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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE, Plaintiff and Respondent, v. BARTOLOME NAVA, Defendant and Appellant.	B229321 (Los Angeles County Super. Ct. No. SA071409)

APPEAL from a judgment of the Superior Court of Los Angeles County, Cynthia Rayvis, Judge. Affirmed.

Alan Stern, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Roberta L. Davis and J. Michael Lehmann, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

Defendant Bartolome Nava appeals from a judgment of conviction entered after a jury trial. The jury found defendant guilty on three counts of attempted willful, deliberate and premeditated murder (Pen. Code, §§ 187, subd. (a), 664) and one count of shooting at an inhabited dwelling (*id*., § 246). The jury also found true the allegations a principal personally and intentionally discharged a firearm in the commission of the attempted murders, proximately causing great bodily injury (*id*., § 12022.53, subd. (e)(1)), defendant personally inflicted great bodily injury on two of the victims (*id*., § 12022.7, subd. (a)), and the crimes were committed for the benefit of a criminal street gang (*id*., § 186.22, subd. (b)(1)(C)). The trial court sentenced defendant to life with the possibility of parole for the attempted murders plus a determinate term of 25 years for one firearm use enhancement; it stayed sentence for shooting at an inhabited dwelling and the remaining firearm use enhancements.

On appeal, defendant contends an erroneous instruction on aiding and abetting requires reversal of his attempted murder convictions. We affirm.

FACTS

At about 11:00 p.m. on June 3, 2009, Lyle Rankins (Rankins), Henry Harvey-Burr (Harvey-Burr) and Michael Davis (Davis) were sitting on the porch of Rankins's home on West Broadway in Hawthorne. Rankins's neighbor, "Dice," was standing on the sidewalk, talking to Rankins.

A viewing was taking place at a mortuary about a block from Rankins's house. Defendant walked over from the mortuary and spoke briefly to Dice. Before walking back to the mortuary, he looked at the men on the porch, "mean mugging" them.

A short time later, a group of 7 to 11 men walked from the mortuary to Rankins's house. One of the men made a comment about someone being disrespectful to his

"homie." Rankins, Harvey-Burr and Davis said they had not been disrespectful to the man. The men started approaching the porch. Two of them lifted up their sweatshirts. Rankins believed they might have been reaching for guns, and he went inside the house and got his gun from the closet. When he turned around, he heard two gunshots.

While Rankins was in the house, Harvey-Burr asked defendant what he told his homeboy. Defendant did not respond. Someone in the group opened fire, shooting Harvey-Burr in the hand and chest, and Davis was shot in the face. The two ran into the house. Rankins fired several shots out of the house. When no one returned fire, he closed and locked the door. He then checked on Harvey-Burr and Davis, and they called the police.

Hawthorne Police Sergeant Shawn Shimono arrived at Rankins's house after 11:30 p.m. He secured the location, collected evidence and made sure Harvey-Burr and Davis received medical attention. Officer Jason Moulton and his canine partner, Pax, responded to the scene. At about 1:30 a.m., Pax located defendant hiding under a car in a nearby driveway. Defendant resisted the dog and was bitten several times before he was taken into custody.

Later that night, Rankins identified defendant in a five-person field show-up. Harvey-Burr and Davis, who were in the hospital, identified defendant from six-pack photographic lineups.

When defendant was arrested, he was wearing a T-shirt printed with a picture of Jason Estrada and the words, "Tepa 13, Heaven's True Angel, R.I.P., Little Homey, Little J." Such T-shirts commonly commemorate the death of a gang member.

Defendant was a member of the Winos clique of Tepa 13, a gang whose territory is in Inglewood adjacent to Hawthorne and Lennox. Defendant's gang moniker is "Bullet," and he has various gang tattoos. Tepa 13's primary activities include narcotics sales, weapons violations, assaults and felony vandalism. Members of Tepa 13 have been convicted of predicate felonies.

DISCUSSION

Defendant's contention is that in order to be liable for aiding and abetting a premeditated attempted murder under the natural and probable consequences doctrine, it was necessary for the jury to find that he personally acted willfully and with premeditation and deliberation. Since the trial court did not instruct the jury as to this requirement, he claims his attempted murder convictions must be reversed.

The trial court instructed the jury pursuant to CALCRIM No. 401 in pertinent part that "[t]o prove that the defendant is guilty of a crime based on aiding and abetting that crime, the People must prove that: [¶] 1. The perpetrator committed the crime; [¶] 2. The defendant knew that the perpetrator intended to commit the crime; [¶] 3. Before or during the commission of the crime, the defendant intended to aid and abet the perpetrator in committing the crime; [¶] AND [¶] 4. The defendant's words or conduct did in fact aid and abet the perpetrator's commission of the crime.

"Someone aids and abets a crime if he or she knows of the perpetrator's unlawful purpose and he or she specifically intends to, and does in fact, aid, facilitate, promote, encourage, or instigate the perpetrator's commission of that crime."

