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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. MAX ELISEO RAFAEL, Defendant and Appellant.	B287750 (Los Angeles County Super. Ct. No. BA392902)

APPEAL from a judgment of the Superior Court of Los Angeles County, Charlaine F. Olmedo, Judge. Affirmed as modified and remanded.

Jonathan E. Demson, 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, Idan Ivri and Nikhil Cooper, Deputy Attorneys General, for Plaintiff and Respondent.

Appellant Max Rafael and codefendant David Ponce were jointly tried for five murders. The jury convicted the defendants on all counts, and Rafael was sentenced to multiple life terms without the possibility of parole. Codefendant Ponce received the death penalty.[1] On appeal, Rafael primarily argues the trial court prejudicially erred in denying his motion to sever the trial and admitting hearsay against him. We disagree and affirm.

FACTUAL AND PROCEDURAL BACKGROUND

On the night of November 1, 2008, five people living in a homeless encampment in Long Beach were shot and killed. The victims were Lorenzo Villacana, Vanessa Malaepule, Hammid Shraifat, Frederick Neumeier, and Katherine Verdun. All the victims had been shot multiple times at close range, and some sustained as many as eight gunshot wounds.

Over a year later, the police pulled over a car in which Ponce and Rafael were riding. A handgun was recovered from the vehicle. Ponce and Rafael were arrested. Rafael was released temporarily, and then arrested again later. While they were in custody, a jailhouse informant recorded the codefendants discussing the Long Beach murders with each other.

Ponce and Rafael were jointly charged with five counts of first degree murder for the killing of the Long Beach victims (Pen. Code, § 187, subd. (a); counts 1–5)[2], and one related count of kidnapping (§ 207, subd. (a); count 6). Ponce was also charged with the unrelated kidnapping and murder of Tony Bledsoe. The

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[1] Ponce's automatic appeal is pending in the California Supreme Court (case No. S247253).

[2] All further statutory references are to the Penal Code unless otherwise stated.

information alleged firearm enhancements (§ 12022.53, subd. (d)), and gang enhancements (§ 186.22, subd. (b)(1)(C)) as to all counts. As to counts 1 through 5, the information further alleged the special circumstance that Rafael was an active street gang participant, and murdered the victims to further the activities of the gang. (§ 190.2, subd. (a)(22).) Rafael pled not guilty to all counts and denied all allegations.

At the joint trial, Ponce's girlfriend, Miko Tanabe, testified that Ponce and Rafael were in the Southside Nuthood Watts gang. Rafael was known as "Chato." The day after the Long Beach murders, Ponce told Tanabe that he and Chato had murdered the victims at the homeless encampment. Ponce said there had been "bad blood" between Ponce and victim Lorenzo Villacana. A week before the murders, Ponce had gone to the encampment to fight Villacana. During the fight, Villacana's girlfriend, victim Vanessa Malaepule, had "mouthed[]off" to Ponce.

According to Tanabe's testimony, Ponce told her that on the night of the murders, Ponce went back to the encampment to confront Villacana. Rafael accompanied him, and a third man drove. Ponce shot Villacana and his girlfriend, and Rafael shot the remaining victims. When Tanabe and Ponce watched the news report on the murders, Ponce stated that it was "him and Chato that did that." After Ponce was arrested, he asked Tanabe to throw out a pair of boots he had worn during the murders.

A resident of the encampment also testified. At about 11:30 p.m. on the night of the murders, she heard an unfamiliar male voice asking her neighbor, victim Hammid Shraifat, "Where's he at?" She then heard multiple pairs of footsteps leading Shraifat away. Shortly thereafter, she heard gunshots.

Later that night, the police found the bodies of the victims in and around Villacana's tent.

In a recorded phone call Ponce made from jail to a friend, Ponce said he heard "C" had been arrested and would end up "right here with me." Ponce worried that "C" would say something during an interrogation.

The prosecution also played for the jury 15 recorded clips of Rafael's and Ponce's conversations with the jailhouse informant. Ponce was recorded in all 15 clips; Rafael was on approximately half. In Ponce's conversations with the informant, he bragged about the murders and described how he covered his tracks, wiping his fingerprints from the bullets and getting rid of the two guns used. Ponce said his "little homey" was with him, and the five victims were his "signature work."

Ponce described sneaking up on a man in the encampment, asking where "L.V." was, following the man to Villacana's location, instructing his companion to shoot at the same time he shot, telling the companion to aim for the head, and then shooting some of the victims while his companion shot the others. The third "homey" was waiting in the car for them, and heard the shots.

Ponce and Rafael were recorded discussing what evidence the police had against them. Ponce described the lack of witnesses, the absence of the guns, and the wiped-down casings, and wondered how the police discovered Rafael's involvement. When Ponce noted that no one other than the perpetrators knew the details of what happened, Rafael agreed that, "Nobody knows." Ponce said to Rafael, "Only me and you know," and Rafael responded, "Yeah . . . and I ain't gonna fold." Rafael

wondered how the police "put the story together," and asked Ponce whether the police knew about "the third person."

