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CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

THE PEOPLE, Plaintiff and Respondent, v. ROLANDO N. GALLEGO, Defendant and Appellant.	C061749 (Super. Ct. No. 06F06085)

APPEAL from a judgment of the Superior Court of Sacramento County, Michael W. Sweet, Judge. Affirmed as modified.

Ralph H. Goldsen, under appointment by the Court of Appeal, for Defendant and Appellant.

Michael T. Risher for ACLU of Northern California as Amicus Curiae on behalf of Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant 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, rules 8.1100 and 8.1110, this opinion is certified for publication with the exception of parts II. through V. of the Discussion.

A jury acquitted defendant Rolando N. Gallego of first degree murder but convicted him of a 1991 second degree murder and found he used a knife to commit it. (Former Pen. Code, §§ 187, 12022, subd. (b)(1).)[1]

Sentenced to a state prison term of 16 years to life, defendant appeals. He contends (1) DNA[2] testing should be deemed a constitutionally protected "search," regardless of the source of the tested material; and, the trial court: (2) coerced a guilty verdict after a second deadlock and abused its discretion in denying the release of juror information; (3) erroneously instructed on an alleged false statement from him; (4) erroneously admitted hearsay evidence and excluded his polygraph willingness; and (5) erred regarding presentence conduct credit and a parole revocation fine.

We agree with defendant's last contention regarding presentence conduct credit and the parole revocation fine, but disagree with his remaining claims. Of note, we conclude that a cigarette butt that defendant voluntarily discarded by tossing it onto a public sidewalk, which was then collected and DNA-tested by law enforcement only to identify defendant as a suspect in an ongoing criminal investigation, did not constitute

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[1] Undesignated statutory references are to the Penal Code.

[2] DNA is the acronym for deoxyribonucleic acid, pursuant to section 295 et seq. and the DNA and Forensic Identification Database and Data Bank Act of 1998, as amended (DNA Act).

a search under the Fourth Amendment to the federal Constitution. Defendant had no reasonable expectation of privacy in this discarded item.

FACTUAL BACKGROUND

The victim was Leticia Estores, defendant's aunt and godmother. She was killed in 1991. Defendant had been one of a few "persons of interest" to law enforcement at that time, but the primary evidence against him was not developed until 2006; that year, his DNA was discovered on a towel that had been collected at the crime scene (the towel contained several apparent blood stains).

The 1991 Murder of Leticia Estores

On August 29, 1991, at 7:00 p.m., Estores, along with a coworker, locked up the hair salon at which they worked; the two planned to see each other again at work the next morning.

Uncharacteristically, Estores did not show up that next morning (August 30); nor did she call. At 1:47 p.m. that afternoon, the police checked on Estores at her home. Getting no response, an officer went inside through the unlocked front door. He found Estores lying in a pool of blood on the kitchen floor. The officer also noticed: a "bloody" towel on the floor near the front door; the television, as well as some lights, were on; there were no signs of forced entry; and the house was very neat. Reputedly, Estores was cautious about opening her front door to strangers.

Crime scene investigators collected an apparently cleaned kitchen knife in the kitchen sink, the broken tip of which was found embedded in Estores's wrist. Although the house was not ransacked, it appeared that someone had gone through drawers in the bedrooms, including the master bedroom, because several items of neatly folded clothing had been flipped over. Estores's husband, George, testified that his wife kept $1,000 in cash in a shoe box in their bedroom closet.[3] Neither that money, nor anything else of value, however, was taken from the house.

An autopsy of Estores disclosed that she had been stabbed and cut at least 50 times, all over her body, including one just below her eye that pierced her brain stem. The pathologist said the time of death could have been between 9:00 and 11:00 p.m., but this time could not be determined with certainty.

Defendant's Statements to Police

In the fall of 1991, Detective Richard Lauther asked defendant where he was on the night of August 29, 1991. Defendant replied that he was at his restaurant job (the Capital Towers), and he gave Lauther his employer's phone number; after work, defendant said, he went home and got into bed with his wife. Lauther did not have any documentation of this statement from defendant. Lauther called defendant's employer and asked whether defendant had been at work on August 29, 1991. The

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[3] George Estores worked and resided in the Bay Area during the week.

employer's response prompted Lauther to want to speak with defendant again.

