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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE,

Plaintiff and Respondent,

v.

ALLEN THOMAS,

Defendant and Appellant.

A129842

(Alameda County Super. Ct.  
No. 160974)

On September 14, 2007, 89-year-old Amanda Pierre's charred body was removed from her burning house. She had suffered multiple blunt force injuries to the face and stab wounds to the face and body, including to her heart, aorta, lung and vagina. Mrs. Pierre's grand nephew, defendant Allen Thomas, was arrested and admitted to police that he hit and stabbed his aunt accidentally or in self-defense. He denied setting the fire. A jury convicted defendant of arson and felony and special circumstance murder. He was sentenced to prison for 16 years, plus life without the possibility of parole.

On appeal, defendant argues (1) there is insufficient evidence to support the jury's finding that defendant's commission of rape by instrument was not incidental to Mrs. Pierre's murder; (2) the special circumstance statute is unconstitutional; (3) the jury was confused by the instructions on the special circumstances and the court should have clarified the law in response to the jury's questions; (4) admission of gruesome photographs violated due process and denied him a fair trial; (5) admission of a witness's lay opinion was error; (6) admission of witness testimony about a prior uncharged arson was error; and (7) refusal to give a defense pinpoint instruction was error.

We find that substantial evidence supports the special circumstance findings; the special circumstance statute is not unconstitutional; the trial court's efforts to answer the jurors' questions satisfied Penal Code section 1138; the trial court did not abuse its discretion in admitting autopsy and crime scene photographs, or lay opinion testimony. If the trial court erred in admitting evidence of a prior fire, the assumed error was harmless beyond a reasonable doubt. Finally, defendant was not entitled to an instruction that entry with intent to commit murder is not burglary for the purpose of first degree felony murder; even if his requested instruction should have been given, the error was not prejudicial. Therefore, we affirm.

### **STATEMENT OF THE CASE**

An amended information charged defendant with murder (count 1) and arson of a dwelling (count 2). (Pen. Code, §§ 187, 451, subd. (b).)<sup>1</sup> It also alleged that defendant personally used a deadly weapon, and committed the murder in the course of a robbery, a burglary, and while engaged in the commission of a rape by instrument. (§§ 12022, subd. (b)(1), 190.2, subd. (a)(17) (A), (G) & (K).) In addition, the information alleged four prior convictions and a prior strike.

On June 3, 2010, the jury found defendant guilty of first degree murder and arson, and also found true the deadly weapon and special circumstance allegations. The court subsequently found true the prior strike allegation. The court sentenced defendant to a determinate term of 16 years, plus life without possibility of parole. Defendant timely appealed.

### **STATEMENT OF THE FACTS**

Mrs. Pierre, defendant Allen Thomas's great aunt, owned a two-story Victorian-style duplex in Oakland. She and her late husband lived upstairs. Defendant's mother, Ruby Thomas, and her nine children, including defendant, moved into the lower unit in 1989 or 1990. Defendant lived in the house for years, sometimes staying with Mrs.

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<sup>1</sup> Unless otherwise indicated, all statutory references are to the Penal Code.

Pierre, and sometimes with his mother. However, Ruby Thomas had moved out in mid-August of 2007.

In October of 2005, Mrs. Pierre and defendant's sister, Samantha Easley, saw defendant rummaging through Mrs. Pierre's purse for money when he was high on drugs. In June of 2006, Mrs. Pierre obtained a restraining order against defendant.<sup>2</sup> Thereafter, defendant was prohibited from being on or near Mrs. Pierre's property. However, Mrs. Pierre allowed him to come back occasionally. He came on the property to help his mother move out, and he kept his insulin in Pierre's refrigerator. Defendant had been living with Mrs. Pierre on and off for about a year at the time of her death. He also lived in his car, which he kept in a parking lot about a four minute walk from Mrs. Pierre's house. In the last six months before Mrs. Pierre's demise, defendant was smoking crack from a crack pipe once or twice a week.<sup>3</sup> In mid-July of 2007, Mrs. Pierre asked Samantha, "Baby, do you think next time he gon' kill me?" Samantha had heard Mrs. Pierre say that once before.

The night before Mrs. Pierre was killed, defendant was drinking beer with Mrs. Pierre's longtime neighbor, 87-year-old Frank Carswell. Defendant told Carswell that he was "going to kill the bitch"—meaning Mrs. Pierre—because she had stolen his "Vietnam money."<sup>4</sup> This was not the first time defendant had told Carswell he was going to kill his great aunt; he had said that four or five times before.

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<sup>2</sup> Certified copies of the restraining order and transcript of the hearing on the petition were admitted into evidence as Exhibit 53. In it, Mrs. Pierre averred that on May 19, 2006 at approximately 5:00 a.m., defendant entered her house without permission and startled her awake by hovering over her while she slept. He told her he was "getting her purse." When Mrs. Pierre started screaming and grabbing her purse, defendant started choking her. Her nephew Seneca came to her aid, and defendant ran away.

<sup>3</sup> Lester Huff, an acquaintance of defendant who lived in his van in the same parking lot where defendant parked his car, also saw defendant use crack cocaine once or twice a week in the three-to six-month period before September of 2007.

<sup>4</sup> Defendant joined the military shortly after graduating high school. He received some monetary compensation for Agent Orange exposure, which Mrs. Pierre was supposed to keep for him.

On the evening of September 13, 2007, defendant drank one or two 12-ounce Bud Light beers with Lester Huff. Later that night, Huff saw someone come into the parking lot and go to defendant's car. Between 11:30 p.m. and 12:30 a.m., he saw defendant leaving the lot with someone. Defendant did not appear to be drunk, but Huff couldn't tell if defendant was intoxicated or high.

### *The Fire*

At 1:00 a.m. on September 14, 2007, firefighters responded to a fire at Mrs. Pierre's house. Smoke was billowing from the eaves of the house, and firefighters had to force open locked doors to enter. There were no signs of forced entry other than by the firefighters. Inside, they discovered Mrs. Pierre's body on the floor in front of the bed in the bedroom and took her outside. Mrs. Pierre's body was "pretty heavily burnt." She was not breathing, and had no pulse or heart activity. She was wearing only a top.<sup>5</sup> Because she had lacerations to her body and head, the Oakland police were called. An arson investigator was also called. Neither the firefighters nor the paramedics removed any clothing from the body.

The arson investigation revealed that smoke detectors in the kitchen had been broken or dismantled. In the bedroom, the bed was burned as a result of an ignitable liquid being poured on it. The carpet was saturated with an ignitable liquid, as well as blood. An ignitable liquid was also used in a corner of the bedroom, where a charred nightstand stood. The fire had traveled from the bed to the ceiling. At trial, the arson investigator opined that the fire was set with some type of ignitable liquid, possibly gasoline; an accelerant had been used to set the fire. Accelerant had also been poured on Mrs. Pierre. The fire had been set around the bed, on the bed, and on top of the victim.

