

THE PEOPLE, Plaintiff and Respondent, v. BRUCE BROOKS, Defendant and Appellant.

No. A124664

COURT OF APPEAL OF CALIFORNIA, FIRST APPELLATE DISTRICT, DIVISION TWO

2011 Cal. App. Unpub. LEXIS 9163

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PRIOR HISTORY: [*1]

San Francisco City and County Super. Ct. No. 187015.

CORE TERMS: brain, scan, hammer, killed, blood, bus, rebuttal, hit, imaging, kill, murder, brain damage, intoxication, killing, bridge, scientific, organic, times, van, reasonable doubt, manslaughter, unconscious, attacked, involuntary manslaughter, tape deck, neuropsychology, conscious, street, drinking, clinic

JUDGES: Lambden, J.; Kline, P.J., Haerle, J. concurred.

OPINION BY: Lambden

OPINION

Defendant Bruce Brooks appeals from his conviction for the second degree murder of Juliette Williamson. He argues the trial court committed prejudicial error by excluding evidence of Single Photon Emission Computed Tomography (SPECT) scans of his brain, allowing the prosecution to present evidence in rebuttal of its own case in chief, and instructing the jury improperly regarding involuntary manslaughter. We affirm the judgment in its entirety.

BACKGROUND

In September 2002, the San Francisco County District Attorney filed an information charging defendant with one count of murder. A jury trial began in July 2008.

Prior to trial, the defense filed a motion in limine to admit evidence of SPECT scans of defendant's brain purportedly showing he had organic brain damage. The defense wanted to use this SPECT evidence to support the conclusions of a neuropsychologist in order to argue that defendant could not form the intent necessary to commit murder. After conducting a hearing pursuant to *People v. Kelly* (1976) 17 Cal.3d 24 (*Kelly*), the court found the SPECT evidence was inadmissible under [*2] *Kelly* because the defense did not establish it was generally accepted in the relevant scientific community and the objectivity of its SPECT expert was very questionable; the court also exercised its discretion to exclude the evidence pursuant to Evidence Code section 352. The neuropsychologist was allowed to testify about her conclusions based on her own neuropsychological testing.

At trial, it was uncontested that Williamson and defendant had been a couple for approximately 16 years, performed together in a band around San Francisco, and lived in a bus that they parked around San Francisco. It was also uncontested that Williamson's body was found floating in the water near Yerba Buena Island on May 22, 2002, that her autopsy indicated she died from numerous blunt force injuries to her head, and that her injuries were consistent with being hit with repeated hammer strikes to her head.

The Prosecution's Case

Herbert Anderson's Testimony

Herbert Anderson testified that he was friends with both defendant and Williamson. He last saw Williamson when she drove past him in her yellow Honda and said hello to him. About four days later, defendant told him that Williamson had left for Chicago or [*3] Louisiana. The next night, defendant, who had been drinking, said he had killed Williamson. When Anderson said he did not believe it, defendant said, "Yeah, I did it." Defendant did not appear to have any injuries, did not complain about any, and did not say anything about Williamson attacking him.

Anderson further testified that defendant told him about three days later that he hit Williamson with a hammer while in the bus and that she took a long time to die. Defendant offered to give Anderson his bus for free. The two went to it and defendant gave Anderson possession and title that same day. There was blood splatter on the wall and ceiling of the bus and a large red stain on the bed. Defendant said it was Williamson's blood from when he killed her and later told Anderson to clean it up. Anderson cleaned up some, but not all, of it.

Anderson also testified that defendant said he wrapped up Williamson's body in a tarp and threw it into the bay after first trying to throw it over the rail by a bridge on Third Street in San Francisco. Defendant drove Anderson to the Hunter's Point Naval Shipyard, showed him where he had rolled the body over the side and into the bay, and said the police [*4] would not find the body.

Anderson further testified that the police came to talk to him about 10 or 11 days after defendant admitted killing Williamson. He gave the police a statement two days later.

As we have indicated, Anderson testified on direct examination that defendant said he killed Williamson with a hammer, and said nothing about Williamson attacking him. On redirect examination, Anderson testified that defendant told him that defendant and Williamson were drinking, they got into a "scuffle," and Williamson "attacked" him just before he killed her. Anderson testified that he told the police that defendant said he and Williamson were drinking and started to either argue or fight--at trial, Anderson could not recall exactly what defendant said--and defendant hit Williamson.

Charles Miranda's Testimony

Charles Miranda testified that he played music with defendant and Williamson. In the early morning of May 6, 2002, defendant came to Miranda's apartment crying and apparently intoxicated and said he had killed Williamson. Defendant said he and Williamson were driving in defendant's van when they began arguing. Williamson smashed defendant's tape deck with a hammer. Williamson got out [*5] of the van and went into the bus; defendant followed her and hit her in the back of the head with the hammer. Although Williamson said she was sorry, defendant kept hitting her in the head with the hammer, doing so 14 times until she died.

Miranda testified that defendant took him to the bus, where blood was splattered on the ceiling, the floor, and a jean jacket that defendant had previously worn. Defendant took Miranda to the Third Street Bridge and showed him where he had attempted to dump Williamson's body into the bay. Defendant said he hit Williamson's head against a concrete wall, and Miranda saw blood and hair there. Defendant said he wrapped Williamson's body in a tarp, tied a carburetor to it, and threw it into the bay at Hunter's Point.

Frank Samuels's Testimony

Frank Samuels testified that he played in a band with defendant and Williamson. Williamson and defendant argued on several occasions and she said that if anything happened to her, defendant "did it." In the early afternoon of May 5, 2002, the band began playing at Pier 39. During a break, Williamson and defendant argued; she hammered the tape deck in defendant's van and threw the hammer into the street. A very upset [*6] defendant retrieved the hammer. The band ended their engagement and the couple dropped Samuels off at a BART station.

Samuels testified that defendant picked him up the next morning to go to a scheduled performance. Defendant said that he and Williamson fought the night before and he hit her in the head with a hammer about 12 times while they were in their bus. He also said he tied an alternator to Williamson's body and threw it into the bay. Samuels did not know what to believe and asked defendant to take him back home.

According to Samuels, the next day defendant called him and said he had made up what he had said and did not kill Williamson, who was in Florida. Samuels later traveled with defendant in defendant's van and noticed Williamson's cell phone and purse inside the van.

Opal Williamson's Testimony

Williamson's sister, Opal Williamson,¹ said Williamson told her in the months before she was killed that defendant was using crack cocaine again and beating her. Williamson said she planned to leave defendant, asked Opal to rent a storage facility for her, and sent boxes to family members. She also said defendant had taken away her cell phone and the keys to her car.

