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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 EIGHT

THE PEOPLE, Plaintiff and Respondent, v. PETER SAMUEL GONZALEZ and JOSE LUIS MARTINEZ, Defendants and Appellants.	B171456 (Los Angeles County Super. Ct. No. BA222996)

APPEALS from judgments of the Superior Court of Los Angeles County.

Raul A. Sahagun, Judge. With respect to Gonzalez: modified in part, remanded for resentencing and otherwise affirmed; with respect to Martinez: remanded for resentencing and otherwise affirmed.

Linda Acaldo, under appointment by the Court of Appeal, for Defendant and Appellant Peter Samuel Gonzalez.

Allison H. Ting, under appointment by the Court of Appeal, for Defendant and Appellant Jose Luis Martinez.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Marc E. Turchin, Supervising Deputy Attorney General, Lawrence M. Daniels and Richard S. Moskowitz, Deputy Attorneys General, for Plaintiff and Respondent.

Jose Luis Martinez and Peter Samuel Gonzalez were involved in the sale of methamphetamine and convicted of several related offenses. On appeal, Gonzalez demonstrates that an enhancement found true by the jury is not supported by substantial evidence, that the trial court erred in calculating his presentence conduct credit, and that the principles announced in the recent case of *Blakely v. Washington* (2004) 124 S.Ct. 2531 (*Blakely*) were violated. Martinez demonstrates that the trial court should have allowed him to dismiss his retained counsel prior to sentencing and that therefore he should be resentenced. We shall modify the judgment against Gonzalez, affirm the judgments, and remand the case to the trial court to resentence both Martinez and Gonzalez.

FACTUAL BACKGROUND

Martinez and Gonzalez were convicted based on the testimony of several police officers and a paid informant, Elias Fierro. Fierro acknowledged that he had a lengthy criminal background. Notwithstanding the challenges to the credibility of Fierro, on appeal, the record must be viewed in the light most favorable to the verdict. (*People v. Kraft* (2000) 23 Cal.4th 978, 1053-1054.)

Viewed in accordance with the proper standard, the evidence shows that Fierro purchased methamphetamine from Martinez, a member of the Maywood Locos gang. The purchase evolved in multiple steps and involved many conversations between Martinez and Fierro. According to Fierro, on September 26, 2001, Martinez called Fierro and said "he had just been jumped into the gang and that now he had a new source for meth." Martinez reported that his source was named Gama[1] and was also in the Maywood Locos. Fierro negotiated the purchase of one pound of methamphetamine and agreed to pay $13,000 for it. Fierro also agreed to talk to his source, who unbeknownst to Martinez, was an undercover police officer referred to as Thomas, and indicated Thomas

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[1] Fierro identified Gama as Gamaliel Sanchez, a co-defendant who pled guilty prior to trial.

would arrange for Martinez to see the money, which would be used to purchase the methamphetamine.

On October 3, 2001, Fierro met with Martinez in a McDonalds parking lot. Martinez left and returned, approximately 15 minutes later, with Gama. Fierro agreed to meet Gama or Martinez at Sound City Stereo to show the money that would be used to purchase the methamphetamine. Gama showed Fierro a plastic baggie containing approximately one ounce of methamphetamine. Fierro called Thomas who spoke to Gama. Gama said "that if he would see the money, he'd have the drugs right away." Martinez drove Gama to Sound City Stereo. Two undercover agents showed Gama $26,000. Fierro then returned with Gama to the McDonalds parking lot, where Martinez was waiting. Later that evening, Gonzalez drove a gold Chevrolet Impala into the McDonalds parking lot. Marco Lopez was a passenger. Gama and Martinez were also at the McDonalds.

Gonzalez introduced himself to Fierro as "Kane" and said that "he was a homeboy of Gama and Jose Luis Martinez." Gonzalez asked Fierro how many pounds of glass (another name for methamphetamine) Fierro wanted. Fierro responded that he was interested in between two and five pounds and Gonzalez responded, "oh really." Gama interrupted and said that they would just sell one pound that day because they did not know Fierro. Gonzalez acquiesced.

Gonzalez asked Fierro "'so what do you want to do?'" Fierro responded "'well if you bring it out to me right here, I'll go ahead and call in the money.'" Gonzalez agreed. Gonzalez then drove away. Martinez stayed at the McDonalds with Fierro.

