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CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. BRANDON ALEXANDER FAVOR, Defendant and Appellant.	B215387 (Los Angeles County Super. Ct. No. BA285265)

APPEAL from a judgment of the Superior Court of Los Angeles County, Michael E. Pastor, Judge. Modified and affirmed.

Allen G. Weinberg, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Linda C. Johnson and Gary A. Lieberman, Deputy Attorneys General, for Plaintiff and Respondent.

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*Pursuant to California Rules of Court, rules 8.1100 and 8.1110, this opinion is certified for publication with the exception of parts I, II, IV, V, and VI.

Brandon Favor appeals from his conviction on one count of first degree murder, two counts of attempted murder, and two counts of second degree robbery. He claims there was insufficient evidence to support the true finding on the robbery-murder special circumstance or the findings that the attempted murders were willful, deliberate and premeditated. He also claims the court erred by instructing the jury on the natural and probable consequences doctrine as to the nontarget offense of attempted murder, but not as to the nontarget offense of attempted willful, deliberate and premeditated murder. Appellant challenges the California death penalty law, claiming the proliferation of special circumstances has undermined the narrowing function required of California law, and claims his life without parole sentence constitutes cruel and/or unusual punishment. Appellant and respondent ask that an error in the abstract of judgment be corrected, and we so order.

In the published portion of this opinion, we conclude the instructions were sufficient with respect to the natural and probable consequences doctrine as applied to attempted willful, deliberated and premeditated murder. In the nonpublished portion of this opinion, we find no error other than that contained in the abstract of judgment, and we affirm the judgment as modified.

FACTUAL AND PROCEDURAL SUMMARY

Jose Huerta was the manager of A & J Liquor Store on Hill Street in Los Angeles. In addition to selling alcohol and food, the store had a Lotto machine and did a large check cashing business, handling as much as $40,000 a day. On November 8, 2004, Huerta was behind the counter talking with Paul Lee, the store owner, when two or three individuals entered the store and locked the door. Huerta had his back turned when they entered. The first thing he heard was a gunshot being fired near his head, burning the side of his head. He fell to the floor and stayed there. After the shot near his head, he heard a shot that sounded like it came from inside the warehouse at the rear of the store, and two more near him. He also heard one of the cash registers being opened.

One of the intruders said, "Get the telephone, get the cameras, and I'll find you. You already know where." A second person asked, "Where are the cameras?" Huerta lifted his head and answered that the cameras were in back. One of the men demanded his money. Huerta, who had just been paid, removed $525 from his pocket and handed it to the man. Huerta then walked to the office in the back of the store, where the security videos were located. The man followed him, looked around inside the room, then exited the store.

After the intruders left the store, Huerta locked the door. He found store employee Pablo Castaneda on the ground in front of the warehouse. He had been shot once in the head and was dead. Store owner Paul Lee was lying on the ground near the check cashing register. He had been shot twice and suffered grave injury. According to Lee's son, between $50,000 and $70,000 was missing from the check cashing portion of the business, and approximately $1,000 was missing from the grocery portion of the business. A mobile phone and some prepaid phone calling cards also were taken.

A flier offering a $75,000 reward was distributed in connection with the crime. The flier contained still photographs from the store security video. Appellant was depicted as one of the three suspects.

Appellant was arrested in June 2005. After waiving his rights, he was interviewed by Los Angeles Police Department detectives. He was shown a videotape of the robbery, and initially denied any part in the robbery. He later admitted that he went to the liquor store with the two other men in the video.

In his recorded interview, which was played at trial, appellant stated that on the day of the robbery, he went to a county building on Adams and Grand to take care of some paperwork. With him was an ex-gang member known as "Trouble" or "Troub." The two men then walked over to A & J Liquor, went inside, and saw that the store was not very secure. Trouble said he would tell his partners about it. He and appellant got on a bus to Crenshaw and King, where they met up with Trouble's partners. Appellant knew one of the men from the streets. He was pretty sure he had gone to high school with the

other man, who was the shooter. He described the shooter as a "shady character" who was not to be trusted.