¹ To avoid confusion, [*7] we refer to Opal Williamson as "Opal," and mean no disrespect by this reference.

Opal testified that she was talking to Williamson on the telephone about four to six weeks before she disappeared when Williamson told Opal, "[Defendant] is going to kill me. He's going to kill me, [Opal]. [Defendant] is going to kill me." Defendant got on the phone and told Opal, "I'm going to kill her. [Opal], I am telling you right now, if she leaves me, I am going to kill her."

Opal stopped hearing from Williamson in early May 2002. After authorities told her Williamson was dead, Opal received eight to 10 calls from defendant, who said Williamson had left him and he was looking for her.

Inspector Kervin Silas's Testimony

San Francisco Police Inspector Kervin Silas investigated Williamson's death. Around May 28, 2002, Miranda showed him where on the Third Street Bridge defendant said he had tried to throw Williamson's body into the bay. There appeared to be blood and hair on the bridge's wall. Silas subsequently arrested defendant, and the police seized a bus, a van, and a yellow Ford subcompact in his possession.

Police interviewed defendant for two hours, and a recording of the interview was played for [*8] the jury. At first, defendant said that a few days before she disappeared, Williamson argued with him and bit his ear. She left a couple of days later without saying where she was going. Defendant did not report her missing; she had left several times before, but returned eventually. When Silas told defendant that Williamson's body had been found, defendant remembered that the last day he saw her, they "argued a little bit" and drove back to the bus. There, Williamson got mad and walked away without taking anything with her, and he had not seen her since. When Silas told defendant police had observed blood on the walls of the bus, defendant suggested someone might have entered the bus and killed Williamson. He did not kill her and did not know why others would claim he admitted doing so.

Later in the interview, defendant said Williamson had broken the tape deck in his van with a hammer, which he had not revealed earlier because he did not want to implicate her in anything. After she left, defendant went into the bus and left the dogs inside. He returned the next morning and discovered blood everywhere. He did not understand what had happened, thought someone had been killed inside the [*9] bus, and did not want to be involved with the bus anymore, so he gave it away. He did not call the police because he thought Williamson might have killed someone, and he cleaned up the blood. After Williamson was missing for a couple of days, he thought something might have happened to her inside the bus, but did nothing about it. He called Williamson's sister after a couple of weeks.

At the end of the interview, defendant asked Silas what would happen if he "was guilty" of killing Williamson.

Other Prosecution Evidence

Silas recovered blood samples from the wall of the Third Street Bridge and the pier at the Hunter's Point Naval Yard. DNA results indicated the blood was Williamson's. Her blood was also found on the bus. A blood splatter expert testified that Williamson was either on or in front of the mattress in the bus when she was assaulted.

Defendant's Case

Dr. Myla Young's Testimony

Dr. Myla Young, a neuropsychologist, testified that she conducted neuropsychological testing of defendant in 2005. This testing "is the method that neuropsychologists use to answer questions about the relationship between brain and actions."

Young concluded that defendant experienced significant impairments [*10] caused by "insults" to his brain that resulted in damage. He experienced attention problems that interfered with everything he did, including his efforts to control his impulses and behavior and react to situations with appropriate responses. His short-term memory was impaired, thwarting his ability to learn new information and causing him to confabulate as he tried to remember things. His ability to shift from one thought or action to the next was also impaired, hindering him from stopping a behavior once he started it and moving on to something else. This handicap could cause a person to start a repetitive act like hitting and not stop until worn out.

Young further testified that defendant's records indicated the insults to his brain had resulted from a severe head trauma when he was about 11 years old that likely prevented the frontal lobe of his brain from maturing properly; his exposure to pesticides and fertilizers, and his sniffing gasoline, while growing up; his drinking alcohol from an early age and abuse of it throughout his life; and his use of a significant amount of drugs, including marijuana, cocaine, heroin, and Valium.

Young also testified that a brain damaged person [*11] who was provoked into committing a violent act could suffer amnesia and give different information to different people about what had happened without intending to lie. She thought there was a greater probability that defendant experienced amnesia directly after the May 5, 2002 incident because of his brain damage.

Defendant's Testimony

Defendant, about 58 years old, testified that his relationship with Williamson was "tumultuous." She was very possessive and scratched or hit him on several occasions. They both abused alcohol and drugs; he would drink from the time he woke up until he passed out for the last time that day. In 2001 and 2002, he was a "major alcoholic" and used Valium, marijuana, and crack cocaine, and in April and May of 2002 he was drinking to excess by the end of the day. In late April 2002, Williamson bit him on the ear in a dispute over the van's registration sticker and was arrested.

Defendant testified that on the day of Williamson death, Williamson hit the tape deck in his van with a hammer and threw the hammer out the window, which defendant retrieved. Later, he was "passed out" in the van and woke up as Williamson was hitting the tape deck again. The deck contained [*12] a music cassette that meant a lot to him. When he put out his arm to stop Williamson, she hit him with the hammer a few times on the arm and at least once with the hammer or a carburetor on the back of his head, knocking him "silly" and causing him to bleed. He saw a fluorescent number "three" with a diagonal line underneath it in his mind.

Defendant testified that he next recalled trying to drop Williamson's tarp-wrapped body over the Third Street Bridge ledge in order to bury her at sea. He did not remember hitting her or wrapping her body in the tarp. He remembered driving to Hunter's Point and looking for a place to put Williamson's body in the water so he could bury her. He must have killed her, but could not recall doing so. He remembered telling others that he killed her because he must have done so. There was blood inside the bus and all over his body.

Defendant further testified that he lied during his interview with Silas about numerous matters because he did not want to go to jail. He did not tell the police what had happened because he was not sure.

Officer Antonio Flores's Testimony

San Francisco police officer Antonio Flores testified that he spoke to Williamson and defendant [*13] by telephone in late April 2002 after Williamson was arrested for biting defendant. Williamson said she bit defendant because he had dug his nails into her finger when she started taking the registration sticker off of a vehicle. Both admitted they had been drinking at the time. Williamson said defendant had physically abused her before. The two knew Williamson was violating a protective order that required her to stay away from defendant, but defendant said he did not request the order nor want Williamson to be prosecuted. Williamson said she wanted to be with defendant, who was a "really good guy."

Other Testimony

Helen Scott, a bail bond agent, testified that on May 4, 2002, she went to Pier 39, where Williamson and defendant were playing music, to get some of the bail money Williamson owed her. Williamson smelled of alcohol and at one point seemed angry with defendant, who did not respond.

Annette Chunko, a former girlfriend of defendant's son who lived with defendant and Williamson for six to eight months in the early 1990's, said defendant and Williamson had an intense relationship, fought hard, and argued a lot.

