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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE,

Plaintiff and Respondent,

v.

VANCE GATTIS,

Defendant and Appellant.

A132506

(Contra Costa County
Super. Ct. No. 51006154)

On April 18, 2011, 58-year-old Vance Gattis was convicted by a jury of second degree murder, in violation of Penal Code section 187.¹ As a result of his three prior convictions, his prior state prison term, and serious felony findings, he was sentenced to state prison for a total term of 46 years to life.

Defendant claims that his constitutional rights were violated by jury instructions that were contradictory, inaccurate, and prejudicially misleading. He also argues that he received ineffective assistance of counsel with respect to some jury instructions and that the trial court erred in admitting irrelevant and remote evidence of his prior domestic violence. We disagree and affirm.

¹ All statutory references are to the Penal Code, unless otherwise stated.

I.
FACTUAL AND PROCEDURAL
BACKGROUND

On January 5, 2010, defendant called 911 and asked for help. Defendant reported that he was in a red Jeep, that he did not know where he was, and that his dead girlfriend was in the car with him somewhere in Richmond. Defendant said he was “sorry” multiple times, and he told the dispatcher many times his girlfriend was dead. The dispatcher determined defendant was at Florida and South Seventh Streets, Richmond.

At approximately 4:19 a.m., a Richmond patrol officer received a dispatch about a “possibly intoxicated male” in a red Jeep with his dead girlfriend. The officer drove westbound on Florida until he saw the red Jeep roll through a stop sign at about five miles per hour, then come to a stop in the middle of the intersection. The officer saw that the driver, later identified as defendant, was nodding off, with his head repeatedly falling forward. The officer ordered defendant to pull to the curb, and defendant was able to do so.

The officer approached the Jeep, opened the driver’s door, and saw a woman lying on her back on the front passenger floorboard. She had blood on the top of her head and on different parts of her clothing. After the officer asked defendant several times who the woman was, he identified the woman as his girlfriend, but did not provide her name. The officer could not tell whether defendant was injured or whether the woman was alive or dead. An ambulance arrived, and ambulance personnel helped defendant walk to the ambulance, because he could not walk by himself at that point. The officer retrieved defendant’s wallet from his back pocket and determined defendant’s identification, as well as the fact that defendant was the registered owner of the Jeep.

Another officer saw blood spatter and fingerprints on the exterior of the Jeep and a bottle of gin inside the car on the center console. The body of defendant’s girlfriend was “contorted on the right front passenger floorboard.” Her knees were flexed, one arm was underneath her, and the other arm was extended outside the car. She had a large laceration on the back of her head, and her face, scalp, and clothes were smeared with

blood. She was cold to the touch and appeared to be in “full rigor,” according to a forensic pathologist who testified at trial. It was later determined that the victim died from bleeding caused by multiple stab wounds. She was stabbed seven times: just below the clavicle, on the breastbone, the lower abdomen, the neck, and three times in the back. The stab wound to the breastbone punctured the victim’s left lung, and a large amount of blood around the lung caused it to collapse.

The victim also had blunt trauma injuries. She had a large number of bruises and contusions over her entire face. The most prominent trauma was to the left side of her face, including the temple, cheek, chin, and nasal bridge, and she had a blood clot around her left eye. In addition, the victim had defensive-type injuries on the backs of both hands. The victim had injuries consistent with choking or strangulation, including abrasions, scrapes, and contusions on her neck, with bruising in the muscle of the neck and hemorrhage bleeding in the soft tissue, as well as ruptured small blood vessels in her eyes. The victim had a liter of blood in her chest, which caused her heart to stop, killing her within minutes. With blood in her lungs, the victim would have gasped for air as if she were drowning, lost the ability to breathe properly, and made gurgling sounds as air bubbled through her blood.

A crime scene investigator followed defendant’s ambulance to the hospital. He observed that defendant had minor abrasions on both knees, bloodstains on his hands, and swollen knuckles. Defendant was nonresponsive to questions until a nurse inserted a catheter, at which point he woke up. A nurse asked defendant what happened to him. The investigator heard defendant say that he had been in a fight with his girlfriend over her use of drugs and the money she spent to buy drugs. Defendant also told the nurse that his girlfriend was dead. A blood test showed that defendant’s blood alcohol level was 0.21 percent.

Defendant and the victim lived together in a mobile home, which police searched pursuant to a warrant. They found a bottle of gin and blood on the floor in the kitchen area and blood spatter in the parking area outside the trailer. The blood spatter was located on the ground, on a white car parked in the area, and on some gravel and dirt

areas. The blood spatter on the car was downward drops, while the spatter in the parking area traveled in a “distinctly westward direction and a northward direction, with an abrupt change in direction.” There were also three separate areas of blood smear, which contained denim fabric and shoe impressions. The blood trail led away from the trailer and terminated near the parking area next to the trailer. The police also found an upper denture in the blood spatter outside the trailer, and the victim did not have teeth or dentures in her mouth when her body was processed by the police.

