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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE, Plaintiff and Respondent, v. RICKEY GLEN LUSTER, Defendant and Appellant.	B194825 (Los Angeles County Super. Ct. No. GA057712)

APPEAL from a judgment of the Superior Court of Los Angeles County. Rafael A. Ongkeko, Judge. Affirmed.

Mark D. Greenberg, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Mary Sanchez and Ryan M. Smith, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

A jury convicted appellant Rickey Glen Luster of the second degree murder of his

wife, who was found beaten, strangled, and naked on the floor of their home. Luster challenges his conviction on the grounds of instructional error, ineffective assistance of counsel, and violation of the Confrontation Clause. First, he contends that CALCRIM No. 220 misstates the reasonable doubt standard and dilutes the prosecution's burden of proof. Second, he argues that CALCRIM Nos. 375 and 852 prevented the jury from considering for the defense theory of the case the victim's conduct in an earlier domestic violence incident. He also asserts that these instructions erroneously told the jury that the preponderance of evidence standard applied to the defense's use of the prior incident. Third, Luster contends that CALCRIM No. 852 violated due process by permitting the jury to convict him based on propensity evidence alone. Fourth, he argues that his trial attorney mishandled his objections to the prosecution's introduction of the victim's earlier statements to police. His lawyer, Luster says, should have argued that a 911 call showed the victim's later statements to police to be insufficiently trustworthy for the hearsay exception of Evidence Code section 1370, subdivision (a) to apply. Finally, Luster challenges the trial court's ruling that he forfeited by wrongdoing his Confrontation Clause objection to the admission of the victim's statements to the police during the earlier domestic violence incident.

We conclude that CALCRIM No. 220 properly articulates the reasonable doubt standard. The use of CALCRIM Nos. 375 and 852 did not prevent the jury from considering the victim's conduct in the prior incident to support the defense's arguments, nor did it mislead the jury about how to apply the preponderance of evidence standard. The instructions plainly were limited in their application to the *prosecution's* use of the prior incident evidence. Nor did CALCRIM No. 852 allow the jury to convict Luster based on propensity evidence; the instruction explicitly told jurors that evidence of prior domestic violence was insufficient to prove guilt and that proof beyond a reasonable doubt of each element of an offense was required. Defense counsel's failure to give the court the recording of the victim's 911 call during the earlier domestic violence incident and to argue that Evidence Code section 1370 did not apply was not prejudicial and

therefore did not constitute ineffective assistance of counsel. The 911 recording did not cast doubt on the trustworthiness of the victim's statements to police on that prior occasion. Finally, the trial court correctly held that, by murdering the victim, Luster forfeited his Confrontation Clause objection to the admission of her earlier statements to the police.

BACKGROUND AND PROCEDURAL HISTORY

On June 10, 2004, Luster called his mother and said that his wife, Barbara Luster, had stabbed him. Luster's daughter LaTreta Luster was at her grandmother's home with her children when Luster called.[1] LaTreta took the phone and spoke to her father. He was angry with LaTreta and her husband because they owed him for electrical work he had done for them. LaTreta asked to talk to Barbara. Barbara said she stabbed Luster because she was "tired of what happened" in an altercation about a year earlier. LaTreta took her children and Luster's mother to the house Luster and Barbara shared. She performed first aid on both her father, who had a bloody wound on his chest, and Barbara, who had a small cut "on her eye" and a bruise on the side of her face. Although Barbara had sounded alert on the telephone, she seemed weak and she mumbled, as if she had been "knocked out" and "was coming to." She sat on the couch as LaTreta helped her father pack some things to move out. LaTreta saw some blood on the wall "on the way to the bathroom." Her father was agitated and cursed at her. At some point, LaTreta saw him take a "handful" of pills he said were Zoloft. Eventually, everyone except Barbara left the house, with Luster following LaTreta in his own car. However, Luster turned his car around at some point. LaTreta drove on to her grandmother's house because her grandmother claimed she was having a heart attack.

About 5:00 p.m. the same day, Luster borrowed a mobile phone from Jaime Raigoza, who was outside a neighboring house. Raigoza heard Luster say that his wife

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[1] For clarity, we refer to Barbara Luster and LaTreta Luster by their first names.

was lying on the floor, he thought she might be dead, and he did not know what to do. Luster appeared to have bloodstains on his shirt. Raigoza told Luster he should call the police. Just then, a police patrol car drove down the street and Raigoza flagged it down. Luster spoke to the police, then went back into his house. Raigoza told the police officer what he had heard Luster say.

Also at about 5:00 p.m., Los Angeles County Sheriff's Deputy Eric Sandoval drove to the Luster home to check on Luster and Barbara. A telephone call from Dr. Robert Model, Luster's psychologist, prompted this welfare check. Model had become concerned because Luster missed his 4:00 p.m. appointment. Luster and Barbara had called Model earlier that day; Luster said he was moving out of the house and Barbara said she was concerned about Luster.

