

CERTIFIED FOR PARTIAL PUBLICATION*
IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FOURTH APPELLATE DISTRICT
DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

PAUL SEONG CHUL YUM,

Defendant and Appellant.

E031437

(Super.Ct.No. FWV 18773)

OPINION

APPEAL from the Superior Court of San Bernardino County. Gerard S. Brown, Judge. Affirmed.

Russell S. Babcock, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Gary W. Schons, Senior Assistant Attorney General, Robert M. Foster and Steven T. Oetting, Supervising Deputy Attorneys General, for Plaintiff and Respondent.

* Pursuant to California Rules of Court, rules 976(b) and 976.1, this opinion is certified for publication with the exception of parts 2 and 3.

1. Introduction

At age 14, defendant killed his mother and his nine-year-old sister by shooting each of them in the head with a rifle. Then, carrying about \$10,000, he drove his mother's Mercedes Benz to Las Vegas and checked into the Riviera Hotel, where he was eventually apprehended by the FBI. The defense presented evidence that defendant had been abused by his father and suffered from post-traumatic stress disorder (PTSD), rendering him insane at the time of the killings.

Defendant was tried as an adult. A jury convicted him of two counts of second degree murder. The jury also found he was sane at the time of the murders. Defendant is serving two concurrent sentences of 40 years to life.

Defendant contends the court erred by not giving instructions on involuntary manslaughter and not giving special instructions about defendant's mental disorders. Defendant also asserts the court erred by not permitting evidence of defendant's SPECT¹ brain scan.

In the unpublished portion of our opinion, we hold a theory of involuntary manslaughter does not apply in this case and, also, the involuntary manslaughter and special defense instructions were properly refused. In the published portion we hold, the SPECT brain scan is not admissible to show defendant suffered from PTSD. We affirm the judgment.

¹ Single Photon Emission Computed Tomography.

2. Instruction on Involuntary Manslaughter

The court did not give an instruction on involuntary manslaughter. Involuntary manslaughter, as defined by statute, is “the unlawful killing of a human being without malice . . . [¶] . . . [¶] in the commission of an unlawful act, not amounting to felony; or in the commission of a lawful act which might produce death, in an unlawful manner, or without due caution and circumspection.”²

Defendant asserts that an instruction on involuntary manslaughter should have been given because evidence of mental illness showed defendant lacked the intent to kill.³ Defendant, however, overlooks the inapplicability of section 192 under these factual circumstances. First, “[i]nvoluntary manslaughter is . . . inherently an *unintentional* killing.”⁴ Therefore, the question of whether defendant lacked intent is pertinent only to the murder charges, not involuntary manslaughter. Second, even if the jury decided defendant lacked intent to kill, his crime would not be reduced to involuntary manslaughter because his conduct did not fit the definition of involuntary manslaughter. Defendant did not kill his mother and sister while committing either a nonfelonious unlawful act or a lawful act. Shooting two people in the head cannot be

² Penal Code section 192 and *People v. Brito* (1991) 232 Cal.App.3d 316, 321. All further statutory references are to the Penal Code unless otherwise stated.

³ *People v. Steele* (2002) 27 Cal.4th 1230, 1253.

⁴ *People v. Hendricks* (1988) 44 Cal.3d 635, 643.

characterized as either nonfelonious or lawful. Therefore, involuntary manslaughter was not a viable alternative to murder.

*People v. Saille*⁵ does not assist defendant. In *Saille*, the court gave an instruction on involuntary manslaughter when a bystander in a bar was killed during an intoxicated scuffle over possession of a rifle.⁶ The conduct which resulted in the killing was either lawful or nonfelonious. Here defendant committed a felonious unlawful act resulting in a killing. *People v. Steele*⁷ is also not apt because it involved instructions on voluntary manslaughter due to provocation or heat of passion, not involuntary manslaughter. Involuntary manslaughter does not apply here and defendant's remaining arguments concerning involuntary manslaughter are irrelevant.

3. Special Defense Instructions

The court gave the jury an instruction based on CALJIC No. 3.32, stating: "You have received evidence regarding a mental disease, mental defect, or mental disorder of the defendant Paul Yum, at the time of the commission of the crime charged namely, First degree Murder in Counts 1 and 2, or lesser crimes thereto, namely Second degree Murder and Voluntary Manslaughter. You should consider this evidence solely for the purpose of determining whether the defendant Paul Yum, actually formed the required

⁵ *People v. Saille* (1991) 54 Cal.3d 1103.

⁶ *People v. Saille, supra*, 54 Cal.3d at pages 1108, 1120-1121.

⁷ *People v. Steele, supra*, 27 Cal.4th at pages 1250-1255.

specific intent, premeditated, deliberated or harbored malice aforethought which are elements of the crimes charged in Counts 1 and 2, namely First degree Murder and the lesser crimes of Second degree Murder and Voluntary Manslaughter.”