Police interviewed defendant at 10:45 p.m. on January 5, 2010. The interview was recorded and played for the jury. During the interview, defendant admitted that he “cut her [the victim] with the knife [¶] . . . [¶] like a camp knife.” Police did not find a camp or pocket knife during their search of defendant’s trailer. During the interview, defendant told police that he hurt his best friend, that he felt terrible, and that he was really sorry about what happened. According to defendant, he fell asleep after drinking alcohol, and was woken up by the victim. He discovered that \$400 was missing from his coat pocket. He protested when the victim said she wanted to get “rock,” but then they both left to “pick some up.” When pressed about what happened to the victim, defendant said “I don’t know what happened,” but he recalled that he “stuck her in the car” and that he “got scared.” She was down on her knees, moaning and crawling, and trying to whisper, and defendant told her to “[h]old on. Hold on.” Defendant heard the victim wheezing, and he heard her stop breathing. Defendant said that he did not remember calling 911 and that he hated himself for drinking a lot of alcohol.

Defendant also told officers his knuckles were bruised and swollen because he fell down his stairs. His knees were bruised. He did not remember hitting the victim with his fists, but he recalled cutting her with his knife. When asked where he put the knife, defendant said the kitchen sink. When told there was no camp or pocket knife in the trailer, defendant claimed he did not throw anything away. Defendant acknowledged that he and the victim “got in a . . . scuffle” after he realized she had taken his money, but he did not recall if he punched her. When asked why he got so upset that he actually stabbed the victim over “400 bucks,” defendant responded that he was “just getting tired

of getting, you know—you know, she’s got a habit of picking up money and stuff.” Defendant said he never thought it would “go this far.” Defendant did not remember much, but he knew that the victim was not running when he stabbed her. She was facing him and yelling for a neighbor.

At trial, defendant did not dispute killing the victim, but instead claimed that he lacked the requisite intent to commit murder. A psychiatrist who evaluated defendant about four months after the murder testified for the defense and opined that defendant was gradually losing his memory due to a form of dementia. The memory loss was also likely caused by a head injury, toxins to the brain from a long history of heavy drinking and cocaine use, and medical problems, including diabetes, high blood pressure and cholesterol, and coronary artery disease. When cocaine and alcohol are used together, the toxin and insult to the brain make the situation worse, according to the psychiatrist. A person under the influence of cocaine and alcohol does not think clearly or rationally. The combination of drugs and alcohol can impede concentration, affect memory, and destroy logical thinking. Thoughts are disturbed, chaotic, illogical, irrational, unrealistic, and delusional, and behavior can be wild, frenzied, unaware, disturbed, and out of control.

Based on his examination of defendant and his review of reports and records, the psychiatrist opined that at the time of the crime, defendant was in a delirious state related to an alcohol blackout. Delirium, which is a recognized mental health diagnosis, is a sudden change in consciousness, and it involves severe mood changes, difficulty controlling behavior, agitation, rage, and loss of control and focus. Delirium can last for hours or even days. The state can end fairly quickly, and the person will have no memory of what happened. Similarly, a person in an alcoholic blackout can operate and do things, but have no memory of it. Delirium is a condition where the brain becomes disturbed and shuts down, and there is a severe disorganization of brain function. A person cannot act clearly or in a rational manner, and often has no memory of what happened during the delirious period. There are many causes for delirium, including the use of alcohol and cocaine. A person in a delirious state probably cannot talk sensibly

with anyone or accomplish a complicated task. When a person has a motive to do something and carries it out, that behavior is unimpaired and goal-directed, which is inconsistent with delirium. Also, stabbing a person seven times is goal-directed behavior as long as the stabber is conscious enough to know what he is doing, according to the psychiatrist.

The jury convicted defendant of second degree murder, and this timely appeal followed.

II. DISCUSSION

A. *The Jury Instructions.*

Defendant argues, for the first time on appeal, that the instructions on unconsciousness were prejudicially conflicting, irreconcilable, and ambiguous.² Defendant additionally argues that trial counsel was ineffective for failing to request a third involuntary manslaughter instruction based on criminal negligence and mental disease, defect, or disorder exacerbated by ingestion of drugs or alcohol.

1. General legal principles.

We begin with the well-known principle in criminal law jurisprudence that a trial court must instruct the jury on all general principles of law relevant to the issues of the case, including defenses and lesser included offenses when they are supported by substantial evidence. (*People v. Rogers* (2006) 39 Cal.4th 826, 866-867; *People v. Oropeza* (2007) 151 Cal.App.4th 73, 78.) “[S]ubstantial evidence means evidence which is sufficient to deserve consideration by the jury and from which a jury composed of reasonable persons could conclude the particular facts underlying the instruction existed.

² Respondent does not argue that defendant forfeited the right to make this argument. However, we seriously question whether defendant’s claims regarding jury instructions were preserved for appellate review. It is settled that a defendant’s failure to object to jury instructions forfeits the claim on appeal. (*People v. Virgil* (2011) 51 Cal.4th 1210, 1260.) In light of defendant’s claim that he was excused from objecting because the instructions affected his substantial rights (§ 1259), and to forestall any later charge brought in a habeas proceeding, we proceed to the merits.

