SUPREME COURT CRIM. NO. S189317

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, vs. BRANDON ALEXANDER FAVOR, Defendant and Appellant.	Court of Appeal No. B215387 Superior Court No. BA285265

APPELLANT'S OPENING BRIEF ON THE MERITS

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ISSUE PRESENTED FOR REVIEW

In order for an aider and abettor to be convicted of attempted willful, deliberate and premeditated murder by application of the natural and probable consequences doctrine, must a premeditated attempt to murder have been a reasonably foreseeable consequence of the target offense or offenses, or is it sufficient that an attempted murder would be reasonably foreseeable?

INTRODUCTION

In November, 2004, appellant and two other men were involved in a takeover armed robbery of a liquor store. One employee of the store was shot to death, and another suffered serious injury.

After appellant's arrest in June, 2005, he admitted he was involved but denied knowledge of guns or any plan to shoot. The prosecution tried appellant solely on an aiding and abetting theory. During argument regarding jury instructions, the prosecutor stated, "[T]he evidence does not in any way suggest that the defendant before the robbery occurred knew that the shooter had a gun, that he knew that the other gentleman had a gun at any time, saw the gun before entering the store." (Slip Opn. 5.) Instead, the prosecution argued that the shootings were reasonably foreseeable, natural and probable consequences of the robberies.

The jury was instructed pursuant to CALCRIM 402 only on the natural and probable consequences theory as to attempted murder, not as to premeditated and deliberate attempted murder.

Appellant argued below that the instructions failed to relate the instruction concerning premeditation and deliberation to the natural and probable consequences instruction.

The Court of Appeal concluded no such instruction was required. (Slip Opn. 9.) The Court of Appeal below recognized that its decision was at odds

with a published decision of the Third District Court of Appeal in *People v. Hart* (2009) 176 Cal.App.4th 662, which held that instructions just like those given here failed to inform the jury that in order to find the accomplice guilty of attempted premeditated murder, "it was necessary to find that attempted premeditated murder, not just attempted murder, was a natural and probable consequence of the attempted robbery." (*Id.* at p. 673; Slip Opn. 10-11.)

For the reasons stated herein, the Court of Appeal erred in concluding the instructions given were sufficient. In order to find an accomplice guilty of attempted premeditated murder, it is necessary that the jury find that premeditated murder was a natural and probable consequence of the target crime. The premeditation and deliberation findings in counts 2 and 3 should be vacated. (*People v. Hart, supra*, 176 Cal.App.4th at p. 675.)

STATEMENT OF THE CASE

Appellant Brandon Alexander Favor was charged in a felony information with murder (§ 187, subd. (a)) – count 1; attempted murder (§§ 664/187, subd. (a)) – counts 2 and 3; and second degree robbery (§ 211) – counts 4 and 5. It was further alleged that the murder in count 1 was committed while appellant was engaged in the commission of a robbery within the meaning of section 190.2, subdivision. (a)(17), and that as to each count, a principal was armed within the meaning of section 12022, subdivision (a)(1). (1CT 118-122.)

Following a jury trial, appellant was found guilty as charged of first degree murder in count 1, attempted willful, deliberate premeditated murder in counts 2 and 3, second degree robbery in counts 4 and 5, and all of the special allegations were found true. (2CT 421-425.)

Appellant was sentenced to life without the possibility of parole on count 1, consecutive indeterminate life sentences on counts 2 and 3, and an additional one year for each of the principal armed allegations in counts 1, 2, and 3. (2CT 472.) Sentence on counts 4 and 5 was stayed pursuant to section 654.

Appellant filed a timely notice of appeal. (2CT 474.)

On December 2, 2010, in a partially published decision, the California Court of Appeal, Second Appellate District, Division Four, affirmed the

judgement of the superior court, ordered a clerical error in the abstract of judgment corrected, and, as is relevant here, concluded that there was no instruction required to inform the jury that in order for an aider and abettor to be convicted of attempted willful, deliberate and premeditated murder by application of the natural and probable consequences doctrine, the premeditated attempt to murder must have been a reasonably foreseeable consequence of the target offense or offenses. (Slip Opn. 9-11.)