When Sandoval arrived, he saw Luster walking outside the house. Luster was wearing a blue jersey that appeared to be bloodstained and wet. Sandoval asked Luster if he was Rickey Luster and Luster said yes. He said his wife was taking a bath. Luster would not stand still; he went back in the house and closed the door. He did not answer when deputies knocked. Sandoval and another sheriff's deputy walked around the house and went in through an open kitchen door. Luster was gone, but the deputies found Barbara lying on the living room floor. Her face was bloody and swollen, and she was not moving or breathing. A fire extinguisher lay near her body. The water was running in the bathtub and the house was flooded. Barbara was taken to the hospital, where she was pronounced dead.

An autopsy determined that Barbara died from asphyxia due to strangulation. Her nonfatal wounds included a black right eye, swollen and split lips, a bruised and fractured sternum, multiple broken ribs with bruising, bruises on her left forearm and right hand, and deep scalp bruises, all caused by blunt force trauma.

Luster was arrested at a motel two days later. He spontaneously told the arresting officers that it was his own blood deputies had seen on his shirt when they came to his

house, and that his wife had stabbed him.

Luster later gave detectives a post admonition statement that was recorded and played at trial. He insisted that Barbara took "a lot of pills and stuff she had" and fell to the floor. He denied touching her except slapping her face repeatedly in an attempt to revive her when she was "acting dead."

Deputy Steven French testified that on June 29, 2003, he and his partner responded to a "family disturbance call" at the Luster home. French saw Luster on the porch, "staggering back and forth." Luster told French that he and his wife had been arguing about his drinking. Luster said his wife walked toward him during the argument, so he pushed her to the ground to make her leave him alone. Luster had a small cut on the top of his head. When asked what happened, Luster said, " 'I think the bitch did it. I don't know.' " Luster said he and his wife had consumed two bottles of wine.

French and his partner entered the home and found Barbara, crying and intoxicated. The inside of the house "looked as if somebody had been in a fight in the house. The items on the walls were knocked to the side. . . . Things had been thrown about and strewn on the floor." The bedroom mirror was cracked and lying on its side, off of the dresser. French asked Barbara whether she had been drinking; she said she had been drinking with Luster. She also said she and Luster had argued about Luster's drinking. She told French that, during the argument, Luster grabbed her by both shoulders and shoved her against the mirror that sat atop the dresser. She said the mirror broke when she hit it and the glass cut her left shoulder. French saw a bleeding cut on Barbara's left shoulder. Barbara told French that Luster had thrown the things French had seen on the bedroom floor. Barbara also told French that Luster grabbed her neck, threw her to the ground, got on top of her, and put his left knee on her chest to hold her down. French saw a scratch on Barbara's neck. Barbara declined medical treatment. The deputies took photographs of Barbara's injuries, the broken mirror, and the disarray inside the Luster home. These photographs were introduced at trial.

LaTreta testified that Barbara had once told her that she would "take no shit from

any man" and would "fuck them up."

Luster testified that he and Barbara both had mental health issues and that there were some problems with their marriage. But, he said, the only time there was violence was in the June 2003 incident: Barbara pushed him into a glass, and he cut his head. It was mutual combat. Luster initially told the police officers what Barbara had done, but after further consideration he recanted because he did not want her to go to jail.

On June 10, 2004, Luster was upset. He wanted to move out because he believed Barbara was being unfaithful. He bought and drank liquor and took some pills. He saw Barbara with a bottle of pills, but did not see her take any. As Luster was packing to move out, Barbara stabbed him with a kitchen knife. She then left the house, and he called his mother to ask her to get him out of there. Barbara came back and Luster told her his mother was coming. Barbara had an object in her hand that appeared to be wood and metal, and she hit herself with it near her right eye, causing a gash. She had tried to hurt herself before and had attempted suicide. Luster took a nap until his daughter arrived. He remembered "fussing at" his daughter about electrical work she had not paid him for, but otherwise he did not recall what he did when his daughter was at the house. When she left, Luster went back to sleep. He did not remember driving away or returning to the house, as LaTreta testified. When Luster awoke, Barbara was sitting on the couch wearing lingerie. He told her he did not want to stay married to her. She threw her wedding ring at him and said either that she would not need it where she was going or that he would not need it. She then swung a blunt object at Luster, hitting him in the back; he fell against the glass of the entertainment center and onto the floor. Barbara lunged over him and bit his arm. Luster threw a hard elbow at her. The next thing he knew, he woke up on the floor and found Barbara lying three to five feet away. He tried to revive her by pouring water over her and tapping her with an open hand. He unsuccessfully attempted to find a phone, then went outside. The police officer arrived and Luster climbed over the backyard fence. Luster paid a neighbor to let him hide in his attic until it was dark. Then, he left and started drinking. Luster took a bus to the home

of his friend James McWilliams.