The trial court is not required to present theories the jury could not reasonably find to exist.” (*Oropeza* at p. 78.) The appellate court reviews independently the question whether the trial court erroneously failed to instruct on defenses and lesser included offenses. (*Ibid.*)

The jury in this case was instructed on murder, manslaughter, intoxication, mental deficiencies, and unconsciousness. Murder is the unlawful killing of a human being with malice aforethought, which can be express or implied. Express malice is the intent to unlawfully kill. (*People v. Perez* (2010) 50 Cal.4th 222, 233, fn. 7.) Implied malice is a “ ‘conscious disregard for life.’ ” (*People v. Blakeley* (2000) 23 Cal.4th 82, 87.) Specifically, malice is implied “when a killing results from an intentional act, the natural consequences of which are dangerous to human life, and the act is deliberately performed with knowledge of the danger to, and with conscious disregard for, human life.” (*People v. Cook* (2006) 39 Cal.4th 566, 596.)

The unlawful killing of a human being without malice is manslaughter. (*People v. Rios* (2000) 23 Cal.4th 450, 460.) A defendant may be guilty of voluntary manslaughter if he or she acts with intent to kill or conscious disregard for life, but, as a result of being provoked, kills in a sudden quarrel, the heat of passion, or in unreasonable self-defense. (*People v. Blakeley, supra*, 23 Cal.4th at pp. 87-89.) A person commits involuntary manslaughter when he or she kills another without any intent to kill and without conscious disregard of the risk to human life. The mental state associated with involuntary manslaughter is criminal negligence. (*People v. Butler* (2010) 187 Cal.App.4th 998, 1007.)

Section 26 exempts from criminal responsibility “ ‘[p]ersons who committed the act charged without being conscious thereof.’ ” (*People v. Chaffey* (1994) 25 Cal.App.4th 852, 855.) However, unconsciousness caused by voluntary intoxication is governed by former section 22 (now section 29.4, hereafter referred to as § 22, as numbered at time of trial), rather than section 26. (*People v. Carlson* (2011) 200 Cal.App.4th 695, 705 (*Carlson*)). Pursuant to section 22, evidence of voluntary intoxication is admissible solely on the issue of whether or not the defendant actually

formed a required specific intent, or, when charged with murder, whether the defendant premeditated, deliberated, or harbored express malice aforethought. (*People v. Turk* (2008) 164 Cal.App.4th 1361, 1370-1371.) Section 22 precludes evidence of voluntary intoxication to negate implied malice. (*Carlson, supra*, at p. 706.) Similarly, pursuant to section 28, evidence of mental disease, mental defect, or mental disorder is admissible solely on the issue of whether or not the accused actually formed a required specific intent, or whether he premeditated, deliberated, or harbored malice aforethought, when a specific-intent crime is charged. If a defendant unlawfully kills without express malice due to voluntary intoxication but still acts with implied malice, which voluntary intoxication cannot negate, the defendant is guilty of second degree murder. (*Carlson, supra*, at p. 707.) If, however, a state of unconsciousness is induced by voluntary intoxication, both express and implied malice are refuted, and the defendant is guilty of involuntary manslaughter. (*People v. Ochoa* (1998) 19 Cal.4th 353, 423-424.)

Defendant argues that there is a structural defect in a CALCRIM instruction on unconsciousness because involuntary manslaughter based on criminal negligence was missing, and because other instructions on unconsciousness were confusing, contradictory, and ambiguous. We shall, therefore, set forth the basic principles from which the instructions on involuntary manslaughter based on unconsciousness are derived.

2. CALCRIM No. 626.

Consistent with defendant's theory that he did not act with intent to kill because of his voluntary intoxication, the jury was instructed, at his request, with CALCRIM No. 626 (Voluntary Intoxication Causing Unconsciousness: Effects on Homicide Crimes), 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 intoxicated if he or she becomes intoxicated by willingly using any intoxicating drug, drink, 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 someone 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: [¶] 1. The defendant killed without legal justification or excuse; [¶] 2. The defendant did not act with the intent to kill; [¶] 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 unconscious. If the People have not met this burden, you must find the defendant not guilty of (murder/ or voluntary manslaughter).” (Italics added.)

Despite requesting the instruction below and failing to object to the language of the instruction italicized above, defendant argues for the first time on appeal that CALCRIM No. 626 is “seriously imprecise and unfortunate,” and claims that the problem with the language regarding assumption of the risk is “obvious.” Defendant believes the instruction should include criminal negligence.

Defendant argues that because CALCRIM No. 626 told the jury that when a person drinks to the point of unconsciousness the person assumes the risk that while unconscious he will commit acts inherently dangerous to human life, it contradicts CALCRIM No. 520, also given in this case, in which implied malice was defined in terms of actual knowledge of dangerousness and conscious disregard for human life. Defendant argues that CALCRIM No. 626 should instruct the jury that under such circumstances (upon a finding that defendant was voluntarily intoxicated to the point of unconsciousness), the law implies only criminal negligence. In support of this argument, defendant relies on *People v. Graham* (1969) 71 Cal.2d 303, which held that the trial court committed reversible error by not instructing the jury on the elements of involuntary manslaughter, despite the fact that the defendant in that case had introduced evidence that he was unconscious due to voluntary intoxication. (*Id.* at p. 316.) The

court stated in a footnote that on remand, the jury should be given instructions that are substantially similar to the ones given in this case, with an additional instruction that “ ‘[u]nder such circumstances, the law implies criminal negligence.’ ” (*Id.* at p. 317, fn. 4.) Such an instruction was unnecessary here, because, unlike in *Graham*, the jury was specifically instructed that if it found that defendant was unconscious due to voluntary intoxication, “then the killing is *involuntary manslaughter*.”³ (Italics added.)

