Filed 12/21/17 P. v. Tamayo CA2/3

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. SERGIO TAMAYO, Defendant and Appellant.	B268900 (Los Angeles County Super. Ct. No. KA100230)

APPEAL from a judgment of the Superior Court of Los Angeles County, Thomas C. Falls, Judge. Reversed in part; modified and, as modified, otherwise affirmed.

Randy S. Kravis, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Zee Rodriguez and Michael C. Keller, Deputy Attorneys General, for Plaintiff and Respondent.

A jury found defendant and appellant Sergio Tamayo guilty of second degree murder and found true weapon and gang allegations. On appeal, Tamayo contends there was insufficient evidence of the specific intent prong of the gang allegation. We agree with that contention. However, we disagree with his other contentions regarding the admissibility of the victim's statement identifying Tamayo and the trial court's failure to instruct on voluntary manslaughter. Accordingly, we reverse the true finding on the gang allegation, as well as modify various sentencing errors, but otherwise affirm the judgment as modified.

FACTUAL AND PROCEDURAL BACKGROUND

I. Factual background

A. *The murder of Miguel Duarte*

Ramon Montes and Tamayo lived in El Monte. The men knew each other, but in October 2012 they argued over Tamayo's contact with Montes's sister, and Tamayo told Montes that he was going to "get" Montes "on the streets." Less than a week later, Tamayo punched Montes, "bust[ing]" Montes's lip.

Montes told his friend, Miguel Duarte, about the fight with Tamayo. Duarte got mad, but Montes told Duarte to let it go, because Duarte was a member of a Pomona gang (although Duarte lived in El Monte) and Tamayo was an El Monte Flores gang member. If Duarte did something, Montes was afraid Duarte would "get more people against [Duarte]."

On October 27, 2012, Montes and Duarte were with Fernandez Ortiz at a party in Montes's apartment complex. While they were outside at approximately 5:00 or 6:00 p.m., Tamayo passed by on a bicycle and Duarte called to him. Duarte told Tamayo that Montes was his friend or brother and that

Tamayo had messed up by hitting Montes, so " 'we're gonna fight' " or " 'get down.' " Duarte and Tamayo then had a fist fight, which, according to Montes, nobody won; it was an "even fight." After, Duarte and Tamayo "squashed it" and went their separate ways. To Montes, it seemed that whatever problems Duarte and Tamayo had were done. Montes went inside.

Although Montes left, Ortiz stayed and Angel Sanches joined him. Duarte was with them, but he left. After some time passed, Duarte returned, looking, according to Ortiz, tired and agitated from running. According to Sanches, Duarte's face was "beat up a little bit." Thinking that Duarte was being followed, Sanches hid him. Sanches asked Duarte if he was all right, and Duarte said he was, but Duarte also said "Sergio" had stabbed him in the back on Dodson Street.[1] After about 30 minutes, someone called a taxi to take Duarte to the hospital, where he died from a stab wound to the back two days later on October 30, 2012.

Estela Haro witnessed some of these events. At about midnight or 1:00 a.m., she was outside her apartment on Dodson, near where the party had been. Duarte, to whom Haro was

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[1] While hospitalized, Duarte told officers a different story. He said that two people wearing hoodies approached him, one from the front and one from behind. He was stabbed from behind, and then he called a taxi from a pay phone. The investigating officer, Detective Ralph Batres, offered an explanation for the inconsistencies between Duarte's stories: when Duarte told officers the story about two people approaching him, Duarte thought he was going to live, so "he wasn't gonna tell 'em, you know, what happened. He's gonna give 'em . . . some bologna story, and then he's gonna tell his friends what really happened."

related, came by and asked to see Haro's father. Haro told Duarte that her father was sleeping, so Duarte left. Later, she heard two men arguing. Walking toward the commotion, she saw Tamayo and Duarte fighting. Tamayo took out a knife, opening and pointing it at Duarte.[2] Tamayo told Duarte to leave, and Duarte looked scared. Duarte ran and Tamayo got on his bike and pursued Duarte. About 10 minutes later, Tamayo returned and told everyone to leave.

