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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

SITUE TOLUAO et al.,

Defendants and Appellants.

D058242

(Super. Ct. Nos. SCN233674-3,
SCN233674-2)

APPEALS from judgments of the Superior Court of San Diego County, Timothy M. Casserly, Judge. Affirmed.

Situe Tolua and Peni Siulua (together Defendants) appeal from judgments entered upon their convictions for murdering Joaquin Pruitt and attempting to murder Sean Oates. The jury also found true gang and other enhancements that were attached to the counts. Defendants assert a number of issues on appeal. Tolua complains that the trial court erred by (1) admitting certain gang evidence, (2) admitting evidence of Siulua's statements to an accomplice concerning Tolua's involvement in the crimes, (3) denying his request to sever the trial, (4) admitting evidence of statements he made to his friend

relaying a conversation with another gang member, (5) failing to hold an evidentiary hearing and denying his new trial motion, (6) denying his petition for release of juror information without setting a hearing and without making express findings, and (7) failing to strike a prior strike conviction under *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497 (*Romero*). Siulua raises similar issues concerning the trial court's admission of gang evidence, denial of the petition for release of juror information, and failure to make express findings on that petition.

We find no prejudicial errors warranting reversal of the convictions and thus affirm the judgments.

FACTUAL AND PROCEDURAL BACKGROUND

The Shooting

Defendants are members of the Deep Valley Bloods (Bloods) criminal street gang in Oceanside, which primarily consists of Samoan members. Their rival gang is the Deep Valley Crips (Crips), a predominantly African-American gang.

In June 2005, other Bloods members, including Patrick Johnson, Michael Linnan and Masi Toluao (Masi), visited the gravesite of Rusty Seau, who had been killed by a Crips member earlier that month. The gravesite had been burned. The men were angry that Rusty was killed and that his gravesite was desecrated. They discussed retaliation, with Masi suggesting that they shoot Crips members. Linnan offered the use of his car and Johnson stated that he would be the driver because, as an African-American, he could go into Crips territory without raising suspicions.

Later that evening, many Bloods members congregated at Masi's house on Arthur Avenue and continued discussing plans for the retaliation. Masi arranged for Johnson to obtain guns from another gang member. Johnson and Defendants went to Linnan's house, picked up Linnan's Ford Taurus, and then obtained the guns from another house.

Johnson and Defendants drove into the Whelan Ranch housing complex, a location where they were likely to find Crips members. Johnson got out of the car, approached a group of African-Americans and asked them for directions. Based on their response, Johnson believed they were Crips and returned to the car where he informed Defendants that the group was "crab niggers." Defendants "pump[ed] each other up."

Johnson pulled the car around a corner and saw the group of African-Americans approaching a Cadillac. Defendants then got out of the car and ran towards the Cadillac's location. While Johnson was waiting for Defendants, he heard gunshots. Defendants then ran back and jumped in the car. Toluao exclaimed, "Go, go. We just shot three people, and I kicked some girl in the head and domed somebody." Siulua stated that he shot the driver.

Oates was in the driver's seat of the Cadillac that night. He heard gunshots and then noticed that Pruitt, who was standing in front of the car, had been shot. Oates observed that a man had his hands on the car and was kicking underneath it. Oates was then shot through the passenger side window. Pruitt died at the scene that night, and Oates suffered a gunshot wound that fractured his clavicle.

At trial, Oates was unsure if there was more than one shooter; however, he previously told officers that there were multiple perpetrators. He did not get a good look

because he was trying to stay low in his seat. He described the one person that he saw as a heavy man wearing a white shirt, black beanie, and a bandana across his face. Oates also stated that the person had a dark skin tone and tight braids pressed along the side of his head that were similar to cornrows. Oates told officers that he thought the shooter was possibly a Black person.

Eyewitness Testimony

Brittney Patterson was with her friends, including Oates and Pruitt, on the night of the shooting. When she heard gunshots, Patterson ran to the front of the Cadillac and then got underneath it. Pruitt was on the ground in front of her. After the gunfire stopped, someone kicked Patterson in the head and then left.

Patterson saw and heard two people. Although she did not get a good look, Patterson described one of those people as a heavy Samoan male with two braids or cornrows. She also stated that the person was wearing a white shirt.

Around midnight on the morning of the shooting, Christine Dinwiddie, a resident of Whelan Ranch, heard 10 to 12 popping sounds like firecrackers. Dinwiddie looked out of her bedroom window and saw a white or silver four-door Toyota or Ford with its brake lights on and head lights off. According to Dinwiddie, there were yellow street lights on in the area that changed the appearance of vehicles by casting a hue on them. After noticing a man in the driver's seat, Dinwiddie saw two men run toward the vehicle. Although Dinwiddie could not identify the race of the men, she described them as neither White nor African-American.

Around the same time, Jeff Dresser, another resident of Whelan Ranch, heard several gunshots. Dresser looked out of his window and saw a four-door sedan with its head lights off. The car appeared to be silver, champagne or cream, but it was hard to make out the color because of the yellow street lights. Dresser then saw two men "shuffling" toward the vehicle and heard one of them say to the other, "Hurry up, nigga." One of the men had his hair pulled back, possibly braided in cornrows. Dresser assumed the men were Black because they used the term "nigga" and were in a Crips neighborhood.

Dresser accompanied police officers to a storage facility several months after the incident. He identified a Ford Taurus that appeared to be the car he saw on the night of the shooting. Dresser particularly noticed that the car in the storage facility was the same color and had similar wrap around tail lights as the car he previously saw at the scene of the crime. Dresser told officers that he was 75% sure of his identification.