McWilliams testified that Luster showed up at his door and said Barbara had killed herself with an overdose and the police were after him. He let Luster make a phone call and drove him to his cousin's house in Los Angeles. The next morning, McWilliams found Luster asleep in the backseat of McWilliams's car. He drove Luster to his home to pick up his van, but the police were there. McWilliams took Luster to work with him, then took him out to eat and left him at a motel.

A jury convicted Luster of second degree murder. The court sentenced him to prison for 15 years to life.

DISCUSSION

1. CALCRIM No. 220 properly states the reasonable doubt standard.

The trial court instructed the jury with CALCRIM No. 220: "The fact that a criminal charge has been filed against the defendant is not evidence that the charge is true. You must not be biased against the defendant just because he has been arrested, charged with a crime, or brought to trial. [¶] A defendant in a criminal case is presumed to be innocent. This presumption requires that the People prove each element of a crime beyond a reasonable doubt. Whenever I tell you the People must prove something, I mean they must prove it beyond a reasonable doubt unless I specifically tell you otherwise. [¶] Proof beyond a reasonable doubt is proof that leaves you with an abiding conviction that the charge is true. The evidence need not eliminate all possible doubt because everything in life is open to some possible or imaginary doubt. [¶] In deciding whether the People have proved their case beyond a reasonable doubt, you must impartially compare and consider all the evidence that was received throughout the entire trial. Unless the evidence proves the defendant guilty beyond a reasonable doubt, he is entitled to an acquittal and you must find him not guilty."

Luster did not object to this instruction. On appeal, however, Luster contends that CALCRIM No. 220 incorrectly states the reasonable doubt standard. He argues that it

does not "convey the appropriate impression that proof beyond a reasonable doubt requires on the part of the jurors a subjective certitude of the truth of the charge," and that the phrase "abiding conviction" in the instruction suggests "more a temporal matter than a matter of intensity of feeling."[2]

Generally, a party may not complain on appeal that a jury instruction was unclear or incomplete unless he objected in the trial court or requested limitation, modification, or clarification. Luster did not do so; therefore, he forfeited this claim. (*People v. Campos* (2007) 156 Cal.App.4th 1228, 1236.) However, even if Luster had preserved his objections for appeal, we would reject them.

"In determining the correctness of jury instructions, we consider the instructions as a whole." (*People v. Campos, supra,* 156 Cal.App.4th at p. 1237.) An instruction can be found to be ambiguous or misleading only if, in the context of the entire charge, there is a reasonable likelihood that the jury misconstrued or misapplied its words. (*People v. Frye* (1998) 18 Cal.4th 894, 957.) We presume that jurors are intelligent and capable of understanding and correlating all jury instructions given. (*People v. Kegler* (1987) 197 Cal.App.3d 72, 80.)

"The beyond a reasonable doubt standard is a requirement of due process, but the Constitution neither prohibits trial courts from defining reasonable doubt nor requires them to do so as a matter of course. [Citation.] Indeed, so long as the court instructs the jury on the necessity that the defendant's guilt be proved beyond a reasonable doubt [citation], the Constitution does not require that any particular form of words be used in advising the jury of the government's burden of proof. [Citation.] Rather, 'taken as a whole, the instructions [must] correctly conve[y] the concept of reasonable doubt to the jury.' " (*Victor v. Nebraska* (1994) 511 U.S. 1, 5.) "[T]he proper inquiry is not whether the instruction 'could have' been applied in an unconstitutional manner, but whether there is a reasonable likelihood that the jury *did* so apply it." (*Id.* at p. 6.)

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2 Oddly, respondent's brief does not respond to any of Luster's arguments about

CALCRIM No. 220 clearly and repeatedly told the jury that the prosecutor was required to prove Luster's guilt beyond a reasonable doubt. The second paragraph stated the presumption of innocence and explained that "[t]his presumption requires that the People prove each element of a crime beyond a reasonable doubt. Whenever I tell you the People must prove something, I mean they must prove it beyond a reasonable doubt unless I specifically tell you otherwise." The final paragraph reiterated the necessity of determining "whether the People have proved their case beyond a reasonable doubt" and ended with an undeniably unambiguous direction: "Unless the evidence proves the defendant guilty beyond a reasonable doubt, he is entitled to an acquittal and you must find him not guilty." CALCRIM No. 103 gave the jury these same instructions; the court also gave that instruction, and Luster does not challenge that instruction on appeal.[3]

The paragraph of CALCRIM No. 220 that defines reasonable doubt properly conveys the correct standard. "An instruction cast in terms of an abiding conviction as to guilt, without reference to moral certainty, correctly states the government's burden of

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CALCRIM No. 220. It addresses many other arguments, none of which Luster has made.