Trouble told these two men about the liquor store. Appellant and the two men took a bus back to the store, and appellant was told to go in to see how many people were in the store. Appellant went in, saw there was nobody inside, cashed a check, and walked out. The two men then entered the store and closed the door. Appellant heard gunshots, and knocked on the door to find out what happened. The shooter, who still had a gun in his hand, opened the door and told appellant to "get the money." Appellant opened the cash register and "took everything up." He also grabbed a phone and gave it to the shooter. As soon as appellant walked into the store, he saw someone lying on the ground who had just been shot. He also heard another shot fired in the back of the store. The shooter took the video from the rear of the store.

After the robbery, appellant and the two men met up to watch the video. They discarded it because it did not show anything. Appellant said he probably went in and out of the liquor store five times, twice by himself while the others were outside.

Appellant was charged by information with one count of first degree murder, two counts of attempted murder, and two counts of second degree robbery. It was alleged that the murder was committed while appellant was engaged in the commission of a robbery, that the attempted murders were committed willfully, deliberately and with premeditation, and that as to each count, a principal was armed with a firearm. He was convicted as charged, and the allegations were found true. This is a timely appeal from the judgment of conviction.

DISCUSSION

I

Appellant claims there was insufficient evidence to support the true finding on the robbery-murder special circumstance. "In order to support a finding of special circumstances murder, based on murder committed in the course of robbery, against an

aider and abettor who is not the actual killer, the prosecution must show that the aider and abettor had intent to kill or acted with reckless indifference to human life while acting as a major participant in the underlying felony." (*People v. Proby* (1998) 60 Cal.App.4th 922, 927; Pen. Code, § 190.2, subds. (c), (d); all statutory references are to the Penal Code.) The phrase "'reckless indifference to human life'" means "subjective awareness of the grave risk to human life created by his or her participation in the underlying felony." (*People v. Estrada* (1995) 11 Cal.4th 568, 578.)

Appellant concedes for purposes of this argument that he was a major participant in the robbery. His claim is that there was no substantial evidence that he acted with reckless indifference to human life. He relies on a statement by the prosecutor during the discussion of jury instructions. Defense counsel was arguing that there was sufficient evidence to support an instruction on duress: "I am asking for the instruction of duress so that the jury will have some guidance of why Mr. Favor, when he was outside of the store and he heard the gunshots, entered the store and at that moment continued with . . . committing the crime of robbery because it can be argued that the man who had the weapon who we've identified as the shooter went in there and shot about five times. Mr. Favor said during his interview, when he walked through the door, he actually observed the shooter fire the last shot at Mr. Castaneda. And in the defendant's mind, he went forward with committing the robbery because one could infer from all the evidence everything that we know about the shooter that Mr. Favor was in sustained fear and concern that if he did not continue through with his role in committing the robbery that his life or the life of his family would be in danger."

The prosecutor opposed the duress instruction, arguing: "Your honor, the 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." This was not a concession that appellant had no subjective awareness that the robbery created a grave risk to human life; it was an argument that appellant's participation in the robbery did not result from being threatened

with a gun before the other two perpetrators entered the store.

But as the prosecutor pointed out in closing argument, in addition to the grocery business, this store included a check cashing business, which typically had large sums of money. "You don't think a place like this . . . might carry a gun? . . . It's possible, probable, foreseeable to a reasonable person that a place like that might have a firearm. The reason why that's relevant is because what do we know that the defendant knew for sure? He knew that there were employees in there because he had been there. He knew Mr. Huerta worked there, Mr. Castaneda worked there, and Mr. Lee worked there. And he also knows how busy it is. Just how did he think shooter and security[1] were going to secure the store? There is no way he thought they were going to walk in and say 'Please give us all your money.' That is not realistic. If you want to wait outside while two guys go and do a strong armed front take over, how else are they going to do that? At least one of them has a gun. And even then is that really enough because chances of a place having a gun are at the very least probable, the very least. So if you know they may have a gun and you have got to go and take it over, what are your options?"