Rachel Bourne also lived in Whelan Ranch at the time of the shooting. Around midnight, Bourne heard gunshots and went outside onto her balcony. Bourne noticed a four-door Ford Contour or Taurus with its engine running. She heard someone say something similar to "we got them" and then saw two men get into the car.

Bourne eventually called 911 and described the two men that she saw as "lighter skin black guys." Later that night, Bourne heard Patterson tell the police that the men were Samoan. Bourne told officers that she was uncertain of the race of the two individuals, but that they could have been Samoan, Mexican or light skinned Black men. A few days after the incident, Bourne told officers that although other people indicated

the men were Samoan, she still thought they were Black. At trial, Bourne stated that one of the men had a complexion similar to a Mexican, Samoan or light skinned Black person and the other man was slightly darker. She also stated that one of the men had his hair in a ponytail or braids.

Forensic Evidence

The police found a black glove and a brochure in Linnan's Taurus. Toluao's fingerprint was on the brochure. A DNA test on the glove revealed that Siulua was a possible contributor of the DNA and Toluao could not be excluded.

Officers also found numerous items near the location of the shooting, including a bandana, beanie, jeans, and sneakers. The beanie had a mixture of DNA on it from at least two people and Toluao could not be excluded as a contributor. DNA obtained from the jeans and sneakers matched Toluao's DNA profile.

DISCUSSION

I. Admission of Gang Evidence

Defendants argue the trial court abused its discretion in admitting evidence of the history of a feud between the Bloods and the Crips because the evidence should have been excluded under Evidence Code section 352 as unduly prejudicial and violated their rights to a fair trial. (Undesignated statutory references are to the Evidence Code.)

Toluao separately contends the trial court erred in admitting evidence of letters and rap lyrics concerning Rusty's murder. Siulua separately contends the trial court erred in admitting evidence that he was with Jimmy Malo, another Bloods member, on the night that Malo was shot by the police.

A. General Principles

Before examining Defendants' claims as to the individual items admitted by the trial court, we briefly outline the principles guiding our review. The trial court is vested with wide discretion in deciding the relevance of specific items of evidence and its ruling will not be disturbed absent an abuse of discretion. (*People v. Green* (1980) 27 Cal.3d 1, 19, overruled on other grounds by *People v. Hall* (1986) 41 Cal.3d 826, 834.) A trial court has similar discretion to exclude evidence under section 352 if it decides the prejudicial impact of the evidence outweighs its probative value. (*People v. Champion* (1995) 9 Cal.4th 879, 914, disapproved on other grounds by *People v. Combs* (2004) 34 Cal.4th 821, 860.) The court's determination under section 352 will not be reversed on appeal absent a clear showing of abuse of discretion. (*People v. Siripongs* (1988) 45 Cal.3d 548, 574.)

Gang evidence, including evidence about a defendant's gang membership and expert testimony about gangs, is generally admissible if it is relevant to a material issue in the case other than criminal disposition, is not more prejudicial than probative, and is not cumulative. (*People v. Albarran* (2007) 149 Cal.App.4th 214, 223; *People v. Avitia* (2005) 127 Cal.App.4th 185, 192.) "Evidence of the defendant's gang affiliation—including evidence of the gang's territory, membership, signs, symbols, beliefs and practices, criminal enterprises, rivalries, and the like—can help prove identity, motive, modus operandi, specific intent, means of applying force or fear, or other issues pertinent to guilt of the charged crime." (*People v. Hernandez* (2004) 33 Cal.4th 1040, 1049.)

However, trial courts are required to carefully scrutinize evidence of a defendant's gang membership because it creates a risk the jury will improperly infer the defendant has a criminal disposition and is therefore guilty of the charged crime. (*People v. Carter* (2003) 30 Cal.4th 1166, 1194.) Thus, even relevant gang evidence may have a highly inflammatory effect on the jury. (*People v. Avitia, supra*, 127 Cal.App.4th at p. 192.) Given this high potential for prejudice, gang evidence should not be admitted if it is only tangentially relevant to the charged offenses. (*People v. Albarran, supra*, 149 Cal.App.4th at p. 223.)

B. History of a Feud between the Bloods and the Crips

Defendants stipulated that the Bloods was a criminal street gang and that they were documented members of that gang. The prosecutor objected to the stipulation. The trial court nevertheless accepted the stipulation, explaining that it would "limit some of the evidence that [wa]s necessary to be presented in this case," such as the purpose of the Bloods and predicate offenses. However, the court stated that the prosecution's gang expert could testify as to "other topics going to the issue of motive and intent."

Thereafter, the gang expert testified regarding the rivalry between the Bloods and the Crips. According to the expert, the murder of Pearl Seau in 2002 by a Crips member sparked a series of violent shootings between the gangs. For example, in 2004, multiple Bloods members stole a vehicle in Carlsbad and then did a drive-by shooting at the residence of a Crips member, firing 30 rounds from an automatic rifle into the residence. The Bloods members later drove the same vehicle near Whelan Ranch and fired an automatic rifle into the home of another Crips member. They then returned to Arthur

Avenue, the location of Masi's house. Later in 2004, Bloods members drove from Arthur Avenue into the Whelan Ranch area. They approached a group of people and then chased down and shot a Black male. Again, the Bloods members returned to Arthur Avenue.

Here, Defendants argue that the trial court erred in admitting evidence regarding multiple shootings by the Bloods that occurred prior to the incident in this case because the prejudicial effect outweighed any probative value and created an unfair risk that the jury would infer that they had a criminal disposition. The People contend that the trial court properly admitted the evidence because the ongoing war between the Bloods and the Crips was relevant to Defendants' motive and intent. We are not convinced that the extensive evidence offered by the gang expert was relevant to Defendants' motive. Rather, the function of that evidence was to show a criminal disposition.