[3] As given, CALCRIM No. 103 provides: "I will now explain the presumption of innocence and the People's burden of proof. The defendant has pleaded not guilty to the charge. The fact that a criminal charge has been filed against the defendant is not evidence that the charge is true. You must not be biased against the defendant just because he has been arrested, charged with a crime, or brought to trial. [¶] A defendant in a criminal case is presumed to be innocent. This presumption requires that the People prove each element of a crime beyond a reasonable doubt. Whenever I tell you the People must prove something, I mean they must prove it beyond a reasonable doubt unless I specifically tell you otherwise. [¶] Proof beyond a reasonable doubt is proof that leaves you with an abiding conviction that the charge is true. The evidence need not eliminate all possible doubt because everything in life is open to some possible or imaginary doubt. [¶] In deciding whether the People have proved their case beyond a reasonable doubt, you must impartially compare and consider all the evidence that was received throughout the entire trial. Unless the evidence proves the defendant guilty

proof." (*Victor v. Nebraska*, *supra*, 511 U.S. at pp. 14-15 [approving CALJIC No. 2.90, the predecessor to CALCRIM No. 220].) In *Hopt v. Utah* (1887) 120 U.S. 430, the Supreme Court explained that "abiding" in the phrase "abiding conviction" means " settled and fixed, a conviction which may follow a careful examination and comparison of the whole evidence." (*Id.* at p. 439.) The California Supreme Court and the Courts of Appeal in every appellate district consistently have rejected challenges to the "abiding conviction" language in the reasonable doubt instruction. (See *People v. Campos*, *supra*, 156 Cal.App.4th at p. 1239 [listing cases and noting that the issue is "conclusively settled"].)

Penal Code section 1096 includes the phrase "that state of the case [that] leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction of the truth of the charge." Luster claims that, in failing to repeat this language, CALCRIM No. 220 tells the jurors that they need only engage in a "rational process of fixing the objective probabilities" rather than making a subjective decision. We do not agree. There is no reasonable likelihood that jurors would understand CALCRIM No. 220 to say that. The phrase "proof that leaves *you* with an abiding conviction that the charge is true" clearly conveys the decision's subjective nature and the very high level of certainty required. The trial court also gave CALCRIM No. 3550. It explained the subjective nature of the jurors' analytical processes, telling them that each "must decide the case for yourself" and that they should not change their minds "just because other jurors" disagreed with them.

Instruction with CALCRIM No. 220 did not violate due process.

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beyond a reasonable doubt, he is entitled to an acquittal and you must find him not guilty."

2. CALCRIM Nos. 375 and 852 did not prevent the jury from considering for the defense Barbara's conduct in the June 2003 incident or mislead the jury about application of the preponderance of evidence standard.

The prosecution introduced evidence of the June 2003 incident under Evidence Code section 1109 to show Luster's propensity for domestic violence. The trial court instructed the jury on the use of the prior incident evidence with CALCRIM Nos. 375 and 852. As given, CALCRIM No. 375 stated:

"The People presented evidence that the defendant committed the offense of battery on a spouse that was not charged in this case.

"You may consider this evidence only if the People have proved by a preponderance of the evidence that the defendant in fact committed the offense. Proof by a preponderance of the evidence is a different burden of proof than proof beyond a reasonable doubt. A fact is proved by a preponderance of the evidence if you conclude that it is more likely than not that the fact is true.

"If the People have not met this burden, you must disregard this evidence entirely.

"If you decide that the defendant committed the offense, you may, but are not required to, consider that evidence for the limited purpose of deciding whether or not:

"The defendant acted with the intent to kill in this case; or

"The defendant had a motive to commit the offense alleged in this case.

"Do not consider this evidence for any other purpose except as otherwise instructed in the following instruction, Instruction # 852.

"If you conclude that the defendant committed the uncharged offense, that conclusion is only one factor to consider along with all the other evidence. It is not sufficient by itself to prove that the defendant is guilty of any crime in this case. The People must still prove each element of the charge beyond a reasonable doubt."

CALCRIM No. 852, as given at Luster's trial, provided,

"The People presented evidence that the defendant committed domestic violence that was not charged in this case, specifically, battery on a spouse.

"*Domestic violence* in this case means abuse committed against and who is a spouse.

"*Abuse* means intentionally or recklessly causing or attempting to cause bodily injury, or placing another person in reasonable fear of imminent serious bodily injury to himself or herself or to someone else.

