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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

RAHEEM ABDUL EDWARDS,

Defendant and Appellant.

G045022

(Super. Ct. No. 04NF4451)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County,
Richard F. Toohey, Judge. Affirmed.

Marleigh A. Kopas, under appointment by the Court of Appeal, for
Defendant and Appellant.

Kamala D. Harris, Attorney General, Gary W. Schons, Assistant Attorney
General, Gil Gonzalez and Vincent P. LaPietra, Deputy Attorneys General, for Plaintiff
and Respondent.

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INTRODUCTION

Defendant Raheem Abdul Edwards appeals from the judgment entered after a jury found him guilty of first degree murder and found true special circumstance allegations that the murder was committed during the commission of a robbery and during the commission of a burglary within the meaning of Penal Code section 190.2, subdivision (a)(17)(A) and (G), respectively. (All further statutory references are to the Penal Code.) Defendant was sentenced to a prison term of life without the possibility of parole.

Defendant does not challenge his conviction for first degree murder. He argues the trial court committed prejudicial error when it instructed the jury on the special circumstance allegations on the ground the court did not expressly instruct the jury to separately consider those two allegations. Defendant argues this court should reverse the findings on the special circumstance allegations and remand the matter to the trial court with directions that he be sentenced to 25 years to life. Defendant also contends section 190.2 is unconstitutional.

We affirm. Even assuming the trial court erred by failing to expressly instruct the jury that it must separately consider the two special circumstance allegations, for the reasons we will explain, any such error would have been harmless beyond a reasonable doubt. As the California Supreme Court has upheld the constitutionality of section 190.2, subdivision (a)(17), we must reject defendant's constitutional challenge to that statute. (See *People v. Nelson* (2011) 51 Cal.4th 198, 225.)

FACTS

I.

DECEMBER 15, 2000 MURDER OF HAENG SHIN KIM

Around 8:30 a.m. on December 15, 2000, defendant and his good friend, Robert Feeney, sat on a bench at a bus stop across the street from the Lucky 7 liquor store

in Anaheim. After about 30 minutes, during which time they discussed stealing money from the store, defendant and Feeney went into the store.

The store's owner, Haeng Shin Kim, followed defendant and Feeney to the back of the store. Defendant heard a gunshot and saw Kim trying to escape. Defendant heard two or three more gunshots and heard Feeney tell him to grab the money. He ran to the cash register, grabbed bills and food stamps, and jumped over Kim's body as he ran out of the store with Feeney; Kim had been fatally shot in the back of the neck and in the lower back. Defendant and Feeney fled to Las Vegas, and then to New York.

II.

DEFENDANT'S 2005 INTERVIEW WITH SERGEANT SULLIVAN

In September 2005, in a jail cell in New York, Sergeant Charles Sullivan of the Anaheim Police Department interviewed defendant about Kim's murder. Defendant told Sullivan that he and Feeney were "like brothers" and that in December 2000, he lived with Feeney's family. Defendant stated that he came home around 7:00 a.m. on December 15, 2000, after completing his graveyard shift at Disneyland, to find Feeney on his way out. Feeney said he "wanted to get some extra money." Feeney told defendant he wanted to seek out some friends in his old neighborhood. Feeney also said he was going to do a robbery.

Ultimately, Feeney proposed that he and defendant steal money from the store. Feeney told defendant he wanted him to divert the attention of the store's clerk to the back of the store so Feeney could take money out of the cash register. Defendant and Feeney watched the store and the customers going in and coming out of it. They waited until it appeared there were no customers inside the store before they entered.

Defendant told Sullivan that after he and Feeney entered the store and put a few things on the counter, defendant walked to a storage area in the back or at the side of the store and the clerk (later identified as Kim) followed him. Defendant stated that he was "stallin' for time, stallin' for time" when he heard a gunshot. Defendant ducked and

then heard two or three more gunshots before he heard Feeney tell him to grab the money. Defendant grabbed the money and jumped over Kim, who was lying face down on the floor near the front door of the store, before running out of the store. Defendant and Feeney fled to Las Vegas and then to New York where Feeney was referred to as “Bobby Two Shots.”