Moreover, defendant’s argument is not supported by the CALCRIM advisory committee notes, which state: “The committee has chosen not to include the phrase ‘criminal negligence is deemed to exist’ because the committee concluded that this unnecessarily complicates the issue for the jury.” (Judicial Council of Cal., *Crim. Jury Instns.* (2012) Bench Notes to CALCRIM No. 626, p. 437.) The courts have long recognized that a reference to criminal negligence should be omitted from jury instructions where it is not an issue in the particular case. (*People v. Lara* (1996) 44 Cal.App.4th 102, 110.) At trial, defendant did not argue that criminal negligence was an issue, and the focus of arguments at trial and of defendant’s expert were based on delirium, a form of unconsciousness.

In addition to the alleged structural problems that defendant raises regarding CALCRIM No. 626, he also claims there is a conflict between that instruction and

³ To be sure, involuntary manslaughter may be based on criminal negligence, long defined in California as follows: “ ‘[T]here must be a higher degree of negligence than is required to establish negligent default on a mere civil issue. The negligence must be aggravated, culpable, gross, or reckless, that is, the conduct of the accused must be such a departure from what would be the conduct of an ordinarily prudent or careful man under the same circumstances as to be incompatible with a proper regard for human life, or, in other words, a disregard of human life or an indifference to consequences.’ ” (*People v. Penny* (1955) 44 Cal.2d 861, 879.) This definition is generally applicable where a defendant commits a lawful act without due caution, resulting in death, which was not an issue in this case. (*People v. Butler, supra*, 187 Cal.App.4th at p. 1007.)

CALCRIM No. 3425⁴ that added to the jury’s confusion as to the legal role of unconsciousness. According to defendant, CALCRIM No. 626 informed the jury that a death caused by an unconscious person is involuntary manslaughter where the unconsciousness is based on voluntary intoxication. CALCRIM No. 3425, on the other hand, informed the jury that an act by an unconscious person is not a crime. We disagree with that analysis and see no conflict.

The instructions clearly explained the difference between legal unconsciousness caused by delirium, which excuses homicide (CALCRIM No. 3425), and unconsciousness caused by voluntary intoxication, which does not excuse homicide (CALCRIM No. 626). The instructions explained the effects of unconsciousness and voluntary intoxication on the various crimes of homicide. (*Carlson, supra*, 200 Cal.App.4th at p. 703.) As we noted above, section 26 does not advance defendant’s arguments here, and such arguments overlook a clarifying amendment to section 22 enacted 18 years ago.

In 1995, the California Legislature amended section 22 so as to preclude evidence of voluntary intoxication to negate implied malice. “To the extent that a defendant who is voluntarily intoxicated [but not unconscious] unlawfully kills with implied malice, the defendant would be guilty of second degree murder.” (*Carlson, supra*, 200 Cal.App.4th at p. 707.) When it amended Penal Code section 22, the California Legislature eliminated the confusion which arose when involuntary manslaughter was used as a defense in an implied malice case and “bolstered the deterrent effect of the statute by underscoring the long-standing principle in California law that voluntary intoxication is no excuse for crime.” (*People v. Timms* (2007) 151 Cal.App.4th 1292, 1302.) In sum, we find no error with respect to CALCRIM No. 626.

⁴ As discussed in more detail in the next section, CALCRIM No. 3425 provides that a defendant is not guilty of murder or involuntary manslaughter if he acted while legally unconscious.

3. CALCRIM No. 3425.

CALCRIM No. 3425, as given in this case, states: “The defendant is not guilty of murder or involuntary manslaughter if he acted while legally unconscious. Someone is legally unconscious when he or she is not conscious of his or her actions. [Someone may be unconscious even though able to move.] [¶] Unconsciousness may be caused by an epileptic seizure or involuntary intoxication or sleepwalking or delirium.⁵ [¶] The People must prove beyond a reasonable doubt that the defendant was conscious when he acted. If there is proof beyond a reasonable doubt that the defendant acted as if he were conscious, you *should conclude that he was conscious*. If, however, based on all the evidence, you have a reasonable doubt that he . . . was conscious, you must find him not guilty.” (Italics added.)

Defendant contends that the above italicized language of CALCRIM No. 3425 misstated the “ ‘presumption of consciousness’ principle.” Defendant argues the instruction should have stated “ ‘should presume’ ” (which *permits* a finding of unconsciousness despite the appearance of consciousness), rather than “ ‘should conclude’ ” (which, according to defendant, impermissibly *compels* a finding of consciousness whenever there is an appearance of consciousness). In essence defendant argues—again, for the first time on appeal—that the instruction is ambiguous and “potentially confusing.” Defendant suggests the last sentence from CALJIC 4.31 be imported as a qualifier after the italicized portion of CALCRIM 3425, above, as follows: “unless from all the evidence you have a reasonable doubt that the defendant was in fact conscious at the time of the alleged crime.” (Italics omitted.)