"You may consider this evidence only if the People have proved by a preponderance of the evidence that the defendant in fact committed the uncharged domestic violence. Proof by a preponderance of the evidence is a different burden of proof from proof beyond a reasonable doubt. A fact is proved by a preponderance of the evidence if you conclude that it is more likely than not that the fact is true.

"If the People have not met this burden of proof, you must disregard this evidence entirely.

"If you decide that the defendant committed the uncharged domestic violence, you may, but are not required to, conclude from that evidence that the defendant was disposed or inclined to commit domestic violence and, based on that decision, also conclude that the defendant was likely to commit second degree murder, as charged here, or voluntary or involuntary manslaughter, lesser offenses. If you conclude that the defendant committed the uncharged domestic violence, that conclusion is only one factor to consider along with all the other evidence. It is not sufficient by itself to prove that the defendant is guilty of second degree murder, as charged here, or voluntary or involuntary manslaughter, lesser offenses. The People must still prove each element of every charge beyond a reasonable doubt."

Luster contends that CALCRIM Nos. 375 and 852 prevented the jury from considering Barbara's conduct in the June 2003 incident. That conduct, he says, was relevant to establish that he acted in self-defense or unreasonable self-defense when he killed Barbara on June 10, 2004. Luster also argues that these instructions erroneously told the jury that they could not consider the June 2003 incident for the defense theory of the case unless they found it proved by a preponderance of the evidence.

Self-defense -- a complete defense -- requires an actual and reasonable belief in the need to defend against an imminent danger of death or great bodily injury. (*People v. Humphrey* (1996) 13 Cal.4th 1073, 1082.) In contrast, one who kills or tried to kill another person because he actually, but unreasonably, believed in the need to defend himself from imminent death or great bodily injury is deemed to have acted without malice. (*People v. McCoy* (2001) 25 Cal.4th 1111, 1116; *In re Christian S.* (1994) 7 Cal.4th 768, 783.) Under such an "unreasonable self-defense" theory, the crime committed is manslaughter or attempted manslaughter, not murder or attempted murder. (*People v. McCoy*, *supra*, 25 Cal.4th at p. 1116.)

The trial court instructed the jury on self-defense as well as voluntary manslaughter based on unreasonable self-defense. Each instruction expressly addressed Barbara's prior conduct toward Luster. The self-defense instruction stated, "If you find that Barbara Luster threatened or harmed the defendant in the past, you may consider that information in deciding whether the defendant's conduct and beliefs were reasonable." The voluntary manslaughter/unreasonable self-defense instruction similarly provided, "If you find that Barbara Luster threatened or harmed the defendant in the past, you may consider that information in evaluating the defendant's beliefs."

We conclude Luster's claims are unfounded. The language of each of the challenged instructions specifically limited its scope to the jury's consideration of inferences to be drawn from a finding that *Luster* committed prior uncharged acts. The first two sentences of CALCRIM No. 375 effectively defined the scope and purpose of the instruction: "The People presented evidence that *the defendant committed* the offense of battery on a spouse that was not charged in this case. [¶] You may consider this evidence only if the People have proved by a preponderance of the evidence that *the defendant in fact committed* the offense." (Emphasis added.) The fourth paragraph of the instruction and its subparagraphs told the jurors that if they decided "that *the defendant committed* the [uncharged] offense," they could consider evidence of that offense on the issues of motive and/or intent to kill. (Emphasis added.) The final

paragraph of CALCRIM No. 375 reiterates the scope of its application: "If you conclude that *the defendant committed* the uncharged offense . . . ." (Emphasis added.) These many explicit references to commission of a prior act by "the defendant" clearly informed jurors that they were to apply CALCRIM No. 375 to consideration of only Luster's behavior in the June 2003 incident, not Barbara's.

Similarly, the first sentence of CALCRIM No. 852 defined the scope of the instruction by referring to "evidence that *the defendant committed* domestic violence that was not charged in this case . . . ." (Emphasis added.) The fourth paragraph prohibited the jury from considering this evidence unless the prosecution proved "*the defendant* in fact *committed* the uncharged domestic violence." (Emphasis added.) The first two sentences in the final paragraph of the instruction expressly conditioned jurors' consideration of the prior domestic violence evidence on a finding that "*the defendant committed* the uncharged domestic violence." (Emphasis added.) CALCRIM No. 852 thus expressly and repeatedly limited its application to evidence of Luster's conduct. Nothing in the instruction suggested it pertained to evidence that Barbara committed domestic violence against Luster.

