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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE,

Plaintiff and Respondent,

v.

EDELTRAUD HAGIWARA et al.,

Defendants and Appellants.

B251129

(Los Angeles County  
Super. Ct. No. VA117381)

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

Stephen Temko, under appointment by the Court of Appeal, for Defendant and Appellant Edeltraud Hagiwara.

Leonard J. Klaif, under appointment by the Court of Appeal, for Defendant and Appellant Troya McCullough.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, James William Bilderback II, Supervising Deputy Attorney General and Kathy S. Pomerantz, Deputy Attorney General, for Plaintiff and Respondent.

Appellant Edeltraud Hagiwara was convicted, following a jury trial, of the first degree murder of Manfred Karger in violation of Penal Code section<sup>1</sup> 187, subdivision (a). The jury found true the special circumstance allegation that Hagiwara committed the murder during the commission of a burglary within the meaning of section 190.2, subdivision (a)(17). Appellant Troya McCullough was convicted, following a jury trial, of voluntary manslaughter in the killing of Karger in violation of section 192, subdivision (a). The trial court sentenced Hagiwara to life in prison without the possibility of parole and McCullough to the upper term of 11 years in state prison.

Hagiwara and McCullough (collectively “appellants”) appeal from the judgment of conviction. McCullough contends the trial court erred in failing to instruct the jury that it should determine if prosecution witness Maria Mastropasqua was an accomplice. Hagiwara contends the court’s jury instructions did not adequately instruct on the People’s burden of proof for first degree murder and there is insufficient evidence to support her conviction for that offense. Hagiwara further contends the jury instructions did not adequately instruct on the burglary special circumstance and there is insufficient evidence to support the true finding on that special circumstance. Each joins in the other’s contentions to the extent applicable. We affirm the judgment of conviction.

#### Facts

At about 8:00 a.m. on June 21, 2010, Moshe El-Ayoubi went to Manfred Karger’s apartment to check on him. Karger had failed to show up at a gathering at El-Ayoubi’s house as planned on Father’s Day (June 20), and had not responded to calls and e-mails from El-Ayoubi. El-Ayoubi used a spare set of keys Karger had given him to let himself into the apartment. There, he found Karger’s body. He saw blood near Karger’s body that was turning dark brown and did not appear fresh. El-Ayoubi ran out of the apartment and called the police.

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<sup>1</sup> All further statutory references are to the Penal Code unless otherwise specified.

a. Investigation

The lead investigator for the Downey Police Department was Detective Steven Aubuchon. He saw no signs of forced entry into Karger's apartment. Detective Aubuchon found Karger's body lying face down on the living room floor. There were numerous lacerations on the back of the head, indicating that Karger had suffered blunt force trauma.

An autopsy later determined that Karger had died from a combination of blunt force trauma and strangulation. The strangulation could have prevented Karger from making any noise. Karger suffered 23 separate lacerations on the back of his head which appeared to have been caused by a blunt object. The injuries were consistent with Karger having been attacked from behind.

There was dark coagulated blood near the body, and a lot of blood spatter on all the walls. Detective Aubuchon did not see any footprints near the body, but did see "smear" marks that suggested the body had been moved. The autopsy uncovered post-mortem injuries to Karger's chest, abdomen, and right arm which were consistent with Karger's body being dragged. The smear marks also suggested that someone either tried to clean up or wore something on his or her feet. There were no signs that anyone had left the scene, such as footprints leading to a door, or "dirty" door knobs.

A sliding glass door in the living room area which led to a balcony was wide open. However, neighbors did not hear any unusual sounds from Karger's apartment on June 20. Ruben Cordero, who lived in the apartment next to Karger's and had an adjoining wall with him, was awake and at home on June 20 from 5:00 a.m. to 9:00 a.m. Cordero did not hear Karger yelling or a woman screaming during that time. About 7:00 a.m., Cordero received an e-mail from Karger wishing him a happy Father's Day. Frances Bohol, who also lived in the apartment building, did not hear any screams or loud noises that weekend.

Detective Aubuchon inspected the apartment and noticed that items appeared to be missing. He saw loose computer cables hanging below the desk in an office area, suggesting that a computer had been there at some point in the past. A safe in the master

bedroom was partially open. Subsequent conversations with Stephen Deack, the primary trustee for Karger's trust, revealed that an Omega watch and two Tissot watches, a necklace and some silver coins belonging to Karger were not in the apartment, or in Karger's safe deposit box.

Police recovered a cell phone from Karger's body, but could not find a wallet. The last call on the cell phone was made to "Peggy's cell" on June 20, 2010, at 8:02 a.m. Detective Aubuchon learned that Peggy was Hagiwara.

Detective Aubuchon learned from both Al-Ayoubi and Deack that Hagiwara owed Karger \$71,000. Although a number of promissory notes were recovered from Karger's apartment and safe deposit box, none of the notes was for \$71,000. Detective Aubuchon later learned from Hagiwara that she had separately borrowed \$15,000 from Karger. No note was found for this amount either.

The detective went to Hagiwara's house in the early morning hours of June 22. Hagiwara's husband and son were there, as was a friend, Jennie Dilello. Hagiwara told Detective Aubuchon that she had last seen Karger on June 18. They had lunch at a Sizzler restaurant. After lunch, she paid Karger the money she owed him. She last spoke with Karger on the phone on June 20, for about four to five minutes.

Detective Aubuchon checked Hagiwara's cell phone and discovered that her call history had been erased. The detective then told Hagiwara that Karger was dead. She showed no emotion. She told the detective that she had borrowed \$71,000 from Karger in 2009 and another \$15,000 in 2010. She had paid him \$95,000 and still owed him about \$3,600.

Hagiwara told Detective Aubuchon that she was not feeling well on June 19 and 20, and stayed at home. She went out briefly to go to the market and get gas. She had planned to meet Karger on June 20, but called him at about 8:00 a.m. to tell him she was sick and could not meet him.

Later in the day of June 22, Hagiwara went to the police station to meet with Detective Aubuchon. This interview was recorded. Hagiwara gave a different account of events. She said that she had not repaid Karger because her money was "tied up."

Karger wanted to return to Austria. He called her every day for weeks about the loans. She became angry and told him to stop calling. The last time she met with Karger was several weeks before his death, at the beach. She did not meet with him on June 19 at the Sizzler. Hagiwara described Karger as “calm” with a “big heart.” She also said he had a “bad temper.”

In October 2010, Detective Aubuchon obtained a wiretap for Hagiwara’s phone. He specifically listened to calls between Hagiwara and Dilello, who had returned to her home in Willits.

That same month, police in Willits spoke with Dilello about the murder, and told her that police in Downey wanted to question her about the murder. On October 15, Dilello called Hagiwara about the police interest. The call was intercepted and recorded by police pursuant to the wiretap. On October 23, Dilello provided a written statement to police, and began cooperating with them. She testified for the People at trial under a grant of immunity.

b. Dilello

According to Dilello, she and Hagiwara were long-time friends, although Hagiwara was “pretty mean” and had “a bit of a temper.” In June 2010, Dilello came to Los Angeles to visit Hagiwara. Hagiwara told Dilello that an older man owed her \$250,000. He was sick and wanted to return to his hometown. Hagiwara wanted to get her paperwork from him before he left. She asked Dilello to find someone to help her steal her paperwork from the man.

