Filed 10/9/09

CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(El Dorado)

THE PEOPLE, Plaintiff and Respondent, v. SEAN NICHOLAS COYLE, Defendant and Appellant.	C058218 (Super. Ct. No. P03CRF0552)

APPEAL from a judgment of the Superior Court of El Dorado County, James R. Wagoner, Judge. Affirmed in part and reversed in part.

Jerry D. Whatley, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Michael P. Farrell, Assistant Attorney General, David A. Rhodes and Daniel B. Bernstein, Deputy Attorneys General, for Plaintiff and Respondent.

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* Pursuant to California Rules of Court, rule 8.1110, this opinion is certified for publication with the exception of parts I-VI and IX of the Discussion.

Defendant Sean Nicholas Coyle killed a drug dealer named Samuel Trujillo.[1] A jury convicted defendant of the three counts of murder alleged in the information: murder with a true finding of the special circumstance that the murder was committed during the commission or attempted commission of a burglary (Pen. Code,[2] §§ 187, subd. (a), 190.2, subd. (a)(17)(G)--count I); murder with a true finding of the special circumstance that the murder was committed during the commission or attempted commission of a robbery (§§ 187, subd. (a), 190.2, subd. (a)(17)(A)--count II); and second degree murder (§ 187, subd. (a)--count III). On all three counts, the jury found true the following gun enhancements: that defendant personally used a firearm in the commission of the offense (§§ 12022.5, subd. (a), 12022.53, subd. (b)), and that a principal was armed with a firearm in the commission of the offense (§ 12022, subd. (a)(1)). The jury failed to reach verdicts on two other firearm enhancement allegations (§ 12022.53, subds. (c) & (d)), and the trial court declared a mistrial as to those allegations. In a bifurcated trial, the jury found defendant had previously been convicted of 14 counts of burglary.

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[1] Defendant's first trial before Judge Wagoner resulted in a mistrial.

[2] Hereafter, undesignated statutory references are to the Penal Code.

The trial court sentenced defendant on count I to state prison for an indeterminate term of life without the possibility of parole (LWOP), tripled under the three strikes law (§ 667, subd. (e)(2)(A)(i)), plus a consecutive 10-year term for the personal use of a firearm (§ 12022.53, subd. (b)). The trial court imposed but stayed a one-year term for the section 12022, subdivision (a)(1) enhancement and a four-year term for the section 12022.5, subdivision (a) enhancement. The trial court imposed but stayed the same sentence terms for count II and its enhancements. On count III, the trial court imposed but stayed an indeterminate term of 45 years to life (15 years tripled for defendant's prior strikes), plus the same terms for the enhancements. As relevant on appeal, the trial court imposed both a restitution fine of $10,000 under section 1202.4, subdivision (b), and a parole revocation fine in the same amount under section 1202.45.

On appeal, defendant asserts the following nine claims of error. (1) The trial court denied him his constitutional rights when it refused to declare a mistrial due to jury misconduct and failed to conduct sufficient inquiry of Juror No. 11 to determine whether good cause for discharge existed. (2) The trial court erred when it refused to allow testimony of Heather Waters that would have undermined the credibility of corroborating witness Amber Fairchild. (3) The trial court erred in denying defendant's request to recall Elizabeth Millstine for further cross-examination. (4) The trial court erred in limiting impeachment of Gilbert Cuevas and Amber

Fairchild by excluding reference to some of their prior convictions. (5) The trial court denied him his constitutional rights by restricting the cross-examination of Amber Fairchild, Jean Winters, and Kellie Henderson regarding receipt of inducements for their testimony. (6) The cumulative effect of the errors requires reversal. (7) He was improperly convicted of three separate counts of murder in violation of his constitutional rights. (8) The trial court erred when it "tripled" the LWOP sentence. (9) The trial court erred in imposing a parole revocation fine.

In the published portion of the opinion, we agree with defendant's claims that he was improperly convicted of three counts of murder and that the trial court erred in tripling his LWOP sentence. Accordingly, we shall modify the judgment to reflect defendant was convicted in count I of murder with true findings on the special circumstances that the murder was committed during the commission or attempted commission of a robbery (§ 190.2, subd. (a)(17)(A)) and a burglary (§ 190.2, subd. (a)(17)(G)), plus true findings that defendant personally used a firearm in the commission of the offense (§§ 12022.5, subd. (a), 12022.53, subd. (b)) and that a principal was armed with a firearm in the commission of the offense (§ 12022, subd. (a)(1)). We shall modify the portion of the sentence imposed by the trial court for count I that imposed a triple indeterminate LWOP term to instead impose a single indeterminate LWOP term. We shall also reverse and vacate the convictions and sentences in counts II and III. In the unpublished portion of

the opinion, we shall strike the parole revocation fine and, in all other respects, we shall affirm the judgment.

FACTUAL BACKGROUND

Sammy Trujillo was a methamphetamine dealer and his house in Diamond Springs was a well-known drug house. Kellie Henderson was friends with Trujillo and had lived at his house off and on over the course of several years. She was living at his house in October 2003, but was in the process of moving out because their friendship was dissolving over her belief Trujillo had failed to keep promises he had made to her.

About two weeks prior to the murder, Henderson met defendant and became intimate with him. A week or so before the murder, Henderson came up with the idea to rob Trujillo for drugs and money. She discussed the idea with defendant. As they both wanted more methamphetamine and some money, Henderson and defendant decided on a plan to rob Trujillo at his house. Defendant would go inside and rob Trujillo while Henderson waited outside. Henderson knew where to get a gun.

Henderson and defendant drove to Trujillo's house on the evening of October 3, 2003, in defendant's gray Chevrolet El Camino. They arrived around 8:00 p.m., packed some of Henderson's property into defendant's car and left around 10:00 p.m. They returned about an hour later. Henderson called her ex-boyfriend, Bobby Lee, who agreed to provide her with a gun to use in the robbery. Defendant and Henderson left Trujillo's house a second time and drove to Placerville, where they met Lee. Lee handed defendant a .44-caliber revolver.

Both he and defendant loaded the gun. Defendant and Henderson returned to Trujillo's house. Rosalyn Snyder, Anthony Birge, Elizabeth Millstine, and Trujillo were inside the house. All of them had been drinking alcohol and/or using methamphetamine. Gilbert Cuevas and his girlfriend Marcie Zylla were outside sleeping in the back of a Chevy Blazer parked in Trujillo's backyard.

Henderson went into her bedroom with defendant to discuss what was going to happen. Snyder was in the bedroom with them helping Henderson pack. Henderson told Snyder that she and defendant were going to "jack" (meaning rob) Trujillo. Snyder did not want anything to do with the plan. Defendant told her it was going to happen whether she liked it or not. Snyder told them she was going to "find a ride out of there." She went into the living room and asked Birge for a ride, but he told her no. Henderson ended up giving Snyder a ride. Birge left and walked to his home a short distance from Trujillo's house.

When Henderson returned, she confirmed with defendant that they were going to go ahead with the robbery. She checked around the house to see who was still present. Millstine was in the bathroom. Cuevas and Zylla were still in the backyard. Trujillo was on the couch in the living room. Henderson reported Millstine's location to defendant. Then she went outside to defendant's car and started its engine running.