Subsequently, on November 12, 1991, Detective Lauther and his partner, Detective Robert Risedorph, interviewed defendant at defendant's residence, which was about a mile from Estores's house. Defendant told the detectives that on the night of the murder, he was gambling at the El Dorado Hotel in Reno. He said he had called his employer that day and told him he could not come to work because he was going to visit his sick grandmother. (The defense subsequently elicited testimony from Lauther that when he checked with defendant's restaurant employer, he was told that defendant had called in sick that day.) Defendant did not tell his wife about his gambling plans because the subject caused friction between them. Defendant added that he used cash to pay for all his expenses on the trip, including gas. He did not think any casino employee would remember him being there.[4]

Defendant admitted to the detectives that he had a gambling problem, that he gambled in Reno frequently, that he owed gambling debts to several people (including $4,000 to his Uncle Paul), that he was still gambling in an attempt to pay his

[4] Robert MacKay worked at the El Dorado Casino in Reno in 1991 as Director of Finance, and still worked there in 2009 as Director of Administration and Internal Audit. MacKay testified that in 1991, the casino had a video security system that erased itself every two or three days. Also, in 1991, the casino issued "Gold Cards" to regular customers so they could accumulate points and receive complimentary benefits; defendant had been issued such a card in 1991, but did not use it on August 29, 1991.

debts, and that he was having trouble making his mortgage payments. Defendant also said he once borrowed $40 from Estores in June 1991 to stay at a hotel after his wife kicked him out for gambling.

Defendant told Detectives Lauther and Risedorph that he last saw Estores the Sunday night before her death; he was at her house for about an hour watching a movie with her husband. Defendant said he had been to Estores's home a few times before then, but had never spent the night there (although he showered there once in June 1991). He denied that he had ever cut himself while in her house.

In July 2006, defendant was reinterviewed by Detectives Grant Stomsvik and Ted Voudouris. Defendant repeatedly denied having anything to do with Estores's murder. He stated, however, that he spent the night at Estores's house two weeks before her death while Estores's then 17-year-old son Christian and his girlfriend were staying there (in August 1991, defendant was 32 years old; Christian testified he could not recall ever seeing defendant at his mother's house). Defendant also acknowledged filing for bankruptcy, apparently in the early 1990's.

Gambling Debts to Family Members

Antonio (Tony) Concepcion, a distant relative of defendant's, and Tony's wife Priscila testified that about a week before Estores was killed, they loaned defendant $5,000 to pay off gambling debts; but they refused to loan defendant

another $5,000 a few days later when he said he had lost the first $5,000 gambling. Defendant also asked Tony to intercede on his behalf with another family member (Eugene Amador) to borrow money.

An aunt of defendant's, Primitiva Madayag, testified that about a week before Estores was killed, she and her husband had loaned defendant $2,000 upon defendant's request.

Forensic Evidence

In December 1993 and September 1994, the Sacramento County Crime Lab, through criminalist Dolores Dallosta (with review by her supervisor, Mary Hansen), conducted forensic tests on the apparently bloodstained 15-inch by 23-inch kitchen towel found at the crime scene. Eighteen different areas of the towel contained what could be bloodstains (by color). Three types of tests disclosed that, at the least, five stained areas contained human blood (the storage of the towel for two years in an unventilated warehouse could have adversely affected the number of blood findings).

In April 2006, another criminalist at the Sacramento County Crime Lab, Joy Viray, conducted DNA testing on three of the five stained areas of the towel that had tested positive for human blood. (Preliminarily, Viray performed a presumptive blood test on these areas and obtained positive results; a confirmatory test, however, showed negative results, which Viray explained could have happened given the age of the sample, as the confirmatory test requires the stain to go into solution.) The

DNA testing revealed a male DNA profile that had similarities to Estores's DNA, suggesting the male was related to Estores.

This DNA testing caused renewed interest in defendant. In May 2006, police surreptitiously obtained a sample of defendant's DNA by following him and then collecting a cigarette butt he had discarded on a public sidewalk. Defendant's DNA on the cigarette butt matched the male DNA on the three human blood-tested areas of the towel.

At trial, defendant did not dispute that his DNA was on the kitchen towel. He disputed that his blood was the DNA contributor; instead, he argued, he had inadvertently wiped sweat, saliva or mucus on the towel on an earlier occasion, and that substance got mixed together with bloodstains from meat. Defendant presented test results from a forensic serologist, Gary Harmor, which supported this theory. These tests showed the absence of human blood (pursuant to a relatively new type of test; although Harmor's presumptive blood tests were all positive), and the presence of cow or sheep blood on the towel as well as human saliva.

The prosecution countered this testimony with test results from county criminalists and with expert testimony from a UC Davis professor of meat science (specializing in meat processing). This evidence showed that liquid in packages containing store-bought beef and lamb does not test positive for human blood, and that there is almost no blood at all in these packages after slaughter and processing (the red liquid in a

meat package is about 99 percent water, and the rest is almost entirely myoglobin, a red pigment in muscle tissue that is distinct from hemoglobin, which is present in blood).