These are reasonable inferences to be drawn from the evidence—that appellant subjectively knew that there was a grave risk to human life created by the robbery he assisted. Appellant went into the store to see what was going on inside, and came back out. The other two perpetrators then went in, locked the door, sent the two customers to the back of the store, and fired a gun past Mr. Huerta, striking Mr. Lee. As soon as appellant heard the gunshots, he knocked on the door and the perpetrator in the security jacket let him in. According to appellant, he was in the store when the shot that killed Mr. Castaneda was fired. On the video, there is no reaction from appellant; he is seen taking the prepaid telephone cards from in front of the counter, then immediately going behind the counter to the cash registers. He appears oblivious to the men who have been shot; he is "on task" to retrieve the money and phone cards, and then he leaves. The entire incident, completed in approximately three minutes, yielded a large amount of

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1 The second perpetrator was wearing a jacket marked "Security."

money and phone cards and resulted in one dead victim, one gravely injured victim, and a slightly wounded third victim. Appellant's participation in the planning of this incident, his response to the gunshots as if they were a signal for him to enter the store, and his conduct once he entered the store all support the inference that he was aware that the robbery, as planned and as executed, presented a grave risk to human life. Viewing the record in the light most favorable to the judgment (*People v. Lewis* (2001) 25 Cal.4th 610, 642), we conclude there was substantial evidence to support the jury's finding that appellant acted with reckless indifference to human life as a major participant in the underlying felony.

II

Appellant next claims there was insufficient evidence that the attempted murders were willful, deliberate and premeditated. He argues there was no evidence indicating whether the shooter decided to fire before he entered the store or whether he shot as a reaction to what he observed when he entered the store.

"Three categories of evidence are helpful to sustain a finding of premeditation and deliberation in a murder case: (1) planning activity; (2) motive; and (3) manner of killing. (*People v. Anderson* (1968) 70 Cal.2d 15, 26-27; see also *People v. Welch* (1999) 20 Cal.4th 701, 758.)" (*People v. San Nicolas* (2004) 34 Cal.4th 614, 658.) These factors need not be present in any particular combination, and when the record includes evidence in all three categories, the verdict generally will be sustained. (*People v. Stitely* (2005) 35 Cal.4th 514, 543.)

In this case, there is very strong evidence of planning. Appellant and Trouble "cased" the store, then met with the other two perpetrators. After that meeting, appellant and the two perpetrators returned to the location, appellant again went into the store to see how many people were inside. When he came out, the two men entered, locked the door, and immediately shot at the store owner and manager. As soon as appellant heard the shots, he knocked at the door and was admitted without delay; according to appellant, the final shot was fired after he entered. He proceeded to take prepaid telephone cards

from the counter and then removed money from the cash register. The three men then left the store. The events within the store took less than three minutes. There is no dispute that the robbery itself was planned. The shooting occurred almost immediately after the two men entered the store, before there was an opportunity for the store employees to resist. And appellant responded to the gunshots as a signal to enter the premises. These facts provide substantial evidence that the shooting was planned.

There also is evidence of motive. As the prosecutor argued at trial, it would not be unusual for the proprietor of a liquor store with a check cashing business to be armed. It may be inferred from the speed of the shooting, before there was any opportunity for the store employees to react, that the motive for the shooting was to overtake the store employees before they could offer any resistance.

Finally, the manner of shooting suggests reflection. The shots were fired immediately upon entry to the store. The first shot was fired near enough to Huerta's head to leave a burn. Lee was shot in the neck and chest, and Castaneda was then shot in the head. The immediacy, the sequence, and the aim of these gunshots support the conclusion that the perpetrators shot with the purpose of preventing any of the employees from resisting or surviving the robbery. We find substantial evidence of premeditation and deliberation.