Respondent claims that defendant’s argument was specifically rejected by the California Supreme Court in *People v. Babbitt* (1988) 45 Cal.3d 660. This overstates the holding, as the instruction at issue in *Babbitt* was CALJIC No. 4.31, and the structural ambiguity complained of here was not specifically addressed in *Babbitt*. Nevertheless, the

⁵ The word “delirium” does not appear in the standard instruction, but was inserted at defendant’s request.

Babbit court concluded that the presumption of the defendant's consciousness at the time of the crime did not impermissibly lighten the prosecution's burden of proving the elements of murder because consciousness was an affirmative defense, not an element of the crime. (*Babbit* at pp. 689-696.) The instruction did little more than guide the jury as to how to evaluate evidence bearing on the defendant's consciousness, and the instructions taken as a whole clearly established that the prosecution had the burden of proving beyond a reasonable doubt not only that the defendant appeared to be conscious, but also that he in fact was conscious. (*Id.* at p. 696.)

In defendant's reply, he directs this court to a recent Third District decision which concluded that CALCRIM No. 3425 is "*potentially* confusing and should be modified." (*People v. Mathson* (2012) 210 Cal.App.4th 1297, 1317 (*Mathson*), italics added.) The *Mathson* court recommended, as defendant does on appeal, that CALCRIM No. 3425 be modified to state that jurors should conclude a defendant was conscious " 'unless' " (as opposed to " '[i]f' ") from all the evidence they have a reasonable doubt that he was in fact conscious, because " '[i]f' " is not the same as " 'unless,' " and might be improperly interpreted to mean a jury "is only to consider whether there is reasonable doubt based on the other evidence if it finds that a defendant acted as if he was not conscious." (*Mathson* at p. 1323, original italics.) The court also concluded that the instruction was potentially confusing because it directs jurors to find a defendant not guilty if they find he was

unconscious, whereas that is not the case where a defendant is unconscious due to voluntary intoxication. (*Ibid.*)⁶

Even assuming arguendo that CALCRIM No. 3425 might arguably be “potentially confusing,” there is no indication that a more perfect instruction on the issue of unconsciousness would have led to a different result in this case. Defendant argues that there was a “subtle issue of unconsciousness” that was “squarely before the jury,” and poses the following hypothetical question: “Was [defendant’s] delirium with unconsciousness, or was this delirium with consciousness?” He argues that the cited instructional flaws “precluded a trustworthy answer to that question.” We disagree. There was abundant evidence that defendant had the legally requisite consciousness, as the jury found when convicting him of second degree murder, and a different jury instruction was not warranted in those circumstances.

In sum, we conclude that the instructions given in this case, taken as a whole, properly instructed the jury as to the potential legal effect of either voluntary intoxication, or unconsciousness caused by a mental condition (delirium) or involuntary intoxication. The jury rejected defendant’s defense that he was unconscious for any reason at the time of the killing, and, thus, he had the requisite express or implied malice. There was ample

⁶ *Mathson* involved very different circumstances from those at issue in this case. Defendant in *Mathson*, *supra*, 210 Cal.App.4th 1297 was found guilty of driving under the influence of drugs, where his defense was that he had been “sleep driving” and was therefore unconscious during the incident. CALCRIM No. 3425 was changed by the trial court there. While affirming the conviction, the *Mathson* court conducted a thorough historical review of the genesis of the instruction and a detailed semantic analysis to better improve the technical and potentially ambiguous language of the instruction based on sleep driving. The *Mathson* court suggested that the “Judicial Council consider substituting ‘sleep walking’ with ‘somnambulism’ or the current term of art, ‘Sleepwalking Disorder.’ ” (*Mathson* at p. 1316, fn. 18.) The *Mathson* court concluded that even without the word “somnambulism,” there was no harmful error because the instructions as a whole there, like here, correctly stated the law, and there is nothing in *Mathson* to suggest the instruction as modified in this case, adding the word “delirium” at defendant’s request, would be confusing. (*Id.* at p. 1317.)

evidence supporting the jury's findings, and therefore we find no reversible error in connection with the jury's instructions.

4. Trial counsel was not ineffective.

The standard of review for an ineffective assistance of counsel claim is well settled. A criminal defendant has both a federal and state constitutional right to the effective assistance of counsel. To establish a claim of incompetence of counsel, a defendant must establish that counsel's representation fell below an objective standard of reasonableness and that it is reasonably probable that, but for counsel's error, the result of the proceeding would have been different. (*Strickland v. Washington* (1984) 466 U.S. 668, 686-688, 694-695 (*Strickland*); *People v. Ledesma* (1987) 43 Cal.3d 171, 215-218; see U.S. Const., 6th & 14th Amends.; Cal. Const., art. I, § 15; *People v. Benavides* (2005) 35 Cal.4th 69, 92-93.) To prevail, a defendant must establish incompetence of counsel by a preponderance of evidence. (*Ledesma* at p. 218.) As an ineffective assistance of counsel claim fails on an insufficient showing of either element, a court need not decide the issue of counsel's alleged deficiencies before deciding if prejudice occurred. (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1126.)