When the informant referred to Rafael's involvement in the five murders, Rafael expressed surprise that the case carried the death penalty.[3] The informant later praised Rafael for killing people at the encampment, and Ponce and Rafael agreed the murders were necessary.[4] Both men bragged about how many people they had killed; Ponce claimed he had twelve people "on [his] belt," and Rafael responded, "I probably got like four."

Shell casing, bullet fragments, and expended bullets were recovered from the crime scene. A ballistics analysis revealed that two guns were used: at least 13 rounds were fired from a 9-millimeter caliber firearm while a second handgun fired at least

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[3] Ponce, not Rafael, was charged with the death penalty.

[4] "[Informant]: If you had the balls to kill, and your homeboy is fucking smoking three fools and you're smoking the other two, hey, my boy, south side glorifies, south side, you know. It's just business.

[Rafael]: Yeah.

[Informant]: You did what you had to do, right? Yes or no? Exactly. That's what I'm saying, Oh, it is what it is, my boy.

[Ponce]: It was—[] that shit was deeper than what you know, my boy.

[Rafael]: Ah really.

[Ponce]: Real talk.

[Rafael]: Alright.

[Ponce]: It was deeper than what you know, my boy. It wasn't just some shit, oh, we need to go over here and do. That shit was for a reason, my boy.

[Rafael]: Yeah."

one .32 caliber bullet. Police recovered no firearms connected to the killings.

A gang expert testified that Ponce and Rafael were active members of the Nuthood Watts gang, and the gang's primary activities included robberies, assaults, shootings, theft, and narcotics sales. In response to a hypothetical question based on the Long Beach murders, the expert opined that the murders benefited the gang by bolstering the gang's reputation, and intimidating potential witnesses against the gang.

The jury convicted Rafael and Ponce on all counts, and returned true findings as to the gang enhancements and special circumstances. The jury found true the firearm enhancements with respect to the murders of Neumeier and Shraifat, and the kidnapping. The court sentenced Rafael to five consecutive terms of life without the possibility of parole, plus two consecutive terms of 25 years to life for the firearm enhancements on the two murder counts, plus a consecutive term of 18 years for the kidnapping count. The court stayed the gang enhancements as to counts 1 through 5. The court also stayed the firearm enhancement as to the kidnapping count but imposed a 10-year gang enhancement added to the high term of eight years. Rafael timely appealed.

DISCUSSION

Rafael makes five arguments on appeal: (1) the trial court abused its discretion in denying his motion to sever his trial from Ponce's, (2) the court erred in admitting Ponce's out-of-court statements against Rafael, (3) there was insufficient evidence that the primary activities of the Nuthood Watts gang were criminal acts, (4) the court should review the superior court's ruling sustaining a detective's claim of privilege, and (5) Rafael is

entitled to 362 more days of pre-sentence custody credits. Respondent does not oppose arguments (4) and (5), therefore, we focus our discussion on Rafael's first three arguments, which we conclude are without merit. We also address respondent's argument that the case must be remanded to allow the trial court to exercise its authority to impose or strike the gang enhancements as to counts 1 through 5.

1. *The Motion to Sever Trial Was Correctly Denied*

Rafael argues severance of the trial was mandated because he was prejudiced by his association with Ponce, and the overwhelming evidence against Ponce impermissibly bolstered the prosecution's weak case against Rafael.

a. *The Law*

Section 1098 provides, "When two or more defendants are jointly charged with any public offense, whether felony or misdemeanor, they *must* be tried jointly, unless the court order[s] separate trials." Our Legislature has thus " ' "expressed a preference for joint trials." [Citation.]' [Citation.]" (*People v. Bryant, Smith and Wheeler* (2014) 60 Cal.4th 335, 379 (*Wheeler*).) "Joint trials are favored because they 'promote [economy and] efficiency' and ' "serve the interests of justice by avoiding the scandal and inequity of inconsistent verdicts." ' [Citation.] When defendants are charged with having committed 'common crimes involving common events and victims,' . . . the court is presented with a ' "classic case" ' for a joint trial. [Citation.]" (*People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 40 (*Coffman*).)

Severance may be called for when " 'there is a serious risk that a joint trial would compromise a specific trial right of one of the defendants, or prevent the jury from making a reliable judgment about guilt or innocence.' [Citations.]" (*Coffman*,

supra, 34 Cal.4th at p. 40.) " '[T]he court may, in its discretion, order separate trials "in the face of an incriminating confession, prejudicial association with codefendants, likely confusion resulting from evidence on multiple counts, conflicting defenses, or the possibility that at a separate trial a codefendant would give exonerating testimony." [Citations.]' " (*Wheeler*, *supra*, 60 Cal.4th at p. 379.) However, "less drastic measures than severance, such as limiting instructions, often will suffice to cure any risk of prejudice. [Citation.]" (*Coffman*, at p. 40.)