Luster especially emphasizes this sentence in CALCRIM No. 375: "Do not consider this evidence for any other purpose except as otherwise instructed in the following instruction, Instruction # 852." While this potentially was a broad prohibition, the phrase "this evidence" must be construed in the context of the rest of the instruction. The first sentence of CALCRIM No. 375 refers to the prosecution's presentation of "evidence that the defendant committed the offense of battery on a spouse." The very next sentence creates the shorthand formulation "this evidence" to refer to "evidence that the defendant committed the offense of battery on a spouse." The third paragraph repeats the shorthand phrase "this evidence." So, in context, the warning not to consider "this evidence for any other purpose" obviously refers to "evidence that the defendant committed the offense of battery on a spouse," not evidence of the June 2003 incident in general or Barbara's conduct then. Moreover, the jurors were told to consider all of the

instructions together. Given the language in CALCRIM No. 375 limiting its application to "evidence that the defendant committed the offense of battery on a spouse" and the express reference to Barbara's past threatening or harmful conduct toward Luster in the self-defense and voluntary manslaughter instructions, jurors would not understand the "do not consider" language in CALCRIM No. 375 to mean they could not consider Barbara's conduct in the June 2003 incident with respect to self-defense and unreasonable self-defense.

Luster also argues that the jury would understand the preponderance of evidence standard in CALCRIM Nos. 375 and 852 to apply as well to consideration of Barbara's conduct in the June 2003 incident. This contention fails for a similar reason. Each of the challenged instructions defined its scope in its first sentence: "[t]he People presented evidence that the defendant committed" spousal battery or uncharged domestic violence. Each challenged instruction then told jurors they could "consider *this evidence* only if the People have proved by a preponderance of the evidence that *the defendant in fact committed*" "the offense" or "the uncharged domestic violence." (Emphasis added.) In context, "this evidence" clearly referred to "evidence that the defendant committed" spousal battery or other domestic violence. Similarly, each instruction's warning to "disregard *this evidence* entirely" (emphasis added) if "the People [had] not met this burden of proof" necessarily referred to "evidence that the defendant committed" spousal battery or the like. The express language limiting the scope of CALCRIM Nos. 375 and 852 to evidence of Luster's commission of domestic violence restricted application of the preponderance of evidence standard to the prosecution's use of Luster's conduct.

Furthermore, every mention of the preponderance standard in these instructions expressly tied that standard to the prosecution: "only if the People have proved by a preponderance of the evidence . . . ." and "[i]f the People have not met this burden . . . ." It is not reasonably likely the jury misconstrued explicit references to the People's burden of proof in this context as saying that standard also applied to the defense when the jurors considered evidence of the June 2003 incident in connection with self-defense.

In addition, the self-defense instruction specifically told the jury the relevant burden of proof: "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 the defendant not guilty of second degree murder." Similarly, the voluntary manslaughter/unreasonable self-defense instruction concluded by specifying, "The People have the burden of proving beyond a reasonable doubt that the defendant was not acting in imperfect self-defense. If the People have not met this burden, you must find the defendant not guilty of second degree murder."

For all of these reasons, Luster's claims of error have no merit.

3. CALCRIM No. 852 does not violate due process.

In a related contention, Luster argues that CALCRIM No. 852 violated his right to due process because it gave jurors "the impression that proof beyond a reasonable doubt of guilt for a charged crime can be based on propensity evidence alone . . . ." Luster acknowledges that the California Supreme Court effectively rejected identical contentions about a predecessor instruction, CALJIC No. 2.50.02, in *People v. Reliford* (2003) 29 Cal.4th 1007 (*Reliford*) [addressing comparable instruction CALJIC No. 2.50.01]. The pertinent portions of CALJIC No. 2.50.02 provided, "If you find that the defendant committed a prior offense involving domestic violence, you may, but are not required to, infer that the defendant had a disposition to commit [another] [other] offense[s] involving domestic violence. If you find that the defendant had this disposition, you may, but are not required to, infer that [he] was likely to commit and did commit the crime [or crimes] of which [he] is accused. [¶] However, if you find by a preponderance of the evidence that the defendant committed a prior crime or crimes involving domestic violence, that is not sufficient by itself to prove beyond a reasonable doubt that [he] committed the charged offense[s]. If you determine an inference properly can be drawn from this evidence, this inference is simply one item for you to consider, along with all other evidence, in determining whether the defendant has been proved guilty beyond a reasonable doubt of the charged crime."

In *Reliford*, the Supreme Court concluded the comparable parts of CALJIC No. 2.50.01 did not tell the jury that it could convict the defendant if it found an uncharged sexual offense true by a preponderance of the evidence: "The problem with the defendant's argument is that the instruction nowhere tells the jury it may rest a conviction solely on evidence of prior offenses. Indeed, the instruction's *next sentence* says quite the opposite: 'if you find by a preponderance of the evidence that the defendant committed a prior sexual offense . . . , that is not sufficient by itself to prove beyond a reasonable doubt that he committed the charged crime.' " (*Reliford*, *supra*, 29 Cal.4th at p. 1013.) The Court concluded, "[T]he instructions could not have been interpreted to authorize a guilty verdict based solely on proof of uncharged conduct." (*Ibid.*) *People v. Brown* (2000) 77 Cal.App.4th 1324, rejected a similar argument challenging an earlier version of CALJIC No. 2.50.02. (*Id.* at p. 1335.)