Prejudice must be established as a demonstrable reality, not simply speculation as to the effect of the error or omission of counsel. (*In re Clark* (1993) 5 Cal.4th 750, 766.) In applying these principles, "a court must indulge a 'strong presumption' that counsel's conduct falls within the wide range of reasonable professional assistance because it is all too easy to conclude that a particular act or omission of counsel was unreasonable in the harsh light of hindsight." (*Bell v. Cone* (2002) 535 U.S. 685, 702.) Accordingly, "a court must 'view and assess the reasonableness of counsel's acts or omissions . . . under the circumstances as they stood at the time that counsel acted or failed to act.'" (*In re Scott* (2003) 29 Cal.4th 783, 812.)

The tactical decisions of a trial attorney are afforded great deference. (*People v. Padilla* (1995) 11 Cal.4th 891, 936, overruled on a different ground in *People v. Hill* (1998) 17 Cal.4th 800, 823, fn. 1.) " '[I]n a painstaking search of any record, a [team of] zealous appellate counsel can find areas in which [they] would quibble with trial

counsel.’ ” (*People v. Bolin* (1998) 18 Cal.4th 297, 314.) “The relevant inquiry under *Strickland* is not what defense counsel could have pursued, but rather whether the choices made by defense counsel were reasonable.” (*Babbitt v. Calderon* (9th Cir. 1998) 151 F.3d 1170, 1173.)

As to this claim, defendant’s instructional argument is that “[t]his was, reasonably viewed, an ‘implied malice’ case. CALCRIM [Nos.] 3428 and 580 were critical instructions and counsel’s failure to request them was indefensible.”

CALCRIM No. 3428 (Mental Impairment: Defense to Specific Intent or Mental State (Pen. Code, § 28)) states, in pertinent part: “You have heard evidence that the defendant may have suffered from a mental (disease[,]/ [or] defect[,]/ [or] disorder). You may consider this evidence only for the limited purpose of deciding whether, at the time of the charged crime, the defendant acted [or failed to act] with the intent or mental state required for that crime. [¶] The People have the burden of proving beyond a reasonable doubt that the defendant acted [or failed to act] with the required intent or mental state” required for that crime.

CALCRIM No. 580 (Involuntary Manslaughter: Lesser Included Offense (Pen. Code, § 192(b))) states, in pertinent part: “When a person commits an unlawful killing but does not intend to kill and does not act with conscious disregard for human life, then the crime is involuntary manslaughter. [¶] The difference between other homicide offenses and involuntary manslaughter depends on whether the person was aware of the risk to life that his or her actions created and consciously disregarded that risk. An unlawful killing caused by a willful act done with full knowledge and awareness that the person is endangering the life of another, and done in conscious disregard of that risk, is voluntary manslaughter or murder. An unlawful killing resulting from a willful act committed without intent to kill and without conscious disregard of the risk to human life is involuntary manslaughter. [¶] The defendant committed involuntary manslaughter if: [¶] 1. The defendant committed (a crime/ [or] a lawful act in an unlawful manner); [¶] 2. The defendant committed the (crime/ [or] act) with criminal negligence; [¶] AND [¶] 3. The defendant’s acts unlawfully caused the death of another person.” The

instruction further provides: “Criminal negligence involves more than ordinary carelessness, inattention, or mistake in judgment. A person acts with criminal negligence when: [¶] 1. He or she acts in a reckless way that creates a high risk of death or great bodily injury; [¶] AND [¶] 2. A reasonable person would have known that acting in that way would create such a risk.” (Italics omitted.)

Instead of the above two instructions that defendant’s counsel now suggests, defendant’s trial counsel asked the court to instruct with CALCRIM 3425, as set forth above. This instruction informed the jury that a defendant is not guilty of murder or involuntary manslaughter if he acted while legally unconscious (not caused by voluntary intoxication). Trial counsel specifically asked the court to add the word “delirium” in a blank space left at the end of the standard sentence that states: “Unconsciousness may be caused by . . . an epileptic seizure [or] involuntary intoxication or sleepwalking [or] _____.” This request—which was granted (*ante*, fn. 5)—was based on the testifying psychiatrist’s opinion that at the time of the crime, defendant was in a delirious state related to an alcoholic blackout.

A verdict of involuntary manslaughter is warranted where the defendant demonstrates that because of mental illness, he did not form the intent to kill unlawfully (i.e., did not have malice aforethought). (*People v. Rogers* (2006) 39 Cal.4th 826, 884.) Since the jury was so instructed using CALCRIM No. 3425, trial counsel did not render ineffective assistance. While appellate counsel may have asked for different instructions (Nos. 3428 and 580), trial counsel’s theory of the case was unconsciousness based on delirium, and the jury was properly instructed according to that theory. (*People v. Hughes* (2002) 27 Cal.4th 287, 345.) Defendant’s argument now is that there was no way to know if the delirium caused consciousness or unconsciousness unless CALCRIM Nos. 3428 and 580 rather than No. 3425 were given. We disagree. Trial counsel may have concluded this argument could undercut the unconscious delirium theory of the defense set forth in No. 3425. But even allowing for the wisdom of hindsight, criminal negligence (as an alternate form of involuntary manslaughter based on delirium) was

never discussed by the court and parties during the discussion on jury instructions because there was no factual basis for it.