### *The Autopsy Findings*

Mrs. Pierre was 89 years old and had suffered burns on 85 to 90 percent of her body, but the causes of death "were multiple stab wounds and incised wounds associated

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<sup>5</sup> According to Samantha Easley, Mrs. Pierre typically wore a knee-length nightgown to bed without undergarments.

with multiple blunt injuries.” Her face was bruised and lacerated. The bones in her nose, upper and lower jaw, and left cheekbone were fractured, and her dentures were broken. A pipe wrench can cause blunt force injuries.

She also had both stab and incised wounds.<sup>6</sup> These included: (1) a stab wound in her right lower back; (2) an incised wound in her right front neck; (3) stab wounds in the left front chest; (4) stab wounds in the midline, to the front side of the chest; (5) another stab wound in the right front side of the chest; (6) a stab wound on the left front side of the abdomen. A wound just outside the right eye area was probably a stab wound (rather than a blunt force injury), as were probably the wounds in the area of the left eyebrow, two wounds on the left side of the face, near the left eye, and two more wounds on the left side of the chin. In addition, there were a total of six incised wounds in the area of the vagina, including wounds on the left and right of the vaginal opening, inside the vagina extending close to the cervix, and the clitoris.

One of the stab wounds in the front side of the chest penetrated eight to 10 inches and passed through the breast bone, the heart, the aorta, the right lung, a rib, and the soft tissue of the back, exiting on the right back side of the body. This wound damaged the left chamber, the left ventricle, and aortic valve of the heart, and would have caused death within three to five minutes. Two other stab wounds also penetrated the heart.

All of these wounds hemorrhaged, indicating that Mrs. Pierre was alive when these injuries were inflicted. There was no smoke or soot in the breathing system within the lungs, indicating that she was not alive when her body burned.

### *The Police Investigation*

Inside the bedroom, police found a knife, a wrench, dentures, and money. In the kitchen, police found broken smoke detectors on the floor. There was “a pretty good degree of blood” saturating the carpet where Mrs. Pierre had been found. Outside the house, police discovered a knife in a storm drain, and a discarded part of a broken smoke

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<sup>6</sup> An incised wound is longer than it is deep. Conversely, a stab wound is deeper than it is long on the surface of the skin.

detector and a bloody handkerchief nearby. Mrs. Pierre's wallet was found in a garbage can.

Some of Mrs. Pierre's relatives, including defendant's sisters Samantha and Inez, gathered at the crime scene after hearing about the fire. Samantha told Sergeant Nolan of the Oakland Police Department that her great aunt had a restraining order against her brother, Allen Thomas. Samantha also told Nolan that "Allen was the No. 1 suspect."

#### *Defendant's Detention*

On his way back to the police station, Nolan saw two apparently homeless men standing in front of a liquor store near the Pierre house and stopped to talk to them in case they had heard any rumors about the fire. Defendant identified himself as Allen. Nolan noticed three spots that looked like blood on the white T-shirt he was wearing under a puffy jacket. Defendant remarked he had "heard something happened to my aunt . . . over there" as he gestured toward the crime scene. Defendant was detained, and frisked for weapons; he had none, but he indicated there was a crack pipe in his sock. Defendant had blood on the top and back of his head, behind his right ear, on his ring finger and palms of both hands, and on his pants and shoes. At that time, defendant did not appear to Nolan to be under the influence of alcohol or drugs.

#### *Defendant's Statements to Police*

Defendant was taken to the police station and placed in an interview room shortly before 5:00 a.m.<sup>7</sup> He was *Mirandized*<sup>8</sup> and interviewed beginning at 6:52 a.m. for almost an hour. After a break, the interview resumed at 9:11 a.m. and continued until 10:38 a.m. During the interview, defendant was responsive and coherent. Defendant's blood was drawn at 4:00 p.m.

During the first interview, defendant told police that the security gate and door at the front of his aunt's house were open when he got there, and a big man came out of the house and bumped into him. There was smoke in the house and his aunt was lying on the

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<sup>7</sup> Defendant told Sergeant Nolan at that time that he had drunk two 16-ounce beers and one 12-ounce beer, and used a small amount of cocaine that night.

<sup>8</sup> *Miranda v. Arizona* (1966) 384 U.S. 436.

floor, all bloody. He panicked and ran out of the house. He said he had handled the monkey wrench recently while doing repairs at his aunt's house. He admitted his aunt obtained a restraining order against him because she thought he broke into her house. According to defendant, the blood on his shirt came from touching his aunt, and the blood on his jacket was his own, from having cut himself about two weeks earlier.

In the second interview, defendant admitted that he lied about seeing "a big dude" run out of his aunt's house. He admitted he was upset with his aunt and his sister Inez for evicting his mother. He said his aunt's door was open when he went to her house to check on her, and they "got into it." He picked up a monkey wrench for protection, in case someone else was there. He called her name and she began attacking him with something in her hand. He did not want to hit her, but he did because she kept swinging at him. He believed he only hit her once or twice before she went down. He checked her and she seemed "all right," but he didn't know if she was alive at that time. He began to cry, and took a tissue to dry his tears. The tissue caught fire when he lit a cigarette. He dropped the tissue and ran out the door, taking Mrs. Pierre's wallet, which was empty. He dropped it into a garbage can because he was afraid his finger prints were on it.

Later, he admitted he went into her bedroom and woke her up by calling her name. She then jumped off the bed naked and kicked him "between [the] legs."<sup>9</sup> He admitted he probably used a knife and stabbed his aunt in the neck and shoulder, but he repeatedly maintained throughout the second interview that it was an accident, and once called it "a mistake . . . a reflex."

Defendant adamantly denied pouring gasoline in Pierre's duplex, setting the fire or disabling the smoke detectors. He complained he was already being blamed for the first fire at his aunt's house a year earlier, "that [he] didn't do."

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<sup>9</sup> According to Samantha, while Mrs. Pierre was healthy and active for her age, she was unable to jump, run, or lunge.

### *Defendant's Telephone Calls from Jail*

Defendant's calls from Santa Rita Jail were monitored and recorded. On September 26, 2007, defendant called his sister Inez. He told her the police were "trying to pin this shit on me . . . ." He said he had admitted nothing. The police wouldn't let him sleep, and was he "full of drugs and everything . . . alcohol, beer, cocaine, weed, you name it. . . ." He admitted using a monkey wrench on Mrs. Pierre because she swung at him and caught him off guard. He said she jumped out of bed with a knife in her hand; he pushed her, and accidentally hit her "in the head." She fell on the floor, but she was breathing. When he left she was fine.