From inside the bathroom, Millstine heard Trujillo say "knock it off." She left the bathroom and walked down the hall to the living room, where she saw defendant pointing a gun at

Trujillo. Millstine heard defendant say "[G]ive me your money," "[G]ive me your dope" and "I'm going to fucking kill you." Trujillo said "okay, okay." Millstine ran back to the bathroom, locked the door and tried to hide. While she was hiding, Millstine heard a further exchange between defendant and Trujillo. Defendant wanted Trujillo's money and dope. Trujillo said, "that's all I've got." Defendant said he knew Trujillo had more drugs buried in the backyard. Trujillo denied it and told defendant, "[Y]ou don't know who you're messing with[.]" Millstine heard defendant "barking" like a dog at Trujillo, like he was taunting him. She heard someone say, "shoot him, shoot him." Millstine heard a single gunshot, followed by the sound of a door opening or shutting and then a car pulling away. She ran out to the living room where she saw Trujillo lying on the floor, bleeding from the chest. Millstine ran out to the driveway and called 911.

Cuevas, who was lying awake in the Blazer that night, noticed defendant looking out of Henderson's bedroom window, and later heard defendant and Trujillo arguing. Defendant wanted everything, including what Trujillo had hidden in the backyard. Trujillo yelled back that he had already given defendant something and he was not going to give him any more. Cuevas heard a gunshot. He got out of the Blazer, looked through a window, and saw Trujillo lying on the floor with the front door wide open. Cuevas woke Zylla and they ran to the home of a neighbor, Jerry Messer. They told Messer that Trujillo had been shot. Birge, who also discovered Trujillo had been shot when he

investigated the noise of defendant's car speeding down the street and saw Trujillo's open front door, drove up to Messer's house seeking help too.

Cuevas, Zylla, Birge, and Messer's friend, Gary Bekowsky, returned to Trujillo's house. The four of them went inside. Zylla got some towels for Bekowsky before she went outside to stay with Millstine, who was talking to 911 personnel. Birge also went outside to wave down responding officers. At some point before emergency crews arrived, Birge stripped down to his underwear because he knew he had dope in his pocket, he could not find it, and he did not want to be arrested. Birge admitted at trial that he had a .45-caliber gun in his truck that night.

Inside, Cuevas asked Trujillo who shot him, but Trujillo made no response. When Cuevas asked Trujillo if it was defendant, Trujillo nodded. As Bekowsky was trying to staunch Trujillo's bleeding with the towels, Cuevas reached over and grabbed a wad of blood-covered bills from Trujillo's shirt pocket. According to Cuevas, Trujillo owed him the money for his week's work, which he denied was dealing drugs for Trujillo.

When an ambulance arrived, Trujillo was taken to the hospital, where he was pronounced dead shortly after his arrival. He died from a single gunshot wound that entered his left shoulder in the back and exited his left upper chest. At Trujillo's house, a deformed bullet consistent with ammunition for a .44-caliber gun was found outside a window that had a bullet hole in it.

After interviewing witnesses at the scene, an alert was put out for defendant's El Camino. Sheriff's deputies spotted defendant's El Camino entering Highway 50 westbound near the Ponderosa Road overpass. The deputies followed the El Camino for several miles. When backup units arrived, they pulled the car over and arrested Henderson, who was the driver, and defendant, who was the passenger. In a field show-up, Millstine identified defendant as the gunman. A search of the El Camino turned up some marijuana and methamphetamine in a case in the engine compartment. In the rear cargo area, deputies found a large plastic bag with numerous syringes.

Henderson testified pursuant to a plea agreement in which she pled guilty to first degree murder and was to receive a sentence of 14 years eight months in exchange for her testimony.[3] After describing the events leading up to the shooting, Henderson testified she began to have second thoughts while waiting in defendant's car. But before she could get to the house, defendant came out and got in the passenger seat of the car. He said, "[L]et's get the fuck out of here." Defendant said he was sorry and that he "shot him, it looks bad." As Henderson drove toward Highway 50, defendant gave her a plastic bag of methamphetamine that he said he had obtained from Trujillo. Henderson tried to conceal it. Defendant held the gun on his lap. When they noticed the sheriff's patrol car

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[3] After trial, the charge against Henderson was reduced from murder to voluntary manslaughter.

behind them, defendant threw the gun out of the passenger window.

At the jail, Henderson gave the bag of methamphetamine she had tried to conceal to an officer. She was placed in a holding cell with Amber Fairchild, whom she had known for several years. Henderson told Fairchild that Trujillo had been shot, that he was dead, and that she was being held for murder. When later housed in the same cell with Fairchild, Henderson told Fairchild she had procured the gun for their robbery of Trujillo and given it to defendant. The gun was thrown out the window and was somewhere along Highway 50. She asked Fairchild to retrieve it when Fairchild got out of jail.

The day after she got out of jail, Fairchild contacted law enforcement and, in a recorded conversation, gave them the information Henderson told her. She testified she came forward because she saw a newspaper clipping about the shooting and she became concerned a young person could find the gun. She testified she did not receive anything for giving the information. Fairchild admitted suffering a felony conviction for spousal abuse in 2005 and a conviction for statutory rape in 2002.

Based on the information from Henderson, sheriff's deputies conducted a search for the gun along Highway 50. A .44-caliber revolver was found in some shrubs along the highway within a half-mile of the Ponderosa Road overpass. It contained five live rounds and one spent cartridge. A fingerprint that matched

defendant's left index finger was found on the frame of the gun in front of the trigger guard.

In jail, Henderson also spoke with Jean Winters over a period of a couple of weeks. Henderson told Winters that Trujillo owed her money for taking the rap for him on a prior drug case and that she had decided to get what she was owed by robbing Trujillo of money and drugs. She obtained an untraceable gun from her friend Bobby Lee. Henderson told Winters that she and defendant went to Trujillo's house to rob him. When they got to the house, Henderson told Snyder about the planned robbery. Henderson gave Snyder a ride away from the house when Snyder did not want to participate. When she returned, Henderson checked Trujillo's house to see who was present. As she left the house, Henderson said defendant "struck [Trujillo] with a pipe." Henderson was going to go back and tell defendant to forget it, but then she heard a gunshot. She and defendant drove away in an El Camino. Henderson told Winters they got about an ounce of drugs from Trujillo and she tried to conceal it. Winters called her mother from jail and asked her to call police and report that Winters had information about this case. Winters later told El Dorado Sheriff's Detective Thomas Hoagland in a taped interview what Henderson had said.

Gunshot residue tests on swabs taken from defendant and Henderson after their arrest were inconclusive.

The defense sought to show Millstine misidentified defendant, the prosecution's witnesses were unreliable, and that either Cuevas or Birge might have committed the crime.

DISCUSSION

I.

The Trial Court Did Not Err In Denying A Mistrial Based On Juror Misconduct Or Fail To Adequately Question The Jurors

Defendant claims the trial court violated his constitutional rights to an impartial jury when it denied his motion for mistrial based on juror misconduct in discussing his custody status. Defendant also claims the trial court should have further questioned Juror No. 11 regarding his/her concerns about the security of personal information provided on the juror questionnaires.