B. *Gang evidence*

Detective Ralph Batres of the El Monte Police Department testified for the People as a gang expert.[3] "Through the case," Detective Batres learned that the victim, Duarte, was a member of Happy Homes "or some other gang."[4] Tamayo, however, is a member of the El Monte Flores gang. The gang claims the City of El Monte as its territory and has approximately 800 members. The gang engages in armed robberies, stabbings, assaults with a deadly weapon, weapon possession, drug sales, "major crimes," and "once in a while you get a murder."

Although the detective never had contact with Tamayo, the detective was aware of him and knew that Tamayo had admitted to other police officers that he was "Moreno" from El Monte Flores. Tamayo has "Monte Del Flores" tattooed on his back.

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[2] When interviewed by police, Haro initially omitted the detail about the knife because she was afraid.

[3] He also investigated the murder.

[4] The detective did not "know" Ortiz "as a gang member" and was unsure if Sanches was a gang member.

Detective Batres reviewed field identification cards (FI cards) prepared by nontestifying officers.[5] An Officer Dominguez prepared one which showed that Tamayo was stopped in 2001 with his brother and Edgar Armenta, both El Monte Flores gang members. Officer Hector Hernandez stopped Tamayo on July 22, 2009, and Tamayo admitted he was a member of El Monte Flores. Another FI card documented that Tamayo was stopped by himself on October 1, 2009 and had "Flores Del Monte" tattooed on his entire back.[6]

Detective Batres talked about the role respect plays in gangs, describing it as "the ultimate that you want to receive in the gang. You want to be looked upon as the one that's the dangerous one, the one that's the violent one. That's the one that everybody . . . stay[s] away from." The prosecutor then asked, "[i]f an El Monte Flores gang member gets into a fight . . . and, apparently, he doesn't win the fight. He doesn't lose the fight, but he clearly doesn't prevail over the other individual. . . . [I]s that a satisfactory . . . ending . . . from the El Monte Flores gang member's perspective?" The detective replied that the gang member would have "to come back and retaliate. It always happens like that," otherwise his gang would look down on him. When the prosecutor tweaked the hypothetical to add that the initial fist fight occurred in the presence of others, the detective

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[5] Two FI cards were admitted and no issue is raised on appeal as to them. Tamayo expressly does not dispute that evidence suggested he was a member of El Monte Flores.

[6] There is a discrepancy between what Detective Batres testified Tamayo's tattoo says and what the FI card says about the tattoo.

said that fact only reinforced his opinion. The prosecutor then added one more fact: the fight was against a member of a different gang. In such a scenario, the detective said it was "automatic" that "[h]e's gonna come back and do something. It's automatic. Or if he doesn't do it, you got to throw in the fact that somebody else could come back and do something because the gang is so big." Also, if an outside gang member living in El Monte "stops lying low" and comes to the attention of El Monte Flores, then "he's gonna be dealt with." Aside from the benefit an individual gang member receives from such retaliation, the gang benefits because it shows that the gang is violent and means business. This all contributes to an atmosphere of fear and intimidation, which allows the gang to control the neighborhood.

Detective Batres admitted, however, that nothing "up front" says this is a gang case.

II. Procedural background

In connection with these events, an information was filed in March 2015 alleging against Tamayo one count of murder (Pen. Code, § 187, subd. (a))[7] and weapon (§ 12022, subd. (b)(1)) and gang (§ 186.22, subd. (b)(1)(C)) enhancements. The information also alleged that Tamayo had one prior strike within the meaning of the Three Strikes law, a prior conviction within the meaning of section 667, subdivision (a)(1), and three 1-year prison priors within the meaning of section 667.5, subdivision (b). On August 14, 2015, a jury found Tamayo not guilty of first degree murder but guilty of second degree murder. The jury found the weapon and gang allegations true.

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[7] All further undesignated statutory references are to the Penal Code.

After a court trial on the prior conviction allegations, which were found true, the trial court sentenced Tamayo on November 5, 2015 to 15 years to life, doubled to 30 years to life.[8] The court sentenced him to a consecutive one year for the weapon enhancement (§ 12022, subd. (b)(1)) and to a consecutive five years for the prison prior (§ 667, subd. (a)). The court struck the one-year prison priors. A 15-year minimum parole eligibility period was imposed (§ 186.22, subd. (b)(5)).