The trial court then instructed the jury pursuant to CALCRIM No. 402 on the natural and probable consequences doctrine. In pertinent part, the court instructed the jury that if it found defendant guilty of shooting at an inhabited dwelling, it "must then decide whether he is guilty of attempted murder. [¶] Under certain circumstances, a person who is guilty of one crime may also be guilty of other crimes that were committed at the same time.

"To prove that the defendant is guilty of attempted murder, the People must prove that: [¶] 1. The defendant is guilty of shooting at an inhabited dwelling; [¶] 2. During the commission of shooting at an inhabited dwelling, a coparticipant in that shooting at an inhabited dwelling 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 shooting at an inhabited dwelling."

The instruction went on to state that "[a] natural and probable consequence is one that a reasonable person would know is likely to happen if nothing unusual intervenes. In deciding whether a consequence is natural and probable, consider all of the circumstances established by the evidence. If the attempted murder was committed for a reason independent of the common plan to commit the shooting at an inhabited dwelling, then the commission of attempted murder was not a natural and probable consequence of shooting at an inhabited dwelling. [¶] . . . [¶]

"The People allege that the defendant originally intended to aid and abet the commission of either shooting at an inhabited dwelling or assault likely to produce great bodily injury. The defendant is guilty of attempted murder if the People have proved that the defendant aided and abetted either shooting at an inhabited dwelling or assault likely to produce great bodily injury and that attempted murder was the natural and probable consequence of either shooting at an inhabited dwelling or assault likely to produce great bodily injury. However, you do not need to agree on which of these two crimes the defendant aided and abetted."

The trial court instructed the jury pursuant to CALCRIM No. 600 on the elements of attempted murder. The trial court then instructed the jury pursuant to CALCRIM No. 601 that if the jury found defendant guilty of attempted murder, it "must then decide whether the People have proved the additional allegation that the attempted murder was done willfully, and with deliberation and premeditation." Specifically, "(The defendant/perpetrator) acted willfully if he intended to kill when he acted. (The defendant/perpetrator) deliberated if he carefully weighed the considerations for and against his choice and, knowing the consequences, decided to kill. (The defendant/perpetrator) premeditated if he decided to kill before acting. [¶] The attempted murder was done willfully and with deliberation and premeditation if either the defendant or the perpetrator or both of them acted with that state of mind."

Penal Code section 664, subdivision (a) (section 664(a)), provides generally that the punishment for an attempted crime is one-half the punishment for the completed offense. "However, if the crime attempted is willful, deliberate, and premeditated murder, . . . the person guilty of that attempt shall be punished by imprisonment in the state prison for life with the possibility of parole. . . . The additional term provided in this section for attempted willful, deliberate, and premeditated murder shall not be imposed unless the fact that the attempted murder was willful, deliberate, and premeditated is charged in the accusatory pleading and admitted or found to be true by the trier of fact." (*Ibid*.)

Our conclusion that CALCRIM Nos. 600 and 601 correctly state the law finds support in *People v. Lee* (2003) 31 Cal.4th 613, which involved a conviction of attempted willful, deliberate and premeditated murder on an aiding and abetting theory, but not based on the natural and probable consequences doctrine. The court held that "section 664(a) properly must be interpreted to require only that the murder attempted was willful, deliberate, and premeditated, but not to require that an attempted murderer personally acted willfully and with deliberation and premeditation, even if he or she is guilty as an aider and abettor." (*Lee*, *supra*, at p. 616.)

The court explained that while "a person may be guilty of attempted murder . . . on varying bases and with varying mental states," section 664(a) "[r]efer[s] three times broadly and generally to 'the person guilty' of attempted murder, . . . [but] not once distinguishes between an attempted murderer who is guilty as a direct perpetrator and an attempted murderer who is guilty as an aider and abettor, and not once requires of an attempted murderer personal willfulness, deliberation, and premeditation. Had the Legislature intended to draw a distinction between direct perpetrators and aiders and abettors, it certainly could have done so expressly." (*People v. Lee*, *supra*, 31 Cal.4th at p. 622.) If "the Legislature intended to require personal willfulness, deliberation, and premeditation of an attempted murderer, . . . it could have done so expressly—as it did when it added subdivision (e) to section 664 . . . ." (*Lee*, *supra*, at p. 622.)

The court concluded that "the Legislature reasonably could have determined that an attempted murderer who is guilty as an aider and abettor, but who did not personally act with willfulness, deliberation, and premeditation, is sufficiently blameworthy to be punished with life imprisonment." (*People v. Lee*, *supra*, 31 Cal.4th at p. 624.) This is "because he or she necessarily acts with knowledge of the direct perpetrator's intent to kill and with a purpose of facilitating the direct perpetrator's accomplishment of the intended killing." (*Ibid*.) The attempted murderer "also necessarily acts with a mental state at least approaching deliberation and premeditation." (*Ibid*.)

The court noted, "Of course, where the natural-and-probable-consequences doctrine does apply, an attempted murderer who is guilty as an aider and abettor may be less blameworthy. In light of such a possibility, it would not have been irrational for the Legislature to limit section 664(a) only to those attempted murderers who personally acted willfully and with deliberation and premeditation. But the Legislature has declined to do so." (*People v. Lee*, *supra*, 31 Cal.4th at pp. 624-625.) As written, the section "does *not* require that an attempted murderer personally act with willfulness, deliberation, and premeditation. It requires only that the attempted murder itself was willful, deliberate, and premeditated." (*Id*. at p. 626.)