Other Suspects

The prosecution anticipated and rebutted a third party culpability defense that Estores's husband George or her son Christian had a motive to kill her because they benefitted from a $100,000 life insurance policy payout; and that George was mad at her for visiting her former husband during a recent trip to the Philippines. George and Christian testified they were in the Bay Area on the night of the murder, and these alibis were corroborated.

DISCUSSION

I. The Fourth Amendment and the DNA Testing of the Discarded Cigarette Butt

Defendant contends his constitutional Fourth Amendment right to be free from unreasonable searches was violated by DNA testing of his discarded cigarette butt that generated his DNA profile, and the trial court erroneously denied his motion to suppress this evidence. Defendant's concern is not with the surreptitious collection of the cigarette butt by the police, but with their DNA testing of that cigarette butt. He argues that no one reasonably expects that the government will conduct warrantless, suspicionless testing of bodily fluids to generate a DNA profile, a profile that contains a wealth of private information including medical conditions and familial relations.

As we shall explain, we conclude the trial court properly denied defendant's motion to suppress. Defendant abandoned the cigarette butt by voluntarily discarding it on a public sidewalk. The facts show the DNA testing here was done only to identify defendant as a suspect in an ongoing criminal investigation. Under these circumstances, defendant did not have a reasonable expectation of privacy in the DNA testing of the cigarette butt; consequently, that testing did not constitute a "search" for Fourth Amendment purposes.

The Fourth Amendment to the federal Constitution provides:

"The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." (U.S. Const., 4th Amend.)

Government activity constitutes a "search" for Fourth Amendment purposes only if the person claiming an illegal search exhibits an actual (i.e., subjective) expectation of privacy in the item searched, and that expectation is one which society recognizes as reasonable (i.e., objectively). (*California v. Ciraolo* (1986) 476 U.S. 207, 211 [90 L.Ed.2d 210, 215]; *Katz v. United States* (1967) 389 U.S. 347, 360-361 [19 L.Ed.2d 576, 588] (conc. opn. of Harlan, J.).)

It is well settled that a warrantless examination of property abandoned in public does not constitute an unlawful

search under the Fourth Amendment, because a person has no reasonable expectation of privacy in such property. (*People v. Parson* (2008) 44 Cal.4th 332, 345.) For example, in *California v. Greenwood* (1988) 486 U.S. 35 [100 L.Ed.2d 30] (*Greenwood*), the United States Supreme Court concluded that the defendants there possessed no reasonable expectation of privacy in trash bags they had left at the public curb, which contained incriminating evidence of their narcotics trafficking. (486 U.S. at pp. 37-41 [100 L.Ed.2d at pp. 34-37].) Even though the police intercepted garbage bags intended for city collection, these defendants could not complain because they had left the items in a place "particularly suited for public inspection." (*Greenwood*, at pp. 37, 40-41 [100 L.Ed.2d at pp. 34, 36-37].)

Here, defendant voluntarily discarded his cigarette butt by tossing it onto a public sidewalk. That cigarette butt, like the trash bags in *Greenwood*, was left in a place "particularly suited for public inspection." Defendant thus abandoned the cigarette butt in a public place, and therefore had no reasonable expectation of privacy concerning the DNA testing of it to identify him as a suspect in a criminal investigation. (See *Commonwealth v. Perkins* (Mass. 2008) 883 N.E.2d 230, 239 [the defendant abandoned any privacy interest in cigarette butts and soda can he left behind after interview with police and later DNA-tested]; *Commonwealth v. Bly* (Mass. 2007) 862 N.E.2d 341, 356-357 [same]; *Commonwealth v. Cabral* (Mass.App.Ct. 2007)

866 N.E.2d 429, 433 [the defendant, who spat on public sidewalk, had no reasonable expectation of privacy in this saliva, or in DNA evidence derived therefrom]; accord, *Piro v. State of Idaho* (Ida.App. 2008) 190 P.3d 905, 909-910; see also *People v. LaGuerre* (2006) 29 A.D.3d 820, 822 [815 N.Y.S.2d 211, 213] [police obtained DNA sample from piece of chewing gum the defendant voluntarily discarded during a contrived soda tasting test]; *State v. Athan* (Wash. 2007) 158 P.3d 27, 33-34 [the defendant had no reasonable expectation of privacy in saliva he used to seal an envelope mailed to detectives in a police ruse, from which detectives obtained a DNA profile]; but see *State v. Reed* (N.C.App. 2007) 641 S.E.2d 320, 321-323 [the defendant's Fourth Amendment rights were violated when a detective kicked the defendant's cigarette butt off his patio to a common area, where it was retrieved by another detective].)