This Court granted appellant's petition for review limited to the issue listed above on March 16, 2011.

STATEMENT OF FACTS

On November 8, 2004, Jose Huerta was working as the manager of A & J Liquor Store on Hill Street in Los Angeles. (3RT 650-651, 671.)

While Huerta was working, some people came into the store and locked the door from the inside. Huerta felt a gunshot being fired near his head, which caused his head to be injured with "red speckles." (3RT 656-657.)

Huerta went to the ground and stayed there. He heard at least two voices and someone talking about getting the security camera and then meeting elsewhere. (3RT 658-659.) The voices sounded African American. (3RT 659-660.) He heard two or three voices and a total of four gun shots: one shot, then two shots, then another single shot. (3RT 675-676.)

Huerta got up and told the men that the cameras were in the back of the store. (3RT 661.) One of the men demanded his money, and Huerta removed $525 in cash from his pocket and gave it to him. (3RT 661, 669, 684.)

Huerta led one of the men to where the cameras were and saw his co-worker, Pablo Casteneda, on the floor. He did not know that Casteneda was dead but thought he looked too still. (3RT 662-663.) It was stipulated that Casteneda died from a single gunshot wound to the head. (4RT 906-907.)

After the men left the store, Huerta discovered that Casteneda was dead and that the store's owner, Paul Lee, had been shot. (3RT 664-665.) Huerta noticed that a mobile phone and some pre-paid mobile calling cards had also

been taken. (3RT 669-670.)

Eugene Lee, Paul Lee's son, testified that around $1,000 was missing from the register that handled the grocery business. (3RT 742.) Between $50,000 and $70,000 in cash was missing related to the check cashing side of the business. (3RT 742-744.)

Los Angeles Police Department Officer Frank Weber created a crime bulletin with stills from the security video. (4RT 918-919.) A second flyer was created after the Los Angeles City Council offered a $75,000 reward. (4RT 921.) Appellant was recognized in a still photo from a security video on the reward flyer related to the investigation, and he was arrested. (3RT 749, 758-759.)

Appellant was interviewed on June 13, 2005, by detectives at the Newton station. (4RT 922.) When he was shown the security video, appellant first denied any involvement in the robbery. Appellant later admitted that he went to the liquor store with the two other men on the video. (2CT 316.)

Appellant stated that he did not enter the store until after he heard shots fired. He then knocked on the door and was let in by the others. Appellant ran in and opened the cash register at the shooter's direction. (2CT 330-331.)

Appellant did not know who the other robbers were by name, but they were acquaintances from the neighborhood. He referred to the shooter as "Trouble" and the other man as "Jay Bird." (2CT 334-335.)

Appellant told the officers that the shooter went to high school at the same time as him and that he played for the school basketball team, but he did not know his name. (2CT 356, 365.) He stated that Jay Bird did not commit the murder and that he was not sure whether Jay Bird had a gun or not. (2CT 363.)

Appellant acknowledged that the reward flyer contained his image and that a denim jacket taken by police from his aunt's house was the same one he wore during the robbery. (2CT 368-369, 4RT 912.)

In a conversation recorded between appellant and his mother, when appellant called his mother from the police station, appellant told her that he had been involved in the robbery but that he did not commit the murder. (2CT 389.)

While appellant was suspected of having "cased" the store earlier in the day, having been back and forth to the store several times during the actual robbery, he was suspected to have entered the store after four or five shots had been fired. (4RT 962-963.)

ARGUMENT

IN ORDER FOR AN AIDER AND ABETTOR TO BE CONVICTED OF ATTEMPTED WILLFUL, DELIBERATE AND PREMEDITATED MURDER BY APPLICATION OF THE NATURAL AND PROBABLE CONSEQUENCES DOCTRINE, A PREMEDITATED ATTEMPT TO MURDER MUST HAVE BEEN A REASONABLY FORESEEABLE CONSEQUENCE OF THE TARGET OFFENSE OR OFFENSES

A. Introduction And Background

Appellant was convicted of attempted willful, premeditated and deliberate murder in counts 2 and 3. The jury was instructed that it could find appellant guilty of "attempted murder" as a natural probable consequence if it found he aided and abetted robbery. However, the instructions did not inform the jury that in order to find the premeditation allegation true, it had to decide that attempted *premeditated* murder was also a natural probable consequence of the robberies that appellant aided and abetted. (2CT 414; 5RT 1273-1275.)