Hagiwara drove Dilello to the location where the man lived. Dilello later identified the location as Karger’s apartment building. Hagiwara told Dilello she needed someone to hold Karger so she could get her paperwork. She said she did not care if Karger was knocked out. Dilello called codefendant Ruben Williams, who lived near

Sacramento.<sup>2</sup> Williams was the boyfriend of Dilello's friend, Maria Mastropasqua. Williams agreed to help find someone for \$1,000. Hagiwara agreed to pay him.

Williams and Mastropasqua drove to Los Angeles, arriving late in the evening of June 19. Dilello met them at a Ralph's market in Downey. Codefendant Troya McCullough was with them. They all went to Hagiwara's house, arriving very late.

At Hagiwara's house, they all ate in the kitchen. Hagiwara set up four places to sleep in the living room. Dilello, Williams and Mastropasqua got ready for bed. McCullough stayed in the kitchen with Hagiwara. Dilello heard Hagiwara say that she did not care what it took for her to get her paperwork, and she did not care if "he had him knocked out." Dilello went to sleep.

The next morning, Hagiwara called Dilello and said Karger was at the front door. Dilello did not see anyone at the front door. Hagiwara said, "forget it," he was on his way back to his house. Hagiwara called Dilello again later. She told Dilello that McCullough took her car and cell phone, got lost and left her behind. According to Dilello, Williams and Mastropasqua were in the living room asleep during this whole time. McCullough was not there.

Dilello was awakened again when Hagiwara and McCullough returned to the house later that morning. They seemed happy. McCullough was wearing different clothing than he had been wearing the day before. Williams, Mastropasqua and McCullough prepared to leave. One of them put a covered box into their car. Dilello led them to the freeway, then returned to Hagiwara's house.

Hagiwara asked Dilello to clean a heavy metal bar that looked like a tire iron. She then asked Dilello to take the bar to Willits to get rid of it, then said to forget about it. Dilello later saw Hagiwara cleaning the bar in the bathroom sink.

Hagiwara told Dilello that she had followed Karger back to his apartment and McCullough would not go with her. She had to "do it herself." She also said that she had given a check to McCullough that morning. Hagiwara gave Dilello a check for

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<sup>2</sup> Before the trial of this matter, Williams entered into a plea agreement and pled guilty to one count of first degree burglary. He is not a party to this appeal.

\$1,000 to give to Williams, to be passed on to McCullough. Dilello returned to Willits the next day.

In her written statement to police, Dilello provided additional details about Hagiwara's statements after the murder. Dilello stated, "She couldn't believe it, she was stronger than him. She had to do it herself and he bit the other guy, if I'm right, he held him." Dilello's statement to the police indicated that Hagiwara told her she thought Karger was still breathing when she left his apartment. Hagiwara also told Dilello that McCullough took her car and cell phone, got lost, and could not get back to Hagiwara. The statement indicated that Hagiwara informed Dilello she stayed at the scene and cleaned it up. Hagiwara also told Dilello that she took a bar into the apartment with her and that she did not care if Karger was knocked out. Dilello's statement further indicated that when Williams and Mastropasqua left Hagiwara's house, they took with them something that was covered up and needed to be destroyed.

#### c. Mastropasqua and Williams

Mastropasqua and codefendant Williams gave an account of events which was similar to Dilello's but not identical. According to Williams and Mastropasqua, Williams did not have a cell phone in June 2010, and so used Mastropasqua's phone. At that time, Williams and Mastropasqua were planning to rent a mobile home in Willits from Hagiwara, and Williams and Hagiwara spoke on the phone about arrangements. Right before Father's Day, Williams and Mastropasqua learned that Dilello had injured herself and was not planning to return to Willits anytime soon. Williams volunteered to drive to Los Angeles to help Dilello. The day Williams and Mastropasqua were planning to leave for Los Angeles, Dilello called Williams and told him Hagiwara was trying to collect a debt from a tenant and needed some "muscle" to help her and to "scare" the tenant. She wanted this done quickly, as the person was leaving the country soon. Hagiwara was willing to pay \$1,000 for the help. Williams could not find anyone he knew who was available to help.

Williams and Mastropasqua left for Los Angeles on June 19. They stopped at a gas station in Stockton on their way and encountered McCullough. Williams and McCullough spoke, but Mastropasqua did not hear their conversation. According to Williams, he told McCullough about Hagiwara's problem with her tenant and that she was willing to pay someone to scare the tenant. Williams also told McCullough that Hagiwara wanted to get some papers back. McCullough then drove to Los Angeles with Williams and Mastropasqua. According to Mastropasqua, during the drive the two men spoke about Hagiwara's problem with her tenant and that she needed help evicting him. Mastropasqua believed they were going to Los Angeles to pick up some things to remodel the mobile home and because Williams and Hagiwara were going to open a second-hand store together. Mastropasqua was not involved in helping Hagiwara with her tenant.

In Los Angeles, the trio met Dilello at a Ralph's market in Downey. Dilello had a private conversation with Williams. The trio followed Dilello to Hagiwara's house, getting lost once on the way. They arrived at Hagiwara's house at about midnight.

According to Mastropasqua, she took a shower while everyone else ate in the kitchen. She then went into the living room, where places to sleep had been prepared. According to Williams and Dilello, Mastropasqua came to the kitchen with the others. The conversation was just about "regular" things.

According to Mastropasqua, when she was in the living room, Williams came in from the kitchen, saying, "I want nothing to do with this." Mastropasqua and Williams went to bed in the living room. Hagiwara and McCullough stayed in the kitchen. Mastropasqua fell asleep quickly and heard only a question about cigarettes before she fell asleep.

According to Williams, he heard Hagiwara say to McCullough, "You can do whatever if it gets out of hand, you can hit him or whatever, I don't care what happens to him." Hagiwara told Williams that McCullough was going with her. Williams said, "I don't want no part of this. Whatever you guys are doing, leave me out of it. I don't

know what's going on. I don't want no part of it." He then went to the living room and went to sleep.

The next morning, Mastropasqua woke up at about 9:00 a.m. Williams and Dilello were asleep. McCullough's bed did not look like it had been slept in. Williams woke up. Mastropasqua, Williams and Dilello went into the kitchen and ate a breakfast prepared by Hagiwara's husband. Hagiwara and McCullough walked into the kitchen together. According to Mastropasqua, Williams asked McCullough where he had been, and McCullough replied that he and Hagiwara had taken care of something. According to Mastropasqua and Williams, McCullough was wearing the same clothes he had worn the day before. According to Williams, McCullough was wearing a silver watch that had blood on it. Williams "panicked" and was worried about what had happened.