Once, as they drove on a highway, Chunko saw Williamson hit defendant [*14] in the head at least four times with a pipe and defendant respond by punching Williamson in the face. Both used cocaine at the time.

Defendant's mother testified that defendant did well in school until he suffered a concussion in sixth grade. Afterwards, he became more disruptive in school, had issues with authority, and resisted psychiatric treatment. He was unable to hold a job for a long period of time. She knew defendant drank heavily and was getting in trouble.

Dr. Michael Chiarottino testified as an expert in addiction medication. Defendant's medical records indicated he received prescriptions for Valium in 2000 and 2001. Valium is a sedative hypnotic that interferes with the formation of short-term memory and can affect emotions, including causing increased violence and aggression. It can cause false memories and complete or fragmentary blackouts.

Rebuttal

Dr. Katie Olson's Testimony

Dr. Katie Olson, a Department of Public Health physician, testified in the prosecution's rebuttal that she saw Williamson as a patient about six times in 2000 to 2001. In March 2001, Williamson had a black eye and said defendant had punched her several times in the face, but she did not want to talk [*15] to the police. She told Olson that defendant was primarily verbally abusive, but had hit her before. Subsequently, Williamson said she wanted to leave defendant, but had to get some work done, pay some bills, and earn some more money before doing so.

Inspector Silas's Recall

Inspector Silas was recalled to testify about his interview with Anderson during his investigation of Williamson's death. Silas testified that Anderson said defendant told him that defendant and Williamson were drunk and started fighting, and that he hit Williamson with a hammer. Anderson never told Silas that defendant said Williamson had attacked him.

Verdict and Sentencing

In August 2008, the jury convicted defendant of second degree murder. The trial court subsequently sentenced defendant to 15 years to life imprisonment. Defendant filed a timely notice of appeal.

DISCUSSION

I.The Court's Exclusion of Defendant's Proffered SPECT Evidence

Defendant first argues that the trial court committed prejudicial error in violation of his state and federal constitutional rights when it excluded defendant's proffered SPECT evidence. We disagree under the particular circumstances of this case.

A.The Proceedings Below

Defendant sought [*16] to introduce evidence, including images, regarding SPECT scans of his brain performed at the Amen Clinic to support his argument that organic brain damage, along with his severe alcoholism, reduced "his neurologic functioning, leading him to act without forming intent to kill, let alone premeditation." He contended the SPECT evidence would show his "diminished blood flow in certain areas of his brain, indicating the presence of organic brain damage," "confirm[] and support[]" the testimony of Dr. Young, and be "relevant and probative of [defendant's] mental state at the time of the killing." At the subsequent *Kelly*² hearing, Dr. Daniel Amen and Dr. Myla Young both testified for the defense.

² Once referred to as "*Kelly-Frye*," we now refer to the "*Kelly*" rules due to changes in the Federal Rules of Evidence that supersede *Frye v. United States* (D.C. 1923) 293 F. 1013. (*People v. Bolden* (2002) 29 Cal.4th 515, 545.)

1.Amen's Testimony at the Hearing

Amen, an assistant clinical professor in psychiatry and human behavior at the University of California at Irvine School of Medicine and a psychiatrist and brain imaging doctor, testified that a brain SPECT scan is a nuclear medicine study in which [*17] very tiny doses of radioactive isotopes combined with another substance are injected into a person's body to obtain "a living picture of brain function." It looks specifically at the blood flow in the brain, "which correlates generally nicely with activity patterns," enabling an understanding of which areas of the brain are working well, and which are low or high in activity. According to Amen, "it is thought that SPECT is a direct measure of blood flow and an indirect measure of activity." Originally done with crude technology, SPECT scans began to be used again clinically after the late 1980's with improved technology for things like head injuries, strokes, dementia, and seizures.

Amen testified that he had performed SPECT scans since 1991 and at his clinic since 1995. He had qualified as an expert witness in brain SPECT imaging between 20 and 30 times in civil and, more commonly, criminal cases, including 13 that involved *Kelly* hearings. He had prepared 22 or 23 peer-reviewed articles on SPECT and maintained a website on which he listed 72 peer-reviewed research studies on SPECT and head trauma. He personally developed the protocol that his clinic used for conducting SPECT scan imaging. [*18] His clinic had "more experience than anybody in the world" and had conducted 44,000 SPECT scans. SPECT imaging was conducted at several California facilities, including Cedar-Sinai Hospital and UCLA. Amen also identified several other experts who testified like him regarding the use of brain SPECT in criminal proceedings.

Amen testified that he used SPECT scans for "a wide variety of diagnoses," including for head injuries, traumatic brain injury, seizures, strokes, early detection of dementia processes, "to help us understand violence, complicated psychiatric illnesses, people who have tried to kill themselves," to look for drug toxicity from prescribed medications or from drug or alcohol abuse, and for environmental toxic exposure. There were many studies of brain injury where MRIs and CT scans were normal, and the SPECT scan was significantly abnormal.

Amen testified that brain SPECT imaging was generally accepted by the neuropsychological community "for purposes of assisting them in neuropsychological evaluations," based on the many neuropsychologists referring patients to his practice and the "wide literature on brain SPECT as it relates to neuropsychiatric illnesses." SPECT imaging [*19] would be useful to a neuropsychologist evaluating defendant because it provided "a direct look at brain function" that, along with the other tests, gave a "more complete look at the actual physical functioning of [defendant's] brain"; however, SPECT scans would never be used in isolation.

Amen said he had testified in criminal matters that mostly involved murder, and that generally the brains he examined were "not very healthy." In a study of 40 murderers, he concluded that, as a group, they had "highly significant low activity" in the prefrontal cortex and a high percentage also had abnormalities in the left temporal lobe. However, Amen said many individuals that have prefrontal abnormalities are not murderers and people are able to compensate for it.

Amen testified about defendant's brain SPECT scans, conducted in 2005 and reviewed via images at the hearing, were "very abnormal." The SPECT imaging showed significantly decreased activity in defendant's prefrontal lobe and on the underside of his prefrontal cortex that was worse at rest, very abnormal for his age, and "often associated with judgment and impulse control, organization, planning, [and] forethought." Defendant also had decreased [*20] activity in his cerebellum, as well as on both sides of his temporal lobes, which "are very important structures in the brain for things like language and memory and temper control" and "could" give him problems with these matters, as well as with "mood stability." He had "scalloping," which was "the bumpy appearance across the surface of his brain," indicative of "some toxic exposure" in his past and which globally affected his brain. Amen also testified that alcohol would have made defendant's brain function worse.