Defendant, joined by amicus American Civil Liberties Union of Northern California (ACLU), argues that two factors render the concept of abandonment inapplicable to DNA testing.

First, the concept of abandonment encompasses an act of volition--of knowingly exposing the item to public view; this activity is missing in depositing DNA. As one commentator has colorfully put it, "[D]epositing DNA in the ordinary course of life when drinking, sneezing, or shedding hair, dandruff, or other cells differs from placing papers in a container on the street to be collected as garbage. Depositing paper in the trash is generally a volitional act. . . . Leaving a trail of

DNA, however, is not a conscious activity." (Imwinkelried, *DNA Typing: Emerging or Neglected Issues* (2001) 76 Wash. L.Rev. 413, 437, fns. omitted; see also Joh, *Reclaiming "Abandoned" DNA*: *The Fourth Amendment and Genetic Privacy* (2006) 100 Nw. U. L.Rev. 857, 867, fns. omitted ["Do we intend to renounce our actual expectations of privacy with respect to this genetic material when we shed our DNA? The volition that is implied in abandonment is simply unrealistic here."].)

Here, though, defendant engaged in a conscious activity--indeed, an unlawful act of littering: voluntarily discarding his cigarette butt onto a public sidewalk. We do not face the situation of DNA being deposited in a truly non-volitional way of unconsciously shedding cells. While defendant may not have reckoned that the police would DNA-test his cigarette butt, the *Greenwood* defendants did not reckon that the police would rifle through their garbage for incriminating evidence either. (See *Greenwood*, *supra*, 486 U.S. at pp. 39-40 [100 L.Ed.2d at pp. 36-37].) Moreover, our society has become increasingly aware of the reach of DNA testing from accounts in the mass media over these past many years.

And this first factor leads us to defendant's second factor, and to the critical issue of DNA *testing* here as an unlawful search. As defendant and amicus point out, a DNA test, unlike, say, garbage or fingerprints, has the potential to reveal a treasure trove of personal information to others. But the facts here show that defendant's DNA testing was done only

for the purpose of identifying defendant as a suspect in an ongoing criminal investigation. (See also § 295 et seq. [California's DNA Act, which mandates warrantless DNA samples from felony offenders and arrestees, limits disclosure of DNA test results and samples to law enforcement personnel, limits the use of that information to identification purposes only, and sets forth criminal penalties for use other than this purpose]; see §§ 299.5, subd. (f), 295.1, subd. (a), 299.5, subd. (*i*)(1)(A), respectively.)

By voluntarily discarding his cigarette butt on the public sidewalk, defendant actively demonstrated an intent to abandon the item and, necessarily, any of his DNA that may have been contained thereon. The facts here show the DNA testing of the abandoned cigarette butt was carried out only to identify defendant as a suspect in an ongoing criminal investigation. On these facts, we conclude that a reasonable expectation of privacy did not arise in the DNA test of the cigarette butt, and consequently neither did a search for Fourth Amendment purposes. (See *United States v. Davis* (D.Md. 2009) 657 F.Supp.2d 630, 649-650.)

These facts also serve to distinguish the present case from two United States Supreme Court decisions cited by defendant for the proposition that an examination or an analysis (i.e., a test) of an item already lawfully in the possession of authorities may nevertheless constitute an additional intrusion into reasonable privacy interests and therefore be an

independent "search" under certain circumstances: *Arizona v. Hicks* (1987) 480 U.S. 321 [94 L.Ed.2d 347] (*Hicks*) and *Skinner v. Railway Labor Executives' Assn.* (1989) 489 U.S. 602 [103 L.Ed.2d 639] (*Skinner*).

In *Hicks*, the high court concluded that the act of moving an item of stereo equipment to see a serial number that was not in plain sight--by a police officer lawfully on the premises on an unrelated matter--constituted an "additional invasion" of the defendant's privacy interest and therefore an independent "search" requiring Fourth Amendment justification. (*Hicks*, *supra*, 480 U.S. at pp. 324-325 [94 L.Ed.2d at pp. 353-354].)

Skinner proceeded from *Hicks.* Relevant to the situation before us, *Skinner* involved the issue of bodily fluids testing implicating Fourth Amendment privacy interests: federal safety regulations that compelled blood samples from railroad employees to determine drug use. For our purposes, *Skinner* concluded that "[t]he ensuing chemical analysis of the sample to obtain physiological data is a *further invasion* [i.e., in addition to the compelled drawing of the sample] of the tested employee's privacy interests . . . ." (*Skinner*, *supra*, 489 U.S. at p. 616 [103 L.Ed.2d at p. 659], italics added.) "[Thus,] the collection *and* subsequent analysis of the requisite biological samples must be deemed Fourth Amendment search*es* . . . ." (*Id.* at p. 618 [103 L.Ed.2d at p. 660], italics added.) As explained above, however, the ensuing analysis here (i.e., the DNA testing) was not done to "obtain physiological data," but only

to identify a particular person in an ongoing criminal investigation.