The opinion of the Court of Appeal herein recognizes that it is in conflict and can not be harmonized with a recent published case, *People v. Hart, supra,* 176 Cal.App.4th 662, wherein the Court of Appeal for the Third Appellate District unanimously reversed a conviction for attempted premeditated and deliberated murder because the jury was instructed on the "natural and probable consequences" theory only as to simple attempted

murder, and not as to premeditated and deliberated attempted murder. (Slip Opn. 10-11.)

Contrary to the Court of Appeal, appellant submits that as applied here, the natural and probable consequences doctrine and aiding and abetting instruction, violated state and federal constitutional requirements of due process, a fair trial, and the right to a jury determination beyond a reasonable doubt on all issues. (U.S. Const., 5th, 6th & 14th Amends.; Cal. Const., art. I, §§ 7, 15, 16.)

Instructional error implicates the federal constitution where the error implicates the fundamental fairness of a trial in violation of due process or infringes upon an enumerated federal constitutional right. (See *Waddington v. Sarausad* (2009) 555 U.S. 179; *Estelle v. McGuire* (1991) 502 U.S. 62, 71.) Jury instructions may be challenged as constitutionally infirm if they had the effect of relieving the State of its burden of persuasion, beyond a reasonable doubt, on every essential element of a crime. (*Francis v. Franklin* (1985) 471 U.S. 307, 313, citing *Sandstrom v. Montana* (1979) 442 U.S. 510, 520-524.

Federal constitutional error occurred here because, in their totality, the instructions here failed to provide a minimally coherent or intelligible way to determine the extent of culpability for an accomplice under aiding and abetting and natural and probable consequences theories. (See *People v. Thomas* (1945) 25 Cal.2d 880, 885; *Cupp v. Naughten* (1973) 414 U.S. 141, 146;

United States v. Paolello (3rd Cir. 1991) 951 F.2d 537, 543; *Falconer v. Lane* (7th Cir. 1990) 905 F.2d 1129, 1136-1137.) Under the instructions given, the trial court substituted an improper presumption of criminal intent based on a foreseeability standard for actual criminal intent, relieving the prosecution from proving an essential element of premeditated and deliberated attempted murder. (*Sandstrom v. Montana, supra,* 442 U.S. at p. 520; *Clark v. Jago* (6th Cir. 1982) 676 F.2d 1099, 1104.) This deprived appellant of a jury determination beyond a reasonable doubt on all material issues and impermissibly reduced the prosecution's burden of proof on the essential premeditation and deliberation element. (*Ibid.*)

What took place in this case completely parallels what happened in *Hart*, *supra*, and this Court should adopt the reasoning of *Hart* as sound while reversing the opinion of the Court of Appeal herein. The findings of premeditation and deliberation in counts 2 and 3 should be vacated.

B. Discussion

In *Hart*, co-defendants Hart and Rayford entered a liquor store intending to rob the husband and wife working there. Hart exhibited a gun and demanded money. He saw there was a gun in an open drawer under the cash register. At that point, he fired on the husband, hitting him in the abdomen. (*Id.* at p. 665.) Rayford was convicted of attempted robbery, assault with a firearm, and attempted premeditated and deliberated murder. (*Id.* at pp.

666-667.)

The *Hart* court concluded:

> Under the instructions as given, the jury may have convicted Rayford of attempted premeditated murder as an aider and abettor under the natural and probable consequences doctrine. The instructions on natural and probable consequences, however, referred to "attempted murder" without noting that, in order to convict Rayford of attempted premeditated murder under the natural and probable consequences doctrine, the jury would have to find that attempted premeditated murder was a natural and probable consequence of the attempted robbery. We therefore conclude that Rayford's conviction for attempted premeditated murder must be reversed and remanded.

(*People v. Hart*, *supra*, 176 Cal.App.4th at p. 665.)