Amen acknowledged that his testimony about SPECT imaging did not include how a person will perform in a particular situation. He was not aware of any imaging studies besides his own that studied the relationship of "acute alcohol and violence." He said "a very large body of literature equates the prefrontal cortex function to issues of judgment, impulse control, organization, planning and forethought." Decreases in that area of the brain make a person more vulnerable to problems with those sorts of behaviors. People with healthy brains can make "bad decisions," but a person is more likely to do so with low frontal lobe activity. Abnormalities in different brain SCAN images [*21] that he had reviewed indicated the individuals involved were potentially more vulnerable to poor judgment, but were not predictors of whether these individuals could or could not perform functions associated with the abnormal areas.

Amen further acknowledged that he was not offering an opinion regarding defendant's mental processes, such as his ability to make judgments and plans, and engage in other executive kinds of activities, at the time of the crime because Amen did not have a complete history for defendant; his testimony was limited to the condition of defendant's brain as reflected in the brain SPECT images. Nonetheless, Amen thought defendant's brain was "vulnerable to violence. May

never be violent, but it--you get it drunk and you drop the activity even further, then because of his baseline abnormalities, he is just highly vulnerable to trouble."

2.Young's Testimony at the Kelly Hearing

The parties stipulated that Young was an expert in both neuropsychology and the use of brain SPECT imaging in neuropsychology. She opined that SPECT imaging was generally accepted in the field of neuropsychology based on her review of the literature and the research, continuing education materials, [*22] and textbooks, and her discussions with colleagues. SPECT analysis was increasingly relied on, as indicated by 201 peer-reviewed articles on neuropsychology and SPECT between 1987 and 2008.

Young testified that she was trained in reading SPECT scans, but stated, "I however, do not consider myself an expert in SPECT analysis." Young said she requested SPECT scans in about half of her cases. She used them primarily to confirm her own conclusions, and they never had indicated something different from her conclusions. SPECT imaging gave her "a description of the physiology of how the brain is working."

Young said she requested the defense conduct a SPECT scan of defendant's brain after she had conducted her own testing. She used the SPECT analysis "to assure the certainty of the conclusions" she had reached from her testing. The scans confirmed that her conclusions were "certainly accurate" and also gave her "a little more information," indicating that some areas were more impaired than she thought. It enabled her to identify impairments specifically in the orbital frontal and anterior cingulate gyrus areas of the prefrontal lobe, as well as in the limbic and temporal lobe areas. Young [*23] stated that it "just provided more definition and more clarity to what I had already concluded." The SPECT imaging results did not affect any of her report, but gave her greater confidence in her conclusions.

At the conclusion of the hearing, the defense contended SPECT had been used across the country and in prestigious institutions for years with increasing confidence and was validated by hundreds of published studies, and that the traditional tests and the SPECT scans tended to validate each other. Therefore, the SPECT evidence should be admitted.

The People argued the SPECT evidence "was not relevant in terms of assisting the trier of fact to determine a particular issue, and was confusing and misleading to that extent." The SPECT scans were "pictures of the brain which show that [defendant] has some sort of organic problems, but that does not go to the issue so far as whether he was able to premeditate or any of those issues that are before the trier of fact regarding the case." Therefore, the SPECT evidence should be excluded.

In response, the defense asserted that, although it would "not be asking the ultimate question, the condition of [defendant's] brain . . . is relevant to [*24] whether he premeditated, planned and intended to kill."

3.The Trial Court's Ruling

The court ruled at the end of the hearing from the bench. It first addressed whether SPECT was generally accepted in the relevant scientific community. The court acknowledged that SPECT had applications in the medical field. However, it questioned SPECT's application in a forensic setting, where there were more prescriptive rules about establishing facts. The court could not find any published cases indicating whether SPECT was generally accepted, cited a case from the Eastern District of New York that excluded PET scans, and noted that Amen himself participated in 13 *Kelly* hearings, indicating a lack of consensus on SPECT's admissibility in a forensic setting.

The court also expressed a concern that Amen's conclusions about what was normal and abnormal were based not on a standardized norm, but on one established by his clinic. Furthermore, Amen offered "no correlation . . . of any substantial nature between blood flow in a particular area, which is what SPECT is designed to do, and any particular behavior." While Amen testified that a person with the abnormalities noted was "'vulnerable to particular [*25] types of behavior,'" "there's a lack of any testimony that there's any quantitative percentage of blood flow, specific cognitive functions or other factors that will be impaired or even affected." The court indicated the images of the scans were "pretty glitzy" and "pretty high tech," but that their colors had no meaning. Furthermore, Amen did not provide sufficient evidence to establish "the validity of inferring mental impairment or cognitive impairment from the images presented."

The court also expressed doubts about Amen's impartiality because his curriculum vitae indicated that he ran three or four different clinics "whose business is to do these brain scans and tell people how to have a healthy brain." The court concluded that, regardless of his teaching position, Amen had built a professional career "basically on the SPECT scans, and is a proponent of the use of the same," and that the bulk of his time was "consumed with research at his clinic and commercial enterprises related to SPECT." Based on these facts, the court had a "'considerable question' . . . as to

whether he is an independent and unbiased expert and truly represents a cross-section of the relevant scientific community, [*26] which is neuropsychology, neurology and related areas."

The court also found certain specific aspects of Amen's testimony were not particularly probative because they were based on vague definitions or incomplete information. It found indications in the literature referred to by Amen that the use of SPECT was still uncommon in the intersection between medical and psychiatric use; that a number of the articles did not indicate that SPECT specifically (as opposed to other procedures like MRI discussed in the articles) was well accepted for the purposes of diagnosing traumatic brain injury; that questions were raised about its utility in diagnosing psychiatric diseases; that large, well designed trials on brain SPECT imaging were necessary before research results could be applied in clinical practice; and that there were questions raised about the interpretation of SPECT images. The trial court concluded that the use of SPECT "had problems of accuracy, problems of correlation without valid and existing research having been done, and there is certainly some question with regard to the reliability of the testimony of Dr. Amen."

The court also found the SPECT evidence was not admissible pursuant [*27] to Evidence Code section 352. It stated that "the parameters of [Evidence Code section] 352 in terms of undue prejudice and lack of relevance would require the exclusion of the SPECT evidence. Reliability is inherently a factor and, without that reliability as to the underpinnings of that which is to be relied on, there is no relevance."

The court also addressed Young's testimony. It noted that Young relied on the SPECT evidence in two ways. First, it gave her greater confidence in her evaluation, which was not a reason to admit the evidence in front of the jury. Second, the SPECT evidence showed a greater severity of organic brain damage, but this did not render it admissible because Young did not change her conclusions. Therefore, the court concluded, the SPECT evidence had little probative value, and did not add anything to Young's opinion. Given that there were substantial difficulties with the SPECT evidence meeting the *Kelly* reliability requirements, the court concluded from its weighing process that Young's references to the SPECT evidence should be excluded.