Fierro and Martinez ate while they waited for Gonzalez to return. Gonzalez returned in the Impala with Gama and two others. Fierro asked "are we ready to do this?" Gonzalez responded "yes." Fierro said he would call for the money. Gonzalez said "okay" and told Gama "'Here, go get the bag out of the trunk.'" Gama retrieved a bag from the trunk of the Impala and placed it in the trunk of Fierro's car. Inside the bag was a ziploc bag with white powder.

Police arrived. Gonzalez, Martinez, Sanchez, and Lopez were detained and searched. Sanchez was carrying a .380 caliber semiautomatic pistol in his front right pocket. In his jacket pocket, Martinez was carrying ammunition for a .380 caliber semiautomatic pistol. Fierro called an undercover agent, who came and arrested, among others, Sanchez, Martinez and Gonzalez. Later tests indicated that the ziploc bag contained 458 grams of methamphetamine.

PROCEDURAL BACKGROUND

In an amended information, Martinez, Gonzalez, Marco Lopez, and Gamaliel Sanchez were charged with conspiracy to commit a crime, sale of a controlled substance, possession for sale of a controlled substance. It was further alleged that Gonzalez suffered four prior convictions within the meaning of Health and Safety Code section 11370.2, subdivision (c). Each crime was alleged to have been committed for the benefit of a gang and, with respect to Martinez and Gonzalez, an enhancement under Penal Code section 12022, subdivision (d) was alleged for each crime. It was further alleged that Sanchez was armed with a .380 semi-automatic handgun.

Sanchez and Lopez pled guilty. Martinez and Gonzalez (Appellants) were tried by jury. During opening statement Martinez's attorney conceded that the jury would find "Martinez did, in fact, engage in a conspiracy to attempt to sell methamphetamine." Neither Martinez nor Gonzalez presented any evidence in his defense.

The jury found true that Martinez and Gonzalez participated in a conspiracy to commit the sale of a controlled substance and the possession of a controlled substance and that they committed those substantive crimes. The jury also found true that a principal was armed with a firearm during the commission of each offense and that Martinez and Gonzalez knew that a principal was armed. The jury also found the gang allegation to be true. Extensive gang evidence had been presented at trial but need not be summarized for purposes of this appeal.

The attorney who represented Martinez during trial died before sentencing. On June 30, 2003, Mr. Samuel Saltalamacchia appeared and requested permission to represent Martinez during sentencing. Martinez requested such representation and the

court granted the request. On September 12, 2003, Martinez indicated that he wished to make a motion to relieve his attorney. The court stated "I will treat this in similar [fashion] to a *Marsden*." The sealed transcript indicates that Martinez wanted to remove his attorney because he could not afford to pay his attorney and therefore did not trust him. Martinez indicated that Saltalamacchi never visited him as promised. Martinez stated that he preferred a state attorney. The court did not relieve Saltalamacchia, who had stated that he was ready to proceed.

The prosecutor indicated that one alleged prior could not be proven and Gonzalez admitted three priors.

Martinez was sentenced to the midterm for the sale of a controlled substance of three years. With respect to the gang allegation, the court selected the high term of four years. The court imposed the midterm of two years on the Penal Code section 12022, subdivision (d) enhancement. The remaining counts were stayed under Penal Code section 654. Gonzalez was sentenced to the high term on the sale of a controlled substance of four years, the high term for the gang allegation of four years, and two years for the firearm enhancement. Gonzalez was also sentenced to three year terms for each of the three priors drug related convictions for an additional nine year term. The remaining sentences were stayed pursuant to Penal Code section 654.

CONTENTIONS

Martinez argues (1) the record lacks substantial evidence to support the jury's finding on the knowing principal armed enhancement; (2) the court should have sua sponte instructed the jury on a lesser included offense to the principal armed enhancement; (3) the trial court erred in treating Martinez's request for new counsel as a *Marsden* motion; and (4) the principles of *Blakely* were violated by sentencing Martinez to the high term on the gang allegation.