A. *Defendant's Custody Status*

1. *Background*

Although the first day of defendant's trial in August 2007 was held at the courthouse in Placerville, the following four days of trial were held in a branch court in Cameron Park. Shortly after the start of the prosecution's case-in-chief at the Cameron Park location, Alternate Juror No. 1 (AJN1) informed the court she was concerned that she may have spoken with defendant in connection with her work as an emergency room nurse. However, AJN1 thought it was possible she was mistaken, since a couple of other jurors had indicated defendant had been incarcerated since 2003.

Outside the presence of the jury, the trial court indicated it saw two problems with AJN1's disclosure: (1) jurors were discussing defendant's custodial status, and (2) there was no way to tell AJN1 that it was unlikely she had spoken to defendant without confirming defendant's custodial status. The defense expressed its concern that jurors were discussing defendant's custodial status and confirming it by reading about the case on the Internet or elsewhere.

The trial court individually spoke with Juror No. 3 (JN3) and Juror No. 6 (JN6), the two jurors identified by AJN1 as telling her that defendant was in custody.

JN3 told the court she was present for AJN1's conversation about possible contact with defendant. JN3 said another juror asked whether defendant was still incarcerated. JN3 *thought* that it was likely because JN3 saw a lot of handcuffs in a room at the courthouse. When there was a break and the jury could not go in that room, JN3 *thought*, "Well, maybe he is incarcerated." There was discussion among the jurors about whether or not defendant was incarcerated. They discussed how long a person can be incarcerated and how long this case had gone on. They questioned why it takes so long. One of the women, who worked at the Sacramento County jail, told them it can take several years and people can be in jail that long before they go to trial. JN3 confirmed that she had not seen or read anything about defendant's custody status or anything about this case at all.

JN6 confirmed she was present for AJN1's conversation about possible contact with defendant. It was discussed whether or not defendant was currently incarcerated and if so, for how long. JN6 said she thought defendant probably had been in custody "all this time." JN6 had no source of information, but just suspected that it was true. JN6 had not read anything about it.

Defendant's counsel made a motion for mistrial, claiming the entire panel was now contaminated and that the court could not admonish the jury without confirming defendant's custody status. He complained the situation was made worse because the Cameron Park court facility did not allow defendant to come into the courtroom as a regular individual would; he had to be brought in from the back of the courtroom. The discussion by the jurors of defendant's custody status, coupled with the required security procedures, prevented defendant from receiving a fair trial.

The prosecution conceded that the jurors' discussions of defendant's custody status was misconduct, but argued a mistrial was not warranted absent a showing of prejudice. The prosecution noted none of the jurors had actually seen defendant in custody. The prosecution suggested the jurors could be questioned to see if there was any prejudice from their discussions and that the trial court could give a special instruction to the jury regarding defendant's custody status.

The court followed the prosecutor's suggestion. It proceeded to question each juror individually as to whether

he/she was present when the discussion in the jury room about defendant's custody status took place and whether it would cause the juror any concern if the trial court instructed the jury not to consider whether defendant was or was not in custody currently or in the past. All but two of the jurors confirmed they were present when the conversation regarding defendant's custody status took place. However, each juror and alternate juror assured the trial court that he/she would not have any concern about defendant's custody status and could follow the instruction of the court if given. The trial court excused AJN1.

Based on the jurors' responses, the trial court then denied defendant's motion for mistrial, finding that a special instruction could cure the misconduct.

The court subsequently reminded the jury of its admonition concerning discussing the case or forming or expressing any opinions on the case prior to deliberations and specifically instructed the jury as follows:

"Whether or not the defendant is currently or at any time has ever been in custody, or whether he is out of custody in this case, is not evidence. [¶] Do not speculate as to whether the defendant is in or out of custody, either currently or in the past. You must completely disregard this circumstance in deciding the issues in this case. You are not to consider it for any purpose or discuss it during your deliberations."

On the following day of trial, the defense again expressed a concern about the jury being able to infer defendant's custody

status based on his presence in the courtroom during the lunch hour. The trial court decided to move the trial back to the courthouse in Placerville to alleviate the problem.

2. *Analysis Of Custody Issue*

Defendant contends his trial was assigned to an unsuitable courtroom, which resulted in his custody status being repeatedly brought to the jurors' attention through their observation of handcuffs in one of the rooms and of defendant in the courtroom during the lunch hour. Defendant contends this inadvertent receipt of knowledge of his custody status, and the jurors' discussion of it, was misconduct that resulted in a substantial likelihood of juror bias that violated his constitutional rights to an impartial jury and due process of law. (*People v. Nesler* (1997) 16 Cal.4th 561, 578-579 (*Nesler*).) We disagree.

To begin with, the record does not support defendant's characterization of the situation as one in which the jury was informed of defendant's custody status, let alone repeatedly reminded. The record reflects a discussion by jurors of defendant's possible custody status. JN3 *thought* that it was *likely* defendant was in custody because JN3 saw a lot of handcuffs in a room at the courthouse and the jury was not allowed to go into that room. The record does not reflect JN3 shared her observations of the handcuffs and deductions therefrom with any of the other jurors. In the presence of the other jurors and alternates, the record reflects JN3 and JN6 simply speculated defendant was in custody, but does not reflect that their speculation was ever confirmed. In fact, to the

extent AJN1 was excused after informing the court that she may have come into contact with defendant at her workplace, the impression may have been conveyed to the jury that AJN1 was correct and that defendant was not in custody. The day after the denial of his motion for mistrial, four jurors did apparently observe defendant in the courtroom during the lunch hour. The record does not reflect that defendant was visibly restrained or held by custodial officers at that time.

At most, the record shows the physical limitations of the court facility at Cameron Park fostered speculation by the jury that defendant was in custody. At most, this is analogous to cases in which the jury is made aware of a defendant's custodial status, a situation that does not deprive a defendant of his or her constitutional rights unless his or her in-custody status is "*repeatedly* conveyed to the jury." (*People v. Bradford* (1997) 15 Cal.4th 1229, 1336 (*Bradford*); see *People v. Valdez* (2004) 32 Cal.4th 73, 121; *People v. Tuilaepa* (1992) 4 Cal.4th 569, 583-584.) Here it was not. Indeed, to ensure that it was not, the trial court arranged for the trial to be moved back to the main courthouse in Placerville.

The jurors did violate the court's pretrial admonition to "not talk about the case or about any of the people . . . involved in the case" prior to deliberations by discussing whether defendant was in custody and how long a defendant can be held in custody before trial. Most of the jurors were also exposed to some out-of-court information when someone who worked at the Sacramento County jail told them it can take several

years for a criminal case to come to trial and that people can be held in jail for that period of time, furthering their speculation regarding defendant's custody status. JN3 also observed "a lot of" handcuffs and surmised defendant's custody status. The prosecutor correctly conceded jury misconduct had occurred. However, the trial court promptly questioned every juror and alternate juror individually regarding their presence for the improper discussion and their ability to follow an instruction not to consider defendant's custody status.[4] None of the jurors or alternates expressed any concern with such an instruction, which was promptly given along with a further admonition against discussing the case prior to deliberations.