On October 30, 2007, defendant again called Inez. He once more denied confessing. He said that when he went to his aunt's house, a big man ran past him. He said Mrs. Pierre's blood got all over him when she hit her head in the door and he grabbed her.

### *Additional Physical Evidence*

A search of defendant's car yielded a pair of bloody shoes, a bloody napkin, another knife, insulin, a needle, and a Bic cigarette lighter with fluid in it, along with a piece of paper with defendant's name on it.

### *DNA Evidence*

DNA samples were taken from defendant and Mrs. Pierre. DNA profiles were developed from the samples and were compared with DNA found at 16 locations.

Four of 12 bloodstains from the front, back and insides of defendant's T-shirt were randomly tested for DNA. Bloodstains A, E, F, and G contained mixed DNA. For bloodstain A, the major donor's DNA was consistent with defendant's DNA, and the minor donor's DNA was consistent with Mrs. Pierre's DNA. For bloodstains E, F, and G, the major donor's DNA was consistent with Mrs. Pierre's. There was not enough information to conclusively say who the minor donor was in bloodstain E, but the minor donor's DNA in bloodstain F and G were consistent with defendant's DNA.

Three of six bloodstains on defendant's sweat pants were tested for DNA. Bloodstain A, on the bottom right leg, was consistent only with Mrs. Pierre's DNA.

Bloodstain F from the inside of the front right leg was consistent only with defendant's DNA. Bloodstain D, from the back bottom portion of the right leg, contained mixed DNA, of which the major donor's was consistent with Mrs. Pierre's DNA. The minor donor was not identified.

DNA typing was done on two bloodstains from the right shoe and one bloodstain from the left shoe. Bloodstains A and B, from the instep and bottom of the right shoe, contained a single donor's DNA and was consistent with Mrs. Pierre's DNA. Bloodstain C, from the toe box of the left shoe, contained incomplete DNA from which it could only be determined that Mrs. Pierre was a potential major donor and the minor donor was male. Of three bloodstains on the napkin, two were tested for DNA. One of these contained DNA consistent with Mrs. Pierre's DNA. In all of the 16 locations tested, 12 locations contained complete DNA types, and "[a]t those 12 locations they matched the DNA types for Amanda Pierre's reference sample." The statistical probability of finding the same DNA profile "from someone randomly picked from the population" across 16 locations is 1 in 444 quintillion.

Vaginal, rectal and oral swabs were collected during the autopsy. The swabs were tested for sperm; none were found.

#### *Other Crimes Evidence*

On December 2, 1986, defendant admitted his involvement in the robbery of a man in his 70's. Defendant said two women asked him to help them rob a man they had set up. According to the women, "the old man was half blind and could not hear too good." Defendant took a baseball bat, intending to scare the man, but when the man "came at him," defendant struck him with a bat "out of impulse." He took the man's television and VCR.

#### *The Defense Case*

A toxicologist testified that the blood sample drawn from defendant reflected a fairly high reading of cocaine metabolite in his blood, indicating that defendant had ingested a "really big dose" of cocaine, or multiple doses of the substance, or the sample could have degraded. When a binge user crashes, he or she may experience delusions or

hallucinations, or become aggressive, or sleepy. A psychiatrist who specializes in treating addictions and major mental illnesses testified paranoid psychosis can result from smoking cocaine. He opined hypothetically that a person who had ingested 15 milligrams of crack cocaine could be paranoid enough to believe that he was being attacked by an unarmed loved one. He also opined sexual violence is often associated with cocaine use.

## DISCUSSION

### I. Substantial Evidence Supports the Rape by Instrument Murder Special Circumstance.

Defendant contends there was insufficient evidence to support the finding of the rape by instrument special circumstance. We apply the substantial evidence rule to defendant's challenge to the special circumstance finding. "The rules governing sufficiency of the evidence are as applicable to challenges aimed at special circumstance findings as they are to claims of alleged deficiencies in proof of any other element of the prosecution's case. [Citation.]" (*People v. Morris* (1988) 46 Cal.3d 1, 19, disapproved on another point in *In re Sassounian* (1995) 9 Cal.4th 535, 543–545.) "We must therefore determine here whether, viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have concluded that defendant had a purpose for the [rape] apart from the murder. [Citations.]" (*People v. Mendoza* (2000) 24 Cal.4th 130, 183.) The evidence is sufficient if it establishes that the defendant committed the murder and the rape by instrument with "independent, albeit concurrent, goals." (*People v. Clark* (1990) 50 Cal.3d 583, 609 (*Clark*).

Defendant argues that for the special circumstance to apply, he must have formed the concurrent intent to commit the rape by instrument prior to or during the commission of the acts that resulted in Pierre's death. At most, he argues, the evidence "shows [defendant] committed a rape by instrument only after he already struck the killing blows that caused Pierre's death." In support of this argument, defendant points to his statement admitting that he stabbed Mrs. Pierre, but only near her head and shoulder. Defendant posits that since the prosecutor relied in part on defendant's version of the sequence of

events during argument, and did not present any evidence to directly contradict or impeach this scenario, the People are bound by defendant's exculpatory version of events. (*People v. Toledo* (1948) 85 Cal.App.2d 577 (*Toledo*); superseded in part as stated in *People v. Burney* (2009) 47 Cal.4th 203, 248–249 (*Burney*).)

Assuming without deciding that the “antiquated and questionable statement of the law” for which defendant cites *Toledo* has continuing vitality (*Burney, supra*, 47 Cal.4th at p. 248), defendant's version of events was not the only evidence concerning the sequence of events. The pathologist's findings could not establish the order in which the stab wounds were inflicted; however, his findings did establish that *all* of the stab wounds hemorrhaged, reflecting that Mrs. Pierre was still alive when the wounds in and around the vaginal opening were inflicted. Thus, even inferring from defendant's statement to police that the stab wounds and blows to the head and shoulder were inflicted before the stab wounds to the vagina, that statement fails to dispel the reasonable inference that defendant formed the intent to rape before or during the murder.