B. Analysis

Defendant argues the trial court committed prejudicial error by violating his state and federal constitutional [*28] rights to due process and to present a complete defense by excluding the SPECT evidence. We disagree.

As defendant implicitly acknowledges in his discussion of California statutory and case law, the application of "ordinary rules of evidence," such as Evidence Code section 352, "generally does not deprive the defendant of the opportunity to present a defense . . ." (*People v. Snow* (2003) 30 Cal.4th 43, 90.) Thus, a court's proper application of these rules does not violate a defendant's constitutional rights.

Pursuant to Evidence Code section 801, subdivision (a), which addresses expert testimony, "[a] person is qualified to testify as an expert if he has special knowledge, skill, experience, training or education sufficient to qualify him as an expert on the subject to which his testimony relates. Whether a person qualifies as an expert in a particular case, however, depends upon the facts of the case and the witness's qualifications. [Citation.] The trial court is given considerable latitude in determining the qualifications of an expert and its ruling will not be disturbed on appeal unless a manifest abuse of discretion [is] shown." (*People v. Boyd* (1987) 43 Cal.3d 333, 357.)

In [*29] addition, the *Kelly* test has been formulated in order to protect the jury from techniques which, though novel, experimental, or new, convey a misleading aura of certainty. (*People v. Stoll* (1989) 49 Cal.3d 1136, 1155-1156.) It does not apply to mere expert testimony, which a factfinder may view with skepticism, but to scientific evidence, which a factfinder typically views with a high degree of certainty. (*In re Amber B.* (1987) 191 Cal.App.3d 682, 686-687.) Pursuant to the test, courts apply a three-pronged analysis to determine whether to allow expert testimony regarding a particular scientific technique. (*People v. Willis* (2004) 115 Cal.App.4th 379, 385.) "First, there must be proof that the technique is considered reliable in the scientific community. Second, the witness testifying about the technique must be a qualified expert on the subject. Third, there must be proof that the person performing the test used correct scientific procedures." (*Ibid.*)

The party offering the scientific evidence has the burden of proving its admissibility by a preponderance of the evidence. (*People v. Ashmus* (1991) 54 Cal.3d 932, 971 [disapproved on other grounds as recognized in *People v. Yeoman* (2003) 31 Cal.4th 93, 117].) [*30] On appeal, the first prong is reviewed independently. (*Ashmus*, at p. 971.) The other two are reviewed for abuse of discretion. (*Ibid.*)

The parties do not cite, and we are not aware of, any published appellate decision that has determined whether SPECT evidence is admissible in a criminal trial to support a theory that a defendant's criminal actions were materially affected by organic brain damage. Defendant cites certain cases from other jurisdictions, but these cases relate to determinations in civil trials regarding brain injury. (See *Donnellan v. First Student, Inc.* (Ill. App. 2008) 891 N.E.2d 463; *Chilcote v. Fireman's Fund Ins. Co.* (D. Mont. 2008) 2008 WL 2764949; *Fini v. General Motors Corp.* (Mich.App. 2003) 2003 WL 1861025.) None of these cases involved the presentation of SPECT evidence to demonstrate an impairment of the kinds of functions and behaviors raised by the defense theory, i.e., those going to defendant's ability to form the legally cognizable intent to commit murder. Defendant also provided the trial court, and provides to us, citations to criminal trials in California in which, he asserts, SPECT evidence has been admitted, but he provides no further explanation; [*31] without knowing what evidence was admitted for what purposes, these citations are unpersuasive. Therefore, we address this issue without the guidance of precedential or persuasive authority.

We affirm the court's decision to exclude the SPECT evidence for three reasons. First, the court did not abuse its discretion in raising serious questions about Amen's qualifications to testify as an expert witness. The court doubted that he could be independent and unbiased in light of his long engagement in significant entrepreneurship activities regarding SPECT via the Amen Clinics and activities as a proponent of the utility of SPECT scan imaging.

Defendant argues the trial court's ruling was somehow improper because the court "seemed to penalize Dr. Amen because he had *too much* involvement with SPECT scans, rather than too little, a criticism [that] stands logic on its head." Furthermore, if the testimony of experts who make a living through work in their areas of expertise, were disregarded, there would be few testifying experts. Neither argument establishes that the court abused its discretion. Both ignore that the court took issue with Amen's impartiality, not his experience.

Defendant also [*32] argues that, even if Amen's credibility was suspect, the court did not impugn the impartiality of Young, who independently opined that SPECT is generally accepted in the field of neuropsychology. This too is unpersuasive. Young stated SPECT was generally accepted in the neuropsychological community, but she did not testify about SPECT techniques. Amen, not Young, did so, testifying about the significance of variations in blood flow shown by SPECT scans, their possible impact on certain brain functions, and the possible "vulnerability" impaired individuals have towards certain behaviors. Young also testified that, while she was trained in reading SPECT scans, she did not consider herself to be an expert in SPECT analysis. Young's general testimony was wholly insufficient to establish the second prong of the *Kelly* test, i.e., "the witness testifying about the technique must be a qualified expert on the subject." (*People v. Willis, supra*, 115 Cal.App.4th at p. 385.)

We see no reason to disturb the court's ruling regarding Amen's qualifications under an abuse of discretion standard. Our conclusion on this issue alone is sufficient to affirm the trial court's ruling.

Second, based on our [*33] independent review, we agree with the trial court that defendant failed to establish that SPECT was generally accepted by the scientific community as showing brain injuries that were relevant to the defense theory that he did not form the intent necessary to commit murder. Defendant did not establish a generally accepted correlation between blood flow to a particular part of the brain and any particular behavior; to the contrary, Amen made clear that he was *not* testifying about such matters. His testimony indicated that there were too many variables involved for him to point to such a correlation, and he stated only that in his opinion, a person with an abnormal SPECT scan might be "vulnerable" to certain behaviors, but even then, the scan could not be used to predict specific behaviors. In short, as the trial court correctly summarized the testimony, "[T]here's a lack of any testimony that there's any quantitative percentage of blood flow, specific cognitive functions or other factors that will be impaired or even affected."

Similarly, none of Amen's or Young's testimony pointed to any research, studies, or articles that related to the defense's specific intended use of the SPECT evidence. [*34] It may be that SPECT scans have some utility in medical diagnoses of certain illnesses, but the defense did not contend defendant suffered from these illnesses. Instead, it sought to introduce SPECT evidence to purportedly show a certain kind of organic brain damage—one that interfered with functions relevant to defendant's forming the intent to kill Williamson. Nothing in the extensive briefing and submissions below, or in the many pages of briefing to this court, indicates that brain SPECT scan imaging is generally accepted by neuropsychology or any other scientific community for this purpose. Therefore, defendant has failed to meet his burden of showing that SPECT scan imaging is generally accepted as required by the *Kelly* test.