In our view, the evidence demonstrated that the motive for the crimes in this case was to seek revenge for Rusty's murder and the desecration of his gravesite. Just before the shooting, Bloods members visited Rusty's grave and were angry about his death and the desecration. They discussed retaliation, with Masi suggesting that they shoot Crips members. The gang expert testified that desecration of a gravesite by a rival gang is a sign of disrespect and that a retaliatory shooting would benefit the gang. Specifically, the expert explained that the crime would benefit the gang because "the gang would be able to exact revenge for one of their own members who would not be in position to exact that revenge" and it would notify the rival gang that disrespect was not tolerated. Thus, Rusty's murder was directly relevant to the issue of motive and intent.

The trial court also admitted evidence of multiple other shootings that had little relevance to the crimes in this case. Even assuming the longstanding feud between the gangs was tangentially relevant, the evidence went beyond what was necessary to establish motive. The gang expert detailed several shootings by Bloods members between 2002 and 2004. The jury heard evidence concerning those crimes that was similar to the facts of this case, namely that Bloods members went into the Whelan Ranch area to commit shootings and then returned to Arthur Avenue, the location of Masi's house. Further, the expert provided inflammatory specifics of the crimes, including that in one instance, the Bloods members fired 30 rounds from an automatic rifle into a residence, and in another, they chased down and shot a Black male. This evidence was irrelevant to the crimes in this case and was inflammatory because it suggested that Defendants had a criminal disposition.

Having found that the evidence was improper, we must determine whether its admission resulted in prejudice. Although the admissibility of evidence at trial is a matter subject to review for abuse of discretion (*People v. Siripongs, supra*, 45 Cal.3d at p. 574), where abuse is shown, we will reverse a judgment only when it appears there is a reasonable probability that absent the admission of such evidence the jury would have reached a verdict more favorable to the defendant. (*People v. Watson* (1956) 46 Cal.2d 818, 837 (*Watson*)). We conclude the error was harmless under the *Watson* standard.

Defendants engage in a lengthy prejudice discussion, arguing that the prosecution lacked a strong case against them. Specifically, they claim the prosecution's case was weak because the eyewitnesses were uncertain in their identifications of the shooters and

whether the Taurus was the getaway car, Johnson's and Linnan's testimony was not credible, the forensic evidence was weak, and they had a credible alternative theory of the murder, namely that a Crips member and another Black male were the shooters. We are not persuaded by these arguments because the evidence against Defendants was strong.

Although some witnesses described the shooters as Black, those witnesses were not definite in their identifications. For example, Oates initially stated that the shooters were "possibly" Black, but later identified them as Samoan. Dresser stated that the men were Black, but explained that it was an assumption because he heard the word "nigga" used during the crime and they were in a Crips neighborhood. Similarly, Bourne initially described the men as "lighter skin black guys," but later stated they could have been Samoan, Mexican or Black. The discrepancies are understandable given that the crime occurred at night. Further, Patterson, who was arguably the closest to the shooters, described one of them as Samoan.

Likewise, the evidence showed that the witnesses' slightly varying descriptions of the getaway car were due to the time of day and street lighting. Although the witnesses described the car as different colors, they stated that the street lighting was poor and cast a yellow hue in the area that could change the appearance of vehicles. Both Dresser and Bourne identified Linnan's car as the one that they saw at the crime scene.

Defendants' argument that the prosecution's case was weak because Johnson and Linnan were not credible does not withstand scrutiny. There was sufficient corroborative evidence connecting Defendants to the crime in a way that could reasonably satisfy the jury that the accomplices were telling the truth. (*People v. Sanders* (1995) 11 Cal.4th

475, 534–535.) Multiple witnesses described similar events and gave similar descriptions of the shooters, including that one had braids or cornrows, which is how Johnson and Linnan described Siulua's hair. Further, DNA evidence linked Defendants to the crimes. Siulua was a possible contributor of DNA on a glove found in Linnan's car, and Toluao's DNA was on jeans and sneakers found near the crime scene.

Lastly, Defendants' alternative theory of the murder did not undermine the prosecution's case. Defendants' alternative theory was that a Crips member, James Turner, was the shooter. This theory was based on a detective's testimony that Oates's friend, Derrick Doublet, reported that Oates claimed Turner was the shooter. At trial, Oates denied having made that statement to Doublet. Instead, Oates testified that he told Doublet that he heard from someone else that Turner was involved in the incident. Thus, we are not persuaded that the Defendants offered a theory of the case that would have caused the jury to reject the strong evidence put on by the prosecution.

Based on the foregoing, we conclude there was no reasonable probability that the Defendants would have obtained a more favorable result absent the admission of the gang expert's testimony concerning the ongoing feud and multiple shootings between the Bloods and the Crips. (*Watson, supra*, 46 Cal.2d at p. 837.)

C. Toluao's Letters and Rap Lyrics

The gang expert testified regarding letters found in Toluao's belongings. In one of those letters, Toluao wrote about Rusty's murder, stating that he saw his "homey laid out across the yellow tape." Another letter contained gang graffiti and rap lyrics. The lyrics

described being a "killer from the turf," "put[ting] in work," and wearing gang attire. Tolua also wrote a rap song entitled "Rusty" that talked about avenging Rusty's death.

Tolua claims the court erred in admitting the letters and rap lyrics because they were inflammatory and irrelevant. We disagree with Tolua's argument because the letters and lyrics were directly relevant to his motive and intent in committing the crimes in this case, namely seeking revenge for Rusty's death. Further, rap lyrics describing gang activities are relevant and admissible in cases charging gang-related crimes.