Gonzalez argues (1) the record lacks substantial evidence that he participated in the conspiracy; (2) the record lacks substantial evidence to support the finding on the principal armed enhancement; (3) the trial court should have sua sponte instructed the jury on a lesser included offense to the principal armed enhancement; (4) the trial court

should have sua sponte instructed the jury with CALJIC No. 2.50.2 and that this error violated his right to due process; (5) the trial court miscalculated his pre-sentence credits; (6) his sentence violated the principles of *Blakely*.

Each appellant joins in the arguments of the other.

The Attorney General concedes that the record lacks substantial evidence to support the finding that Gonzalez knew Sanchez was armed. The Attorney General also acknowledges that the trial court should have allowed Martinez to substitute his attorney and incorrectly calculated Gonzalez's presentence conduct credits. The Attorney General disputes Appellants' remaining contentions.

DISCUSSION

I. Substantial Evidence Supports the Finding Gonzalez Participated in the Conspiracy

Gonzalez argues that the evidence is not sufficient to support his conviction for conspiracy. We review a challenge to the sufficiency of the evidence to determine whether, after weighing all of the evidence in the light most favorable to the prosecution, a rationale jury could have found all of the elements beyond a reasonable doubt. (*People v. Kraft, supra*, 23 Cal.4th at pp. 1053-1054.) The parties agree the elements of conspiracy are "(1) an agreement between two or more persons; (2) with the specific intent to agree to commit a public offense; (3) with the further specific intent to commit that offense; and (4) an overt act committed by one or more of the parties for the purpose of accomplishing the object of the agreement or conspiracy." (*People v. Liu* (1996) 46 Cal.App.4th 1119, 1128.)

Gonzalez argues that "the evidence adduced at trial never established that appellant had the necessary 'slight connection' with the conspiracy to sell methamphetamine," thus challenging the agreement element with respect to him. Gonzalez further argues that "[t]aken in its best light, the prosecution evidence here established that appellant drove his car to a McDonald's parking lot, that within the trunk of his car was a department store bag containing secreted methamphetamine; that appellant was present in the parking lot while the conspirators discussed the terms of the sale; and that appellant made several ambiguous remarks to Fierro. That is insufficient

evidence for any rational trier of fact to find beyond a reasonable doubt that appellant was a co-conspirator who specifically intended to participate in the sale of methamphetamine."

Contrary to Gonzalez's argument, the evidence summarized by Gonzalez is sufficient to support his conviction. Even if the evidence may be interpreted to show that Gonzalez coincidently was present during the meeting of buyers and sellers and happened to discuss the purchase of methamphetamine with Fierro, a reasonable jury also could infer from that evidence that Gonzalez agreed to sell the methamphetamine. The jury could have inferred that Gonzalez was not just an innocent bystander based on the fact that he drove the car with the methamphetamine inside and participated in conversations concerning the sale of the methamphetamine. In addition, the conversations, which Gonzalez describes as "ambiguous," concerned the amount of methamphetamine Fierro wanted to buy and the agreement to transfer the methamphetamine to Fierro in return for Fierro assuring the payment. As the Attorney General argues, "[w]hile Gonzalez was . . . free to argue to the jury that he was just along for the ride the jury was hardly obliged to accept such an argument at face value . . . ." The evidence Gonzalez summarizes demonstrates his link to the conspiracy, the existence of which he does not question.

II. Evidence of Principal Armed Enhancement

Both Martinez and Gonzalez argue that the evidence was insufficient to support the enhancement under Penal Code section 12022, subdivision (d). That statute provides "Notwithstanding the enhancement set forth in subdivision (a), any person who is not personally armed with a firearm who, knowing that another principal is personally armed with a firearm, is a principal in the commission of an offense or attempted offense specified in subdivision (c), shall be punished by an additional and consecutive term of

imprisonment in the state prison for one, two, or three years." There is no dispute that the crimes in this case fall within those specified in subdivision (c).[2]

There was no evidence Gonzalez had knowledge that Sanchez was personally armed. Officer Enrique Gonzalez, on cross-examination, admitted that his opinion that an armed member of a gang would inform a non-armed member that the armed member had a gun was "based on zero evidence." Quoting *People v. Killebrew* (2002) 103 Cal.App.4th 644, 651, the Attorney General correctly points out "[i]t seems fairly self-evident that an expert opinion that is admittedly 'based on zero evidence' fails to satisfy the requirement that '[t]he opinion must be based on matter perceived by, or personally known, or made known to the witness at or before the hearing that is of the type that reasonably may be relied on in forming an opinion on the subject to which the expert testimony relates.'"