DISCUSSION

I. Sufficiency of the evidence to support the true finding on the gang enhancement

The jury found true the allegation that Tamayo committed the murder for the benefit of, at the direction of, or in association with a criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members. (§ 186.22, subd. (b)(1).) He now contends there was insufficient evidence to support the specific intent prong of that enhancement. As we explain, we agree.

In reviewing a sufficiency of the evidence challenge to the specific intent element of section 186.22, subdivision (b)(1), "we review the entire record in the light most favorable to the judgment to determine whether it contains substantial evidence—that is, evidence that is reasonable, credible, and of solid value—from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt." (*People v. Albillar*

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[8] As we note in the disposition, the abstract of judgment does not reflect the 30-year-to-life sentence on count 1 and we therefore order the abstract modified accordingly.

(2010) 51 Cal.4th 47, 59-60.) As to the specific intent prong of the gang enhancement, " '[i]ntent is rarely susceptible of direct proof and usually must be inferred from the facts and circumstances surrounding the offense.' " (*People v. Rios* (2013) 222 Cal.App.4th 542, 567-568.) Further, expert testimony about gang culture and habits is the type of evidence a jury may rely on to reach a finding on a gang allegation. (*People v. Vang* (2011) 52 Cal.4th 1038, 1048; *People v. Ferraez* (2003) 112 Cal.App.4th 925, 930.) Nonetheless, an expert's opinion must be rooted in facts shown by the evidence. (*People v. Gardeley* (1996) 14 Cal.4th 605, 617-618, overruled on other grounds by *People v. Sanchez* (2016) 63 Cal.4th 665; *In re Frank S.* (2006) 141 Cal.App.4th 1192, 1196-1197; *Ferraez*, at p. 931 [although expert's testimony alone was insufficient to establish drug offense was gang related, it was coupled with other evidence from which such an inference arose].) "A gang expert's testimony alone is insufficient to find an offense gang related." (*People v. Ochoa* (2009) 179 Cal.App.4th 650, 657.) There must be some evidence supporting a finding, for example, that the crime was committed for the benefit of, at the direction of, or in association with a criminal street gang. (*Ibid.*) Also, where, as here, the gang-member defendant acts alone, the mere combination of the charged offense and gang membership "is insufficient to support an inference on the specific intent prong of the gang enhancement. Otherwise, the gang enhancement would be used merely to punish gang membership." (*People v. Rios*, *supra*, 222 Cal.App.4th at pp. 573-574; see also *In re Frank S.*, *supra*, 141 Cal.App.4th at p. 1199 [gang membership alone did not prove minor's specific intent in possessing knife was to promote, further or assist criminal conduct by gang members].)

As our Supreme Court has cautioned, not every crime committed by a gang member is related to a gang. (*Albillar*, at p. 60.)

Here, there were no obvious or outright indicia of a gang-related specific intent. (See, e.g., *People v. Ochoa*, *supra*, 179 Cal.App.4th at p. 662 [insufficient evidence crime was gang related where defendant did not, for example, call out gang name, display gang signs, wear gang clothing, engage in gang graffiti, brag about crime].) Detective Batres admitted as much when he said there was nothing "up front" to denote this was a gang case; for example, there was no evidence a gang challenge was issued, that someone called out the name of their gang, wore gang-associated clothing, and wrote graffiti or otherwise bragged about the murder. Also, it was undisputed that the initial fist fight between Duarte and Tamayo was *not* gang-related. Instead, the only evidence giving rise to the specter of a gang-related specific intent was Detective Batres's testimony. He suggested that Tamayo, to protect his and his gang's reputation, could not let an "even fight" stand—Tamayo had to take revenge on Duarte. This was "automatic" given that the initial fist fight occurred in the presence of community members (Montes and Ortiz) and that Duarte was a rival or outside gang member.

This argument is problematic. First, there was no evidence Duarte belonged to a *rival* gang. There was evidence he belonged to a gang, but even that evidence was vague because Detective Batres merely said Duarte was from a Pomona or West Covina gang called Happy Homes or "some other gang." The detective did not say Duarte's gang and Tamayo's gang were rivals. Moreover, there was no evidence that Tamayo even knew that Duarte was a gang member. Therefore, to the extent the detective based his opinion on Tamayo knowing that Duarte was

a rival gang member or even just a gang member, there was no basis in the evidence for that opinion.