The court rejected the argument that "an attempted murderer who is guilty as an aider and abettor, but who did not personally act with willfulness, deliberation, and premeditation, is insufficiently blameworthy to be punished with life imprisonment." (*People v. Lee*, *supra*, 31 Cal.4th at p. 627.) It stated that this argument "ignores the very substantial blameworthiness of even this sort of attempted murderer—necessarily so in the general case, and possibly so even under the natural-and-probable-consequences doctrine." (*Ibid*.) In any event, "an assumption that punishment must be finely calibrated to a criminal's mental state[] . . . is unsound. Punishment takes account not only of the criminal's mental state, but also of his or her conduct, the consequences of such conduct, and the surrounding circumstances. [Citations.] Such circumstances may include the fact that the murder attempted was willful, deliberate, and premeditated." (*Ibid*.)

In *People v. Cummins* (2005) 127 Cal.App.4th 667, review denied June 29, 2005, Division One of this court addressed the question "whether a jury must find a *premeditated* attempted murder to be a natural and probable consequence of a target crime" in order to convict a defendant of premeditated attempted murder as an aider and abettor under the natural and probable consequences doctrine. (*Id*. at p. 680.) The court found no reason, under the facts of the case before it, "to depart from the reasoning of the *Lee* court in a situation that applies the natural and probable consequences doctrine." (*Ibid*.) It emphasized that the defendant "was a willing and active participant" in the steps leading up to the attempted murder. (*Ibid*.)

In *People v. Curry* (2007) 158 Cal.App.4th 766, review denied April 16, 2008, the Third District agreed with *Cummins* that *Lee* applies in cases involving the natural and probable consequences doctrine. (*Id*. at pp. 791-792.) Thereafter, the Third District decided *People v. Hart* (2009) 176 Cal.App.4th 662, review denied November 19, 2009. In *Hart*, the court held that in order for a defendant to be convicted of attempted premeditated murder as an aider and abettor under the natural and probable consequences doctrine, the court must instruct the jury that it must find that attempted premeditated murder—not merely attempted murder—was a natural and probable consequence of the target crime. (*Id*. at pp. 670-672.) In reaching this conclusion, however, it relied on a case it decided prior to *Lee*—*People v. Woods* (1992) 8 Cal.App.4th 1570. It did not discuss *Lee* or *Curry*, and whether those opinions would have any effect on its decision.

We agree with *Cummins* and *Curry* that, under *Lee*, a jury need only find that attempted murder was a natural and probable consequence of the target crime, not that premeditated attempted murder was a natural and probable consequence. (*People v. Curry*, *supra*, 158 Cal.App.4th at pp. 791-792; *People v. Cummins*, *supra*, 127 Cal.App.4th at p. 680.) The jury therefore was properly instructed in this case.

We vacated submission of this case pending a decision by the Supreme Court in *People v. Favor* (2010) 190 Cal.App.4th 770, review granted March 16, 2011, S189317. In *Favor*, Division Four of this district rejected *Hart* based on *Lee* and *Cummins*, noting that *Hart* did not address either case. (*Favor*, *supra*, at p. 776, fn. 2.)

In an opinion filed on July 16, 2012, the Supreme Court agreed with *Cummins* and Division Four's opinion in *Favor* "that the jury need not be instructed that a premeditated attempt to murder must have been a natural and probable consequence of the target offense." (*People v. Favor* (2012) ___ Cal.4th ___, ___ [2012 WL 2874241*1].) Relying on *Lee* and *Cummins*, the court concluded that "[b]ecause section 664(a) 'requires only that the attempted murder itself was willful, deliberate, and premeditated' (*Lee*, *supra*, 31 Cal.4th at p. 626 . . .), it is only necessary that the attempted murder 'be committed by one of the perpetrators with the requisite state of mind.' (*Cummins*, *supra*, 127 Cal.App.4th at p. 680 . . . .) Moreover, the jury does not decide the truth of the penalty premeditation allegation until it first has reached a verdict on the substantive offense of attempted murder. [Citation.] Thus, with respect to the natural and probable consequences doctrine as applied to the premeditation allegation under section 664(a), attempted murder—not attempted premeditated murder—qualifies as the nontarget *offense* to which the jury must find foreseeability. Accordingly, once the jury finds that an aider and abettor, in general or under the natural and probable consequences doctrine, has committed an attempted murder, it separately determines whether the attempted murder was willful, deliberate, and premeditated." (*Favor*, *supra*, at p. ___ [2012 WL 2874241*7].) It is not required that the aider and abettor have "reasonably foreseen[n] an attempted premeditated murder as the natural and probable consequence of the target offense." (*Ibid*.)

DISPOSITION

The judgment is affirmed.

JACKSON, J.

We concur:

WOODS, Acting P. J.

ZELON, J.