Respondent relies on several key facts to show that there was no evidence warranting an instruction on criminal negligence and that the evidence clearly established that defendant acted with malice, and we agree with the Attorney General's analysis: defendant stabbed the victim seven times, beat her until she had bruises and contusions over her entire face, and choked her until small blood vessels ruptured in her eyes. Respondent argues that defendant killed the victim because he was tired of her taking his money for drugs. Respondent suggests that since defendant was conscious enough to recall details of his conduct, conscious enough to recall the reason for his conduct, and conscious enough to dispose of the murder weapon when he was finished, criminal negligence cannot be supported on any theory. Respondent concludes that "[s]ince the conduct underlying the charge did not include a misdemeanor, a lawful act, or a noninherently dangerous felony, involuntary manslaughter instructions based on a theory of criminal negligence were not warranted in this case. Specifically, in light of the number and severity of injuries inflicted, defendant did not engage in misdemeanor or noninherently dangerous activity, much less commit a lawful act without due caution and circumspection. (*People v. Garcia* (2008) 162 Cal.App.4th 18, 33)." We agree that because there was no evidence from which the jury could find that defendant acted in a manner that was merely criminally negligent, defendant's argument is unfounded. (*People v. Williams* (2001) 26 Cal.4th 779, 788.)

"The correctness of jury instructions is to be determined from the entire charge of the court, not from a consideration of parts of an instruction or from a particular instruction." (*People v. Harrison* (2005) 35 Cal.4th 208, 252.) Here, the trial court and both counsel treated mental disease, voluntary intoxication, and unconsciousness as one issue, because defendant's expert testified that at the time of the crime, defendant was in a delirious state related to an alcohol blackout. Since the instructions on voluntary intoxication, delirium, and unconsciousness afforded defendant a full consideration of his defense as it was presented at the trial, counsel's representation did not fall below an

objective standard of reasonableness under prevailing professional norms. (*People v. Carter* (2003) 30 Cal.4th 1166, 1211.) Defendant likewise cannot demonstrate prejudice, because even had the jury been instructed on other involuntary manslaughter theories of criminal negligence, there is no “reasonable probability” that it would have chosen another option. (*People v. Breverman* (1998) 19 Cal.4th 142, 177.)

B. *No Error to Admit Evidence of Defendant’s Prior Domestic Violence.*

1. Background.

Over defendant’s objection, the court allowed the testimony of defendant’s former girlfriend under Evidence Code section 1109. This included: that she dated and lived with defendant in 1999; that defendant assaulted her on two occasions during arguments; that on August 14, 1999, defendant assaulted her with a belt and then choked her until she released bodily fluids and lost consciousness; that on November 9, 1999, defendant punched the girlfriend in the face with his closed fist between five and seven times; that the girlfriend suffered a black eye and contusions to her nose; that on March 19, 2001, defendant was convicted of two counts of inflicting corporal injury on her resulting in a traumatic condition, and one count of making criminal threats of death or great bodily injury and causing her to be in sustained fear for her safety. Defendant was sent to state prison for 12 years.

Respondent also sought to admit into evidence that in 1980 defendant committed an assault with intent to commit rape and that in 1990 defendant was convicted for corporal injury to a spouse. The court excluded that evidence.⁷

2. Analysis.

Defendant argues that the trial court erred in admitting evidence of his domestic violence in 1999 against a former girlfriend. Specifically, defendant argues the evidence

⁷ A review of the probation report reveals that respondent sought admission of only a small part of defendant’s extensive criminal record spanning more than 40 years. The prosecutor did not seek to admit defendant’s four convictions for raping and violently sodomizing his four-year-old niece in 1979 or the 1988 conviction following the severe beating he gave his son with a paddle after his son did not go straight home after school. Defendant had been incarcerated for 22 of the previous 30 years for domestic violence.

was too remote and irrelevant in a trial with issues concerning intoxication, dementia, and delirium. The appellate court reviews a challenge to a trial court's decision to admit evidence pursuant to Evidence Code section 1109 for abuse of discretion. (*People v. Johnson* (2010) 185 Cal.App.4th 520, 531 (*Johnson*).)

Evidence Code section 1109 states, in relevant part, that “in a criminal action in which the defendant is accused of an offense involving domestic violence, evidence of the defendant's commission of other domestic violence is not made inadmissible by Section 1101 if the evidence is not inadmissible pursuant to Section 352.” (Evid. Code, § 1109, subd. (a)(1).) Evidence Code section 352, in turn, provides: “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.” “By its incorporation of section 352, section 1109, subdivision (a)(1) makes evidence of past domestic violence inadmissible only if the court determines that its probative value is ‘substantially outweighed’ by its prejudicial impact.” (*Johnson, supra*, 185 Cal.App.4th at p. 531.) The trial court has broad discretion “ ‘in assessing whether [the] prejudicial effect [of evidence] outweighs its probative value.’ ” (*People v. Jones* (2011) 51 Cal.4th 346, 373, quoting *People v. Horning* (2004) 34 Cal.4th 871, 900.)