III

Appellant claims his conviction on counts two and three of attempted premeditated and deliberate murder must be reversed because the jury was only instructed on the natural and probable consequences theory as to "simple" attempted murder, not as to premeditated and deliberate attempted murder.

Pursuant to CALCRIM No. 402, the court instructed the jury as follows: "The defendant is charged in counts 4 through 5 with robbery and in counts 2 through 3 with attempted murder. You first must 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 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 robbery; [¶] 2. During the commission of robbery, a co-participant 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 the robbery." These instructions were correct with respect to attempted murder as a natural and probable consequence of robbery.

The jury also was instructed on willful, deliberate and premeditated attempted murder pursuant to the pattern CALCRIM instruction: "If you find the defendant guilty of attempted murder in count 2 and/or count 3, then you must decide whether the People have proved the additional allegation that the attempted murder was done willfully and with deliberation and premeditation, within the meaning of Penal Code section 664 (A). The defendant and/or a principal acted willfully if he intended to kill when he acted. The defendant and/or a principal deliberated if he carefully weighed the considerations for and against his choice and, knowing the consequences, decided to kill. The defendant and/or a principal premeditated if he decided to kill before acting. The attempted murder was done willfully and with deliberation and premeditation if either the defendant or a principal or both of them acted with that state of mind."

Appellant argues these instructions failed to relate the instruction concerning premeditation and deliberation to the natural and probable consequences instruction. We conclude no such instruction was required.

In *People v. Lee* (2003) 31 Cal.4th 613, the Supreme Court examined the necessary showing for an aider and abettor to be found guilty of attempted willful, deliberate and premeditated murder under section 664, subdivision (a). The court concluded the law required only that the *murder* attempted was willful, deliberate, and premeditated, not that the *attempted murderer* personally acted willfully and with deliberation and premeditation, even if he or she is guilty as an aider and abettor. (*Id.* at

p. 616.) The court noted 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. . . . Punishing such an attempted murderer with life imprisonment would not run counter to section 664(a)'s purpose of making the punishment proportionate to the crime." (*Id.* at p. 624.) The natural and probable consequences theory of liability was not present in *Lee*, but the court observed 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. 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." (*Id.* at pp. 624-625.)

In *People v. Cummins* (2005) 127 Cal.App.4th 667, 680, the court rejected the claim that the court should have instructed the jury that it had to find that a premeditated attempted murder was a natural and probable consequence of the target crimes of robbery and carjacking. Applying the reasoning of *Lee* to the natural and probable consequences theory of attempted murder, the court held it was sufficient that the jury was instructed on the elements of attempted premeditated murder and on the natural and probable consequences doctrine. "Nothing more was required." (*Id.* at p. 681; see also *People v. Curry* (2007) 158 Cal.App.4th 766, 791-792.)

People v. Hart (2009) 176 Cal.App.4th 662, reached a different conclusion. The case is factually similar to this one; the defendant was convicted of premeditated attempted murder when his codefendant shot the owner of a liquor store during a robbery. The jury was instructed that it could find the defendant guilty of attempted murder if it found that it was a natural and probable consequence of the attempted robbery. The court held the instructions 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.)

But as the Supreme Court observed in *Lee*, the Legislature declined to make a distinction in the findings necessary for perpetrators or for aiders and abettors in section 664, subdivision (a). (31 Cal.4th at pp. 624-625.)[2] In this case, as in *Cummins*, the jury was properly instructed on the elements of attempted murder based on natural and probable consequences, and on the requisite findings for willful, premeditated and deliberate attempted murder. Nothing more was required.