"We review a trial court's denial of a severance motion for abuse of discretion based on the facts as they appeared at the time the court ruled on the motion. [Citation.]" (*Wheeler*, *supra*, 60 Cal.4th at p. 379.) "Even if a trial court abuses its discretion in failing to grant severance, reversal is required only upon a showing that, to a reasonable probability, the defendant would have received a more favorable result in a separate trial. [Citation.]" (*Coffman*, *supra*, 34 Cal.4th at p. 41.)

b. *Trial Court Proceedings*

Prior to trial, Rafael moved to sever, pointing to the "overwhelming" evidence against Ponce and arguing that evidence would taint Rafael by association, and unfairly bolster the weak case against Rafael. The prosecution opposed the motion, responding that, because the same evidence showed that Rafael was equally culpable in the encampment murders, there was no guilt by association. The trial court denied the motion, reasoning that Rafael and Ponce were charged with the same crimes, and Ponce's admissions were cross-admissible. The court further found that evidence that Ponce alone murdered Tony Bledsoe on a separate occasion would not unduly prejudice Rafael

given that he and Ponce were already accused of five separate murders.

c. *The Trial Court Did Not Abuse its Discretion in Denying Severance*

Rafael argues that severance was required because the evidence against Ponce was "compelling and highly inflammatory" and "obscure[d] the weakness of" the case against Rafael. In support of this argument, Rafael relies on Ponce's identification of Rafael as the second Long Beach killer to Tanabe and the informant, and Ponce's graphic descriptions of both the Long Beach and Bledsoe murders.

Rafael also contends the joint trial was unfair because Ponce's inflammatory statements invited the jury to find Rafael guilty by association. He argues the evidence against him was weak compared with that against Ponce, the more senior member of their gang who engaged in a "violent and sadistic way of life." According to Rafael, by being tried with Ponce, Rafael "could not avoid being unfairly smeared with the same brush." We disagree.

The record does not support the accusation that the jury would have found Ponce's guilt so overwhelming compared to Rafael's that it would have convicted Rafael simply because of their association. The evidence was that both defendants took an active role in the commission of the murders. Ponce sought out Villacana because of "bad blood" between them, and Rafael willingly accompanied him as he hunted Villacana down. While Ponce was executing Villacana and his girlfriend, Rafael gunned down all potential witnesses. Although Ponce gave vivid descriptions of his murders, and Rafael was more taciturn, both made statements indicating they had committed multiple brutal murders. This was not a situation where one defendant was

marginally involved and the other defendant actively perpetrated the crimes.

Similarly unavailing is Rafael's claim that the case against Ponce impermissibly bolstered the weak case against him. The case against Rafael was not weak: he made multiple incriminating statements in jail, displaying knowledge of the Long Beach killings and bragging about his own murders. Rafael argues that "the risk was that the jury would accept the prosecution's claim that [he] was the second Long Beach killer based merely on the evidence that he was a junior member of Ponce's gang who was familiar with the state of the evidence concerning those murders." However, this argument mischaracterizes Rafael's recorded statements—Rafael did not just indicate familiarity with the murders; rather, he agreed with Ponce that "no one" knew about the murders, and when Ponce said "Only me and you know," Rafael agreed and promised not to "fold." This evidence did not suggest that Rafael was merely one of multiple junior gang members familiar with the murders; it strongly suggested he was the second shooter.

Moreover, that a joint trial may have made it more likely that Rafael would be convicted is not itself a sufficient reason to mandate severance. "Defendants are constitutionally entitled to a fair trial, not one that gives them the best possible chance for an acquittal. An essential goal of a trial is that the fact finder determine what happened through a fundamentally fair and reliable process. . . . [S]everance is not required [] merely because properly joined charges might make it more difficult for a defendant to avoid conviction compared with his or her chances were the charges to be separately tried.' [Citation.]" (*Wheeler*, *supra*, 60 Cal.4th at p. 381.)

Rafael cites to *People v. Letner* (2010) 50 Cal.4th 99 in support of his argument that the prejudicial association with Ponce necessitated separate trials. *Letner* does not assist Rafael. In *Letner*, the defendants were charged with the same murder, and the trial court denied severance. (*Id.* at p. 149.) The Supreme Court affirmed, and rejected the argument that "the prejudicial nature of the association between the two defendants" justified severance. (*Id.* at p. 151.) The trial court summarized the evidence against the codefendants as follows: "both defendants knew [the victim] was alone at her house and possessed a car and cash for the rent. Both defendants were found traveling out of town in the victim's car on the night of the murder, and their belongings were found in the trunk. They both provided conflicting accounts of where they were going. They subsequently abandoned the car, leaving their possessions inside, and fled. Moreover, forensic evidence discovered at the scene and in the victim's car pointed toward each defendant's involvement in the murder. Finally, both defendants made statements that were self-incriminating . . . . [Citation.]" (*Ibid.*)

The *Letner* court found that there was "sufficient independent evidence of guilt" such that "the quantity and quality of the evidence implicating one defendant compared to the other" was not so "dissimilar that the jury likely convicted both defendants based upon the strength of the evidence against only one of them." (*Letner, supra,* 50 Cal.4th at pp. 153, 151.) The court further observed that "the jury repeatedly was instructed at the conclusion of the guilt phase that it must consider separately the evidence against each defendant and reach a verdict as to each based solely upon the evidence

admitted against him. . . . [W]e presume the jury followed these instructions. [Citation.]" (*Id.* at p. 152.)