In light of defendant's abandonment of the cigarette butt on a public sidewalk and the fact that the DNA testing of that cigarette butt was done only to identify him as a suspect in an ongoing criminal investigation, we are left, in the end, with the following rhetorical observation. What if the police here, instead of testing the cigarette butt for defendant's DNA to identify him in an ongoing criminal investigation, had merely obtained defendant's fingerprint from the cigarette butt to identify him. Would defendant be able to assert, under the Fourth Amendment, a reasonable expectation of privacy in the testing of the cigarette butt for fingerprint identification purposes? No, he would not. (See *Cupp v. Murphy* (1973) 412 U.S. 291, 294-295 [36 L.Ed.2d 900, 904-906]; *Davis v. Mississippi* (1969) 394 U.S. 721, 727 [22 L.Ed.2d 676, 681]; *People v. Ayala* (2000) 24 Cal.4th 243, 278-279.) We see no distinction, for Fourth Amendment purposes, between these two situations.

II. The Trial Court Neither Coerced a Verdict Nor Abused Its Discretion in Refusing to Release Juror Information*

Defendant contends the trial court--after the jurors stated they were deadlocked for a second time--coerced a guilty verdict, and abused its discretion by denying defendant's

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* See footnote, *ante*, page 1.

petition for juror information to show juror misconduct that related to that coercion. We disagree.

A. Background

After 16 days of testimony and arguments, jurors began deliberating on the afternoon of February 11, 2009. The jurors next deliberated on February 17, all day, and had some testimony read back to them. On February 18, at noon, the jury stated it believed it was deadlocked. The foreperson reported an eight-to-four split. The trial court polled the jurors individually. Juror No. 5 expressed hesitancy about a deadlock, indicating that he/she wanted to confer with fellow jurors. The trial court directed the jury to continue deliberating, and the court gave a proper instruction that suggested ways to break impasses (a so-called "dynamite" instruction). (See *People v. Gainer* (1977) 19 Cal.3d 835, 842, 856; *People v. Moore* (2002) 96 Cal.App.4th 1105, 1118-1120.) The jury then deliberated for about two more hours that day.

After deliberating all day the next day, February 19, the jury informed the trial court at 4:00 p.m. that it was unable to reach a verdict. Upon inquiry, the foreperson did not think there was a reasonable probability that a verdict could be reached by deliberating further. However, the foreperson stated that the jury had taken only one additional ballot that day, after three previous ballots.

When the trial court asked for the numerical breakdown of the last ballot, the foreperson replied "nine [to] three," but

two unidentified jurors said "No." The following exchange between the foreperson and the trial court then occurred:

"THE COURT: Nine to three? Okay. So it sounds like it's news to the rest of the jury.

"JUROR NO. ELEVEN [Foreperson]: We took a vote. Somebody said to me afterward, said they wanted to change their vote, so it was nine [to] three.

"THE COURT: Okay. When did that occur in terms of your coming into this courtroom?

"JUROR NO. ELEVEN: In the hallway just now.

"THE COURT: Just now. Okay. Then it sounds like, to me--not to be critical--but it sounds like to me that there is some movement, because you said that there's not. And then just now, coming into court, someone told you that they were changing their vote, which I don't want to judge how you're conducting your deliberations, but . . . because of your statement to me, I think there may be some movement. At least I don't feel I want to do anything other than send you back to deliberate."

The trial court directed the jury to resume deliberations the next morning; and denied defendant's request to poll the jurors individually because the record indicated what had happened.

After resuming deliberations for three hours the next day (Friday, February 20), the jury requested that the following testimony be read back to it: Detective Lauther's complete

first testimony; defense expert Harmor's testimony on validation regarding the newer type of human blood test he had used; and testimony from three relatives regarding loans (Tony and Priscila Concepcion, and Primitiva Madayag).

And after deliberating for about two more full days, including the readback of the requested testimony, the jury reached its verdict.

Subsequently, defendant petitioned for the release of jurors' names, addresses and phone numbers based on the reported hallway conversation between the foreperson and another juror. Apparently, the trial court never expressly ruled on that petition, but also never notified the jurors, as it said it would do, if it had granted the petition.