However, Martinez was not similarly placed to Gonzalez because Martinez had ammunition that matched Sanchez's semiautomatic pistol. Based on this evidence the jury could infer that Martinez had knowledge that Sanchez was armed. While Martinez states "there was no testimony that the ammunition matched Gama's gun," that statement is inaccurate. The evidence indicated that Sanchez carried a .380 caliber semiautomatic and the ammunition Martinez carried was for a .380 caliber semiautomatic.

Thus, the evidence is sufficient to support the finding on the Penal Code section 12022, subdivision (d) enhancement with respect to Martinez but must be reversed with respect to Gonzalez. As Gonzalez acknowledges, the difference between an enhancement under subdivision (d) and subdivision (a) of Penal Code section 12022 is the knowledge requirement. Therefore, the enhancement must be reduced from one

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[2] As the Attorney General points out, we need not decide whether this enhancement applies to a conspiracy because Appellants were also convicted of the substantive crimes, which are clearly within the ambit of subdivision (c).

under Penal Code section 12022, subdivision (d) to one under subdivision (a) of the same statute.

III. Lesser Included Offense to Principal Armed Enhancement

As discussed above, the jury found the enhancement under Penal Code section 12022, subdivision (d) to be true. That statute provides: "Notwithstanding the enhancement set forth in subdivision (a), any person who is not personally armed with a firearm who, knowing that another principal is personally armed with a firearm, is a principal in the commission of an offense or attempted offense specified in subdivision (c), shall be punished by an additional and consecutive term of imprisonment in the state prison for one, two, or three years."

Martinez[3] argues that the trial court should have instructed the jury on subdivision (a)(1) of section 12022 which provides as follows: "Except as provided in subdivisions (c) and (d), any person who is armed with a firearm in the commission of a felony or attempted felony shall be punished by an additional consecutive term of imprisonment in the state prison for one year, unless the arming is an element of that offense. This additional term shall apply to any person who is a principal in the commission of a felony or attempted felony if one or more of the principals is armed with a firearm, whether or not the person is personally armed with a firearm."

Our Supreme Court expressly held that a trial court is not required to instruct the jury on a lesser included enhancement; "we hold that a trial court's sua sponte obligation to instruct on lesser included offenses does not encompass an obligation to instruct on 'lesser included enhancements.'" (*People v. Majors* (1998) 18 Cal.4th 385, 410-411.)

Martinez argues that our high court's decision conflicts with *Apprendi v. New Jersey* (2000) 530 U.S. 466 (*Apprendi*). In *Apprendi*, the court considered the following question: "whether the Due Process Clause of the Fourteenth Amendment requires that a

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[3] Gonzalez also raises this issue, but given the finding that with respect to him the enhancement must be reversed, this issue becomes moot.

factual determination authorizing an increase in the maximum prison sentence for an offense from 10 to 20 years be made by a jury on the basis of proof beyond a reasonable doubt." (530 U.S. at p. 469.) The court held that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." (*Id.* at p. 490.)

Whereas *Apprendi* concerns the determinations that must be made by a jury, *Majors* concerns the instructions given to the jury. Here, consistent with the mandate of *Apprendi*, a jury (not a judge) found the enhancement to be true beyond a reasonable doubt. Martinez's argument that *Apprendi* overrules the holding in *Majors* that a court is not required to sua sponte instruct on a lesser included enhancement is not persuasive. We are required to follow the holding of our high court. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.)

IV. The Error in Failing To Instruct With CALJIC No. 2.50.2 Was Harmless

The jury was instructed that it should not consider out-of-court statements made by an alleged co-conspirator against another alleged co-conspirator unless it is found by a preponderance of the evidence that a conspiracy existed when the statement was made, that both the declarant and the defendant against whom it was offered were participating in the conspiracy and that the statement was made in furtherance of the conspiracy. Gonzalez argues that the trial court erred in not giving CALJIC No. 2.50.2 sua sponte to define "preponderance of the evidence" for the jury.[4]

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[4] That instruction provides "'Preponderance of the evidence' means evidence that has more convincing force than that opposed to it. If the evidence is so evenly balanced that you are unable to find that the evidence on either side of an issue preponderates, your finding on that issue must be against the party who had the burden of proving it. [¶] You should consider all of the evidence bearing upon every issue regardless of who produced it."