Defendant also told Sullivan that although he knew he was going to help Feeney “do a robbery,” defendant did not have a gun with him on December 15, 2000, and did not know Feeney had a gun with him until defendant heard the first gunshot in the store. Defendant admitted he had seen Feeney with a gun on an unspecified occasion and knew that Feeney had books on guns.

III.

DEFENDANT’S TRIAL TESTIMONY

At trial, defendant testified about a similar, general sequence of events leading to Kim’s murder, as the one he described during his interview with Sullivan. Contrary to statements made during that interview, defendant testified that he thought Feeney was joking when he spoke about robbing the store and that he and Feeney entered the store for the purpose of purchasing cigars and something to drink.

Defendant testified that after he got home from work around 7:00 a.m. on December 15, he was surprised to see Feeney in the living room because he was not an early riser. Defendant asked Feeney where he was going and Feeney said he was going to “get some money.” Feeney told defendant that he was going to see some friends at some apartments in “Del Monte” and that he was going to see a guy and borrow some money from him. Defendant told Feeney that he was going to go with him because it seemed “something was really off” and defendant did not want Feeney to get into trouble. Defendant and Feeney walked to some apartments but did not find the person whom Feeney was looking for or anyone else whom he might know. Defendant and Feeney sat down on a bench at a bus stop.

Defendant testified Feeney asked him, “what am I going to do? Christmas is coming up. I got to do something for my parents.” He also testified as follows:

They discussed going into the store and “getting some money.” Feeney stated he wanted defendant to go into the store and hide in the back to distract the clerk while Feeney stole the money. Defendant thought Feeney was joking and told him they did not have to do that because he was working and Feeney could have anything he wanted from defendant. Feeney brushed off defendant because he had a problem accepting things from people.

Defendant and Feeney continued to sit on the bench and talked about robbing the store. Defendant calmed Feeney down. Defendant pointed out the number of people going into and coming out of the store and told Feeney that robbing the store would not work. They agreed that they would go into the store, buy a few things, and then return home where Feeney could smoke pot and drink alcohol.

Defendant testified that after he and Feeney walked into the store, defendant put cigars and a soda on the counter, which he intended to buy with money he had with him. Defendant went to a storage area in the back of the store because he and Feeney did not see the type of alcohol Feeney wanted; defendant could not remember the type of alcohol they were looking for, except that it was probably “some kind of white liquor.”

Kim followed defendant to the storage area. Defendant testified he thought that if he kept Kim distracted, Feeney might have the opportunity to steal money from the store and leave. Defendant testified he “kind of was stalling by saying, where’s the liquor? What kind of liquor,” while Kim told defendant, “you’re not supposed to be back here.”

Defendant testified he heard a gunshot and saw Kim “just try to get away.” Defendant said he crouched down and was “just out of it.” Kim had moved away and out of defendant’s sight when defendant heard two or three more gunshots, and then heard

Feeney say, “go grab the money.” Defendant stated he assumed something had happened to Kim after he heard the gunshots. Defendant grabbed the money and ran to the back door where Feeney was. The back door was locked. Feeney turned defendant and said, “go, go, go.” Defendant and Feeney ran out the front door.

Defendant and Feeney ran to the house of one of Feeney’s friends; the friend gave them a ride home. Defendant and Feeney later fled to Las Vegas, and then to New York.

Defendant testified that prior to hearing the gunshots, he had no idea Feeney had a gun with him or might use a gun to rob the store. Defendant testified he had no idea Kim’s life was or could be in danger. Defendant acknowledged during cross-examination that robbery is dangerous because “lots of things could happen.”

Defendant testified that, at the time he left the store, after seeing Kim on the floor, he did not think about stopping to administer first aid because he did not know how to do so. He claimed he did not think about stopping to call the police or 911 to seek medical assistance for Kim; he thought Kim was already dead.