(*People v. Zepeda* (2008) 167 Cal.App.4th 25, 35 [songs showed defendant's gang had motive and intent to kill rival gang members]; *People v. Olguin* (1994) 31 Cal.App.4th 1355, 1372–1373 [rap lyrics were properly admitted when crime was allegedly gang-related because gang membership was "obviously important," and evidence tending to show it was "highly relevant"].) Accordingly, we conclude the trial court did not abuse its discretion in admitting evidence of the letters and rap lyrics.

D. Siulua's Contact with Malo

The expert testified regarding a shooting in October 2005 on Arthur Avenue. During that incident, Malo, a Bloods member, shot at the police and was struck when the police returned fire. The expert offered evidence that Siulua and Johnson were with Malo on Arthur Avenue on the night of that shooting. Specifically, the expert identified Siulua and Johnson in a photograph with Malo that was taken that night. All three men were displaying gang signs in the photograph.

Siulua claims the gang expert's testimony concerning his presence with Malo on the night that Malo was shot had little probative value and was inflammatory and

cumulative. While photographs indicating a defendant's gang affiliation are generally relevant and admissible in cases charging defendant with gang-related crimes (*People v. Valdez* (2011) 201 Cal.App.4th 1429, 1433–1434, 1437), we agree with Siulua that the evidence had little probative value in this case. The photograph showed that Siulua was a member of the Bloods, but that evidence was already established through Siulua's stipulation. Further, although the People claim that the evidence was relevant because it provided credibility to Johnson's account of the events by linking Johnson and Siulua together, the Malo shooting did not occur until after the crimes in this case. Thus, the gang expert's testimony did not connect Johnson and Siulua on the date of the relevant events.

Given the inflammatory nature of the evidence concerning the Malo shooting and its lack of relevance, it was not properly admitted. However, for the reasons discussed earlier (*ante*, part I.B), we conclude there was no reasonable probability that Siulua would have obtained a more favorable result absent the admission of evidence. (*Watson, supra*, 46 Cal.2d at p. 837.)

E. Defendants' Due Process Claim

Defendants recast their section 352 and relevance claims as a due process violation, arguing that the admission of the gang expert's testimony rendered the trial fundamentally unfair and thus the *Chapman* standard of prejudice applies. (See *Chapman v. California* (1967) 386 U.S. 18, 24 ["before a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a

reasonable doubt"].) We disagree that the admission of the evidence constituted a due process violation.

"Ordinarily, even erroneous admission of evidence does not offend due process unless it is so prejudicial as to render the proceeding fundamentally unfair." (*People v. Esayian* (2003) 112 Cal.App.4th 1031, 1042; *People v. Partida* (2005) 37 Cal.4th 428, 436 ["the admission of evidence, even if error under state law, violates due process only if it makes the trial fundamentally unfair"].) For example, even the improper admission of evidence of uncharged crimes committed by the defendant does not ordinarily amount to constitutional error. (See *People v. Felix* (1993) 14 Cal.App.4th 997, 1007–1008.)

While the expert's testimony concerning the gang feud, multiple shootings by the Bloods, and the incident involving Malo constituted a portion of the prosecution's case-in-chief, it was far from the primary evidence of Defendants' guilt. Rather, the prosecution's case was largely based on Johnson's and Linnan's testimony that detailed the crimes and surrounding events. Further, the expert's testimony was no more prejudicial than Defendants' own stipulation that they were documented members of a gang engaged in a pattern of criminal conduct and whose primary activities included "the commission of one of the crimes set forth in Penal Code Section 186.22."

Having reviewed the entire record of the trial, we do not find that this is a case where the improper evidence was so uniquely inflammatory that it rendered the trial fundamentally unfair. Accordingly, we reject Defendants' due process arguments.

II. Admission of Siulua's Out-of-Court Statements

During trial, the jury learned of out-of-court statements that Siulua made to Johnson that incriminated Tolua. Tolua claims that admission of the statements violated his rights to due process and confrontation under *Bruton v. United States* (1968) 391 U.S. 123 (*Bruton*) and *People v. Aranda* (1965) 63 Cal.2d 518 (*Aranda*) (together *Aranda-Bruton*). The Attorney General asserts that the statements were admissible under the exceptions to the hearsay rule allowing declarations against penal interest (§ 1230) and statements of coconspirators (§ 1223). We conclude the statements were admissible as declarations against penal interest and thus need not consider the coconspirator exception.

A. Background

Johnson testified that when Defendants ran back to the car, Siulua stated that he shot the driver. Johnson also testified that about a week after the shooting, Siulua told him that he and Tolua were shooting in different directions. Detective Damon Smith testified about a statement Johnson made that Siulua told him a week or two after the shooting that Siulua and Tolua shot some people as they were getting into a car and that Siulua shot the driver.

B. Analysis

Generally, *Aranda-Bruton* bars admission in a joint trial of one defendant's out-of-court confession that incriminates a codefendant, even if the court instructs the jury to consider the confession only against the declarant. (*Bruton, supra*, 391 U.S. at pp. 135–136; *Aranda, supra*, 63 Cal.2d at pp. 529–530.) The *Aranda-Bruton* rule presumes the

statement is an *admissible* admission by the declarant and inadmissible hearsay against the codefendant. (*People v. Fletcher* (1996) 13 Cal.4th 451, 455.) However, "if the statement is admissible against the codefendant under a hearsay exception, and its admission otherwise survives confrontation analysis, then the jury may consider it against the codefendant; no reason exists for severance or redaction." (*People v. Smith* (2005) 135 Cal.App.4th 914, 922.)