Williams and the others loaded up the car. Hagiwara gave Williams a wallet, computer tower and a bag with McCullough's clothes on top and told Williams to get rid of them. She also gave him a metal bar to get rid of, but then changed her mind and took it back. Williams, Mastropasqua and McCullough left before noon. According to Mastropasqua, Williams and McCullough did not talk about what had happened in front of her. Williams seemed angry. Mastropasqua noticed that McCullough was wearing a fancy gold watch that he did not have earlier. Williams took the watch, smashed it and threw it into a nearby irrigation canal.

A few days after they got back to Northern California, Williams and Mastropasqua went to the beach. There, Williams scattered parts from the computer tower around the area. He burned the wallet Hagiwara had given him, but not before seeing an I.D. card with a picture of an older white male in it. The bag Hagiwara had given Williams contained a bloody green shirt and latex gloves. Williams scattered them in a vegetated area of a nearby campground.

At some point after the murder, McCullough gave Williams a check for \$1,500 that Hagiwara had given to McCullough. The name was scratched out. Hagiwara told Williams to send the check back to her and she would give him cash. About three months after the murder, Hagiwara wired \$7,500 to Williams, with instructions to give

\$1,500 to McCullough. The remainder was for a business venture between Williams and Hagiwara involving the purchase and resale of marijuana.

Mastropasqua picked up the money and gave it to Williams. Williams did not give any cash to McCullough. He did use some of the money to purchase marijuana, which resulted in his arrest in October 2010. Thereafter, he began cooperating with the authorities.

d. Cell phone records

Records for cell phones registered to Hagiwara, her son Andrew, Karger and Dilello were analyzed.<sup>3</sup> The records showed that on June 20 Andrew's phone made or received numerous calls from the area of Karger's residence. There were eight calls between 7:04 a.m. and 8:15 a.m. At 8:01 a.m., Karger's phone called Andrew's phone. Karger's phone was in the area of Hagiwara's house.

Four calls with Dilello's phone were made between 7:55 a.m. and 8:13 a.m. on June 20. Dilello's phone was in the area of Hagiwara's house.

Hagiwara's phone was involved in at least five calls in the morning of June 20. At 7:06 a.m., her phone called a number in the 209 area code. This number was found written on a piece of paper in McCullough's wallet after he was arrested. Hagiwara's phone was in the area of Karger's residence at the time of the call. At 9:32 a.m., Hagiwara's phone received a call from Andrew's phone. Andrew's phone was in the area of Karger's residence while Hagiwara's was in an area adjacent to it. Immediately after the call ended, Hagiwara's phone called Andrew's phone. The location of Hagiwara's phone had changed. It could have moved nearer to Karger's residence. At 10:02 a.m., Hagiwara's phone called the same number in 209 area code. The phone was about halfway between Karger's residence and Hagiwara's residence. A 10:14 a.m. call to the same number placed the phone in the area of Hagiwara's house.

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<sup>3</sup> Andrew does not appear to have been a suspect in this matter. The People's theory was that Hagiwara's phone was used by McCullough and Andrew's phone was used by Hagiwara.

e. Post-murder statements by Hagiwara

Dilello and Hagiwara remained in contact after the killing, and continued to discuss it. Beginning in October, 2010, these conversations were recorded by the police. Several recordings were played for the jury.

On October 25, 2010, Dilello visited Hagiwara at her house. At the request of police, Dilello wore a body wire during the visit to Hagiwara's house. Dilello told Hagiwara she was "scared" because "they know a lot." Dilello further stated, "[t]hey showed me a lot of pictures," some of which were of Hagiwara's family and some of which were of "that guy." Dilello tried to recall his name, and Hagiwara stated, "It doesn't matter. We don't want to mention anything. . . . We don't know him." They discussed "that guy" and how he made a phone call to Stockton from Hagiwara's phone and that the only reason the police knew about him was through that call. Hagiwara told Dilello she was going to go to a German bakery that she frequented and tell the workers she was at the bakery on Father's Day and on the Saturday before, "early in the morning." Hagiwara also said, "I think Maria [Mastropasqua] and Ruben [Williams] did something. And—and I think also that they didn't get rid of the shit."

The police told Dilello to discuss DNA evidence with Hagiwara. She asked Hagiwara, "Remember at one point you said he bit him, I think?" Dilello explained at trial that Hagiwara had told her that Karger bit McCullough when McCullough was holding him. She further stated that Hagiwara told her she "didn't even need [McCullough] because he didn't even help her." Hagiwara said, "[T]hey don't have my DNA. That's for sure." Dilello suggested the police may have had "that guy's" DNA, and Hagiwara said, "Well, if they have his, then I don't know nothing, right? Do you know anything?" Dilello responded, "No."

Hagiwara told Dilello, "Look here. Look here. What you need to say to them—that you have morbid obesity. You have [a] disability. You're not feeling very good. You have a lot of pain, and you don't know anybody, and you don't want to know anything. Okay. Because you didn't know this man. You didn't know anything. You

just knew that I told you that that was your friend and that they came to the house. That's what you're sticking with. And don't take a test. You don't have to."

Hagiwara told Dilello that she needed to find Williams and "make absolutely sure that everything got destroyed." Dilello explained at trial that the covered, box-shaped item that was put in the trunk of William's car was the item that needed to be destroyed. Hagiwara and Dilello discussed some pictures of "guys" that the police showed to Dilello, and Dilello stated, "That one looks like you know—it looks—yeah." Hagiwara responded, "No, it doesn't. You have to find some strength. We just cannot 'um—ah.' That's not good. You have to—you know how [you have] to have to look at that? How am I gonna save my ass? You gotta find some strength in you. You gotta say, 'No, I don't know him, you know. It might—I seen a lot of people when I was on drugs. I don't know.' The main thing is that you were down here to pick up clothes, and you came to help me."

Hagiwara told Dilello to tell Williams that the police showed Dilello his pictures and told her they have his DNA, and that he should "make sure" he doesn't say anything. Hagiwara also told Dilello to tell Williams "that everything has to be taken care if [*sic*]. Whatever it is, he better go and take care of it if he hasn't." Hagiwara told Dilello to buy a phone card or to use her sister's phone to call Hagiwara.

Hagiwara told Dilello to tell Williams that "accessory is equal to the one who did it." She also told Dilello to tell him that Hagiwara knew his last name and Maria's mother's last name and that she had "a lot of things on them." Dilello told Hagiwara that the police told her that she owed Karger money, and Hagiwara responded, "No, I didn't." Hagiwara continued, "It's true that we had money dealings," but that she did not owe him anything. Hagiwara explained, "I don't know what he would have sent or what he did or paper-wise what he wrote? I don't know. I didn't look for no safe. I should have taken his cell phone. I should have done a lot of things in retrospect, which I didn't. But it's just as well."

Hagiwara coached Dilello on the answers she should give to the police. Hagiwara reiterated that Dilello needed to find Williams and tell him “he better take care of everything, what he didn’t take care of.”

Dilello and Hagiwara discussed a picture that the police showed to Dilello. Dilello told Hagiwara that she told the police the person looked familiar, and Hagiwara responded, “that will be coming back.” Hagiwara explained to Dilello that she should tell the police that he may have been someone she knew from the past when she was involved with drugs. At the request of the police, Dilello tried to get Hagiwara to tell her McCullough’s last name, but Hagiwara said she did not know what it was.