In *Hart*, "[o]ne of the prosecution's theories of guilt as to Rayford was that he aided and abetted Hart in the attempted robbery . . . and that the attempted murder . . . .was a natural and probable consequence of the attempted robbery." (*Id.* at p. 668.) The Court of Appeal in *Hart* agreed that "the trial court did not sufficiently instruct the jury concerning the relationship between the natural and probable consequences doctrine and the premeditation and deliberation element of attempted premeditated murder." (*Ibid.*)

The *Hart* court observed that the natural and probable consequences doctrine, recognized at common law, was "based on the recognition that 'aiders and abettors should be responsible for the criminal harms they have naturally, probably and foreseeably put in motion.'" (*Id.* at p. 668, quoting *People v. Prettyman* (1996) 14 Cal.4th 248, 260.) Whether a given act is a "natural and

probable consequence of another criminal act aided and abetted by a defendant" is a question of fact for the jury, under a reasonable person standard. (*Ibid.*, internal quotation marks omitted, quoting *People v. Nguyen* (1993) 21 Cal.App.4th 518, 531.)

In *Hart*, the trial court instructed the jury concerning the natural and probable consequences doctrine with CALCRIM 402. It inserted "attempted robbery" for the target crime and "attempted murder or assault with a firearm" for the nontarget crime, and did not mention the charged premeditation element of attempted premeditated murder.

The court also instructed the jury on the elements of attempted murder. It also instructed that if the jury found the defendant guilty of attempted murder, it must "decide whether the People have proved the additional allegation that the attempted murder was done willfully, and with deliberation and premeditation." (*People v. Hart, supra*, 176 Cal.App.4th at p. 670.) "The court did not relate the instruction concerning premeditation and deliberation to the natural and probable consequences instruction." (*Ibid.*) In *Hart*, with respect to the natural and probable consequences doctrine, the jury was asked only whether under all of the circumstances, a reasonable person in the defendant's position would have known that the commission of the attempted murder or assault with a firearm was a natural and probable consequence of the commission of the attempted robbery. (*Ibid.*) That is exactly what happened

in appellant's case.

Here, the trial court instructed the jury with CALCRIM 402, inserting "Robbery" for the target offense, and "Attempted Murder" for the non-target crime, in part, as follows:

> The defendant is charged in counts 4-5 with robbery and in Counts 2-3 with attempted murder.
>
> You must first decide whether the defendant is guilty of robbery. If you find the defendant is guilty of this crime, then you must decide whether he is guilty of attempted murder.
>
> Under certain circumstances, a person who is guilty of one crime also may be guilty of the crimes that were committed at the same time.
>
> To prove the defendant is guilty of attempted murder, the People must prove that:
>
> 1. The defendant is guilty of robbery;
>
> 2. During the commission of robbery, a coparticipant in that robbery committed the crime of attempted murder;
>
> AND
>
> 3. Under all of the circumstances, a reasonable person in the defendant's position would have known that the commission of attempted murder was a natural and probable consequence of the commission of robbery.

(2CT 414; 5RT 1273-1274.)

Also, just like in the *Hart* case, the trial court here instructed the jury on the elements of attempted murder. (2CT 415-416; 5RT 1280-1282.) The trial court herein also instructed that if the jury found the defendant guilty of

attempted murder, it must determine whether the prosecution had proved the additional allegation that the attempted murder was done willfully and with deliberation and premeditation. (2CT 416; 5RT 1281-1283.) Here, as in *Hart*, the trial court did not relate the instruction concerning premeditation and deliberation to the natural and probable consequences instruction.

C. The Error

The instructions here did not require the jury to determine that premeditated and deliberated attempted murder was a natural and probable consequence of the robberies appellant aided and abetted. Jury instructions relieving the prosecution of the burden of proving beyond a reasonable doubt each element of the charged offense violate the Sixth Amendment right to a jury trial, as well as the due process clause. (*Sullivan v. Louisiana* (1993) 508 U.S. 275 [113 S.Ct. 2078, 124 L.Ed.2d 182]; *United States v. Gaudin* (1995) 515 U.S. 506, 510 [115 S.Ct. 2310, 132 L.Ed.2d 444]; *People v. Flood* (1998) 18 Cal.4th 470.)