B. Analysis

Coercion

A "[trial] court may ask jurors to continue deliberating where, in the exercise of its discretion, it finds a 'reasonable probability' of agreement. [Citations.] Any claim that [a] jury was pressured into reaching a verdict depends on the particular circumstances of the case." (*People v. Pride* (1992) 3 Cal.4th 195, 265, fn. omitted; § 1140.) "The court must exercise its power, however, without coercion of the jury, so as to avoid displacing the jury's independent judgment 'in favor of considerations of compromise and expediency.'" (*People v. Rodriguez* (1986) 42 Cal.3d 730, 775 (*Rodriguez*).)

Here, the trial was long (16 days of testimony and argument), the case was close, and the most contested issue (the source of blood on the towel) involved extensive expert testimony. The jury had deliberated for only two full days, which included the readback of testimony from two witnesses, when it "believe[d]" it was first deadlocked at eight to four. And at this point, one of the jurors indicated equivocation and a desire to confer with fellow jurors.

The jury reached its second impasse after only a little more than one full day of additional deliberation. At this point, the foreperson indicated movement in the vote total, to nine to three, because one juror had expressed a change of vote, to the foreperson, upon the jury's filing into the courtroom for the deadlock inquiry.

None of the trial court's comments to the jury was coercive.

Most significantly, after the second deadlock, the jury requested the readback of testimony from five witnesses (not previously requested), and specifically identified the testimony from these witnesses that it was interested in.

The circumstances of this case are similar to those in *Rodriguez*, *supra*, 42 Cal.3d 730, in which our state high court found no jury coercion. As *Rodriguez* concluded: "Here the trial had been long, the evidence voluminous, and the issues complex. . . . Under the circumstances, the trial judge could reasonably conclude that his direction of further deliberations

would be perceived as a means of enabling the jurors to enhance their understanding of the case rather than as mere pressure to reach a verdict on the basis of matters already discussed and considered. [Citation.] Subsequent events bore out that conclusion, for on the next three days following the jury's final statement of deadlock, it requested, and was read, five portions of testimony that had not previously been read to it during deliberations. Thus, the deliberations remained 'properly focused on the evidence' [rather than indicating coercion]." (*Id.* at pp. 775-776.)

As noted, quite similar circumstances are presented here. In fact, the present case can be contrasted with those decisions identified in *Rodriguez* in which coercion was found; in those decisions, "the trials had been relatively short and the issues relatively simple, so that further deliberations seemed unnecessary for purposes of enabling the jury to understand the evidence and could only be deemed intended to coerce the minority into joining the majority jurors' views of the case." (*Rodriguez*, *supra*, 42 Cal.3d at p. 775, citing *People v. Crossland* (1960) 182 Cal.App.2d 117, 119 and *People v. Crowley* (1950) 101 Cal.App.2d 71, 75; see also *Jiminez v. Myers* (9th Cir. 1993) 40 F.3d 976 [relied upon by defendant as a case where coercion was found; however, at issue in *Jiminez* was only whether the defendant acted with intent to kill when he fired a gun through a door, and both parties there conceded it was the kind of case where further deliberations would not be helpful

when deadlock occurred--see *Rodriguez v. Marshall* (9th Cir. 1997) 125 F.3d 739, 750-751 [distinguishing *Jiminez* in this fashion], disapproved on different grounds in *Payton v. Woodford* (9th Cir. 2003) 346 F.3d 1204, 1218, fn. 18.)

Defendant argues that coercion is shown by the following circumstances: (1) the dynamite instruction given after the first deadlock proved ineffective in preventing the second; (2) the trial court ignored the two unidentified dissident jurors who had said "no" to the question of whether movement in the jury voting had occurred; (3) the trial court approved of secret voting by jurors if such voting indicated movement by minority jurors; (4) the trial court did not want to know why the juror who changed his or her vote in the hallway was unable to do so in front of the other jurors; and (5) the court did not limit the length of resumed deliberations.

We take these five circumstances in order. First, the jury, in this complex case, had deliberated only a little over one full day after being given the dynamite instruction before coming to the second impasse. Arguably, the fuse of that instruction was still burning at that point. Second, the trial court did not ignore the two dissident jurors--they expressed their dissent that the vote tally had moved from eight to four to nine to three *before* the foreperson had a chance to explain that trek. Third, the trial court did not approve of secret voting; it was interested only in determining if movement had in fact occurred. Fourth, the hallway/vote-changing juror would

have to face the music (i.e., his or her fellow jurors) upon return to the deliberation room. And, fifth, the jury had not deliberated for very long (a little over three full days, which included extensive readback of testimony) in this complex, close, technical case before reaching the second deadlock; the trial court's failure to set a time limit for further deliberations proved wise given the extensive readback of additional testimony the jury requested after the second impasse.