As in *Letner*, the evidence implicating Rafael and Ponce was not so dissimilar that it created the likelihood the jury would convict Rafael based only upon the strength of the evidence against Ponce. Both men made incriminating statements, both were in the same criminal street gang, and there was no physical evidence tying Ponce, but not Rafael, to the crime. The jury here was also repeatedly instructed to consider separately the evidence against each defendant. We presume the jury followed these instructions. (See *Coffman*, *supra*, 34 Cal.4th at pp. 43–44.)

Lastly, in support of his separate argument that the joint trial deprived him of constitutional due process, Rafael points to the prosecution's introduction of Ponce's out-of-court statements identifying Rafael as the second killer. Rafael argues this was inadmissible hearsay, and rendered his trial fundamentally unfair. As explained below, we reject the argument that the prosecution was able to present evidence against Rafael in a joint trial that could not have been presented at a separate trial.

Considering all the circumstances before the trial court, the relevant factors weighed in favor of a joint trial: Rafael and Ponce were charged with the same crimes that they committed together, there was no danger of jury confusion, there were no conflicting defenses, and there was no suggestion that Ponce would have provided testimony exonerating Rafael had they been tried separately. (See *Wheeler*, *supra*, 60 Cal.4th at p. 379.) Defendants were charged with having committed "common crimes involving common events and victims;" as such, this was a "classic case" for a joint trial. (*Coffman*, *supra*, 34 Cal.4th at

p. 40.) Accordingly, we find no abuse of discretion in the trial court's denial of severance. For the same reasons, the joint trial did not deprive Rafael of his right to due process.

2. *The Admission of Statements Against Interest Was Proper*

Rafael contends the trial court prejudicially abused its discretion in admitting Ponce's statements to Tanabe and the informant as statements against interest under Evidence Code section 1230.

a. *The Law*

Hearsay is generally inadmissible unless it falls under an exception. (Evid. Code, § 1200, subd. (b).) One exception, found in Evidence Code section 1230, permits the admission of any statement that, "when made, . . . so far subjected [the declarant] to the risk of . . . criminal liability . . . that a reasonable man in his position would not have made the statement unless he believed it to be true." (Evid. Code, § 1230.)[5]

"To demonstrate that an out-of-court declaration is admissible as a declaration against interest, '[t]he proponent of such evidence must show that the declarant is [1] unavailable, that [2] the declaration was against the declarant's penal interest

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[5] Evidence Code section 1230 provides, "Evidence of a statement by a declarant having sufficient knowledge of the subject is not made inadmissible by the hearsay rule if the declarant is unavailable as a witness and the statement, when made, was so far contrary to the declarant's pecuniary or proprietary interest, or so far subjected him to the risk of civil or criminal liability, or so far tended to render invalid a claim by him against another, or created such a risk of making him an object of hatred, ridicule, or social disgrace in the community, that a reasonable man in his position would not have made the statement unless he believed it to be true."

when made and that [3] the declaration was sufficiently reliable to warrant admission despite its hearsay character.' [Citation.]" (*People v. Grimes* (2016) 1 Cal.5th 698, 711 (*Grimes*).) We discuss each of the *Grimes* elements next.

Unavailability of declarant. Rafael does not challenge the implied finding that his codefendant Ponce was legally unavailable. (*See People v. Fuentes* (1998) 61 Cal.App.4th 956, 961–962 [a declarant who asserts his Fifth Amendment privilege not to testify is "unavailable" within meaning of the statute governing admissibility of declarations against interest].)

Against penal interest. Evidence Code section 1230 "does not authorize the admission of 'those portions of a third party's confession that are self-serving or otherwise appear to shift responsibility to others.' . . . Nor 'does [it] . . . allow admission of non-self-inculpatory statements . . . made within a broader narrative that is generally self-inculpatory.' [Citations.]" (*People v. Gallardo* (2017) 18 Cal.App.5th 51, 71.) Thus, "a hearsay statement 'which is in part inculpatory and in part exculpatory (e.g., one which admits some complicity but places the major responsibility on others) does not meet the test of trustworthiness and is thus inadmissible." (*People v. Duarte* (2000) 24 Cal.4th 603, 612.)

" 'This is not to say that a statement that incriminates the declarant and also inculpates the nondeclarant cannot be specifically disserving of the declarant's penal interest.' [Citation.] Our Supreme Court [has] explained, for example, that the exception permits the 'admission of those portions of a confession that, though not independently disserving of the declarant's penal interests, also are not merely "self-serving," but "inextricably tied to and part of a specific statement against

penal interest." ' [Citation.]" (*Gallardo*, *supra*, 18 Cal.App.5th at p. 71.)