Defendant testified that a surveillance tape of the store showed Kim limping toward the front door while Feeney pointed a gun at him. Defendant stated the tape also showed Kim thereafter lying on the floor of the store when defendant, followed by Feeney, ran out of the store.¹

PROCEDURAL BACKGROUND

Defendant was charged in an information with one count of murder in violation of section 187, subdivision (a). The information contained two special circumstance allegations that (1) pursuant to section 190.2, subdivision (a)(17)(A), defendant committed murder while he “was engaged in the commission of the crime of

¹ The surveillance tape was shown to the jury.

robbery in violation of Penal Code section 211 and 212.5”; and (2) pursuant to section 190.2, subdivision (a)(17)(G), defendant committed murder while he “was engaged in the commission of the crime of burglary in the first or second degree” in violation of section 460.

The jury returned a verdict form finding defendant guilty of first degree murder. The jury found both special circumstance allegations true and returned a separate form for each of its true findings as to the special circumstance allegations. The trial court sentenced defendant to a prison term of life without the possibility of parole. Defendant appealed.

We set this matter for oral argument and invited the parties to submit supplemental briefs addressing, inter alia, whether the instructional error asserted by defendant in this appeal was harmless beyond a reasonable doubt. We have reviewed the parties’ supplemental briefs.

DISCUSSION

I.

THE INSTRUCTIONAL ERROR AS TO THE SPECIAL CIRCUMSTANCE ALLEGATIONS WAS HARMLESS BEYOND A REASONABLE DOUBT.

The trial court has a duty to instruct “on general principles of law that are commonly or closely and openly connected to the facts before the court and that are necessary for the jury’s understanding of the case,” even in the absence of a request. (*People v. Mayfield* (1997) 14 Cal.4th 668, 773.) A special circumstance allegation is “*sui generis*—neither a crime, an enhancement, nor a sentencing factor.” (*People v. Friend* (2009) 47 Cal.4th 1, 71.) The California Supreme Court has held, “we do not believe the courts can extend a defendant less protection with regard to the elements of a special circumstance than for the elements of a criminal charge.” (*Ibid.*)

Defendant argues the trial court erred by instructing the jury with an incomplete version of CALCRIM No. 700. Form CALCRIM No. 700 states in its entirety: “If you find (the/a) defendant guilty of first degree murder, you must also decide whether the People have proved that [one or more of] the special circumstance[s] is true. [¶] The People have the burden of proving (the/each) special circumstance beyond a reasonable doubt. If the People have not met this burden, you must find the special circumstance has not been proved. [You must return a verdict form stating true or not true for each special circumstance on which you all agree.] [¶] In order for you to return a finding that a special circumstance is or is not true, all 12 of you must agree. [¶] *[You must (consider each special circumstance separately/ [and you must] consider each special circumstance separately for each defendant).]*” (Italics added.)

Here, the version of CALCRIM No. 700, which was given to the jury, was not modified to reflect that more than one special circumstance had been alleged in this case. Defendant’s instructional error argument focuses on the failure of the trial court to include the final sentence of form CALCRIM No. 700, which would have expressly instructed the jurors they must consider each special circumstance allegation separately. The version of CALCRIM No. 700 given in this case states: “If you find the defendant guilty of first degree murder, you must also decide whether the People have proved that the special circumstance is true. [¶] The People have the burden of proving the special circumstance beyond a reasonable doubt. If the People have not met this burden, you must find the special circumstance has not been proved. [¶] In order for you to return a finding that a special circumstance is or is not true, all 12 of you must agree.”