On October 27, 2010, the police requested that Dilello call Hagiwara, and they gave her key things to talk about in order to elicit certain responses from Hagiwara. During the call, Dilello informed Hagiwara that the Downey police had interviewed her again and showed her pictures of Williams, Mastropasqua, and “that guy.” Dilello told Hagiwara that she thought Williams and Mastropasqua had been arrested. Dilello stated that she allowed the police to take DNA samples from her saliva and hair. She also mentioned to Hagiwara that she overheard the police talking about a watch. She asked Hagiwara, “was it that watch?” and Hagiwara responded, “Yeah, uh-huh. They didn’t get rid of it.” Dilello asked Hagiwara if she may have left some of her DNA behind, and Hagiwara stated that she did not know. Dilello said “they” told her they would “get rid of everything.” Hagiwara agreed, and Dilello responded, “That’s what I think. Remember you said that . . . you said what destroy everything or something?” Dilello asked Hagiwara what she had given to “them,” and Hagiwara responded, “Everything that was worn. Everything that was worn, uhm, let’s see what else. Uhm,—mmmnh, what we have on our hair. Uhm, all of what we wear on feet, you know?” Hagiwara said that she changed “there” but did not leave anything behind. At the end of the conversation, Hagiwara said, “I was home, right? . . . I was home. I wasn’t there and you weren’t there. We were all at home.”

Less than an hour later, Dilello and Hagiwara spoke again. Dilello told Hagiwara that the police showed her some pictures, including one of Williams. With respect to

other people in the photos, Dilello stated that she told the police she had “seen them around.” Dilello further stated to Hagiwara, “That’s the one I still don’t know who that one is, that’s why I keep telling you that guy.” Dilello was referring to McCullough.

During the call, Hagiwara mentioned a piece of paper that was “twittled” in Dilello’s face by someone. Dilello explained in court that the paper was the check that Hagiwara had given to McCullough, and that Williams put it in front of Dilello’s face and said, “If she wants this check back, she needs to give the money, cash.” Hagiwara asked, “Has anyone, has anyone seen em?” and Dilello responded that no one had, but that she was “asking around” and that Hagiwara should not worry because Dilello was “doing it right you know I don’t want to be you know.”

Hagiwara told Dilello, “there’s more to it I just don’t know what it is you know,” and further stated, “I don’t know what to say to this but um I’m sort of getting sick now I better prepare myself that I can swallow.” Dilello responded, “Don’t say that,” and Hagiwara said, “I’m not, they not gonna get me alive, that’s for sure.” Hagiwara told Dilello not to “buckle” and that there was “so much at stake.” Hagiwara said “Well you know, you know for everything I’m just gonna take the fifth [*sic*] I’m [*sic*] ain’t saying nothing no more but I will check into the law.” Hagiwara said, “I’m going to dye my hair now [and] then I’m gonna ground up a lot of stuff and uh have it all ready in a capsule.”

On November 1, 2010, Hagiwara called Dilello. During the call, Dilello tried to discuss topics that the police had suggested. Hagiwara asked Dilello about Williams, stating, “Did he, did he call you back?” Dilello responded that he said “he’s not gonna go down for anything that you and Troy did to Manfred.” Hagiwara told Dilello to tell Williams the money was not for clothes, and, “I don’t know Troy and you don’t know Troy and so to keep his shit together.” Hagiwara told Dilello to tell codefendant Williams “[n]ot to talk, not to, no nothing and that’s all.” Dilello responded, “I’d say he’s more concerned about you and what you and umm Troy did to Manfred that’s what he’s more concerned about. He’s freaking out over it.” Hagiwara said Williams “doesn’t need to freak,” and “[h]e had done what he suppose be done nothing would have had and and [*sic*] what he brought, you know. All I know, all I know if they come to get me I all

ready [*sic*] told you but if they get me before I'm ready to swallow let me tell you just this, if I go don't think for [a] New York second he ain't going."

f. Defense

Hagiwara testified in her own behalf. She was born in post-war Germany and grew up hungry and poor. As a child, she was emotionally and physically abused by her stepfather. Hagiwara testified that she suffered from depression. She was married twice, and had five children. She was abused by her first husband, who abandoned her.

Hagiwara knew Karger for more than 30 years. She met him and his wife, Maria, at a German market in the Alpine Village. Karger and Maria were arguing, and Karger was being abusive toward her. Hagiwara remained in contact with Maria, but was angered by Karger's abuse and did not speak with him for 12 or 13 years. She saw him at the German market again and resumed a friendship with him. Hagiwara would occasionally cook and clean for Karger.

Although Hagiwara and Karger were friends, he was frequently abusive toward her and would call her demeaning names. He physically abused her five times. Hagiwara described the five incidents of abuse, including one which required Hagiwara to get stitches over her eyebrow. Karger would apologize after these incidents, and she would forgive him. Hagiwara described Karger as someone who had a "big heart," was a "good man," and "[w]hen he was your friend, he was your friend."

Hagiwara testified about the loans Karger made to her. The first one was made in 2004. She borrowed \$20,000 or \$25,000, and repaid Karger \$40,000. In 2005, Hagiwara borrowed \$40,000 from Karger and repaid him \$80,000. In 2007, she borrowed another \$40,000 and repaid Karger \$80,000. In 2008, Hagiwara borrowed \$45,000 from Karger and repaid him \$90,000. The fifth loan, made in 2008, was for \$71,000. Hagiwara borrowed an additional \$15,000 after that. She paid every loan back, for double the original amount, except for the \$71,000, and \$15,000. Karger told Hagiwara that he would shred the promissory notes after the loans were paid off.

In February 2010, Hagiwara had not yet paid Karger back for the fifth and sixth loans. Karger told her he was going to get double back “or else.” Hagiwara asked, “or else what?” Karger kicked her. She did not speak to him for a month.

The final incident of abuse occurred in March or April 2010. Karger was planning to return to Austria and he wanted \$100,000 for the \$71,000 and \$15,000 that he had lent Hagiwara. He was harassing her and making threats. She told him he was going to wait “a long time” to get repaid. Karger told her he was going to “pull [her] out by [her] ass out of [her] house.” Karger’s threats escalated. He would call Hagiwara and leave “nasty” messages and send her e-mails.

Hagiwara confronted Karger at his apartment and told him “this will be the last time you beat on me. The next time you’ll get beat.” Karger kicked Hagiwara four or five times in the back and legs. She felt shame and embarrassment from the abuse.

The week before June 20, 2010, Karger was calling and e-mailing Hagiwara and showing up at her house. She was intimidated and felt she needed to arm herself, so she put a “standard” 12-inch wrench in her purse. She felt that, if Karger was going to attack her, she was going to try her “darnedest” to hit him back.

Hagiwara asked Dilello to help her find a bodyguard in case she had to see Karger again. Hagiwara denied that she told Dilello that she needed someone to hold Karger. She also denied that she told Dilello she needed “muscle” to evict someone or that she asked Dilello to help her steal anything or to kill someone. Hagiwara testified that she did not intend to kill Karger, nor did she intend to steal anything from him.