"[W]hether a statement is self-inculpatory or not can only be determined by viewing the statement in context. [Citation.]" (*Grimes*, *supra*, 1 Cal.5th at p. 716.). A trial court "may take into account not just the words but the circumstances under which they were uttered, the possible motivation of the declarant, and the declarant's relationship to the defendant." (*Id.* p. 711.) "Ultimately, courts must consider each statement in context in order to answer the ultimate question under Evidence Code section 1230: Whether the statement, even if not independently inculpatory of the declarant, is nevertheless against the declarant's interest, such that 'a reasonable man in [the declarant's] position would not have made the statement unless he believed it to be true.' " (*Id.* at p. 716.)

Trustworthiness of the declaration. "There is no litmus test for the determination of whether a statement is trustworthy and falls within the declaration against [penal] interest exception. The trial court must look to the totality of the circumstances in which the statement was made, whether the declarant spoke from personal knowledge, the possible motivation of the declarant, what was actually said by the declarant and anything else relevant to the inquiry." (*People v. Greenberger* (1997) 58 Cal.App.4th 298, 334.)

b. Standard of Review

"We review a trial court's decision whether a statement is admissible under Evidence Code section 1230 for abuse of discretion. [Citation.]" (*Grimes*, *supra*, 1 Cal.5th at p. 711.)

c. *The Trial Court Proceedings*

Prior to trial, the prosecution moved to admit (1) Ponce's statements to Tanabe, (2) the 15 clips from the informant's conversations with the codefendants, and (3) a clip from a recorded phone conversation between Ponce and Tanabe. Rafael opposed the motion on the grounds that Ponce's statements to Tanabe were unreliable, and the recordings were inadmissible hearsay. The trial court found the statements were trustworthy and against the speaker's interests, and admitted them as declarations against interest.

d. *The Trial Court Did Not Err in Admitting Ponce's Extrajudicial Comments as Statements Against Interest*

1. The trial court gave individualized consideration to the challenged statements.

Rafael first objects to the method by which the trial court ruled that Ponce's statements to the informant (not to Tanabe) were admissible. Rafael argues the trial court erred in making an overarching ruling that all the statements were admissible because the court was required to evaluate each statement individually. In support of this argument, Rafael cites to *Gallardo, supra,* 18 Cal.App.5th 51.

In *Gallardo*, the trial court admitted the entire 40-page transcript of a declarant's jailhouse confession. (*Gallardo*, *supra*, 18 Cal.App.5th at p. 72.) The trial court did not "independently assess whether each statement" implicating the defendants was against the declarant's penal interest at the time he made it. (*Ibid.*) The Court of Appeal concluded that the court prejudicially erred in admitting certain evidence, and in anticipation of a retrial, directed the trial court to "conduct an individualized

inquiry to determine whether each statement the prosecution seeks to admit was sufficiently against" the declarant's interest to warrant admission under Evidence Code section 1230. (*Id.* at p. 77.)

We agree with the principle expressed in *Gallardo* but find the case distinguishable. Here, the trial court did not admit pages of transcript without conducting an individualized review of the statements. The trial court admitted 15 clips of conversation totaling 41 pages out of hundreds of transcript pages. Over 20 of the pages admitted were partial pages. The court's comments also indicate it reviewed the statements individually: for example, the court directed the prosecution to redact portions that were unduly prejudicial. The court complied with *Gallardo*'s mandate.

2. The Trial Court Properly Admitted the Statements

Rafael argues that Ponce's statements to Tanabe identifying Rafael as the second killer and "significant portions of the *Perkins* operation recordings" were not against Ponce's interest because they were collateral to Ponce's admission of murder, and shifted blame to Rafael.[6]

We first observe that Rafael's appellate briefs suffer from the same defect he claims, without justification, the trial court employed – Rafael lumps together all the jailhouse recorded statements and the statements to Tanabe and argue none is

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[6] By "*Perkins* operation" we understand counsel to have been referring to *Illinois v. Perkins* (1990) 496 U.S. 292, 300 in which the United Supreme Court upheld the validity of jailhouse conversations between a suspect and an informant even without warnings under *Miranda v. Arizona* (1966) 384 U.S. 436.

admissible. This is demonstrably not so. For example, some of the admitted statements were made by Rafael himself, e.g. Rafael will not fold, overall Rafael had committed a total of four murders, and his agreement that the murders were necessary.

Tanabe's testimony at trial. Rafael contends that Tanabe's testimony about Rafael's "role in Ponce's story was merely a collateral detail, just as the killing of three victims in addition to L.V. and his girlfriend was, in Ponce's view, merely a collateral detail—the elimination of any potential witnesses." Tanabe testified that Ponce claimed to be the instigator and leader of the plan to kill Villacana *and* eliminate witnesses. It was Ponce who fought with Villacana, and it was Ponce's idea to go to the encampment to exact revenge on him.