Defendant acknowledges that evidence of concurrent intents to rape and kill can support a special circumstance finding, and that, “[i]n fact, that was the People's theory” here. Defendant disputes the existence of substantial evidence supportive of concurrent objectives or intents. He argues that substantial evidence for a concurrent intent to rape is absent because (1) defendant had never previously tried to rape his aunt although he had broken into her house to steal from her; (2) Mrs. Pierre feared the next time he broke in he would kill her, but not that he would sexually abuse her; (3) he never threatened to sexually abuse her, although he did threaten to kill her; and (4) he had prior theft-related convictions, but no prior sex offenses. Defendant also disputes that Mrs. Pierre's state of undress from the waist down supports an inference of independent intent on his part because other testimony established that Mrs. Pierre slept without underwear or pajama bottoms. Finally, defendant admits this “leaves only the fact that her genital area was viciously stabbed, half a dozen times,” but argues that this evidence does not establish a concurrent intent to rape because, by his own admission, defendant had already bludgeoned Mrs. Pierre with a wrench and stabbed her near the head and shoulder; thus,

he did not form the intent prior to or during the commission of the acts that resulted in Mrs. Pierre's death.

The jury could view the facts differently. The evidence that Mrs. Pierre was still alive when she was stabbed in the vagina, and that the wounds to her heart and aorta likely would have killed her within three to five minutes, sufficiently establish that defendant formed the intent to rape his great aunt with the knife prior to or during the murder. Furthermore, the viciousness of the attack and the number and type of wounds to her vaginal area and clitoris amply supports the inference that defendant formed the intent to mutilate and humiliate Mrs. Pierre sexually, independently of, and not incidentally to, the intent to kill her. In our view, the evidence is sufficient to establish that defendant raped and killed the victim with "independent, albeit concurrent, goals." (*Clark, supra*, 50 Cal.3d at p. 609, fn. omitted.) We, therefore, reject defendant's claim of evidentiary insufficiency.

## **II. The Special Circumstance Statute Is Not Unconstitutional.**

Defendant argues that the special circumstance statute, Penal Code section 190.2, subdivision (a), violates the federal constitution's Eighth Amendment because it "impermissibly broaden[s] the class of persons subject to the death penalty by essentially including the entire class of persons who were also guilty of first-degree murder on the same theories." Defendant acknowledges that our Supreme Court has "consistently rejected the claim that the statutory special circumstances, including the felony-murder special circumstance, do not adequately narrow the class of persons subject to the death penalty" (*People v. Pollock* (2004) 32 Cal.4th 1153, 1195), and has repeatedly authorized "use of a felony to qualify a defendant both for first degree murder and for a special circumstance . . ." (*People v. Taylor* (2001) 26 Cal.4th 1155, 1183.) He raises the issues in his brief in order to preserve them for federal review. As an intermediate appellate court, we are bound by stare decisis to follow California Supreme Court precedent. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.) Therefore, we find the special circumstance statute is constitutional.

### **III. The Trial Court's Efforts to Clarify CALCRIM No. 8.81.17 Complied with Penal Code Section 1138.**

Defendant argues that all three special circumstance findings must be reversed because the trial court violated its duty to clarify CALCRIM No. 8.81.17<sup>10</sup> after the jury requested further instruction on the meaning of the phrase “merely incidental to the commission of the murder.”<sup>11</sup>

The jury initially asked two questions: “#1 Could we have additional clarification, the meaning of ‘merely incidental to the commission of the murder[?]’ in CALJIC [No.] 8.81.17 special circumstances section[?] #2 Can you find for special circumstances with just clause ‘1A’ (‘[t]he murder was committed etc.’)[?]” In consultation with both counsel, the court decided that the second question could be answered by informing the jury: “ #‘1A’ OR # ‘1B’ And #2” and that answer was written on the jury’s request form.

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<sup>10</sup> The trial court separately and identically instructed with CALJIC No. 8.81.17 as to each of the three special circumstances, murder in the commission of (1) robbery (2) burglary, and (3) rape by instrument.

Thus, as given in this case, CALJIC No. 8.81.17 stated in relevant part: “To find that the special circumstance referred to in these instructions as murder in the commission of rape by instrument [or burglary or robbery] is true, it must be proved:

“1a. The murder was committed while the defendant was engaged in or was an accomplice in the commission or attempted commission of a rape by instrument [or burglary or robbery]; or

“1b. The murder was committed during the immediate flight after the commission [or] attempted commission of a rape by instrument [or burglary or robbery] by the defendant to which the defendant was an accomplice; and

“2. The murder was committed in order to carry out or advance the commission of the crime of rape by instrument [or burglary or robbery] or to facilitate the escape therefrom or to avoid detection. In other words, the special circumstance referred to in these instructions is not established if the attempted rape by instrument was merely incidental to the commission of the murder.”

<sup>11</sup> The jury asked three questions about CALJIC No. 8.81.17. Defendant raises no issue with respect to the second question. We will, therefore, confine our discussion to the first and third questions.

As to the first question, on the record and in the presence of both counsel, the court explained it had read *People v. Valdez* (2004) 32 Cal.4th 73 (*Valdez*) and proposed answering the jury's question "by saying that the defendant formed the intent to commit the specific felony before or while killing, not after the killing occurs. That's the meaning of " 'merely incidental.' " Defense counsel objected, stating: "I don't believe that accurately describes the meaning of " 'incidental.' " I believe the D.A. is stating there be [*sic*] concurrent intent, but I'm not sure the definition the Court is going to give, the Court describes merely the meaning of incidental. It may describe the status of the law with regards to when the intent must be formed, but it's different than merely incidental."

When the court asked what defense counsel would propose instead, defense counsel responded he needed more time to think about it. "I was trying to think of a better definition than what the Court is going to give." The prosecutor approved of the court's proposed instruction. Defense counsel stated that his only concern was that the statement of law did not accurately reflect the meaning of merely incidental, "and it could suggest that the Court is interpreting their question one way and pushing them a certain way."

Noting *Valdez* was cited in the use note to CALJIC No. 8.81.17, and that it was a correct statement of law, the court overruled the defense objection and instructed the jury in writing on the jury request form as follows. "Merely incidental to the commission of the murder means: The defendant formed the intent to commit the specific felony before or during the killing, not after the killing." The court asked the bailiff to deliver the court's answer before taking the jury to lunch and asked the attorneys to be back at 1:30 "[s]o if they have any further questions, and then if that doesn't help, we can bring them down." The lunch recess was taken.

At 2:00 p.m., six of the jurors sent a note to the judge stating: "CALJIC [No.] 8.81.17 SPECIAL CIRCUMSTANCES part 2 states: 'The murder was committed in order to carry out or advance . . . etc.' and then says 'in other words the special circumstances do not apply if the (rape by instrument) was "merely incidental" to the

commission[.]’ [¶] [A]nd then you say ‘ “merely incidental” means the defendant formed the intent to commit the specific felony before or during the killing’ but the truth of the latter statement does not necessarily imply that the defendant performed the killing to carry out, facilitate, etc, the felony. So which rule applies? The former is more restrictive.” (Emphasis in original.) To this note the court responded in writing: “We have given you all that we can give you.” At 2:40 p.m. the jury returned its guilty verdicts and true findings on all counts and allegations and was thereafter polled, unanimously affirming the verdicts.