Defendant attempts to avoid this issue by arguing that they only sought to introduce the SPECT evidence to show brain damage, but that avoids the issue; certainly, it was relevant for the court to consider the evidence in light of the defense's own theory regarding its relevance. Defendant also argues that the trial court confused its own personal impression of the reliability of SPECT evidence with whether or not it was generally accepted by the neuropsychology [*35]

community. However, as we have indicated, the court correctly determined that defendant failed to establish that the proffered SPECT evidence was generally accepted for the purpose for which the defense proposed to use it.

Finally, whether or not the SPECT evidence was sufficiently reliable to be admissible under the *Kelly* test, the court did not abuse its discretion to exclude it pursuant to Evidence Code section 352. Section 352 states, "The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury." (Evid. Code, § 352.) The probative value of the SPECT evidence was very questionable in light of the defense's failure to link the results of a brain SPECT scan to any particular behaviors. Furthermore, to the extent the SPECT evidence was offered solely to show that defendant suffered organic brain damage, it was largely cumulative of Young's own conclusions, which she acknowledged she reached before the SPECT scans occurred and which were unchanged by the SPECT [*36] evidence. At most, the SPECT evidence gave Young more confidence in her conclusions which, as the trial court pointed out, was hardly reason enough to admit the evidence. On the other hand, the SPECT evidence, which the court found included "pretty glitzy" images, had a great potential to create an undue prejudice because of its seeming certainty, mislead the jury, and necessitate an undue consumption of time.

In light of our conclusion, we need not address the parties' debate regarding whether the court committed prejudicial or harmless error.

II. The Prosecution's Recall of Silas

Defendant argues that the trial court also prejudicially violated his state and federal constitutional rights to due process when it permitted the prosecution to recall in rebuttal a witness that the prosecution presented in its case in chief, Police Inspector Silas, in order to rebut the testimony of one of its own witnesses, Herbert Anderson, also presented by the prosecution during its case in chief. Again, we disagree.

A. The Proceedings Below

The prosecution called both Anderson and Silas to testify. Anderson said in direct examination that about five days after he last saw Williamson, defendant told him that [*37] he had hit her with a hammer, and later admitted again to doing so. Defendant had no apparent injuries, nor did he complain of any, and did not say anything about being attacked by Williamson. However, on redirect examination, Anderson testified that defendant said he and Williamson were drinking, they got into a "scuffle," and Williamson "attacked" him just before he killed her. Anderson also said he told the police that defendant said he and Williamson were drinking and started to argue or fight--at trial, Anderson could not recall exactly what defendant said--and defendant hit Williamson. When Silas testified, he was not asked about what Anderson told him about defendant's statements.

In the defense's presentation of its case, defendant testified that Williamson struck him with a hammer or a carburetor in the head after he tried to stop her from destroying his tape deck, after which he did not recall anything until he was standing on the Third Street Bridge holding her tarp-wrapped body. He did not recall telling Anderson anything about killing Williamson. The defense did not present any other evidence touching on Anderson.

After the defense presented its case, the prosecution sought [*38] to recall Silas to rebut Anderson's testimony that Williamson had "attacked" defendant just before he killed her. Defendant objected because he saw no distinction between this testimony and Anderson's reference to "fighting" when he was interviewed by the police. The trial court found a distinction between the terms, overruled the objection, and allowed the prosecution to recall Silas in rebuttal. Silas testified that Anderson said defendant had told him that he and Williamson started fighting, and he hit Williamson with a hammer. Silas said Anderson never said defendant told him Williamson had attacked defendant.

B. Analysis

Penal Code section 1093, subdivision (d) provides that, after the prosecution and defense have introduced evidence in support of their cases, "[t]he parties may then respectively offer rebutting testimony only, unless the court, for good reason, in furtherance of justice, permit them to offer evidence upon their original case." Our Supreme Court explained in *People v. Mayfield* (1997) 14 Cal.4th 668 that "[i]f evidence is directly probative of the crimes charged and can be introduced at the time of the case in chief, it should be." (*Mayfield*, at p. 761, citing *People v. Thompson* (1980) 27 Cal.3d 303, 330, [*39] *People v. Carter* (1957) 48 Cal.2d 737 (*Carter*), and *People v. Bunyard* (1988) 45 Cal.3d 1189.)

Thus, proper rebuttal evidence "'does not include a material part of the case in the prosecution's possession that tends to establish the defendant's commission of the crime. It is restricted to evidence made necessary by the defendant's case in the sense that he has introduced new evidence or made assertions that were not implicit in his denial of guilt.'" (*People v. Mayfield*, *supra*, 14 Cal.4th at p. 761.) "The reasons for the restrictions on rebuttal evidence are 'to (1) ensure the orderly presentation of evidence so that the trier of fact is not confused; (2) to prevent the prosecution from "unduly magnifying certain evidence by dramatically introducing it late in the trial;" and (3) to avoid "unfair surprise" to the defendant from sudden confrontation with an additional piece of crucial evidence.'" (*Ibid.*) "The decision to admit rebuttal evidence over an objection of untimeliness rests largely within the sound discretion of the trial court and will not be disturbed on appeal in the absence of an abuse of that discretion.'" (*Ibid.*) The order of proof, including admission of rebuttal evidence, [*40] also rests largely within the sound discretion of the trial court. (*People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 68.)

Defendant argues that the trial court committed prejudicial error by allowing the prosecution to offer evidence in rebuttal that should have been presented during its case in chief, thereby effectively destroying the defense theory of imperfect defense, i.e., that defendant attacked Williamson because he believed he was in imminent danger of suffering great bodily harm and needed to defend himself.³ He first argues the facts of this case are analogous to those found in *Carter*, *supra*, 48 Cal.2d 737. *Carter* is easily distinguishable, however.

³ We question whether defendant objected sufficiently below to preserve this specific appellate claim. However, the People do not raise the issue of forfeiture. Therefore we do not consider it further.

Carter was charged with murdering a bar owner, whose wallet, a wrench from the bar, and a red cap belonging to Carter were found under a bridge two-thirds of a mile from Carter's home. (*Carter*, *supra*, 48 Cal.2d at p. 743.) After Carter testified that he had not been to the bridge, the prosecution, in rebuttal, introduced the red cap [*41] with hair fibers that matched Carter's hair. (*Id.* at pp. 753-754.) The Supreme Court indicated it was error to allow the prosecution to do so because defendant's not guilty plea made it clear that he would not admit having gone to the area under the bridge, and his denial on the stand furnished no new matter for rebuttal. Therefore, the court ruled, the red cap should have been introduced during the prosecution's case in chief. (*Id.* at p. 754.)