That Ponce told Tanabe that Rafael accompanied him, shooting three of the victims because they were witnesses to Villacana's murder, was not collateral to Ponce's crimes—it directly inculpated Ponce as an aider and abettor to those murders in addition to the murders that Ponce personally committed. Although Rafael contends that Ponce's story would have been "substantially the same" without "the specific identity of the second killer," courts are not required to admit "no more of a declarant's statement than [is] necessary to expose him to criminal liability" and "mechanically sever and excise the rest . . . ." (*Grimes*, *supra*, 1 Cal.5th at p. 717.)

The jailhouse recordings. With respect to the recorded conversations played for the jury, we observe first that in his appellate briefs Rafael references only two specific statements he contends should not be admitted: (1) Ponce's statements on a recorded jail call that "C"—presumably Rafael whose moniker was Chato—was arrested and Ponce hoped "C" would not say

anything under the pressure of interrogation, and (2) Ponce's statement to the informant that the police showed Tanabe "my little homey's picture that was with me that did that shit." The first excerpt was self-inculpatory and did not assign greater blame to Rafael or shift responsibility to him. Rather, examined in context, the statement was Ponce's expression of concern that "C" would implicate him in some way. It did not directly point to Rafael as the perpetrator of three murders. Ponce told his friend, "I just need help," in response to which, the friend attempted to reassure him: "Naw . . . as far as C saying anything . . . C ain't sayin' nothin', man."

As to Ponce's statement that the police showed Tanabe Rafael's ("my little homey's") picture, Ponce said this in the context of recounting how he first told Tanabe about the murders over the phone. The police had recorded that phone call, and played it for Tanabe. As on the other occasions in which Ponce bragged about his crimes, in this excerpt, Ponce casts himself as primarily responsible for the killings: "I went over there and handled business . . . you will see it on the news . . . I did that . . . I made it around home base five different times . . . my little homey[] . . . was with me that did that shit . . . ." The statement about the "little homey" did not diminish Ponce's responsibility, rather, it was part of Ponce's boasting about orchestrating the killings.

As to the jailhouse recordings generally, Rafael cites to *Gallardo*, *supra*, 18 Cal.App.5th 51 for the proposition that a defendant's identification of other individuals as the perpetrators is not admissible when it does not "increase" his "criminal culpability." (*Id.* at p. 74.) In *Gallardo*, a defendant identified two of his codefendants as participants in shooting. (*Id.* at p. 73.)

In a conversation with jailhouse informants, the speaker said his codefendants committed the shooting while he waited around the corner in the "getaway" car. (*Id.* at pp. 73–74.) The Court of Appeal concluded the statements were too self-serving and unreliable to qualify as declarations against the speaker's penal interest. (*Ibid.*) Although the speaker did "effectively 'admit[] some complicity' by demonstrating [he] had knowledge of what had occurred . . . the statements nonetheless 'plac[ed] the major responsibility' on his codefendants. [Citations.]" (*Id.* at p. 74.)

This is not *Gallardo*. Here, Ponce's statements did not place the major responsibility on Rafael. Far from it – in Ponce's statements to both Tanabe and the informant, Ponce consistently portrayed himself as the principal actor and mastermind of five heinous killings, and Rafael as the younger gang member following his lead. His identification of Rafael as the other shooter was tied to his description of the murders as carried out jointly by both of them. He did not attempt to minimize his role in the murder, rather he cast himself as the hardened criminal and Rafael as the novice taking direction from him. (*See People v. Cortez* (2016) 63 Cal.4th 101.) Nothing he said shifted culpability away from him. Essentially, even though he shot only two people, Ponce proudly proclaimed to the mastermind of five murders in all, including three committed by Rafael.

For example, Ponce consistently claimed the murders were his idea: it was his plan to murder Villacana, and Ponce directed Rafael to shoot at the same time and to aim for the head. The circumstances in which the statements were made also do not provide reason to believe that Ponce made the statements to deflect responsibility—he was bragging about having committed murder, and about his "little homey" taking his orders in order to

match Ponce's violent reputation. The two even discussed how many murders they had committed. Thus, Ponce's fingering of Rafael neither minimized his own role in the murders nor mitigated his own blameworthiness.

Rafael argues that the statements were not trustworthy because Ponce had a motive to shift blame to Rafael due to the culture of having younger gang members accept blame for crimes committed by senior members. Rafael cites to Ponce's comments berating Rafael for not accepting responsibility for the firearm seized by the police when they were arrested in 2010. In that conversation, Ponce explained that Rafael, presumably having a lesser criminal record than Ponce, would serve less time for the crime. The court in *Grimes* similarly observed that, a "member of a criminal street gang, for example, may choose to take the fall for fellow gang members by making a confession that exculpates them." (*Grimes*, *supra*, 1 Cal.5th at p. 716.)

This purported practice in gang culture has no application to Ponce's conversations with another inmate. As Rafael acknowledges, it is "speculation" that Ponce would have identified Rafael as his partner in crime as a rehearsal for potential "future reports." Even if there was some benefit to Ponce when Ponce said Rafael committed three murders, at most that benefit was within the gang culture alone. It had nothing to do with very real harm to Ponce's penal interest which was that Ponce had placed himself squarely on the hook for all five murders.