Statements against a declarant's penal interest are admissible under an exception to the hearsay rule if the declarant is unavailable to testify. (§ 1230.) However, only "'specifically disserving'" portions of an out-of-court statement are admissible as statements against penal interest. (*People v. Duarte* (2000) 24 Cal.4th 603, 612.) Consequently, 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)'" must either be redacted to eliminate self-serving or blame-shifting portions or excluded entirely. (*Ibid.*) A statement can, however, both incriminate others and be "specifically disserving" to the declarant's penal interest. Such a statement is admissible in a joint trial in its entirety as a statement against penal interest. (*People v. Greenberger* (1997) 58 Cal.App.4th 298, 335 (*Greenberger*).

To the extent that Siulua's out-of-court statements implicated Toluaao in the charged crimes, they fell comfortably within the declaration against penal interest exception to the hearsay rule. Siulua's inculpatory statements to Johnson did not suggest any attempt to shift blame and bore typical indicia of reliability. (*Greenberger, supra*, 58 Cal.App.4th at p. 335 ["the most reliable circumstance is one in which the conversation

occurs between friends in a noncoercive setting that fosters uninhibited disclosures"].) In the statements at issue, Siulua took responsibility for his role in the criminal activities and did not place more or less blame on Toluao. There was no evidence suggesting that Siulua knew at the time he made the statements that Oates survived and Pruitt died.

Additionally, Siulua's statements were not made to curry favor with authorities. The statements were all made near the time of the shooting and Defendants were not arrested until two years later. Thus, at the time that Siulua made the statements, he did not have a motive to lie.

In our view, the complained of statements are indistinguishable from those admitted in *Greenberger*, where there did "not appear to be any role shifting or effort to minimize [the declarant's] involvement" in the crime (*Greenberger, supra*, 58 Cal.App.4th at p. 341), as well as those admitted in *People v. Cervantes* (2004) 118 Cal.App.4th 162, where the declarant's statements "did attribute blame to [the other codefendants] but accepted for himself an active role in the crimes." (*Id.* at p. 175.) In both cases, the appellate court held that no Sixth Amendment violation arose from the introduction of the statements in a joint trial. (*Greenberger*, at pp. 341–342; *People v. Cervantes*, at p. 177.) Consequently, we reject Toluao's argument that admission of the statements violated his rights to confrontation and due process.

III. *Request to Sever the Trial*

Toluao next contends he was denied the right to a fair trial by the trial court's denial of his severance motion. Specifically, he argues that because the trial court

admitted Siulua's out-of-court statements to Johnson, it should have severed the trial. We disagree.

Jointly charged defendants must be tried together unless the court orders separate trials. (Pen. Code, § 1098; see *People v. Boyde* (1988) 46 Cal.3d 212, 232 [legislative preference for joinder].) Joint trials are favored because they promote judicial economy and efficiency and avoid inconsistent verdicts. (*Zafiro v. United States* (1993) 506 U.S. 534, 539–540.) Codefendants, who are charged with having committed "common crimes involving common events and victims," present a "classic" case for a joint trial. (*People v. Keenan* (1988) 46 Cal.3d 478, 499–500.)

Despite the legislative preference for joint trials, separate trials are permitted in the court's discretion. A separate trial may be ordered "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." (*People v. Massie* (1967) 66 Cal.2d 899, 917, fns. omitted.)

We review the denial of a motion to sever for abuse of discretion. (*People v. Turner* (1984) 37 Cal.3d 302, 312, overruled on another point in *People v. Anderson* (1987) 43 Cal.3d 1104, 1149–1150.) We determine whether a court has abused its discretion by looking at the facts at the time the motion was heard. (*People v. Pinholster* (1992) 1 Cal.4th 865, 932.) "A ruling that was correct when made will stand unless joinder cause[d] such "'gross unfairness'" as to violate defendant's due process rights." (*People v. Carasi* (2008) 44 Cal.4th 1263, 1296.)

Here, Siulua's out-of court statements to Johnson were against his penal interest and were made in circumstances which provided particularized guarantees of trustworthiness. Therefore, as we have already stated, the trial court did not abuse its discretion in admitting those statements. (*Ante*, part II.) Likewise, the trial court did not abuse its discretion in denying Tolua'o's severance motion, which was based on the admission of Siulua's out-of-court statements. (See *Greenberger, supra*, 58 Cal.App.4th at p. 334 ["a declaration against interest may be admitted in a joint trial so long as the statement satisfies the statutory definition and otherwise satisfies the constitutional requirement of trustworthiness"].) Accordingly, we must determine whether the trial court's ruling caused gross unfairness that violated Tolua'o's due process rights. We conclude it did not.

Although Tolua'o asserts that the statements implicated him as the person who shot Pruitt, independent evidence supported the prosecution's theory of the case. Jurors heard evidence that just after the shooting, Tolua'o stated, "We just shot three people, and I kicked some girl in the head and domed somebody." This statement alone connected Tolua'o to the crimes and specifically to Pruitt's murder. Further, as we have already explained, the evidence against Defendants was strong. (*Ante*, part I.B.) There was an abundance of evidence, including accomplice and eyewitness testimony and forensic evidence, from which the jury could connect Tolua'o to the charged offenses. Given the sufficient independent evidence, we do not see how the jury would have reached a different result absent admission of Siulua's out-of-court statements. Under the

circumstances of this case, the failure to sever the trials did not result in a gross unfairness that constituted a constitutional violation.