The *Hart* court realized that based on the facts presented there, "a reasonable jury could have concluded that the actual perpetrator (*Hart*) was guilty of attempted premeditated murder but that the aider and abettor (Rayford) was guilty of no more than attempted unpremeditated murder." (*People v. Hart, supra*, 176 Cal.App.4th at p. 672.) Even though Hart and Rayford planned the robbery, and Hart brought a gun to the robbery, a

"reasonable person in Rayford's position may not have concluded that attempted premeditated murder would be a natural and probable result of the planned robbery." (*Ibid.*) A jury could conclude otherwise too, but "the facts do not lead ineluctably to that conclusion." (*Ibid.*)

The *Hart* court concluded that:

> (1) the jury, under the facts of this case, could have concluded that attempted unpremeditated murder was a natural and probable consequence of the attempted robbery and that attempted premeditated murder was not a natural and probable consequence and (2) the instructions were insufficient to inform the jury concerning its duty in this regard.

(*Id.* at p. 670.)

The instructions in *Hart* were inadequate to guide the jury in that fact-finding task. Attempted murder and premeditation and deliberation, were adequately defined; however, the natural and probable consequences instruction did not mention the premeditation and deliberation element of attempted premeditated murder. (*Id.* at p. 668.) It was necessary to tell the jurors they had to "find that attempted premeditated murder, not just attempted murder, was a natural and probable consequence of the [target offense]." (*Id.* at p. 673.)

The Court of Appeal herein believed *Hart* was wrongly decided and that this Court's decision in *People v. Lee* (2003) 31 Cal.4th 613 dictates a different result. (Opn. 9-11.) *Lee* is inapplicable to the case at bar. As the

Court of Appeal recognized, "[t]hee natural and probable consequences theory of liability was not present in *Lee*. . . ." (Slip Opn. 10.) Not only does *Lee* not involve the natural and probable consequences doctrine, but it recognized that "where the natural-and-probable-consequences doctrine does apply, an attempted murderer who is guilty as an aider and abettor may be less blameworthy." (*People v. Lee, supra*, 31 Cal.4th at p. 624.)

Here, as in *Hart*, "[t]he jury was left to its own devices without proper guidance concerning the law." (*People v. Hart, supra*, 176 Cal.App.4th at p. 674.) Under the instructions given, the jury may have found appellant guilty of attempted murder by using the natural and probable consequences doctrine, an objective test, and then found the premeditation and deliberation element true using the only instruction given as to that element, which is described a subjective test. (*Ibid.*; 2CT 416.)

D. The Failure To Instruct Correctly Was Not Harmless Beyond A Reasonable Doubt

Failure to instruct correctly on the elements of aiding and abetting violates the right to jury trial guaranteed by the federal Constitution. Accordingly, it is subject to federal constitutional harmless-error analysis and is assessed under the harmless beyond a reasonable doubt standard under *Chapman v. California* (1967) 386 U.S. 18, 24. (See also *People v. Williams* (2001) 26 Cal.4th 779, 797.) Misinstruction on elements of a crime is federal

constitutional error and such an error may be found harmless only if it is determined beyond a reasonable doubt that the jury verdict would have been the same absent the error. (*Neder v. United States* (1999) 527 U.S. 1, 15; *People v. Sengpadychith* (2001) 26 Cal.4th 316, 324.)

This type of error omits or misdescribes an element of a charged offense, violates the right to jury trial guaranteed by our federal Constitution, and the reviewing court must ask whether beyond a reasonable doubt the jury verdict would have been the same absent the error. (See *People v. Nero* (2010) 181 Cal.App.4th 504, 519.)

No reasonable harmless beyond a reasonable doubt argument can be made here. All that was necessary for appellant to have achieved a better result was for a single juror to not be convinced beyond a reasonable doubt that the attempted premeditated murder was a natural and probable consequence of the robberies in this case.

Respondent can not meet the heavy burden of showing the error to be harmless beyond a reasonable doubt. Respondent had argued below that because appellant knowingly committed a takeover robbery with a "shady character" who was "not to be trusted," no reasonable jury could have concluded that premeditated attempted willful and deliberated murder was not a foreseeable result of the robberies. While that may be one reasonable conclusion, it is not harmless beyond a reasonable doubt.