Defendant argues the court erred when it refused to provide further clarification of the special circumstance instruction in response to the six jurors’ third question, and further failed to answer the jury in the presence of counsel. Defendant’s argument requires this court to determine whether the jury misunderstood the special circumstance instructions in a manner that violated defendant’s constitutional rights. (*People v. Smithey* (1999) 20 Cal.4th 936, 963 (*Smithey*)). Defendant urges this court to conclude that “half the jury returned ‘true’ findings on three special allegations, even though they did not understand the instructions they were given regarding those allegations.” However, defendant does not explain how the court’s instructions were wrong, or how jurors’ questions indicate a misunderstanding of the law to his detriment.

Penal Code section 1138<sup>12</sup> imposes on the trial court a mandatory “duty to clear up any instructional confusion expressed by the jury. [Citations.]” (*People v. Gonzalez* (1990) 51 Cal.3d 1179, 1212, superseded on another point as stated in *In re Steele* (2004) 32 Cal.4th 682, 690.) “This does not mean the court must always elaborate on the standard instructions. When the original instructions are themselves full and complete, the court has discretion under section 1138 to determine what additional explanations are

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<sup>12</sup> Penal Code section 1138 provides: “After the jury have retired for deliberation, if there be any disagreement between them as to the testimony, or if they desire to be informed on any point of law arising in the case, they must require the officer to conduct them into court. Upon being brought into court, the information required must be given in the presence of, or after notice to, the prosecuting attorney, and the defendant or his counsel, or after they have been called.”

sufficient to satisfy the jury’s request for information. [Citation.]” (*People v. Beardslee* (1991) 53 Cal.3d 68, 97 (*Beardslee*).

CALJIC No. 8.81.17, and the court’s supplemental explanation of the meaning of “merely incidental,” were both correct statements of the law as explained in *Valdez, supra*, 32 Cal.4th 73. In that case, the defense argued there was insufficient evidence to prove the defendant “killed the victim in order to advance the independent felonious purpose of robbery.” (*Valdez, supra*, at p. 105.) Our Supreme Court responded to that argument by stating: “To prove the robbery-murder special circumstance, the prosecution was required to prove that defendant formed the intent to steal before or while killing the victim. [Citation.]” (*Ibid.*) In that case, the court found “ample evidence that the victim was robbed, that defendant remained behind after the others left in order to rob the victim, and that defendant killed the victim to accomplish that purpose. The evidence is sufficient to support defendant’s conviction of felony murder, and the robbery-murder special-circumstance finding.” (*Id.* at p. 106.)

Defendant Valdez also argued the trial court erred in not instructing the jury with the bracketed second paragraph of CALJIC No. 8.81.17, and that “the omission was critical and prejudicial because it allowed the jury to find true the robbery-murder special circumstance based merely on a finding that the murder *took place* during a robbery, as opposed to finding that the murder occurred to *advance the independent felonious purpose of robbery*.” (*Valdez, supra*, 32 Cal.4th at p. 113, italics added.) The *Valdez* court also rejected this contention, explaining that the argument was based on too literal a reading of the court’s observation in *People v. Green* (1980) 27 Cal.3d 1, 61 (*Green*),<sup>13</sup> “that the purpose of the special circumstance was to single out those ‘defendants who killed in cold blood in order to advance an independent felonious purpose. . . .’ [Citation.] Although the defendant in *Green* technically committed a robbery, it was clear from the evidence that it was not ‘a murder in the commission of a robbery but the exact opposite, a robbery in the commission of a murder.’ (*Green, supra*, at p. 60.) But

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<sup>13</sup> *Green* has been overruled on other points in *People v. Hall* (1986) 41 Cal.3d 826, 834, footnote 3, and *People v. Martinez* (1999) 20 Cal.4th 225, 233–237.

in *People v. Kimble* (1988) 44 Cal.3d 480 [citation], we expressly rejected the ‘suggestion that *Green*’s clarification of the scope of felony-murder special circumstances has somehow become an “element” of such special circumstances, on which the jury must be instructed in all cases regardless of whether the *evidence* supports such an instruction.’ [Citations.] *Green* simply made clear that a robbery, in a special circumstance allegation, cannot be ‘merely incidental to the murder.’ (*Green*, at p. 61.)” (*Valdez*, *supra*, 32 Cal.4th at pp. 113–114, original italics.)

Here, unlike in *Valdez*, the jury *was* instructed with the bracketed second paragraph of CALJIC No. 8.81.17. Thus, the jury was instructed to determine whether the murder was committed “in order to carry out or advance” a separate felonious purpose, or “facilitate the escape therefrom or to avoid detection,” or, “[*i*n other words,” to decide whether committing another felony “was merely incidental to the commission of the murder.”

As our Supreme Court recently explained in *People v. Brents* (2012) 53 Cal.4th 559 [2012 Lexis 1039], “[s]entence [B] of the instruction’s second paragraph merely elaborates or clarifies the idea expressed in sentence [A] of the paragraph, and sentence [A] (which is only illustrative) is not even necessary to the instruction. [Citation.] For this reason, sentence [B] of the instruction’s second paragraph begins with the phrase ‘In other words.’ ” (*Id.* at p. 613.) Furthermore, the court’s answer to the jury’s second question underscored that before it could return a true verdict on the special circumstances, it *must* make the findings required by the second bracketed paragraph, which is more than *Valdez* itself requires. As the use note to CALJIC No. 8.81.17 emphasizes, “[t]he bracketed element number 2 can be deleted when there is no supporting evidence. It does not comprise a separate element of special circumstance. It is only required if there is substantial evidence that the robbery *was* merely incidental to the commission of the murder.” (Use Note to CALJIC No. 8.81.17 (2004 Rev.) (Fall 2011 ed.) p. 561, italics added.) Here, the trial court gave defendant the benefit of the doubt on the question whether robbery, burglary and rape by instrument were merely incidental to the murder, first by instructing on the second paragraph of CALJIC No.

8.81.17, second by directing the jury to treat the second paragraph of CALJIC No. 8.81.17 as if it were a separate element of the special circumstance allegation, and third by attempting to explain the phrase “merely incidental” in the context of the special circumstance instruction.