According to Hagiwara, Williams, Mastropasqua, and McCullough arrived at her house around 2:00 a.m. She prepared food and they all ate together. They never talked about Karger during the meal. Mastropasqua excused herself first, then Dilello, and finally Williams. Hagiwara cleaned up while McCullough continued to eat. Hagiwara told McCullough she “need[ed] somebody to be at [her] car and if [she] [got] hurt to intervene.” She told McCullough that Karger might get violent but denied that she told McCullough that she did not care if Karger got back up. Hagiwara went to bed. She assumed McCullough did as well.

Karger called Hagiwara that evening and said he was going to drag her out of her house by her ass. He told her to be at his house in the morning.

Around 5:30 a.m. the next morning, McCullough knocked on Hagiwara's bedroom door. Hagiwara and McCullough went to Downey and had coffee. Karger called and told Hagiwara he was at her house, and she told him she was near his apartment. Karger told her to wait there.

Hagiwara and McCullough waited outside Karger's building. Hagiwara told McCullough he was to join her and "not touch anybody or go near anybody until [] [she] [said] so because if [she] [got] hurt [she was] gonna scream." When Karger arrived, Hagiwara introduced him to McCullough.

Hagiwara went inside with Karger, while McCullough remained in the car. He was to come up if he heard fighting or if Hagiwara screamed. According to Hagiwara, she brought McCullough with her because she was scared. She did not intend to hurt Karger, nor did she intend to take anything from him.

Once Hagiwara was upstairs, Karger asked, "You got my money, bitch?" She told him she did not and that she had come to talk to him about it. Hagiwara wanted Karger to understand that he would have to wait for her to pay him back. Karger kicked Hagiwara in the right buttock and under her right rib. She screamed, and McCullough came upstairs. Hagiwara thought she was going to get "really, really hurt." She testified that she had a struggle with Karger and could not really remember what she did, but Karger appeared to be dead. At that point, McCullough left in Hagiwara's car. Hagiwara used a towel to wipe off her shoes.

Hagiwara went outside and saw her car was gone. She tried to call McCullough, who had her other phone. Hagiwara took Karger's computer because "he wrote so many nasty stuff to [her]." She had not planned to take the computer before going into Karger's apartment. Hagiwara was not aware of anything else being taken from the apartment. She testified, however, that if she previously said that she took Karger's wallet, then she must have.

She claimed that Deack was incorrect that watches and jewelry were missing from Karger's apartment. Hagiwara stated she had packed those items for Karger when he was preparing to leave for Austria, and that she never saw them again.

Hagiwara and McCullough both showered when they returned to her house. When Hagiwara came out of the shower, Williams had a bag and told her to put "everything" in it. She saw that Williams had Karger's wallet. Hagiwara denied that she asked Williams to dispose of any items. She denied that she tried to clean up Karger's apartment, that she wore gloves, or that she had given any gloves to Williams. According to Hagiwara, she did not wear a hair net, booties, or a slip cover. She claimed that she "didn't wear anything" because she did not "plan to go there to cause harm." Hagiwara had a Tag Heuer watch at her house that was missing after the incident. She testified that she did not take a watch from Karger's apartment.

Hagiwara denied that she gave a bar to Dilello, but testified that Dilello may have seen the wrench in her hand when she cleaned it.

Hagiwara was contacted by the police on the Monday after the incident. She was not forthcoming about her involvement because she did not want her family to know anything about it. Hagiwara reiterated that she did not plan to kill Karger nor did she plan to steal anything from him.

Hagiwara also offered the testimony of Linda Barnard, Ph.D., a marriage and family therapist who specialized in treating trauma survivors. Dr. Barnard described in detail the physical and psychological abuse Hagiwara's stepfather inflicted on Hagiwara. She also reviewed an MRI scan of Hagiwara's brain and opined that Hagiwara had brain damage that likely resulted from her abuse. According to Dr. Barnard, Hagiwara grew up thinking she had no value, and that the only way she would be valued was if she worked and gave money to her family.

Hagiwara told Dr. Barnard that around 2008, Karger became verbally abusive toward her, and began to physically abuse her in 2009. Dr. Barnard further testified that the abusive behavior was followed by calm periods when Karger would apologize to Hagiwara. According to Dr. Barnard, Karger's abuse would escalate around the

repayment of loans made to Hagiwara. Given Hagiwara's history, Dr. Barnard opined that Hagiwara had a heightened perception of danger. Dr. Barnard testified that Karger's threats were perceived as being extremely dangerous by Hagiwara, and that she thought Karger might kill her. Dr. Barnard opined that Hagiwara's decision making ability was impaired under stressful and threatening circumstances. Dr. Barnard testified that Hagiwara was capable of planning a murder and could form the criminal intent to steal or to kill.

Hagiwara informed Dr. Barnard that she had outstanding loans from Karger for \$71,000, and \$15,000. Hagiwara also told Dr. Barnard that she asked Dilello to find her someone who could beat up Karger, and that she needed someone to help her get "some sort of papers." Dr. Barnard believed the papers had to do with Karger and his future trip to Austria.

Hagiwara told Dr. Barnard that she and McCullough went into Karger's apartment together on Father's Day morning. McCullough grabbed Karger around the neck in a choke hold and took him down to the ground. Karger did not stay down, however. Hagiwara told Dr. Barnard that she then went down to her car to get something that Karger wanted. Hagiwara then returned to the apartment and got the wrench out of her purse. Hagiwara told Dr. Barnard that she could not remember the attack on Karger. Hagiwara did, however, describe a scenario that implied she was hitting Karger and he kept getting up. Dr. Barnard testified that Hagiwara knew she had bludgeoned Karger, but she could not remember doing it. Hagiwara told Dr. Barnard that she cleaned blood off her shoes and took a computer before she left the apartment. She also told Dr. Barnard that on the day of the incident, there were a lot of papers in Karger's apartment.

## Discussion

### 1. Homicide instructions

Hagiwara contends the court had a sua sponte duty to modify the instructions on first degree murder to include language outlining the prosecution's legal burden to disprove imperfect self-defense beyond a reasonable doubt. Hagiwara acknowledges that

the jury was correctly instructed on the imperfect self-defense form of voluntary manslaughter with CALCRIM No. 571. However, she contends that CALCRIM No. 641, which instructed the jury on completing the verdict forms, precluded the jury from considering whether the prosecutor had disproven imperfect self-defense. Hagiwara is mistaken.<sup>4</sup>

“[T]he absence of imperfect self-defense . . . is not an *element* of the offense of murder to be proved by the People.” (*People v. Martinez* (2003) 31 Cal.4th 673, 685.) Imperfect self-defense is a mitigating circumstance “which may reduce murder to manslaughter by negating malice. [Citation.] The defendant is obliged to ‘proffer some showing on these issues sufficient to raise a reasonable doubt of his guilt of murder.’ [Citation.]” (*Ibid.*) Thus, the trial court had no sua sponte duty to modify the first degree murder instructions in the manner described by Hagiwara.