Here, just as in *Hart, supra*, the trial court instructed the jury with CALCRIM 402, inserting "Robbery" for the target offense, and "Attempted Murder" for the non-target crime. (2CT 414; 5RT 1273-1274.) Likewise, the trial court instructed the jury on the elements of attempted murder. (2CT 415-416; 5RT 1280-1282.) It also instructed that if the jury found the defendant guilty of attempted murder, it must determine whether the prosecution had proved the additional allegation that the attempted murder was done willfully, and with deliberation and premeditation. (2CT 416; 5RT 1281-1283.) Just as in *Hart*, the trial court did not relate the instruction concerning premeditation and deliberation to the natural and probable consequences instruction, and the instructions did not require the jury to determine that premeditated and deliberated attempted murder was a natural and probable consequence of the robberies appellant aided and abetted.

Just as in *Hart*, the error was prejudicial and reversal is required. In effect, the jury was given an "unwarranted all-or-nothing choice with respect to aider and abettor liability for the killing...." (*People v. Hart, supra*, 176 Cal.App.4th at p. 674, citing *People v. Woods* (1992) 8 Cal.App.4th 1570, 1590.) The *Hart* court "failed to inform the jury that it could convict Rayford of a lesser crime than Hart's crime under the natural and probable consequences doctrine." (*Ibid.*) The same error occurred here. The trial court did not inform the jury it could convict appellant of a lesser crime than the

crime that was committed by the shooter.

Here, as in *Hart*, "[t]he jury was left to its own devices without proper guidance concerning the law." (*People v. Hart, supra*, 176 Cal.App.4th at p. 674.) Under the instructions given, the jury may have found appellant guilty of attempted murder by using the natural and probable consequences doctrine, an objective test, and then found the premeditation and deliberation element true using the only instruction given as to that element, which is described a subjective test. (*Ibid.*; 2CT 416.) "Thus, the instructions on the natural and probable consequence doctrine and attempted murder were prejudicially deficient." (*Ibid.*)

Accordingly, appellant urges this Court to reverse the premeditated and deliberated findings in counts 2 and 3. (*People v. Hart, supra*, 176 Cal.App.4th at p. 675.)

CONCLUSION

For the reasons stated above, appellant respectfully urges this Court to vacate the premeditation and deliberation findings in counts 2 and 3 due to the instructional error mentioned herein and remand for the trial court to resentence appellant accordingly.

DATED: June 29, 2011

Respectfully submitted,

_____

ALLEN G. WEINBERG
Attorney for Appellant
BRANDON ALEXANDER FAVOR

CERTIFICATE OF APPELLATE COUNSEL PURSUANT TO CALIFORNIA RULES OF COURT, COURT, RULE 8.520(c)(1)

I, Allen G. Weinberg, appointed counsel for appellant Brandon Alexander Favor, hereby certify, pursuant to rule 8.520(c)(1) of the California Rules of Court, that I prepared the foregoing opening brief on the merits on behalf of my client, and that the word count for this brief is 4,132 words, which does not include the cover or tables. This brief therefore complies with the rule, which limits an opening brief on the merits to 14,000 words. I certify that I prepared this document in Corel WordPerfect, and that this is the word count WordPerfect generated for this document.

Dated: June 29, 2011

ALLEN G. WEINBERG
Attorney for Appellant
BRANDON ALEXANDER FAVOR

PROOF OF SERVICE BY MAIL

I, the undersigned, declare as follows: I am over eighteen (18) years of age and not a party to the within action. My business address is 9454 Wilshire Boulevard, Suite 600, Beverly Hills, California 90212.

On the date indicated below, I served the within

APPELLANT'S OPENING BRIEF ON THE MERITS

on each of the following, by placing a true copy thereof in a sealed envelope with postage fully prepaid, in the United States Mail at Beverly Hills, California addressed as follows:

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I declare under the penalty of perjury that the foregoing is true and correct. Executed this 29th day of June, 2011, at Beverly Hills, California.

ALLEN G. WEINBERG