Whether juror misconduct prejudiced defendant is a mixed question of law and fact subject to an appellate court's independent determination. (*Nesler, supra,* 16 Cal.4th at p. 582.) We have independently reviewed the record and conclude the discussion the jury had and the extraneous information the jurors received were not by their nature so inherently prejudicial as to substantially influence the jury, and considering the nature of the misconduct and the totality of the surrounding circumstances, it is not substantially

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[4] Although defendant makes a brief assertion that "the trial court failed to conduct adequate voir dire to uncover the effect of the 'misconduct,'" defendant does not provide any explanation of what further questioning he feels was necessary or what relevant information the trial court failed to elicit. We need not address undeveloped points inadequately briefed. (*People v. Turner* (1994) 8 Cal.4th 137, 214, fn. 19.)

likely any juror was "actually biased" against the defendant. (*Nesler, supra,* 16 Cal.4th at pp. 578-583; *In re Carpenter* (1995) 9 Cal.4th 634, 653-654.)

B. *Juror's Concern Over The Security Of Personal Information In The Juror Questionnaires*

1. *Background*

Juror No. 11 (JN11) sent a note to the trial judge on the sixth day of trial that read: "I am concerned about the security of the personal information provided in the juror questionnaire. Could the court collect and destroy or retain all copys [*sic*] on a need to know basis?"

The trial court proposed to let the jury know that all the questionnaires that were not used were collected and that at the end of the trial, the court would keep the original questionnaires, but all the copies would be collected and destroyed, so there was nothing to worry about. The defense asked the court to question JN11 because a newspaper article had appeared that talked about safety concerns with the trial in the Cameron Park court if defendant was a dangerous person. The trial court agreed to question JN11.

When JN11 was brought in, the court explained the procedures for dealing with the jury questionnaires, informed JN11 that all personal information would be sealed at the conclusion of the trial, and told JN11 of his/her right to notice and a hearing on any request to open the sealed information. The trial court asked JN11 what had triggered his/her concern. JN11 responded that he/she had observed

defendant looking through the questionnaires and that he/she had "worked a little in this field and had some bad experiences." JN11 denied seeing any article in the newspaper or anything similar that caused additional concern. The trial court told JN11 that defendant had a right to look through the questionnaires, but he did not get a copy of them. JN11 thanked the court and was excused from the courtroom. Defense counsel immediately took up scheduling matters with the court, making no comment regarding JN11's concern or the trial court's handling of the matter. When the jury returned to the courtroom, the trial court explained the note it had received from JN11 and repeated the explanation it had given to JN11 of what happens to the questionnaires at the conclusion of trial and the sealing of the jurors' personal information.

2. *Analysis of Security Concern*

Defendant claims reversal is required because the trial court failed to follow up, clarify, and address JN11's comment that he/she had "worked a little in this field and had some bad experiences." Defendant notes that "'[o]nce a trial court is put on notice that good cause to discharge a juror may exist, it is the court's duty "to make whatever inquiry is reasonably necessary" to determine whether the juror should be discharged.'" (*Bradford, supra,* 15 Cal.4th at p. 1348, quoting *People v. Espinoza* (1992) 3 Cal.4th 806, 821.) Defendant claims the trial court gave "scant attention to JN11's concerns" and argues that "when a trial court learns that the jury has been exposed to extraneous material, it is the court's duty to

ascertain the nature of that evidence and its effect on the jurors' ability to deliberate impartially."

Defendant's arguments fail to place JN11's comments in their appropriate context. JN11's note expressed concern about the security of juror personal information on the juror questionnaires and asked the court to collect and destroy or retain all the copies on a need to know basis. It was in this context of concern over the ultimate disposition of the questionnaires that JN11 explained he/she had had "some bad experiences." The trial court assured JN11 regarding the handling of the questionnaires and JN11 was apparently satisfied. Defendant made no complaint at the time that the trial court's inquiry was inadequate. Moreover, there is nothing in the record that indicates JN11 was biased against defendant. JN11's comments in context did not constitute "good cause" to doubt JN11's ability to perform his or her duties that would justify his/her removal from the case. Further questioning was not required. (*Bradford, supra,* 15 Cal.4th at p. 1348 ["A hearing is required only where the court possesses information which, if proved to be true, would constitute 'good cause' to doubt a juror's ability to perform his or her duties and would justify his or her removal from the case"].)

Following up defendant's expressed concern over whether the note was triggered by JN11's exposure to a newspaper article, the court confirmed JN11 had not seen any article or anything similar that caused his/her concern. Thus, there is

nothing in the record showing JN11 was exposed to any extraneous information in this regard. The trial court was not required to make any further inquiry on such issue.

Defendant claims the procedures outlined by the trial court might not have alleviated jurors' concerns for their safety because "for all the jurors knew[,] [defendant] had already recorded all their personal information and nothing was to be done to retrieve such information." Defendant's claim that JN11 and other jurors were worried over defendant's having recorded their personal information is based entirely on speculation. There is nothing in the record to suggest defendant was taking notes of the jurors' personal information when he was looking through the questionnaires. Indeed, if he had been, it is probable JN11's note to the court would have brought this fact to its attention and the court would have expressed concern over defendant's use of such information. However, the note makes no such claim and focuses exclusively on the disposition of the questionnaires. This suggests a possible concern over identity theft, not defendant's dangerousness. The trial court addressed the concern expressed and took the additional step of providing assurances regarding the use and disposition of the questionnaires to the jury as a whole. We find no error in the trial court's handling of the matter.

II.

The Trial Court Committed Harmless Error In Excluding The Testimony Of Heather Waters Based On A Finding Of Lack Of Credibility

A. *Background*

In March and April 2005, Judge Keller conducted a hearing on several pretrial issues, including whether the testimony of Fairchild and Winters should be excluded under *Massiah v. United States* (1964) 377 U.S. 201 [12 L.Ed.2d 246] (*Massiah*), which held that statements deliberately elicited from charged defendants by a government agent, including a jailhouse informant, violate the Sixth Amendment right to counsel and are inadmissible. One of the issues considered in the hearing was whether Fairchild was offered any inducement in return for her information and testimony.

Detective Hoagland testified at the hearing that he received a message from a female caller (Fairchild) on October 8, 2003, saying she had information regarding the shooting. He called Fairchild back and Fairchild related the information she had concerning the case. He did not make her any promises or offer any inducements in return for her statement. Fairchild did not ask for any. Hoagland later learned Fairchild had some charges pending when he spoke with her. He did not know what happened to her case. He never spoke with her lawyer.

Fairchild testified at the hearing that she contacted Hoagland the day after her release from jail to report what

Henderson had told her while they were in custody. She said her husband had recommended against her doing so because "it would cause [her] a bunch of trouble." Fairchild, however, decided it was the right thing to do. Fairchild testified Hoagland did not promise her anything or offer any benefit in exchange for her statement. She said she was not asking for any special treatment on her pending case and confirmed that her statement was not the result of any inducements, promises, benefits or special treatment. The charges pending against her were not resolved until April 2004. She could not recall if she entered a plea or the charges were dismissed; she knew her probation was reinstated.

Heather Waters, Fairchild's niece, testified Fairchild had called her and told her how excited she was about "getting off her charges" because of something Henderson had told her while she was in jail. Fairchild did not tell Waters this when she got out of jail, but sometime later after Waters had called the police and they told her she was going to be getting off her charges. Waters also claimed she was present when an officer called Fairchild back. When Fairchild got off the call, she told Waters they were satisfied with what she told them and that they would help her out in court and she did not have to worry about it. The officer was going to get her case dismissed. Fairchild was excited about getting off the charges and not having to do any time.