Defendant argues the trial court had a sua sponte duty to expressly instruct the jury that it must consider the special circumstance allegations separately. In support of this argument, defendant cites the Bench Notes accompanying form CALCRIM No. 700, which, in turn, solely cite *People v. Holt* (1997) 15 Cal.4th 619, 681 (*Holt*), for the proposition that the trial court has a sua sponte obligation to instruct the jury to

consider each special circumstance allegation separately. The Bench Notes to CALCRIM No. 700 also state, without citing to legal authority, that the court is to “[g]ive the bracketed paragraph [of form CALCRIM No. 700] if more than one special circumstance is charged.” (Judicial Council of Cal., Jury Instns. (2012) Bench Notes to CALCRIM No. 700, p. 463.) The California Supreme Court in *Holt, supra*, 15 Cal.4th at pages 680-681, however, did not address whether the trial court has a sua sponte obligation to expressly instruct that the jury must consider the special circumstance allegations separately, as set forth in the bracketed language in form CALCRIM No. 700.

In *Holt, supra*, 15 Cal.4th at pages 638-639, the defendant was convicted of first degree murder, first degree robbery, rape, sodomy, and first degree burglary. The jury also found true the special circumstance allegations that the murder occurred during the commission or attempted commission of robbery, rape, sodomy, and burglary. (*Id.* at p. 639.)

The defendant in *Holt* argued the trial court “did not properly describe the special circumstances” when it instructed the jury that, if the defendant was convicted of murder in the first degree, it “‘must then determine if one or more of the following special circumstances are true or not true: robbery, burglary, rape or sodomy.’” (*Holt, supra*, 15 Cal.4th at p. 680.) The defendant argued the court erred by “failing to explain in the introductory instruction (CALJIC No. 8.80 [the predecessor to CALCRIM No. 700]) that the substantive crimes and the special circumstances differed since, for the latter allegations to be found true, the jury was required to find that the murder was committed ‘during the commission’ of one or more of the underlying crimes.” (*Ibid.*) The defendant further argued the error “assertedly was compounded when the court included all four substantive offenses in the subsequent instruction [citation] instead of giving a separate instruction based on each substantive offense.” (*Ibid.*)

The California Supreme Court rejected the defendant’s arguments and concluded, “[t]he instructions, read together, properly stated the law.” (*Holt, supra*, 15

Cal.4th at p. 680.) The Supreme Court held: “It is clear from this that the jury was expressly told that there were four special circumstances, each of which had to be separately considered, and that to be found true each special circumstance required finding that the murder was committed while the defendant was engaged in the commission of the particular underlying crime.” (*Id.* at p. 681.) The court did not address whether the trial court had a sua sponte obligation to expressly instruct the jury that special circumstance allegations must be considered separately. In that case, the jury had been so instructed. (*Ibid.*)²

For purposes of our analysis, we assume the trial court had a sua sponte obligation to expressly instruct the jury that it had to separately consider each special circumstance allegation, and that the court failed to do so. We therefore consider whether such an error was harmless on this record.

Defendant argues we must apply the harmless beyond a reasonable doubt standard under *Chapman v. California* (1967) 386 U.S. 18, 24 (*Chapman*) in determining whether the instructional error at issue was prejudicial. He argues that even if the harmless error standard set forth in *People v. Watson* (1956) 46 Cal.2d 818 (*Watson*) applied, “[i]t is at least reasonably probable that absent this error, not all twelve jurors would have found the special circumstances to be true.” (See *People v. Friend, supra*, 47

² Similarly, in *People v. Hughes* (2002) 27 Cal.4th 287, 377, the Supreme Court rejected the defendant’s argument the jury might have been misled by the trial court addressing all three special circumstances in a single instruction. Citing *Holt, supra*, 15 Cal.4th 619, the Supreme Court held that “[t]he instructions, read together with the verdict form, made clear that there were three special circumstances, each of which had to be considered separately, and that in order to be found true each special circumstance required a determination that the murder was committed while defendant was engaged in the commission of the particular underlying crime, or committed during defendant’s immediate flight after committing the particular underlying crime.” (*People v. Hughes, supra*, at p. 377.) As the jury in that case was expressly instructed to consider the special circumstances separately, the Supreme Court did not address whether the trial court had a sua sponte obligation to do so or the effect of a trial court’s failure to so instruct.