IV. Admission of Toluaao's Out-of-Court Statements

Toluaao challenges the trial court's ruling allowing his friend, Monica Villarreal, to testify about statements he made a few days before the shooting. Toluaao argues that the statements were inadmissible hearsay and irrelevant. We conclude the out-of-court statements were admissible as nonhearsay statements reflecting Toluaao's state of mind.

A. Background

The prosecution sought to introduce evidence through Villarreal's testimony that a few days before the shooting, Toluaao was upset because Masi criticized him for not "putting in enough work for the gang." Toluaao argued that the evidence constituted hearsay and was irrelevant. The prosecution argued that the evidence was relevant to Toluaao's state of mind and motive. The trial court initially ruled that the statements were not admissible; however, after further argument, it concluded that the statements were relevant to the issue of motive.

Subsequently, Villarreal testified that a few days before the shooting, she picked up Toluaao from a 7-Eleven and he was upset and crying. Toluaao told Villarreal that he was upset because he fought with his cousin Masi and Masi told him that "he wasn't shit, and he wasn't about shit and that he really wasn't from the hood." On cross-examination, Villarreal testified that Toluaao did not go into specifics concerning what the fight was about. Villarreal stated that "it was a family problem."

B. Analysis

Hearsay evidence is "evidence of a statement that was made other than by a witness while testifying at the hearing and that is offered to prove the truth of the matter stated." (§ 1200, subd. (a).) Because an out-of-court statement is not made under oath and cannot be tested by cross-examination, hearsay is not admissible unless it qualifies under an exception to the hearsay rule. (§ 1200, subd. (b); *People v. Davis* (2005) 36 Cal.4th 510, 535; *People v. Cudjo* (1993) 6 Cal.4th 585, 608.)

However, "[e]vidence of an out-of-court statement is . . . admissible if offered for a nonhearsay purpose—that is, for something other than the truth of the matter asserted—and the nonhearsay purpose is relevant to an issue in dispute." (*People v. Davis, supra*, 36 Cal.4th at pp. 535–536.) An out-of-court statement that is not offered for the truth of the matter does not present a hearsay problem because the trier of fact may consider the evidence on a relevant issue without needing to determine whether the facts contained in the statement are true or false. (See *People v. Turner* (1994) 8 Cal.4th 137, 189, disapproved on another point in *People v. Griffin* (2004) 33 Cal.4th 536, 555, fn. 5.) We review a trial court's ruling on the admissibility of evidence for abuse of discretion. (*People v. Guerra* (2006) 37 Cal.4th 1067, 1113.)

Here, there were two layers of out-of-court statements: (1) Masi's statement to Toluaao that "[Toluaao] wasn't shit, and he wasn't about shit and that he really wasn't from the hood," and (2) Toluaao's statement to Villarreal that Masi made those remarks. When evidence consists of multiple layers of hearsay, the evidence is admissible if each layer separately meets the requirements of a hearsay exception. (*People v. Arias* (1996) 13

Cal.4th 92, 149; *People v. Perez* (1978) 83 Cal.App.3d 718, 730.) Likewise, multiple layers of out-of-court statements are admissible if they are nonhearsay because they are not offered for the truth of the matter. (See *People v. Dehnel* (1979) 99 Cal.App.3d 404, 408–409.)

Both layers of statements in this case were relevant to Toluao's motive and state of mind regardless of the truth of the stated facts that Toluao "wasn't shit" and "wasn't from the hood." As to the first layer, Masi's statement to Toluao was relevant to prove that the effect of that statement on Toluao was to motivate Toluao to prove himself to Masi, a "shot caller" within the gang. A statement that is offered to prove the effect on the hearer is nonhearsay because "it is the hearer's reaction to the statement that is the relevant fact sought to be proved, not the truth of the matter asserted in the statement.'" (*People v. Scalzi* (1981) 126 Cal.App.3d 901, 907; *People v. Duran* (1976) 16 Cal.3d 282, 295.) Similarly, as to the second layer, Toluao's statement to Villarreal about Masi's remarks was relevant to Toluao's state of mind. Statements that circumstantially prove state of mind regardless of the truth of the contents of the statements are nonhearsay. (*People v. Ortiz* (1995) 38 Cal.App.4th 377, 389; *People v. Spencer* (1969) 71 Cal.2d 933, 944.) Further, Toluao's state of mind and motive were relevant to an issue in dispute, namely whether his motivation in committing the crimes was to benefit the gang.

The trial court did not abuse its discretion in ruling that the evidence was admissible because it was relevant to Toluao's motive. Moreover, given the abundance of evidence supporting Toluao's conviction, it is not reasonably probable that Toluao would have obtained a more favorable result absent Villarreal's testimony, especially where she

stated that Toluaio did not tell her the specifics of the argument and that it was a "family problem." Accordingly, we reject Toluaio's argument.

V. *Alleged Juror Misconduct*

A. Background

Toluaio moved for a new trial based on juror misconduct and requested an evidentiary hearing on the matter. He also petitioned the court to release juror contact information. Siulua did not submit his own requests, but joined in Toluaio's arguments.

Toluaio's defense counsel submitted a declaration from his investigator to support his new trial motion and request for juror information. In that declaration, the investigator stated that Juror No. 5 responded to a letter that he left on her door. When the investigator spoke to Juror No. 5, she told him that she believed at the time of trial that Toluaio was not guilty. Juror No. 5 also stated that she and other jurors believed that the perpetrators were Black. According to Juror No. 5, jurors discussed the upcoming Thanksgiving holiday, wanting to go home for vacation, and that the trial was taking longer than expected. Lastly, Juror No. 5 informed the investigator that she thought Toluaio had the right to appeal even if she voted guilty and thus she could be home for Thanksgiving.