On cross-examination, Waters admitted that she was not currently getting along with Fairchild. Waters thought

Fairchild was responsible for turning her (Waters) in for auto theft. Waters admitted she had two felony convictions for burglary and receiving stolen property. Waters also admitted she had a methamphetamine problem during the time when she claimed Fairchild called her.

The trial court found there was no evidence Fairchild was acting as an agent of the police when Henderson was speaking to her in jail. The trial court found no evidence that Fairchild had received any kind of benefit in her case as a result of cooperating with the police. It concluded her testimony could be introduced without violating the principle of *Massiah*.

More than two years later, in August 2007, a hearing was held before Judge Wagoner on the prosecution's motion in limine to exclude any mention of inducements for the testimony of Fairchild and Winters. Defendant opposed the motion, contending, with respect to Fairchild, there was evidence of inducements, in the testimony of Waters, that Fairchild was promised her charges would be dismissed because of her cooperation in this case. The trial court stated it had on many occasions reviewed the taped statements of Fairchild and the transcripts of the prior hearing. It concluded there was no evidence, other than speculation, that any benefits of any kind were provided to Fairchild. The court stated: "The niece's testimony was, at best, suspect; at worst, an out-and-out lie, and did not make a favorable impression on the court." The court granted the motion in limine to exclude any mention of inducements as to Fairchild or Winters.

The trial court stated, however, it would allow defendant to ask Fairchild if she received any inducement or any promises or anything of that nature for giving her statement in order to explore her possible bias. But if she said "no," that would end the inquiry. Defendant asked if he could follow up with a question asking whether she told her niece something different. The trial court responded "[n]o." The court stated, "That's a collateral issue under [Evidence Code section] 352[.]" Defendant pointed out that Waters would be able to testify to prior inconsistent statements of Fairchild. The trial court said it had "made inquiry into this before, and . . . [¶] . . . I will say it flat out, I think she's lying, and so I will not allow her lies to be used to somehow muddy the waters in this situation on a collateral issue."

Later, during the testimony of Fairchild, a further hearing was held outside the presence of the jury to question Fairchild regarding the disposition of her case after she testified in the pretrial hearing of this case. Fairchild testified she and her attorney had spent several months fighting her spousal abuse case and that it "was kind of mainly dropped in April of 2004." She thought it was dismissed by the district attorney. Defense counsel suggested the timing indicated Fairchild received an inducement, as the charges were pending against her up until she testified at the Evidence Code section 402 hearing and then the charges "simply went away." The trial court dismissed the suggestion as "the rankest of speculation." The trial court

denied defendant's later renewed motion to introduce the testimony of Waters.

B. *Analysis*

Defendant contends the trial court erred when it refused to allow the testimony of Waters, which would have undermined the credibility of Fairchild, and in doing so violated his constitutional rights to due process and to present a complete defense. Defendant claims Fairchild did receive a benefit by having her charges dismissed and that Waters's testimony would have served to impeach Fairchild's testimony to the contrary. According to defendant, Waters's testimony was also relevant to prove Fairchild's state of mind that she at least believed she was going to receive a benefit for her testimony. (Evid. Code, § 1250.) Acknowledging the discretion of the trial court to exclude evidence under Evidence Code section 352, defendant claims the trial court improperly excluded Waters's testimony under such section based on the court's own assessment of Waters's credibility. Defendant argues, in any event, the trial court's discretion under Evidence Code section 352 must yield to his right to a fair trial and his right to present all relevant evidence of significant probative value in his defense.

We disagree with defendant's assessment of the significance of this testimony. Fairchild testified to several statements made by Henderson to her while they were in jail together. The most important of these statements was that the gun used in the murder was thrown out of the car window and was located somewhere along Highway 50. This information triggered the

search along Highway 50 and resulted in the finding of the .44-caliber revolver with defendant's fingerprint. The finding of the gun strongly corroborated the truthfulness of Fairchild's report of Henderson's statements. Against this backdrop, the significance of the possibility that Fairchild made the report to law enforcement with either the promise or the hope of a benefit in her pending charges is considerably reduced.[5]

Of course, when Fairchild denied receiving any inducements for her information and testified her motivation in coming forward was her concern that a young person could find the gun, Waters's testimony became relevant to impeach Fairchild. However, "Evidence Code section 352 'empowers courts to prevent criminal trials from degenerating into nitpicking wars of attrition over collateral credibility issues.' [Citation.]" (*People v. Chatman* (2006) 38 Cal.4th 344, 372.)

Here, in making an assessment of Waters's proposed testimony pursuant to Evidence Code section 352, it would have been reasonable for the trial court to consider the probability that the prosecution would seek to impeach Waters's testimony regarding her aunt's statements and demeanor. The prosecutor

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[5] We also disagree with defendant that the record shows Fairchild received a benefit because her pending case was ultimately dismissed. While the record establishes Fairchild reported Henderson's statements and subsequently testified for the prosecution and that her pending charges were dismissed, the record does not establish that the dismissal was *because of* her testimony or otherwise related to her providing the information to law enforcement. Any causal connection is pure speculation on this record.

would likely have called Detective Hoagland to testify to his conversations with Fairchild, and to introduce the tape recordings of his initial conversation with, and his further examination of, Fairchild. Waters's testimony may also have been impeachable with evidence that Fairchild and Waters were not currently getting along, that Waters believed Fairchild was responsible for turning her in for auto theft, and that Waters had been previously convicted of two felonies--burglary and receiving stolen property. The accuracy of her testimony could have been questioned on the basis of her admitted methamphetamine use during the time when she claimed Fairchild called her. A trial court could reasonably conclude the probative value of impeachment of Fairchild with Waters's testimony in an effort to ultimately bring into question Henderson's testimony would be outweighed by the likely undue consumption of time and confusion of the issues. There was a serious risk of an open-ended mini-trial on an issue of marginal relevance.

However, instead of making such a permissible assessment under Evidence Code section 352, the trial court prohibited Waters from testifying based on its assessment of her credibility. While a trial court must assess the credibility of a hearsay declarant as a foundational matter, "[a] trial court may exclude the live testimony of a witness whom the court disbelieves only in 'rare instances of demonstrable falsity.' [Citation.]" (*Vorse v. Sarasy* (1997) 53 Cal.App.4th 998, 1012-1013.) Credibility of a proffered witness is not an appropriate

part of the balancing required by Evidence Code section 352. (*People v. Cudjo* (1993) 6 Cal.4th 585, 610; *People v. Alcala* (1992) 4 Cal.4th 742, 790-791 (*Alcala*); *People v. Chandler* (1997) 56 Cal.App.4th 703, 711.) The trial court erred in excluding the testimony of Waters based on its doubts, however legitimate, as to Waters's credibility.

Nevertheless, the error is harmless. The issue was, as the trial court noted, a collateral matter. As we have explained, Waters's testimony was subject to attack and impeachment on a number of grounds, making it likely the jury would have given it low probative value. The evidence against defendant was strong. It is not reasonably probable the jury would have reached a result more favorable to defendant had Waters testified. (*Alcala, supra,* 4 Cal.4th at p. 791.)

III.

