and Institutions Code section 203, provides that "[a]n order adjudging a minor to be a ward of the juvenile court shall not be deemed a conviction of a crime for any purpose . . . ." Section 203, however, "is superseded in the three strikes context. [Citations.]" (*People v. Arias* (2015) 240 Cal.App.4th 161, 168.)

poses a much more serious danger to the public. "That the Legislature (and the voters through the initiative process) have chosen to create a system of graduated punishment, for recidivists with prior serious or violent offenses committed as juveniles, that distinguishes between those who were and were not fit . . . to be treated as juveniles, simply does not constitute invidious discrimination." (*People v. Cole*, *supra*, 152 Cal.App.4th at p. 238.)

The trial court found that appellant met four of the five unfitness criteria (Welf. & Inst. Code, § 707, subd. (c)) when he was tried as an adult in 2005.[4] Appellant had been a gang member since age 11, had a lengthy criminal record, and just before his sixteenth birthday, stabbed an individual. Appellant declared that it was for the San Fer gang and that he "would do it again." Appellant was tried as an adult and pled guilty to ADW with personal use of a deadly weapon (§§ 245; 12022, subd. (b)(1)), in exchange for a five year prison sentence. Pursuant to the negotiated plea, an attempted murder charge with gang and great bodily injury enhancements was dismissed. In the words of the trial court, appellant was "fitnessed up to the adult court for adult prosecution," and it "is an adult conviction, and . . . a strike for all purposes." We concur. Appellant makes no showing that his second strike sentence violates equal protection principles or is barred by section 667, subdivision (d)(3).

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[4] The criteria considered at a juvenile fitness hearing include: (1) the degree of criminal sophistication, (2) whether the minor can be rehabilitated prior to the expiration of the juvenile court's jurisdiction, (3) the minor's previous delinquent history, (4) previous attempts by the juvenile court to rehabilitate the minor, and (5) the circumstances and gravity of the charged offenses. (Welf & Inst. Code, § 707, subd. (c).)

Sentence and Abstract of Judgment

Appellant was sentenced to 34 years state prison based on the following sentence calculation: Selecting count 3 (carjacking) as the principal term, the trial court imposed a nine-year term, doubled it based on the prior strike, and imposed a consecutive five year enhancement on the prior serious felony conviction for an aggregate principal term of 23 years. The trial court imposed a consecutive one year term on the prior prison term enhancement (§ 667.5, subd. (b)), increasing the sentence to 24 years state prison. On the remaining counts (counts 1, 2, 4, 5, and 8), the trial court imposed one-third-the-midterm sentences, doubled the sentences based on the prior strike, and ordered the aggregate 10 year sentence to run consecutive to the 24 year sentence on count 3. On count 6 for attempted criminal threats, the trial court stayed the sentence pursuant to section 654 but failed to impose a sentence.

In applying section 654, "the trial court must impose a sentence on all counts, but stay execution of sentence as necessary to prevent multiple punishment. [Citations.]" (*People v. Alford* (2010) 180 Cal.App.4th 1463, 1469.) Here the failure to impose a sentence on count 6 is an unauthorized sentence. (*Id.*, at pp. 1472-1473.) Pursuant to *Alford,* we modify the sentence on count 6 to reflect that appellant was sentenced to one-third the midterm (four months) for attempted criminal threats, that the sentence was doubled to eight months based on the prior strike, and that the eight month sentence was stayed pursuant to section 654. The abstract of judgment must also be corrected to state that the conviction on count 6 was for attempted criminal threats rather than the completed crime.

Appellant contends, and the Attorney General agrees, that the abstract of judgment does not accurately reflect the sentence imposed on counts 1 and 8 for first degree residential burglary. (*People v. Mitchell* (2001) 26 Cal.4th 181, 185 [appellate court has inherent power to correct clerical errors in abstract of judgment].) On counts 1 and 8, the trial court imposed 16-month terms (one-third the midterm), doubled the sentences based on the strike prior, and ordered the 32-month sentences to run consecutive to the sentence on count 3. The abstract of judgment incorrectly states that a low term was imposed on counts 1 and 8, and the "consecutive full term" box is checked rather than the "1/3 consecutive" box. It fails to note that count 8 conviction is a serious felony and must be corrected.

Appellant argues, and the Attorney General agrees, that appellant's presentence custody credits were incorrectly calculated. Appellant was awarded 579 days actual custody and 87 days good time/work time. We modify the judgment to reflect that appellant was awarded 582 days actual custody (arrested on October 22, 2013 and sentenced on May 26, 2015).

Disposition

The judgment of conviction is affirmed. The sentence is modified to reflect that on count 6 for attempted criminal threats, appellant was sentenced to eight months (one-third the midterm, doubled based on the prior strike), and the sentence was stayed pursuant to section 654. The superior court clerk is directed to prepare an amended abstract of judgment to reflect the sentence modification and an award of 582 days actual custody credit, and to correct the aforementioned clerical errors. The amended abstract of judgment shall be forwarded to the

California Department of Corrections. As modified, the judgment is affirmed.

NOT TO BE PUBLISHED.

YEGAN, J.

We concur:

GILBERT, P. J.

TANGEMAN, J.

Christopher G. Estes, Judge

Superior Court County of Los Angeles

Janet Gusdorff, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Kathleen Kenealy, Acting Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Shawn McGahey Webb, Supervising Deputy Attorney General, Blythe J. Leszkay, Deputy Attorney General, for Plaintiff and Respondent.