Lastly, even if we were to assume the trial court improperly admitted some of the statements, Rafael cannot show a more favorable outcome would have been reasonably probable if this evidence had been excluded. (See *People v. Masters* (2016)

62 Cal.4th 1019, 1064.) Rafael discussed the details of the encampment murders with Ponce, swore to keep the information secret, agreed that the murders were necessary, worried about the investigation, and compared how many kills he had relative to Ponce. Any error was undoubtedly harmless.

3. *Substantial Evidence Supports the Gang Enhancement*

Rafael argues the prosecution failed to prove that the Nuthood Watts gang is a criminal street gang as defined in section 186.22, subdivision (f) because there was insufficient evidence that the gang's "primary activities" included criminal acts defined in subdivision (e).

a. *The Law*

The California Street Terrorism Enforcement and Prevention Act (STEP Act; § 186.20, et seq.) provides for enhanced punishment for "any person convicted of a felony . . . committed for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members." (§ 186.22, subd. (b)(4).) As relevant here, the STEP act mandates a 10-year term for enumerated violent felonies, such as murder and kidnapping. (§§ 186.22, subd. (b)(1)(C); 677.5, subds. (c)(1) & (c)(14).) Section 190.2, in turn, sets forth a special circumstance for a sentence of death or life without the possibility of parole if, the "defendant intentionally killed the victim while the defendant was an active participant in a criminal street gang . . . and the murder was carried out to further the activities of the criminal street gang." (§ 190.2, subd. (a)(22).)

Both section 186.22, subdivision (b)(1) and section 190.2, subdivision (a)(22) require the prosecution to establish the existence of a "criminal street gang." As is relevant here, to

qualify as a "criminal street gang," one of the gang's primary activities must be the commission of one or more of certain crimes listed in the gang statute. (§ 186.22, subd. (f); *People v. Sengpadychith* (2001) 26 Cal.4th 316, 322 (*Sengpadychith*).)

"Sufficient proof of the gang's primary activities might consist of evidence that the group's members *consistently and repeatedly* have committed criminal activity listed in the gang statute. Also sufficient might be expert testimony, as occurred in [*People v.*] *Gardeley* [(1996)] 14 Cal.4th 605 . . . . There, . . . [t]he gang expert based his opinion on conversations he had with [the defendant] and fellow gang members, and on 'his personal investigations of hundreds of crimes committed by gang members,' together with information from colleagues in his own police department and other law enforcement agencies. [Citation.]" (*Sengpadychith*, *supra*, 26 Cal.4th at p. 324.)

We review a challenge to the sufficiency of the evidence to support an enhancement under the substantial evidence standard. (*People v. Albillar* (2010) 51 Cal.4th 47, 59–60.)

b. *Trial Court Proceedings*

A gang expert testified about the Nuthood Watts gang for the prosecution, and opined that Ponce and Rafael were members of the gang. According to this expert, the gang's primary activities were "robberies, vandalism, assault, which can include shootings . . . that may lead to murder, vehicle thefts, narcotic sales, [and] illegal possession of firearms." Based on court dockets of criminal convictions, the expert opined that those crimes were committed by Nuthood Watts gang members. When presented with a hypothetical situation similar to the Long Beach murders, the expert opined that the murders benefitted the

Nuthood Watts gang by bolstering the gang's reputation, and intimidating potential witnesses.

c. *Substantial Evidence Supports the "Primary Activities" Finding*

Rafael argues the prosecution did not provide sufficient evidence of Nuthood Watts's primary criminal activities because the gang expert provided only a (1) "brief summary of his professional background," (2) gave "no specific examples of any of the offenses he listed" other than the two predicates and the Long Beach murders, and (3) did not indicate what his involvement was with those predicates or any "specific investigation." We conclude the gang expert established adequate foundation for his opinion, and substantial evidence supports the finding that Nuthood Watts's primary activities included the crimes enumerated in section 186.22, subdivision (f).[7]

The gang expert provided a sufficient factual basis for his opinions about the gang. He had worked for the County Sheriff's gang unit for 13 years, held an associate's degree in criminal justice, had completed 40 hours of training in gangs, testified as a gang expert on 15 prior occasions, and had made personal contact with thousands of gang members. He had monitored the Nuthood Watts gang as one of the gangs in his jurisdiction, was familiar with the Nuthood Watts gang symbols, and knew the gang's street-by-street boundaries.

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[7] Respondent contends that Rafael has forfeited the argument that there was insufficient foundation for the expert's opinion. Because Rafael's argument is intertwined with the claim that there was insufficient evidence of the gang enhancements, we will address the foundation point as well.

