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 REPLY BRIEF ON THE MERITS

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INTRODUCTION

By this reply brief, no attempt is made to set forth a response to each of respondent's arguments, as most of respondent's arguments are fully covered by the opening brief. Only those points requiring additional comments will be raised to assist this Court in resolving the pertinent issues.

As anticipated in appellant's opening brief on the merits, respondent's argument is primarily based on its belief that this Court's decision in *People*

v. Lee (2003) 31 Cal.4th 613 (*Lee*) supports the decision of the appellate court. Appellant maintains that *Lee* is inapplicable here and that the Third District Court of Appeal's decision in *People v. Hart* (2009) 176 Cal.App.4th 662 (*Hart*) is correct. Reversal is required.

ARGUMENT

I.

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

Respondent argues the trial court correctly instructed the jury that it had to determine whether attempted murder was a natural and probable consequence of the robbery, and not that attempted premeditated murder was the natural and probable consequence. (Respondent's Brief on the Merits ("RBOM") 5, 11-13.)

As anticipated, respondent's argument is premised on its belief that this Court's decision in *Lee* dictates such a result. *Lee* is inapplicable to the case at bar. As the Court of Appeal recognized, "[t]he 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, it further 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.)

As argued in greater detail in appellant's opening brief on the merits, the Court of Appeal herein recognized that its decision was at odds with the decision of the Third District Court of Appeal in *Hart*, 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.)

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 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,

and 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.*) 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.

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. 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. (*Hart*, *supra*, 176 Cal.App.4th at p. 675.)

II.

APPELLANT WAS PREJUDICED AND REVERSAL IS REQUIRED

Respondent's fallback position is that appellant was not prejudiced. (RBOM 14-15.) Respondent argues as it did below that because appellant agreed to be involved in an armed takeover robbery, he was necessarily blameworthy for a "cold calculated decision to kill." (RBOM 15.) Respondent is wrong.

The parties agree that where an instruction omits an element of an offense, the federal constitutional standard of harmless error is implicated. (RBOM 14.) 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.)

Respondent's harmless beyond a reasonable doubt argument is easily rejected because 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 has argued 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 attempted premeditated and deliberated murder was not a foreseeable result of the robberies. (RBOM 14-15.) 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 attempted premeditated and deliberated 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, and for the reasons set forth in more detail in the opening brief on the merits, 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: November 21, 2011 Respectfully submitted,

_____

ALLEN G. WEINBERG
Attorney for Appellant
BRANDON ALEXANDER FAVOR

CERTIFICATE OF APPELLATE COUNSEL PURSUANT TO CALIFORNIA RULES OF 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 1,953 words, which does not include the cover or tables. This brief therefore complies with the rule, which limits a reply brief on the merits to 8,400 words. I certify that I prepared this document in Corel WordPerfect, and that this is the word count WordPerfect generated for this document.

Dated: November 21, 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

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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 21st day of November, 2011, at Beverly Hills, California.

ALLEN G. WEINBERG