In fact, the word “incidental” has no special meaning in this context. The dictionary definition of “incidental” is “1: being likely to ensue as a chance or minor consequence. . . . 2: occurring merely by chance or without intention or calculation.” (Merriam-Webster’s Collegiate Dictionary (10th ed. 2001) p. 586.) “ ‘[A] word or phrase having a technical, legal meaning requiring clarification by the court is one that has a definition that *differs* from its nonlegal meaning. [Citations.]’ . . .” (*Smithey, supra*, 20 Cal.4th at pp. 980–981.) The court’s clarification of the phrase “merely incidental” was obviously intended to convey to the jury that the special circumstance allegation was not true, i.e., did not apply, unless the evidence proved that the defendant’s mental state with regard to the three target felonies was the *opposite* of incidental, that is, intentional or purposeful.

Moreover, the jurors’ third question makes clear they did not misunderstand the court’s answer. The third question shows they clearly understood that incidental was the opposite of purposeful; instead, the jurors’ third question focused on *how* purposeful the defendant’s action and/or intent had to be: it zeroed in on the tension between the first paragraph of CALJIC No. 8.81.17 and the second, between the idea of committing a murder *in order to* carry out or advance a distinct felonious purpose, and committing a felony with an intent to do so formed previously to or concurrently with the commission of a murder. In our view, the trial court did not abuse its discretion in concluding there was nothing more to say that would be helpful to the jury and yet not harmful to the defendant, except redirecting the jury’s attention to the instructions already given. The trial court here did not “figuratively throw up its hands and tell the jury it cannot help” (*Beardslee, supra*, 53 Cal.3d at p. 97) when it responded: “We have given you *all* that we can give you.” (Italics added.) As our Supreme Court has observed, “comments diverging from the standard are often risky. [Citation.] The trial court was

understandably reluctant to strike out on its own.” (*Ibid.*) Referring the jury back to the full and complete instructions it had already received from the court was, in this case, a considered response that further explanation was not desirable. The court was not required to re-read the instructions aloud in order to comply with section 1138. No abuse of discretion appears.<sup>14</sup>

#### **IV. The Trial Court Did Not Abuse Its Discretion by Admitting Autopsy Photographs of Mrs. Pierre’s Burned Body.**

Defendant argues the trial court abused its discretion and violated his rights to due process and a fair trial by admitting too many autopsy and crime scene photographs depicting Mrs. Pierre’s burned body, over defense objection. In addition, at the close of evidence the defense objected to two diagrams, one of the female body and one of female genitalia.

We review the trial court’s decision to allow autopsy and other photographs that may be gruesome for abuse of discretion. (*People v. Lucas* (1995) 12 Cal.4th 415, 449.) Here, the defense moved prior to trial for exclusion of “any autopsy photo other than the minimum necessary to depict each wound suffered by the decedent” and “[a]ny autopsy or crime scene photographs that depict the burn condition of the decedent’s body.” At that point, the trial court reviewed each of the photographs proffered by the prosecution, heard both sides’ arguments for and against exclusion, and ruled on the admissibility of each photograph individually. The court did the same with respect to the crime scene

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<sup>14</sup> Defendant posits that the trial court’s final response was given without consultation with the attorneys. However, the record does not support that inference. The court’s response was that “*We* have given you all that *we* can give you.” (Italics added.) It is doubtful the court was speaking as the royal we, especially since the court had specifically asked the attorneys to return to court promptly at 1:30 in case the jury had further questions. Thus, although the reporter’s transcript does not include a conference between the court and counsel before the court sent its answer to the jury, neither does it include any basis for finding that such a consultation did not occur off the record. In any event, we do not find that defendant forfeited his claim of error. (*People v. Roldan* (2005) 35 Cal.4th 646, 729 [“When a trial court decides to respond to a jury’s note, counsel’s silence waives any objection under [Penal Code] section 1138.”]; disapproved on another ground in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22. But see *People v. Ross* (2007) 155 Cal.App.4th 1033, 1047–1048 [no waiver found].)

photographs. As a result of the court's review, some photos were excluded and some were withdrawn by the prosecutor.

Defendant argues the autopsy photographs had no additional probative value over the testimony of the pathologist, the firefighter and the arson investigator and were merely cumulative; that the photographs of Mrs. Pierre's burned body "had no relevance to the case" because she did not die of her burns; and that their minimal probative value was outweighed by the potential for prejudice by virtue of the "gruesome nature of what they depicted." However, defense counsel did not argue that any of the photos were particularly gruesome as compared with others; his arguments were that the photos were irrelevant or cumulative, and that introducing any of them would be "inflammatory and unfairly prejudicial."

In any event, we are not persuaded that the photographs lacked probative value. The photographs were relevant to the manner in which the injuries were inflicted and were useful in assisting the jury to understand the technical medical testimony concerning the autopsy. (*People v. Loker* (2008) 44 Cal.4th 691, 704–705.) The manner in which the injuries were inflicted were, in turn, relevant to defendant's intent in inflicting them. In particular, the photos of the wounds to Mrs. Pierre's genitalia were highly relevant to the special circumstance determination before the jury. Finally, the nature of the wounds inflicted on Mrs. Pierre was relevant to prove or disprove defendant's claims of self-defense and accident. So far as this record shows, the trial court reviewed the photographs and weighed the probative value of each photo against its potential for prejudice in a reasonable manner. We see no abuse of discretion.

**V. The Trial Court Did Not Abuse Its Discretion by Refusing to Strike A Lay Witness's Opinion Testimony.**

Frank Carswell testified that when defendant said he was going to kill the bitch he said it in a tone of voice "like a person when he got angry and he want to do something and he want to do it real bad." This testimony drew a defense objection: "Speculation. Lacks foundation. He was asked to describe the tone. He's going way beyond that right now." The court overruled the objection and the prosecutor asked Carswell if he was

finished with his answer. Carswell replied: “The tone, that tone of voice that he had, it was just like a person want to do something to somebody that had did them bad or something like that and they had a reason to kill them. And that’s the way it sounded to me.” Defense counsel objected again on the same ground and moved to strike the testimony. The court again overruled the objection.

On appeal, defendant argues the court abused its discretion in allowing Carswell’s testimony and denying the defense motion to strike. He contends Carswell’s testimony was speculative and irrelevant, and even if it was based on Carswell’s personal observation, it was not helpful to the jury and amounted to “nothing more than a belief in how the case should be decided.” He also argues “the admission at trial of speculative and therefore irrelevant lay opinion testimony . . . in obviation of California’s Evidence Code and decisional law,” violated his constitutional rights to due process and a fair trial under the Fourteenth Amendment. Because we find that the trial court did not admit speculative and irrelevant evidence, we reject both the state law and constitutional claims of error.