The Trial Court Did Not Abuse Its Discretion In Refusing Defendant's Request To Recall Millstine

Millstine was called as part of the prosecution's case-in-chief. She was subjected to direct examination, cross-examination, redirect examination and recross-examination. She was excused subject to recall.

Defendant subsequently sought to have Millstine recalled for further testimony regarding what she heard when she was in the bathroom. Defense counsel explained that Millstine had testified before Zylla, and that Zylla subsequently testified she heard a female voice saying "shoot him, shoot him." Counsel wanted to question Millstine about what she heard and whether

she heard a female voice. The trial court refused to allow Millstine to be recalled on this offer of proof because defendant had the opportunity to examine Millstine regarding what she heard.

Defendant claims the trial court's refusal of his request to recall Millstine was an abuse of discretion that violated his constitutional right to confrontation. Not so.

Evidence Code section 774 provides that "[a] witness once examined cannot be reexamined as to the same matter without leave of the court, but he may be reexamined as to any new matter upon which he has been examined by another party to the action. Leave may be granted or withheld in the court's discretion."

Millstine testified on direct examination that while she was hiding in the bathroom, she heard some commotion, a sound like "barking," and a statement "shoot him, shoot him." Millstine could not recall what else she heard, but upon having her memory refreshed with her statement to Hoagland, she testified to further statements by defendant and Trujillo as they yelled at each other. Among these statements were comments by defendant that he was going to kill Trujillo and that he "would shoot him." When asked to describe the "barking," Millstine explained she heard what she believed to be defendant barking like a dog at Trujillo. She took it as defendant taunting Trujillo.

On cross-examination, Millstine was asked how many people she heard in the living room. She said she heard just defendant

and Trujillo. When asked if she, at some point, heard any additional voices, Millstine replied, "No." Millstine was then asked about her statement to officers immediately after the shooting. Millstine was shown a portion of a report reflecting a statement by her that she could not recognize or could not identify the voice that said "shoot him." Millstine did not remember making the statement, but did not deny she had done so.

Thus, the record reflects Millstine was questioned by both the prosecution and the defense regarding the identity of the voices she heard from her hiding place in the bathroom. Defendant's subsequent request to recall Millstine, after Zylla testified she heard a female voice saying "Shoot him, shoot him," was a request for reexamination on the same matter. As such, Evidence Code section 774 restricted Millstine's recall in the absence of leave granted by the trial court in its discretion.

The trial court did not abuse its discretion in denying such leave based on defendant previously having a full opportunity to question Millstine as to whom she heard while she was in the bathroom. Defendant certainly could have asked Millstine if she heard a female voice. "[D]efendant cannot complain if he had opportunity to cross-examine and failed to exercise his right." (*People v. Manchetti* (1946) 29 Cal.2d 452, 462.) Defendant was not denied his right to confront and cross-examine Millstine.

IV.

The Trial Court Did Not Impermissibly Restrict Defendant's Ability To Impeach Cuevas and Fairchild With Their Prior Convictions

The prosecution filed a pretrial motion in limine to exclude under Evidence Code section 352 the use of certain remote prior offenses to impeach several witnesses, including Fairchild and Cuevas. With respect to Cuevas, the prosecution sought to exclude the use of a 1993 felony conviction for sexual battery and an unidentified misdemeanor conviction in 2002. The prosecution did not seek to prohibit impeachment of Cuevas with his felony convictions in 2004, one of which was for corporal injury to a spouse or cohabitant. With respect to Fairchild, the prosecution sought to exclude the use of two misdemeanor arrests in 1989 for petty theft and a 1990 felony conviction of robbery. The prosecution did not seek to prohibit impeachment of Fairchild with her 2002 felony conviction for statutory rape and her 2005 felony conviction for spousal abuse.

Defendant opposed the prosecution's motion to exclude Cuevas's 1993 sexual battery conviction and Fairchild's 1990 robbery conviction, arguing the convictions had strong probative value on these witnesses' credibility and character. Defendant submitted on the use of Fairchild's 1989 misdemeanors. Defendant did not object to the exclusion of the prior convictions on the ground that such exclusion violated his constitutional right to confrontation.

The trial court granted the prosecution's motion in limine as to Cuevas and Fairchild based on a finding that Cuevas's 1993 prior conviction and Fairchild's 1989 misdemeanors and 1990 robbery were too remote.

At trial, Cuevas admitted he had suffered a couple of felony convictions in 2004, and that one of those convictions was for corporal injury to a spouse or cohabitant; Fairchild admitted her felony convictions for statutory rape and spousal abuse.

On appeal, defendant now claims the trial court impermissibly restricted his ability to impeach Cuevas and Fairchild with their felony convictions, thereby violating his constitutional rights to due process, to confrontation, and to cross-examination.[6] The People contend defendant forfeited his constitutional claim by failing to raise it at the trial court level, and that in any event, the claim is without merit. In reply, defendant argues against forfeiture on the ground that the arguments he raised in the trial court were broad enough to encompass his appellate constitutional claims and that his claim merely restates, under alternative legal principles, a claim identical to the claim made in the trial court. The People have the better argument.

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[6] Defendant fails to acknowledge in his briefs the fact that Cuevas and Fairchild were impeached with prior felony convictions and that the trial court only excluded evidence of the several remote convictions.

As the trial court was asked to make a ruling on the admissibility of the prior convictions of Fairchild and Cuevas only under Evidence Code section 352 and not based on the different analysis required for a claim by defendant that exclusion would violate his constitutional right to confrontation, defendant forfeited his constitutional objection for appeal. (*People v. Partida* (2005) 37 Cal.4th 428, 435-436; *In re Seaton* (2004) 34 Cal.4th 193, 198.)

Moreover, even if it was not forfeited, defendant's claim fails on the merits.

"'"[A] criminal defendant states a violation of the Confrontation Clause by showing that he was prohibited from engaging in otherwise appropriate cross-examination designed to show a prototypical form of bias on the part of the witness, and thereby, 'to expose to the jury the facts from which jurors . . . could appropriately draw inferences relating to the reliability of the witness.'" [Citations.] However, not every restriction on a defendant's desired method of cross-examination is a constitutional violation. Within the confines of the confrontation clause, the trial court retains wide latitude in restricting cross-examination that is repetitive, prejudicial, confusing of the issues, or of marginal relevance. [Citations.] California law is in accord. [Citation.] Thus, unless the defendant can show that the prohibited cross-examination would have produced "a significantly different impression of [the witnesses'] credibility" [citation], the trial court's exercise of its discretion in this regard does not violate the Sixth

Amendment.' [Citation.]" (*People v. Hillhouse* (2002) 27 Cal.4th 469, 494.)

The admission of evidence of Cuevas's 14-year-old sexual battery felony conviction would not have produced a significantly different impression of Cuevas's credibility in light of his admission of having several more recent felony convictions, including a 2004 felony conviction for corporal injury to a spouse or cohabitant. The admission of evidence of Fairchild's 17-year-old felony conviction would not have produced a significantly different impression of Fairchild in light of her admission of having suffered a felony conviction in 2002 for statutory rape and a felony conviction in 2005 for felony spousal abuse. The exclusion of these remote priors did not violate defendant's constitutional right to confrontation.

V.