In the present case, however, defendant's not guilty plea did not put the prosecution on notice regarding Anderson's testimony, and defendant does not argue that prosecution should have known about Anderson's "attack" reference prior to its redirect of him. Furthermore, Silas's rebuttal testimony did not constitute unfair surprise. Anderson's interview with Silas was tape-recorded and a transcript made of it, which, judging from the defense cross-examination of Silas, was made available to the defense.

Defendant also argues that, like *Carter*, "nothing presented during the defense case justified Inspector Silas[s] rebuttal testimony" because defendant purportedly "did not remember anything that happened with Williamson inside the bus on May 5, [*42] 2002, or anything that he subsequently told Anderson about the incident. (See *Carter*, *supra*, 48 Cal.2d at pp. 753-754.) This is incorrect. The defendant testified in the defense presentation of evidence that Williamson hit him on the arm a few times with a hammer and in the back of the head with a hammer or carburetor before he lost his memory. As a result, the prosecution had further good reason to rebut the defense's "attack" theory. The People do not raise this particular testimony in their respondent's brief, but as they do point out, "[n]umerous cases have approved the introduction of rebuttal evidence where, as in the case at bench, rebuttal testimony repeats or fortifies a part of the prosecution's case in chief which has been attacked by defense evidence." (*People v. Graham*, *supra*, 83 Cal.App.3d at p. 741.) Silas's rebuttal testimony rebutted not only what *Anderson* testified to in the prosecution's case in chief, but also what *defendant* testified to in his defense regarding Williamson's attack of him.

Along with arguing, incorrectly, that Silas's rebuttal testimony constituted unfair surprise, defendant also contends that it unduly magnified the evidence by dramatically introducing [*43] it late in the trial. (*Carter*, *supra*, 48 Cal.2d at p. 753.) We disagree, given the briefness of the testimony, Anderson's "attack" reference, and defendant's own testimony.

In short, we conclude that under the circumstances, the trial court could reasonably allow the prosecution to present Silas's rebuttal testimony. The trial court, therefore, did not abuse its discretion.

In any event, any error by the trial court was undoubtedly harmless for multiple reasons under either the federal or state standard. (*Chapman v. California* (1967) 386 U.S. 18, 24; *People v. Watson* (1956) 46 Cal.2d 818, 836.) Whatever the jury believed defendant told Anderson, it was a relatively minor issue, and undermined by Anderson's own equivocal

testimony in the prosecution's case in chief, in which he recalled defendant telling him that he "fought" with Williamson as well as that Williamson "attacked" him. The evidence was overwhelming that in the days after he killed Williamson, defendant separately told Anderson, Miranda, and Samuels that he had done so. Miranda's and Samuels's testimony indicated defendant made no mention of any attack by Williamson; to the contrary, Miranda testified that defendant said [*44] he followed Williamson as she went into the bus and hit her in the back of the head with the hammer. There was no evidence, including from Anderson's testimony, that defendant was injured at all when he killed Williamson; rather, the evidence made clear that he struck Williamson many times in her head, further weakening any imperfect self-defense theory.

Defendant's story was utterly unpersuasive. His claim of amnesia, for example, was not credible in light of the testimony of Anderson, Miranda, and Samuels; indeed, he showed the blood-splattered bus to Anderson and Miranda, further demonstrating his awareness that he killed Williamson. The evidence also indicated defendant lied to protect himself, such as the testimony by Samuels that defendant said he had made up the killing, his disingenuous calls to Opal inquiring about Williamson's whereabouts, and, as he admitted, his false statements in his interview with police. The contention that Silas's rebuttal testimony impacted defendant's arguments that he did something less than murder Williamson cannot be maintained in light of this overwhelming evidence.

III. The Court's Jury Instructions

Finally, defendant argues the trial court violated [*45] his state and federal constitutional rights to due process in the course of instructing the jury regarding involuntary manslaughter and voluntary intoxication because the instruction effectively prevented the jury from convicting defendant of the lesser offense and improperly shifted the burden of proof to defendant. Both arguments are unpersuasive.

A. The Proceedings Below

The trial court agreed to instruct the jury consistent with CALCRIM No. 580 regarding involuntary manslaughter. In doing so, the court instructed the jury that defendant committed involuntary manslaughter if, among other things, "defendant committed a crime that possessed a high risk of death or great bodily injury because of the way in which it was committed[.]"

The court also instructed consistent with CALCRIM No. 625 regarding the effect of voluntary intoxication on defendant's culpability. In addition, the court instructed the jury consistent with CALCRIM No. 626 as follows: "Voluntary intoxication may cause a person to be unconscious of his or her actions. A very intoxicated person may still be capable of physical movement but may not be aware of his or her actions or the nature of those actions. A person is voluntarily [*46] intoxicated . . . by willingly using any intoxicating drink, drug, or other substance knowing that it could produce an intoxicating effect, or willingly assuming the risk of that effect.

"When a person voluntarily causes his or her own intoxication to the point of unconsciousness, the person assumes the risk that while unconscious he or she will commit acts inherently dangerous to human life. If somebody dies as a result of the actions of a person who was unconscious due to voluntary intoxication, then the killing is involuntary manslaughter.

"Involuntary manslaughter has been proved if you find beyond a reasonable doubt that:

"The defendant killed without legal justification or excuse. That's No. 1.

"No. 2. The defendant did not act with the intent to kill;

"No. 3. The defendant did not act with a conscious disregard for human life; and

"4. As a result of voluntary intoxication, the defendant was not conscious of his actions or the nature of those actions.

"The People have the burden of proving beyond a reasonable doubt that the defendant was not conscious. If the People have not met this burden, you must find the defendant not guilty of murder or voluntary manslaughter."

The court gave this [*47] instruction over the objection of the defense that it improperly shifted the burden of proof to the defense. The defense sought an instruction consistent with CALJIC No. 8.47. The court ruled that the instructions clearly stated that it was the People's burden of proof, and that the last paragraph of the challenged instruction indicated that it applied to murder and/or voluntary manslaughter, and applied to homicide in general. The court rejected the re-

quest for a CALJIC instruction, and found that the CALCRIM instructions should be read together (rather than have a CALJIC instruction planted in the middle of them) and fully informed the jury of the law and its obligations.

B. Analysis

1. The Court's Instruction Pursuant to CALCRIM No. 580

Defendant argues that the trial court instructed the jury pursuant to CALCRIM No. 580 on the wrong theory, i.e., instructing regarding whether defendant "committed a crime that possessed a high risk of death or great bodily injury because of the way in which it was committed," rather than on the theory that he "committed a lawful act, but acted with criminal negligence." As the People point out, however, defendant did not rely on the theory that he committed [*48] a lawful act with criminal negligence, nor does the evidence support this theory; hitting a victim repeatedly in her head with a hammer is in no way a lawful act. Therefore, the court did not err.