All of the jury instructions, including the instruction on imperfect self-defense voluntary manslaughter, were read to jurors before they began deliberating. Thus, jurors were aware that convicting Hagiwara for imperfect self-defense voluntary manslaughter was an option. Nothing in CALCRIM No. 641 precluded the jury from considering this option during deliberations. Hagiwara is correct that the instruction tells jurors that the court “can accept a verdict of guilty of a lesser crime only if all of you have found the defendant not guilty of all of the greater crimes.”<sup>5</sup> However, the complete charge reads “*You may consider these different kinds of homicide in whatever order you wish*, but I can accept a verdict of guilty of a lesser crime only if all of you have found the defendant not guilty of all of the greater crimes.” (Emphasis added.) Thus, the instruction makes it clear that deliberations can occur in any order the jury chooses. It is only the verdict

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<sup>4</sup> Respondent contends Hagiwara has forfeited her claim by failing to object in the trial court. A claim that the trial court has a sua sponte duty to instruct is not forfeited by a failure to object.

<sup>5</sup> This portion of the instruction has been mandated by the California Supreme Court. (*People v. Fields* (1996) 13 Cal.4th 289, 310-311.)

forms which must be filled out in a particular manner. There is no error in this instruction.

## 2. Sufficiency of the evidence – Murder

Hagiwara was prosecuted for first degree murder under two different theories: (1) the murder was willful, deliberate and premeditated and (2) the murder occurred during the commission of a felony, specifically burglary. Hagiwara contends the evidence is insufficient to support her conviction for willful, deliberate and premeditated first degree murder because all the evidence supported a theory that she acted in imperfect self-defense and so lacked the malice required for first degree murder. She contends the prosecution presented no evidence to the contrary. Hagiwara further contends there is no evidence to show she intended to commit a burglary and so no evidence to support a first degree felony murder conviction. There is sufficient evidence to support both theories.

### a. Applicable law

“In reviewing a challenge to the sufficiency of the evidence, we do not determine the facts ourselves. Rather, we examine the whole record in the light most favorable to the judgment to determine whether it discloses substantial evidence—evidence that is reasonable, credible and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. [Citations.] We presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence. [Citation.] [¶] The same standard of review applies to cases in which the prosecution relies primarily on circumstantial evidence and to special circumstance allegations. [Citation.] [I]f the circumstances reasonably justify the jury’s findings, the judgment may not be reversed simply because the circumstances might also reasonably be reconciled with a contrary finding. [Citation.] We do not reweigh evidence or reevaluate a witness’s credibility. [Citation.]” (*People v. Nelson* (2011) 51 Cal.4th 198, 210 [internal quotation marks omitted].)

b. Evidence of intent to kill

A conviction for willful, deliberate and premeditated murder requires proof of express malice, that is of an intent to kill. “Evidence of intent to kill is usually inferred from defendant’s acts and the circumstances of the crime. [Citation.]” (*People v. Ramos* (2011) 193 Cal.App.4th 43, 48.)

Here, Hagiwara had one or more motives to kill Karger. She wanted to obtain the paperwork for Karger’s loan to her, and she may also have wanted revenge for Karger’s alleged mistreatment of her. (*People v. Smith* (2005) 37 Cal.4th 733, 742 [“where motive is shown, such evidence will usually be probative of proof of intent to kill”].)

There is evidence to support an inference that Hagiwara planned to kill Karger. Planning is indicative of an intent to kill. (See *People v. Mendoza* (2011) 52 Cal.4th 1056, 1069 [planning shows premeditation and deliberation].) Hagiwara went to Karger’s apartment accompanied by McCullough to provide muscle. Hagiwara carried a wrench. These facts support an inference that she planned to attack Karger. (See *People v. Villegas* (2001) 92 Cal.App.4th 1217, 1224 [planning may be reasonably inferred from evidence that defendants armed themselves before shooting].) Hagiwara wore something on her hair and her feet. She may also have brought latex gloves with her. Since Hagiwara took steps before going to Karger’s apartment to ensure she did not leave any evidence in the apartment, it is reasonable to infer that she intended to kill him, since if Karger was merely beaten he could identify Hagiwara as his attacker and the precautions would be pointless.

The severity of Karger’s injuries also support a conclusion that Hagiwara intended to kill Karger. (See *People v. Lashley* (1991) 1 Cal.App.4th 938, 945 [serious injury is evidence of intent to kill].)

c. Evidence contradicting imperfect self-defense

A defendant who acts in imperfect self-defense does so in the actual but unreasonable belief that it is necessary to defend herself from imminent peril of death or

great bodily injury. (*People v. Vasquez* (2006) 136 Cal.App.4th 1176, 1178.) This mental state negates the malice, or intent to kill, required for murder. (*Ibid.*)

Much of the evidence which shows an intent to kill also contradicts Hagiwara's imperfect self-defense claim. As we discuss in subsection 2(b) above, Hagiwara went to Karger's apartment armed and with a companion for muscle. She took preemptive steps to reduce or eliminate evidence of her presence there. These facts suggest that Hagiwara was prepared to be the aggressor in the encounter. Although the sliding door to Karger's apartment was open, the neighbor in the adjacent apartment did not hear Karger yelling or a woman screaming on the morning of the murder. Another neighbor also did not hear any screams or loud noises the weekend of the murder. This supports an inference that Hagiwara was in fact the aggressor against Karger, taking him by surprise without an initial struggle.

The fact that the neighbors did not hear any noises from Karger's apartment also directly contradicts Hagiwara's claim that she screamed when Karger attacked her, and did so loudly enough to be heard outside. This falsehood in turn casts doubt on her claim that she believed she was in imminent peril.

After the killing, Hagiwara told Dilello that McCullough held Karger for her. She also said she did not even need McCullough. These circumstances too cast doubt on Hagiwara's claim that she believed it was necessary to defend herself from imminent peril.

Further, there was evidence that Hagiwara attempted to clean up Karger's apartment after the killing, and to dispose of evidence linking her to the killing. This is more consistent with consciousness of wrongdoing than with an honest belief that self-defense was necessary. In addition, in her extensive discussions with Dilello after the killing, Hagiwara never claimed self-defense.

#### d. Felony murder evidence

All murder which is committed in the perpetration, or attempted perpetration of burglary is first degree murder. (§ 189; *People v. Edwards* (2013) 57 Cal.4th 658, 718.)

So long as the burglary is not merely incidental to the killing or an afterthought to it, the killing may be felony murder even if it did not occur in the midst of the commission of the burglary. (*People v. Prince* (2007) 40 Cal.4th 1179, 1259.)