At the hearing on Toluaio's motion, defense counsel informed the court that he had subpoenaed Juror No. 5 and that she was waiting outside the courtroom. Defense counsel also stated that although he asked Juror No. 5 to submit a declaration, she was unwilling to sign one under penalty of perjury. Thereafter, the trial court engaged in a discussion with the prosecutor regarding whether Toluaio made a sufficient showing to warrant a

new trial. The prosecutor took the position that Toluaio did not make a sufficient showing because the defense investigator's declaration was inadmissible and contained information which related to the jurors' mental processes. The trial court denied the motion for a new trial and petition for juror contact information.

B. New Trial Motion

Toluaio contends the trial court abused its discretion by denying his motion for a new trial without first conducting an evidentiary hearing to inquire into claimed jury misconduct. We disagree.

"The trial court has the discretion to conduct an evidentiary hearing to determine the truth or falsity of allegations of jury misconduct, and to permit the parties to call jurors to testify at such a hearing. [Citation.] Defendant is not, however, entitled to an evidentiary hearing as a matter of right. Such a hearing should be held only when the court concludes an evidentiary hearing is 'necessary to resolve material, disputed issues of fact.' [Citation.] 'The hearing should not be used as a "fishing expedition" to search for possible misconduct, but should be held only when the defense has come forward with evidence demonstrating a strong possibility that prejudicial misconduct has occurred. Even upon such a showing, an evidentiary hearing will generally be unnecessary unless the parties' evidence presents a material conflict that can only be resolved at such a hearing.' [Citations.] [¶] 'We review for abuse of discretion the trial court's denial of defendant's postverdict request for an evidentiary hearing into allegations of jury misconduct.'" (*People v. Avila* (2006) 38 Cal.4th 491, 604; accord *People v. Dykes* (2009) 46 Cal.4th 731, 809–810.)

Here, the only evidence Toluao presented of jury misconduct was the defense investigator's declaration containing hearsay statements from one juror regarding her feelings on Toluao's guilt and about what other jurors purportedly discussed during deliberations. "[O]rdinarily a trial court does not abuse its discretion in declining to conduct an evidentiary hearing on the issue of juror misconduct when the evidence proffered in support constitutes hearsay." (*People v. Dykes, supra*, 46 Cal.4th at p. 810.)

Moreover, nothing in the record indicates that the prosecutor actually disputed the information obtained by the defense investigator. Instead, the prosecutor took the position that the information, even if true, did not trigger either a requirement that juror information be disclosed or a new trial granted. Absent a factual dispute necessitating a hearing to resolve it, the trial court acted within its discretion in deciding the motion for a new trial without holding an evidentiary hearing. (*People v. Davis* (2009) 46 Cal.4th 539, 625.)

C. Petition for Release of Juror Information

Defendants contend the trial court erred in failing to (1) set a hearing on their petition for release of juror contact information, and (2) state its reasons for denying the petition in a minute order.

Code of Civil Procedure sections 206 and 237 are designed to maximize the safety and privacy of individuals after they have served as trial jurors, while retaining the defendant's ability to contact jurors after trial if he or she shows sufficient need for such information. (See *Townsel v. Superior Court* (1999) 20 Cal.4th 1084, 1087, 1096; *People v. Granish* (1996) 41 Cal.App.4th 1117, 1124.) A criminal defendant may petition for

access to personal juror identifying information—their names, addresses and telephone numbers—when the sealed information is "necessary for the defendant to communicate with jurors for the purpose of developing a motion for new trial or any other lawful purpose." (Code Civ. Proc., § 206, subd. (g).) The petition must be supported by a declaration that includes facts sufficient to establish good cause for the release of the information. (Code Civ. Proc., § 237, subd. (b).) If the court determines the petition and supporting declaration establish a prima facie showing of good cause for release of the juror information, the court must set a hearing, unless the record establishes a compelling interest against disclosure. (*Ibid.*) If the court does not set a hearing, it "shall by minute order set forth the reasons and make express findings either of a lack of a prima facie showing of good cause or the presence of a compelling interest against disclosure." (*Ibid.*)

To demonstrate good cause, a defendant must make a sufficient showing "to support a reasonable belief that jury misconduct occurred." (*People v. Jones* (1998) 17 Cal.4th 279, 317.) The alleged misconduct must be "'of such a character as is likely to have influenced the verdict improperly.'" (*People v. Jefflo* (1998) 63 Cal.App.4th 1314, 1322.) Good cause does not exist where the allegations of jury misconduct are speculative, conclusory, vague, or unsupported. (*People v. Wilson* (1996) 43 Cal.App.4th 839, 852.) In addition, a trial court can properly consider the extent to which the evidence proffered in support of the petition would be excludable under section 1150, subdivision (a), because it reflects the jurors' thought processes. (*People v. Jefflo*, at p.

1322.) We review an order denying a request for personal juror identifying information for abuse of discretion. (*People v. Jones*, at p. 317.)

Here, Defendants argue they made a prima facie showing of good cause based on the declaration from Tolua'o's defense investigator. Even assuming the truth of the defense investigator's assertions, Juror No. 5's statements reflected the jurors' thought processes and were not of such a character as to have influenced the verdict improperly. While jurors may have discussed the upcoming Thanksgiving holiday and their desire to be home, there was no evidence that they rendered guilty verdicts because of those considerations. Further, Juror No. 5's statements that some jurors believed that the perpetrators were Black, that she believed Tolua'o was not guilty, and that she believed Tolua'o had a right to appeal if she voted guilty went to the mental processes of the jurors. (See *People v. Peavey* (1981) 126 Cal.App.3d 44, 51 [juror's statement that she "believed [defendant] to be not guilty but only voted guilty because the rest of the jurors did so" was "demonstrative only of her mental processes and the subjective considerations"]; *People v. Stevenson* (1970) 4 Cal.App.3d 443, 445 [juror's statement that he would have voted not guilty had he known his vote would result in a hung jury went to the mental process of the juror].)