In support of the argument that the expert failed to lay a foundation for his opinions, Rafael relies on *In re Alexander L.* (2007) 149 Cal.App.4th 605, which reversed a gang enhancement because the expert's opinion was not supported by a sufficient foundation. *Alexander L.* is distinguishable. In that case, a gang expert testified that he knew that members of the defendant's gang had been involved in certain crimes, but did not state how he knew. (*Id.* at p. 611.) "No specifics were elicited as to the circumstances of these crimes, or where, when, or how [the expert] had obtained the information." (*Id.* at pp. 611–612.) The expert did not opine as to what the gang's "primary" activities were. (*Ibid.*)

Here, by contrast, the expert testified that the gang's primary activities included robberies, assaults, shootings, theft, and narcotics sales. The expert also explained that his opinion was based on information he obtained while working in the County Sheriff's gang unit and monitoring the Nuthood Watts gang. This evidence was substantial evidence of the "primary activities" element of the definition of a criminal street gang. (See *People v. Prunty* (2015) 62 Cal.4th 59, 82 [gang expert's testimony the defendant's gang engaged "in various criminal practices, including homicide, assault, and firearms offenses" was "likely sufficient" to establish "primary activities" element]; *Sengpadychith*, *supra*, 26 Cal.4th at p. 324 [the "primary activities" element may be satisfied by an expert testimony that the defendant's gang " 'was primarily engaged in . . . statutorily enumerated felonies' "].) There is no requirement that a gang expert give specific examples of the primary criminal activities or discuss specific investigations in which he had been involved in order to prove the gang's "primary activities" element. (Cf.

§ 186.22, subd. (e) ["a pattern of gang activity" may be established by two or more incidents].)

4. *Review of the Sealed Transcript*

Rafael requests, and respondent does not object to, this court's review of the trial court's decision to seal portions of the record regarding Detective Hardiman's claim of privilege. Detective Hardiman supervised the *Perkins* operation in which an undercover informant recorded his conversations with Ponce and Rafael. Detective Hardiman claimed that aspects of that operation were privileged under Evidence Code sections 1040 and 1042. The trial court reviewed the privilege claim in camera. We have reviewed the record and conclude that the trial court did not abuse its discretion in rejecting disclosure of the materials. (See *People v. Landry* (2016) 2 Cal.5th 52, 74.)

5. *Remand for Limited Resentencing*

Respondent argues that the trial court erred by staying the 10-year section 186.22, subdivision (b)(1)(C) gang enhancement in counts 1 through 5 because the enhancement is mandatory and must be imposed when found true unless the trial court strikes it in the interests of justice under section 186.22, subdivision (g). (*People v. Le* (2015) 61 Cal.4th 416, 423.) We agree that remand is required to allow the court to decide whether to impose the gang enhancement or strike it.

Section 186.22, the gang enhancement statute, "provides different levels of enhancement for the base felony if that felony is 'committed for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members. . . .' (§ 186.22, subd. (b)(1).) If the base felony qualifies as a violent felony under the list of felony crimes contained in

section 667.5, then 'the person shall be punished by an additional term of 10 years.' (§ 186.22, subd. (b)(1)(C).) . . . It is also important to note that the sentence enhancements in section 186.22, subdivision (b)(1) are mandatory—all three provisions specify that the additional punishment 'shall' be imposed. [Citation.]" (*Le*, *supra*, 61 Cal.4th at p. 423.)

The trial court erred by imposing and staying execution of the gang enhancement. Under section 186.22, the trial court was required to enhance Rafael's prison sentence by 10 years "absent a lawful reason not to do so." (*People v. Vega* (2013) 214 Cal.App.4th 1387, 1396.) One such reason is the court's discretion to "strike the additional punishment for the enhancement[ ] . . . in an unusual case where the interests of justice would best be served, if the court specifies on the record and enters into the minutes the circumstances indicating that the interests of justice would best be served by that disposition." (§ 186.22, subd. (g).) Although it may be stricken, the "gang enhancement may not be stayed." (*Vega*, at p. 1397.)

We therefore vacate the stay of the gang enhancement and direct the trial court on remand as to each count either to impose the enhancement or to strike it. (*People v. Lua* (2017) 10 Cal.App.5th 1004, 1020–1021.) If the court chooses to strike one or more of the gang enhancements, it must state its reasons for doing so on the record in accordance with section 186.22, subdivision (g).

6. *Rafael is Entitled to 362 Additional Days of Custody Credits*

Rafael argues, respondent concedes, and we agree that he is entitled to 362 additional days of pre-sentence custody credit. Rafael was arrested on June 24, 2011 and sentenced—2,400 days

later—on January 18, 2018. However, he was only given 2,039 days of pre-sentence custody credits. He is therefore entitled to an additional 362 days of custody credits. (See *People v. Browning* (1991) 233 Cal.App.3d 1410, 1412 [sentencing court must grant a defendant actual time credits both for the day of arrest and the day of sentencing.].)

DISPOSITION

The case is remanded for limited resentencing to allow the trial court to exercise its discretion to impose or strike the gang enhancements as to counts 1 through 5 in accordance with section 186.22, subdivision (g). The trial court is ordered to correct Rafael's credits to reflect that he is entitled to 2,401 days of pre-sentence custody credits. In all other respects, the judgment is affirmed.

RUBIN, P. J.

WE CONCUR:

BAKER, J.

MOOR, J.