Defendant argues that his defense pursued the theory that he "was only guilty of involuntary manslaughter because at the time he committed the May 5, 2002 killing, he was unconscious due to intoxication." The citations to the record that he provides do not necessarily support this assertion. Defendant cites to a passage of his defense counsel's closing argument in which counsel, after contending that "during the period of the incident with Williamson, he did not have consciousness," referred to the "combination of the intoxication and [defendant's] organic brain damage and the stress of the situation" to explain why there was "no motor function that [defendant] can recall." The statement cited comes at the end of an argument that begins with the statement, "How is it possible, how is it possible that [defendant] blanked out everything?" Counsel then summarized Young's and Chiarottino's testimony regarding defendant's brain damage, alcohol and drug use, lack of recall, and amnesia. Thus, the [*49] argument largely addresses defendant's lack of any recall of killing Williamson. A lack of recall is not sufficient to merit an unconscious instruction. (See *People v. Rogers* (2006) 39 Cal.4th 826, 888 ["defendant's own testimony that he could not remember portions of the events, standing alone, was insufficient to warrant an unconsciousness instruction"].)

More to the point, to the extent counsel's argument suggested, barely, that defendant killed Williamson while unconscious due to intoxication, there was no evidence to support this assertion. Defendant's testimony was the only conceivable support, and it provided none when examined closely. While he testified that he drank in excess by the end of the day during April and May 2002, he only said that he was "passed out" *before* he was awoken by Williamson's beating on his tape deck on the night of the killing. Consistent with defendant's further testimony, defense counsel stated in closing argument that defendant woke up, tried to stop Williamson from destroying his tape deck, was hit in the back of the head with a hammer or a carburetor, and next remembered being on the Third Street Bridge. In other words, defendant's testimony indicated [*50] only that he was knocked out by a blow to the head from Williamson, not because of intoxication. Therefore, we conclude that the trial court instructed on the proper theory regarding CALCRIM No. 580.

Defendant further argues that the court's selection of the wrong theory of involuntary manslaughter prevented the jury from appropriately applying CALCRIM No. 626, particularly because there purportedly was no evidence to support the court's involuntary manslaughter instruction as given. As a result, he argues, the court's instruction "made it nearly impossible for the jury to find [defendant] guilty of this lesser offense."

We disagree that there was no evidence to support the court's CALCRIM No. 580 instruction. The defense argued that defendant's actions towards Williamson were affected by brain damage that made it difficult for him to control his conduct, based on Young's testimony. His counsel argued in closing after summarizing this testimony, "there's no doubt in my mind that . . . if his brain had not been so juiced, or if he didn't have organic brain damage, I think he would have had better control." This suggested that, to the extent defendant struck Williamson with a hammer, he [*51] did so without intending to kill her and could not stop because of brain damage; that is, he "committed a crime that possessed a high risk of death or great bodily injury because of the way in which it was committed," consistent with the instruction in CALCRIM No. 580. Thus, the court's involuntary manslaughter instruction was proper.

To the extent defendant asserts that the court's instruction pursuant to CALCRIM No. 580 somehow interfered with the jury's application of CALCRIM No. 626, we need not address the merits of this argument because any such error was undoubtedly harmless under the federal or state standard. (*Chapman v. California*, *supra*, 386 U.S. at p. 24; *People v. Watson*, *supra*, 46 Cal.2d at p. 836.) As we have discussed, the testimony of Anderson, Miranda, and Samuels regarding what defendant told and showed them in the days after the killing provided overwhelming evidence that defendant was conscious when he killed Williamson, and there was no evidence that he did so while unconscious due to intoxication.

Given our conclusions, we need not address the remainder of the parties' arguments regarding this instruction.

2.The Court's Instruction Pursuant to CALCRIM No. 626

Defendant [*52] also argues the trial court's instruction pursuant to CALCRIM No. 626 improperly shifted the burden of proof to the defense in two respects.

First, he argues that the court, by instructing the jury that involuntary manslaughter was proved if the jury found "beyond a reasonable doubt" that he killed without legal justification, did not act with the intent to kill, did not act with conscious disregard for human life, and was not conscious of his actions due to voluntary intoxication, somehow shifted the burden of proof to the defense. This is correct. As with any crime, it merely reflects that the People must prove defendant's guilt beyond a reasonable doubt in order to obtain a conviction; nothing in this language shifts the burden to defendant.

Second, defendant points to language in the court's instruction which states, "The People have the burden of proving beyond a reasonable doubt that defendant was not unconscious." Defendant argues the jury was misled by this language because it suggests the People bore the burden of proof for that one element only, and that the other elements of the crime were defendant's burden to disprove. This argument is also unpersuasive. As the respondent [*53] correctly points out, defendant failed to mention the next sentence in the instruction, which states, "If the People have not met this burden, you must find defendant not guilty of murder or voluntary manslaughter."

Both of defendant's arguments are even less persuasive when we review the court's instructions as a whole. We are required to do so, and to "assume that the jurors are intelligent persons and capable of understanding and correlating all jury instructions which are given." (*People v. Yoder* (1979) 100 Cal.App.3d 333, 338.) Among other things, the court specifically instructed the jury, "A defendant in a criminal case is presumed to be innocent. This presumption requires that the People prove a defendant guilty beyond a reasonable doubt. Whenever I tell you the People must prove something, I mean they must prove it beyond a reasonable doubt." The court also instructed the jury, "The People have the burden of proving beyond a reasonable doubt that the killing was not justified. If the People have not met this burden, you must find defendant not guilty of murder or manslaughter," and that "[i]n order to prove murder or voluntary manslaughter, the People have the burden of proving [*54] beyond a reasonable doubt that the defendant acted with intent to kill or with conscious disregard for human life. If the People have not met either of these burdens, you must find the defendant not guilty of murder and not guilty of manslaughter." The court made very clear to the jury that the prosecution had the burden of proof throughout, and not the defendant. Defendant's argument is without merit.

Furthermore, as the People also argue, any error in giving CALCRIM No. 626 was undoubtedly harmless under the federal or state standard. (*Chapman v. California*, *supra*, 386 U.S. at p. 24; *People v. Watson*, *supra*, 46 Cal.2d at p. 836.) Regardless of the trial court's decision to give this instruction, there was overwhelming evidence that defendant was conscious when he killed Williamson and no evidence that he did so while unconscious due to intoxication.

DISPOSITION

The judgment is affirmed.

Lambden, J.

We concur:

Kline, P.J.

Haerle, J.