Second, Detective Batres suggested, and the People argue, the "jury could find that, in stabbing the person who had disrespected him earlier that night in the presence of other people, [Tamayo] sought to increase the community's fear" of El Monte Flores. But there is no evidence Tamayo stabbed Duarte in the presence of others or otherwise openly connected himself to that crime. To be sure, there was evidence the murder contributed to an atmosphere of fear in the community, because Ortiz and Sanches put their wounded friend in a taxi rather than call 911 and Haro initially failed to tell police that she saw Tamayo with a knife because she was afraid. But there was no evidence that Tamayo, in stabbing Duarte, *specifically intended* to contribute to a fear of El Monte Flores or to otherwise promote criminal conduct by gang members. To conclude otherwise on this evidence would be to bootstrap specific intent onto the vague benefit a gang receives any time a member commits a crime in its territory and the community is aware of it, thereby effectively rewriting section 186.22, subdivision (b)(1) as a general intent enhancement. (See, e.g., *In re Daniel C.*, *supra*, 195 Cal.App.4th at p. 1364; *People v. Ramon* (2009) 175 Cal.App.4th 843, 853 [expert "testimony about a possible reason for committing a crime" insufficient, by itself, to establish specific intent element].) Such bootstrapping might work when a gang member commits a crime with known gang members, in which case a jury "may fairly infer that the defendant had the specific intent to promote, further, or assist criminal conduct by those gang members." (*People v. Albillar*, *supra*, 51 Cal.4th at p. 68.) But it does not work on the evidence before us and where defendant acted alone.

We therefore reverse the true finding on the gang enhancement.[9]

II. Admissibility of Duarte's out-of-court statement

Tamayo next contends that admitting Duarte's statement identifying Tamayo as his attacker was prejudicial error. The challenged statement came in during Ortiz's and Sanches's testimony. Ortiz testified that Duarte said "Sergio" stabbed him. Sanches then similarly testified that Duarte said, "Sergio," although Sanches didn't know what Duarte meant. Defense counsel did not object to Ortiz's testimony but did object to Sanches's subsequent testimony. The trial court overruled the objection and admitted the statement under Evidence Code section 1240.[10]

Evidence Code section 1240 contains the spontaneous statement exception to the hearsay rule. A statement is admissible under that exception if (1) there is some occurrence startling enough to produce nervous excitement and render the utterance spontaneous and unreflecting; (2) the utterance was made before there has been time to contrive and misrepresent, that is, while the nervous excitement may be supposed still to dominate and the reflective powers to be yet in abeyance; and

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[9] Tamayo does not contend that reversal of the true finding on the gang enhancement requires reversal of the judgment.

[10] After defense counsel objected on hearsay grounds, the court held an unreported sidebar. The record was settled on appeal, and the parties agree that the court found that Duarte's statement to Sanches was not a dying declaration but a spontaneous statement and overruled the objection on that ground.

(3) the utterance relates to the circumstance of the occurrence preceding it. (*People v. Poggi* (1988) 45 Cal.3d 306, 318.) Thus, a statement is spontaneous if made while the declarant is under the stress of excitement caused by the perception and undertaken without deliberation or reflection. (*People v. Morrison* (2004) 34 Cal.4th 698, 718.) A number of factors may inform a court's inquiry as to whether the exception applies; for example, the timing of the statement, whether it was delivered directly or in response to a question, the declarant's emotional and physical condition when making the statement, and whether the content of the statement suggested an opportunity for reflection and fabrication. (*People v. Merriman* (2014) 60 Cal.4th 1, 64.) We review a trial court's ruling on the admissibility of a statement under Evidence Code section 1240 for an abuse of discretion. (*Merriman*, at p. 65.)

Here, Tamayo's contention that Duarte's statement was not made under stress and excitement and before Duarte had time to contrive and misrepresent is based on a strained interpretation of Ortiz's and Sanches's testimony about Duarte's demeanor after being stabbed. According to Sanches, Duarte was "talking to me good. He said it was okay. Nothing was wrong. He was all right." To Ortiz, Duarte looked tired and "agitated" from running.

This testimony does not support a conclusion that the trial court abused its considerable discretion by finding that Duarte's statement was spontaneous. First, although the record is ambiguous as to how much time passed between the stabbing and the statement, inferentially it was not long, and Tamayo does not argue otherwise. When Ortiz and Sanches encountered Duarte, Duarte was running, presumably from his attacker, and bleeding.