Luster nonetheless argues that the substitution of "conclude" in CALCRIM No. 852 in place of "infer" in CALJIC No. 2.50.02 should lead to a different result. He argues that "conclude" evokes the concept of the "ultimate conclusion," i.e., the verdict.

The pertinent part of CALCRIM No. 852 provides: "If you decide that the defendant committed the uncharged domestic violence, you may, but are not required to, conclude from that evidence that the defendant was disposed or inclined to commit domestic violence and, based on that decision, also conclude that the defendant was likely to commit second degree murder, as charged here, or voluntary or involuntary manslaughter, lesser offenses. If you conclude that the defendant committed the uncharged domestic violence, that conclusion is only one factor to consider along with all the other evidence. It is not sufficient by itself to prove that the defendant is guilty of second degree murder, as charged here, or voluntary or involuntary manslaughter, lesser offenses. The People must still prove each element of every charge beyond a reasonable doubt."

We are not persuaded that jurors would understand the word "conclude" in the first and second sentences of CALCRIM No. 852 to mean the ultimate conclusion of whether Luster was guilty of the crime. None of the instructions referred to the verdict as the "ultimate conclusion." Jurors likely would understand "conclude" in these sentences to mean "infer." Moreover, the final two sentences of CALCRIM No. 852, quoted above, unequivocally negated the interpretation of the instruction Luster argues. In short, despite the altered wording, *Reliford* applies equally to CALCRIM No. 852. It is not reasonably likely the jury misconstrued or misapplied this instruction.

4. Defense counsel's failure to proffer the recording of a 911 call and to argue an additional ground for opposing the admission of the victim's statements to police during the June 2003 incident did not constitute ineffective assistance of counsel.

The prosecutor sought to introduce the testimony of Deputy French and a 911 tape to prove the June 2003 incident. Defense counsel objected to admission of Barbara's statements to French as a violation of the Confrontation Clause under *Crawford v. Washington* (2004) 541 U.S. 36 (*Crawford*). The prosecutor argued the statements were not testimonial or, in the alternative, the theory of forfeiture by wrongdoing mentioned in *Crawford*, 541 U.S. at page 62, and *Davis v. Washington* (2006) 547 U.S. 813, 815 applied. Defense counsel argued that Barbara's statements to French were testimonial and that forfeiture by wrongdoing did not apply. The court found the incident relevant under Evidence Code sections 1101(b) and 1109 and admissible under Evidence Code section 352, but deferred ruling on the Confrontation Clause issue. It later ruled that Barbara's statements were testimonial, but it reserved ruling on the forfeiture by wrongdoing issue.

After discussing the issue with counsel several more times, the trial court ultimately ruled that forfeiture by wrongdoing applied, and it allowed French to testify to Barbara's statements to him when he responded to the June 2003 incident. In its meticulous explanation of its reasoning, the trial court noted that it assumed the prosecutor was offering the statements under the hearsay exception in Evidence Code

section 1370. The court explained that it found section 1370's requirements satisfied. On trustworthiness, the court stated, "That is probably the largest issue here. Again, that would be subject to proof, but I would find for purposes of this ruling at this time, . . . that there appears to be sufficient indicia of trustworthiness here." The court noted that the photographs of Barbara's injuries corroborated her statements to French, further suggesting trustworthiness. Defense counsel did not argue that section 1370 did not apply, but contended that its constitutionality was in doubt under *Crawford* and its progeny.

Luster asserts his trial attorney rendered ineffective assistance by failing to "marshal the proper evidence and argument to defeat the application of" Evidence Code section 1370. He argues that the 911 tape[4] showed that Barbara's statements to French were not made under circumstances that would indicate their trustworthiness. He notes that on the tape Barbara lied about drinking alcohol, failed to mention her own injuries while asking for an ambulance for her husband, and defensively told the 911 dispatcher that her husband was accusing her of causing his injuries. Although the tape later was played at trial, the trial court apparently had not heard it or seen a transcript of it when it ruled on the admissibility of Barbara's statements to French.

A claim that counsel was ineffective requires a showing, by a preponderance of the evidence, of objectively unreasonable performance by counsel and a reasonable probability that, but for counsel's errors, appellant would have obtained a more favorable result. (*People v. Ledesma* (1987) 43 Cal.3d 171, 216-218.)