Here, there was evidence that Hagiwara went to Karger's apartment to steal the paperwork relating to her debt to Karger. Dilello testified that Hagiwara told her that an older man had her paperwork and she wanted to get it before he left the country. Dilello also testified that Hagiwara asked her to find someone to help her steal her paperwork from Karger. Dr. Barnard testified that Hagiwara stated that she told Dilello she needed someone to help her get "some sort of papers." The papers had something to do with Karger and his planned trip to Austria. Further, the promissory notes for Hagiwara's outstanding loans were not found by the police after Karger's death. This is substantial evidence to show that Hagiwara intended to go to Karger's apartment to commit theft and thus substantial evidence to show she intended to commit a burglary. Thus, there is sufficient evidence to support the felony murder conviction.

Hagiwara points out that the jury found not true the special circumstances allegation that she committed the murder for financial gain and the special circumstance allegation that the murder was committed in the perpetration of robbery. She contends this shows the jury did not find that she went to the apartment to steal her paperwork. We do not agree.

The jury's not true finding on the robbery special circumstance could have been based on a finding that Hagiwara did not use force or fear to steal the loan paperwork. Robbery only occurs when the perpetrator uses force or fear to accomplish the felonious taking. (§ 211.) Absent force or fear, a felonious taking constitutes the offense of theft.

The jury's not true finding on the financial gain special circumstance could have been based on a finding that Hagiwara's taking of the loan paperwork, although a theft, would not result in financial gain for Hagiwara. Hagiwara testified that Karger was harassing her for repayment of the \$71,000 and \$15,000 loans before he left the country. There is also evidence that Hagiwara was willing to repay the loans, but could not do so quickly. Thus, the jury could have believed that Hagiwara stole the loan paperwork not

for financial gain (that is to avoid repaying the loan) but to prevent Karger from trying to force her to immediately repay the debt in a lump sum. Alternatively, at times, Hagiwara claimed to have repaid the loans but lacked a receipt to prove the repayment, and the jury could have found this testimony credible and believed that Hagiwara stole the loan paperwork to prevent Karger from trying to force her to make payments she did not owe. This, too, would not involve financial gain.

As we discuss in more detail in section 4 below, the jury was instructed that burglary could also be based on an intent to commit an assault. Hagiwara testified that she told Karger in March or April that “this will be the last time you beat on me. The next time you’ll get beat.” This is sufficient evidence to support a finding that Hagiwara went to Karger’s apartment with the intent to assault him, although, as we discuss in section 4 below, there is no reasonable possibility that the jury in fact relied on this intent alone to find that a burglary occurred.

### 3. Sufficiency of the evidence – burglary special circumstance

Hagiwara contends there is insufficient evidence to support the true finding on the special circumstance allegation that the murder was committed while she was engaged in the commission of a burglary. There is sufficient evidence.

“[A] felony-murder special circumstance is inapplicable if the underlying felony is merely ‘incidental’ or ‘ancillary’ to the murder; instead, the evidence must demonstrate an independent or concurrent felonious purpose distinct from any intent to kill.” (*People v. Riccardi* (2012) 54 Cal.4th 758, 836.)

As we discuss in section 2(d) above, there is sufficient evidence to support Hagiwara’s conviction under a felony murder theory. This same evidence is sufficient to support the burglary special circumstance finding. (See *People v. Foster* (2010) 50 Cal.4th 1301, 1349 [same evidence that supported felony murder based on the commission of a burglary also supports burglary special circumstance].)

#### 4. Burglary special circumstances instruction

Hagiwara contends the instruction on the burglary special circumstances read together with the instruction defining burglary was confusing. Specifically, Hagiwara contends the two instructions might have caused the jury to believe that it could find the burglary special circumstance true if the underlying felony was assault. We agree that the two instructions would have the effect described by Hagiwara.<sup>6</sup> We question whether that belief would be erroneous, but find no prejudice to Hagiwara in any event.

##### a. Instructions given

The trial court instructed the jury on burglary pursuant to CALCRIM No. 1700. That instruction stated that the People must prove that when the defendant “entered a building, (he/she) intended to commit theft/or false imprisonment or assault with force likely to produce great bodily injury.”<sup>7</sup> This was the only instruction defining burglary.

The court instructed the jury on the burglary murder special circumstance using a modified version of CALCRIM No. 730, the standard jury instruction for a special circumstances allegation that the murder was committed in the commission of a felony within the meaning of section 190.2, subdivision (a)(17). That instruction does not define any of the felonies listed in section 190.2, subdivision (a)(17).<sup>8</sup> The modified version given in this case did not define burglary. There can be no doubt the jury looked to

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<sup>6</sup> Respondent contends that each instruction was separately legally correct and so Hagiwara forfeited her claim by failing to object. CALCRIM No. 730 failed to provide a definition of burglary, or to refer jurors to a definition of burglary. Thus, it was not a legally correct instruction as given. Hagiwara’s claim is not forfeited.

<sup>7</sup> This instruction was presumably intended in part for use in deciding an independent charge of burglary against Williams.

<sup>8</sup> The standard version of CALCRIM No. 730 tells jurors, “To decide whether (the defendant/[and] the perpetrator) committed [or attempted to commit] \_\_\_\_ <insert felony or felonies from Pen. Code, § 190.2(a)(17)>, please refer to the separate instructions that I (will give/have given) you on (that/those) crime[s].” The trial court in this matter omitted this paragraph from the instructions.

CALCRIM No. 1700 for the definition of burglary. Thus, the jury certainly believed that the burglary murder special circumstance could be based on a burglary perpetrated with the intent to commit an assault.

b. Applicable law

In 1969, the California Supreme Court held that second degree felony murder may not be based on a felonious assault or other felony “which is an integral part of the homicide.” (*People v. Ireland* (1969) 70 Cal.2d 522, 539 (*Ireland*)). Later that year, the California Supreme Court extended the *Ireland* “merger” doctrine to first degree felony murder. (*People v. Wilson* (1969) 1 Cal.3d 431, 440.) The court held that a first degree felony murder conviction could not be based on burglary if the burglary was perpetrated with an intent to commit an assault upon the victim. (*Id.* at p. 442.)

In 2009, the California Supreme Court expressly overruled *Wilson, supra*, 1 Cal.3d 431. (*People v. Farley* (2009) 46 Cal.4th 1053, 1121.) The court held that the opinion in *Wilson, supra*, 1 Cal.3d 431, “erred in extending the merger doctrine to first degree felony murder.” (*People v. Farley, supra*, 46 Cal.4th at p. 1117 (*Farley*)). Thus, a first degree felony murder conviction may now be based on a killing committed during a burglary perpetrated with the intent to commit an assault on the victim. (*Id.* at pp. 1111-1112.)

The application of the *Ireland* merger doctrine to the burglary murder special circumstance following *Farley, supra*, 46 Cal.4th 1053 is less clear. In a footnote in *Farley*, the court stated, “our conclusion defeats defendant’s challenge to the burglary murder special circumstance.” (*Id.* at p. 1116, fn. 22.) However, the court did not refer to or expressly overrule its prior decisions extending the *Ireland* merger doctrine to the burglary murder special circumstance. (See, e.g. *People v. Ramirez* (2006) 39 Cal.4th 398, 463; *People v. Seaton* (2001) 26 Cal.4th 598, 646.) We read the *Farley* footnote as impliedly overruling *People v. Ramirez, supra*, 39 Cal.4th 398 and its predecessors. Thus, the true finding on the burglary special circumstance in this case could properly have been based on a burglary perpetrated with the intent to commit assault.

c. Prejudice

Even if the jury was improperly instructed that burglary could be based on an intent to commit assault, “other aspects of the verdict or the evidence leave no reasonable doubt” that the jury also made a finding that the burglary was perpetrated with the intent to commit a theft, and so any error was harmless beyond a reasonable doubt. (See *People v. Chun* (2009) 45 Cal.4th 1172, 1205.)