Cal.4th at p. 79 [“When reviewing a claim based on assertedly ambiguous instructions, we inquire whether the jury was reasonably likely to have construed them in a manner that violates the defendant’s rights”].)

It does not matter whether the *Chapman* or *Watson* harmless error standard applies because it is unclear how, in light of all the instructions given to the jury and the verdict and separate findings as to the special circumstance allegations returned by the jury, a reasonable jury could have improperly conflated the two special circumstance allegations during deliberations and failed to make the required findings for each special circumstance allegation.³

The jury was instructed on the substantive murder charge that, in order to prove defendant guilty of first degree murder under a felony-murder theory, the prosecution had to prove (1) defendant committed or aided and abetted another in committing the crime of robbery or burglary; (2) defendant intended to commit or intended to aid and abet the perpetrator in committing the crime of robbery or burglary; (3) if defendant did not personally commit the robbery or burglary, then a perpetrator, whom defendant was aiding and abetting, personally committed the crime of robbery or

³ Defendant’s counsel filed a letter informing this court of her intention at oral argument to cite to *People v. Mil* (2012) 53 Cal.4th 400, for the proposition that “reviewing courts must assess the evidence of the defendant’s reckless indifference to human life in the light most favorable to the defendant, to decide in keeping with instructional error analysis whether a rational factfinder could come to the conclusion that he did not act with such indifference to human life.” Defendant’s counsel also expressed her intention to cite *Neder v. United States* (1999) 527 U.S. 1, upon which *People v. Mil*, *supra*, 53 Cal.4th at page 417, relies, for the proposition that “where evidence is contested and conflicting regarding an omitted element, instructional error is reversible because the court cannot conclude beyond a reasonable doubt the verdict would have been the same absent the error.” Neither case is applicable here because defendant does not argue on appeal that the trial court failed to properly instruct the jury on an element of the charged offense or the elements of the special circumstance allegations. Instead, defendant argues the trial court failed to expressly instruct the jury to consider the special circumstance allegations separately. For the reasons explained *post*, such an error was harmless.

burglary; (4) while committing the robbery or burglary, the perpetrator caused the death of another person; and (5) there is a logical connection between the cause of death and the robbery or burglary. The jury was given CALCRIM No. 1600, defining the elements of robbery, and also CALCRIM No. 1700, containing the elements of burglary.

The jury found defendant guilty of first degree murder. The verdict form stated: “We the Jury in the above-entitled action find the Defendant, RAHEEM ABDUL EDWARDS, GUILTY of the crime of FELONY, to-wit: Violation of Section 187(a) of the Penal Code of the State of California (MURDER in the First Degree) as charged in COUNT 1 of the Information.” The jury’s verdict is not challenged in this appeal.

As to the special circumstance allegations, in addition to the version of CALCRIM No. 700 quoted *ante*, the jury was instructed with CALCRIM No. 703, as follows: “If you decide that . . . the defendant is guilty of first degree murder but was not the actual killer, then, when you consider the special circumstance[s] of Murder during the commission of Robbery/Murder during the commission of Burglary, you must also decide whether the defendant acted either with intent to kill or with reckless indifference to human life. [¶] In order to prove these . . . special circumstance[s] for a defendant who is not the actual killer but who is guilty of first degree murder as (an aider and abettor[]), the People must prove either that the defendant intended to kill, or the People must prove all of the following: [¶] 1. The defendant’s participation in the crime began before or during the killing; [¶] 2. The defendant was a major participant in the crime; [¶] AND [¶] 3. When the defendant participated in the crime, (he) acted with reckless indifference to human life. [¶] [A person acts with reckless indifference to human life when he knowingly engages in criminal activity that he knows involves a grave risk of death.] [¶] If the defendant was not the actual killer, then the People have the burden of proving beyond a reasonable doubt that . . . he . . . acted with either the intent to kill or with reckless indifference to human life and was a major participant in the crime for the special circumstance of Murder during the commission of Robbery or Murder during the

commission of Burglary to be true. If the People have not met this burden, you must find . . . this special circumstance . . . has . . . not been proved true.”