Evidence Code section 1370, subdivision (a) provides a hearsay exception for a statement that satisfies the following conditions: "(1) The statement purports to narrate, describe, or explain the infliction or threat of physical injury upon the declarant. [¶] (2) The declarant is unavailable as a witness pursuant to Section 240. [¶] (3) The statement was made at or near the time of the infliction or threat of physical injury.

Evidence of statements made more than five years before the filing of the current action or proceeding shall be inadmissible under this section. [¶] (4) The statement was made under circumstances that would indicate its trustworthiness. [¶] (5) The statement was made in writing, was electronically recorded, or made to a physician, nurse, paramedic, or to a law enforcement official." Section 1370, subdivision (b)(3) provides that the existence of corroborating evidence is a relevant factor in evaluating the trustworthiness of the statement at issue.

We assume for argument's sake that defense counsel should have challenged the trustworthiness element of section 1370 and supported this argument by playing the 911 tape for the trial court or giving the court a transcript. Nonetheless, Luster has not shown a reasonable probability of a more favorable result had his attorney done so. Counsel's failure to make a futile or unmeritorious objection or argument is not ineffective assistance. (*People v. Price* (1991) 1 Cal.4th 324, 387.)

The 911 call does not cast doubt on the trustworthiness of what Barbara later told French. There are some minor differences, but Barbara's statements to French at the scene are largely consistent with her statements in the 911 call. In the call, Barbara told the dispatcher that Luster "kept throwing things" at her, had hit her, and had knocked over the dresser and broken it. French's description of his conversation with Barbara tracked this fairly closely: he testified Barbara told him Luster had shoved her against the dresser, so that she broke the mirror, and that he had thrown the things French saw on the bedroom floor. French's observations and the police photographs also corroborated Barbara's statements: the broken mirror was lying on its side, off of the dresser, Barbara's shoulder was cut, and objects French thought would have been on the dresser were strewn about the bedroom floor. That Barbara did not mention her own injuries during the 911 call was entirely consistent with both her stated purpose of getting an ambulance to help Luster and French's testimony that she refused the officers' offer to

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4 The 911 recording was played at trial. The appellate record contains a transcript

get her medical treatment. Barbara's statement to French that Luster had been drinking was consistent with her statement to this effect to the 911 dispatcher and with Luster's own admission to French. Barbara's denial to the 911 operator that she had been drinking apparently was false, but the question before the trial court was the trustworthiness of her statements to French, not the trustworthiness of her statements to the 911 operator. Barbara admitted to French that she had also been drinking. Luster's own admission to French that he pushed Barbara down during the argument effectively corroborated Barbara's statement to the deputies that Luster shoved her into the mirror during the argument. Finally, although it did not detract from her statements to French, Barbara's "defensive" reference in the 911 call to her husband's accusation against her was consistent with Luster's own cryptic statement to French to the effect that Barbara caused the laceration on his head. It also was consistent with Luster's trial testimony that he and Barbara were engaged in mutual combat. Luster's scalp laceration itself tended to corroborate Barbara's statement to the 911 dispatcher that her husband was bleeding from the back of his head.

Accordingly, it is not reasonably probable that the trial court would have concluded Barbara's statements to French were not made under circumstances indicating their trustworthiness if it had heard the 911 recording or read the transcript. Counsel's failure (1) to give the court the recording and/or transcript during the consideration of the admissibility of French's statements and (2) to argue that the trustworthiness element of Evidence Code section 1370 was not satisfied therefore was not prejudicial. Luster's ineffective assistance of counsel claim thus has no merit.

5. The trial court correctly applied the forfeiture by wrongdoing doctrine.

Luster contends the trial court erroneously applied the doctrine of forfeiture by wrongdoing in admitting Barbara's statements to deputies during the June 2003 incident. He argues, in essence, that there should be no forfeiture without an intent to subvert the

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of the recording.

judicial process. Because there was no evidence he acted with that intent in killing Barbara, he argues, the doctrine is inapplicable.

As Luster concedes, the California Supreme Court has rejected this argument. In *People v. Giles* (2007) 40 Cal.4th 833, the Court concluded that the forfeiture by wrongdoing doctrine may be applied where the defendant's intentional criminal act rendered the witness unavailable to testify, whether or not the defendant specifically intended to prevent the witness from testifying. (*Id.* at p. 849.) *Giles* forecloses our review of Luster's claim. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.) We acknowledge that the United States Supreme Court has granted *certiorari* in *Giles.* (__ U.S. __; 128 S.Ct. 976.) Until and unless that Court reverses our high court in *Giles,* the decision remains the controlling law in this state.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

EGERTON, J.*

We concur:

COOPER, P. J.

RUBIN, J.

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