“A lay witness may testify to an opinion if it is rationally based on the witness’s perception and if it is helpful to a clear understanding of his testimony.” (*People v. Farnam* (2002) 28 Cal.4th 107, 153; Evid. Code, § 800.) We review the trial court’s evidentiary rulings for abuse of discretion. (*People v. Cowan* (2010) 50 Cal.4th 401, 462.) We find none here. Defendant admits that “it was perfectly appropriate for Carswell to testify that appellant spoke in an ‘angry’ tone,” but considers the rest of Carswell’s attempt to describe defendant’s tone of voice as beyond the pale. We do not. First, Carswell’s opinion testimony was not speculative: it was based on his firsthand aural and visual observation of defendant’s demeanor while threatening to kill Mrs. Pierre. (Evid. Code, § 702.) Second, Carswell’s opinion was helpful in conveying to the jury that it was his perception from what he personally heard and observed that defendant was nursing a grudge against Mrs. Pierre, and the threat was not idle, but serious and purposeful. Contrary to defendant’s assertion, Carswell did not suggest a “belief in how

the case should be decided,” or otherwise comment on defendant’s credibility. No error appears.

**VI. The Trial Court Did Not Abuse Its Discretion by Refusing to Strike A Witness’s Testimony Concerning a Prior Fire At Mrs. Pierre’s House.**

Defendant also faults the trial court for allowing Carswell to testify about a prior fire at Mrs. Pierre’s house, and allowing an arson investigator to corroborate Carswell’s testimony. Carswell answered, “Yes” to the prosecutor’s question whether he had “ever see[n] smoke come out of Ms. Pierre’s house before that night.” Carswell added, “That house had been set on fire before and all the people around, even his brother said he did it.” Defense counsel’s objection and motion to strike were overruled. The prosecutor then asked, “How long ago did you see the first fire?” Carswell continued, “May have been a year, maybe more. I know it was in 2000.”

An arson investigator later testified that when he arrived at Mrs. Pierre’s house on the morning of September 14, 2007, he remembered there had been a prior fire at the same house on September 19, 2006. His testimony was admitted to corroborate Carswell’s testimony and rebut the inference that Carswell’s memory was faulty. Although the court indicated it would instruct the jury that the evidence was offered solely to corroborate Carswell, the record does not show that such a limiting instruction was ever given.

We review the court’s ruling on the admissibility of uncharged offenses for abuse of discretion. (*People v. Kipp* (1998) 18 Cal.4th 349, 369.) The prosecutor’s questions came after defense counsel had asked Carswell, on cross-examination, whether he had “go[ne] out on [his] porch that night.” Carswell replied, “I just explained to you that I went out on the porch. I got out of my bed, went out on the porch, and sit down when I saw a fire—they said her house was on fire. [¶] It had been on fire. *He had set the house on fire before.* And we went out there, and I sat on the porch with the peoples that live upstairs with me.” (Italics added.) Since defense counsel did not move to strike Carswell’s accusation, the prosecution was not barred from eliciting on redirect examination further information about the earlier fire, such as when it occurred. (*People*

*v. Steele* (2002) 27 Cal.4th 1230, 1247.) “ ‘The extent of the redirect examination of a witness is largely within the discretion of the trial court. . . . It is well settled that when a witness is questioned on cross-examination as to matters relevant to the subject of the direct examination but not elicited on that examination, he may be examined on redirect as to such new matter.’ [Citation.]” (*Id.* at pp. 1247–1248.)

Assuming arguendo that no evidence about the prior fire was admissible under Evidence Code section 1101, subdivision (b) because, in the absence of any evidence linking defendant to the fire, it was not relevant to prove defendant’s knowledge, motive, intent, or modus operandi, we are convinced any error was harmless beyond a reasonable doubt.<sup>15</sup> (*Chapman v. California* (1967) 386 U.S. 18 (*Chapman*).) On redirect examination, Carswell’s answer clarified that there *had* been a fire, but it had been *rumored* defendant set it, and he had no information linking defendant to the fire. Defendant himself had complained to the police that he was being blamed for the first fire a year earlier, even though he “didn’t do” it. The arson investigator offered no testimony about any suspects in the 2006 fire. The mention of the fire was brief and was not capitalized upon in closing argument.

Furthermore, the objective evidence that the second fire was deliberately set was overwhelming. And, even though defendant denied setting the fire deliberately, in his statement to police he intimated that he might have accidentally started the fire by lighting a teary tissue with his cigarette. Further, ample DNA evidence placed defendant at the scene of the fire during the murder. In our view, it is clear beyond a reasonable doubt that the scant evidence that neighbors and relatives blamed defendant for a prior fire “did not contribute to the verdict obtained.” (*Neder v. United States* (1999) 527 U.S. 1, 15–16 (quoting *Chapman, supra*, 386 U.S. at p. 24.)

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<sup>15</sup> Defendant argues the error deprived him of a fair trial and due process under the federal constitution.

## VII. The Trial Court Did Not Err By Refusing to Give Defendant's Requested Instruction on Burglary Felony Murder.

Defendant argues that the trial court erred in failing to instruct the jury on the merger doctrine articulated in *People v. Ireland* (1969) 70 Cal.2d 522 (*Ireland*). *Ireland* was a second degree murder case, but the merger doctrine was extended to first degree felony murder in *People v. Wilson* (1969) 1 Cal.3d 431, 441–442 (*Wilson*). The Supreme Court recently overruled *Wilson* and held, prospectively, that the merger doctrine has no application to first degree felony murder. (*People v. Farley* (2009) 46 Cal.4th 1053, 1121–1122.) Although *Farley* does not apply here, “preexisting jurisprudence had limited *Wilson* to cases of burglary felony murder where the defendant’s only felonious purpose was to assault or kill the victim.” [Citations.] (*People v. Gonzales* (2011) 51 Cal.4th 894, 942, fn. omitted.)

Defendant requested the following instruction based on *Ireland/Wilson*: “Entry into a building or inhabited dwelling with the intent to commit murder is not burglary for the purposes of first degree felony murder. A burglary to commit murder is not felony murder.” At trial, defense counsel argued that he was requesting the instruction “to avoid any confusion with regards to the instruction that accompanies that.” On appeal, he argues that the requested instruction embodied a defense to burglary felony murder, if the jury believed that defendant entered Mrs. Pierre’s house with the intent to kill her.

The trial court declined to so instruct, observing that the CALJIC instructions to be given were “sufficient on that point.” The court’s instructions on burglary felony murder, burglary special circumstance, and burglary made clear that the *only* intent at issue under the instructions, and the only one that would constitute a burglary, was the intent to steal.<sup>16</sup>

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<sup>16</sup> The court instructed the jury in relevant part as follows: “The unlawful killing of a human being, whether intentional, unintentional, or accidental, which occurs during the commission . . . of . . . robbery or burglary or rape by instrument is murder of the first degree when the perpetrator had the specific intent to commit that crime.”