“ ‘ ‘The principal factor affecting the probative value of an uncharged act is its similarity to the charged offense.’ ’ ” (*Johnson, supra*, 185 Cal.App.4th at pp. 531-532, quoting *People v. Hollie* (2010) 180 Cal.App.4th 1262, 1274.) Section 1109 was intended to make admissible a prior incident “similar in character to the charged domestic violence crime, and which was committed against the victim of the charged crime or another similarly situated person.” (Assem. Com. on Public Safety, Analysis of Sen. Bill No. 1876 (1995-1996 Reg. Sess.) June 25, 1996, p. 5 (Assem. An. of Sen. Bill 1876).) Thus, the statute reflects the legislative judgment that in domestic violence cases, as in sex crimes, similar prior offenses are “uniquely probative” of guilt in a later accusation. (*People v. Britt* (2002) 104 Cal.App.4th 500, 505-506.) This suggests a psychological

dynamic not necessarily involved in other types of crimes. (*People v. Hoover* (2000) 77 Cal.App.4th 1020, 1027.)

“ ‘The propensity inference is particularly appropriate in the area of domestic violence because on-going violence and abuse is the norm in domestic violence cases. Not only is there a great likelihood that any one battering episode is part of a larger scheme of dominance and control, that scheme usually escalates in frequency and severity. Without the propensity inference, the escalating nature of domestic violence is likewise masked.’ ” (*Johnson, supra*, 185 Cal.App.4th at p. 532, fn. 8.)

Considering a related statute permitting the admission of prior sex offenses, the California Supreme Court outlined factors for a trial court to consider when weighing the probative value and prejudicial effect of prior offense evidence: “[the other offense’s] nature, relevance, and possible remoteness, the degree of certainty of its commission and the likelihood of confusing, misleading, or distracting the jurors from their main inquiry, its similarity to the charged offense, its likely prejudicial impact on the jurors, the burden on the defendant in defending against the uncharged offense, and the availability of less prejudicial alternatives to its outright admission, such as admitting some but not all of the defendant’s other sex offenses, or excluding irrelevant though inflammatory details surrounding the offense.” (*People v. Falsetta* (1999) 21 Cal.4th 903, 917; Evid. Code, § 1108.)

Defendant’s trial counsel argued that the evidence was too remote, irrelevant on the issue of intent to kill, and prejudicial pursuant to Evidence Code section 352. The prosecutor argued that the evidence was not too remote since defendant had been incarcerated for domestic violence for 22 of the last 30 years. Counsel also argued that the evidence was extremely probative on the issue of intent: “The fact that the defendant has a very strong demonstrated history of abuse towards women, I think, is highly probative for the jury’s determination in this case.”

The trial court excluded defendant’s 1980 assault with intent to commit rape because it was too remote. The court also excluded a 1990 conviction for corporal injury to a spouse. The court allowed the 1999 assaults on the former girlfriend as probative

and admissible under Evidence Code section 1109. The court analyzed these incidents under Evidence Code section 352, and concluded the priors were relevant and not too remote.

Evidence Code section 1109, subdivision (e) establishes a presumption that conduct more than 10 years prior to the current offense is inadmissible unless the court determines that admission is in the interest of justice. (*Johnson, supra*, 185 Cal.App.4th at p. 539.) However, “it sets a threshold of presumed inadmissibility, not the outer limit of admissibility . . . and vests the court with substantial discretion” (*Ibid.*) The time between the prior crimes and present crime was 10 years and two months, which barely missed the 10-year mark. Also, as argued by respondent, “the prior acts were recent when you toll the amount of time between the incidents [and] the time [defendant] spent in prison.” We conclude that defendant’s prior acts of domestic violence which occurred in November 1999 were not too remote in time from his present crime, which occurred during the first week of January 2010.

Furthermore, “the passage of time generally goes to the weight of the evidence, not its admissibility.” (*People v. Hernandez* (2011) 200 Cal.App.4th 953, 968.) Even a 30-year gap between offenses is not too remote when the prior and current offenses are “ ‘remarkably similar.’ ” (*Ibid.*) The offenses in this case were remarkably similar, in that defendant beat and choked two girlfriends during arguments. After considering all the arguments and weighing the factors, the court excluded a 1980 incident and a 1990 conviction for domestic violence. There is nothing in this record to suggest anything less than a careful weighing of the requisite factors in the exercise of the trial court’s discretion.

Nevertheless, even if the trial court erred in admitting evidence of defendant’s prior domestic violence pursuant to Evidence Code sections 1109 and 352, the error does not compel reversal as it is not reasonably probable that the result at trial would have been different without the prior offense evidence. There is no question that defendant killed the victim. The only question was whether he was unconscious or delirious when he did it. As noted above, the evidence clearly established that defendant was not

unconscious or delirious, but instead acted with malice. Defendant's argument now that the Evidence Code section 1101 issues of intent and motive were not in dispute at trial (so that the priors are irrelevant on intent) is without merit. Although defendant admitted that he killed the victim, he did not admit that he killed her while conscious and angry that she took his money.

III.
DISPOSITION

The judgment is affirmed.

Baskin, J.*

We concur:

Ruvolo, P. J.

Rivera, J.

* Judge of the Contra Costa Superior Court assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.