The trial court should have instructed the jury with CALJIC No. 2.50.2. The purposes of jury instructions include providing the jury with the tools necessary to appropriately apply the requisite burdens. (*People v. Mower* (2002) 28 Cal.4th 457, 483-484 [court must sua sponte instruct jury on burden of proof for each issue].) Defining "preponderance of the evidence" as is done in CALJIC No. 2.50.02 would have assisted the jury in understanding when statements made by co-conspirators could be considered by it.

We need not decide the appropriate standard to evaluate the error because it was harmless beyond a reasonable doubt. Gonzalez does not identify a single particular statement made by a co-conspirator that the jury could have improperly used against him. He argues: "[t]he prejudice to appellant is obvious. Without the co-conspirators' statements, appellant could not have been convicted of any of the charges in this case." The issue, however, is the prejudice that resulted from the trial court's failure to give the instruction, not the prejudice that resulted from the admission of co-conspirator's statements. Gonzalez's argument assumes that if the instruction had been given, the jury would not have found any co-conspirators statements to be admissible. The record demonstrates just the opposite. The jury found beyond a reasonable doubt that Gonzalez was guilty of the crime of conspiracy to commit a crime. Given that the jury found beyond a reasonable doubt that Gonzalez participated in the crime, the failure to define preponderance of the evidence with respect to the foundational requirements for co-conspirator statements was harmless beyond a reasonable doubt.

While Martinez states that he joins in all of the arguments of Gonzalez, he points out no prejudice as a result of the trial court's failure to instruct the jury with CALJIC No. 2.50.02. Martinez's counsel admitted during opening argument that Martinez participated in the conspiracy. Therefore, the instruction could not have assisted Martinez in any way and the trial cout's failure to give it was, with respect to Martinez, harmless beyond a reasonable doubt.

V. Martinez's Request to Substitute Counsel

Between trial and sentencing Martinez retained new counsel. When he requested that the court appoint a public defender because he was concerned that his new counsel would not vigorously represent him, the trial court evaluated the request under the standards of *People v. Marsden* (1970) 2 Cal.3d 118, 123 (*Marsden*). Martinez argues, instead of applying *Marsden*, the trial court should have applied *People v. Ortiz* (1990) 51 Cal.3d 975, 983 (*Ortiz*).) *Marsden* requires a defendant to show good cause for relieving a court appointed attorney whereas under *Ortiz*, a defendant may dismiss retained counsel at any time as long as it does not result in "'significant prejudice' to the defendant" and will not "result in 'disruption of the orderly processes of justice.'" (*Ibid*.)

The Attorney General agrees that the court erred in applying *Marsden* rather than *Ortiz*. The Attorney General argues that Martinez's request to discharge his counsel was later than it should have been but acknowledges that allowing another continuance for new counsel to represent Martinez at sentencing would not have disrupted the orderly process of justice.

We agree with the parties. The trial court erred in applying the standard under *Marsden* instead of the standard under *Ortiz*. "The risk in compelling a defendant to go to trial with unpaid counsel against his wishes and those of his attorney is that the defendant will 'get what he paid for.'" (*Ortiz, supra*, 51 Cal.3d at p. 985; see also *Lempert v. Superior Court* (2003) 112 Cal.App.4th 1161, 1172 [forcing counsel to represent an individual defendant raises substantial concerns].) While Martinez probably should have requested to dismiss his counsel at an earlier date, there would be no disruption in continuing a sentencing hearing that, as the Attorney General acknowledges, did not require witnesses and did not create a danger of evidence deteriorating. We agree with the parties that the appropriate relief is to allow Martinez a new sentencing hearing upon remand.