Dilello and Williams both testified that Hagiwara wanted help to get the paperwork relating to a loan back from Karger. Dr. Barnard also testified that Hagiwara stated that Hagiwara told Dilello she needed help to get papers from Karger. After Karger’s death, a number of promissory notes were found among Karger’s possession, but the notes for \$71,000 and \$15,000 owed by Hagiwara were not found. Thus, the evidence was overwhelming that Hagiwara went to Karger’s apartment with the intent to steal her promissory notes.

Although there is evidence suggesting that Hagiwara may have *also* intended to use force on Karger, it appears the jury rejected that evidence. The jury found true the burglary special circumstance and not true the robbery special circumstance. The only difference between robbery and theft is that robbery requires the use of force or fear. (*People v. Waidla* (2000) 22 Cal.4th 690, 737.) The jury’s not true finding on the robbery special circumstance indicates that the jury found that Hagiwara did not go to Karger’s apartment with the intent to use force. There is no reasonable possibility that the jury would have found that Hagiwara intended to acquire the papers peacefully, then use force to assault Karger.

As we discuss in section 2(b) above, there is substantial evidence that Hagiwara went to Karger’s apartment planning to kill him as well as to steal her paperwork. However, assuming the jury believed the evidence suggesting that Hagiwara *also* intended to kill Karger, that would not invalidate the true finding on the burglary special circumstance. “Concurrent intent to kill and to commit an independent felony will

support a felony-murder special circumstance. [Citation.]” (*People v. Mendoza* (2000) 24 Cal.4th 130, 183.)

#### 5. Accomplice instruction

McCullough contends the trial court erred in failing to instruct the jury sua sponte that it should determine if Mastropasqua was an accomplice and if so the defendants could not be convicted on the basis of her uncorroborated accomplice testimony alone. We do not agree.

##### a. Applicable law

“An accomplice’s testimony is not sufficient to support a conviction unless it is corroborated by other evidence connecting the defendant with the commission of the offense. [Citation.]” (*People v. Carrington* (2009) 47 Cal.4th 145, 190.)

“An ‘accomplice’ is ‘one who is liable to prosecution for the identical offense charged against the defendant on trial in the cause in which the testimony of the accomplice is given.’ (§ 1111.)” (*People v. Carrington, supra*, 47 Cal.4th at p. 190.) A person is liable to prosecution for an offense if he or she commits the offense or aids and abets in its commission. (*People v. Sully* (1991) 53 Cal.3d 1195, 1227 [to be accomplice, witness must be chargeable with crime as principal]; § 31 [defining principals].) An aider and abettor is one who aids, promotes, encourages or instigates a crime with knowledge of the unlawful purpose of the perpetrator and the intent to assist in the commission of the crime. (*People v. Beeman* (1984) 35 Cal.3d 547, 560.)

“Whether a person is an accomplice within the meaning of section 1111 presents a factual question for the jury “unless the evidence presents only a single inference.” [Citation.] Thus, a court can decide as a matter of law whether a witness is or is not an accomplice only when the facts regarding the witness’s criminal culpability are “clear and undisputed.” [Citations.]’ [Citation.]” (*People v. Carrington, supra*, 47 Cal.4th at p 191.)

b. Analysis

As McCullough acknowledges, Mastropasqua denied any knowledge of what Hagiwara and the others were planning to do and there is no direct evidence to the contrary. McCullough contends there was sufficient circumstantial evidence from which the jury could infer that Mastropasqua knew of the criminal purpose of Hagiwara, Williams and Dilello. There is no evidence which would support such an inference.

As McCullough correctly points out, Mastropasqua was aware that Hagiwara asked Williams to provide some “muscle” and was also aware that Williams was bringing McCullough to Los Angeles to provide “muscle.” However, there is no indication of criminal purpose in Hagiwara’s initial request for muscle. According to Mastropasqua, Hagiwara told Williams she was trying to evict a guy from one of her properties who was giving her problems and she needed some “muscle.” Mastropasqua also heard Williams tell McCullough on the ride down that Hagiwara was having problems with someone she was evicting and needed some “muscle.” There are many legal reasons that Hagiwara could have wanted “muscle,” including protection from the troublesome tenant. A bare request for “muscle” and/or an agreement to provide “muscle” does not support an inference of planned criminal activity.

McCullough also points out that after Mastropasqua took a shower at Hagiwara’s house, she heard Williams say that he wanted “nothing to do with this.” McCullough contends this statement indicates that Mastropasqua knew something illegal was occurring. There is nothing to suggest that the reason Williams wanted nothing to do with the plan was some illegality in the plan. Williams could have wanted more money or felt the plan involved too much effort. Williams’s decision not to be involved in the plan does not support an inference of criminal activity on the part of the remaining participants.

Further, even if evidence could support an inference that Mastropasqua knew of the others’ criminal purpose, there is no evidence that Mastropasqua aided, promoted, or encouraged the crime. Mastropasqua allowed Williams to use her cell phone on a recurring basis because Williams did not have a cell phone. There is no evidence

indicating that Mastropasqua allowed Williams to make or receive a call on her cell phone with the foreknowledge that the call would involve solicitation of a crime. Similarly, Mastropasqua rode to Los Angeles with Williams and McCullough, but the car belonged to Williams, and Williams testified that he did the driving. There is no evidence of any planning or other discussion of the crime in the car, apart from the brief statement described above. Thus, there is no evidence that Mastropasqua's presence in the car aided, promoted or encouraged the crime. Once at Hagiwara's home in Los Angeles, Mastropasqua took a shower and fell asleep.<sup>9</sup> This certainly did not aid, promote or encourage the commission of a crime. At most, assuming Mastropasqua knew of the others' criminal purpose, she failed to prevent their commission of a crime. This is not sufficient to establish aiding and abetting and so not sufficient to make Mastropasqua an accomplice. (*People v. Stankewitz* (1990) 51 Cal.3d 72, 90 [mere presence at scene of crime or failure to prevent its commission is not sufficient to establish aiding and abetting].)

Since the facts concerning Mastropasqua's lack of criminal liability are clear and undisputed, and permit only one reasonable inference, the trial court did not err in finding that as a matter of law Mastropasqua was not an accomplice.

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<sup>9</sup> According to Williams and Dilello, Mastropasqua was in the kitchen while everyone was eating. During that time, there was just regular or normal conversation. Mastropasqua's presence during such conversation did not aid, promote or encourage the commission of a crime.

Disposition

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

GOODMAN, J.\*

We concur:

MOSK, Acting P.J.

KRIEGLER, 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.