Under the particular circumstances of this case, we conclude the trial court did not coerce the jury into reaching its verdict.

Juror Information

Defendant contends the trial court abused its discretion in denying his petition for the release of the jurors' names, addresses and phone numbers. This petition was based on the reported hallway conversation, set forth above, between the jury foreperson and the juror who changed his or her vote just after the second deadlock. Defendant claims this conversation evidenced juror misconduct (i.e., discussing the case outside the presence of the other jurors), and the release of this information would have assisted him in making his coercion argument. We find no abuse of discretion.

Assuming defendant has not forfeited this contention by failing to obtain an express ruling on his petition (as noted

previously at p. 19, *ante*), we reject the contention on its merits.

As implied above, a trial court's denial of a petition for disclosure of juror identifying information is reviewed for abuse of discretion. (*Townsel v. Superior Court* (1999) 20 Cal.4th 1084, 1094, 1096.) A defendant is entitled to juror identifying information only if he "sets forth a sufficient showing to support a reasonable belief [(1)] that jury misconduct occurred, [(2)] that diligent efforts were made to contact the jurors through other means, and [(3)] that further investigation is necessary to provide the court with adequate information to rule on a motion for new trial." (*People v. Rhodes* (1989) 212 Cal.App.3d 541, 552; *People v. Carrasco* (2008) 163 Cal.App.4th 978, 990; Code Civ. Proc., §§ 237, subd. (a)(2), 206, subd. (g).)

Defendant's claim is most prominently tripped up by factor (3). As the People persuasively argue, "absent some reason to believe that the verdict was influenced by the reported hallway communication [and no such reason was ever posited, because the circumstances show that only a vote change was uttered in the hallway rather than any substantive discussion of issues, and the jurors subsequently resumed deliberations that were focused on the evidence and that confronted the vote-changing juror], the trial court already had all the information it needed to evaluate the alleged juror misconduct based on the comments of the foreperson. . . . Moreover, since none of the other jurors

were privy to the conversation, giving [defendant] identifying information on those jurors would have invited a 'fishing expedition' by defense counsel hoping to upset the verdict."

Defendant counters by noting that the "burning question in this case is why the unidentified juror who whispered a vote change to the foreperson in the hallway was unable to convey his or her vote in the presence of the remaining jurors. . . . [This showed] a reasonable likelihood that the jury contained a biased member." As just alluded to, however, the hallway/vote-changing juror had to face his or her fellow jurors when the trial court directed the jury to continue deliberating (after this hallway remark was reported). And facing those other jurors, this juror had to explain the vote change to them; this was done, moreover, in a crucible which showed the jury was focused on the evidence (requesting an extensive readback of testimony from five significant witnesses).

Combining these reasons with those set forth in the previous subheading (*Coercion*), we also conclude the trial court did not abuse its discretion in denying the petition for juror identifying information to help with defendant's coercion argument.

III. Instructions Concerning Defendant's Alleged False Statement to Detective Lauther

This issue concerns defendant's allegedly false oral statement to Detective Lauther--which was not documented--that he was at work at the Capital Towers Restaurant on the night of August 29, 1991 (the likely time of the murder).

Defendant contends the trial court erroneously gave two conflicting instructions concerning this statement, as follows:

The first instruction was from CALCRIM No. 358, stating: "You have heard evidence that the defendant made oral statements before the trial. You must decide whether or not the defendant made any of those statements, in whole or in part. If you decide that the defendant made such statements, consider the statements, along with all of the other evidence, in reaching your verdict. It is up to you to decide how much importance to give to such statements. [¶] Consider with caution any statement made by the defendant tending to show his guilt unless it was written or otherwise recorded."

The second instruction was from CALCRIM No. 362, modified to include a reference to the alleged statement to Detective Lauther. That instruction read: "If you find that the defendant made a false or misleading statement relating to the charged crime, to wit: to Detective Lauther, regarding having been at work, knowing the statement was false or intending to mislead, that conduct may show he was aware of his guilt of the crime and you may consider it in determining his guilt. [¶] If you conclude that the defendant made the statement, it is up to you to decide its meaning and importance. However, evidence that the defendant made such a statement cannot prove guilt by itself."

Defendant argues that a reasonable juror would have understood the first instruction to be a general statement of

the law, and the second instruction to be a specific statement of how the law should apply to the facts of this case; such an understanding, defendant asserts, deprived him of the benefit of the first instruction's "Consider with caution" admonition.

In evaluating purportedly ambiguous instructions, we ask whether there was a "reasonable likelihood" the jury misunderstood or misapplied the instructions. (*People v. Clair* (1992) 2 Cal.4th 629, 662-663.) We do not think so here.