The jury was also instructed with CALCRIM No. 3550 which stated in relevant part: “Your verdict and any findings . . . must be unanimous. This means that, to return a verdict, all of you must agree to it.”⁴

The jury returned two separate forms recording its findings as to the special circumstance allegations. The jury returned a form entitled “FINDING,” which stated: “We the Jury in the above-entitled action FIND IT TO BE TRUE that the SPECIAL CIRCUMSTANCE exists to-wit: Murder While Engaged in the Commission of Burglary, as alleged in the Information, within the meaning of Penal Code Section 190.2(a)(17)(G).”

The jury returned a second form entitled “FINDING,” which stated: “We the Jury in the above-entitled action FIND IT TO BE TRUE that the SPECIAL CIRCUMSTANCE exists to-wit: Murder While Engaged in the Commission of Robbery, as alleged in the Information, within the meaning of Penal Code Section 190.2(a)(17)(A).” The clerk of the trial court read the jury’s verdict and findings as quoted *ante*, and asked: “Ladies and gentlemen of the jury, [are these] your verdict and findings?” The reporter’s transcript states that in response to this question: “Jury answers in the affirmative.”

The trial court stated the clerk would summarize the verdict and findings and ask each juror individually if he or she had personally rendered the verdict and findings in this case. The clerk stated: “Verdict as to count 1, guilty of murder in the first degree. [¶] Finding of true that the special circumstance exists, murder while

⁴ The jury was also instructed with CALCRIM No. 220 which stated, in part: “A defendant in a criminal case is presumed to be innocent. This presumption requires that the People prove a defendant guilty beyond a reasonable doubt. Whenever I tell you the People must prove something, I mean they must prove it beyond a reasonable doubt.”

engaged in the commission of burglary. [¶] Finding of true that the special circumstance exists, murder while engaged in the commission of robbery.” The clerk asked the jurors, “[i]s this your verdict and are these your findings.” Each juror individually responded, “[y]es.”

In his opening brief, defendant argues, “[b]ecause not informed as required by law that it must consider each of the two special circumstances separately, [defendant]’s jury thus was denied the opportunity to ‘consider the full range of possible verdicts’ [citation], and to find [defendant] guilty of only first degree felony-murder.” Defendant also argues, “[i]f properly instructed as required by law, there is a reasonable possibility that at least one juror would have determined the killing was felony-murder and nothing more.” But, defendant does not analyze *how* the failure to expressly instruct the jury to consider each special circumstance allegation separately might have had such an effect. Neither defendant’s appellate briefs nor the record itself shows how the jury might have done anything other than separately determine the truth of the elements for each of the special circumstance allegations. Unlike *Holt, supra*, 15 Cal.4th at page 680, defendant does not argue the trial court failed to explain that the substantive offense and the special circumstances differed. Instead, defendant argues the jury might not have understood it had to consider each special circumstance allegation separately from the other. Defendant does not explain, however, how the jury might have labored under such a misunderstanding.

We have assumed that the express statement the jury must consider the special circumstance allegations separately should have been included in the given version of CALCRIM No. 700. We also note the special circumstance allegations were inconsistently referred to as both singular and plural in the jury instructions and in the prosecutor’s closing argument. The record simply does not show how such imperfections had impacted the jury’s findings on the special circumstance allegations given our

analysis of the full record, especially considering the two separate special circumstance findings.

Defendant argues the prejudice caused by the instructional error is evidenced by the jury's requests to the trial court during deliberations, which revealed "they were struggling to determine to what extent [defendant] was culpable with respect to the special circumstances." But, a review of the jury's requests and the court's responses to those requests confirms that any question the jury might have had as to whether robbery and burglary are separate crimes was correctly answered by the court. The jury's first request sought a clean copy of a "not guilty" form on the substantive murder count due to a mistake made on the form that had been given to the jury. This request did not relate to the special circumstance allegations.