IV

Appellant argues that as a matter of statutory construction, the felony-murder special circumstance that was used to enhance his sentence is unconstitutional under the state and federal constitutions "because it fails to narrow the class of death-eligible murderers and thus renders the overwhelming majority of first degree murderers death eligible." This claim has been repeatedly rejected by the Supreme Court, and we do so here. (See *People v. Martinez* (2010) 47 Cal.4th 911, 967; *People v. Gamache* (2010) 48 Cal.4th 347, 406 ["the felony-murder special circumstance (§ 190.2, subd. (a)(17)) is not overbroad and adequately narrows the pool of those eligible for death"].)

V

Appellant also argues his sentence of life without the possibility of parole constitutes cruel and unusual punishment. "'Cruel and unusual punishment is prohibited by the Eighth Amendment of the United States Constitution and article I, section 17 of the California Constitution. Punishment is cruel and unusual if it is so disproportionate to the crime committed that it shocks the conscience and offends fundamental notions of human dignity.' (*People v. Mantanez* (2002) 98 Cal.App.4th 354, 358, fns. omitted.)" (*People v. Sullivan* (2007) 151 Cal.App.4th 524, 568-569.) The Supreme Court has identified three techniques for determining whether a penalty offends this prohibition: Examining the nature of the offense and the offender, comparing the punishment with the

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[2] *Hart* does not address *Lee*, nor the application of its reasoning in *People v. Cummins*.

penalty for more serious crimes in the same jurisdiction, and comparing the punishment with the penalty for the same offense in other jurisdictions. (*In re Lynch* (1972) 8 Cal.3d 410, 425-427.)

Appellant relies on *People v. Dillon* (1983) 34 Cal.3d 441, 479, where the Supreme Court emphasized the need for individual consideration of the nature of the offense and of the offender. The court recognized that in the abstract, robbery-murder presents a very high level of danger to society, but instructed that the court also must consider "the totality of the circumstances surrounding the commission of the offense in the case at bar, including such factors as its motive, the way it was committed, the extent of the defendant's involvement, and the consequences of his acts." (*Ibid*.) As to the nature of the offender, the inquiry "focuses on the particular person before the court, and asks whether the punishment is grossly disproportionate to the defendant's individual culpability as shown by such factors as his age, prior criminality, personal characteristics, and state of mind." (*Ibid*.)

Appellant was a major participant in the robbery, actively participating from the time of the original planning all the way through to the conclusion. The crime resulted in the death of one employee and grave permanent physical harm to the store owner. As we discussed in section I, there is sufficient evidence that appellant acted with reckless indifference to human life throughout. There is nothing disproportionate between the punishment and the nature of the offense.

As to the nature of the offender, appellant asserts he had no prior felony convictions, just a lengthy misdemeanor record involving summary probation and traffic offenses. At the time of the incident, appellant was 23 years old. In the 10 years from his first sustained juvenile petition at age 13 to the commission of these crimes, his criminality had increased from traffic offenses to carrying a loaded firearm, and infliction of corporal injury on a spouse. There was no evidence that appellant resisted participation in the robbery. More importantly, it is apparent from the security video of this incident that appellant was neither fearful nor panicked as he participated in the

robbery, even after the shooting. Unlike the 17-year-old defendant in *People v. Dillon*, *supra*, 34 Cal. 3d at page 486, who had no prior criminal activity and acted out of fear, appellant showed increasing involvement in criminal activity including ongoing active participation in the preparation and commission of this robbery. There is nothing disproportionate between the nature of the offender and the sentence of life without the possibility of parole.

VI

Respondent asks that we order the abstract of judgment be amended to correctly reflect that appellant was convicted of second degree robbery in counts four and five. We shall direct the superior court to make that correction.

DISPOSITION

The abstract of judgment is amended to show that in counts four and five, appellant was convicted of second degree robbery. In all other respects, the judgment is affirmed.

CERTIFIED FOR PARTIAL PUBLICATION.

EPSTEIN, P. J.

We concur:

WILLHITE, J.

SUZUKAWA, J.