VI. Gonzalez's Presentence Credits

Gonzalez argues that the court miscalculated by seven days his presentence credits. Gonzalez points out and the Attorney General agrees that, in this context,

fractional days should be counted as whole days. (*People v. Scroggins* (1987) 191 Cal.App.3d 502, 508.) The record indicates that when fractional days are considered, Gonzalez demonstrates that he was in custody for 502 days and should have received 250 days of conduct credit, and his statements are supported by the record. Therefore, as the parties agree, the abstract of judgment must be amended to reflect 752 instead of 745 days of conduct credit.

VII. The Principles of Blakely Were Violated

For Gonzalez, the court selected the high term on count two because Gonzalez had numerous convictions of increasing seriousness and the crime involved a large amount of contraband. The court also selected the high term with respect to the gang enhancement because "the manner in which the crime was carried out does indicate planning, sophistication and professionalism." Gonzalez argues that the imposition of the high terms violates the principles of *Blakely, supra*, 124 S.Ct. 2531.

As discussed above, in *Apprendi, supra*, 530 U.S. 466, the United States Supreme Court held that except for a prior conviction, any fact that increases the penalty beyond the prescribed statutory maximum must be tried by a jury. (*Id.* at p. 490.) In *Blakely*, the high court applied the *Apprendi* holding to the sentencing scheme of the state of Washington and held the relevant "'statutory maximum' for *Apprendi* purposes is the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant." (*Blakely, supra*, 124 S.Ct at p. 2538.) The high court reaffirmed this holding in the recent case of *United States v. Booker* (2005) 125 S.Ct. 738 (*Booker*) and found that the Federal Sentencing Guidelines violated the Sixth Amendment right to a jury where the sentence was increased beyond the standard range based on a fact not admitted by the defendant and not found to be true by the jury.

Contrary to the Attorney General's argument, *Blakely* and *Booker* apply to this state's sentencing scheme because absent finding additional facts, the trial court may

impose the middle term, not the upper term. (Pen. Code § 1170, subd. (b)[5].) The next question is whether in imposing the high term on count two and the high term on the gang enhancement the court relied on factors that must be considered by a jury.

With respect to the substantive count, the court sentenced Gonzalez to the high term because Gonzalez's convictions were of increasing seriousness. This factor was appropriately considered by the trial court.[6] However, as Gonzalez argues, the trial court's finding is not supported by substantial evidence. Gonzalez's prior convictions included violations of Health and Safety Code sections 11351.5, 11379.5, and 11378.5, all of which contain a 3, 4, or 5 year penalty, all carrying a higher penalty than the crime for which he was currently sentenced. There is no evidence in the record demonstrating a basis for finding one crime was more serious than the others.

With respect to the gang allegation, the trial court found that it involved planning and sophistication and on that basis sentenced Gonzalez to the high term. This sentence violated the principles of *Blakely* because the jury verdict did not reflect planning and sophistication and these facts were not admitted by Gonzalez. Planning and sophistication is similar to premeditation, a finding made by a jury to establish first degree murder. This finding, which was the only factor relied on by the trial court, was not necessarily found by the jury. Reliance on planning and sophistication was not harmless. The trial court presented no evidence in support of the finding and a

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[5] That statute provides the court "shall [impose] the middle term, unless there are circumstances in aggravation . . . ."

[6] This issue was decided in *People v. Sample* (2004) 122 Cal.App.4th 206, review granted December 1, 2004, which is currently pending before the California Supreme Court.

reasonable jury could have rejected an argument that the crimes involved a high degree of planning and sophistication.[7] Gonzalez must be resentenced.

DISPOSITION

With respect to Gonzalez, the enhancement is modified from one pursuant to Penal Code section 12022, subdivision (d) to one under Penal Code section 12022, subdivision (a). The case is remanded for resentencing. Following resentencing, the clerk shall forward an amended abstract of judgment to the appropriate prison authorities. The amended abstract of judgment shall include 752 days of presentence conduct credit for Gonzalez.

With respect to Martinez, the case is remanded for resentencing. Following resentencing, the clerk shall forward an amended abstract of judgment to the proper prison authorities.

In all other respects, the judgments are affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

COOPER, P.J.

We concur:

RUBIN, J. FLIER, J.

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[7] Martinez makes a similar argument based on the fact that the court selected the high term on the gang enhancement "because of the planning and sophistication and professionalism of which [*sic*] the crime was carried out." Because Martinez must be resentenced, we need not currently consider this contention.