The Trial Court Did Not Err In Its Restriction Of The Cross-Examination Of Fairchild, Winters And Henderson

A. *Fairchild*

Defendant claims the trial court committed reversible error when it restricted his cross-examination of Fairchild regarding her receipt of inducements for providing information to law enforcement and testifying. Defendant contends the jury would have received a significantly different impression of Fairchild's credibility if the trial court had permitted such cross-examination and the jury learned she had been afforded inducements for her testimony. (*People v. Quartermain* (1997)

16 Cal.4th 600, 623-624 (*Quartermain*); *People v. Cooper* (1991) 53 Cal.3d 771, 817.)

Defendant's argument is based on the assumption that Fairchild did receive an inducement or benefit as a result of her reporting Henderson's statements to law enforcement and subsequently testifying for the prosecution. However, apart from the proffered testimony of Waters, the exclusion of which we have already considered, the record does not establish Fairchild was actually promised, offered, or given any inducement or benefit for her cooperation. Therefore, the trial court did not abuse its discretion in limiting examination of Fairchild on this issue to a single question of whether she received anything in return for providing her information to Hoagland, to be followed up only if Fairchild responded in the affirmative. (*People v. Harris* (1989) 47 Cal.3d 1047, 1090-1091 (*Harris*), disapproved on other grounds in *People v. Wheeler* (1992) 4 Cal.4th 284, 299, fn. 10.) There is nothing in the record to suggest the jury would have received any different impression of Fairchild's credibility if defendant had been allowed additional cross-examination on this issue. (*Quartermain, supra,* 16 Cal.4th at pp. 623-624.)

B. *Winters*

Defendant makes the same claim regarding the trial court's limitation of his cross-examination of Winters regarding inducements or benefits she received.

The issue of whether Winters received any inducements for her information and testimony was considered at the same hearing

held in March and April 2005 that considered the issue for Fairchild.

Winters testified at the hearing in 2005 that she was facing several charges that carried a maximum penalty of two years in state prison when she met with Hoagland on October 23, 2003. She said she was not looking for a deal to benefit herself or her husband, who had also been arrested, when she met with Hoagland. She did not ask for any benefit in exchange for her information, nor was she offered any. Her pending cases were resolved in March 2004, which was subsequent to her testifying at the preliminary hearing in this case. She was sentenced to one year in county jail. With credit for time served, she was released in July 2004.

James Clark, the defense attorney who represented Winters in her criminal matters, testified there was no discussion, explicit or implicit, about any type of consideration for Winters' cooperation in this case. Clark testified he was present during pretrial meetings in which the prosecutor expressly told Winters she would not be receiving any favorable treatment in return for her statement and testimony in this case. Clark noted he did not encourage Winters to cooperate in this case because he thought testifying could be dangerous for her. Clark testified they were getting ready to go to trial on a charge of receipt of stolen property that he thought they could "beat," when the prosecutor offered Winters a deal for her to plead in return for one year in county jail. Based on

Winters' criminal history, Clark thought it was an excellent offer and recommended Winters take it.

Judge Keller found there was no evidence that Winters received any kind of benefit as a result of cooperating with the police. Consequently, her testimony, along with Fairchild's, could be introduced without violating *Massiah.*

At the trial in August 2007, a hearing was held before the trial court, Judge Wagoner, on the prosecution's motion in limine to exclude any mention of inducements for the testimony of Fairchild and Winters. The court concluded it had seen no evidence that benefits of any kind were provided to either Fairchild or Winters. It granted the prosecution's motion, although it ruled both Fairchild and Winters could be asked "if they received any inducement or any promises or anything of that nature for giving their statements." If they said no, that would end the inquiry.

After Winters testified on direct examination and prior to cross-examination by defendant, the trial court held another Evidence Code section 402 hearing regarding the possible benefits Winters received for providing her information. At this hearing, Winters testified she had three or four cases pending against her when she provided her statement to Hoagland and that she was still in custody at the time of the preliminary hearing in this case. The month after the preliminary hearing, she ended up pleading to receiving stolen property; the other charges were dropped, and she was sentenced to a "Johnson" year

in jail.[7] She testified again that she received no promises or commitments from law enforcement and that she came forward because it was the right thing to do. The trial court confirmed its previous ruling on the prosecution's motion in limine. Neither the prosecution nor the defense asked Winters the one question allowed by the trial court: "if they received any inducement . . . or anything of that nature for giving their statement[]."

We reject defendant's claim of error in the trial court's restriction of his cross-examination of Winters for the same reason we rejected it for Fairchild. The record simply does not contain evidence that Winters was actually promised, offered, or given any inducement or benefit for her cooperation. Nothing in the record supports a causal connection between Winters's testimony and the resolution of her charges. Therefore, the trial court did not abuse its discretion in limiting defendant's cross-examination of Winters on the issue of inducements. (*Harris, supra,* 47 Cal.3d at pp. 1090-1091.) There is nothing in the record to suggest the jury would have received any different impression of Winters's credibility if defendant had been allowed additional cross-examination on this issue. (*Quartermain, supra,* 16 Cal.4th at pp. 623-624.)

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[7] *People v. Johnson* (1978) 82 Cal.App.3d 183.

C. *Henderson*

After the mistrial (see fn. 1, *ante*), Henderson testified for the prosecution pursuant to a plea agreement in which she pled guilty to first degree murder and was to receive a sentence of 14 years eight months in exchange for her testimony.

Defendant sought permission of the trial court to question Henderson about special treatment and privileges she received at the jail to induce her to testify. Defendant claimed a special job was created for Henderson prior to her plea agreement that resulted in her receiving extra privileges at the jail. Defense counsel admitted he had no information that directly linked her job to an inducement for her to plead, but he was unaware of any other similarly situated prisoner who received such privileges.

The prosecution claimed jail inmates were assigned work by their classification, that Henderson had held the same job prior to her and defendant's first trial when there was no plea agreement, and that after the plea agreement, all of Henderson's privileges were taken away.

The trial court ruled that it would allow defendant to ask Henderson if she received any inducements at the jail in order to get her to plead, but if she said no, no further inquiry would be allowed. The court stated: "Based on what I've heard, it would be, again, indulging in rank speculation. Whether or not any of us has ever heard of anything like the treatment she's being given, given to someone awaiting trial for murder, is not an indication or proof that she was given some sort of inducement to try to get her to plead and testify in this

matter." Defendant did not ask Henderson the question permitted by the court.

Defendant claims on appeal the trial court's restriction of his cross-examination "constituted a significant infringement on [his] right to present a defense." He claims "the jury would have questioned Henderson's credibility if they had learned that [she] had been afforded special treatment at the jail."

Again, the record fails to reflect that Henderson received any special treatment at the jail *in order to induce* her plea and testimony. As the trial court recognized, defendant's claim was based on speculation. Moreover, the record does not reflect that subjecting Henderson to questions regarding her work assignment at the jail would have produced a significantly different impression of her credibility. The jury already knew the most important point--that Henderson was testifying pursuant to an agreement through which she would receive an agreed sentence of 14 years eight months. Moreover, if defendant had been allowed to ask Henderson about her job and privileges at the county jail, it is clear the prosecutor would have elicited testimony that she held the same job long before she pled guilty and that her plea resulted in her losing the job. This would have reduced the probative value of any testimony regarding her job and resulting privileges for purposes of attacking her credibility.