In considering the instructions as a whole, as the jury was also instructed to do, the jury would have concluded that the first instruction applied to all unrecorded, oral statements made by defendant--including his statement to Detective Lauther regarding having been at work on the night of August 29, 1991.

IV. Evidentiary Issues Involving Hearsay and Polygraph Willingness

Defendant raises two evidentiary issues; a third he has withdrawn.

First, defendant claims the trial court erroneously admitted a hearsay statement from his employer to Detective Lauther under the "state of mind" hearsay exception. Defendant is mistaken.

During the prosecution's case, Detective Lauther testified that after defendant told him he was at work (on the night of August 29, 1991), Lauther asked the employer if defendant was at work that night; Lauther "receive[d] a response" from the employer, and decided to contact defendant again. When the

prosecutor asked Lauther "why" he had decided to do so, defense counsel unsuccessfully objected on "relevance" grounds.

This evidence was not admitted for the truth of the employer's response, but only to show why Lauther decided to contact defendant again; the jury was so instructed (and immediately after this, Lauther testified that he contacted defendant again because defendant said he was at work and the employer said not so).

Consequently, the employer's statement was not offered for the hearsay purpose of the truth of the matter stated; the "state of mind" hearsay exception therefore did not apply. (Evid. Code, § 1250.) In any event, the defense objected to this statement on grounds of "relevance" rather than hearsay. (See Evid. Code, § 353 [to preserve review, specific ground of objection must be stated].)

Second, defendant contends the trial court violated due process by refusing to allow evidence that he had offered to take a polygraph examination in 1991, to rebut the prosecution's evidence of consciousness of guilt (i.e., defendant's supposed lie to Detective Lauther).

Defendant has forfeited this contention by agreeing at trial with the prosecution and the trial court that he could present evidence of his cooperation with the police, but not offers to take a polygraph examination (Evid. Code, § 351.1, subd. (a) [precluding such polygraph evidence]).

V. Parole Revocation Fine and Presentence Conduct Credits

On ex post facto grounds, we agree, along with both parties, that the trial court incorrectly imposed a $10,000 parole revocation fine under section 1202.45; that statute did not take effect until 1995, after the 1991 offense here. (*People v. Flores* (2009) 176 Cal.App.4th 1171, 1181-1182.) We strike this fine. (*Flores*, at p. 1182.)

Also on ex post facto grounds, we agree, along with both parties, that the trial court improperly determined, under section 2933.2, that defendant was not entitled to any local conduct credits for the 1,013 days he spent in presentence custody; section 2933.2, subdivision (a) (denying such credits to convicted murderers) did not take effect until 1998. (See Operative Effect and Historical and Statutory Notes, 51B West's Ann. Pen. Code (April 2000 ed.), foll. § 2933.2, pp. 348-349.)

In 1991, there were no limits on presentence local conduct credits based on the type of crime committed; and, if all days of conduct credits were earned (good time/work time), presentence detainees received two days of local conduct credit for every four days actually served. (Former § 4019, subds. (a)(1), (b), (c), (f), as amended by Stats. 1982, ch. 1234, § 7, pp. 4553-4554.) Defendant's probation report indicates he incurred only two relatively minor infractions during his presentence custody. Rather than remand this matter to the trial court for its calculation of defendant's presentence local conduct credits, in the interest of judicial efficiency, we

calculate them as amounting to 506 days of good time/work time credits. (*Flores*, *supra*, 176 Cal.App.4th at p. 1182.)

We deem defendant to have raised the issue whether recent amendments to section 4019, effective January 25, 2010, and to section 2933, effective September 28, 2010, entitle him to additional presentence custody credits. They do not. (§§ 1192.7, subd. (c)(1), 4019, former subds. (b)(2), (c)(2) [as amended by Stats. 2009-2010, 3d Ex. Sess., ch. 28, § 50]; 2933, subd. (e)(3) [as amended by Stats. 2010, ch. 426, § 1, eff. Sept. 28, 2010].) [THE REMAINDER OF THE OPINION IS PUBLISHED.]

DISPOSITION

The judgment is modified so that (1) the $10,000 parole revocation fine is stricken, and (2) defendant is awarded 506 days of presentence local conduct credits. As so modified, the judgment is affirmed. The trial court is directed to amend the abstract of judgment to reflect these two modifications, and to send a certified copy of the abstract to the Department of Corrections and Rehabilitation. **(*CERTIFIED FOR PARTIAL PUBLICATION*.)**

BUTZ, J.

We concur:

RAYE, Acting P. J.

ROBIE, J.