Notably, after the jury returned its guilty verdicts, each juror, including Juror No. 5, answered "yes" when polled as to whether the verdict was their individual verdict. There was no evidence of any hesitation or equivocation from the jurors.

Under the circumstances, the defense investigator's declaration did not constitute a good cause showing of juror misconduct justifying a subsequent hearing under Code of

Civil Procedure section 237, and the trial court did not abuse its discretion in denying that hearing. Thus, we turn to Defendants' argument that we must remand the matter to the trial court to set forth its reasons for denying their petition in a minute order.

Relying on *People v. Bonnetta* (2009) 46 Cal.4th 143 (*Bonnetta*), Defendants argue that the trial court's statutory obligation to set forth the reasons for a denial under Code of Civil Procedure section 237, subdivision (b), is mandatory rather than discretionary. In *Bonnetta*, our Supreme Court considered the trial court's statutory obligations under Penal Code section 1385, subdivision (a), concerning the dismissal of actions by the trial court in furtherance of justice. (*Bonnetta*, at p. 145.) In concluding that Penal Code section 1385 mandates the trial court to set forth its reasons for a dismissal in the court's minutes, the Supreme Court reasoned that the statutory requirement protected the public interest against improper or corrupt dismissals and facilitated appellate review. (*Bonnetta*, at pp. 150–152.)

We are not persuaded by Defendants' arguments. In contrast to *Bonnetta*, where the public interest was to protect against improper and corrupt dismissals, the public interest here is to protect the safety and privacy of trial jurors, while retaining the defendant's ability to contact jurors after trial if he or she shows sufficient need for such information. (See *Townsel v. Superior Court*, *supra*, 20 Cal.4th at pp. 1087, 1096; *People v. Granish*, *supra*, 41 Cal.App.4th at p. 1124.) Unlike dismissal of actions, where there is a potential for corruption, we do not see that kind of potential for abuse when it comes to the denial of juror information. Rather, where, as here, we are convinced from the transcript of the oral proceedings that the trial court found Defendants did not make a

showing of good cause for the release of juror information, the public interest is satisfied. Further, the trial court's failure to set forth its reasons in a minute order did not hamper our ability to conduct a review on appeal. Thus, while the trial court should have stated its reasons in a minute order, there was no prejudice.

In sum, we reject Defendants' arguments concerning their petition for release of juror information and the trial court's denial of that petition.

VI. *Romero Motion*

Toluao argues the trial court abused its discretion in denying his motion to strike a prior strike conviction. Specifically, he contends the trial court did not properly weigh the relevant factors because it assigned more weight to the seriousness of the current offense rather than factors such as his youth, minor criminal history and prospect for rehabilitation. We disagree.

In deciding whether to dismiss a prior conviction allegation under Penal Code section 1385, a trial court must consider whether "in light of the nature and circumstances of his present felonies and prior serious and/or violent felony convictions, and the particulars of his background, character, and prospects, the defendant may be deemed outside the scheme's spirit, in whole or in part, and hence should be treated as though he had not previously been convicted of one or more serious and/or violent felonies." (*People v. Williams* (1998) 17 Cal.4th 148, 161.) However, the court may not strike a sentencing allegation out of judicial convenience or because of court congestion, because a defendant pleads guilty, or out of personal antipathy for the effect that the three strikes law would have on a defendant. (*Romero, supra*, 13 Cal.4th at p. 531.)

We review the trial court's refusal to strike a prior conviction allegation for abuse of discretion. (*People v. Carmony* (2004) 33 Cal.4th 367, 375.) The defendant has the burden of showing that the sentencing decision was irrational or arbitrary. (*Id.* at p. 376.) Without such a showing, we must presume the trial court acted to achieve legitimate sentencing objectives and will not set aside its discretionary determination to impose a particular sentence unless its decision was so irrational or arbitrary that no reasonable person could agree with it. (*Ibid.*)

In denying Tolua'o's motion, the trial court noted that the current offense was "the most serious type of offense we have in the system" and that the prior conviction was also a serious offense. The court also considered that the prior conviction occurred only two years prior to the offenses in this case. Based on the totality of the circumstances, the trial court concluded that Tolua'o fell within the spirit of the three strikes law.

Our review of the record convinces us that the trial court fully understood its discretion on the *Romero* motion and properly applied it. Tolua'o has a continuous history of criminal conduct that started when he was a juvenile and has escalated ever since. In 1998, Tolua'o committed petty theft and vandalism and was sentenced to community service. In 2000, Tolua'o committed a robbery in which he hid behind dumpsters, jumped out and then punched the victim in the face while his cohort stole the victim's wallet. Tolua'o then committed another robbery in 2003. This time, Tolua'o and other Bloods members punched and kicked the victim until the victim gave them his wallet. Tolua'o was sentenced to two years in prison for this crime, which constituted a

prior strike conviction. Additionally, since he was a juvenile, Toluaao continuously associated with known gang members.

Toluaao has not met his burden of showing that the trial court's decision was irrational or arbitrary. Accordingly, we cannot conclude that the trial court abused its discretion in declining to strike Toluaao's prior strike conviction.

DISPOSITION

The judgments are affirmed.

McINTYRE, J.

WE CONCUR:

McCONNELL, P. J.

McDONALD, J.