The trial court did not abuse its discretion in restricting the cross-examination of Fairchild, Winters, and Henderson on the subject of inducements for their testimony.

VI.

There Is No Cumulative Error

Defendant contends that if the errors here do not individually rise to reversible error, the cumulative effect of the errors requires reversal. We have found only one error and have concluded it was harmless. There is no cumulative error.

VII.

Defendant Was Improperly Convicted Of Three Separate Counts of Murder

Defendant claims he was improperly convicted of three separate counts of murder and that convictions on two of the three counts must be reversed. The People concede defendant can only stand convicted of one count of murder for his killing of Trujillo. We accept the People's concession.

Section 954 provides, in pertinent part, that "[a]n accusatory pleading may charge two or more different offenses connected together in their commission, or different statements of the same offense . . . under separate counts . . . . The prosecution is not required to elect between the different offenses or counts set forth in the accusatory pleading, but the defendant may be convicted of any number of *the offenses* charged . . . ." (Italics added.) "Thus multiple charges and multiple convictions can be based on a single criminal act, if the charges allege separate offenses." (*People v. Muhammad* (2007) 157 Cal.App.4th 484, 490; *People v. Ryan* (2006) 138 Cal.App.4th 360, 368-369.) Here, the three counts charged a single offense:

murder. (§ 187, subd. (a).) The three counts simply alleged alternative theories of the offense.

The People suggest the appropriate remedy for this error is to consolidate the judgment to reflect one count of murder with two special circumstances and a finding of malice. The People note that in similar circumstances involving duplicative convictions, other courts have ordered that multiple counts be consolidated into a single judgment. (*People v. Scott* (1944) 24 Cal.2d 774, 777 (*Scott*) [ordered three counts of rape based on single act of intercourse consolidated into single judgment]; *People v. Craig* (1941) 17 Cal.2d 453, 459 [consolidating judgments and modifying the single judgment to state defendant was convicted of rape as charged in two counts]; *People v. Brown* (1948) 87 Cal.App.2d 281, 287 (*Brown*) [consolidating convictions for rape and a lesser included offense of assault with intent to commit rape].)

Defendant argues against consolidation. He distinguishes *Scott, supra,* 24 Cal.2d 774 and *Brown, supra,* 87 Cal.App.2d 281, as cases that did not increase the severity of a count for which the defendant had been tried and convicted. Defendant also claims consolidation would violate his due process right to notice of the charges against him.

Consolidation of defendant's convictions into a single count of murder with true findings on both special circumstances would not violate defendant's due process right to fair notice of the charges. This case is not like *People v. Hernandez* (1988) 46 Cal.3d 194, cited by defendant. In *Hernandez*, the

Supreme Court held that, as a matter of statutory interpretation and due process, a sentencing judge could not impose an additional three-year enhancement under section 667.8 (kidnapping for purposes of rape) when violation of that section was not pled or proved, but mentioned for the first time in a probation report. (*Hernandez, supra,* at p. 197.) Here, both special circumstances were charged in the second amended information. The jury made true findings on them both.

Nor is this case like *People v. Mancebo* (2002) 27 Cal.4th 735, cited by defendant. In *Mancebo,* the Supreme Court held the trial court erred in sentencing when it used an unpled multiple victim circumstance to support a sentence under the one strike law (§ 667.61) in order that a pled and proved gun use allegation could be used to impose additional sentence enhancements. (*Mancebo, supra,* at pp. 740, 743, 745, 754.) The Supreme Court stated "a defendant has a cognizable due process right to fair notice of the specific sentence enhancement allegations that will be invoked to increase punishment for his crimes." (*Id.* at p. 747.) Here, defendant had notice of both of the special circumstances used to impose on him the indeterminate LWOP term. Each was pled and proved. In addition, each of the firearm enhancements used in sentencing defendant were pled and proved.

There is no due process violation in allowing the special circumstances and enhancements pled and found by the jury to be true to be retained in a consolidated single count of murder. To the contrary, consolidation preserves all of those jury

findings, and does not increase the severity of defendant's sentence.

We shall vacate defendant's convictions of murder in counts II and III, together with the sentences imposed but stayed on those counts, and modify the judgment on count I to reflect defendant was convicted of murder with true findings on the special circumstances that the murder was committed during the commission or attempted commission of a robbery (§ 190.2, subd. (a)(17)(A)) and a burglary (§ 190.2, subd. (a)(17)(G)), plus true findings that defendant personally used a firearm in the commission of the offense (§§ 12022.5, subd. (a), 12022.53, subd. (b)) and that a principal was armed with a firearm in the commission of the offense (§ 12022, subd. (a)(1)). We decline the People's invitation to state an express finding of malice. It is sufficient that count I reflect an open count of murder.

VIII.

The Trial Court Erred In "Tripling" Defendant's Life Without Possibility Of Parole Sentence

In *People v. Smithson* (2000) 79 Cal.App.4th 480, this court held the plain language of section 667, subdivision (e)(1), a part of the three strikes law, permits doubling only "the determinate term or minimum term for an indeterminate term." (*Smithson, supra,* at p. 503, italics omitted; see *id.* at p. 504.) Since LWOP's are indeterminate terms with no minimum terms, they cannot be doubled under the three strikes law. (*Id.* at pp. 503-504.)

Defendant argues, and the People concede, the same rationale applies here for the language of section 667, subdivision (e)(2). We agree. The sentence on count I must be modified to impose a single indeterminate term of life without the possibility of parole.

IX.

The Trial Court Erred In Imposing A Parole Revocation Fine

Defendant contends, and the People concede, the trial court erred by imposing a parole revocation fine (§ 1202.45) because defendant was sentenced to prison for life without the possibility of parole. We accept the People's concession. "[A] parole revocation fine is inapplicable where there is no possibility of parole." (*People v. DeFrance* (2008) 167 Cal.App.4th 486, 505; accord, *People v. Jenkins* (2006) 140 Cal.App.4th 805, 819.) We shall order the section 1202.45 fine stricken.

DISPOSITION

The judgment of conviction on count I is modified to reflect defendant was convicted of murder with true findings on the special circumstances that the murder was committed during the commission or attempted commission of a robbery (§ 190.2, subd. (a)(17)(A)) and a burglary (§ 190.2, subd. (a)(17)(G)), plus true findings that defendant personally used a firearm in the commission of the offense (§§ 12022.5, subd. (a), 12022.53, subd. (b)) and that a principal was armed with a firearm in the commission of the offense (§ 12022, subd. (a)(1)). The portion of the sentence imposed on count I that imposed a triple

indeterminate term of life without the possibility of parole is modified to reflect the imposition of a single indeterminate term of life without the possibility of parole. (§ 190.2, subd. (a).) The parole revocation fine (§ 1202.45) imposed on count I is stricken. Defendant's convictions of murder in counts II and III, together with the sentences imposed but stayed on those counts, are reversed and vacated. In all other respects, the judgment is affirmed.

The trial court is directed to prepare an amended abstract of judgment and minute order to reflect the modifications on count I and to forward a certified copy of the amended abstract to the Department of Corrections and Rehabilitation.

CANTIL-SAKAUYE, J.

We concur:

SIMS, Acting P. J.

ROBIE, J.