The jury's second request sought "[c]larification of the definitions of burglary and burglary." Although the jury might have intended to seek clarification of the definitions of burglary and *robbery*, the trial court answered the question by stating, "[f]or your evaluation of Count 1 and the special circumstances, burglary is defined in pages 40 through 42 of the packet."

The jurors' third request contained three parts. The jury asked: "Can burglary become robbery while in process? [¶] Are those (burglary & robbery) inclusive or exclusive? [¶] Can you be guilty of robbery if you are not the one using force?" The court responded to the first two questions of the jury's request by stating: "Burglary and Robbery are separate crimes. A burglary is complete upon entry if one enters a building with the intent to commit theft."⁵ As to the question regarding force, the court answered: "Yes. See page 24 of the packet. Such a person could be guilty of robbery if it is shown

⁵ The jury was also instructed with CALCRIM No. 1702 as follows: "To be guilty of burglary *as an aider and abettor*, the defendant must have known of the perpetrator's unlawful purpose and must have formed the intent to aid, facilitate, promote, instigate, or encourage commission of the burglary *before the perpetrator finally left the structure*." (Italics added.)

beyond a reasonable doubt that he aided and abetted in the robbery.” Although defendant argues the trial court’s responses were inadequate, he does not argue that they were in any way inaccurate. The exchange between the jury and the court, regarding those requests, shows the jury was expressly informed of the separate nature of the crimes of burglary and robbery, the two crimes which underlie the special circumstance allegations.

In sum, under either the *Chapman* or *Watson* harmless error standard, we conclude, in light of the totality of the given jury instructions, the trial court’s responses to the jury’s requests during deliberations, and the state of the verdict and findings forms returned by the jury, the failure to expressly instruct the jury that it must consider the special circumstance allegations separately constituted harmless error.

II.

DEFENDANT’S CONSTITUTIONAL CHALLENGE TO SECTION 190.2 IS WITHOUT MERIT.

In his opening brief, defendant argues, “notwithstanding stare decisis principles, here the special circumstance statute was unconstitutional as applied, and violated the Eighth Amendment, by failing to narrow the class of persons eligible for life in prison without parole, as it permitted the jury to use the same facts to establish both first degree (burglary and robbery) felony-murder as well as the ‘enhancing’ special circumstances of murder during the commission of a burglary and a robbery.” (Some capitalization omitted.) Defendant further states in his opening brief that he “acknowledges that the California 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.’ [Citation.] Instead, it has repeatedly authorized ‘use of a felony to qualify a defendant both for first degree murder and for a special circumstance. . . .’ [Citations.] Under the doctrine of stare decisis, these decisions are controlling at this time. [Citation.] [¶] But California’s statutory death penalty (or LWOP) . . . sentencing scheme has never expressly been approved by United States Supreme Court review. . . . [¶] Therefore, this

issue is raised to preserve it for federal review, if in the future the United States Supreme Court determines that section 190.2, subdivision (a) violates the Eighth Amendment.”

In *People v. Nelson, supra*, 51 Cal.4th at page 225, the California Supreme Court held that “California homicide law and the special circumstances listed in section 190.2 adequately narrow the class of murderers eligible for the death penalty. [Citations.] Specifically, the felony-murder special circumstance (§ 190.2, subd. (a)(17)) is not overbroad and adequately narrows the pool of those eligible for death.” As the California Supreme Court has upheld the constitutionality of section 190.2, subdivision (a)(17), we must reject defendant’s constitutional challenge to that statute. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.)

DISPOSITION

The judgment is affirmed.

FYBEL, J.

WE CONCUR:

RYLAARSDAM, ACTING P. J.

BEDSWORTH, J.