Sanches, thinking that the attacker was nearby, hid Duarte. Thus, the excitement of the situation was ongoing. Second, it does not appear that Duarte's statement was given in response to a question. Rather, Ortiz said Duarte complained about being injured and "[h]e was just telling me" he had been stabbed. Third, and notwithstanding Ortiz's and Sanches's testimony about Duarte's demeanor, it is not clear Duarte in fact was calm. Although Ortiz attributed Duarte's agitation to running, that was merely Ortiz's impression. Another very reasonable explanation for Duarte's fatigue and agitation was that they resulted from just having been pursued and stabbed. Also, the court could have believed that Sanches and Ortiz downplayed the gravity of Duarte's condition to explain their odd behavior of putting Duarte, unaccompanied, into a taxi rather than calling 911. In any event, Duarte's ability to speak coherently does not render the hearsay exception inapplicable. (*People v. Poggi*, *supra*, 45 Cal.3d at p. 319.) We therefore conclude that the trial court acted well within its discretion by admitting Duarte's statement.

Because we conclude that Duarte's statement was admissible, we reject Tamayo's related due process and ineffective assistance of counsel claims. Tamayo concedes that admitting the statement did not violate the Confrontation Clause because the statement was not testimonial. And, because there was no error in admitting Tamayo's statement, his counsel did not provide ineffective assistance by failing to object to it. (See generally *Strickland v. Washington* (1984) 466 U.S. 668, 694 [ineffective assistance of counsel claim requires showing of error and prejudice]; *People v. Scott* (1997) 15 Cal.4th 1188, 1211-1212.)

III. Failure to instruct on voluntary manslaughter

Tamayo contends that the trial court should have sua sponte given a voluntary manslaughter instruction. A court must instruct the jury sua sponte on the general principles of law that are closely and openly connected to the facts and that are necessary for the jury's understanding of the case. (*People v. Moye* (2009) 47 Cal.4th 537, 548; *People v. Breverman* (1998) 19 Cal.4th 142, 154.) Instructions on a lesser included offense must be given when there is substantial evidence from which the jury could conclude the defendant is guilty of the lesser offense, but not the charged offense. (*People v. Manriquez* (2005) 37 Cal.4th 547, 584 (*Manriquez*).) In deciding whether there is substantial evidence of a lesser included offense, we do not evaluate the credibility of the witnesses, a task for the trier of fact. (*Id.* at p. 585.) We independently review whether the trial court erred by failing to instruct on a lesser included offense. (*Id.* at p. 587.)

Murder is the unlawful killing of a human being with malice aforethought. (§ 187, subd. (a); *Manriquez*, *supra*, 37 Cal.4th at p. 583.) Voluntary manslaughter is the intentional but nonmalicious killing of a human being. (*People v. Moye*, *supra*, 47 Cal.4th at p. 549; § 192, subd. (a).) Voluntary manslaughter is a lesser included offense of murder. (*People v. Lee* (1999) 20 Cal.4th 47, 59; *Manriquez*, at p. 583.) A killing may be reduced from murder to voluntary manslaughter if there is evidence negating malice, for example, where the defendant kills upon a sudden quarrel or in the heat of passion on sufficient provocation. (*Manriquez*, at p. 583.) "Heat of passion arises when 'at the time of the killing, the reason of the accused was obscured or disturbed by passion to such an extent as would cause the ordinarily

reasonable person of average disposition to act rashly and without deliberation and reflection, and from such passion rather than from judgment.' " (*People v. Barton* (1995) 12 Cal.4th 186, 201.) The provocation that incites the defendant to homicidal conduct may be physical or verbal but it must be caused by the victim or be conduct reasonably believed by the defendant to have been engaged in by the victim. (*Manriquez*, at p. 583; *Moye*, at p. 550; *Lee*, at p. 59; *People v. Lasko* (2000) 23 Cal.4th 101, 108.) No specific type of provocation is required, and the passion aroused need not be anger or rage, but can be any violent, intense, high-wrought or enthusiastic emotion other than revenge. (*Lasko*, at p. 108.)