“If you find the defendant in this case guilty of murder of the first degree, you must then determine if one or more of the following special circumstances is true or not

“A defendant is entitled, upon request, to a nonargumentative instruction that pinpoints his or her theory of the case. [Citation.] An instruction that directs the jury to “consider” certain evidence is properly refused as argumentative. [Citation.] ‘In a proper instruction, “[w]hat is pinpointed is not specific evidence as such, but the *theory* of the defendant’s case.’” [Citations.]” (*People v. Ledesma* (2006) 39 Cal.4th 641, 720 (*Ledesma*)). However, a trial court is not required to give a pinpoint instruction if it is duplicative of other instructions. (*People v. Wright* (1988) 45 Cal.3d 1126, 1134 (*Wright*); see also *People v. Bolden* (2002) 29 Cal.4th 515, 558.)

Here, none of the other instructions explicitly told the jury that burglary felony murder could not be predicated upon entry with the intent to murder. Nevertheless, the requested instruction was arguably duplicative of other instruction in the sense that “the instructions given to the jury did not posit the applicability of the felony-murder rule upon any such theory” as unauthorized entry with the intent to kill. (*People v. Sears*

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true: Murder in the commission of robbery, murder in the commission of burglary, and/or murder in the commission of rape by instrument. [¶] The People have the burden of proving the truth of a special circumstance. . . . [¶] . . . [¶] You must decide separately each special circumstance alleged in this case. . . .”

“To find that the special circumstance referred to in these instructions as murder in the commission of burglary is true, it must be proved: [¶] One. That the murder was committed while the defendant was engaged in . . . the commission or attempted commission of a burglary or the murder was committed during the immediate flight after the commission or attempted commission of a burglary by the defendant . . . ; and, [¶] Two. The murder was committed in order to . . . advance the commission of the crime of burglary or to facilitate the escape therefrom or to avoid detection. In other words, the special circumstance referred to in these instructions is not established if the attempted burglary was merely incidental to the commission of the murder.”

“Every person who enters any building with a specific intent to steal, take, and carry away the personal property of another of any value, and with the further specific intent to deprive the owner permanently of that property is guilty of the crime of burglary in violation of Penal Code section 459. [¶] . . . [¶] [¶] It does not matter whether the intent with which an entry was made is thereafter carried out. [¶] In order to prove this crime, each of the following elements must be proved: [¶] One. A person entered a building; and [¶] Two. At the time of the entry, that person had the specific intent to steal and take away someone else’s property and intended to deprive the owner permanently of that property.”

(1970) 2 Cal.3d 180, 189.) On the other hand, even if the instruction “was arguably an appropriate ‘pinpoint’ instruction of the type that focuses upon the defendant’s theory of the case and should be given upon request,” (*Ledesma, supra*, 39 Cal.4th at p. 720), in our view, any error was harmless.

This type of error “requires reversal only if ‘the court, “after an examination of the entire cause, including the evidence,” is of the “opinion” that it is reasonably probable that a result more favorable to [defendant] would have been reached in the absence of the error.’ (*People v. Watson* (1956) 46 Cal.2d 818, 836 [*Watson*].)” (*Wright, supra*, 45 Cal.3d at p. 1144.) In this case, our consideration of the entire record leads us to conclude that it is not reasonably probable that had the requested instruction been given, the jury would have reached a verdict more favorable to defendant. Here, there was no dearth of evidence that defendant entered Mrs. Pierre’s house with the intent to steal. And, the fact that the intent to steal was the only permissible basis for a finding of burglary felony murder was driven home by the instructions and the arguments of counsel. In other words, although defendant is correct that the trial record contains evidence from which the jury *could have* inferred that defendant entered Mrs. Pierre’s house with the intent to kill her, there were no instructions or arguments which permitted the jury to do so. So far as the jury could tell from the instructions, the intent to steal is the only intent that turns an unauthorized entry into a burglary. In this case, the jury was *not* instructed that “ ‘burglary is committed when a person enters any house “with intent to commit . . . any felony.” . . .’ (Pen. Code, § 459.)” (*People v. Sears* (1965) 62 Cal.2d 737, 745, overruled on another point in *People v. Cahill* (1993) 5 Cal.4th 478, 494.)

Furthermore, both counsel informed the jury during argument that burglary felony murder applied to this case only if defendant entered with the intent to steal. The prosecutor specifically argued that burglary felony murder did not apply if defendant entered with a dual intent to steal and kill.<sup>17</sup> Finally, there is no indication that the jury

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<sup>17</sup> The prosecutor argued: “[B]urglary is defined very specifically. It’s defined that your intent to go in is specifically to steal.” “[I]f you find a burglary, that he entered with dual intent—I want to go in to kill Amanda Pierre and I want to go in to steal from

was uncertain or confused on this point. For all these reasons, we conclude that if error occurred, it was harmless. (*Wright, supra*, 45 Cal.3d at p. 1144.)<sup>18</sup>

### CONCLUSION

Substantial evidence supports the special circumstance findings. The special circumstance statute is not unconstitutional. The trial court's efforts to answer the jurors' questions satisfied section 1138. The trial court did not abuse its discretion in admitting autopsy and crime scene photographs, or admitting lay opinion testimony. If the trial court erred in admitting evidence of a prior fire, it was harmless beyond a reasonable doubt. Defendant was not entitled to an instruction that entry with intent to commit murder is not burglary for the purposes of first degree felony murder; but even if his requested instruction should have been given, the error was not prejudicial under *Watson*. No cumulative prejudice appears.

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her—there's no felony murder under burglary because the burglary doesn't allow for that kind of dual extent [sic] because it's defined so specific, that it's at the time of entry.” “[B]urglary special circumstance is true only if the intent at the time of the entry was to steal, not to assault or to kill.”

Defense counsel argued: “Now, as [the prosecutor] told you yesterday, if there's a burglary to commit a murder, that is not felony murder. Okay. That is not felony murder because that is a felony that occurs during the commission of a murder. You got it? [¶] . . . [¶] And you must have the intent to steal when you enter the house. If you don't have the intent to steal when you enter the house, it's not a burglary. Not a burglary. If the intent to steal occurs after the murder or the taking occurs after the murder, it's not felony murder.”

<sup>18</sup> Defendant contends that “the cumulative effect of two or more errors” requires reversal. In this case, we find no cumulative prejudice from any potential errors in the failure to give a pinpoint instruction on felony murder, and admission of evidence of a prior fire.

**DISPOSITION**

The judgment is affirmed.

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Marchiano, P.J.

We concur:

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Dondero, J.

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Banke, J.