The four special instructions requested by the defense concern the specific causes and effects of PTSD and Attention Deficit Disorder (ADD). On appeal, defendant again maintains the instructions were necessary to give the jury the alternative of convicting defendant of involuntary manslaughter instead of second degree murder. As we have already discussed, however, involuntary manslaughter was not one of the possible crimes in this case. Furthermore, CALJIC No. 3.32 adequately informed the jury that there was evidence defendant suffered from mental disorders that could negate intent or malice. Additional such instruction would have been argumentative and cumulative.⁸

4. SPECT Brain Scan

Dr. Daniel G. Amen,⁹ of the Amen Clinic for Behavioral Medicine, performed a SPECT brain scan on defendant. “Brain SPECT imaging” is described on Dr. Amen’s website as “a nuclear medicine study that uses very small doses of radioisotopes to evaluate brain blood flow and activity patterns. SPECT is widely recognized as an effective tool for evaluating brain function in strokes, seizures, dementia and head trauma. . . . During the past 11 years our clinics have developed this technology further

⁸ *People v. Mickey* (1991) 54 Cal.3d 612, 697.

⁹ Dr. Amen’s internet website is BrainPlace.com.

to evaluate and subtype ADD, anxiety and depression, aggression, the effects of substance abuse, and non-responsive neuropsychiatric conditions.”¹⁰

At the Evidence Code section 402 hearing on the prosecution’s motion to exclude the brain scan and Dr. Amen’s testimony, Dr. Amen testified that defendant’s brain scan showed results associated with trauma and consistent with the SPECT pattern found in other PTSD sufferers. He also testified that SPECT is typically used to diagnose brain trauma, strokes, seizures, and dementia but not psychiatric disorders.

In support of its motion, the prosecution presented articles from medical journals indicating brain imaging has been deemed scientifically acceptable to diagnose stroke, epilepsy, brain tumors, dementia, and Alzheimer’s disease, and movement disorders, like Parkinson’s disease. The same articles also question the use of SPECT to diagnose psychiatric disorders. The prosecution’s expert witness, Dr. Peter Conti, testified there are three approved clinical uses for SPECT: the diagnosis of stroke, epilepsy or seizure, and dementia. Other applications are experimental and the use of SPECT to diagnose brain trauma and PTSD is controversial. In this particular case, Dr. Conti disagreed that defendant’s SPECT scans showed abnormalities.

The court ruled the defense had not shown SPECT has achieved general scientific acceptance and therefore the SPECT evidence was not admissible.

Where expert testimony is based on the application of a new scientific technique,

¹⁰ <www.brainplace.com/ac/docs/brochure_new.pdf>

its proponent must demonstrate that the method employed is reliable--that is, the particular technique or test must have gained general acceptance in the field to which it belongs.¹¹ The trial court's ruling on this issue is subject to independent review by the appellate court.¹²

Defendant contends that the proffered testimony of Dr. Amen was not subject at all to *Kelly* because it was expert medical opinion and thus fell outside the realm of evidence considered a "new scientific technique." This contention is belied by the record.

As demonstrated in the evidentiary hearing, the proffered evidence was that of Dr. Amen describing brain SPECT imaging and his methods pertaining thereto, and opining that the scan revealed diminished activity in defendant's left temporal lobe, and hyperactivity elsewhere, findings consistent with brain trauma and correlated with violence, anger, and aggression. Clearly, the purpose of Dr. Amen's testimony was to put forth evidence of defendant's SPECT scan in an attempt to show he had temporal lobe damage caused by brain trauma, which in turn caused him to kill his mother and sister. Accordingly, in order for Dr. Amen's testimony to be admissible, defendant had to demonstrate that the use of SPECT scan imaging to diagnose brain trauma and PTSD

¹¹ *People v. Kelly* (1976) 17 Cal.3d 24, 30; *People v. Leahy* (1994) 8 Cal.4th 587, 611-612.

¹² *People v. Ashmus* (1991) 54 Cal.3d 932, 971.

was generally accepted in the field of brain imaging and neurology.¹³ Defendant failed to make this showing.

In order to establish general acceptance of the use of SPECT scans to diagnose brain trauma and PTSD, defendant had to show substantial agreement among a cross-section of the relevant scientific community.¹⁴ Defendant had to demonstrate a consensus in the field, which Dr. Amen’s testimony did not. Our review of the testimony of Doctors Amen and Conti and the pertinent medical literature reveals that the majority of qualified members in the neurology and brain imaging community does not support the use of SPECT scans to diagnose prior head trauma and mental disorders like PTSD and considers the technique generally unreliable for this purpose. Accordingly, we hold the trial court properly excluded Dr. Amen’s testimony.

5. Disposition

We affirm the judgment.

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s/Gaut
J.

We concur:

s/Ramirez
P. J.

s/Hollenhorst
J.

¹³ *People v. Leahy, supra*, 8 Cal.4th at pages 607, 611.

¹⁴ *People v. Leahy, supra*, 8 Cal.4th at pages 607, 611.