There was insufficient evidence to warrant giving a voluntary manslaughter instruction. Rather, the evidence was that Duarte and Tamayo fought to a draw early in the evening. At least six hours later, Haro saw them argue, Tamayo draw a knife, and Duarte run away with Tamayo in pursuit. However, the fist fight between Duarte and Tamayo was insufficient provocation for the later stabbing. Not only had at least six hours passed between the fist fight and the stabbing, the fist fight appeared, to Montes, to have settled Duarte's and Tamayo's differences, because they "squashed it" and went their separate ways. (See, e.g., *People v. Breverman*, *supra*, 19 Cal.4th at p. 163 [if sufficient time elapses between the provocation and fatal blow for passion to subside and reason to return, killing is not voluntary manslaughter]; *People v. Moye*, *supra*, 47 Cal.4th. at p. 551 [fight occurring night before murder insufficient by itself to constitute legally sufficient provocation].) And although Haro later saw the men arguing, she could not hear what was said and her testimony therefore was insufficient to establish that Duarte

provoked Tamayo. (See, e.g., *People v. Gutierrez* (2009) 45 Cal.4th 789, 826 [taunting words, a technical battery, or slight touching insufficient to warrant instruction]; *Manriquez*, *supra*, 37 Cal.4th at p. 586 [calling defendant " 'mother fucker' " and repeated taunting insufficient to establish provocation].)

Tamayo, however, points out that the trial court instructed the jury with CALJIC No. 8.73 regarding provocation to reduce a murder from first degree to second degree.[11] (See also CALCRIM No. 522.) It makes no sense, he argues, for the court to instruct on provocation in that context but *not* to instruct on provocation in the context of voluntary manslaughter under a heat of passion theory (see CALJIC No. 8.42). But it does makes sense. The existence of provocation inadequate to reduce a murder to manslaughter may nevertheless raise a reasonable doubt as to the degree of murder so as to reduce a murder from first to second degree. (*People v. Rogers*, *supra*, 39 Cal.4th at p. 878; *People v. Valentine* (1946) 28 Cal.2d 121, 132.) Therefore, the two contexts are different. Before us is whether there was sufficient evidence to support a heat-of-passion theory of voluntary manslaughter. Therefore, as we have explained, there was not such evidence so the trial court had no sua sponte duty to give that instruction.

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11 The court instructed: "If the evidence established that there was provocation which played a part in inducing an unlawful killing of a human being, you should consider the provocation for the bearing it may have on whether the defendant killed with or without deliberation and premeditation." (See generally *People v. Rogers* (2006) 39 Cal.4th 826, 878-879.)

IV. Restitution

The trial court imposed a $300 restitution fine under section 1202.4, subdivision (b) and a suspended fine in the same amount under section 1202.45. Based on a comment the court made when it imposed those fines, Tamayo contends the court meant to impose the minimum amount authorized by law, which was $240 at the time Tamayo committed his crime in October 2012. (Former § 1202.4, subd. (b).) The court said: "You are ordered to pay a victim restitution fund fine of—the numbers went up actually because the government is never satisfied. They want more money every time—$300, a parole post-release community supervision *mandatory* restitution fine of $300." (Italics added.) Tamayo posits that this comment shows that the court misapprehended the scope of its discretionary sentencing choices; that is, the court thought the minimum was $300 when it in fact was $240. We agree and modify the judgment to reflect that the fines under sections 1202.4 and 1202.45 were in the amount of $240 each. (See generally *People v. Martinez* (2014) 226 Cal.App.4th 1169, 1188-1191.)

V. Custody credits

The trial court awarded Tamayo 1,070 days of custody credits. The parties agree that Tamayo is entitled to one additional day of credit, for a total of 1,071 days of credit. (§ 2900.5.) We agree and order the abstract of judgment modified accordingly.

DISPOSITION

The true finding on the gang allegation under section 186.22, subdivision (b)(1) is reversed. Accordingly, the 15-year minimum parole eligibility period under section 186.22 only is

stricken. The judgment is also modified to reflect (1) imposition of 30 years to life on count 1, (2) imposition of a $240 fine under section 1202.4 and of a $240 fine under section 1202.45, and (3) 1,071 days of custody credits. The clerk of the superior court is directed to modify the abstract of judgment and to forward it to the Department of Corrections and Rehabilitation.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

DHANIDINA, J.*

We concur:

EDMON, P. J.

LAVIN, J.

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